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Standing Voting Instructions: Empowering the Excluded Retail Investor

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Abstract

Despite the increasing importance of shareholder voting, regulators have paid little attention to the rights of retail investors who own approximately 30% of publicly traded companies but who vote less than 30% of their shares. A substantial factor contributing to this low turnout is the antiquated mechanism by which retail investors vote. The federal proxy voting rules place primary responsibility for facilitating retail voting in the hands of custodial brokers who have limited incentives to develop workable procedures, and current regulatory restrictions impede market-based innovation that incorporate technological innovations. One of the most promising such innovations is standing voting instructions (SVI). SVI allows investors to designate their voting preferences in advance of shareholders' meetings and have their shares voted in accordance with those preferences. Although SVI is readily available to institutional investors, the federal proxy rules prevent its use by retail investors, and proposals seeking modifications of these rules have languished before the Securities & Exchange Commission (SEC) for years. The SEC's primary rationale for failing to act is the concern that SVI will lead to uninformed voting. This Article addresses and rejects the claim that the risk of uninformed voting justifies the SEC's failure to remove the regulatory obstacles to SVI. Current technology is consistent with the creation of voting platforms that allow retail investors meaningful participation in the voting process while retaining appropriate safeguards to minimize the potential for adverse effects. Ironically, implementation of voting platforms allowing SVI has the potential to make retail investor voting both more efficient and better informed and to increase the legitimacy of corporate democracy.

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Article

Standing Voting Instructions: Empowering the Excluded Retail Investor

Jill E. Fisch†

INTRODUCTION

Institutional investor voting is a hot topic. Academics debate the efficacy of institutional activism.[1] Issuers malign the voting behavior of institutions that blindly follow the recommendations of proxy advisors such as Institutional Shareholder Services (ISS) and Glass Lewis.[2] The U.S. Securities and Exchange Commission (SEC) and the Department of Labor (DOL) caution institutional investors that voting the shares of their portfolio companies is a fiduciary responsibility.[3]

† Perry Golkin Professor of Law, University of Pennsylvania Law School. I am grateful for thoughtful feedback from Chuck Callan and Steve Norman, and to Broadridge for providing me with access to its retail and institutional voting platforms. Early drafts of this paper were presented at the University of Pennsylvania Ad Hoc Faculty Workshop, the UC Berkeley Faculty Workshop, the AALS Section on Securities Regulation, the 2017 UC Berkeley/University of San Diego Workshop, and Navigating Federalism in Corporate and Securities Law at Tulane Law School. I received many helpful comments at each session. Copyright © 2017 by Jill E. Fisch.

1. *See, e.g.*, Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015) (offering empirical evidence about the effects of shareholder activism on long-term firm value); Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014) (questioning the hypothesis that empowering activist shareholders will increase long-term shareholder value).

2. *See, e.g.*, *Examining the Market Power and Impact of Proxy Advising Firms: Hearing Before the Subcomm. on Capital Mkts. & Gov't-Sponsored Enters. of the H. Comm. on Fin. Servs.*, 113th Cong. 5–6 (2013) (written testimony of Darla C. Stuckey, Senior Vice President of Policy & Advocacy, Society of Corporate Secretaries and Governance Professionals), http://financialservices.house.gov/uploadedfiles/hhrg-113-ba16-wstate-dstuckey-20130605.pdf (describing reports from issuers that their investors follow proxy advisor recommendations without questioning them).

3. *See infra* notes 56–58 and accompanying text (discussing Department of Labor Avon letter and SEC rulemaking).

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In contrast, no one cares very much about retail investor voting.[4] With institutional investors holding a growing percentage of publicly traded shares,[5] the limited propensity of retail investors to vote their shares,[6] and the economic cost of reaching out to individual investors to solicit their proxies, the retail vote has been all but forgotten.[7]

The ability of retail investors, if engaged, to have a meaningful effect on the outcome of a shareholder vote is one reason to reconsider this approach.[8] The 2015 proxy contest at DuPont offers an example. In a closely-contested election in which hedge fund activist Trian nominated four candidates for the DuPont board, DuPont emerged victorious.[9] Although many large institutional investors, as well as the major proxy advisory firms,

4. *See* Frank G. Zarb Jr. & John Endean, *Restoring Balance in Proxy Voting: The Case for "Client Directed Voting,"* HARV. L. SCH.: F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 14, 2010), https://corpgov.law.harvard.edu/2010/02/14/restoring-balance-in-proxy-voting-the-case-for-client-directed-voting (observing that "the absence of retail investor participation" is an ignored "fundamental defect" in corporate proxy voting). *But see* Daniel M. Gallagher, *Opening Statement at the Proxy Voting Roundtable*, U.S. SEC. & EXCH. COMM'N (Feb. 19, 2015), http://www.sec.gov/news/statement/opening-statement-proxy-voting-roundtable-gallagher.html (expressing particular interest in hearing "if there are ways in which the Commission can improve retail shareholder participation in the proxy process").

5. John Endean, *The Untapped Power of Individual Investors*, WALL ST. J. (Oct. 5, 2014), https://www.wsj.com/articles/john-endean-the-untapped-power-of-individual-investors-1412543380 (quoting BROADRIDGE & PRICEWATERHOUSECOOPERS, 2014 PROXY SEASON PREVIEW 2 (2d ed. 2014), http://proxypulse.broadridge.com/proxypulse/assets/docs/broadridge-pwc-proxypulse-2nd-edition-june2014.pdf (stating that institutional investors own 70% of the shares of U.S. companies)).

6. *See* BROADRIDGE & PRICEWATERHOUSECOOPERS, 2015 PROXY SEASON PREVIEW 3 (1st ed. 2015), http://media.broadridge.com/documents/Broadridge-PwC-ProxyPulse-1st-Edition-2015.pdf (reporting that retail investors vote only 29% of their shares, while institutional investors vote 90%).

7. *See* James McRitchie, *Retail Shareholder Proxy Participation: Part 2 – CDV*, CORP. GOVERNANCE (Feb. 17, 2015), https://www.sec.gov/comments/4-681/4681-4.pdf ("In the 1940s and 1950s thousands of [retail] shareowners frequently showed up for shareowner meetings.").

8. *See, e.g.*, BROADRIDGE & PRICEWATERHOUSECOOPERS, 2016 PROXY SEASON PREVIEW 3 (1st ed. 2016), http://media.broadridge.com/documents/ProxyPulse-First-Edition-2016.pdf ("Data continues to show that engagement of the retail investor base can play an instrumental role in the outcome of a shareholder meeting.").

9. *See* Jacob Bunge & David Benoit, *DuPont Defeats Peltz, Trian in Board Fight*, WALL ST. J. (May 13, 2015), https://www.wsj.com/articles/dupont-appears-poised-to-win-over-peltz-1431521546.

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supported some or all of the Trian slate, none of Trian's nominees was elected.[10] According to both Nelson Peltz and DuPont CEO Ellen Kullman, DuPont's victory was due, in part, to the support of its retail investors.[11]

A second reason to reconsider the importance of retail investor voting is the virtual elimination of discretionary broker voting.[12] Prior to 2010, New York Stock Exchange (NYSE) Rule 452 permitted brokers to cast votes on most issues with respect to shares that they held as custodians if they did not receive voting instructions from the beneficial owner.[13] The NYSE gradually narrowed the scope of this discretionary voting authority.[14] By January 2012, brokers were barred from exercising discretionary voting authority with respect to uncontested director elections, say-on-pay, and charter and bylaw amendments.[15] Now, with respect to all of these issues, if shareholders do not provide

10. *Id.*

11. Jeff Mordock, *Retail Shareholders Cited as Key to DuPont's Victory*, DELAWAREONLINE (May 13, 2015), http://delawareonline.com/story/money/business/2015/05/13/trian-rebuffed-dupont-slate-wins-seats/27226613. *See also* Ronald Orol, *Why DuPont Beat Nelson Peltz in the Biggest Proxy Fight in Years*, THESTREET (May 20, 2015), https://www.thestreet.com/story/13158047/3/why-dupont-beat-nelson-peltz-in-the-biggest-proxy-fight-in-years.html (quoting Bruce Goldfarb, CEO of proxy solicitor Okapi Partners, stating that the vote by retail investors was "possibly a real factor in the decision").

12. *See infra* notes 98–101 and accompanying text (describing the process by which NYSE reduced the scope of discretionary broker voting).

13. NYSE Rule 452, 1996 WL 34424015, 1. The rule authorized discretionary broker voting for so-called routine issues. *See also* Order Approving NYSE Proposed Rule Change to Eliminate Broker Discretionary Voting for the Election of Directors, 74 Fed. Reg. 33293, 2 n.7 (July 1, 2009), https://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf (explaining the scope of Rule 452, prior to the 2009 amendments). Thus, brokers were not allowed to vote uninstructed shares with respect to matters such as proxy contests or mergers. *Id.* at 5 n.14 (listing non-routine matters under Rule 452).

14. *See infra* notes 98–101 and accompanying text. Previously, in 2003, the NYSE amended Rule 452 to ban discretionary voting with respect to approval of equity compensation plans. *See* Order Approving NYSE and Nasdaq Proposed Rule Changes Relating to Equity Compensation Plans, Exchange Act Release No. 34-48108 1, 7 (June 30, 2003) [hereinafter Exchange Act Release No. 34-48108], https://www.sec.gov/rules/sro/34-48108.htm.

15. Memorandum from NYSE Regulation to all NYSE & NYSE Amex Equities Members & Member Orgs. (Jan. 25, 2012), https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-interpretations/2012/12-4.pdf (explaining that these subjects "going forward will be treated as 'Broker May Not Vote' matters" under NYSE Rule 452).

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their brokers with voting instructions, their shares will not be voted at all.[16]

A final, and perhaps most important, reason to provide retail investors with a meaningful opportunity to vote their shares is to preserve the legitimacy of shareholder voting in reducing managerial agency costs and maintaining director accountability.[17] Recent regulatory changes and the rise of shareholder activism have made shareholder voting power increasingly important.[18] Shareholders today vote on a growing range of issues, such as executive compensation[19] and shareholder-nominated director candidates.[20] Recent developments in Delaware corporate law provide that director decisions that have been approved by an informed shareholder vote are largely insulated from judicial oversight.[21] Yet current voting outcomes do not reflect the preferences of all shareholders. Currently, 91% of institutional shares are voted, but voting turnout by retail investors averages less than 30%.[22]

16. Shares for which a broker has not received voting instructions are typically called broker "non-votes." LATHAM & WATKINS, CLIENT ALERT: RECOMMENDED PROXY DISCLOSURE FOR DIRECTOR ELECTIONS AND OTHER PROPOSALS, 4 (Mar. 3, 2016), https://www.lw.com/thoughtLeadership/LW-recommended-proxy-disclosure. As long as there is at least one routine matter being voted on at the shareholders meeting—such as the ratification of the auditing firm—broker non-votes may be counted toward a quorum. *Id.*

17. *See, e.g.*, *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

18. *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 897–901 (2013) (explaining how activist shareholders are able to leverage their power by attracting the voting support of more passive institutional investors).

19. *See* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Exchange Act Release Nos. 33-9178; 34-63768, 1 (Apr. 4, 2011), https://www.sec.gov/rules/final/2011/33-9178.pdf (adopting amendments to the Rules providing for shareholder approval of executive compensation).

20. *See, e.g.*, SKADDEN, PROXY ACCESS: HIGHLIGHTS OF THE 2016 PROXY SEASON (June 28, 2016), https://www.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FProxy_Access_Highlights_of_the_2016_Proxy_Season.pdf (describing the increasing adoption of proxy access provisions that enable shareholders to nominate director candidates on the issuer's proxy statement).

21. *See, e.g.*, *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 305–06 (Del. 2015) (rejecting a challenge to a merger where the merger had been approved by a fully informed shareholder vote).

22. BROADRIDGE & PRICEWATERHOUSECOOPERS, 2017 PROXY SEASON REVIEW 2 (Sept. 2017), https://www.broadridge.com/_assets/pdf/broadridge-2017-proxy-season-review.pdf.

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Low retail turnout allows institutional investors to dominate election results,[23] but there are reasons to believe that retail investor voting preferences differ systemically from those of institutional investors. According to at least some commentators, retail investors are more likely to support management[24] and to vote in favor of executive compensation plans.[25] These differences matter. Although institutional investors hold the majority of voting stock of publicly traded companies, retail shareholders own enough shares to make a difference; in many cases, a voting threshold of 20% to 30% can have a critical effect on the issuer.[26] In addition, regardless of whether retail shareholders

23. *See* Matt Egan, *Just 27% of Investors Bother To Vote*, CNN MONEY (June 12, 2014), http://buzz.money.cnn.com/2014/06/12/shareholders-dont-vote (stating that poor turnout by retail investors means "their voices are being drowned out by large institutions on hot-button issues"); Dominic Jones, *Did E-proxy Figure in Apple's Surprise Say-on-Pay Loss?*, IR WEB REPORT (Mar. 5, 2008), http://www.irwebreport.com/20080305/did-e-proxy-figure-in-apples-surprise-say-on-pay-loss ("Low retail turnout has the effect of amplifying the votes of institutional activist investors.").

24. *See, e.g.*, Mary Ann Cloyd, *How Well Do You Know Your Shareholders?*, HARV. L. SCH.: F. ON CORP. GOVERNANCE & FIN. REG. (June 18, 2013), https://corpgov.law.harvard.edu/2013/06/18/how-well-do-you-know-your-shareholders ("Retail shareholders support management's voting recommendations at high rates."); *See* Neil Stewart, *Retail Shareholders: Looking Out for the Little Guy*, IR Magazine (May 15, 2012), https://www.irmagazine.com/articles/shareholder-targeting-id/18761/retail-shareholders-looking-out-little-guy (reporting that retail investors are more likely to support management than institutions). *But see* BRUNSWICK GROUP, A LOOK AT RETAIL INVESTORS' VIEWS OF SHAREHOLDER ACTIVISM AND WHY IT MATTERS (July 2015), https://www.slideshare.net/Brunswick/retail-investors-views-of-shareholder-activism-summary-of-results (reporting, based on results from a survey of 801 retail investors, that the majority believe activists add long-term value, and may thus be more likely to support activists than generally thought).

25. *See* BROADRIDGE & PRICEWATERHOUSECOOPERS, *supra* note 8, at 2 ("Among the companies that failed to attain majority shareholder approval for executive compensation plans, retail investors cast 66% of their votes in favor of these plans while institutions cast 65% of their votes against."); David Bogoslaw, *Retail Investors Seen as Key to Firms Struggling on Say-on-Pay, Says ProxyPulse*, IR MAGAZINE (Oct. 8, 2013), https://www.irmagazine.com/articles/proxy-voting-annual-meetings/19800/retail-investors-seen-key-firms-struggling-say-pay-says-proxypulse (stating that retail investors showed greater support for say-on-pay plans than institutional investors).

