

NOTE

THE FOLLY OF RULE 14a-11: *BUSINESS ROUNDTABLE V. SEC* AND THE COMMISSION'S NEXT STEP

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INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) has been stretching the United States Securities and Exchange Commission's resources dangerously thin—to the extent

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that the securities rule-maker has had to abandon some pressing matters (filling crucial job openings) to address others (promulgating 105 rules, conducting more than twenty studies, and creating five new offices).¹ Common sense dictates that in a time of financial crisis, the last thing the government would want to do is undercapitalize and overburden one of its financial watch-dog agencies. Recent invalidations of Commission rules show that this is indeed what Dodd-Frank has exacerbated, demonstrating that the agency needs to refocus.²

In a recent invalidation, *Business Roundtable v. SEC*,³ the United States Court of Appeals for the District of Columbia Circuit invalidated Rule 14a-11, which would have required public companies to publish certain shareholders' director nominations in proxy statements.⁴ A proxy statement is a required statement filed in advance of the annual meeting when a U.S. company solicits shareholder votes.⁵ The purpose of a proxy statement is to "promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'"⁶ Although the Commission could have appealed the D.C. Circuit's decision, the Commission formally announced on September 7, 2011, that it would not seek immediate review.⁷ The court's tabling of the constitutional issues⁸ raised in *Business*

1. See Bill Swindell, *SEC Stretched Thin by New Rules*, GOV'T EXEC. (Oct. 19, 2010), <http://www.govexec.com/dailyfed/1010/101910cdpm3.htm> (quoting Chairman Schapiro as indicating that the Commission had to "shift[] resources from other areas that . . . are equally deserving of [the Commission's] time and attention" and that the Commission overall was "really resource constrained" (internal quotation marks omitted)).

2. See Diane Katz, *Proxy Access Rule: Appeals Court Rejects SEC Regulation*, THE HERITAGE FOUND. (July 26, 2011), http://www.heritage.org/research/reports/2011/07/proxy-access-rule-appeals-court-rejects-sec-regulation#_edn2 (recounting that courts have recently invalidated at least three other Commission rules because the Commission failed to adequately analyze the costs and benefits of the rules' implementation).

3. 647 F.3d 1144 (D.C. Cir. 2011).

4. *Id.* at 1147.

5. *Proxy Statement*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/answers/proxy.htm> (last visited Jan. 17, 2012).

6. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (quoting H.R. REP. NO. 73-1383, at 14 (1934); S. REP. NO. 73-792, at 12 (1934)).

7. Press Release, U.S. Sec. & Exch. Comm'n, Statement by SEC Chairman Mary L. Schapiro on Proxy Access Litigation (Sept. 6, 2011), <http://www.sec.gov/news/press/2011/2011-179.htm> (explaining that the Commission will "learn from the Court's objections," indicating that the Commission took the court's harsh criticisms as final and would not seek review).

8. See *Bus. Roundtable*, 647 F.3d at 1156 (declaring that the Commission acted arbitrarily and capriciously and noting that, "[a]ccordingly, [the court had] no occasion to address the petitioners' First Amendment challenge to the rule").

Roundtable puts the Commission in an uncomfortable position: the Commission can start over and craft a new 14a-11-type rule that accounts for a cost-benefit analysis, but those efforts may ultimately be struck down based on a First Amendment challenge. The D.C. Circuit lambasted the Commission for failing—yet again—to adequately analyze the cost-benefit analysis of a proposed rule;⁹ but solving the cost-benefit problem would not necessarily mean that the rest of the Commission’s reasoning was sound. This dilemma could cost the Commission—and the average American taxpayer—significant amounts of money and time.¹⁰

This Note argues that had the D.C. Circuit reached the First Amendment issue in its analysis, the Commission would have learned that any such mandatory proxy access rule will not withstand strict scrutiny. In particular, this Note contends that even if the Commission can provide economic support for a new version of Rule 14a-11, so long as the rule requires mandatory proxy access,¹¹ the rule would be subject to strict scrutiny and thus would fail that review because the Commission would be unable to show a compelling interest or narrow tailoring. Part I provides the context surrounding Rule 14a-11 and briefly explains the corporate First Amendment jurisprudence under which any new version of the rule would be analyzed. Part II discusses the First Amendment implications of Rule 14a-11’s possible successor and argues that any subsequent Rule 14a-11 attempts will fail under the strict scrutiny analysis that would be applied. This Note concludes by recommending that the Commission not waste its resources on replacing Rule 14a-11 because the successor rule would fail strict scrutiny and be declared unconstitutional.

