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Secretary, Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090
15 January 2020

Comments on Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 [Release No. 34-87458; File No. S7-23-19]

Dear Ms. Countryman,

Prior to my retirement, I spent 19 years investing professionally, first as a securities analyst, then a portfolio manager and leader of a fund group, then as Director of Research, Chief Investment Officer and member of the Executive Committee, all at AllianceBernstein, L.P. Since my retirement I have published academic research regarding sustainability disclosure, materiality and fiduciary duty.[1] In addition, I have acted twice in my own personal capacity as a shareholder proponent, and have aided the non-profit shareholder representative As You Sow on thirteen proposals submitted by individual proponents.[2] These proposals concern a variety of topics, but all focus on financially material sustainability disclosure compliant with the Sustainability Accounting Standards Board (SASB) compendium. The results of these proposals are that of the fifteen submitted, seven have been withdrawn upon settlement with the issuer,[3] two were omitted through the no-action process, five are pending, and one went to a vote and received 41% support upon submission for the first time. In light of the Commission's current preference for principles-based disclosure of material sustainability information, monitored by methods of private ordering such as engagement and proxy voting, I would like to think that I am furthering the Commission's goals through my efforts.

Through my experience first as a fiduciary, then as an advisor to a shareholder representative and finally as a proponent myself, I have developed a perspective that I hope the Commission finds useful. This perspective is primarily with reference to two issues. The first is the 14a-8(b) eligibility requirement. The second is the set of amendments surrounding the use of shareholder representatives, both in the 14a-8(b) context as well as the 14a-8(c) "one-person,

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[1] Rissman, Paul and Kearney, Diana, Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility (February 1, 2019). 49 Environmental Law Reporter 10155 (2019) . Available at SSRN: https://ssrn.com/abstract=3332813

[2] All resolutions are available on As You Sow's Current Resolutions web page (https://www.asyousow.org/resolutions-tracker). The resolutions are: 2019: Advance Auto Parts (omitted), AutoZone (omitted), CarMax (withdrawn), Essex Property Trust (withdrawn), Fastenal (voted), PACCAR (withdrawn), Western Digital Corp (withdrawn); 2020: Fastenal (resubmission), Genuine Parts, O'Reilly Auto Parts, Sanderson Farms, Skyworks Solutions, and Ulta Beauty (all pending). I have filed directly with BlackRock, Inc. and State Street Corp. These resolutions are available upon request.

[3] All withdrawal letters are publicly available on As You Sow's Current Resolutions web page (https://www.asyousow.org/resolutions-tracker). Withdrawal letters to BlackRock and State Street are available upon request.

one-submission" amendment. In each case, the overriding issue is that these amendments further choke off whatever weak ability has existed in the past for the retail shareholder to communicate their concerns to their corporate managements, whose actions directly affect investors' long-term financial health.

The Commission has long recognized the importance of the retail shareholder. In fact, the Commission's 2018-2022 Strategic Plan has as its first goal, "Focus on the long-term interests of our Main Street investors." In 2019 the Commission focused on the needs of the retail investor when it published an exhaustive final rule, Regulation Best Interest, designed to "enhance the efficiency of recommendations that broker-dealers provide to retail customers, allow retail customers to better evaluate the recommendations received, [and] improve retail customer protection when receiving recommendations from broker-dealers…"[4] The Commission in the recent past has also extended its interest in the retail investor to the proxy system; in its 2010 Concept Release on the U.S. Proxy System, the Commission stated that, "we understand that the level of voting by retail investors is a particular area of concern….Given the importance of proxy voting, we view significant lack of participation by retail investors in proxy voting as a source of concern…".[5] The 14a-8 Proposed Rule, therefore, provides the Commission with a golden opportunity to facilitate the retail shareholder's ability to communicate issues of importance to the managements and boards that oversee a Main Street investor's long-term financial health. The Proposed Rule, unfortunately, does the opposite.