26. *See Proxy Voting Roundtable*, U.S. SEC. & EXCH. COMM'N 100–02 (Feb. 19, 2015), https://www.sec.gov/spotlight/proxy-voting-roundtable/proxy-voting-roundtable-transcript.txt [hereinafter 2015 Proxy Voting Roundtable] (providing Alan Beller's comments stating that retail is important now because of withhold vote campaigns, in which directors who get less than 70% support can wind up leaving the board); *Id.* at 91 (providing Reena Aggarwal's comments stating that "twenty to thirty percent dissent votes can make a big difference").

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vote differently from institutional voters, voting results should convey the views of all shareholders.

Although there are many plausible reasons for the low voting rate among retail investors,[27] the mechanics of the voting process are likely a substantial factor. Institutional investors can vote their stock easily and inexpensively.[28] ISS and other third party services provide voting platforms that enable institutions to authorize the voting of their shares in advance—either in accordance with customized voting guidelines or in accordance with a proxy advisor or management recommendation—and to, in essence, automate the voting process.[29] Retail investors have no such option and must submit separate voting instructions in connection with each shareholder meeting through a process that is cumbersome in many cases is not directly linked to an investor's brokerage account, and provides no mechanism for creating across-the-board instructions or voting policies.[30] It is little wonder that the level of retail voting is low and continues to fall.[31]

In addition to disenfranchising retail shareholders, the fact that, on average, 20% of shares are unvoted may disserve issuers.[32] As Scott Hirst has observed, low turnout may prevent issuers from making governance changes that are supported by both boards and shareholders, due to their inability to obtain the necessary vote threshold.[33] The problem arises because shareholder approval of many issues requires support by a majority or

27. *See, e.g.*, Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 57–87 (2016) (attributing low voting rates by retail investors to rational apathy).

28. *See* Endean, *supra* note 5 (highlighting the efficient features of institutional voting).

29. *See infra* notes 62–73 and accompanying text (describing the process by which market providers and intermediaries facilitate the institutional voting process).

30. *See generally* Zarb & Endean, *supra* note 4 (stating that the voting process is "simply more burdensome" for retail investors than it is for institutions).

31. *See* Egan, *supra* note 23 ("A paltry 27% of retail investor shares were voted during the fall 2013 proxy election season. That's even worse than the turnout in U.S. political elections—57.5% of eligible U.S. citizens participated in the 2012 presidential election.").

32. *See* Scott Hirst, *Frozen Charters*, 34 YALE J. ON REG. 91, 102 (2017) (finding a median turnout of 81% in director elections for Russell 3000 companies).

33. *See id.* at 112–16 (discussing proposed amendments to company charters that received more than 90% of the votes cast, but failed due to supermajority requirements).

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supermajority of outstanding shares.[34] Unvoted shares count as votes against the proposal.[35] The problem of so-called "frozen charters" is particularly acute in that issuers frequently include provisions in their Initial Public Offering (IPO) charters that restrict the rights of public shareholders, such as classified boards or dual class voting structures.[36] Low voter turnout may prevent issuers from removing these provisions when they are no longer valuable.[37]

One possible way of increasing the level of retail investor voting is to permit retail investors the opportunity to submit standing voting instructions (SVI), also known as client-directed voting.[38] Because most modern shareholders hold their stock in street name, their votes are cast by intermediaries on the basis of their voting instructions.[39] Current SEC rules prohibit intermediaries from soliciting SVI from their customers, however.[40] Because of these rules, although most institutional investors have access to an Internet-based voting platform that permits them to designate their voting instructions in advance, retail shareholders are unable to do so.

34. Charters of 88% of IPO companies in 2015 contained supermajority provisions for approving mergers or amending the charter or bylaws. WILMER HALE, 2016 M&A REPORT 4 (2016), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2016-WilmerHale-MA-Report.pdf.

35. *See* Hirst, *supra* note 32, at 101 ("Most supermajority requirements are a percentage of *shares outstanding*, rather of the *votes cast* on the proposal.").

36. *See, e.g.*, Joseph A. Hall, *The Impact of ISS' New Policy on IPO Company Director Elections*, HARV. L. SCH.: F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 10, 2016), https://corpgov.law.harvard.edu/2016/08/10/the-impact-of-iss-new-policy-on-ipo-company-director-elections (reporting results of survey finding that "IPO companies continue to adopt charter provisions such as a classified board or dual class stock that can be viewed as having an anti-takeover impact, without any noticeable impact on valuation or marketing").

37. *See supra* notes 32–33 and accompanying text.

38. The term client-directed voting was coined by Steve Norman in 2006. James McRitchie, *An Open Proposal for Client Directed Voting*, HARV. L. SCH.: F. ON CORP. GOVERNANCE & FIN. REG. (July 14, 2010), https://corpgov.law.harvard.edu/2010/07/14/an-open-proposal-for-client-directed-voting. Commentators have also used the term advance voting instructions or AVI. *See, e.g.*, Luis A. Aguilar, *Ensuring the Proxy Process Works for Shareholders*, Statement by SEC Commissioner, U.S. SEC. & EXCH. COMM'N (Feb. 19, 2015), https://www.sec.gov/news/statement/021915-psclaa.html. This paper will use the term SVI to refer to all such proposals.

39. *See* J. Robert Brown, Jr., *The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility?*, 13 J. CORP. L. 683, 704 (1988) (describing this procedure).

40. See *infra* notes 186–88 and accompanying text.

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As early as 2007, the SEC's Proxy Working Group considered rule changes to facilitate SVI.[41] To date, however, the SEC has failed to change its rules to allow retail investors to designate their voting instructions to a broker or voting platform in advance in the same manner as institutional investors. Rather, SVI has been characterized as highly controversial.[42] Commentators have raised concerns about its implementation[43] and, more fundamentally, about its potential for contributing to uninformed shareholder voting.[44]

This Article considers these concerns. First, the Article explores and rejects the claim that the risk of uninformed voting justifies the SEC's failure to remove the regulatory obstacles to SVI. Second, the Article reflects on the appropriate safeguards for the implementation of SVI that would minimize the potential for adverse effects on the voting process. Notably, reforming retail investor voting by implementing SVI could make retail investor voting both more efficient and better informed.

Rather than citing these concerns or the complexity of SVI as a basis for preventing its use by retail investors,[45] the Commission should adopt regulatory reforms not just to remove existing impediments but to integrate SVI into the process by which brokers solicit voting instructions. Such regulation would

41. *See* AUGUST 27, 2007 ADDENDUM TO THE REPORT AND RECOMMENDATIONS OF THE PROXY WORKING GROUP TO THE NEW YORK STOCK EXCHANGE DATED JUNE 5, 2006, at 4–5, http://www.shareholdercoalition.com/sites/default/files/NYSE%20PWG%20Report%20Addendum%208-27-2007_0.pdf [hereinafter ADDENDUM] (describing the Working Group's consideration of Steve Norman's proposal for client-directed voting).

42. *See, e.g.*, KIMBERLY K. RUBEL & BREE F. ARCHAMBAULT, DRINKER BIDDLE, SECURITIES UPDATE: PROXY PLUMBING CONCEPT RELEASE – A MOVE TOWARD PROXY PROCESS REFORM? 7, 11 (Sept. 2010), https://s3.amazonaws.com/documents.lexology.com/01135a5e-45ca-4ea4-a0b0-39fe28fa47bf.pdf (describing SVI as "[t]he most controversial proposal to increase retail participation discussed in the [SEC's 2010] Concept Release").

43. *See* ALAN L. BELLER, JANET L. FISHER & REBECCA M. TABB, COUNCIL OF INSTITUTIONAL INV., CLIENT DIRECTED VOTING: SELECTED ISSUES AND DESIGN PERSPECTIVES 12–15 (Aug. 2010), http://www.cii.org/files/publications/white_papers/08_31_10_client_directed_voting_white_paper.pdf (describing potential advantages and disadvantages of implementing SVI).

44. *See* RUBEL & ARCHAMBAULT, *supra* note 42, at 11 (explaining that SVI "creates a tension with the policy objective of obtaining informed investor votes"); Aguilar, *supra* note 38, at 5 (describing uninformed voting as "one of the fundamental concerns that have been previously raised about so-called 'advance voting instructions'").

45. *Cf.* BELLER ET AL., *supra* note 43, at 2 ("The complexity of CDV and the policy and regulatory issues it entails suggest to us that a robust CDV model is likely to have a long gestation period . . . .").

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reinforce the growing importance of shareholder voting. In addition, it would encourage greater retail investor engagement in corporate governance, which may serve as a useful counterpoint to the increasing empowerment of institutional investors.[46]

This Article proceeds as follows. In Part I, the Article briefly surveys the background of shareholder voting and the developments that have led to the current devaluation of the retail investor. Part II describes the SVI model and evaluates the concerns that have been raised about SVI. Part III critically examines the regulatory objective of informed shareholder voting and the role of that objective in the regulatory debate over SVI. Part IV identifies appropriate safeguards for the implementation of SVI.

I. THE BACKGROUND OF SHAREHOLDER VOTING

A. LEGAL AND MARKET DEVELOPMENTS IN SHAREHOLDER VOTING

In 1932, Berle and Means published the classic *The Modern Corporation and Private Property*, in which they identified the central challenge posed by the corporate form as the separation of ownership and control.[47] The corporation to which Berle and Means referred was owned by dispersed public shareholders with small stakes.[48] Indeed, Berle and Means argued that these small stakes prevented shareholders from holding management accountable.[49] The dispersed model of corporate ownership persisted—as recently as the early 1950s, institutional investors owned less than "10% of the stock of the 1000 largest, public companies."[50]

46. This Article takes as a given the existing role of shareholder voting in corporate governance and does not address the normative question of whether the existing level of shareholder power reflected in the voting process is optimal. For differing viewpoints on that issue, *compare* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) (arguing that shareholders should have greater power to make corporate decisions), *with* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010) (arguing against increased shareholder power).

47. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

48. *Id.* at 47–65.

49. *Id.*

50. SUNEELA JAIN, BARBARA BLACKFORD, DONNA DABNEY & JAMES D. SMALL, THE CONFERENCE BOARD, WHAT IS THE OPTIMAL BALANCE IN THE REL-

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Today, the situation has changed. Institutional investors own a substantial majority of the shares of public companies.[51] At the largest issuers, institutional ownership exceeds 70%.[52] As a result of their substantial voting power, institutional investors have become increasingly important. Issuers engage frequently with institutional investors,[53] and this engagement has an effect on firm decisions.[54] Some commentators have argued that, in fact, the re-concentration of ownership in the hands of institutional investors has transformed corporate governance away from the Berle and Means focus on managerial agency costs, to a new system of agency capitalism in which the agency costs of institutional intermediaries have become more important than the managerial agency costs upon which Berle and Means focused their attention.[55]

A variety of regulatory developments contributed to increased institutional investor engagement in the voting process. In 1988, the DOL issued the so-called Avon Letter, the first of a series of statements advising the managers of pension funds that proxy voting was an important component of their fiduciary responsibilities under ERISA.[56] The DOL followed up with several

ATIVE ROLES OF MANAGEMENT, DIRECTORS, AND INVESTORS IN THE GOVERNANCE OF PUBLIC CORPORATIONS? 9 (2014), http://www.shareholderforum.com/access/Library/20140306_ConferenceBoard-Paper.pdf.

51. *See, e.g.*, BROADRIDGE & PRICEWATERHOUSECOOPERS, *supra* note 8, at 1 ("During the 2015 mini-season [July 1–Dec. 31], institutional investors owned 62% of the street shares of U.S. companies, compared to 38% for retail investors.").

52. BROADRIDGE & PRICEWATERHOUSECOOPERS, 2015 PROXY SEASON WRAP-UP 3 (3d ed. 2015), https://www.broadridge.com/_assets/pdf/broadridge-2015-proxy-season-wrap-up.pdf (noting that institutional ownership varies by issuer size and that, as of 2015, institutions owned 72% of large issuers).

53. *See* MARC GOLDSTEIN, INV'R RESPONSIBILITY RESEARCH CTR. INST., DEFINING ENGAGEMENT: AN UPDATE ON THE EVOLVING RELATIONSHIP BETWEEN SHAREHOLDERS, DIRECTORS AND EXECUTIVES 4 (Apr. 10, 2014), https://www.irrcinstitute.org/wp-content/uploads/2015/09/engagement-between-corporations-and-investors-at-all-time-high1.pdf (describing trends in level and type of engagement between issuers and investors).

54. Craig Doidge, Alexander Dyck, Hamed Mahmudi & Aazam Virani, *Collective Action and Governance Activism* 34 (Rotman Sch. of Mgmt., Working Paper No. 2635662, 2017), http://ssrn.com/abstract=2635662 (reporting findings that institutional investor's "activism through private engagements has an impact, both in terms of value when its formation was announced, and in changing actual governance policies including majority voting, say-on-pay, compensation practices, and incentive pay").

55. Gilson & Gordon, *supra* note 18.

56. *See* Letter from Alan D. Lebowitz, Deputy Assistant Sec'y, Dep't of Labor, to Helmuth Fandl, Chairman of the Ret. Bd., Avon Prods., Inc. (Feb. 23,

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interpretive guidelines reinforcing this position.[57] In 2003, the SEC adopted rules requiring mutual funds to develop policies and procedures with respect to voting shares in their portfolio companies and to disclose their votes on an annual basis.[58] As a result of these regulations, a substantial percentage of institutional investors began to take proxy voting more seriously.[59] Many institutional investors with substantial equity interests allocated specialized resources to analyzing governance issues and making voting decisions.[60] Because institutional investors control a substantial number of votes, their policy concerns generate considerable public attention.[61]

Market providers responded to increased institutional investor involvement in voting by providing them with new tools to facilitate the proxy voting process.[62] ISS developed into the most important intermediary, on a global basis, providing institutional investors with a variety of services to assist them in exercising their voting power.[63] ISS is perhaps best known for its

1988), *in* 15 PENS. REP. (BNA) 371, 391 (Feb. 29, 1988) ("The decision[s] as to how proxies should be voted . . . are fiduciary acts of plan asset management.").

57. In 2008, the Department of Labor issued clear guidelines that stated, "the fiduciary act of managing plan assets that are shares of corporate stock includes the management of voting rights appurtenant to those shares of stock." Department of Labor, Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 73 Fed. Reg. 61,732 (Oct. 17, 2008).

58. 17 C.F.R. § 275.206(4)-6 (2017); *Id.* § 270.30bl-4.

59. *See generally* INDEP. DIR. COUNCIL & INV. CO. INST., OVERSIGHT OF FUND PROXY VOTING (July 2008), https://www.ici.org/pdf/ppr_08_proxy_voting.pdf (explaining requirements for mutual fund directors to oversee proxy voting by their funds and practices used by directors to engage in that oversight).