Petitioners argued that requiring publication of a shareholder’s director nominations violates a corporation’s First Amendment rights. Opening Brief of Petitioners at 55, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014800, at *55.

9. See *Bus. Roundtable*, 647 F.3d at 1148–49 (blaming the Commission for “opportunistically” characterizing certain costs and failing to address other costs without explanation).

10. See Noam Noked, *Implications of the Proxy Access Case*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Aug. 23, 2011, 9:15 AM), <http://blogs.law.harvard.edu/corpgov/2011/08/23/implications-of-the-proxy-access-case/#more-20347> (positing that any further universal access rulemaking “will have to be accompanied by substantial economic analysis that may be beyond the resources that the agency can reasonably expend on any one rulemaking”).

11. Throughout this Note, all references to a “Rule 14a-11-type rule,” “Rule 14a-11 successor,” or the like assume a rule that still requires universal mandatory proxy access with no out, but has been properly analyzed and supported by the Commission under the required cost-benefit analysis.

I. BACKGROUND: FIRST AMENDMENT RIGHTS OF THE CORPORATION
AND A HISTORY OF RULE 14a-11

The Commission passed Rule 14a-11 in a 3-2 decision in August 2010 after an arduous fourteen months of deliberation and sifting through over 500 sharply-divided comment letters.¹² Had it been enacted without challenge, Rule 14a-11 would have allowed an individual shareholder, or group of shareholders, to include a nominee of the shareholder's choice in a public company's proxy statement in certain instances.¹³ A Shareholder could file a Schedule 14N¹⁴ and provide a copy of their nomination to the company if the shareholder owned at least three percent of the voting power entitled to vote in the election of directors, had held that power for at least three years, and intended to continue to own these securities through the upcoming director election.¹⁵ Business Roundtable, an association comprised of chief executive officers of leading U.S. companies, challenged the implementation of Rule 14a-11; the Commission temporarily stayed the use of Rule 14a-11 and its sister rule, Rule 14a-8.¹⁶

Under the amendments to Rule 14a-8, public companies would no longer be able to exclude a shareholder's proposal to establish a rule in a company's governing documents guaranteeing inclusion of one or more shareholders' director nominations in the proxy statement.¹⁷ Rule 14a-8 would thus allow shareholders to accomplish independently what Rule 14a-11 would require of companies: to include certain shareholders' director nominations in proxy materials.¹⁸

12. Jeffrey McCracken & Kara Scannell, *Fight Brews as Proxy-Access Nears: Companies Race to Derail or Soften SEC Plan; 'Ultimate Vehicle' for Activists*, WALL ST. J., Aug. 26, 2009, at C1.

13. Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56,674 (Sept. 16, 2010).

14. A Schedule 14N is a document submitted to the SEC disclosing, among other things, information surrounding the length of ownership and the shareholder's voting power.

15. See Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,674-77 (summarizing how a shareholder could invoke Rule 14a-11).

16. *In re* Bus. Roundtable, Securities Act Release No. 9149, Exchange Act Release No. 63,031, Investment Company Act Release No. 29,456, 2010 WL 3862548 (Oct. 4, 2010) (granting stay). The rules had been scheduled to become effective November 15, 2010. Facilitating Shareholder Director Nominations, Securities Act Release No. 9151, Exchange Act Release No. 63,109, Investment Company Act Release No. 29,462, 75 Fed. Reg. 64,641, 64,641 (Oct. 20, 2010).

17. 17 C.F.R. § 240.14a-8 (2011).