The Submission Threshold

Under the current rules, it is a wonder that individual proponents ever submit shareholder resolutions at all. To begin, the typical individual rarely owns enough stock in a particular company to qualify for the existing submission threshold. The Commission has never considered this point because it has not looked at stock ownership in a portfolio context. This is an error, however. The point can be illustrated by the following thought experiment: the median household held stocks and mutual funds worth $47,000 in 2016.[6] Let us suppose that the median investor owns only stocks and no mutual funds, a highly restrictive assumption. Let us further suppose that this investor is prudent and educated, as the Commission wishes them to be, and is therefore diversified and market-weighted, according to the dictates of CAPM and Modern Portfolio Theory. This investor also wishes to hold as few stocks as possible while still achieving a reasonable level of diversification, and is aware of the studies that range from "ten

[4] SECURITIES AND EXCHANGE COMMISSION 17 CFR Part 240, Release No. 34-86031; File No. S7-07-18, RIN 3235-AM35. Regulation Best Interest: The Broker-Dealer Standard of Conduct, at 374.
[5] Concept Release on the U.S. Proxy System. https://www.federalregister.gov/d/2010-17615/page-43002
[6] Jonathan Eggleston and Robert Munk, "Net Worth of Households: 2016." https://www.census.gov/content/dam/Census/library/publications/2019/demo/p70br-166.pdf

or so"[7] to "at the very least, 30 stocks"[8] to, "at least, 164 stocks"[9] as appropriate levels of stockholding. For the sake of argument our prudent investor throws a bit of caution to the wind and decides upon a twenty-stock portfolio. Further, suppose our prudent median investor wishes to mimic the capitalization profile of a widely-accepted broad market benchmark such as the S&P 500, and has decided to select a variety of mega-cap and large-cap stocks that they can put into buckets that match the S&P's capitalization quintiles, four stocks each. The current capitalization quintiles of the S&P 500 are:[10]

The largest quintile of S&P 500 companies comprises 67% of S&P 500 capitalization
The second quintile of S&P 500 companies comprises 16% of S&P 500 capitalization
The third quintile of S&P 500 companies comprises 9% of S&P 500 capitalization
The fourth quintile of S&P 500 companies comprises 6% of S&P 500 capitalization
The smallest quintile of S&P 500 companies comprises 3% of S&P 500 capitalization

Our investor distributes their twenty stocks into each quintile on an equal-weighted basis. In this case, they own:
$7870 worth of each stock in their largest group of four stocks;
$1880 worth of each stock in their second largest group of four stocks;
$1060 worth of each stock in their third largest group of four stocks;
$700 worth of each stock in their fourth largest group of four stocks;
$350 worth of each stock in their smallest group of four stocks.

Under the current submission threshold, our median prudent investor does not own enough stock to submit resolutions for more than 20% of their holdings! If they own a mix of stocks and funds, they can do even less. If they are more diversified, they can do even less. The amendment to the submission threshold would imply that the median prudent retail investor can never file a resolution for any stock held less than three years, and would only be able to file for a very small fraction of the stocks they have owned for at least three years. The amendment simply takes a bad situation and makes it much worse.

Incidentally, as the Proposed Rule notes, the average number of proposals submitted to S&P 500 companies was 1.24 in 2018, while the average number of proposals submitted to Russell 3000 companies was 0.28. The capitalization-weighting of investors' portfolios is a partial explanation for this anomaly (it is also true that proponents feel that filing with industry leaders is the most effective way to make their point). Continuing our example, only a twenty-stock portfolio worth $270,000 could allow its owner to submit resolutions to any of the smallest

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[7] Evans, John L., and Stephen H. Archer. "Diversification and the Reduction of Dispersion: An Empirical Analysis." The Journal of Finance 23, no. 5 (1968): 761-67. At 767. doi:10.2307/2325905.
[8] Statman, Meir. "How Many Stocks Make a Diversified Portfolio?" The Journal of Financial and Quantitative Analysis 22, no. 3 (1987): 353-63. At 362. doi:10.2307/2330969.
[9] Domian, Dale L. and Louton, David A. and Racine, Marie D., Diversification in Portfolios of Individual Stocks: 100 Stocks are Not Enough (April 2006). At 4. Available at SSRN: https://ssrn.com/abstract=906686
[10] S&P 500 holdings and weights can be downloaded from a variety of websites, such as https://www.ishares.com/us/products/239726/ishares-core-sp-500-etf.

quintile of their (large cap) stock portfolio, and under the proposed amendment, *this could only happen after three years of ownership.* The Commission, by its actions, is virtually approving two separate corporate governance regimes, one for mega-cap companies and one for all others. Under the proposed amendment to the submission threshold the largest companies can be monitored by individuals through private ordering, while smaller companies are rarely monitored by individuals at all.

