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SEC Release File No. S7-23-19

Dear SEC Commissioners and Staff:

This letter supplements my previous letters on SEC Release File No. S7-23-19.

During most of my long public career, I attempted to minimize enviornmental damage primarly through laws and regulations. No matter which party was in power, our department was very constained. For example, we could regulate harzardous waste (excpet household waste) but not the hazardous chemicals that went into the products that created the hazardous waste. Unlike the European Union, are regulatory scheme does not subsribe to the precautionary principle.[1]

For that and many other reasons, I became a shareholder advocate, especially in retirement. However, unlike many of my good friends, I focus primarily on corporate governance issues. While I support environmental and social proposals at many companies, they largely deal with the symptoms of problems in corporate governance that separate economics from values.

The "science" of economics has been largely built on a foundation of false assumptions: humans are driven by self-interest, markets are free, more is better, humans are rational actors, etc. I view corporate governance more from the prospective of a sociologist, through surveys of what people actually want and behave. I focus on governance and the rules of governance because frameworks can help or hinder the ability of organizations, such as public corporations, to align with human values.

The thrust of the SEC Release is to move corporations even further from rekoning with the values of the many, in favor of only the few. Half of Americans own any stock, the bottom half of Americans have no voice as shareholders in shaping corporations. Christine Jantz's comment letter[2] contains a good analysis of how proposed threholds would primarily limit submissions to the richest one percent of Americans, disproportionately reducing the voice of women and minorites.

That runs contrary to Chairman Clayton's tesimony to the Senate. "The question we ask ourselves every day: how does our work benefit the Main Street investor? Each proposal or action we take is guided by that princple."[3]

[1] https://ec.europa.eu/environment/integration/research/newsalert/pdf/precautionary_principle_decision_making_under_uncertainty_FB18_en.pdf
[2] https://www.sec.gov/comments/s7-23-19/s72319-6672544-204026.pdf
[3] https://www.sec.gov/news/testimony/testimony-financial-services-and-general-government-subcommittee-us-senate-committee

Webs of accountability are tangled and complex. We are often told we should only invest through intermediaries, such as mutual funds. Leave proxy proposals and voting to the experts. Unfortunately, many of these parties have financial conflicts of interest and other incentives to keep us ignorant. The SEC Release contributes to creating what are essentially democratic-free zones around corporate governance, with little or no accountability to ultimate owners, except the top one percent.

The SEC Release overemphasizes the cost to companies of processing proposals. Chairman Clayton cited several letters, supposedly from individual investors, praising the Release. These and others turned out to be essentially fakes, generated by an advocacy group underwritten by companies seeking to curtail shareholder rights, primarily concerned with the rise of environmental, social, and governance (ESG) proposals.[4]

I incorporate by reference the comments of Josh Zinner of the Interfaith Center on Corporate Responsibility. I endorse and seek to echo the entirety of his comments unreservedly.[5] Here I quote just a few highlights.

> The Release depicts the shareholder proposal process as a vehicle by which proponents burden companies in the pursuit of self-serving and value-destroying goals. That portrayal is at odds with empirical evidence and the extensive experience of ICCR members…
>
> A 2018 Bank of America study "found that firms with a better ESG record than their peers produced higher three-year returns, were more likely to become high-quality stocks, were less likely to have large price declines, and were less likely to go bankrupt. Deutsche Asset & Wealth Management and researchers from the University of Hamburg surveyed the academic literature and found that 62.6% of meta-analyses showed a positive relationship between ESG and corporate financial performance…
>
> An influential 2003 study found that companies whose governance provisions provided the strongest shareholder rights and lowest management power, as measured using a governance index sometimes referred to as the "G Index," outperformed those with the weakest shareholder rights and highest management power by a statistically significant 8.5% per year…
>
> Ignoring this literature without explanation, the Release focuses on event studies of share price reactions to the shareholder proposal process. This treatment is inconsistent with the 2012 Guidance, which states, "Where the Commission is giving greater weight to some empirical evidence/studies than to others, it should clearly state the reason(s) for doing so." The SEC Release explains that its review of studies focuses on "short-term market reactions to shareholder proposals" because long-term effects are more difficult to attribute to proposals. But shareholder proposals are not intended or designed to benefit short-term traders in the company's shares; instead, they promote changes that enhance value over the long term. Indeed, the Release emphasizes the importance of a long-term orientation in justifying longer ownership duration requirements. The value of the proposal process should not be measured by reference to short-term share price reactions.

In a section titled *Need for Proposed Amendments*, the SEC Release argues "Rule 14a-8 facilitates engagement between shareholders and the companies they own." Amendments are proposed because

[4] Zachary Mider & Ben Elgin, "SEC Chairman Cites Fishy Letters in Support of Policy Change," Bloomberg (Nov. 19, 2019) (https://www.bloomberg.com/news/articles/2019-11-19/sec- chairman-cites-fishy-letters-in-support-of-policy-change)

[5] https://www.sec.gov/comments/s7-23-19/s72319-6702907-206070.pdf

Rule 14a-8 is "susceptible to overuse," allowing individual shareholders to shift the cost of soliciting their proposals to the company and other shareholders. The SEC Release seeks to guard against overuse.

> We are concerned that the $2,000/one-year threshold established in 1998 does not strike the appropriate balance today. We believe that holding $2,000 worth of stock for a single year does not demonstrate enough of a meaningful economic stake or investment interest in a company to warrant the inclusion of a shareholder's proposal in the company's proxy statement.

The SEC Release, therefore, implies shareholders have taken advantage to Rule 14a-8's susceptibility to overuse. Readers would reasonably assume shareholders must have dramatically increased the number of proposals filed and increased the cost to companies and other shareholders. Yet, according the SEC Release's own data, "Our analysis shows no discernible trend in the number of submitted shareholder proposals in the 1997 to 2018 period." (p. 70) "The percentage of voted, omitted, and withdrawn proposals has largely remained stable during our sample period." (p. 72)

In fact, while the overall number of proposals has not trended up or down, the average number submitted to each individual company has fallen. "The average number of proposals submitted to S&P 500 companies has decreased from 1.85 in 2004 to 1.24 in 2018, representing a 33 percent decrease during our sample period, and the average number of proposals submitted to Russell 3000 companies has decreased from 0.38 in 2004 to 0.28 in 2018, representing a 26 percent decrease during our sample period." (p. 74) This decline is also reflected in other independent research, as displayed in the following graph.[6]

Figure 1: Submitted Shareholder Proposals Over Time in the S&P 1500

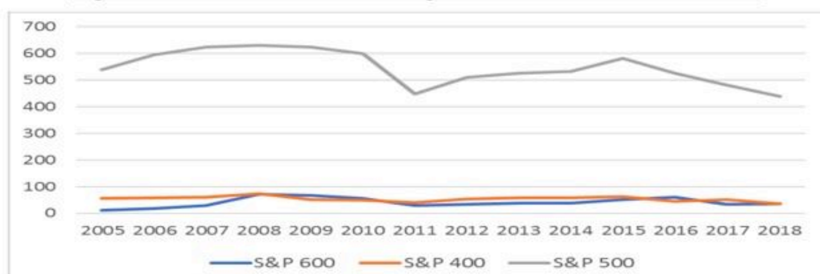


Figure 1 also demonstrates that larger companies received the majority of proposals, likely because these companies receive wide press coverage. For instance, in 2015, over 450 proposals were submitted to the S&P 500 companies, which is comprised of large cap companies. The mid and small cap companies that comprise the S&P 400 and 600, respectively, however, saw less than 150 shareholder proposals combined.