18. Compare Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,674-77 (summarizing the amendments to Rule 14a-11 that would compel all public companies to publish the director nominations of certain shareholder), with

In *Business Roundtable*, the D.C. Circuit struck down Rule 14a-11 on procedural grounds,¹⁹ but the court left Plaintiffs' constitutional challenges untouched.²⁰ The D.C. Circuit declared the rule invalid on the grounds that the Commission acted "arbitrarily and capriciously" by failing to assess the economic effects of Rule 14a-11.²¹ However, Rule 14a-11 also implicates the First Amendment because corporations are legal persons that retain rights under the Constitution just as citizens do.²² Plaintiffs asserted that Rule 14a-11 violated the First Amendment by compelling companies to publish third-party speech by including shareholder nominations in proxy materials.²³ Plaintiffs further argued that companies could be required to do so even when a majority of shareholders oppose the nomination and even if the accompanying speech was false or misleading.²⁴

Under the First Amendment, groups and individuals usually are not required to speak or to carry the speech of a third party.²⁵ In

17 C.F.R. § 240.14a-8(i) (prohibiting corporations from excluding shareholder proposals to include bylaws that would require the company to publish shareholder proxy nominations).

19. *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

20. *Id.* at 1156.

21. *Id.* at 1148–49. The court elaborated that the "arbitrary and capricious" conclusion was based on the Commission's unjustified rosy outlook on the costs and benefits of the rule, its failure to quantify costs, its failure to support predictive judgments, and the inclusion of contradictory statements in the Rule. *Id.* The D.C. Circuit also strongly criticized the Commission's application of the rule to investment companies, *id.* at 1154–56, but that issue is beyond the scope of this Note.

22. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 706 (1819) (establishing the notion of corporate personhood in the United States); see also 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, . . . as well as individuals."); *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) ("The Court has recognized that First Amendment protection extends to corporations." (citations omitted)).

23. Opening Brief of Petitioners at 55, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014800, at *55.

24. *Id.* at 56. Under Rule 14a-11, companies would be required to publish information about, and the ability to vote for, a shareholder's nominees for director. Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56,674–77 (Sept. 16, 2010). The final rule makes clear that a shareholder will be liable for any false or misleading representations made in the Schedule 14N, but it does not prevent the possibility that the company could publish and circulate the materials before the false or misleading nature of the facts surrounding the director nomination becomes known. *Id.* at 56,676.

25. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241–42 (1977) (forbidding teachers' union from using service charges required by non-union members to publish ideological views of the union); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that police could not prevent citizens from covering a portion of the state license plate reading "Live Free or Die" because the First Amendment afforded the individuals the right to hold an opinion different from the

Pacific Gas & Electric v. Public Utilities Commission,²⁶ the Supreme Court invalidated a state law requiring a gas and electric utility to carry the message of a third party on a newsletter sent to customers.²⁷ Pacific Gas inserted a newsletter in its monthly bill to customers that included, among other subjects, political editorials.²⁸ After a public consumer group requested that the Public Utilities Commission forbid distribution of editorials through the newsletter, the Utilities Commission instead required Pacific Gas to apportion space in its newsletter for use by the public consumer group four times a year, despite the group's views being contrary to those of Pacific Gas.²⁹ The third-party "[a]ccess" to the billing envelope was "limited to persons or groups . . . who disagree[d] with [the utility's] views . . . and who oppose[d] [the utility] in" certain proceedings before the agency.³⁰ The plurality applied strict scrutiny and determined that the agency's requirement of newsletter space for third parties burdened the utility's "right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."³¹ The Court ultimately declared the order invalid because it infringed on Pacific Gas's freedom of speech by compelling the company to provide a forum for views in opposition to its own.³²

Content-based speech regulation requires courts to apply strict scrutiny—the most stringent standard of judicial review—to assess the constitutionality of a law.³³ For a government action to pass strict scrutiny, it must: (1) be justified by a compelling interest; (2) be narrowly tailored; and (3) be the least restrictive means for achieving the asserted goal.³⁴ Courts have been reluctant to define what constitutes a compelling interest, but the concept generally applies to something necessary or crucial, not merely preferred.³⁵ To be

majority).