The current $2000 submission threshold is an arbitrary limit with little justification. Suppose the Commission adopted a limit grounded in an actual policy goal, such as, "the submission limit should allow the median prudent retail investor to file a shareholder proposal for their median holding." In that case, the submission limit for our example would have to be much lower, at $590 (the largest 250 companies in the S&P 500 comprise 87.5% of its total market capitalization. If the largest half of the median investor's twenty stocks comprised 87.5% of their $47,000 portfolio, their median holding would be $590 worth of stock).

The Main Street investor who fortuitously owns at least $2000 worth of stock in the particular company they wish to engage with next faces a daunting series of obstacles in the process of filing. First, the proponent must craft a well-reasoned resolution in under 500 words, ignorant of such labyrinthine rules as that an acronym such as CEO is counted as three words the first time, but as one word all of the subsequent times it is used in a proposal. Or, that each word in a hyphenated phrase is counted, even though the most popular word processing program counts the entire phrase as one word. The Commission has not to my knowledge published a style guide for resolutions. The proponent is required to guess.[11]

Second, the proponent must choose a request and phrase it in such a way that it can survive the no-action process. The proponent must be familiar with all of the Staff Legal Bulletins' guidance regarding ordinary business and micromanagement exceptions. Any proposal must carefully sail between the Scylla of micromanagement and the Charybdis of substantial implementation. What significant policy issue that worries the proponent may transcend a company's ordinary business practices, yet maintain a material nexus to the company's operations? Highly-paid legal teams on the issuer side incur significant time spent guessing how Staff will interpret the eligibility of resolutions.[12] The untrained Main Street retail investor is at sea in the no-action process. There are a myriad of details, generally unknown to the retail

[11] Thirty-six proposals submitted between 2007 and 2018 were challenged at the Commission on the basis of word count. Seven of these proposals were excluded from the proxy. See Matsusaka, John G. and Ozbas, Oguzhan and Yi, Irene, Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions (April 2019). USC CLASS Research Paper No. CLASS17-4; Marshall School of Business Working Paper No. 17-7. Available at SSRN: https://ssrn.com/abstract=2881408, Table 1.

[12] Members of the corporate law academy scratch their heads as well. A recent review of the ordinary business exclusion concludes that "the exclusion is in a state of chaos." See Steel, Reilly, The Underground Rulification of the Ordinary Business Operations Exclusion (March 23, 2016). 116 Columbia Law Review 1547 (2016). Available at SSRN: https://ssrn.com/abstract=2752591. At 1549.

investor, that may subject a resolution to exclusion, vitiating all of the effort expended in its creation.[13]

Third, the act of filing the proposal doesn't release the individual from further responsibilities. If the company requests a no-action decision from Staff, the proponent must study the request and write a rebuttal, one that often requires esoteric knowledge of prior Staff precedents. If the proposal survives the no-action process and advances to the proxy, the proponent should ideally file an exempt solicitation with the Commission in order to bolster shareholder support. Each of these, if done effectively, demands significant time and effort. Finally, the proponent, or someone designated by the proponent, must incur the cost of travel to the Annual Meeting to present the resolution in person, for which the proponent is generally allotted a two-minute time slot.

Chair Clayton has wondered at the concentration of individual filers: "Yes, you heard that right, five individuals accounted for 78% of all the proposals submitted by individual shareholders."[14] To my mind this is a simple reflection of the fact that there aren't many more than five individuals in America who, on their own and without external assistance, are obsessed enough to expend the time, money and effort to file, and follow through with, shareholder proposals. In order to reduce this concentration, the Commission proposes to make filing more difficult for these five. A far superior approach would be to make filing much easier for the rest of us.

Use of Representatives and Engagement of Individual Proponents with Issuers

The Commission will further restrict the ability of individuals to file proposals if it adopts its proposed amendment to Rule 14a-8(c), "to apply the one-proposal rule to 'each person' rather than 'each shareholder' who submits a proposal." This amendment includes the stipulation that, "a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative would be submitting each proposal on behalf of different shareholders."[15]

Despite all of the hurdles faced by a Main Street retail proponent, it is feasible for an individual to file a proposal with the assistance of a representative, such as First Affirmative Financial

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[13] "In terms of SEC decisions, the commission is most likely to allow omissions of proposals from individuals, agreeing with companies in 72 percent of those cases that are decided. In part, this reflects the lack of sophistication of many individual investors, who fail to understand Rule 14a-8 and lack advice from attorneys with expertise in the area." Matsusaka, Ozbas and Yi, *supra* note 11, at 17.