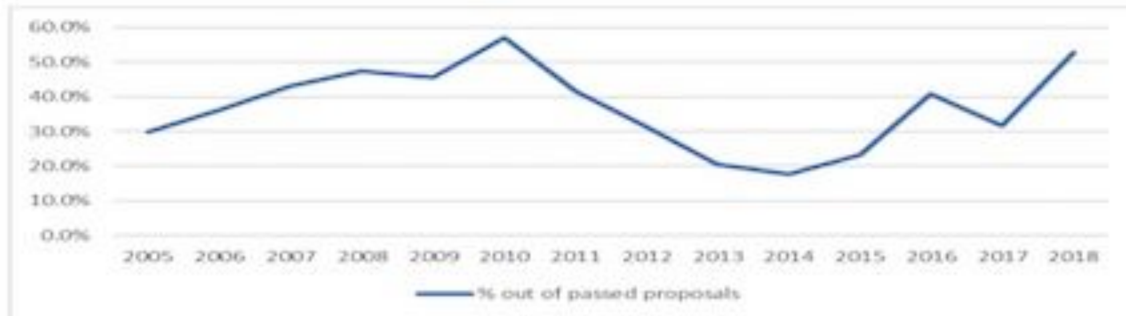
Given that the overall number of shareholder proposals has been relatively flat and the average number per company is trending down, we must conclude shareholders have *not* taken advantage of Rule 14a-8 susceptibility for overuse.

Finally, "overuse" could also be claimed if there were a substantial drop in overall support for shareholder proposals. However, the SEC finds "our analysis shows that the average voting support of all proposals has remained stable during our sample period, but there is an increase in the average voting support for environmental and social proposals over the sample period." (p. 85) Therefore, overuse on the basis of lack of support cannot legitimately be claimed. Additional independent

[6] Nili, Yaron and Kastiel, Kobi, *The Giant Shadow of Corporate Gadflies* (January 15, 2020). Univ. of Wisconsin Legal Studies Research Paper No. 1523., p.11. SSRN: https://ssrn.com/abstract=3520214

research also finds that proposals submitted by gadflies, such as myself, have also met with increasing success. See graph below.[7]

> More generally, our data indicate that 26% of the 1,864 proposals submitted by gadflies between 2005 and 2018 received a majority of shareholder votes cast (which we call "passed proposals"),[103] and that gadflies' proposals constitute a large fraction of the passed proposals.[104] For example, in 2018, over 53% of the passed proposals were submitted by gadflies.[105]
>
> Figure 5: Gadflies' Share in Passed Proposals



> Again, these numbers outperform more established investors, such as pension funds that filed only 14% of the passed proposals in the same year. Moreover, this number constitutes only a lower bound of gadflies' influence, as proponents of

Need for the proposed amendments has, therefore, not been demonstrated. They should be rejected. Next I attempt to briefly provide answers to many questions raised in the SEC Release.

Proposed amendment is to Rule 14a-8(b) Submission Thresholds

1. We are proposing to amend Rule 14a-8(b) to establish new ownership requirements for establishing an investor's eligibility to submit a shareholder proposal to be included in a company's proxy statement. Should we amend Rule 14a-8(b) as proposed?

The SEC could reasonably change the eligibility requirements to adjust for inflation. The original increase from $1000 to $2000 included a future inflationary adjustment as noted on page 15, footnote 36, of the proposal. As such, an actual current inflation adjustment, removing the future adjustment of the previous change, would result in a $2521.60 threshold, rounded to $2500.

2. The proposed amendments seek to strike a balance between maintaining an avenue of communication for shareholders, including long-term shareholders, while also recognizing the costs incurred by companies and their shareholders in addressing shareholder proposals. Are there other considerations we should take into account?

The SEC should consider the desirability of wider participation of shareholders in corporate governance. Alienation of shareholders from meaningful input is likely to lead to calls for socialism and government control. Already 57% of millennials reject the capitalist mode of production.[8] Those who do are just beginning to realize how their investment are voted in corporate elections to

[7] Nili, Ibid, p. 22.
[8] James McRitchie, *Millennial Socialists Bolstered by SEC* at https://www.corpgov.net/2019/12/millennial-socialists-bolstered-by-sec/

concentrate power in corporate elites, obfuscate environmental issues and influence civil elections with dark money.

Additionally, the SEC Release recognizes wildly exaggerated costs incurred by companies and their shareholders in addressing shareholder proposals, but none of the benefits, noting only "To the extent that [newly excludable] shareholder proposals would be value- enhancing, the potential exclusion of value-enhancing proposals could be detrimental to companies and their shareholders." (p. 141)

For example, the five individual proponents, who Chairman Clayton[9] criticized for submitting 78% of all proposals by individual shareholders submit almost exclusively "good governance" proposals.

The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent[10] found:

> Out of the 114 firms in our sample that granted that power over 2005-2017, 80% had received a precatory proposal. Relatedly, 84% of the unique firms that received at least one shareholder proposal asking for the right to call special meetings had granted their shareholders that right by the end of 2017…
>
> The proposals were almost exclusively filed by individuals (as opposed to pension funds or other institutional investors). Remarkably, close to 90% of the proposals were filed by members of four families (the Chevedden family, the Steiner family, the Young-McRitchie family, and the Rossi family).

Our actions not only improved the long-term value of our companies, they also helped move the entire market by driving what is considered "best practice." Driving beta (the whole market) is much more impactful and sustainable than seeking a slight alpha edge, which tends to fluctuate more.

Another more recent academic study found the governance related proposals submitted by the individual "gadfly" shareholder proponents criticized by Chairman Clayton "attracted, on average, 47.8% shareholder support between 2005 and 2018."[11] "More generally, our data also show that when gadflies' proposals receive majority support, they are followed by a management proposal to amend the company's governance terms in 64.5% of the applicable cases, and the vast majority of these management proposals (82%) eventually passed and resulted in an actual governance change."[12]

The study also found that gadfly proposals constitute a large fraction of proposals that pass. "For example, in 2018, over 53% of the passed proposals were submitted by gadflies."[13] A recent Diligent Institute report finds that equity returns for 2017 and 2018 of the top 20% of S&P 500 companies exhibiting strong corporate governance (many adopted as a result of gadfly proposals) outperformed the bottom 20% by 17% over that period.[14] Good governance included shareholder rights, such as annual election of directors and simple majority vote standards.

9 https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting#_ftn19, 11/5/2019
10 Emiliano Catan and Marcel Kahan https://corpgov.law.harvard.edu/2019/05/31/the-never-ending-quest-for-shareholder-rights-special-meetings-and-written-consent/
11 Nili, Yaron and Kastiel, Kobi, *The Giant Shadow of Corporate Gadflies* (January 15, 2020). Univ. of Wisconsin Legal Studies Research Paper No. 1523., p. 5. SSRN: https://ssrn.com/abstract=3520214
12 Nili, Ibid, p. 3.
13 Nili, Ibid, p. 22.
14 *The High Cost of Governance Deficits: A Case for Modern Governance*, Diligent Institute, https://www.diligentinstitute.com/modern-governance-report/

Since the market cap of S&P 500 companies rose $1,843,463,000,000 in just those two years,[15] the report provides supporting evidence that the proposed rule would result in decreased gains to shareholders (opportunity costs) of billions, maybe hundreds of billions, of dollars each year by delaying passage and enactment of shareholder proposals promoting good corporate governance. That enormous cost is not considered in the SEC Release's economic analysis.

3. Should we adopt a tiered approach, providing multiple eligibility options, as proposed? Are there other approaches that would be preferable instead?

No. See response to #1 above.

4. How is a sufficient economic stake or investment interest best demonstrated? Is it by a combination of amount invested and length of time held, as proposed, or should another approach to eligibility be used?

The SEC's two- and three-year holding periods are arbitrary and capricious, with no factual backing as to rationale. Tax law in the US declares a year of holding as long-term investing; it makes no sense for the SEC to be three times as conservative in the current widely accepted legal standard.

5. Are the proposed dollar amounts and holding periods that we propose for each of the three tiers appropriate? Are there other dollar amounts and/or holding periods that would better balance shareholders' ability to submit proposals and the related costs? Should any dollar amounts be indexed for inflation or stock-market performance?

The proposed dollar amounts, holding periods and three tiers are arbitrary and capricious. The SEC Release offers no basis in facts to support its scheme other than bold assertions.