26. 475 U.S. 1 (1986).

27. *Id.* at 6–7.

28. *Id.* at 5.

29. *Id.* at 6.

30. *Id.* at 13.

31. *Id.* at 14 (citation omitted).

32. *Id.* at 20–21.

33. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 462 (2009) (“[C]ontent-based restrictions must satisfy strict scrutiny, i.e., they must be narrowly tailored to serve a compelling government interest.”); *see also* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 592 (2009) (describing the method of review of an infringement of a fundamental right as “a maximizing test”).

34. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 817 (2000).

35. *See, e.g., Texas v. Cobb*, 532 U.S. 162, 172 (2001) (characterizing admissions of guilt from valid *Miranda* waivers as not merely “desirable,” but essential to serving society’s compelling interest in finding, convicting, and punishing criminals); *Bush v. Vera*, 517 U.S. 952, 999 (1996) (“The simple question is whether the race-based

narrowly tailored, an action may not be overbroad³⁶ or fail to address specific indispensable facets of the compelling interest.³⁷

II. A RULE COMPELLING PUBLICATION OF SHAREHOLDER PROXY NOMINATIONS VIOLATES THE RIGHTS OF CORPORATIONS

Even if the Commission creates a new 14a-11-like rule adjusted to comply with the procedural defects identified in *Business Roundtable*,³⁸ the new rule would violate the First Amendment. Any rule that compels a public company to print and circulate shareholder nominations should be subject to strict scrutiny, and such a rule will necessarily fail that test because it would not serve a compelling interest, would not be narrowly tailored, and would not be the least restrictive means available for achieving the government's interest.³⁹

A. *Strict Scrutiny Applies Because Rule 14a-11 is a Content-Based Regulation of Corporate Speech*

Any regulation of the content of speech made by persons, individual or corporate, is subject to strict scrutiny if it is not based on reasonable time, place, and manner concerns.⁴⁰ Rule 14a-11 regulates the content of speech because it compels companies to carry and fund third-party speech with which the companies disagree.⁴¹ Creation of a rule aiming to increase proxy access that did not have universal scope would be redundant because shareholders

districting was reasonably necessary to serve a *compelling* interest.” (emphasis added)).

36. See *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 511 (D.C. Cir. 2010) (invalidating a law requiring a permit to engage in “expressive” activity in a national park because it was “overbroad” and therefore violated the First Amendment). The overbreadth in *Boardley* derived from a regulation prohibiting the speech of a single pamphleteer in a “free speech area”: an area where the government had little interest in maintaining a peaceful atmosphere. *Id.* at 520–21.

37. See Maurice R. Dvson, *When Government Is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in Pics v. Seattle School District*, 40 U. TOL. L. REV. 145, 150 (2008) (defining as “under-inclusive” those laws that do not meet the requirements of strict scrutiny because they fail to address essential aspects of the compelling interest).

38. 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

39. *Playboy Entm't Grp.*, 529 U.S. at 813, 817 (defining the elements of strict scrutiny that an alternative Rule 14a-11 would have to satisfy).

40. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (holding that content-based restrictions on speech are subject to strict scrutiny, while content-neutral regulations are only subject to intermediate scrutiny).

41. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n.*, 475 U.S. 1, 19 (1986) (applying strict scrutiny to orders trying to compel companies to publish third-party information). Additionally, if enacted, Rule 14a-11 could mandate the publication of speech that is false and misleading. See Opening Brief of Petitioners, *supra* note 23, at 55.

already have the ability to implement mandatory proxy access at their discretion.

Strict scrutiny applies to content-based regulations of speech, except in rare circumstances that involve lesser-protected categories, such as commercial speech.⁴² Rule 14a-11 does not implicate commercial speech, which has been defined as “advertisements that ‘[do] no more than propose a commercial transaction.’”⁴³ Commercial speech is often reviewed by reference to the audience, rather than the speaker, and has been protected when the audience consists of consumers entitled to know the “truth” from companies.⁴⁴ Rule 14a-11’s replacement rule would not be directed at consumers, but rather at shareholders.⁴⁵ Rule 14a-11’s replacement, therefore, would not be commercial speech and thus would not be subject to a lower standard of review.