[14] Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System, *available at* https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting.

[15] https://www.federalregister.gov/d/2019-24476/page-66468

Network[16] or Trillium Asset Management,[17] who possesses the expertise to properly write resolutions, rebuttals to no-action requests, and exempt solicitations, and to shepherd all of these documents through a complicated process. The representative fulfills a further function by negotiating settlements on the proponent's behalf. Finally, the representative will incur the cost of appearing at the Annual Meeting to present the resolution. The non-profit organization As You Sow has emerged as a leader in assisting individual proponents. The organization works directly with individual investors, foundations, financial advisors and managers whose clients seek to sponsor environmental and socially responsible proposals, and others, providing retail investors with the ability to effectively raise ESG risk issues with their companies in a way they could not otherwise do. I have worked with As You Sow for the past two filing seasons to create a campaign to improve financially material environmental and social disclosure, regarding such topics as the risks of climate change to the availability of water in the production process, or the impact of diversity issues in a company's management ranks on corporate performance and reputation. A significant number of individual shareholders have shown interest in these topics and many others, and are eager to sign their names in sponsorship to resolutions that As You Sow has crafted.

As You Sow filed multiple resolutions with seven companies for 2019 meetings. These were all on behalf of individual proponents, since As You Sow does not own stock.[18] The Commission's 14a-8(c) amendment would have had the effect of reducing the number of resolutions filed by individual proponents by ten (one foreign company received two resolutions), or 17% of individual resolutions filed by As You Sow with U.S. companies. Organizations such as As You Sow fulfill a policy goal by easing the way for a Main Street retail investor to express their concerns about the sustainability of returns of companies whose stocks they own. The proposed 14a-8(c) amendment restricts this ability.

The Commission's Proposed Rule regarding shareholder engagement, to "require a statement from each shareholder-proponent that he or she is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal," is well-intentioned but misguided, and will actually have the most pernicious effect on the ability of individual proponents to engage with their companies of any of the other amendments being offered.

Retail Main Street investors are not required to have law degrees. They can range from sophisticated to very unsophisticated. For these individuals, who simply wish to create positive behavior change in certain companies whose stocks they own, a mandated conversation with an assistant general counsel, head of investor relations, corporate secretary, and even outside

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[16] See, for example the 2019 Nucor Proxy Statement, *available at* https://assets.ctfassets.net/aax1cfbwhqog/6IycydHfGij9P8rcvTfFeS/d161ae54cea3cf0914e4a2b46519ebf1/Nucor_Proxy_Statement_-_2019_Annual_Meeting.pdf

[17] See, for example American Express Company - Withdrawal of No-Action Request Submitted on December 18, 2015, *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/trilliumasset122215-14a8.pdf.

[18] As the names of individual proponents are not disclosed on the As You Sow website, it isn't possible for me to determine how many individuals were represented by the organization.

counsel (these are examples of people I have actually engaged with) who are acting in concert in a potentially adversarial capacity will be extremely discouraging. The result will be that any desire a Main Street investor may have to file a resolution will be greatly diminished by the distaste of facing a phalanx of corporate brass aligned against them. The proposed rule that an individual set aside time to engage with corporate management, whether or not assisted by a representative, is not only just one more requirement to disincentivize an individual who otherwise wishes to file a resolution, it may also freeze anyone thinking of becoming a proponent.

Are ESG Shareholder Proposals Value-Enhancing?

The Commission in the Proposed Rule takes no position on whether shareholder resolutions are value-enhancing: "Our economic analysis does not speak to whether any particular shareholder proposal or type of proposals are value enhancing, whether the proposed amendments would exclude value-enhancing proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value enhancing."[19] Nevertheless, the economic analysis did summarize a number of papers, leaving the overall impression that research was inconclusive. The Commission did not consider an important working paper, however, that should be included in the record. In addition, the body of research indicates that while governance-focused resolutions may not have much of an effect on company value, what little data we have on governance proposals that speak to non-traditional topics such as political campaign and lobbying spending, and anti-corruption measures, as well as environmental and social proposals, suggest that these types of proposals, especially when they address financial materiality, are value enhancing.