60. *See, e.g.*, Kirsten Grind & Joann S. Lublin, *Vanguard and BlackRock Plan to Get More Assertive with Their Investments*, WALL ST. J. (Mar. 4, 2015), http://www.wsj.com/articles/vanguard-and-blackrock-plan-to-get-more-assertive-with-their-investments-1425445200 (describing governance engagement by BlackRock, Vanguard, and State Street, and noting that large mutual fund companies own sufficient stakes to be taken seriously by their portfolio companies).

61. *Id. See also* Joann S. Lublin, *BlackRock Toughens Stance on Boards*, WALL ST. J. (Mar. 3, 2015), http://www.wsj.com/articles/blackrock-to-take-tougher-stance-on-u-s-corporate-directors-1425414807 (reporting BlackRock's announcement that "it may oppose board members' re-election over such issues as excessive tenure, insufficient diversity, poor short-term attendance and corporate bylaw changes that ignore investor rights"). BlackRock manages $4.65 trillion in assets. *Id.*

62. *See, e.g.*, Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649 (2009) (describing developments at proxy advisory firms and the history and growth of ISS).

63. *Id.* at 649, 652.

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advisory services; it provides its investor-subscribers with information about issues on which they are being asked to vote, as well as recommendations as to how to vote.[64] ISS Voting Analytics collects and analyzes data about institutional voting policies, voting results, and patterns.[65] In recent years, a second major proxy advisory firm, Glass Lewis, has gained prominence for the information and recommendations that it provides to subscribers.[66]

Market intermediaries also offer institutional investors tools to simplify the mechanics of the voting process.[67] ISS offers a service to its subscribers called ProxyExchange that permits them to outsource the mechanics of the voting process including executing ballots and maintaining voting records.[68] Glass Lewis provides its clients with Viewpoint, a web-based voting platform.[69] Broadridge offers ProxyEdge, an Internet-based system that allows institutional investors to "[m]anage, track, reconcile and report [their] proxy voting through electronic delivery of ballots," and "[s]atisify SEC requirements regarding vote reporting and record keeping."[70]

64. *Id.* at 652.

65. ISS VOTING ANALYTICS, https://www.issgovernance.com/solutions/iss-analytics/voting-analytics (last visited Oct. 18, 2017).

66. After ISS, Glass Lewis has the next largest client base. *See* Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 871 (2010) (evaluating the influence of ISS and Glass Lewis)*; see also* Ed Batts, *Proxy Advisory Firms in Legislative Crosshairs*, LAW360 (July 8, 2016), http://www.law360.com/articles/815410/proxy-advisory-firms-in-legislative-crosshairs (observing that the market for proxy advisory services is "dominated" by two firms: ISS and Glass Lewis). A number of additional firms provide advisory services that focus outside of the U.S. markets. *See* Elizabeth Judd, *A Guide to Proxy Advisers*, IR MAGAZINE (Sept. 3, 2014), https://www.irmagazine.com/articles/proxy-voting-annual-meetings/20359/guide-proxy-advisers (identifying and describing a number of non-U.S. proxy advisory firms).

67. Proxy advisors have been subject to criticism both for the quality of the advisory services that they provide and for potential conflicts of interest. *See, e.g.*, Choi et al., *supra* note 62, at 657–58 (describing accounts of advisor conflicts of interest). In response, SEC staff released guidance to institutional investors with respect to their reliance on proxy advisors. *See* SEC Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014), https://www.sec.gov/interps/legal/cfslb20.htm.

68. PROXYEXCHANGE, ISS, https://www.issgovernance.com/solutions/proxy-voting-services/proxy-exchange/ (last visited Oct. 18, 2017) (describing Proxy Exchange).

69. *Proxy Voting – Viewpoint*, GLASS LEWIS, http://www.glasslewis.com/proxy-voting (last visited Oct. 18, 2017) (describing Viewpoint).

70. *ProxyEdge*, BROADRIDGE, https://www.broadridge.com/_assets/pdf/broadridge-proxyedge-complete-proxy-management-from-voting-through-reporting.pdf (last visited Oct. 18, 2017) (describing ProxyEdge).

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Importantly, these institution-directed services allow their subscribers to provide standing voting instructions or SVI. Standing voting instructions are voting guidelines or policies provided by an investor to an intermediary in advance of a specific shareholder meeting, directing how the investor's shares are to be voted. The intermediary then applies these instructions to each shareholder meeting, and casts the client's vote in accordance with those instructions, unless the client directs otherwise.[71] SVI enable investors to coordinate votes for all the securities in their portfolios on a single platform, making them a critical component of an efficient voting process for institutional investors that may hold positions in thousands of portfolio companies.[72] As of 2014, for example, more than half of institutional users of ProxyEdge used some form of SVI.[73]

Retail investors do not have access to an analogous mechanism for voting their shares. The vast majority of retail investors hold their securities in street name, meaning that the investor, known as a beneficial owner, holds his or her securities through an intermediary—typically a bank or broker—known as a nominee or record holder.[74] Street name ownership means that the beneficial owner is not listed on the issuer's share registry as the holder of record. To protect the voting rights of beneficial owners, SEC rules require that the nominee holder forward proxy materials to the beneficial owner and obtain instructions from the beneficial owner as to how to vote the shares.[75]

71. See Letter from Glass Lewis to Mary Schapiro, Chair, U.S. Sec. & Exch. Comm'n (Oct. 18, 2010), https://www.sec.gov/comments/s7-14-10/s71410-100.pdf (describing process of voting subscribers' shares according to subscribers' custom voting policies).

72. *See, e.g.*, HEXAM Capital Partners, *Proxy Voting Philosophy and Procedures*, COPPIN COLLINGS app. 1 (Jan. 2016), http://coppincollings.com/pdf/Proxy%20Voting%20-%20Version%207%20-%20January%202016.pdf (describing ProxyEdge and how its "quick vote tool allows you to vote the same way across all proposals with one click").

73. Presentation, Broadridge, Status Update on Initiatives to Increase Retail Voting Participation 12 (Aug. 8, 2014) (on file with author).

74. Many institutional investors hold their securities in street name as well. As of 2007, approximately eighty-five percent of exchange-traded securities were held through nominees. Roundtable on Proxy Voting Mechanics, U.S. SEC. & EXCH. COMM'N (May 23, 2007), https://www.sec.gov/spotlight/proxyprocess/proxyvotingbrief.htm.

75. *See* Keir D. Gumbs, Todd Hamblet & Kristin Stortini, *Debunking the Myths Behind Voting Instruction Forms and Vote Reporting*, 21 CORP. GOVERNANCE ADVISOR 1, 1 (2013), https://www.cov.com/-/media/files/corporate/publications/2013/07/corp_gov_advisor_article-voting_instruction_forms_and_vif_reporting.pdf (describing the SEC and NYSE rules protecting the voting rights of beneficial owners). The regulations require the soliciting party to bear

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Retail investors must submit separate voting instructions for every shareholder meeting at each company in which they own stock. Platforms that consolidate the voting procedure, such as those offered to institutional investors, are neither open to nor cost-effective for retail investors. Although retail investors can use the Internet to submit their voting instructions, the mechanism for doing so, proxyvote.com, has been described as "inefficient and clunky."[76] Until recently, retail investors were required to access proxyvote.com separately for each meeting by manually keying in a control number.[77] Although Broadridge has improved proxyvote.com, incorporating some information from an investor's past votes and, in some cases, allowing direct links from e-delivery, the functionality is far more limited than that available to institutional investors.[78]

Perhaps the most important difference is the inability of retail investors to submit SVI. Unlike institutions, retail investors cannot designate a set of voting preferences in advance, save their prior voting preferences, or designate a set of guidelines that will be applied automatically. As a result, investors must enter their voting instructions separately for each issuer, each issue and each annual meeting. In addition, proxyvote.com is purely a voting platform; it does not provide investors with information about the issues on which they are voting. Indeed, proxyvote.com is not fully integrated even with the federally mandated disclosure; access to that information via the proxyvote.com website requires a series of cumbersome click-throughs to material stored on other websites.

The SEC has not ignored developments in Internet technology. Indeed, in 2007, the SEC embraced the Internet by revising

the costs of transmitting proxy materials under Regulation 14A. The NYSE sets the maximum fee that brokers can charge an issuer for the transmission of proxy materials. *See* U.S. Sec. & Exch. Comm'n, Order Granting Approval to Proposed Rule Change Amending NYSE Rules 451 and 465 and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual (Oct. 18, 2013) [hereinafter Rulemaking Order], https://www.sec.gov/rules/sro/nyse/2013/34-70720.pdf (adopting changes to NYSE proxy fee structure).

76. Letter from Moxy Vote to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 6 (Aug. 17, 2012), https://www.sec.gov/rules/petitions/2012/petn4-651.pdf.

77. *Id.*

78. The differences stem from a variety of reasons including cost, regulatory barriers, and the fact that retail investors do not subscribe to the advisory services whose recommendations are integrated into the institutional voting sites. *See also infra* notes 79–80 and accompanying text (describing the regulatory barriers).

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the proxy solicitation rules to eliminate the requirement that issuers provide investors with a full copy of the mandated disclosures.[79] This rule change, known as e-proxy, substituted notice and access for full distribution, enabling issuers to satisfy the disclosure requirements by posting proxy materials on their website and providing investors with a notice of the posting.[80] E-proxy enhances efficiency, in that it allows issuers to avoid the high cost of printing and mailing proxy materials to all their shareholders.[81] At the same time, however, electronic delivery may reduce the visibility of voting issues.[82] Some statistics suggest that e-proxy has contributed to lower retail voter turnout.[83] The reasons for this effect are unclear,[84] but replacing the written proxy statement with just a notice may reduce the salience

79. Internet Availability of Proxy Materials, 72 Fed. Reg. 4148 (Jan. 29, 2007) (to be codified at 17 C.F.R. pt. 240, 249, and 274); Shareholder Choice Regarding Proxy Materials, 72 Fed. Reg. 42,222 (Aug. 1, 2007) (to be codified at 17 C.F.R. pt. 240); Amendments to Rules Requiring Internet Availability of Proxy Materials, Exchange Act Release No. 33-9108 (Feb. 22, 2010), https://www.sec.gov/rules/final/2010/33-9108.pdf.

80. Shareholder Choice Regarding Proxy Materials, 72 Fed. Reg. 42,222 (Aug. 1, 2007) (to be codified at 17 C.F.R. pt. 240). Investors are entitled to receive a paper copy of the full proxy material, at no cost, on request. *Id.* at 42,224.

81. *See, e.g.*, Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475 (2008) (arguing that e-proxy offers a cheaper and more efficient alternative to the traditional proxy contest).

82. *See* Sarah N. Lynch, *SEC Official Calls for Review of Electronic Proxy Delivery Rules*, REUTERS, (Feb. 19, 2015), http://www.reuters.com/article/us-sec-proxy-idUSKBN0LN24D20150219 (stating that such rules likely have depressed retail investor participation in elections).

83. *See, e.g.*, Jones, *supra* note 23 (arguing that e-proxy may have contributed to the turnout of only 4% percent of Apple's retail shareholders at the 2008 annual meeting); FABIO SACCONE, CONFERENCE BOARD, E-PROXY REFORM, ACTIVISM, AND THE DECLINE IN RETAIL SHAREHOLDER VOTING 4 (Dec. 2010), http://shareholderforum.com/e-mtg/Library/20101200_ConferenceBoard.pdf (citing a speech by SEC Commissioner Paul Atkins) (reporting retail vote of 16.4% for issuers that did not deliver paper proxy materials); Aguilar, *supra* note 38 ("[R]etail response rates have declined each year since the introduction of the notice and access model."); Lynch, *supra* note 82 (quoting statement by Robert Schifellite, an executive with Broadridge Financial Solutions, that "retail investors vote 41 percent of the shares when they receive the full mailed packet, versus 23 percent when notified by e-mail, and a mere 18 percent when notified about voting by mail").

84. *See, e.g.*, Amendments to the Rules Requiring Internet Availability of Proxy Materials, Exchange Act Release No. 33-9073, at 7 (Oct. 14, 2009), https://www.sec.gov/rules/proposed/2009/33-9073.pdf (describing lower voting turnout after adoption of e-proxy but noting that "[t]he available data do not necessarily exclude the possibility that factors other than requirements of our notice and access rules may contribute to the different voting response rates, although the available data do not identify them").

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of the issues on which shareholders are going to be asked to vote.[85] In addition, shareholders who receive only a notice of the annual meeting may be unwilling to make the additional effort to obtain a full set of the proxy materials.[86]

No regulation requires retail investors to vote their stock,[87] and the multi-step aspect of e-proxy coupled with the rational apathy of small investors, traditionally, led relatively few retail investors to submit voting instructions.[88] For many years, the effect of low retail voter turnout was masked, however, by discretionary broker voting.[89] NYSE rules in effect since 1937, and NYSE Rule 452 in particular, granted brokers discretionary voting authority with respect to routine matters.[90] Rule 452, known as the ten-day rule, provided that if the beneficial owner did not provide voting instructions at least ten days before the shareholders meeting, the broker was free to vote those uninstructed shares as he or she saw fit.[91]

85. Alternatively, the delivery of the notice may have created confusion among investors as to how to cast their vote. *See id.* at 8 (describing this possibility).

86. *See, e.g.*, *id.* at 6–7 (observing substantially lower voting rate by shareholders that received notice only, as opposed to those that received delivery of a full set of proxy materials).

87. Noam Noked, *The Promise of the Enhanced Broker Internet Platform*, HARV. L. SCH.: F. ON CORP. GOVERNANCE. & FIN. REG. (Sept. 22, 2013), https://corpgov.law.harvard.edu/2013/09/22/the-promise-of-the-enhanced-broker-internet-platform.

88. *See* JEFFREY T. HARTLIN & PAUL HASTINGS: STAY CURRENT, THE SEC APPROVES THE ELIMINATION OF BROKER DISCRETIONARY VOTING IN ALL DIRECTOR ELECTIONS 3 (Aug. 2009), https://www.paulhastings.com/docs/default-source/PDFs/1385.pdf (reporting that, in 2009, voting instructions were submitted for only 32% of retail shares). "Data from the 2005 proxy season indicates that the voting rights relating to 56% of accounts with shares held in street name were not exercised by their beneficial owners. Presumably, many of these shares were nonetheless voted by brokers." William K. Sjostrom, Jr., *The Case Against Mandatory Annual Director Elections and Shareholders' Meetings*, 74 TENN. L. REV. 199, 220 (2007).

89. Sjostrom, *supra* note 88, at 220 ("Broker votes of uninstructed shares typically represent five to ten percent of votes cast at an annual shareholders' meeting.").

90. *See SEC Publishes for Comment Proposed Amendment to NYSE Rule to Eliminate Broker Discretionary Voting in Uncontested Director Elections*, GIBSON DUNN: CLIENT ALERT (Mar. 13, 2009), https://www.gibsondunn.com/publications/pages/SECProposedAmendmentToNYSERuletoEliminateBrokerDiscretionaryVoting.aspx (recounting history of Rule 452).