Similarly, the idea that the “comprehensive regulation of . . . securities” subjects speech about corporate governance to less First Amendment protection is not sufficient to exempt the Rule from strict scrutiny.⁴⁶ Although the Supreme Court has upheld the Commission’s regulation of speech concerning securities,⁴⁷ courts have delineated that only “[s]peech relating to the purchase and sale of securities” is subject to lesser First Amendment scrutiny.⁴⁸ Rule

42. See *United States v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001) (“We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression.”).

43. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 790 (1985) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)); see also *United Foods*, 533 U.S. at 409 (noting that commercial speech occurs when one “propose[s] a commercial transaction”).

44. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 567–68 (1980) (holding that corporations have the right to propose commercial transactions and advertise because consumers have the right to the information, not because of corporate personhood); see also Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 868 (2007) (explaining that, in commercial speech cases, the “identity of the speaker [is] more or less ignored”).

45. See *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56,674–77 (Sept. 16, 2010) (summarizing the Commission’s finalized rule).

46. See *SEC v. Wall Street Publ’g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (noting that the First Amendment does not limit regulation in “areas of extensive economic supervision, such as the securities, antitrust and transportation fields” (citation omitted) (internal quotation marks omitted)). The Commission argued that, because the rule purports to regulate securities, it should be subjected to a less stringent First Amendment analysis than strict scrutiny. Brief for Respondent at 64–65. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305), 2011 WL 2014799, at *64–65.

47. See *Dun & Bradstreet, Inc.*, 472 U.S. at 758 n.5 (explaining that the government is permitted to regulate securities and corporate proxy statements, as well as commercial speech).

48. See *Wall Street*, 851 F.2d at 373 (noting that the government’s authority to

14a-11, however, did not address the purchase and sale of securities. Rather, the rule addressed shareholder proxy access. Accordingly, it was not within the scope of the Commission's authority to regulate speech.⁴⁹ The proxy access rule would regulate the content of the information disseminated, rather than merely ensuring dissemination of information to ordinary citizens, which is the Commission's primary function and reason for creation.⁵⁰ The D.C. Circuit has stated that it would be "impermissibl[e]" for the Commission to "be drawn into the arena encompassing content regulation" of speech.⁵¹

Rule 14a-11 does not simply require additional disclosure from the company; it forces the company to publish a third party's view. One could argue that because the shareholders own a stake in the company, they are associated with the company and are not third parties. Although the shareholders own the corporation's securities, they do not own the corporation.⁵² This is a subtle but essential difference. Because the corporation itself is a legal entity,⁵³ and because a shareholder is not authorized to act on behalf of the corporation,⁵⁴ it follows that the shareholder and the company are not the same person within the eyes of the law. Consequently, the speech of a shareholder is not the same as the speech of a corporation,⁵⁵ and shareholder speech is therefore third-party speech.

regulate speech pertaining to the purchase and sale of securities is "at least as broad" as its authority to regulate commercial speech).

49. See Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,723 (mentioning selling and purchasing of securities only with regards to reporting requirements of section 5(b) of schedule 14A).

50. The Commission strives to provide "all investors, whether large institutions or private individuals, [with] access to certain basic facts about an investment prior to buying it." *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC.GOV, <http://www.sec.gov/about/whatwedo.shtml> (last visited Jan. 6, 2012). The Commission was created after the Great Crash of 1929, when it was estimated that over half of the securities sold to people were fraudulent. *Id.* The Commission was created to "restore investor confidence in . . . capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing." *Id.*

51. *Wall Street*, 851 F.2d at 375.

52. See, e.g., Andrea M. Matwyshyn, *Imagining the Intangible*, 34 DEL. J. CORP. L. 965, 1007 (2009) (noting that securities give shareholders rights to the profits and assets of the company, but not to the company itself).