6. We are proposing to maintain the $2,000 ownership level, but increase the corresponding holding period to three years. Should we also increase the $2,000 threshold? If so, what would

[15] http://siblisresearch.com/data/total-market-cap-sp-500/

be an appropriate increase? For example, should we adjust for inflation (e.g., $3,000) or otherwise establish a higher amount?

As indicated in response to #1 above, I would not oppose an inflation adjusted threshold of a $2500.

7. Are there potential drawbacks with the tiered approach? If so, what are they?

See response to #4.

8. Instead of adopting a tiered approach, should we simply increase the $2,000/one-year requirement? If so, what would be an appropriate threshold?

See response to #1.

9. Should the current 1 percent test be eliminated, as proposed? Should the 1 percent threshold instead be replaced with a different percentage threshold? Are there ways in which retaining a percentage-based test would be useful in conjunction with the proposed tiered thresholds?

Yes, eliminate the 1 percent test. It serves no useful purpose as long at the $2,000 or $2,500 threshold remains. I know of no listed company with a value of $250,000 or less.

10. Should we instead use only a percentage-based test? If so, at what percentage level? Are there practical difficulties associated with a percentage-based test such as calculation difficulties that we should take into consideration?

No, any percentage-based test is likely to disenfranchise all but a few of the largest funds, funds that have never filed any shareholder proposals.

11. Should we prohibit the aggregation of holdings to meet the thresholds, as proposed? Would allowing aggregation of holdings be consistent with a shareholder having a sufficient economic stake or investment interest in the company to justify the costs associated with shareholder proposals?

Aggregation should be allowed for holdings held by the same person, family or organization. For example, my wife and I have five accounts. Unless clarified, the SEC rule may allow companies to argue that two or more broker/bank letters evidencing threshold ownership constitutes "aggregation," even though held by the same person, family or organization. If the SEC raises the thresholds, then aggregation should be allowed between people, families and organizations.

12. If we were to allow shareholders to aggregate their holdings to meet the thresholds, should there be a limit on the number of shareholders that could aggregate their shares for purposes of satisfying the proposed ownership requirements? If so, what should the limit be? For example, should the number of shareholders that are permitted to aggregate be limited to five so as to reduce the administrative burden on companies associated with processing co-filed submissions?

Rather than setting a limit on the number, simply require a lead contact with authority to represent the group of shareholders. That would reduce the administrative burden on companies.

13. Should we require shareholder-proponents to designate a lead filer when co-filing or co-sponsoring a proposal? Would doing so facilitate engagement and reduce administrative

burdens on companies and co-filers? If we required shareholder- proponents to designate a lead filer, should we require that the lead filer be authorized to negotiate the withdrawal of the proposal on behalf of the other co-filers? Would such a requirement encourage shareholders to file their own proposals rather than co-file? Would the number of shareholder proposal submissions increase as a result?

Requiring co-filers to designate a lead filer is common practice and serves a clearer path to negotiations for all parties.

14. What other avenues can or do shareholders use to communicate with companies besides the Rule 14a-8 process? Has the availability and effectiveness of these other channels changed over time?

There are some helpful tools coming online. Today, social media drives public opinion, and changes it daily. Companies that fail to engage often regret it, just as many regret not engaging with activist investors. Most are familiar with Facebook, YouTube, WhatsApp, Messenger, WeChat, Instagram, Tumblr, Google, Twitter and other general-purpose social media sites. Many are not limited to shareholders, do not monitor content, and some are better known for spreading propaganda than facilitating reasoned discussion.

For example of unregulated propaganda, see a YouTube video from Chris & Holly Turner of Stampede Consulting, which attempts to drum up comments on SEC Release File No. S7-22-19.[16] The Turner's claim proxy advisors are "submitting shareholder proposals" on things like "abortion, climate change, sanctuary cities, gun control..." "You're getting almost half your money stolen and given to things like abortion and open borders, sanctuary cities…" "Some of these shareholder proposals are giving money to organizations that oppose the second amendment, oppose the first amendment, that oppose the right to life…" Of course, proxy advisors are not submitting shareholder proposals or stealing money. Shareholder proposals are not giving money away or opposing the Constitution.

The SEC's higher threshold would encourage such outright lies and propaganda wars. The current thresholds allow small shareholders to engage with companies through shareholder proposals, a much more regulated and civil activity than posting propaganda on social media sites. There is no substitute for shareholder proposals in communicating effectively with companies, especially around corporate governance issues, since it is the only way to get an issue in front of all shareholders for a vote.

Newer social media sites and applications are being developed to generate public pressure around specific corporate accountability issues. Disclosure of proxy votes in real-time would help ground those developing opinions around factual information. A few examples posted in the *Shareholder Action Handbook*[17] are as follows:

YourStake.org facilitates the ability of individual shareholders to have their voices heard. Users create an "Ask" on any issue for public companies and funds. Once an Ask receives substantial support, a "Champion," with a proven track record on social and environmental issues, is appointed to negotiate the Ask. Champions include Walden Asset Management and Zevin Asset Management.

[16] McRitchie, *Sock Puppets for Proxy Advisory Rule*, https://www.corpgov.net/2020/01/sock-puppets-for-proxy-advisory-rule/

[17] https://www.corpgov.net/shareowner-action-handbook/#Networking

Say.com provides a framework for communications between companies and shareholders for many uses. Unlike SEC Rule 14a-8 shareholder proposals, Say is not limited as to what questions shareholders can pose to companies.

Just Capital surveys thousands of Americans to identify issues most important in defining a "more just economy." Employees are gaining on shareholders as the top priority for Main Street at companies. An increased number also believe CEOs should take a stand on important social issues and that acting together can change corporate behavior. About 76% said they would take a job at a more just company, even if it paid 20% less.

Change.org claims nearly 200 million users in 18 countries. Petition led campaigns targeted and changed Massage Envy (sexual assault issues), Walmart (banning dangerous paint strippers), and Starbucks (recycling), among others.

SumOfUs, claims "15,096,345 people stopping big corporations from behaving badly." Accomplishments include getting the European Union to ban" Bayer's bee-killing pesticides" and McDonalds to reduce plastic waste.

The *Center for Political Accountability* (CPA) leads efforts for corporate political disclosure and accountability and publishes the annual CPA-Zicklin Index, benchmarking companies. CPA's Track Your Company database includes undisclosed company election-related spending and profiles. Collision Course examines the heightened risks companies face.

The *Gender Diversity Exchange* exposes "whether companies' intentions match their outcomes to reward those that do well, encourage other companies to do better, and share their results." The database includes information on each company's directors, diversity policy, quantitative targets, policy implementation, women in the C-suite, percent of women in management and trends.

As You Sow works directly "with corporate executives to collaboratively develop business policies and practices that reduce risk, benefit brand reputation, and increase the bottom line, while bringing positive environmental and social change." They file proxy proposals, provide free online tools to screen mutual funds on specific ESG issues, and issue reports (CEO Pay, Proxy Preview, Proxy Voting Guidelines).

As prominent board advisor Eleanor Bloxham notes,

> The proposal would restrict investors' rights to annually voice changing beliefs, while at the same time, robbing companies of this valuable feedback. And without the leverage of the proxy process, boards and companies that now reluctantly engage in dialogue would likely refuse to even speak to investors about looming risks.[18]

Bloxom reminds readers the Business Roundtable's 2005 *Guidelines for Shareholder-Director Communications* is just beginning to take hold. The current system facilitates shareholder nudges and minor corrections. Absent such feedback, "the chance of whole-system meltdowns increases, raising the risk of more frequent economic downturns." That likelihood is totally unrecognized in the SEC Release.

[18] *The SEC's New Rules Will Move Companies Backward*, Barron's, 1/29, 2020, https://www.barrons.com/articles/the-secs-new-proxy-rules-will-hurt-good-boards-51580295601?mod=hp_LATEST

Absent such feedback, Bloxom warns, the SEC may be forced to implement one-size-fits-all regulatory mandates, such as those imposed by Sarbanes-Oxley and Dodd-Frank. “Their proxy requests are canaries in the coal mine, signaling other investors to concerns, and encouraging boards and companies to do what is in the best interests of the company, the markets, and the economy.” [19]

The SEC Release argues shareholders now have alternative ways to engage companies, such as social media. However, participation on social media is not limited to shareholders, is often not fact checked, and provides for less true dialogue.