91. *See* Order Approving Proposed Rule Change to Amend NYSE Rule 452, Exchange Act Release No. 34-60215, 74 Fed. Reg. 33,293, at 4 n.12 (July 1, 2009) [hereinafter Exchange Act Release No. 34-60215], https://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf. With respect to routine matters, including uncontested elections, if a beneficial owner does not provide instructions at least ten

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In 2004, the Business Roundtable submitted a petition requesting the SEC to revise its proxy rules.[92] The Business Roundtable observed that various aspects of the proxy rules had become outdated and that technological innovations warranted the implementation of a better system of communicating with shareholders.[93] Among the proposals was a request that the SEC eliminate the circuitous process that required beneficial owners to use their broker as an intermediary in the voting process.[94] The Business Roundtable suggested replacing the existing voting process with one that would enable beneficial owners to vote their shares directly.[95] The petition also noted that various developments were leading to the erosion of the ten-day rule and that a number of commentators had proposed that the rule be eliminated as obsolete.[96] The Business Roundtable argued that this provided additional reason to facilitate direct investor voting.[97]

The Business Roundtable's predictions regarding the ten-day rule were accurate. Over the course of the next several years, the NYSE gradually began to cut back on the scope of the ten-day rule. The regulatory changes limited the scope of discretionary voting authority by classifying an increasing number of voting issues as non-routine.[98] As the Business Roundtable's petition had noted, in 2003, the NYSE had already classified

days before the meeting, the broker is free to, and typically does, vote these uninstructed shares as it chooses. Sjostrom, *supra* note 88, at 220.

92. *See* Petition for Rulemaking Regarding Shareholder Communications, Business Roundtable [hereinafter Rulemaking Petition], http://www.shareholdercoalition.com/sites/default/files/BRT%20Petition%204-16-08_0.pdf (last visited Oct. 18, 2017).

93. *Id.* at 1.

94. *Id.* at 11.

95. *Id.* at 2. John Wilcox submitted a comment letter earlier, in 2003, making a similar recommendation. *See* Letter from John C. Wilcox, Vice Chairman, Georgeson S'holder Commc'ns, Inc., to U.S. Sec. & Exch. Comm'n, SEC File No. S7-19-03 (Dec. 12, 2003), https://www.sec.gov/rules/proposed/s71903/georgeson121203.htm.

96. Rulemaking Petition, *supra* note 92, at 8.

97. *Id.*

98. In 2005, the NYSE created its Proxy Working Group for the purpose of reviewing the NYSE's rules concerning proxy voting with a particular focus on Rule 452. *See* Proxy Working Group, NYSE, Inc., Report and Recommendations of the Proxy Working Group to the New York Stock Exchange, at 1 (June 5, 2006), http://www.shareholdercoalition.com/sites/default/files/NYSE%20Proxy%20Working%20Grp%20Rpt%206-5-2006.pdf. At that time, NYSE Rule 452 classified eighteen items as non-routine, but including uncontested director elections, among other items, as routine. *Id.* The Working Group recommended

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shareholder approval of equity compensation plans as a non-routine matter for which discretionary broker voting was not permitted.[99]

Similarly, in 2009, the SEC approved the NYSE's request to amend Rule 452 to eliminate discretionary voting in uncontested director elections.[100] Subsequently, the NYSE extended the ban to the shareholder vote mandated by Dodd-Frank in connection with executive compensation. On January 25, 2012, the NYSE amended the rules to prohibit discretionary voting on corporate governance issues such as charter and bylaw amendments.[101]

Today, brokers are prohibited from exercising discretionary voting authority with respect to most issues on which shareholders are asked to vote.[102] Instead, nominee holders such as banks and brokers are supposed to obtain voting instructions from the beneficial owners of the securities and to vote the shares in accordance with those instructions.[103] Rule 14b-1(d) requires brokers to solicit voting instructions, but it does not specify the form that the broker's request must take.[104] Unlike Rule 14a-4 which contains explicit specifications for the required form of proxy,[105] there is no similar requirement for the voter information form (VIF), or a mandate that it contain identical language to that on the formal proxy.[106] Instead, the regulations leave the procedure

that the rule be changed to classify uncontested director elections as non-routine. *Id.* at 4. The NYSE subsequently sought SEC approval to amend Rule 452. Exchange Act Release No. 34-60215, *supra* note 91, at 1.

99. Exchange Act Release No. 34-48108, *supra* note 14.

100. *See* Exchange Act Release No. 34-60215, *supra* note 91. Notably, the rule change retained the broker-vote at open-end investment companies (mutual funds) because mutual funds are largely retail held, and since retail investors are less likely to vote, it is costly for funds to solicit votes. *Id.* at 15–17.

101. NYSE, Inc., Information Memo No. 12-4, "Application of Rule 452 to Certain Types of Corporate Governance Proxy Proposals" (Jan. 25, 2012).

102. Leigh P. Ryan, Michael L. Zuppone & Rebecca A. Brophy, *NYSE Implements New Restrictions on Broker Discretionary Voting*, PAUL HASTINGS: CLIENT ALERT, at 1 (Mar. 2012). The primary issue that remains classified as routine is the ratification of the firm's auditors. *See id.* at 2 ("The NYSE has specifically noted that the ratification of independent auditors continues to be a routine or 'Broker May Vote' matter . . . .").

103. Rule 14b-1, 17 C.F.R. § 240.14b-1 (2017) regulates the process of disclosing proxy materials to beneficial owners and soliciting voting instructions. *See* Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, 75 Fed. Reg. 42,982, 42,984–85 (July 22, 2010) [hereinafter Proxy Plumbing Release] (describing this process).

104. 17 C.F.R. § 240.14b-1.

105. Gumbs et al., *supra* note 75, at 4.

106. *See* James McRitchie, *SEC's IAC Seeks Input for Agenda*, SHAREHOLDER ACTIVIST, http://www.theshareholderactivist.com/shareholder-policies

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for obtaining voting instructions to the discretion of the record holder.[107]

Although the existing rules require brokers to establish a website at which investors can access the request for voting instructions, the existing rules do not require the website even to provide investors with access to the proxy statement and other soliciting materials.[108] In addition, the rule only obligates a broker to solicit voting instructions once it has received proxy materials from a soliciting party.[109]

In practice, most nominee holders outsource the transmission of proxy materials and the solicitation of voting instructions to a private service provider—Broadridge.[110] Broadridge provides investor communications technology supporting the proxy voting process for more than 90% of public companies in North America.[111] Issuers, rather than nominees or record holders, bear the cost of compliance with Regulation 14A and are required to reimburse brokers for the costs of compliance under a fee schedule set by the NYSE.[112]

-investor-regulations/secs-iac-seeks-input-for-agenda (last visited Oct. 18, 2017) (describing differences in the language of a shareholder proposal and the language that appeared on Broadridge's VIF).

107. Gumbs et al., *supra* note 75, at 6 n.22. *See also* Amendments to Rules Requiring Internet Availability of Proxy Materials, *supra* note 79, at 11 (observing that the notice required under e-proxy does not have to conform to Rule 14a-4 or "directly mirror the proxy card").

108. *See* Rule 14b-1(d)(2), 17 C.F.R. § 240.14b-1 (2017) (noting that the provision of such access is "at the broker or dealer's option").

109. *Id.*

110. *See* Roundtable on Proxy Voting Mechanics, *supra* note 74 ("Most broker-dealers outsource proxy processing functions, including forwarding proxy materials to beneficial owners and collecting voting information from beneficial owners for forwarding to the issuer."); *Recommendations of the Investor Advisory Committee: Impartiality in the Disclosure of Preliminary Voting Results*, U.S. SEC. & EXCH. COMM'N, at 2 (Oct. 9, 2014), https://www.sec.gov/spotlight/investor-advisory-committee-2012/impartiality-disclosure-prelim-voting-results.pdf ("[B]rokers almost universally contract out the tasks to a single intermediary, Broadridge.").

111. *FORTUNE Magazine Names Broadridge One of the "World's Most Admired Companies*," BROADRIDGE, (Feb. 22, 2016), https://www.broadridge.com/press-release/2016/broadridge-named-one-of-the-worlds-most-admired-companies.

112. Broadridge bills issuers directly for this service pursuant to a fee schedule established by the NYSE and Nasdaq. Proxy Plumbing Release, *supra* note 103, at 56.

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B. INITIATIVES TO FACILITATE RETAIL INVESTOR VOTING

From the time that the NYSE Proxy Working Group first began to consider limiting the scope of discretionary broker voting, commentators recognized that the contemplated regulatory changes would dramatically reduce the percentage of retail shares voted because very few retail shareholders submit voting instructions.[113] At that time, the Working Group made several recommendations aimed at increasing retail voting, including increasing efforts to educate investors about the proxy voting system and supporting issuer efforts to communicate with beneficial owners.[114] In its subsequent addendum, which focused on the difficulty for issuers of obtaining a quorum in the absence of broker voting, the Working Group identified proportional voting and client-directed voting as possible solutions.[115]

SVI was suggested by Steve Norman, who was a member of the Working Group and the Corporate Secretary of American Express.[116] Norman suggested that investors be permitted to submit a good-until-cancelled instruction as part of their brokerage agreement which would allow the designation of one of four voting positions for all securities held in the investor's account: (1) follow the board's recommendation; (2) vote against the board's recommendation; (3) abstain; (4) vote proportionally with the retail votes for which the broker has received voting instructions.[117] Norman contemplated that the instructions would operate as a default in the event that the investor did not submit specific voting instructions for a particular shareholder meeting.[118] The proposal contemplated that these instructions could always be revoked by the investor, either generally or with respect to a specific meeting.[119]

The Working Group debated the merits of Norman's proposal but did not reach a conclusion.[120] Although members of the group recognized various advantages to the proposal, they also identified a number of concerns.[121] Arguably the most serious

113. *Id.* at 88–89.

114. *Id.* at 4–5.

115. ADDENDUM, *supra* note 41, at 3–5. Proportional voting would have given brokers the discretion to vote shares for which they did not receive voting instructions in the same proportion as instructed shares. *Id.* at 3.

116. *Id.* at 4.

117. *Id.* at 5.

118. *Id.*

119. *Id.*

120. *Id.* at 4–6.

121. *Id.* at 5.

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was the risk of uninformed voting.[122] As the addendum explained, "it was noted that the [client-directed voting (CDV)] proposal could make it easy for investors (particularly retail investors) to disengage from the proxy process, and essentially make important voting decisions in advance without full information about the matters to be voted upon."[123]

In 2007, the SEC held a roundtable on broker voting.[124] In its public statement concerning the roundtable, the SEC noted the Proxy Working Group's identification of CDV as a possible alternative to discretionary broker voting.[125] The SEC noted, however, that "[c]lient-directed voting may raise concerns because the client (beneficial owner) is being asked to make a voting decision prior to receiving any proxy materials."[126]

Commentators on the SEC's 2009 rulemaking also suggested that the SEC make the necessary rule changes to permit either CDV or SVI.[127] The SEC declined to do so, observing in its subsequent release approving the NYSE rule change that "[w]ith respect to client directed voting, the Commission notes that it raises a variety of questions and concerns, such as requiring shareholders to make a voting determination in advance of receiving a proxy statement with the disclosures mandated under the federal securities laws and without consideration of the issues to be voted upon."[128]

The SEC continued to consider whether to adopt changes to the proxy rules to permit SVI. In July 2010, the SEC issued the "Proxy Plumbing Release."[129] The Proxy Plumbing Release sought input on a broad variety of issues related to proxy voting in an effort to identify mechanisms for improving the current system.[130]

Among the topics addressed by the release was SVI.[131] The SEC acknowledged that the low level of voting by retail investors

122. *Id*.

123. *Id.*

124. Roundtable on Proxy Voting Mechanics, *supra* note 74.

125. *Id.*

126. *Id.*

127. *See* Exchange Act Release No. 34-60215, *supra* note 91, at 34 (noting SEC approval of amendments to NYSE Rule 452).

128. *Id.*

129. Proxy Plumbing Release, *supra* note 103.

130. *See id*. at 10 ("[W]e remain interested in ways to improve our proxy disclosure, solicitation, and distribution rules.").

131. *Id.* at 81–86. The SEC noted the existing proxy rules would not permit brokers to solicit SVI from their customers. *See id.* at 84 ("There is currently no

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was "a source of concern,"[132] and that commentators had proposed SVI as a tool to increase retail investor participation in voting.[133] The SEC observed, however, that SVI raised "a variety of questions and concerns."[134] It noted that an SVI system would require "investors to make a voting decision in advance of receiving a proxy statement containing the disclosures mandated under the federal securities laws and possibly without consideration of the specific issues to be voted upon."[135] It also warned that the availability of SVI might serve as a disincentive for investors to read the proxy statement.[136]

Part of the Proxy Plumbing Release solicited comments on whether the SEC should adopt regulatory changes to permit retail investors to submit SVI.[137] The SEC also solicited comments on a related proposal—the development of an enhanced broker internet platform (EBIP), which would enable investors to receive proxy information and submit voting instructions through their brokerage account website.[138] As with SVI, an EBIP would provide retail investors with functionality currently only available to institutional investors. It would also create a mechanism for investors to submit or modify their SVI through their brokerage accounts.

The Proxy Plumbing Release did not lead the SEC to adopt reforms to the proxy voting process. The SEC revisited the possible need for reforms in its 2015 Proxy Voting Roundtable.[139] Again, the subject of SVI was raised.[140] Several roundtable participants noted that commentators had proposed various forms of SVI for a number of years.[141] At the Roundtable, Alan Beller

applicable exemption for securities intermediaries to solicit advance voting instructions from their customers.").

132. *Id.* at 78.

133. *Id.* at 81–84.

134. *Id.* at 83.

135. *Id.*

136. *See id.*

137. *Id.* at 1–2. The SEC specifically observed that such reforms would enable retail investors access to a service that is presently available to institutional investors. *Id.* at 84.

138. *Id.* at 80–81.

139. *Proxy Voting Roundtable*, U.S. SEC. EXCH. & COMM'N, https://www.sec.gov/spotlight/proxy-voting-roundtable.shtml (last visited Oct. 18, 2017). For an unofficial transcript of the roundtable, see 2015 Proxy Voting Roundtable, *supra* note 26.

140. 2015 Proxy Voting Roundtable, *supra* note 26, at 133, 138–41.

141. *Id.*

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observed that the potential disadvantages of SVI could be crystalized into a single essential concern—that permitting SVI would increase the potential for uninformed voting.[142] By definition, investors who submit SVI would be making their voting decisions in advance of, and without access to, the federally-mandated disclosures contained in the proxy statement. Arguably, then, SVI can be viewed as in tension with the disclosure-based approach to investor protection that animates federal securities regulation. Put more strongly, federally-mandated disclosure would potentially be irrelevant to shareholders who do not use that information to decide how to vote.