53. See generally Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 773-74 (2005) (asserting that the notion of the corporation as a legal person dates back to the Roman empire).

54. See Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 438 (2004) (noting that, unlike partnerships, shareholders "are not agents of the corporation," "cannot cause the corporation to incur liabilities," and "are not liable for the debts of their corporation").

55. Cf. *Janus Capital Grp., Inc., v. First Derivative Traders*, 131 S. Ct. 2296, 2302-04 (2011) (holding that a mutual fund can "make" a statement independently of its shareholders or directors).

B. Rule 14a-11 Does Not Serve a Compelling Interest

To survive strict scrutiny, the rule must serve a compelling interest.⁵⁶ A compelling interest is one that is crucial or necessary, not just preferable.⁵⁷ A Rule 14a-11-type requirement, however, would guarantee mandatory proxy access, which is not necessary, and some argue is not even desirable.⁵⁸ In its final brief to the D.C. Circuit, the Commission described its “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.”⁵⁹ The Commission’s brief, however, made no mention of a “compelling interest.”⁶⁰ “Compelling interest” is a term of art,⁶¹ and by failing to categorize its interest as the type necessary under strict scrutiny, the Commission hurt its constitutional argument.

Additionally, the Commission cannot have a compelling interest in a 14a-11-type rule because forcing a company to associate with the views of third parties violates a basic principle that legal persons cannot “be an instrument for fostering . . . an ideological point of view” they find “unacceptable.”⁶² Additionally, such a rule would conflict with Supreme Court decisions rejecting the “mandated support” of “speech by others”⁶³ by forcing companies to publish speech that potentially conflicts with their views.

Moreover, an order that is not content-neutral would not further the government interest of promoting speech by making a variety of viewpoints available.⁶⁴ A 14a-11-type rule could not serve a

56. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 817 (2000) (applying strict scrutiny to laws that merely burden speech in the same manner as to those that completely restrict speech).

57. See *supra* note 35 and accompanying text (examining cases where courts have defined a “compelling interest” as something necessary or crucial).

58. See, e.g., Adam O. Emmerich, *D.C. Circuit Strikes Down Proxy Access Rules*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (July 22, 2011, 4:36 PM), <http://blogs.law.harvard.edu/corpgov/2011/07/22/d-c-circuit-strikes-down-proxy-access-rules/> (arguing that proxy access is not only unnecessary, but indeed is not even helpful).

59. Brief for Respondent, *supra* note 46, at 67.

60. See *id.* at 66–67.

61. Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 12 n.81 (1996).

62. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating the requirement that New Hampshire residents could not cover “Live Free or Die” on their license plates).

63. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001).

64. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 20 (1986) (providing that inhibiting one side’s expression at the expense of another means the content is not neutral); see also *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980) (declaring that, when the government regulates speech based on its

compelling interest because it is not neutral in “exposing” individuals “to a variety of viewpoints.”⁶⁵ Similar to the requirement invalidated in *Pacific Gas*, where a state utilities commission ordered the utility company to place a third party’s newsletter in its billing envelopes,⁶⁶ Rule 14a-11 attempted to require companies to place the information supporting director nominations of third parties in proxy statements to shareholders.⁶⁷ The mandated enclosure was not “neutral” in either instance because each disclosure necessarily entailed publishing opinions of persons “who disagree with [the company’s] views as expressed.”⁶⁸ Had the D.C. Circuit addressed the constitutional issue in *Business Roundtable*, like the requirement in *Pacific Gas*, the court would likely have found Rule 14a-11 unconstitutional under strict scrutiny—as the court would any replacement for this rule.

C. Rule 14a-11 is Not Narrowly Tailored or Less Restrictive Than Alternative Means

Any subsequent 14a-11-type rule would not be narrowly tailored because less restrictive means exist for achieving the government’s purpose.⁶⁹ The original rule is not narrowly tailored because it necessarily includes all public corporations in its scope.⁷⁰ Previously proposed proxy access rule amendments, for example, required certain “triggers” that may have demonstrated an objective need for

subject matter, the regulation “slips from . . . neutrality . . . into a concern about content,” and is more likely to be unconstitutional (citation omitted) (internal quotation marks omitted)).