15. Unlike other issuers, open-end investment companies generally do not hold shareholder meetings each year. As a result, several years may pass between the submission of a shareholder proposal and the next shareholder meeting. In these cases, the submission may no longer reflect the interest of the proponent or may be in need of updating, or the shareholder may no longer own shares or may otherwise be unable to present the proposal at the meeting. Should any special provisions be considered, after some passage of time (e.g., two years, three years, five years, etc.), to require shareholders to reaffirm submission of shareholder proposals for open-end investment companies or, absent reaffirmation, for the proposals to expire?

Shareholder proponents should have an opportunity to update proposals.

16. Does the Rule 14a-8 process work well? Should the Commission staff continue to review proposals companies wish to exclude? Should the Commission instead review these proposals? Is there a different structure that might serve the interests of companies and shareholders better? Are states better suited to establish a framework governing the submission and consideration of shareholder proposals?

The current process works reasonably well. It serves both issuers and shareholders at comparatively low cost. The biggest problem with the current system is that retail shareholders and 70.9% of funds who do not purchase proxy voting advice or analysis.[20] That means they are either reading through thousands of pages of proxy materials during the short proxy season attempting to vote intelligently, applying some simple rules of thumb, or not bothering to vote at all. The SEC’s rules requiring funds report their proxy votes annually occurred before use of the internet really took hold and before the world adapted to an instantaneous news cycle. The SEC should consider requiring funds to announce their votes in real time in a sortable database format, as suggested in my rulemaking petition of July 9, 2019.[21]

Such a rule would improve the Rule 14a-8 process by helping investors more easily analyze proxy issues by reading how others have voted (which may often include their reasons) and by improving feedback loops between fund investors and fund voters. When fund investors can easily see how their funds vote on Rule 14a-8 proposals, they are more likely to move their investments to funds more aligned with their own values.[22]

SEC Release: Proposals Submitted on Behalf of Shareholders

[19] https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Guidelines%20for%20Shareholder-Director%20Communications%20(05-05).pdf

[20] Nick Dawson, *Are Proxy Voting Advisors Really that Influential?*, https://www.proxyinsight.com/research/Proxy%20Insight%20PVA%20Research_151015023727.pdf

[21] https://www.sec.gov/rules/petitions/2019/petn4-748.pdf

[22] Proxy Scorecard and Fund Competition, September 7, 2019, https://corpgov.law.harvard.edu/2019/09/07/proxy-scorecard-and-fund-competition/.

17. We are proposing to amend Rule 14a-8's eligibility requirements to require certain additional information when a shareholder uses a representative to act on its behalf in the shareholder-proposal process. Should we amend the rule as proposed?

Given SLB 14I, which appears to be working. I do not see a need for amendments. If the Commission includes these amendments, they should consider similar amendments and disclosure concerning agents representing issuers. For example, when the SEC receives a no-action request from outside counsel, how do the Staff know outside counsel is authorized to represent the company for this specific shareholder proposal?

18. Are the informational requirements we are proposing appropriate? Should we require any additional information or action? If so, what additional information or action should we require? For example, should there be a notarization requirement? How would these measures affect the burden on shareholders?

A notarization requirement would just be another unnecessary tax on shareholder proposals, like a poll tax for voting. The broker letter and documentation of authorization are fully adequate. The SEC presents no evidence of existing fraud.

19. Is any of the proposed information unnecessary to demonstrate the existence of a principal-agent relationship and/or the shareholder-proponent's role in the shareholder-proposal process? If so, what information is unnecessary?

Yes, the shareholder's statement supporting the proposal is unnecessary, since it is implied given the documentation already includes the specific proposal to be submitted. Their signature implies endorsement.

20. Are there legal implications outside of the federal securities laws that we should be aware of or consider in allowing a principal-agent relationship in the context of the shareholder-proposal rule?

See the arguments of Timothy Smith and others. I endorse their analysis and recommendations without reservation.[23]

21. As part of the shareholder-proposal submission process, representatives generally deliver to companies the shareholder's evidence of ownership for purposes of satisfying the requirements of Rule 14a-8(b). Where the shareholder's shares are held in street name, this evidence comes in the form of a broker letter from the shareholder's broker. Since a broker letter from the shareholder's broker generally cannot be obtained without the shareholder's authorization, does the fact that the representative is able to provide this documentation sufficiently demonstrate the principal-agent relationship and/or the shareholder's role in the shareholder-proposal process? Is the answer different if the representative is the shareholder's investment adviser that owes a fiduciary duty to the shareholder?

Yes, obtaining the broker letter, which is then transmitted by the shareholder's representative already documents the principal-agent relationship and support of the proposal. If the shareholder disagrees with the proposal submitted on their behalf, they would not obtain the broker letter evidencing ownership.

[23] https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf.

SEC Release: Rule 14a-8(b) Shareholder Engagement

22. We are proposing to amend Rule 14a-8(b) to add a shareholder engagement component to the current eligibility criteria that would require a statement from the 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. Should we adopt the amendment as proposed? Could the shareholder engagement component be unduly burdensome or subject to abuse rather than facilitating engagement between the shareholder-proponent and the registrant? If so, how could we address such undue burden or abuse?

While the intent of encouraging dialogue is certainly good, any rule in this area should refer to the shareholder proponent and/or their agent. In many cases, the shareholder proponent may want to submit a proposal to encourage proxy access or disclosure of political contributions, to provide two examples, but may less knowledgeable than their agent in engaging constructively with the company around negotiations. Additionally, the company should also have to meet the same requirement, with a letter or email acknowledging receipt and a similar commitment to be available during a similar time period. In fact, many proposals might be avoided altogether by including an email address for the corporate secretary or board in the proxy as the address to which proxy proposals, whether in draft or finalized, should be sent. After obtaining such information over the years, I have avoided the need to submit several shareholder proposals by simply emailing and concern and finding out they readily agree to address it.

23. We are also proposing to require that the shareholder-proponent include contact information as well as business days and specific times that he or she is available to discuss the proposal with the company. Should we adopt this amendment as proposed? Should we specify any additional requirements for the contact information or availability? For example, should we require a telephone number or email address to be included? Should we require a minimum number of days or hours that the shareholder-proponent be available?

As above, any such requirement should apply to the shareholder proponent and/or their agent. I would hesitate to include detailed information concerning specific days or times, since we all have busy schedules and do not want to block out specific dates and times so as to make them unavailable for other engagements. Focus on general agreement to provide reasonable availability. Additionally, including private telephone numbers and email addresses could be problematic, since that information may not be redacted from no-action posts on the SEC internet site.

24. Would companies be more likely to engage with shareholders if the proposed amendment was adopted? Are there other ways to encourage such engagement that we should consider? Are there potential negative consequences of encouraging such engagement between individual shareholders and a company, or are there other potential negative consequences of this proposal?

See responses to 22 and 23 above.

25. As proposed, a shareholder would have to provide a statement 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 this timeframe appropriate? If not, what would be an appropriate timeframe?

Again, it should refer to the shareholder and/or agent. Some flexibility should be allowed for vacations, illness, etc.

26. If the shareholder uses a representative, should we also require that the representative provide a similar statement as to his or her ability to meet to discuss the proposal with the company?

Again, it should refer to the shareholder and/or agent.

27. Should companies be required to represent that they are able to meet with shareholder-proponents?

Yes. Whatever conditions are imposed on shareholders and/or their representatives should also be imposed on companies.

28. What are ways that companies engage with shareholders outside of the shareholder-proposal process?

I have engaged with representatives of companies in my portfolio several times at corporate director and shareholder conferences, sometimes reaching agreement with no proposal needed.

I incorporate by reference the comments Timothy Smith and others regarding Shareholder Engagement.[24]

One-Proposal Limit Rule 14a-8(c)

29. We are proposing to amend Rule 14a-8(c) to explicitly state, "Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting." Should we amend the rule as proposed?

