SEC Rule 14a
Securities Act of 1933 ("33 Act"): deals with disclosure procedures that companies must follow when selling securities on the public markets.

Securities Exchange Act of 1934 ("34 Act"): establishes (among other things) disclosure requirements for corporations after they have gone public. All public companies are subject to proxy regulation under § 14(a) of the Act.

Regulation 14A (Rules 14a-1 through 14a-12): substantive regulation of the process of soliciting proxies and communication among shareholders.

Schedule 14A: what you need to disclose in a “full dress” registration statement.
HLS, Inc. is a public corporation registered under the 1934 Act.

TarPERS, a 1% institutional investor, is considering a proxy campaign to put three candidates on HLS’s 9-member board.

But before TarPERS goes ahead, it wants to know where it stands with other big institutional investors.

Plan has three steps: (1) Circulate a memo to 15 other institutions to check their sentiments. (2) Line up endorsement from Institutional Shareholder Services. (3) Send out proxy solicitation and statements to HLS shareholders.
Rule 14a-1(l)(iii): “solicitation” is “any communication reasonably calculated to result in procurement of a proxy.”

Rule 14a-3(a): may not solicit a proxy unless you provide a proxy statement “containing the information provided in Schedule 14A,” unless the communication is exempt:

- Rule 14a-2(b)(1): solicitation that “does not . . . seek directly or indirectly . . . the power to act as proxy” is exempt from filing requirements.

- Rule 14a-2(b)(2): solicitation to ten or fewer other shareholders is exempt

BUT: Rule 14a-6(g): even if exempt, if shareholder owns more than $5 million worth of stock, must still file the communication and “Notice of Exempt Solicitation” after sending it out.
"Any solicitation by . . . any person who does not, at any time during such solicitation, seek directly or indirectly, . . the power to act as proxy for a security holder and does not furnish or otherwise request, . . a form of revocation, abstention, consent or authorization. *Provided that*. . . “ [the exemption does not apply to any person affiliated with the registrant, etc.]"
The Short Slate Problem

Pre-1992 Rule 14a-4(d) ("bona fide nominee rule"): would have prevented TarPERS from listing any management nominees on its slate.

**Problem:** Assume 10 shares, 9 seats on the board, and straight (non-cumulative) voting. Management holds 4 shares; TarPERS supporters hold 6 shares. TarPERS proposes a short slate of 3 directors; management nominates a full slate. If TarPERS supporters vote for the short slate plus six management nominees at random, management’s nominees will each receive 8 votes, while the 3 TarPERS directors will receive 6 votes each.

**New Rule 14a-4(d)(4):** permits TarPERS to solicit proxies for its own nominees plus the six management nominees that it believes to be the most qualified.
In the Wake of Scandals Like Enron and WorldCom
Investors Deserve A True Voice in Director Elections

THE SEC IS CONSIDERING RULES TO GIVE INVESTORS the ability to nominate and elect corporate board candidates — using the same proxy ballot as the board’s hand-picked nominees. When boards control their own membership, directors can be unaccountable and insensitive — opening the door to abusive executive compensation, fraud and other misconduct. We have seen it all too often.

- If properly drafted, the SEC’s new rules will give shareholders the ability to use proxy materials to elect truly responsive directors, leveling the playing field with board-nominated candidates.
- A recent Harris Poll found nine out of 10 investors believe corporate misconduct has weakened investor confidence in the stock market.
- And eight of 10 investors want the right to offer investor-nominated board candidates through the proxy ballot.
- Another survey found 88 pension funds representing $8 trillion in assets support open access to director elections.

Open Access for Shareholders Is the Next Critical Step of Corporate Reform

The SEC agrees:
Reforms are needed.

Now let’s make sure the reforms are responsive and responsible by assuring they:

- Protect against frivolous challenges by requiring significant shareholder involvement.
- Protect against corporate raiders by limiting involvement to long-time shareholders.
- Protect against hostile takeover by limiting the number of investor-nominated candidates to less than a majority.
- Promote against unresponsive boards by giving investors timely access to the ballot.

Support the Most Important Step Yet in Corporate Reform!
Support Open Access to Director Elections.
Rule 14a-8 requirements: Must hold $2,000 or 1% of the corporation’s stock for a year ((b)(1)); must file with management 120 days before management plans to release its proxy statement ((e)(2)); proposal may not exceed 500 words (d); and proposal must not run afoul of subject matter restrictions . . .

Thirteen grounds for excluding proposals from the company’s solicitation materials (14a-8(i)): e.g., improper under state law ((i)(1)), relates to a matter of ordinary business ((i)(7)), relates to a matter < 5% of business ((i)(5)), relates to an election of directors or a procedure for such election ((i)(8)), conflicts with company’s proposal ((i)(9)). Burden is on the company to demonstrate grounds for exclusion (g).
Companies Adopting Majority Vote Proposals

*Chicago Business* (Feb. 28, 2006)

Majority vote proposals have gained momentum this year. Institutional Shareholder Services found that 140 majority vote proposals have been filed for the 2006 proxy season compared to 89 that were filed last year.

“It is the most significant proposal out there,” said Nell Minow, editor of the Corporate Library, which tracks corporate governance issues.

The momentum, which has been building for the past two years, has been fueled by shareholder dissatisfaction with corporate greed, mismanagement and lack of accountability by some corporate boards.

“I think it’s an excellent thing and an inevitable thing,” Ms. Minow said. “Before, you either voted with management or you sold the stock.”

Most of the companies – 80% - that adopted a majority vote proposal made it a policy which has less teeth than a by-law, Ms. Allen said.

“A policy doesn’t do enough,” she said. “It sets discretion.”

Only 16% of companies adopting the proposal made it part of the company’s by-laws. Five percent made it both, according to the Neal, Gerber study.
AFSCME (pension fund) submits a 14a-8 proposal to CA (formerly Computer Associates) to amend the bylaws so that the board must reimburse a shareholder for “reasonable expenses” incurred in the successful election of its candidates to less than 50% to the board.

CA seeks a no-action letter from the SEC to exclude the proposal, and the SEC certifies two questions to the Delaware Supreme Court:

(1) Is the AFSCME Proposal a proper subject for action by shareholders as a matter of Delaware law?

(2) Would the AFSCME Proposal, if adopted, cause CA to violate any Delaware law to which it is subject?
DGCL §109(b) vs. §141(a)

§109(b): “The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its right or powers of its stockholders, directors, officers, or employees.”

§141(a): “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”
Putting it All Together: A Victory for Shareholder Democracy

Even uncontested director elections are not a sure thing due to majority vote requirements: Corporate law now facilitates, and many companies have now adopted, a requirement that directors are elected by a majority (not plurality) of the votes cast.

Shareholder proxy access makes contested director elections more likely: Under currently proposed SEC rule, a 1% shareholder (or shareholder group) can place nominees on the company’s proxy statement for up to ¼ of the total board seats.

New rule on broker voting gives activists more influence in director elections: July 2009 SEC rule prevents brokers from voting discretionary shares in uncontested director elections, which gives more power to institutional investors.

eProxy makes it cheaper to run an insurgent slate: Reduces costs of distributing proxy materials, and likely gives more power to institutional investors.

Delaware Supreme Court invites 14a-8 resolutions that require reimbursement of shareholder proxy expenses: AFSCME decision rejects the specific resolution at CA but leaves the door open through better drafting.