65. *Pac. Gas*, 475 U.S. at 20.

66. *Id.* at 5–7.

67. Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56,674–77 (Sept. 16, 2010).

68. *Pac. Gas*, 475 U.S. at 13.

69. *E.g.*, *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1183 (9th Cir. 2007) (determining that the definition of “contribution” was narrowly tailored because it “(1) promote[d] a substantial government interest that would be achieved less effectively absent the regulation, and (2) [did] not burden substantially more speech than is necessary to further the government’s legitimate interests” (citation omitted) (internal quotation marks omitted)), *abrogated on other grounds by* *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 599 (8th Cir. 2005) (holding that a statute excluding professional solicitors from an exemption of charitable organizations being blocked on do-not-call lists was narrowly tailored because it applied only to unwilling residents); *Int’l Caucus of Labor Comms. v. City of Montgomery*, 111 F.3d 1548, 1551 (11th Cir. 1997) (determining that a ban on distributing political literature from tables on sidewalks was narrowly tailored to fit the municipality’s interest in keeping public pathways obstruction free).

70. *See* *Facilitating Shareholder Director Nominations*, 75 Fed. Reg. at 56,679–80 (explaining the reasoning behind, and consequences of, including a no “opt out” provision in the Commission’s final rule).

increased proxy access.⁷¹ In contrast, Rule 14a-11 applies to all companies—except those that have debt securities registered under Section 12 of the Exchange Act—and does not allow companies to opt out of Rule 14a-11's requirements.⁷²

Other less restrictive possibilities exist to achieve the government's interest of increasing proxy access. One such example would be for the Commission to rely on the amendment to Rule 14a-8.⁷³ The amendment changes Rule 14a-8(i) so that companies may no longer rely on Rule 14a-8(i) to exclude a shareholder proposal to establish a procedure in the governing documents guaranteeing proxy access for one or more shareholders.⁷⁴ This technique still satisfies the Commission's overall goal—to have increased shareholder proxy access—but only imposes it on corporations where shareholders elect to utilize such a rule.⁷⁵ Because the Commission is concerned about shareholders having sufficient proxy access, the Commission should implement a mechanism to ensure that shareholders can propose and adopt a bylaw that would require companies to publish shareholder proxy materials.⁷⁶

71. *Compare* Security Holder Director Nominations, Exchange Act Release No. 48,626, Investment Company Act Release No. 26,206, 68 Fed. Reg. 60,784, 60,789–92 (proposed Oct. 23, 2003) (triggering events include (1) a majority of outstanding shares authorizes requiring shareholder nominations to be published with proxy materials, and (2) shareholders representing at least thirty-five percent of the votes withhold authority on their proxy cards for their shares to be voted for a director), *with* Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,680–81 (defending the decision not to include triggering events based on the concern that inclusion would add unnecessary complexity and impede shareholders' abilities to nominate and elect directors in all companies, not just those with demonstrated governance issues). *But see* Stephen M. Bainbridge, *A Comment on the SEC's Shareholder Access Proposal*, ENGAGE, Apr. 2004, at 18, 24 (positing that the presence of triggering events would still not narrowly tailor a proposed rule because “nothing in either [of the SEC's proposed] trigger[s] limits the rule to the Enrons of the world”).

72. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,671–74 (explaining that, despite the split in comments suggesting that a “one size fits all” approach will not work, the Commission decided not to allow companies to exempt themselves from Rule 14a-11 regulation).

73. *See id.* at 56,730 (detailing the proposed amendment to Rule 14a-8).

74. *Id.* at 56,731–32.

75. *See id.* at 56,677–80 (indicating that the changes are intended to “facilitate the effective exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors”).