The proposed amendment to Rule 14a-8(c) would uproot the long-standing "one proposal" rule that allows "each shareholder" to submit one proposal per proxy. While it may appear to be a simple matter "to apply the one-proposal rule to 'each person' rather than [to] 'each shareholder' who submits a proposal," such a change is arbitrary, without rational basis, and would in fact disrupt investors of all sorts in a myriad of complex and unintended ways.

The SEC Release acknowledges, at page 29, "that shareholders may wish to use a representative for a number of reasons, including to obtain assistance from someone who has more experience with the shareholder-proposal process or as a matter of administrative convenience." Despite this acknowledgement, the SEC Release recites no prior effort to gather and evaluate information about the ways in which investors use representatives. It also states, "[t]he amendment is not intended to prevent shareholders from seeking assistance and advice from lawyers, investment advisers, or others to help them draft shareholder proposals and navigate the shareholder-proposal process."

The outcome of the proposed change would be to arbitrarily limit an investor's ability to use a representative of her choice, conditioned on whether the representative had already assisted another investor in filing a resolution for a vote at the same meeting. The SEC Release correctly acknowledges that there may be "unintended consequences on the practice of shareholders using representatives to submit shareholder proposals." The fact of the matter is that those consequences would be adverse and severe.

[24] https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf

The SEC Release could restrict or impede important relationships – including fiduciary relationships – between an investor and her representative, and among investors. They would also arbitrarily penalize shareholders that make use of professional representation, and thus would unfairly discourage all shareholders from employing experts to help craft their proposals and supporting statements.[25]

30. Would the proposed amendment have unintended consequences on shareholders' use of representatives or other types of advisers, such as lawyers or investment advisers, and, if so, what are those consequences?

Yes, arbitrarily excluding agents from representing more than one shareholder at a company will have adverse consequences. Why should an investment advisor have to deny one client the right to file a proposal at a company simply because another client has submitted a different proposal at the same company? The same applies to fund advisors, like BlackRock with multiple clients or the New York City Comptroller, who represents several funds. Again, see the extensive arguments of Timothy Smith and others referenced in the footnote above.[26]

31. Alternatively, should we amend Rule 14a-8 to explicitly state that a proposal must be submitted by a natural-person shareholder who meets the eligibility requirements and not by a representative? If so, should we clarify that although a shareholder may hire someone to draft the proposal and advise on the process, the shareholder must be the one to submit the proposal?

So, since funds are not "natural-persons" they would be prohibited from filing proposals? This whole line of "reasoning" makes no sense. If I hire an attorney to file a brief, should I have to submit it myself? If I tell my banker to send a check, would it make sense for them to tell me they will draft it and a transmittal, but I have to be the one to mail it? If a company is filing a no-action request, should they have to mail it themselves, rather than outside counsel?

The rationale given for this proposal is not grounded in economic analysis.

> In our view, a shareholder submitting one proposal personally and additional proposals as a representative for consideration at the same meeting, or submitting multiple proposals as a representative at the same meeting, would constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders and also may tend to obscure other material matters in the proxy statement. (p. 38)

What is the basis of this belief? Rules based on belief appear to be arbitrary unless those beliefs are widely held. What hardship does current practice pose? None is provided.

Many registered investment advisors, for example, submit proposals from more than one client to the same company. Under such circumstances, the company only needs to coordinate only with one person. Under the proposed rule, the investment advisor could still submit one client's proposal and could still help the other client, but that client would have to send it themselves. The company would then need to deal with two separate individuals. What good does this accomplish? This provision raises the cost of filing by creating greater inefficiencies for proponents and issuers. It is essentially an unwarranted tax to discourage value creating activity.

[25] Arguments directly taken from those of Timothy Smith and many others. I endorse their analysis and recommendations without reservation. https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf

[26] https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf

32. Alternatively, should we require the shareholder-proponent to disclose to the company how many proposals it has submitted in the past to that company? For example, should we require disclosure of the number of proposals the shareholder has submitted directly, through a representative, or as a representative to the company in the last five years? Should companies be required to disclose this information in the proxy statement? Would this information be material to other shareholders when considering how to vote on the proposal?

This is an idea to create busywork and distraction. If it took no effort, it might be an idea worth considering. Take Netflix as an example. Yes, it might be helpful to know shareholder proposals to declassify the board passed with the following percentages of the vote: 82.6% in 2012; 80.4% 2013; 82.3% in 2014; 79.8% in 2015; 83.8% in 2016; 62.9% in 2017. If a shareholder proponent thinks that is important, they can include it in their proposal.

Companies should be required to disclose if a shareholder proposed something similar to what they are proposing. For example, I submitted a proposal to Costco for the 2020 meeting to allow shareholders to remove directors without cause. I withdrew the proposal when Costco agreed to submit the proposal to shareholders as a management proposal. The SEC should require that companies disclose, within their own proposals, if any shareholder has made a similar proposal within the last five years.

33. If adopted, would the proposed informational requirements discussed in Section II.B alleviate the concerns addressed in this section such that the proposed amendments to Rule 14a-8(c) would be unnecessary?

The legitimate concerns are already addressed by SLB 14I.

34. In lieu of, or in addition to, limiting the number of proposals a shareholder would be able to submit directly or as a representative for other shareholders, should we adopt a total limit on the number of proposals allowed to be submitted per company per meeting? If so, what numerical limit would be appropriate, and how should such a limit be imposed?

I do not see a need for any such limitation. The SEC Release has not discussed its authority to set such a limit or its necessity.

35. As an alternative or in addition to limiting the number of proposals a shareholder would be able to submit directly or as a representative for other shareholders, should we adopt a limit on the aggregate number of shareholder proposals a person could submit in a particular calendar year to all companies? If so, what would be an appropriate limit, and how would such a limit be imposed?

Again, I do not see a need for any such limitation. The SEC Release has not discussed its authority to set such a limit or its necessity. What's next? Will the Commission limit the number of companies a shareholder can vote at, or the number of share/votes they can cast? It is analogous to limiting a citizen's right to vote in only a limited number of jurisdictions. If you vote for federal candidates, you cannot vote for local candidates.

36. Should we require companies to disclose how many proposals were withdrawn and therefore not included in the proxy statement, and how many were excluded pursuant to a no-action request?

This is an idea worth considering, if it is required to be reported objectively, without management spin. Such information should include the nature of each proposal, relevant provisions and the name of each

proponent. It would be useful to reveal how many proposals and what type of proposals are withdrawn because management submitted a similar, although often less robust, proposal.

SEC Release: Rule 14a-8(i)(12) – Resubmissions

37. Should we maintain the current approach of three tiers of resubmission thresholds but increase the thresholds to 5, 15, and 25 percent, as proposed? Would alternative thresholds such as 5, 10, and 15 percent, or 10, 25, and 50 percent, be preferable? If so, what should the thresholds be? Should we instead adopt the thresholds that were proposed by the Commission in the 1997 Proposing Release (i.e., 6, 15, and 30 percent)? Do the proposed resubmission thresholds better distinguish those proposals that are on a path to meaningful shareholder support from those that are not?

The SEC Release presents no reasonable arguments for the necessity of raising the resubmission thresholds. According to data presented in the release, fewer shareholder proposals have been submitted, votes have been higher overt time and more proposals are being negotiated, rather than coming to a vote. Shareholders and managers are learning to work together. Those trends should be applauded by the Commission. The current gaining rules, including submission and resubmission thresholds, are working.

Instead of applauding these improvements, the SEC claims "overuse" of the proposal process. As indicated by the SEC own Investor Advisory Committee: "With respect to resubmission requirements, the SEC seems to believe – without explanation -- that there should be some natural rate of exclusion due to resubmission requirements, and since there are fewer being excluded, the resubmission thresholds need increasing."[27] The SEC belies the recent growth in dialogue, some of which has been brought about through its own efforts in requiring a "say on pay" and in fostering board level review of many proposals through SLB Nos. 14I, 14J and 14K.