Despite the absence of regulatory changes, private market providers have attempted to respond to the concerns identified in the Proxy Plumbing Release and the 2015 Roundtable by developing mechanisms to facilitate retail investor voting. These experiments have had limited success, due in part to regulatory impediments.[143] Perhaps the best known effort was Moxy Vote, an internet-based platform created by a private investment firm that was designed to allow retail investors both to cast their votes, and to view information from institutional investors such as hedge funds.[144] The site simplified the mechanics of the voting process by allowing shareholders to mirror other shareholders' votes or to cast their votes in accordance with particular advocacy positions or predetermined voting policies.[145] For shareholders to use Moxy Vote, however, their brokers had to forward voting authority to Moxy Vote, and some brokers were unwilling to do so.[146]

142. For comments of Alan Beller, see *id.* at 129.

143. *See* Robin Miller, *Shareholder Advocacy in Corporate Elections: Case Studies in Proxy Voting Websites for Retail Investors*, CLARK U. INT'L DEV., COMMUNITY & ENV'T, Paper 52, at 5 (May 1, 2016) ("[O]f the several websites that were created in the United States [to facilitate retail investor voting] including Moxy Vote, Sharegate.com, Shareowners.org, United States Proxy Exchange and ProxyDemocracy.org, all but one site have effectively ceased operations.").

144. Joseph N. DiStefano, *West Chester's Moxy Vote Boosts Rebel Shareholders*, PHILA. INQUIRER (Nov. 20, 2009), http://philly.com/philly/blogs/inq-phillydeals/West_Chesters_MoxyVote_boosts_rebel_shareholder_voices_.html (Moxy Vote was started as a for-profit market intermediary with seed funding from an investment partnership, and at the time of its creation, it was unclear whether the site could be funded through advertising subscriptions or fees).

145. *See generally* Letter from Larry Eiben to Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n (Aug. 17, 2012), https://www.sec.gov/rules/petitions/2012/petn4-651.pdf (describing Moxy Vote).

146. McRitchie, *supra* note 7 ("Some brokers were refusing to deliver to the now defunct Moxy Vote CDV system.").

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Moxy Vote ceased operations in 2012, due to a combination of regulatory hurdles and the reluctance of custodial brokers to allow their customers to vote through the site.[147] At that time, Moxy Vote petitioned the SEC for a rulemaking to permit a "neutral Internet voting platform" that would enable retail investors to designate a neutral internet site for delivery of proxy information, storing voting preferences, and executing shareholder votes.[148] To date, the SEC has not enacted such a rule.[149]

Although Moxy Vote's effort to combine internet proxy voting with information relevant to the voting decision was not successful, other market participants have continued to innovate. Broadridge, for example, has continued to develop and expand technological tools for retail investor voting. Broadridge's innovations offered retail investors the first modern alternatives to submitting their voting instructions by mail—initially enabling telephonic submission and then electronic submissions through proxyvote.com. Of the retail shares that are currently voted, more than two-thirds are voted through proxyvote.com.[150]

Broadridge has innovated with respect to proxyvote.com as well. For example, Broadridge developed a one-click button to allow investors to vote in accordance with the board's recommendations on all issues, rather than providing instructions separately for each issue on the proxy card.[151] Critics objected to the button, however, because Broadridge did not offer a similar

147. Richard Finger, *Shareholders, Shake Off Your Apathy and Vote to Stop Tom Ward and Michael Dell*, FORBES (Feb. 21, 2013), http://www.forbes.com/sites/richardfinger/2013/02/21/shareholders-shake-off-your-apathy-and-vote-to-stop-tom-ward-and-michael-dell-from-screwing-you; *see also* Jeff Blumenthal, *Done In By Regulatory Stumbling Blocks, Moxy Vote Says*, PHILA. BUS. J. (July 20, 2012), http://www.bizjournals.com/philadelphia/print-edition/2012/07/20/done-in-by-regulatory-stumbling.html ("Individual shareholders have no legal grounds to compel their brokers to deliver ballots electronically to Internet voting platforms. Many brokerages told Moxy Vote that they would send them only when required to do so by regulators.").

148. *See* Eiben, *supra* note 145.

149. *See* James McRitchie, *The False Promise of the Enhanced Broker Internet Platform*, CORP. GOVERNANCE (Sept. 25, 2013), http://www.corpgov.net/2013/09/the-false-promise-of-the-enhanced-broker-internet-platform (advocating for a similar but broader proposal for an "open CDV" that would allow anyone to create a voting feed and enable retail shareholders to choose a feed as the basis for their proxy votes).

150. BROADRIDGE & PRICEWATERHOUSECOOPERS, *supra* note 8, at 2.

151. Ross Kerber, *Proxy Sites Dump One-Click Vote Button on SEC Concerns*, REUTERS (Mar. 20, 2013), http://www.reuters.com/article/proxy-voting-website-idUSL1N0C5D3M20130320.

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mechanism for investors to vote against all the board recommendations, creating an uneven playing field.[152] Broadridge subsequently removed the button.[153] Broadridge has also added features to the site, such as enabling an investor to cast votes for pending shareholders meetings at more than one issuer after entering a single control number, so long as the shares are held in the same account.

Although Broadridge has continued to develop proxyvote.com to simplify the mechanics of the voting process,[154] the challenge is that brokers are not currently required to connect the platform to retail investors' brokerage accounts. As a result, many investors must use proxyvote.com to submit voting instructions to their brokers.[155] Retail investors could engage in internet voting more efficiently if they had access to a single platform to manage their account—a platform that would include securities positions, notice of upcoming shareholder meetings, access to proxy information, and the ability to cast the investor's vote. In addition, proxyvote.com does not offer investors the ability to submit SVI and does not include additional information that might assist shareholders in making their decisions, such as the recommendations of proxy advisors or information on how other large investors are voting.

Importantly, brokers—who indirectly control retail voting through the voting mechanisms that they provide to their customers—have limited incentives to provide their customers with more efficient voting procedures. Brokers do not bear the cost of soliciting voting instructions; Regulation 14A requires issuers to compensate nominee holders for the costs of forwarding proxy material and collecting voting instructions. The NYSE oversees this system by setting the rules concerning the fees that issuers

152. *See, e.g.*, James McRitchie, *ProxyVote.com Encourages Zombie Voting*, CORP. GOVERNANCE (MAY 31, 2012), https://www.corpgov.net/2012/05/proxyvote-com-encourages-zombie-voting ("The vote with management button results in zombie voting.").

153. *See* Gumbs et al., *supra* note 75, at 4 (arguing that the button might have seemed to be in tension with Rule 14a-4, which requires that shareholders be given the opportunity to vote individually on each matter under consideration, although shareholders would obviously not have been required to use the button if they wanted to vote separately on each matter).

154. *See, e.g.*, *Broadridge Introduces the First Mobile ProxyVote Platform Shareholders Can Now Vote on Smartphones and Other Mobile Devices*, BROADRIDGE (Dec. 2, 2010), http://www.broadridge.com/news-events/press-releases/Broadridge-Introduces-the-First-Mobile-ProxyVote-Platform.html (describing Broadridge's expansion of proxyvote.com to mobile devices).

155. Proxy Plumbing Release, *supra* note 103, at 80.

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must pay to broker-dealers for this process.[156] The system does not, however, create any financial incentive for brokers to seek out retail votes or to make the voting process easier for their customers. As a result, in 2010, the NYSE created the Proxy Fee Advisory Committee (PFAC) to review the existing fee structure and make recommendations.[157] Among the PFAC's objectives was to "encourage and facilitate active voting participation by retail street-name shareholders."[158]

In its comments on the SEC's Proxy Plumbing release, Broadridge suggested to the PFAC that it could further this objective through the use of EBIPs, also known as investor mailboxes.[159] Like Moxy Vote, EBIPs centralize the mechanics of proxy voting for retail shareholders by allowing them to vote their proxies on their broker's website, as well as providing them with consolidated access to proxy materials and other information. Although Broadridge was not successful in persuading the SEC to adopt EBIPs through rulemaking,[160] it argued to the PFAC that brokers could be encouraged to cooperate with Broadridge to implement EBIPs if they were compensated through an incentive fee.[161]

The NYSE agreed and, in 2013, amended its rules to establish an incentive fee program designed to encourage brokers to develop and encourage the use of EBIPs.[162] Since 2013, Broadridge has developed an investor mailbox that can be directly integrated into the broker's website, allowing the broker's customers to submit voting instructions directly through that

156. *See* RECOMMENDATIONS OF THE PROXY FEE ADVISORY COMMITTEE TO THE NEW YORK STOCK EXCHANGE 2–3 (May 16, 2012), http://www.shareholdercoalition.com/sites/default/files/NYSE%20PFAC%20Report%205-16-2012.pdf [hereinafter Recommendations of the Proxy Fee Advisory Committee] (explaining that "in 2012, issuers paid approximately $200 million in aggregate on fees for proxy distribution to street name shareholders during a year").

157. *See id.* at 1, 6–7 (describing the formation and composition of the PFAC).

158. *Id.* at 9.

159. Rulemaking Order, *supra* note 75, at 24.

160. Noked, *supra* note 87.

161. *See* Recommendations of the Proxy Fee Advisory Committee, *supra* note 156, at 23 (describing Broadridge's argument).

162. Rulemaking Order, *supra* note 75, at 55. The rules permit brokers to charge issuers a one-time $0.99 fee per account for establishing an EBIP, through which they provide investors with notice of upcoming meetings and a mechanism for submitting voting instructions through the broker's website—this incentive fee is in effect for a test period that ends December 31, 2018. *Id.*

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website.[163] The incentive fee has increased broker use of EBIPs, but progress has been limited, in large part because broker participation remains voluntary. The limited progress has led some commentators to criticize the SEC for failing to mandate broker cooperation in the development of EBIPs.[164] As of September 2016, brokers that provide their customers with access to EBIPs handle 58% of all street positions.[165] In addition, the functionality of EBIPs is limited by existing proxy solicitation rules, as will be discussed in the next Part.

Another market participant is ProxyDemocracy.org. ProxyDemocracy provides retail investors with information, in a searchable format, about pending voting issues, as well as how major mutual funds and other institutional investors are voting on those issues.[166] Although this information is useful, it is not linked to a voting platform for retail shareholders. Accordingly, investors using proxyvote.com must shift to ProxyDemocracy for each shareholder meeting at which they want to vote.[167] In addition, ProxyDemocracy does not provide investors with a mechanism by which they can automatically cast their votes in the same way that a designated institutional shareholder is voting, and the website is limited to information from ten institutional investors.[168]

Private market voting platforms are not the only possible tool for increasing retail investor voting. An alternative approach would rely on individual issuers to provide investors with rewards or incentives for voting their shares. In 2010, Prudential demonstrated the potential value of this approach when it created an innovative vote incentive program. The program offered

163. *See Product Insights, Mailbox for Investors Product Demo*, BROADRIDGE, http://broadridge.com/product-insight/mailbox-product-demo.html (last visited Oct. 18, 2017) (providing an investor mailbox demo video).

164. *See* Noked, *supra* note 87 ("Unfortunately, EBIPs are currently the caboose on a stalled train: a rulemaking to change the structure of proxy fees which has been years in the making and is now languishing at the Commission."); *see also* Letter from Charles E. Schumer, Senator, to Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, at 2 (May 23, 2013), https://www.sec.gov/comments/sr-nyse-2013-07/nyse201307-32.pdf ("[U]rg[ing] the Commission to move forward expeditiously with the Investor Mailbox (or EBIP) proposal . . . .").

165. E-mail from Chuck Callan, Senior Vice President, Broadridge, to author (Oct. 5, 2016, 3:06 PM CST) (on file with author).

166. PROXYDEMOCRACY, http://www.proxydemocracy.org (last visited Oct. 18, 2017).

167. *See Advance Disclosers*, PROXYDEMOCRACY, http://proxydemocracy.org/about/vote_sources (last visited Oct. 18, 2017) (describing identities of advance disclosers).

168. PROXYDEMOCRACY, *supra* note 166.

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investors who voted their shares the choice of having a tree planted or receiving an eco-friendly tote bag.[169] Prudential's program appears to have been successful in increasing voting by shareholders who had not previously voted, and other companies might be able to increase retail voting by adopting similar programs.[170] Prudential is somewhat unique, however, in that it did not have to rely as heavily as most companies on the cooperation of broker intermediaries because it has a substantial number of retail shareholders who are holders of record.[171] Most companies in which retail shareholders hold through intermediaries would find implementing a voting incentive program to be more costly.[172]

In a recent paper Kobi Kastiel and Yaron Nili propose a somewhat different approach to increasing retail voting—a nudge.[173] Structured after Richard Thaler and Cass Sunstein's well known book,[174] the proposal would offer investors "highly visible voting default arrangements that would . . . allow (or force) them to choose from a menu of voting short-cuts."[175] The idea behind the nudge is to enable investors to use short-cuts to streamline the voting process by allowing shareholders to set up and opt-in to default voting arrangements or preferences, rather than being forced to specify votes on each individual issue at each issuer. The proposal strongly resembles the types of voting arrangements that are currently available to institutional investors.

The nascent market developments suggest that harnessing technology to make retail voting more efficient offers the greatest promise for increasing retail participation. The model for doing so can be found in the voting platform that market forces

169. *See Our Approach to Shareholder Engagement*, PRUDENTIAL, http://corporate.prudential.com/view/page/corp/31846 (last visited Oct. 18, 2017).

170. *See* WILLIAM L. TOLBERT, JR., ELAINE WOLFF & ADAM R. KREIS, JENNER & BLOCK CORP. UPDATE, INCENTIVIZING SHAREHOLDERS TO VOTE—TOTE BAG ANYONE? 1, 3 (2012), https://jenner.com/system/assets/publications/9013/original/Incentivizing_Shareholders_to_Vote_%E2%80%93_Tote_Bag_Anyone.pdf (reporting the effect of Prudential's program but that, as of March 2012, "no company has yet followed Prudential's example and adopted such a program").

171. *Id.* at 3.

172. *Id.*

173. Kastiel & Nili, *supra* note 27, at 87–91.

174. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (describing how many small and seemingly insignificant things can influence, or nudge, human behavior).

175. Kastiel & Nili, s*upra* note 27, at 55.

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currently provide to institutional investors. Although the progress with EBIPs has substantially improved the efficiency of the retail process, the functionality of EBIPs is limited so long as they cannot be used to submit SVI. Further, retail investors have demonstrated their interest in having the ability to submit SVI. Broadridge conducted two separate online surveys of investor interest in SVI in 2011 and 2014.[176] In their survey responses, investors overwhelming reported that they viewed SVI as making it easier to vote their shares and that they would be more likely to vote if this service were available to them.[177]

II. SVI AND EXISTING REGULATORY CONSTRAINT

As the preceding Part explains, institutional investors have access to a variety of services that simplify the mechanics of proxy voting, including: (1) a centralized Internet platform on which they can access information relating to voting matters for their entire portfolio; (2) the ability to cast votes through this platform; and (3) the ability to designate voting policies or preferences, rather than casting votes on an individual, firm-by-firm basis. The institutional experience demonstrates that the technological challenges to providing these services are minimal. Nonetheless, EBIPs—the closest retail analogue—provide only a subset of these services, and are available only to a fraction of the retail investor population. Specifically, EBIPs do not offer retail investors the opportunity to designate their voting preferences in advance or to submit voting guidelines that would apply across their entire portfolio. SVI provides this functionality. Market participants are precluded from offering SVI to retail investors because of existing provisions in the SEC's rules regulating the solicitation of proxies. This Part identifies the existing regulatory barriers to SVI and explains how they could be eliminated.