76. *See* 17 C.F.R. § 240.14a-8 (2011) (describing when a company must include shareholder proposals in the company's proxy statements); *see also* Robert J. Jackson, Jr., *SEC Strengthens Shareholders' Role in Corporate Political Speech Decisions*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 15, 2011, 11:04 AM), <http://blogs.law.harvard.edu/corpgov/2011/05/15/sec-strengthens-shareholders-role-in-corporate-political-speech-decisions/> (advocating to increase shareholder power over the board to include things such as veto power over political campaign contribution decisions). *But see* Charles M. Nathan, *A 12-Step Program to Truly Good Corporate Governance*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 18, 2011, 9:26 AM),

Rule 14a-8 provides this mechanism by allowing shareholders to propose mandatory proxy access provisions for the company in which they hold stock.⁷⁷ Rule 14a-11, conversely, forces mandatory proxy access on all companies without providing an out.⁷⁸ This is inapposite with a principal tenet of business law: shareholders should not be coerced into adopting provisions.⁷⁹ Consequently, a new 14a-11-type rule would not be narrowly tailored because it would encompass all public companies without providing an out, would not be targeted at only those companies in need of increased proxy access, and would not be the least restrictive means available to the Commission to achieve its desired goals.

CONCLUSION

Due to Dodd-Frank, the Commission will continue to be exceptionally busy for the foreseeable future, stretching its already thin resources to the breaking point.⁸⁰ During a time when there is so much else to do,⁸¹ the Commission should not waste time and resources by pursuing a recalibration of Rule 14a-11. Any mandatory

<http://blogs.law.harvard.edu/corpgov/2011/05/18/a-12-step-program-to-truly-good-corporate-governance/> (arguing that expanded shareholder access reduces economic value to the average shareholder by allowing corporate governance and social accountability activists to distract board members from their true objective of maximizing shareholder wealth).

77. See 17 C.F.R. § 240.14a-8 (explaining how a shareholder can include a proposal in a company's proxy card and listing circumstances where the company may exclude the shareholder's proposal).

78. Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,679–80.

79. See, e.g., *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387–88 (Del. 1995) (invalidating anti-takeover measures because they are “preclusive” and “coercive” with regards to shareholders).

80. See *supra* note 1 and accompanying text (noting that the Commission has been forced to devote too many resources to complying with Dodd-Frank).

81. For instance, the SEC is working on developing the rules to get a consolidated audit trail (CAT) system in place that will collect equity stock trading information in real time. This will be more efficient by allowing for SEC staff members previously encumbered by bluesheeting (the process of collecting equity stock trading information) to spend more time analyzing the data than collecting it. See Scott Patterson, *SEC Pushes Plan for Audit System*, WALL ST. J., Sept. 21, 2011, <http://online.wsj.com/article/SB10001424053111904491704576574883908453622.html>. Additionally, the SEC has recently come under fire for settling too quickly and for too little with companies thought to have contributed to the 2008 financial crisis. See *SEC v. Citigroup Global Mkts., Inc.*, No. 11 Civ. 7387, 2011 WL 5903733, at *4 (S.D.N.Y. Nov. 28, 2011) (rejecting SEC proposed settlement with Citigroup because recent SEC policy of settling cases without requiring the accused company to either admit or deny the agency's allegations does not satisfy the law). It has been suggested that the lighter stance taken against some of the biggest firms involved with the financial meltdown has been due to an agency stretched too thin and lacking the necessary capacities to fight against the Goliath corporations. See *Times Topics: Securities and Exchange Commission*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/organizations/s/securities_and_exchange_commission/index.html (last visited Jan. 8, 2012).

proxy access rule will necessarily fail strict scrutiny, which must be applied because such a rule would regulate the content of corporations' speech. Because a mandatory proxy access rule does not serve a compelling government interest, is not narrowly tailored, and is not the least restrictive means for achieving that interest, a recalibration of Rule 14a-11—even if able to overcome the procedural defects outlined by the court in *Business Roundtable v. SEC*—will still fail strict scrutiny. The mandates of Dodd-Frank already require tremendous resources from the Commission. Because of the obstacles it faces, the Commission should abandon a mandatory proxy access rule and focus its attention on other projects and problems, such as upgrading market surveillance technology and remaining tough on rule-breakers.