The release notes an aggregate increase in shareholder support has been accompanied by a significant decline in the total number of proposals over the past fifteen years, from 1.85 per company in 2004 to 1.24 in 2018 at S&P 500 companies, and from 0.38 in 2004 to 0.28 in 2018 and Russell 3000 companies. If anything, that trend shows that shareholder proposals are being underutilized. Therefore, the SEC would be justified in lowering submission and resubmission thresholds, but not raising them.

38. Alternatively, should we remove resubmission thresholds for the first two submissions and, instead, allow for exclusion if a matter fails to receive majority support by the third submission within a certain number of years? Under such an approach, what would be an appropriate lookback period and how long should the cooling-off period be (e.g., three years, five years, or some other period of time)?

See response to #37 above.

39. What are the estimated costs companies incur as a result of receiving resubmitted proposals? Are the costs different for resubmitted proposals than for initial submissions? In particular, which specific costs incurred (e.g., printing costs, staff time, fees paid to external parties such

[27] Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC), January 16, 2020, p. 11, https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-advisors-shareholder-proposals.pdf

as legal advisors or proxy solicitors, management time, board time, etc.) may differ between resubmitted proposals and initial submissions?

Why is the SEC Release only focused in its analysis with the minor cost of proposals on issuers and not the increased share value brought about by the proposals? See response to #2 above. In fact, buried in the economic analysis, the release admits the following:

> 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. (page 112)

The academic evidence that adoption of corporate governance measurers, of the type in proposals filed by Chevedden, Steiner, McRitchie and Young, lead to higher shareholder returns and long-term improvements. Three are cited here; many more could be provided.[28]

40. Is there a voting threshold that, if not achieved initially, a proposal is unlikely to surpass in subsequent years? Conversely, is there a voting threshold that, if achieved, a proposal is unlikely to fall below in subsequent years?

No, there are many factors that come into play such as the terms, wording and proponent of the proposal as well as the business climate and firm specific events sometimes reflected in stock price. For example, in 2014 I had a proxy access proposal at Cisco that won 5.4% of the vote. One element allowed for an unlimited number of shareholders to form a group to nominate (although it was poorly worded). My 2015 proxy access proposal at Cisco left that element up to the company. Additionally, my 2014 was very critical of the board, whereas the 2015 proposal was not. Stock performance may have been a little worse at time of 2015 meeting than at the 2014. Probably, the momentum of adoptions at other companies helped. In 2015, my proxy access proposal at Cisco won 64.7% of the vote.

Similarly, my wife (Myra Young) submitted a proposal on proxy access in 2014 at Fedex and only won 3.2% of the vote. It basically raised the same issues I had at Cisco that year. Marco filed in 2015. Their wording was more general, like my 2015 Cisco proposal. The situation was also similar to Cisco with respect to stock price, but more pronounced at Fedex, climbing before the 2014 meeting; dropping before (and after) 2015 meeting. The Marco proposal won with 54.3% of the vote in 2015. There is no voting threshold that negates the likelihood of future success.

41. Should we shorten or lengthen the relevant five-year and three-year lookback periods? If so, what should the lookback periods be?

[28] *The Vote is Cast: The Effect of Corporate Governance on Shareholder Value*, Vicente Cuñat, Mireia Gine, Maria Guadalupe, 11/2009, http://www2.lebow.drexel.edu/PDF/Docs/CorpGov/Cunat_Gine_GUADALUPE_The_Vote_Is_Cast_The_Effect_of_Corporate_Governance_on_Shareholder_Value.pdf; Szilagyi, Peter & Renneboog, L.. (2011), *The Role of Shareholder Proposals in Corporate Governance*. Journal of Corporate Finance. 17. 167-188. 10.1016/j.jcorpfin.2010.10.002, https://www.researchgate.net/publication/227360674_The_Role_of_Shareholder_Proposals_in_Corporate_Governance; 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 or http://dx.doi.org/10.2139/ssrn.3269378

As indicated in my response to question #40 above, votes on the same issue can vary widely, depending on many variables. How many failing votes did the Gilbert brothers have on issues such as requesting an affirmative vote on the auditor? I have not researched the issue, but it could be that they *never* won but the SEC finally required it as a rule. It can take years for environmental and social issues to ripen. Lengthening lookback periods would just delay addressing action in areas such as human rights, board diversity and the climate crisis. It would be like taking the canary out of the proverbial coal mine and using mass deaths of humans as the remaining indicator.

42. Should the vote-counting methodology under Rule 14a-8(i)(12) be revised? For example, should shares held by insiders be excluded from the voting calculation, or should broker non-votes and/or abstentions count as votes "against"? Should there be a different vote-counting methodology for companies with dual-class voting structures? If so, what should that methodology be?

Dual class shares should be banned or should be required to be phased out, otherwise the growing disparity in wealth will continue to accelerate and very few Americans will have any meaningful voice in the companies they own. Lack of voice will further discourage them from investing in equities at all. Votes should be calculated as a percent of Yes/No votes. Abstentions should not count as "against" vote. All companies should count votes the same. Votes not cast should not automatically be filled in as votes in favor of what the board recommends. Current practices are like those utilized in civic elections in old communist countries. Such vote rigging by default should not be allowed. It is no wonder so many do not bother to vote when the system is rigged in favor of entrenched managers and boards.

43. Would the proposed changes in resubmission thresholds meaningfully affect the ability of shareholders to pursue initiatives for which support may build gradually over time? Do legal or logistical impediments to shareholder communications affect the ability of shareholders to otherwise pursue such longer horizon initiatives? If so, how? Are there ways to mitigate any potential adverse effects of the proposed resubmission thresholds while limiting costs to companies and shareholders?

As stated above, upping resubmission requirements would serve to slow adoption of changes that build gradually over time, like proxy access, human rights, measures to address climate change. The cost of including shareholder proposals is minimal and encourages continuing dialogue. If the SEC required companies to include an e-mail address for the submission of proxy proposals (and inquiries regarding potential proxy proposals), as well as the name and contact information for proxy proponents, that would encourage continuing dialogue.

Virtual-only meetings have become an easy way to discourage shareholder communications. The SEC should require companies that hold virtual shareholder meetings to allow those attending to share their contact information with others in "attendance" online so they can continue to discuss issues after the virtual meeting, just as shareholders could after or before attending a meeting in person. There are many instances where I have resolved issues with management through face-to-face discussions at a meeting. I have also used such meeting to gather support for various measures among shareholders. Because the Staff have now awarded no-action letters to keep proposals to move from virtual-only to hybrid meetings, based on the 'ordinary business' exemption, many shareholders (especially retail shareholders at small companies) have only one source of information concerning ESG issues, management's proxy.

44. When considering whether proposals deal with substantially the same subject matter, the staff has focused on whether the proposals share the same "substantive concerns" rather than the

"specific language or actions proposed to deal with those concerns." Should we consider adopting this standard, or its application?

The more specific the SEC Release can get, the better. For example, proposals on board diversity can be approached from entirely different perspectives. Some proponents request term or age limits. Others suggest something like the Rooney Rule to ensure candidate pools at least include women and minorities. Other proponents put forward proposals requesting candidates self-identify with regard to ideology. Substantive concerns may be similar, but the specific actions and likely outcomes would be substantially different.

Momentum Requirement

45. Should we adopt the Momentum Requirement, as proposed? If so, should we adopt this requirement instead of, rather than in addition to, the proposed resubmission thresholds? Would this requirement be difficult to apply in practice?

Any momentum requirement would be subject to known and unknow exigencies that can wildly effect momentum such as news, social media, stock price, proxy solicitation or management opposition statement. There would be many ways for managers and boards to game such a system. The proposed Momentum Requirement lacks clarity as to its application to an absolute or relative number. Additionally, there is no discussion of necessity, how the proposed 10% was arrived at, the economic impact of its application or of any reasonable alternatives.

46. As proposed, a proposal that receives a majority of the votes cast at the time of the most recent shareholder vote would not be subject to the Momentum Requirement. Is there a voting threshold below a majority of the votes cast that demonstrates a sufficient level of shareholder interest in the matter to warrant resubmission regardless of whether future proposals addressing substantially the same subject matter gain additional shareholder support? If so, what is an appropriate threshold?