Under section 14(a) of the Securities Exchange Act of 1934, the SEC has the authority to regulate the proxy solicitation process.[178] The SEC has set out the scope of its regulatory authority by defining as proxy solicitations all communications to share-

176. *See* Presentation, Broadridge, Evaluation of Proxyvote.com 29–33 (Jan. 2015) (on file with author).

177. *Id.*

178. Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (2012).

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holders that are "reasonably calculated to result in the procurement, withholding or revocation of a proxy."[179] The SEC rules provide that, unless an exemption applies, all proxy soliciting material must be filed with the SEC.[180] In addition, most proxy solicitations require that the speaker file a proxy statement and provide that statement to shareholders.[181]

Brokers, as discussed above,[182] are the gatekeepers for retail voting, both because the provisions of Regulation 14A require brokers to solicit voting instructions[183] and NYSE rules compensate them for doing so.[184] A broker's request for voting instructions from its customer is a communication reasonably calculated to result in the procurement of a proxy. The request therefore falls within the SEC's definition of a proxy solicitation.[185]

To enable brokers to solicit voting instructions without fear of liability, the SEC has created a regulatory exemption for certain communications from a broker to its customers. Under Rule 14a-2(a)(1), brokers can transmit third-party proxy solicitation material to their customers and request voting instructions so long as the broker: (1) receives no compensation other than reimbursement of its costs; (2) promptly furnishes all proxy soliciting material; and (3) impartially requests a proxy or voting instructions.[186] The exemption only applies if the broker refrains from providing its own information or analysis of the matters upon which the shareholders are being asked to vote.[187] The exemption has the effect of treating the broker's function as ministerial, rather than a proxy solicitation. Rule 14a-2(a)(1)(ii) limits a broker's ability to obtain standing voting instructions because, for the exemption to apply, the broker must "furnish

179. General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-1(l)(1)(iii) (2017) (defining "solicitation").

180. *See* 17 C.F.R. § 240.14a-2 (providing exemptions from the filing and proxy statement requirements); *see also* § 240.14a-6 (describing filing requirements).

181. *See* 17 C.F.R. § 240.14a-3 (describing information that must be furnished to shareholders).

182. *See supra* Part I.A.

183. 17 C.F.R. § 240.14b-1(d).

184. Processing and Transmission of Proxy Material, New York Stock Exchange Rule 451 (2016), http://wallstreet.cch.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_2&manual=/nyse/rules/nyse-rules.

185. *See* 17 C.F.R. § 240.14a-1(l)(1)(iii) (defining "solicitation").

186. *Id.* § 240.14a-2(a)(1).

187. *Id.* § 240.14a-2(a)(1)(iii) (stating that solicitations must be "impartial").

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promptly" proxy materials to the person solicited.[188] By definition, the submission of SVI takes place prior to the filing of proxy materials, making it impossible for the broker to satisfy this requirement.

The exemption under Rule 14a-2(a)(1) does not extend to a broker's own expert analysis, recommendations, or information on how other shareholders are voting. Brokers are permitted, under a different exemption, Rule 14a-2(b)(3), to furnish not just additional information but explicit proxy voting advice to their clients.[189] The exemption for proxy voting advice applies as long as the broker provides financial advice in the ordinary course of business, does not receive special compensation for the advice, discloses any conflicts or relationships, and is not soliciting on behalf of any participant in the proxy contest.[190] Unlike the exemption under Rule 14a-2(a)(1),[191] however, this provision only exempts the broker from the filing requirements and the obligation to furnish a proxy statement.[192] As a result, a broker who provides advice pursuant to this exemption faces some regulatory risk; the broker could be liable under Rule 14a-9 for proxy fraud.[193]

Rule 14a-4(d) also limits a broker's ability to ask for SVI.[194] Rule 14a-4(d) does not permit a proxy to confer voting authority "with respect to more than one meeting" or for "any annual meeting other than the next annual meeting . . . to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders."[195] An SVI platform would require a change in the rule to allow customers to submit voting instructions prior to the distribution of the proxy statement. SVI would also require an amendment to Rule 14a-4(d) to authorize

188. The broker must "[f]urnish[] promptly to the person solicited (or such person's household in accordance with § 240.14a-3(e)(1)) a copy of all soliciting material with respect to the same subject matter or meeting received from all persons who shall furnish copies thereof for such purpose . . . ." *Id.* § 240.14a-2(a)(1)(ii).

189. *Id.* § 240.14a-2(b)(3). The rule limits the exemption to those with whom the broker has a business relationship. *Id.*

190. *Id.*

191. Rule 14a-2(a)(1) provides exemptions from §§ 240.14a-3 to -15. *Id.* § 240.14a-2(a)(1).

192. Exemptions under Rule 14a-2(b) are limited to §§ 240.14a-3 to -6 (other than -6(g) and -6(p)), -8, -10, and -12 to -15. *Id.* § 240.14a-2(b).

193. *Id.* § 240.14a-9.

194. *Id.* § 240.14a-4(d).

195. *Id.* § 240.14a-4(d)(2)–(3).

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voting instructions that would apply to multiple shareholders' meetings.

Only very modest changes to these provisions would be required to permit brokers to solicit SVI from their customers. The SEC would have to broaden the exemption under Rule 14a-2 to permit brokers to solicit SVI, to enable them to do so in advance of the distribution of the proxy statement, and to provide information in addition to the materials that are distributed by the issuer and any other soliciting party. A broader exemption under Regulation 14A might not be sufficient, however, in that it would merely allow, but not compel, brokers to accept SVI and, as noted above, brokers have shown limited interest in facilitating retail voting in the absence of affirmative regulatory obligations or financial incentives. Consequently, the SEC should go further in enabling efficient retail investor voting by amending Regulation 14A to require custodial brokers to provide investors with access to an Internet-voting platform. Specifically, custodial brokers should be required to provide their retail clients with comparable functionality to that available to institutional investors, including the ability to submit voting instructions through the broker's website and the ability to provide SVI.[196]

Amending Regulation 14A to require an effective internet-based system for retail voting would have several advantages over the current system. First, it would overcome existing broker reluctance to establishing EBIPs and provide all investors with access to voting platforms. Second, requiring that brokers permit SVI would alleviate potential concerns that brokers may currently face about their liability exposure if they deviate from existing practices.[197] Third, by addressing these issues explicitly,

196. Alternatively, the SEC could eliminate the pass-through nature of existing Regulation 14A by requiring intermediaries to execute proxies giving beneficial owners the right to vote their shares directly. This would enable beneficial owners to cast their votes directly or use of an Internet-based intermediary like Moxy Vote. *See* Rulemaking Petition, *supra* note 92, at 14 ("Providing the right to vote to the beneficial owner would simplify the voting and vote tabulation process, and would enable those companies using Internet voting systems for record holders to extend that system to all beneficial owners."). By obligating brokers to execute such proxies, this regulatory change would enable market participants to compete over the development of voting platforms in the same way that market competition has produced multiple options for institutional investors.

197. Recall that the SEC stated in its Proxy Plumbing Release in 2010 that the proxy rules do not contain an exemption permitting SVI. Proxy Plumbing Release, *supra* note 103, at 84.

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the regulation could include appropriate safeguards to protect investors. This Article will consider those safeguards in Part IV.

Despite these advantages, and despite the fact that SVI proposals have been before the SEC for more than ten years, the SEC has failed to make the necessary changes even to permit SVI, much less to encourage it. The SEC's failure to act appears to be based on several concerns. As noted earlier,[198] in 2009, the SEC identified the concern that SVI would enable investors to make their voting decisions before receiving the federally-mandated proxy disclosures.[199] This, in turn, might lead shareholders to make their voting decisions in a generic fashion, without reference to the firm-specific context in which those instructions are being applied. This is likely to lead at least some investors to rely on rules of thumb or heuristics. Investors using SVI might also rely to a substantial degree on third-party voting recommendations or policies, especially policies formulated by governance intermediaries such as proxy advisory firms.

These concerns reflect a common theme—the prospect that SVI will promote uninformed voting by shareholders. At the 2015 SEC Roundtable, Allan Beller succinctly identified uninformed voting as the key obstacle to the implementation of SVI: "there is a tension between providing a system that encourages retail investors to vote and the promotion of informed voting."[200] In the next Part, this Article challenges the claim that the risk of uninformed voting is an appropriate basis for failing to implement SVI for retail investors. In Part IV, the Article offers some preliminary suggestions about the appropriate safeguards for such implementation.

III. SVI AND UNINFORMED SHAREHOLDER VOTING

This Article argues that the risk of uninformed voting is a red herring—an insufficient basis for the SEC to continue to deny retail investors a functional voting platform that includes the capacity for SVI. The concern about uninformed voting is misplaced for four reasons. First, uninformed voting by retail investors is unlikely. Second, existing regulations are inconsistent with the voting rights conferred on investors by state law. Third, SVI is not in tension with the mandatory disclosure regime provided by federal law. Finally, institutional investors currently

198. *See supra* Part I.B.
199. Exchange Act Release No. 34-60215, *supra* note 91, at 33,302.
200. 2015 Proxy Voting Roundtable, *supra* note 26, at 129.

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have access to SVI, and the differences between retail and institutional investors do not warrant different treatment.

A. RETAIL INVESTORS ARE UNLIKELY TO ENGAGE IN UNINFORMED VOTING

Uninformed voting is, assuredly, undesirable. If shareholders lack adequate information about the issues on which they vote, they may make mistakes and be vulnerable to exploitation. The economic rationale for shareholder voting rights is based on the theory that, as residual claimants, shareholders have the incentive to make discretionary decisions in a way that will maximize firm value.[201] If shareholders do not vote in an informed manner, they may not maximize firm value through their voting decisions. This behavior has the potential to impose costs not only on shareholders, but also on other stakeholders and society at large.

Berle and Means famously recognized that dispersed public shareholders faced collective-action costs that limit their ability to use their voting rights effectively.[202] For small investors, it is rational to be apathetic about voting—the typical retail investor may lack a sufficient stake to warrant the investment of time necessary to make a fully-informed decision. Rational apathy is, of course, not a by-product of SVI. Nonetheless, because SVI gives shareholders the opportunity to designate their voting preferences in advance and across all their holdings, its availability could reduce the incentive for shareholders to research a particular vote at a specific issuer.

There is, nonetheless, a substantial gap between theory and practice. Simply put, the risk that retail investors will engage in uninformed voting is overstated. There are several reasons for this. First, and most importantly, retail investors have skin in the game. As owners, retail shareholders have a meaningful economic stake in the companies in which they invest. It is far more likely that shareholders who do not believe themselves to be sufficiently informed will withhold their vote, rather than cast an uninformed vote that might risk damaging their economic stake. In contrast, most institutional votes are cast by agents or intermediaries, introducing the potential for conflicts of interest or other agency costs.[203]

201. FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 68 (1991).

202. BERLE & MEANS, *supra* note 47, at 71.

203. *See* Gilson & Gordon, *supra* note 18, at 865 (identifying the dual set of

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Not only do retail investors have a meaningful economic interest, they acquired that economic interest by making an affirmative decision to purchase their shares. Even if a retail investor's stake in a voting outcome is relatively small, the underlying investment is likely to be economically meaningful to that shareholder. In addition, information acquired by the investor in connection with the trading decision also has the capacity to inform that investor's voting decisions. Indeed, although retail investor trading decisions may be less sophisticated, they are likely to be more information-based than a substantial proportion of institutional decisions that are made on the basis of index composition, benchmarks, or trading algorithms.[204]

Second, the use of SVI is not inconsistent with investor use of and reliance on federally-mandated disclosures. As discussed in Part IV, this Article's proposal for SVI would retain the requirement that brokers send a full set of proxy material to their SVI clients for each meeting, at the same time they distribute those proxy materials to their other clients. It would also require that brokers provide clients with the opportunity to override the standing instructions at any time and to notify clients of their right to do so in connection with every shareholder meeting. Accordingly, customers would retain the ability to use the federally-mandated disclosure to change or reaffirm any voting instructions that they had previously submitted.

Third, the proxy statement is not the only relevant source of information with respect to voting decisions. Shareholders today have access to substantial and timely information about issuers and voting issues. As noted above, shareholders have access to information in connection with their trading decisions and have some level of familiarity of the issuers at which they are being asked to cast votes, by virtue of having voluntarily invested in those companies. Issuer information is available on the Internet and is disseminated through an increasing number of analysts, websites, and service providers. Retail investors can access the voting guidelines of mutual funds and the voting policies of many

agency relationships presented by institutional investor involvement in corporate governance).

204. *See* Dan Li & Geng Li, *Are Household Investors Noise Traders? Evidence from Belief Dispersion and Stock Trading Volume*, 19, 30 (Fed. Reserve Bd. Working Paper No. 2014-35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438025 (presenting data that trading by household investors is belief- and information-based and contributes to market efficiency).

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other institutional investors, and can use that information to formulate their own voting policies.[205] Business and financial media provide extensive coverage of shareholder voting issues, and recent economic studies demonstrate the influence of media coverage on voting outcomes.[206]

Finally, increased levels of retail participation in the voting process will create an incentive for participants in an election to reach out and communicate with retail investors. Proxy solicitation firms have a variety of tools available to enable issuers and challengers to communicate their views to a retail-investor base. The use of such tools is far more likely to generate an informed vote than the existing system of notifying an investor of the online availability of a complex proxy statement.[207] Today, because of the low levels of retail voting, participants in the proxy solicitation process have little reason to provide information to retail investors beyond filing the federally-mandated proxy statement, a document which, after the adoption of e-proxy, is generally not even provided to shareholders directly.[208] If retail voting is more efficient, retail investors are more likely to vote their shares, and, in turn, participants in an election will have greater reasons to seek to inform those votes.

205. SEC rules require mutual funds to disclose their votes and voting policies publicly. 17 C.F.R. § 270.30b1-4 (2017). *See, e.g.*, *Vanguard's Proxy Voting Guidelines*, VANGUARD, https://about.vanguard.com/investment-stewardship/voting-guidelines (last visited Oct. 18, 2017) (describing Vanguard's voting policies). DOL Regulations impose similar requirements on public pension funds. *See, e.g.*, California Public Employees' Retirement System, Statement of Investment Policy for Global Governance, (Mar. 16, 2015), https://www.calpers.ca.gov/docs/forms-publications/global-principles-corporate-governance.pdf (describing CalPERS voting policy).