Grewal *et al* (2016) published an important working paper on the relationship between firm value and shareholder proposals that address financially material aspects of sustainability.[20] The authors defined financially material sustainability topics based on the SASB Materiality Map. In tracking firm performance longitudinally, "we find that subsequent to filing shareholder proposals, targeted firms experience changes in Tobin's Q over time…proposals on material issues are associated with subsequent and steady increases in Tobin's Q."[21] The economic analysis should cite this research to show that financially material ESG proposals, including those by individuals such as myself and those represented by As You Sow, are indicated to be value-enhancing.

The economic analysis also cites Flammer's (2015) regression discontinuity study of near-miss CSR (corporate social responsibility) proposals. While the analysis notes that near-miss proposals may not be representative of CSR proposals in the aggregate, Flammer distinguishes proposals that lead to improvements in stock price and firm operations from the aggregate in

[19] https://www.federalregister.gov/d/2019-24476/page-66494.
[20] Grewal, Jyothika and Serafeim, George and Yoon, Aaron, Shareholder Activism on Sustainability Issues (July 6, 2016). Available at SSRN: https://ssrn.com/abstract=2805512.
[21] *Id,* at 26.

that they "are more likely to be related to performance in some way," for example "a textual analysis of their support statement shows that they more frequently contain arguments linking CSR to performance."[22] This study, then, would again suggest that financially material ESG proposals may drive firm operational improvement.

Finally, the economic analysis cites Gantchev and Giannetti's (2018) study of the effects of proposals submitted by individuals on firm value. Proposals submitted by the top ten individual filers that were within 20% of passing on either side produced significantly negative short-term stock returns (+/- 1 day from vote) and also significantly negative long-term stock returns (1 day before the vote to twelve months after the vote). But the category of individuals in general (including the top ten but also all other individuals) submitted proposals that had no significant short-term effect but a significantly positive long-term effect.[23] Gantchev and Giannetti's top ten individuals submitted proposals that were heavily weighted to standard governance topics.[24] This would indicate that the "all individuals" category would be less weighted to standard governance and more to ESG topics. This difference could perhaps account for the better long-term stock performance of the category of proposals submitted by individuals in the aggregate. Restricting financially material ESG proposals filed by individuals, including the thirteen that As You Sow has filed as a representative, either by tightening submission thresholds or through the 14a-8(c) amendment, may have the unintended consequence of stifling improvement in corporate performance and firm value.

Conclusion

This Commission has committed itself to advance the interests of the small investor as its number one priority. As far as filing shareholder resolutions goes, the Commission has taken a system that is already draconian for small investors and, by adding additional submission threshold requirements, placing restrictions on representatives, and forcing proponents to enter the maw of the corporate legal machine, is making the system even more draconian. These ill-considered amendments will result in a more, not less, intense concentration of proponents, as potential proponents aside from the five mentioned by Chair Clayton decide that filing proposals just isn't worth the aggravation. These proposed amendments should not

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[22] Caroline Flammer (2015) Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach. Management Science. At 2.

[23] Gantchev, Nickolay and Giannetti, Mariassunta, The Costs and Benefits of Shareholder Democracy (November 15, 2019). European Corporate Governance Institute (ECGI) - Finance Working Paper No. 586/2018; Swedish House of Finance Research Paper No. 18-15; SMU Cox School of Business Research Paper No. 18-35. Available at SSRN: https://ssrn.com/abstract=3269378. Table 3, Panel B.

[24] "Chevedden says his proposals fall into about ten categories — elect board members every year, instead of every three years, require a majority vote — instead of a plurality — for members of the board, require an independent board chairman, majority voting requirements, as opposed to supermajorities, allow shareholders to call meetings, confidential voting so that executives can't see who is voting and how, cumulative voting, require directors to retain company stock for a period of time, and limit accelerated pay in the case of a merger or buyout." The Corporate Attack On John Chevedden. February 11th, 2014, available at https://www.corporatecrimereporter.com/news/200/the-corporate-attack-on-john-chevedden/

be adopted.

Sincerely,
Paul Rissman

[redacted]