No, as above #45, any momentum requirement can be easily gamed through solicitations, management opposition statements, etc.

47. As proposed, a proposal that receives a majority of the votes cast at the time of the most recent vote would not be excludable under the Momentum Requirement. Should this exception to the Momentum Requirement be limited to the most recent shareholder vote, or should it apply to a different lookback period such as three years or five years?

No, this idea of a momentum requirement is fatally flawed, since any momentum requirement can be easily gamed.

48. Should the Momentum Requirement apply to all resubmitted proposals, not just those that have been resubmitted three or more times? For example, assuming adoption of the proposed resubmission thresholds, should a proposal be excludable if proposals addressing substantially the same subject matter received 19 percent on the first submission and 16 percent on the second submission, even though 16 percent exceeds the relevant proposed threshold of 15 percent for a second submission?

No, this idea of a momentum requirement is fatally flawed, since any momentum requirement can be easily gamed.

49. Does a 10 percent decline in the percentage of votes cast demonstrate a sufficiently significant decline in shareholder interest to warrant a cooling-off period for any proposal receiving less than majority support? Would a different percentage—such as 20, 30, or 50 percent—or an alternative threshold, be more appropriate?

No, this idea of a momentum requirement is fatally flawed, since any momentum requirement can be easily gamed. Resubmission requirements are sufficient.

50. Should the cooling-off period for proposals that fail the Momentum Requirement be shorter than the cooling-off period for proposals that fail to satisfy the existing resubmission thresholds? If so, what would be an appropriate cooling-off period?

No, this idea of a momentum requirement is fatally flawed, since any momentum requirement can be easily gamed.

51. Are there other mechanisms we should consider that would demonstrate that a proposal has lost momentum? For example, should there be a separate basis for exclusion if the level of support has not increased by more than 10 percent in the last two votes in the previous five years? Or, should there be a separate basis for exclusion if the level of support does not reach 50 percent within 10 years of first being proposed? If so, what would be an appropriate cooling-off period?

No, this idea of a momentum requirement is fatally flawed, since any momentum requirement can be easily gamed.

Economic Analysis

1. Are there any entities affected by the proposed rule amendments that are not discussed in the economic analysis? In which ways are those entities affected by the proposed amendments? Please provide an estimate of the number of any additional affected entities.

The SEC's guidance for economic analysis states that any release proposing a rule "should evaluate the costs and benefits even- handedly and candidly" and "frame costs and benefits neutrally and consistently."[29] Yet the proposed rule includes no estimate of the cost to shareholder proponents of compliance nor any estimate of costs to the economy of proposals that would fail to be adopted.

For example, the Gilbert brothers won none of their proposals in the 1930s, and 1940s but their efforts led to SEC rules. Among the most important is the right to be able to file shareholder proposals. That right stemmed from John Gilbert filing four (count them) proposals with the Transamerica company for their 1946 meeting. Those proposals dealt with the following topics: 1. Have an independent auditor of the company's books elected by shareholders, 2. Prevent Transamerica from blocking actions by shareholders to use a technical device of advance notice to exclude shareholder proposals, 3. Change the meeting place from Wilmington to San Francisco and 4. Require a post-meeting report so shareholder would learn what happened.[30] These and other early proposals led to many changes, despite never obtaining majority support.

[29] *Current Guidance on Economic Analysis in SEC Rulemakings,* Memo dated March 6, 2012, page 14, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

[30] Frank D. Emerson and Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, University of Chicago Law Review, page 809, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2770&context=uclrev

2. Are there any costs or benefits of the proposed rule amendments that are not discussed in the economic analysis? If so, please describe the types of costs and benefits and provide a dollar estimate of these costs and benefits.

The SEC Release's cost benefit analysis only weighs the relatively insignificant (inflated) cost of shareholder proposals. It does little or nothing to estimate the tens, perhaps hundreds, of billions of dollars added to corporate wealth by the adoption of shareholder proposals over the years. There is no estimate of the value of having a vote on the auditor, independent boards, more diverse boards, majority vote standards for directors, addressing the risks of climate change, adopting cost-saving energy efficiency, addressing cybersecurity concerns, requiring annual election of directors, the value or reputational enhancement of disclosing dark money contributions, adopting nondiscrimination policies, avoiding use of slave or prison labor, etc.

3. What would be the effects of the proposed rule amendments, including any effects on efficiency, competition, and capital formation? Would the proposed rule amendments be beneficial or detrimental to proponents, companies, and the companies' shareholders, and why in each case?

The amendments would be detrimental to efficiency, competition and capital formation. Long ago, most companies abandoned policies that encouraged employees to leave their brains at home and to just blindly follow the commands of management. Command and control management has long been replaced by more participatory styles that take advantage of knowledge wherever it is found in the organization. Shareholders also have good ideas and knowledge that is different than that of boards and management. Discouraging shareholder proposals discourages the adoption of new ideas and will lead to more entrenchment and stagnation.

4. What is the dollar cost for companies to engage with proponents, process, and manage a shareholder proposal (including up to or after a vote on the proposal)? In particular, what is the dollar cost for companies to: (i) review the proposal and address issues raised in the proposal; (ii) engage in discussion with the proponent; (iii) print and distribute proxy materials and tabulate votes on the proposal; (iv) communicate with proxy advisory firms and shareholders (e.g., proxy solicitation costs); (v) if they intend to exclude the proposal, file with the Commission a notice that they intend to exclude the proposal; and (vi) prepare a rebuttal to the proposal? Do these costs vary with the issue raised in the proposal? Do these costs vary with the type of shareholder-proponent (i.e., institutional versus retail investor)? Are these costs different for first-time submissions relative to resubmissions? Do these costs vary with the number of resubmissions? Do these costs vary with the number of proposals received by the company? Do these costs vary with company size? Do these costs differ in cases in which a no-action request is prepared and in other cases, such as where a proposal's exclusion is challenged in court? Do managers have discretion with respect to these costs?

What are the costs of stale boards, captured by management? What are the costs of male, pale, stale boards, in comparison to diverse boards? What are the reputational costs of discriminating against people based on ethnicity, racial, or sexual identity? How much would market caps be reduced without proxy access, independent boards, independent auditors, declassified boards, special meetings, written consent, etc.? Where are those estimates? The SEC Release's cost/benefit analysis is entirely one-sided.

5. In response to a questionnaire the Commission made available in 1997, some respondents indicated that costs associated with determining whether to include or exclude a shareholder proposal averaged approximately $37,000 (which figure may have included estimates for

considering multiple proposals). The Commission also sought information about the average printing cost and 67 respondent companies reported that the average cost was approximately $50,000. How do these costs compare with costs today? Has "notice and access" or other technological advancements had an effect on the costs associated with disseminating proxy materials? If so, what are those effects?

6. What are the differences in cost incurred by companies with respect to proposals for which a no-action request is prepared and submitted to the staff and those for which a no-action request is not prepared? What are the specific costs incurred?
7. In general, how do costs differ for proposals that are submitted during shareholder meetings and not presented in the proxy and those that are presented in the proxy?
8. What are the costs, if any, associated with shareholders' consideration and voting on a shareholder proposal? Do these costs differ depending on the shareholder proposal topic? Do these costs differ depending on whether the shareholder proposal is a first-time submission or a resubmission?
9. How likely is it that market practices would change in response to the proposed rule amendments? What type of market practices that are not discussed in the economic analysis would change in response to the proposed rule amendments? For example, would larger shareholders become more likely to submit proposals in cases where smaller shareholders would no longer be eligible to submit proposals on their own? Are there frictions associated with this type of reallocation? To what extent would these changes in market practice or other effects mitigate the potential effects of the proposed amendments?