206. *See, e.g.*, Reggy Hooghiemstra, Yu Flora Kuang & Bo Qin, *Say-on-Pay Votes: The Role of the Media*, 24 EUR. ACCT. REV. 753 (2015) (reporting that negative media coverage of CEO pay is associated with say-on-pay voting dissent in the UK); Reena Aggarwal, Isil Erel & Laura Starks, *Influence of Public Opinion on Investor Voting and Proxy Advisors* 21–22 (Fisher Coll. of Bus. Working Paper No. 2014-03-12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447012 (finding that public opinion, as reflected in media coverage, influences both proxy advisor recommendations and voting outcomes).

207. *See A Short-List of Incentives That Might Get More Folks to Vote Their Proxies*, SHAREHOLDER SERVICE OPTIMIZER (2011), https://www.optimizeronline.com/article/101670/a-short-list-of-incentives-that-might-get-more-folks-to-vote-their-proxies (discussing how mailing a full package of proxy materials is more likely to get retail investors to vote).

208. Lynch, *supra* note 82.

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B. STATE LAW VOTING RIGHTS ARE NOT CONDITIONED ON INFORMED VOTING

Although federal law regulates the mechanics of shareholder voting, state corporate law is the primary source of shareholders' substantive voting rights.[209] Indeed, the original rationale for federal proxy regulation was to restore to shareholders the ability to exercise their state-conferred voting rights when shareholder dispersion threatened their ability to do so effectively.[210]

State law does not, however, require that shareholders cast an informed vote. Indeed, state law imposes few restrictions on the motive or intent underlying the exercise of shareholder voting power. Delaware courts, for example, have explicitly recognized a shareholder's right to act selfishly in exercising its voting power.[211] Similarly, the courts have explained that shareholders may validly determine how to vote their shares "by whim or caprice."[212]

Shareholder voting power is not conditioned upon shareholder-specific characteristics, such as a shareholder's independence, intent, or good faith.[213] Delaware corporate law even allows shareholders to sell their voting rights to someone else.[214] Shareholders do not act as fiduciaries when they exercise their

209. Federal law has, to some extent, supplemented shareholders' state law voting rights. The most obvious example is the federally-mandated advisory vote on executive compensation. *See* Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 752 (2013) (discussing say-on-pay).

210. *See, e.g.*, Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 453 (2012) ("The federal proxy rules were designed to replicate, as nearly as possible, an in-person shareholder meeting.").

211. *See* Thorpe v. CERBCO, Inc., 676 A.2d 436, 442 (Del. 1996) (citing DEL. CODE ANN. tit. 8, § 271 (1996)) (affirming controlling shareholder's right to vote based on own self-interest in a transaction requiring shareholder approval to sell substantially all of a corporation's assets).

212. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A.2d 441, 447 (Del. 1947) ("Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed his fellow shareholders."); *accord* Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987).

213. *See* Fisch, *supra* note 210, at 455 ("State law does not condition the exercise of voting power on shareholder-specific characteristics.").

214. Hewlett v. Hewlett-Packard Co., No. CIV.A. 19513, 2002 WL 549137, at *4 (Del. Ch. Apr. 8, 2002) ("Shareholders are free to do whatever they want with their votes, including selling them to the highest bidder.").

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voting rights,[215] and they are under no obligation to vote their shares in the best interests of the corporation.[216]

Although shareholders have occasionally faced challenges for acting selfishly when exercising their voting rights, those cases typically involve controlling shareholders acting on behalf of the corporation, rather than purely in their capacity as shareholders.[217] Even in those cases, courts have recognized that, while a controlling shareholder may not use the corporate machinery to gain an advantage at the expense of the minority, even controlling shareholders may nonetheless act out of self-interest in both voting and selling their stock.[218]

Although the failure of state law to oversee the manner in which shareholders exercise their voting power may seem problematic, it is premised on two considerations—the shareholders' economic stake, which aligns their voting decisions with the objective of maximizing firm value, and the balance of authority between boards and shareholders which limits the scope of shareholder voting power.[219] Shareholder voting is, at best, a weak tool for constraining board and management power, and

215. *See, e.g.*, Tanzer v. Int'l Gen. Indus., Inc., 379 A.2d 1121, 1124 (Del. 1977), *overruled by* Weinburger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (quoting WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2031 (perm. ed., rev. vol 1976)) ("At a stockholders' meeting, each stockholder represents himself and his own interests solely and in no sense acts as a trustee or representative of others . . . ."); *see also Bershad*, 535 A.2d at 845 ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interest.").

216. Concededly, state law recognizes that "[w]hat legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization." Kurz v. Holbrook, 989 A.2d 140, 178 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom*. Crown EMAK Partners, LLC v. Kurz, 997 A.2d 377 (Del. 2010).

217. *See, e.g.*, Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1269 (2008) (observing that the circumstances in which courts have imposed fiduciary duties on shareholders have been limited both to controlling shareholders and to cases involving "corporate 'freeze-outs' and closely held corporations").

218. *Tanzer*, 379 A.2d at 1124 (even a controlling "stockholder in a Delaware corporation" has the right "to vote [his shares] in his own interest"), *rev'd on other grounds*, 457 A.2d 701; Williams v. Geier, 671 A.2d 1368, 1380–81 (Del. 1996) ("Stockholders (even a controlling stockholder bloc) may properly vote in their own economic interest . . . .").

219. *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 35–36) (on file with author) (identifying the rationale for limiting shareholder power in favor of director primacy).

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imposing conditions on the exercise of that power is likely to eviscerate its effectiveness. Moreover, questions about the ability of shareholders to exercise their voting power intelligently are more properly addressed to the substantive scope of shareholder voting rights than to the manner in which those rights are exercised.[220]

C. UNINFORMED SHAREHOLDER ACTION IS NOT IN TENSION WITH THE OBJECTIVES OF THE FEDERAL SECURITIES LAWS

In contrast to state corporate law, the disclosure orientation of the federal securities laws prioritizes the goal of informed shareholder action. The very rationale of a mandatory disclosure system is to protect investors by giving them sufficient information relevant to their trading and voting decisions.[221] Federal law requires the disclosure of specified information in a variety of circumstances. Issuers are required to file a registration statement and prospectus prior to selling securities to the public.[222] After going public, issuers are required to make periodic disclosures to keep investors informed, including an annual report.[223] In addition, anyone who solicits proxies from shareholders is required to comply with the proxy-solicitation requirements of Regulation 14A, which include the preparation of a proxy statement.[224]

One objective of this disclosure is to facilitate informed shareholder action.[225] Federal law does not actually require, however, that shareholders be informed. Rather, the obligation is on issuers to disclose, not on investors to use that disclosure.[226] The principle behind the federal disclosure system is to require that the mandated disclosure be sent to each investor, not that

220. *See, e.g.*, Fisch, *supra* note 209, at 753–54 (identifying limitations on shareholders' ability to cast an intelligent "say-on-pay" vote).

221. *See, e.g.*, Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 431 (2003) ("Disclosure is merely the chosen means to the end of informed investor decision making.").

222. 15 U.S.C. § 77e (2012).

223. Securities Exchange Act of 1934, 15 U.S.C. §§ 78(b)(1), (g)(1), m, o(d) (2012).

224. *Id*. § 78n(a).

225. *See, e.g.*, Paredes, *supra* note 221, at 462 ("Informed investor decision making [is] a key goal of the federal securities laws, probably the main goal today.").

226. *Cf.* Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CALIF. L. REV. 279, 280 (2000) (proposing instead the elimination of issuer-based regulatory requirements in favor of investor regulation).

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each investor read it, acknowledge that they have read it, or demonstrate his or her familiarity with its contents prior to investing or voting.

Moreover, as a practical matter, modern investors are unlikely to read the federally-mandated disclosure documents. The length and complexity of the proxy statement and supporting documents continues to increase. For example, Jeffrey Gordon observed that the average length of an annual report increased from approximately sixteen pages in 1950 to 165 in 2004.[227] A similar increase has occurred in the length of proxy statements.[228] Not only has the documentation increased in length, but shareholders are asked to vote on an increasing number of issues.[229]

As a result, many investors never read the federally-mandated disclosures.[230] As Troy Paredes explains, the existing disclosure regime is too extensive and complex, and, as a result, "few people expect the 'average' individual investor to focus in any detail on the information that companies disclose."[231] Similarly, a 2006 survey by the Investment Company Institute (ICI) reported that only one-third of mutual-fund investors consulted the prospectus before purchasing their shares and that most investors do not use the SEC-mandated disclosure documents to monitor their investments.[232]

The SEC's concern about SVI reducing shareholder use of the mandated disclosure is also in tension with other regulatory reforms that have reduced shareholder access to the disclosures and made it easier to vote without reading them. As noted above, for example, the introduction of e-proxy meant that investors

227. Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1547 (2007). The average length of an annual report continues to increase; *see also* Vipal Monga & Emily Chasan, *The 109,894-Word Annual Report*, WALL ST. J., June 2, 2015, at B10 (reporting that GE's 2013 annual report was 246 pages long and that the average annual report in 2013 was about 42,000 words).

228. *See, e.g.*, Kastiel & Nili, *supra* note 27, at 69 (citing the example of the Apple proxy statement, which grew from eighteen pages in 1994 to ninety in 2004).

229. *Id.* at 68.

230. *Cf.* Stephen Choi, *Behavioral Economics and the Regulation of Public Offerings*, 10 LEWIS & CLARK L. REV. 85, 118 (2006) ("Most individual investors are likely not to read the prospectus even if delivered to them.").

231. Paredes, *supra* note 221, at 431–32.

232. *See* INV. CO. INST., UNDERSTANDING INVESTOR PREFERENCES FOR MUTUAL FUND INFORMATION 22 (2006), https://www.ici.org/pdf/rpt_06_inv_prefs_full.pdf.

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must affirmatively seek out the disclosure materials, rather than receiving them automatically.[233] Similarly, the SEC allows shareholders to submit voting instructions on their mobile devices.[234] These actions arguably increase the risk that shareholders will vote without reading the lengthy proxy statement.

This is not to say that the federally-mandated disclosure system is a failure. The system works because the disclosures are made to the market, and some market participants incorporate that information into trading prices by relying on that information. This enables the rest of the investing public to free-ride—relying on the market price set by better-informed investors.[235] In addition, issuer disclosures are "largely 'filtered' through experts—various securities professionals and financial intermediaries—who research and process the information and whose trades and recommendations ultimately set securities prices."[236] Developments in technology have dramatically increased the market's ability to process and disseminate information, meaning that the average investor reaps the benefit of issuer disclosures today through an ever-growing number of Internet and social-media sources.

That federal law expressly vests investors with discretion to choose which and how much information to use is reflected in the SEC's 2005 Public Offering Reforms.[237] In the reforms, the SEC shifted the disclosure requirement in the registration process from that of providing investors with disclosure, to instead providing investors with access—that is, making the disclosure available.[238] The access-equals-delivery system treats issuers as having delivered the mandated disclosures to investors once

233. *See supra* notes 79–80 and accompanying text (discussing e-proxy).

234. *See, e.g.*, Letter from John G. Strumpf, Chairman & Chief Exec. Officer, Wells Fargo & Co., to Stockholders (Mar. 16, 2016), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2016-proxy-statement.pdf (advising shareholders that they can vote their shares using their mobile devices).

235. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014) (quoting Amgen Inc., v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013)) ("It is reasonable to presume that most investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information.").

236. Paredes, *supra* note 221, at 431–32.

237. Securities Offering Reform, 70 Fed. Reg. 44,722, 44,731–32 (Aug. 3, 2005).

238. *See* Choi, *supra* note 230, at 102–04 (evaluating the effect of shifting from delivery to access).

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those disclosures are made publicly available.[239] The result of the system, however, is that investors are left with the choice of whether to access the applicable disclosure documents, and need not affirm that they have read them before purchasing securities.

D. ALLOWING SVI FOR INSTITUTIONAL BUT NOT RETAIL INVESTORS IS NOT WARRANTED

Finally, it is important to recognize that the SEC's current regulations have the practical effect of enabling institutional, but not retail, investors to utilize SVI. The risk of uninformed voting is not unique to retail investors, however. The same concern might be raised about institutional investor voting.

The regulatory changes adopted by the DOL and the SEC to mandate institutional voting impose a duty on institutional investors to vote, but institutions do not necessarily cast that vote in an informed manner. Indeed, commentators frequently criticize institutional investors for "blindly" relying on proxy advisors,[240] and policymakers have sought to impose greater regulatory restrictions on advisors with the objective of compelling a more informed institutional vote.[241] The mechanism for doing so is unclear, however. Many institutions lack the sophistication and resources to vote in an informed manner. Investment advisors may be expert in designing investment strategies but lack competence in evaluating governance issues. Some institutions, such as index funds, compete by minimizing their operating expenses, and devoting substantial resources to governance research may be in tension with that business model. In addition, institutional investors are subject to agency costs—those who are making voting decisions do not, as a general rule, have an economic interest in the securities that they are voting.

239. *See* Rules 153, 172, 173, 174, 17 C.F.R. §§ 230.153, .172, .173, .174 (2017).

240. *See, e.g.*, Daniel Gallagher, Commissioner, U.S. Sec. & Exch. Comm'n, *Remarks at Society of Corporate Secretaries and Governance Professionals*, http://sec.gov/News/Speech/Detail/Speech/1370539700301 (July 11, 2013) ("The last thing we should want is for investment advisers to adopt a mindset that leads to them blindly casting their votes in line with a proxy advisor's recommendations, especially given the fact that such recommendations are often not tailored to a fund's unique strategy or investment goals.").

241. *See, e.g.*, Bonnie Barsamian & Marc Leaf, *Proxy Advisory Firms in the Regulatory Spotlight*, LAW360 (Dec. 8, 2016), https://www.law360.com/articles/869646/proxy-advisory-firms-in-the-regulatory-spotlight (discussing proposed regulation of proxy advisory firms).

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Commentators have suggested that institutional investors are better positioned to research and develop voting policies than retail investors, and it is certainly true that some institutional investors, such as Blackrock and Vanguard, devote substantial resources to voting research.[242] Both institutional and retail investors vary tremendously, however, and it is likely that a substantial percentage of retail investors who invest directly in common stock are at least as sophisticated as the advisors to many smaller pension and mutual funds. In short, the difference between retail and institutional investors, with respect to both their ability and their willingness to make informed voting decisions, is overstated.

Even the claim that retail investors are less sophisticated than institutions is likely overstated. Wealthy, better-educated, and more sophisticated households are most likely to invest in the stock market in general,[243] and, within the overall population of retail investors, are more likely to own stock directly, as opposed to mutual fund shares.[244] This pattern has increased recently, as unsophisticated households have reduced their investment in equity.[245]

It is possible, of course, that the opportunity to submit SVI will encourage retail investors to be lazy. It is also possible that institutional investors have structures and internal controls that enable them to oversee the mechanics of the SVI process more

242. *See, e.g.*, Madison Marriage, *BlackRock, Vanguard and State Street Bulk up Governance Staff*, FIN. TIMES (Jan. 28, 2017), https://www.ft.com/content/657b243c-e492-11e6-9645-c9357a75844a (describing expansions in the size of corporate governance teams at Blackrock, Vanguard and State Street).