Large funds like BlackRock, Vanguard, State Street and Fidelity have never filed any shareholder proposals. Because they want to supply retirement services to corporations, they are unlikely to initiate shareholder advocacy. If N-PX forms were required to be filed more frequently, ideally in close to real-time as votes are cast and in sortable format, funds may begin to compete with each other over voting records and advocacy. See SEC proposed rule, File 4-748.[31]

Despite not currently filing shareholder proposals, the mega-funds do frequently support proposals, especially what are considered "best practices," such a declassified boards and majority vote requirements for directors in uncontested elections. Retail shareholders have been instrumental in spreading such "best practices" both within the S&P 500 and to mid- and small-cap companies. Among net effects of the proposed rule would be to dramatically decrease progress towards more independent and diverse boards, while encouraging companies to ignore negative externalities of their behavior, such a polluting, contributing to the decline of democracy through "dark money," etc.

10. To what extent would the proposed amendments affect incentives for shareholders to engage with companies prior to and/or following the submission of a shareholder proposal? What are the costs to shareholders and companies associated with such engagement? To what extent would the proposed amendments affect the outcome of such engagement? Would the requirement that the proponent provide a statement that he or she is willing to meet with the company after submission of the shareholder proposal promote more frequent resolution of the proposals outside the voting process? What would be the cost savings, if any, to proponents and companies associated with such resolutions? Do answers to the above questions differ when considering individual or institutional shareholder-proponents?

Again, while the intent of encouraging dialogue is certainly good, any rule in this area should refer to the shareholder proponent and/or their agent. In many cases, the shareholder proponent may want to submit a proposal to encourage proxy access or disclosure of political contributions, to provide two

[31] James McRitchie, July 9, 2019, https://www.sec.gov/rules/petitions/2019/petn4-748.pdf

examples, but may less knowledgeable than their agent in engaging constructively with the company around negotiations. Additionally, the company should also have to meet the same requirement, with a letter or email acknowledging receipt and a similar commitment to be available during a similar time period. In fact, many proposals might be avoided altogether by including an email address for the corporate secretary or board in the proxy as the address to which proxy proposals, whether in draft or finalized, should be sent. However, the Commission should understand, some proposals lend themselves to negotiations and some do not. For example, there is a wide mix of variation in proxy access provisions. Usually, there is not much to negotiate on a written consent proposal or a proposal to allow removal of directors without "cause."

11. Relatedly, would the proposed amendments affect shareholder engagement outside of the shareholder-proposal process? Would the possible reduction in the number of shareholder proposals allow company resources to be directed towards alternative engagement efforts? What are the costs associated with alternative types of shareholder engagement to companies and shareholders?

The SEC could make the EDGAR filing system more user friendly to facilitate the ability of shareholders to file PX14A6G documents without going through a contractor.

12. What are the opportunity costs to companies and shareholders of shareholder proposal submissions? Please provide a dollar estimate per proposal for these opportunity costs. Do these opportunity costs vary with the type of proposal, the type of proponent, or the type of company? Please provide an estimate of the hours the board of directors and management spend to review and process each shareholder proposal.

Please beware of inflated costs that may be submitted by companies for time spent reviewing and fighting shareholder proposals. I have seen some very wild estimates, especially after 2014 when several companies went directly to court, instead of requesting no-action relief through the SEC. Of course, taking that route was much more expensive, especially when they lost and had to include the proposals in their proxies after all that additional expense. How much does it cost for a company to oppose a proxy proposal or the challenge to a board director? It largely depends on what the company wants to spend. In 1991, Sears reportedly spent $5.5 million to keep one position on their ten-seat board from going to Robert A.G. Monks. If they had listened to his ideas, instead of resisting, maybe they would still be in business. The cost to Sears and its shareholders of keeping Monks off the board may have been $5.5 million but that cost estimate fails to consider the likely benefits that would have accrued to Sears and its shareholders if they had not only saved the $5.5 million allocated to defeat him but had gained the benefits of his wisdom that would likely have helped them avoid bankruptcy.

For a fuller discussion, see the comments of John C. Coates IV and Barbara Roper of January 30, 2020,[32] which I endorse and hereby incorporate by reference unreservedly.

13. Is the distribution of the dollar value and the duration of firm-specific holdings different for institutional and individual investors? Are there distributional differences when comparing the subsets of individual and institutional shareholders likely to submit shareholder proposals? Please provide any relevant data or summary statistics of the holdings of retail and institutional investors recently and over time.

Although the distribution of stocks held by individual and institutional investors has roughly flipped over time, individuals continue to file a disproportionate number of shareholder proposals. A large

[32] https://www.sec.gov/comments/s7-23-19/s72319-6729667-207388.pdf

portion of institutional investments are held by mega-funds such as BlackRock, Vanguard, State Street and Fidelity. As discussed above, these funds have conflict of interest because they depend on corporate managers for their retirement investment services. Being perceived as activists, potentially voting against their corporate clients could cost them business. That is one more reason it is critically important not to raise submission thresholds, since that would cause individuals to file significantly fewer proposals.

14. Does the majority of shareholders that submit a proposal through a representative already provide the documentation that would be mandated by the proposed rule amendments? To the extent that the practices of certain proponents are not consistent with the proposed amendments, would the costs to proponents to provide this additional documentation be minimal? Are there any costs and benefits of providing the additional disclosures that we haven't identified in the economic analysis? If so, please provide a dollar estimate for these costs and benefits. Would the proposed amendments related to proposals submitted by a representative have any effect on efficiency, competition, or capital formation?

Most of the information specified in the proposed rule is already required by SLB 14I. The problem is in the proposal to restrict agents from representing more than one shareholder at any individual company. That is a little like requiring each proponent to use a different mail service or internet provider. Why not make companies use different outside counsel to respond to each shareholder proponent at a company? Why not, because it is inefficient? Why does the SEC want to encourage inefficiencies on the side of shareholders but not on the side of companies?

15. What is the relation, if any, between the level and duration of proponent's ownership and the likelihood of submitting shareholder proposals? What is the relationship, if any, between the level and duration of proponents' ownership and the likelihood of submitting shareholder proposals that are more likely to garner majority support and be implemented by management? Do answers to the above questions vary based on the shareholder type or proposal topic?

I am more likely to file at companies where I have owned stock for fewer years than companies where I have held for years. I most frequently file proposals aimed at establishing good governance practices. By the time I have held a company for several years, many have already adopted the practices I most frequently advocate. After a filing proposals at many companies for a couple of years, I will sometimes be asked what I intend to file in the future. Companies, such as WD-40 and iRobot have avoided proposals by simply adopting good governance provisions after discussing them.

The propensity to file fewer governance proposals at companies where I have held shares longer is not as great when it comes to environmental and governance proposals. Those areas have long lagged and are now evolving more quickly. Perhaps that is because the general public finds those issues more relatable. They can see more immediate impacts from reducing pollution than from mechanisms that allow shareholders to hold directors more accountable, even though pollution can be a symptom of poor governance.

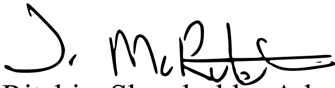
16. What are the concerns, if any, associated with drawing inferences about the effects of the proposed amendments from analysis of data on proponents' ownership from proxy statements and proof-of-ownership letters?
17. To what extent are there additional costs to companies and shareholders associated with applying a three-tiered ownership threshold instead of a single-tier threshold in determining a shareholder's eligibility to submit shareholder proposals?
18. We have observed instances of shareholder proposals going to a vote despite being eligible for exclusion under Rule 14a-8. What are the costs and benefits to companies of including such

proposals in the proxy statement? To what extent may these practices change if proposed amendments are adopted?

Conclusion

The SEC Release has failed to demonstrate any need for the proposed rules, which would discourage share ownership and participation in capitalism by Main Street investors through systematic disenfranchisement. The SEC Release's cost/benefit only weighs the immediate costs to companies of processing shareholder proposals. It makes no attempt to weigh the additional costs to shareholder proponents or the benefits of shareholder proposals, which far outweigh the costs. The proposal would set standards, such as length of holding requirements, submission, resubmission and momentum thresholds based on arbitrary and capricious methods, with no basis in law or evidence. Applying the one-proposal limit to representatives (agents) would do nothing to decrease administrative burden on companies and would essentially impose an unwarranted tax on shareholder proponents. Please feel free to contact me with any questions.

Sincerely,



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