243. Robert Frank, *The Stock Gap: American Stock Holdings at 18-year Low*, CNBC (Sept. 8, 2014), http://www.cnbc.com/2014/09/08/the-stock-gap-american-stock-holdings-at-18-year-low.html ("[In] 2010, the latest period available, the top 10 percent of Americans by net worth held 81 percent of all directly held or indirectly held stocks.").

244. *See* Li, *supra* note 204, at 24 ("[P]rime-age, better educated, white, and higher-income consumers should have a more pronounced effect on stock trading volume."); *see also* Daniel Barth, *The Costs and Beliefs Implied by Direct Stock Ownership* 9 (European Cent. Bank, Working Paper No. 1657, 2014) (analyzing data from the Survey of Consumer Finances and Household Wealth and finding that wealthy households are relatively more likely to own individual stocks, hold an increased number of individual stocks and allocate more of their household wealth to equity).

245. *See, e.g.*, Marcin Kacperczyk, Jaromir Nosal & Luminita Stevens, Investor Sophistication and Capital Income Inequality 4 (Dec. 2015) (unpublished manuscript) (on file with author) ("Over time, unsophisticated households increase their share of liquid, money-like instruments and shift away from direct stock ownership and ownership of intermediated products, such as actively managed equity mutual funds.").

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effectively and to identify situations in which it is in their interests to override their standing instructions. Even institutions, however, can make stupid mistakes in casting their votes. Recently, for example, T. Rowe Price failed to override its computerized voting system and mistakenly voted its shares in favor of the 2013 Dell merger, even though the funds' advisors believed the merger price was too low.[246] By voting in favor, the funds were disqualified from exercising their appraisal rights, an error that cost them $194 million.[247]

IV. IMPLEMENTATION OF SVI

Implementation of SVI raises a variety of practical considerations. There is the question of the manner in which brokers should solicit SVI. Should brokers be required to ask every customer for SVI or is it sufficient if brokers give their customers the opportunity to do so? Should third party providers be permitted to offer retail investors the opportunity to access internet sites that enable them to submit SVI? Should brokers be required to cooperate with third-party providers?

A second question concerns the types of instructions that customers should be permitted to submit. A voting platform could provide investors with a limited number of choices, such as the four choices proposed by Steve Norman—voting with the board recommendation, voting against the board recommendation, voting proportionately with other shareholders, or abstaining.[248] This range of choices would be very simple to implement, as evidenced by Broadridge's one-click button.[249]

A platform could also provide investors with a broader set of options, such as, allowing investors to cast their votes in the same way that another designated investor, in the way a mutual fund or public pension fund votes its shares. An investor might, for example, choose to vote their shares in the same way as Vanguard's S&P 500 index fund. This option is similar to the manner in which institutional investors currently have the ability to direct their votes to be cast in accordance with the recommendations of a proxy advisor, such as ISS or Glass Lewis.

246. Sarah Krouse, *T. Rowe Price Pays Up for Botched Vote*, WALL ST. J. (June 6, 2016), http://www.wsj.com/articles/t-rowe-price-to-reimburse-clients-194-million-for-dell-deal-flub-1465244254.

247. *Id.*

248. *See supra* notes 116–19 and accompanying text.

249. *See supra* note 151 and accompanying text (discussing one-click button).

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Because this approach would result in the investor essentially delegating voting authority to a third party, it raises questions about the extent to which such delegations are appropriate. Institutional investors have been highly criticized for delegating their voting decisions to proxy advisory firms.[250] Delegating voting authority, however, raises fewer concerns in the context of retail investors. First, retail investors who lack the interest or expertise to analyze voting decisions carefully may rationally view institutions as more knowledgeable. Second, a retail investor's decision to delegate voting authority to a large institutional investor with skin in the game is very different from an institution's decision to delegate to a proxy advisor who is not subject to the disciplinary forces of an underlying economic interest.[251] Third, retail investors who delegate voting authority are acting as principals, rather than fiduciaries, with respect to their voting decision.

More complex SVI options would allow investors to designate issue-specific voting policies or guidelines, such as voting against classified boards, in favor of separating the chair and CEO, or against overboarded directors. The mechanism by which investors designate such preferences would, of necessity, be more complex. Nonetheless, the systems available to institutional investors allow these types of designations. An even more complex menu might enable investors to set up screens which would operate to direct the investors' vote in accordance with specified criteria—such as voting in accordance with management recommendations unless the screen flags a problem like underperformance or poor corporate governance.

A third question concerns the type of information that should be available on a voting platform. This Article argues that, at a minimum, a retail voting platform should enable an investor to designate SVI for all the investor's security holdings and to access the proxy statement, proxy card, and annual re-

250. *See* Gallagher, *supra* note 240; *see also* David Larcker & Allan McCall, *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J.L. & ECON. 173, 203 (2015) ("The outsourcing of voting to proxy advisory firms appears to have the unintended economic consequence that boards of directors are induced to make choices that decrease shareholder value.").

251. *See* Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 688 (2005) (criticizing the influence of proxy advisors that have no "skin in the game").

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port, as well as any other soliciting material, when those documents become available.[252] Platform providers may find, however, that investors want to obtain additional information. Providers could collect and include, as ProxyDemocracy does, the pre-announced votes of institutional investors.[253] Providers could include the published voting guidelines of major institutional investors or of the proxy advisory firms. They could also include links to research concerning corporate governance issues, or media reports concerning specific issuers or voting issues. The broader the scope of this information, the more the voting platform can serve as a single source for informing investors.

Resolving questions about the best way to implement SVI is complex. This Article argues, however, that it is neither necessary nor desirable for the SEC to address these questions or to determine the ideal structure for a retail voting platform.[254] Instead, the Article suggests that existing market forces will enable service providers to experiment with voting platforms, based on investor demand for these options and the cost of providing them. Rather than concern itself with identifying an ideal protocol in adopting its regulations, the SEC should limit itself to removing the existing regulatory impediments and implementing minimal safeguards to prevent abuse. These safeguards should

252. In an ideal world, the voting platform would populate the voting options with the precise language contained in the proxy, when that language becomes available.

253. CalPERS publishes its voting decisions in advance of the shareholders' meeting in an explicit attempt to encourage other shareholders to vote the same way. *See Key Decisions*, CALPERS, https://calpers.ca.gov/page/investments/governance/proxy-voting/key-decisions (last visited Oct. 18, 2017) ("We publish our proxy voting decisions to encourage shareowners to vote in accordance with CalPERS. These votes are for informational purposes only and not intended as investment advice.").

254. Because voting platforms can be implemented in conjunction with brokers' existing websites, as Broadridge has done with EBPs, it is unnecessary to impose a separate registration requirement on the voting platform itself. To the extent that non-brokers seek to establish stand-alone voting platforms, the SEC may consider whether to require them to register as broker-dealers or investment advisers. It is worth noting that, under current law, proxy advisory firms do not have to register with the SEC, although legislation has been proposed to require such registration. *See, e.g.*, Ed Batts, *Yet Another Congressional Proposed Corporate Reform: Proxy Advisory Firms in the Crosshairs*, HARV. L. SCH.: F. ON CORP. GOVERNANCE & FIN. REG. (July 20, 2016), https://corpgov.law.harvard.edu/2016/07/20/yet-another-congressional-proposed-corporate-reform-proxy-advisory-firms-in-the-crosshairs (describing "the Proxy Advisory Reform Act of 2016").

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be implemented through regulation of broker-dealers who permit customers to establish SVI and through regulation of intermediaries who provide a proxy-voting platform.[255]

With respect to the manner of implementing SVI, SEC regulations should mandate that any communication to a shareholder clearly disclose that the SVI instructions can be revoked at any time prior to the shareholder meeting, that the SEC has mandated specific disclosures in connection with a shareholder vote, and that shareholders should read those disclosures before deciding whether to adhere to their pre-designated instructions. Investors who have established SVI should continue to receive notice of all proxy communications in the same manner as other shareholders. To facilitate easy access to the SEC-mandated disclosures in connection with the voting decision, the SEC should require proxy-voting platforms to post or provide links to the disclosures as soon as they are available.[256] In addition, SEC regulations should provide for the proxy voting platform to notify its customers in advance of the annual meeting of each issuer in which they own stock. The notice should alert investors about the upcoming shareholder vote, advise them how their shares will be voted based on their existing instructions, explain how they can change that vote if they so desire, and inform investors of the final deadline for submitting or changing voting instructions with respect to this meeting.

With respect to the SVI options, the SEC's primary focus should be to require that they are evenhanded and transparent.

255. This structure is analogous to the regulatory structure established by Title II of the Jumpstart Our Business Startups Act of 2012 (JOBS Act) with respect to crowdfunding. Pub. L. No. 112-106, 126 Stat. 306, 315–23 (codified as amended in scattered sections of 15 U.S.C.). Specifically, the JOBS Act allows crowdfunded securities to be sold either by a registered broker-dealer or through a registered crowdfunding portal. *See* Lori Smith, Bridget Henwood & Michael Psathas, *Regulating the Gatekeepers: The Regulatory Scheme for Funding Portals in Crowdfunding Offerings*, WHITE & WILLIAMS LLP (Nov. 15, 2013), http://whiteandwilliams.com/resources-alerts-Regulating-the-Gatekeepers-The-Regulatory-Scheme-for-Funding-Portals-in-Crowdfunding-Offerings.html; *see also* Shekhar Darke, Note, *To Be or Not to Be a Funding Portal: Why Crowdfunding Platforms Will Become Broker-Dealers*, 10 HASTINGS BUS. L.J. 183 (2014) (arguing that providers will prefer to register as broker-dealers); *cf.* Smith et al., *supra* (explaining SEC rules implement a variety of safeguards applicable to crowdfunding platforms).

256. Currently this is a substantial deficiency in Proxyvote.com. Although the site includes a hyperlink to the proxy statement, the webpage itself lacks complete information on the issues for which voting instructions are sought and investors who access the proxy statement through the hyperlink risk timing out on the voting platform.

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Thus, if a platform contains a vote-with-management button, it should also offer investors the option to vote against management. If the platform allows investors to vote in accordance with the votes or guidelines of other investors, it should provide investors with those guidelines and/or the investors' past voting record. In addition, the site should not contain any language that suggests or endorses a particular vote or voting policy.[257]

The SEC's policy with respect to permitting platforms to provide additional information is perhaps the most difficult issue, because the SEC has long taken the view that someone who provides information to investors has endorsed the information provided and may be liable if that information is inaccurate or incomplete.[258] In addition, the SEC may be wary of encouraging platforms to provide links to information that is one-sided, unverified, or has the potential to mislead investors. Here, however, the SEC's regulatory approach may need to reflect the reality that investors already have access to this information through the Internet and that the collection or aggregation of publicly-sourced information should not expose a platform to liability unless that information is modified or skewed. With respect to issues of distortion or bias, the SEC's approach should focus on the incentives for such distortion, rather than the provision of information.

Toward that end, perhaps the most significant safeguard that the SEC can impose is a requirement that voting platforms be free of conflicts of interest. The fundamental principles underlying this requirement are already contained in the proxy rules, which distinguish those with an interest in the outcome of a shareholder vote or a relationship with the participants from

257. Issuers and institutional investors will have ample incentives to monitor platforms and report instances of potential distortion or bias to the SEC, which can address such conduct by using Rule 14a-9. Notably, Rule 14a-9 applies to prohibit proxy fraud even with respect to proxy solicitations that are otherwise exempt from the proxy statement and filing requirements of Regulation 14A. 17 C.F.R. § 240.14a-9 (2017).

258. Indeed, the SEC failed to exempt crowdfunding intermediaries from liability for issuer fraud. *See* Alan Bickerstaff, Jeff C. Dodd & Ted Gilman, *SEC Adopts Rules to Allow Crowdfunding Beginning May 16, 2016*, ANDREWS KURTH INSIGHTS (Dec. 2, 2015), https://www.andrewskurth.com/insights-1284.html ("The SEC specifically declined to exempt funding portals (or any intermediaries) from the statutory liability provision of Securities Act Section 4A(c).").

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others.[259] The SEC rules should prohibit a voting platform or anyone that maintains a voting platform from having a financial interest in an issuer, the subject of a shareholder vote, or a relationship to participants in an election contest. The regulations should designate that voting platforms can only be funded by: (1) issuers through the NYSE schedule under Regulation 14A or a substantially similar fee structure; (2) brokers that are providing the platform for the benefit of their customers; or (3) customers themselves through direct fees. The regulations should explicitly prohibit platforms from receiving any form of compensation from individuals or organizations who might have a direct or indirect interest in the subject of a shareholder vote, including proxy contest participants, advocacy groups, institutional investors such as hedge funds, and proxy advisory firms.

Finally, the SEC might decide that some issues are inherently case-specific and inappropriate for SVI. Accordingly, the SEC rules might provide that a broker may not utilize SVI for issues such as a merger or a contested election and must instead provide notice to the customer at the time that the proxy statement is released and solicit voting instructions. In any cases in which brokers are not permitted to use SVI, the rules should require them to notify SVI investors that their standing instructions do not apply and that their shares will not be voted unless they take action.

The foregoing discussion offers a preliminary blueprint for the introduction of voting platforms and SVI for use by retail investors. The market responses to this proposal cannot be predicted with certainty, and the SEC will need to continue to monitor voting platforms in the same way that it monitors the overall proxy solicitation process. In particular, as with other aspects of proxy voting, the SEC must police against bias, conflicts of interest, and potential fraud. The difficulty of this task is likely to be minimal, however. A variety of interested participants in the shareholder voting process, including institutional investors, issuers, and investor advocates, are likely to detect and reveal potential problems.

CONCLUSION

Despite the increasing importance of shareholder voting, retail investors have been largely excluded. Few retail investors

259. *See, e.g.*, 17 C.F.R. § 240.14a-2 (b)(1) (exempting certain solicitations from the filing and proxy statement requirements but identifying various categories of interested persons for whom the exemption does not apply).

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vote their stock, and the mechanics of the voting process rarely make it rational for them to do so. This Article advocates a solution to the problem—providing retail investors with access to a voting platform analogous to those used by institutional investors. A voting platform that allows investors to obtain information and cast votes with respect to all their security positions, submit SVI, and obtain information relevant to the voting decision would reduce the cost and improve the efficiency of the voting process.

The biggest obstacle to regulatory changes implementing voting platforms and SVI is the concern that SVI would increase uninformed voting. As this Article has demonstrated, however, this risk is not specific to retail investors, nor likely to be exacerbated by SVI. Instead, this Article offers specific suggestions as to the regulatory changes required to implement SVI and the appropriate safeguards to protect investors. By creating the opportunity for market providers to meet the needs of retail investors, SVI offers the potential to bring greater legitimacy to shareholder voting.

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