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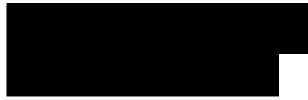

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February 3, 2020

Vanessa A. Countryman
Secretary
Securities & Exchange Commission
100 F Street
Washington, D.C. 20549

Re: File No. S7-23-19

Via email to rule-comments@sec.gov

Dear Madam Secretary:

I am an attorney who has been involved in 14a-8 matters since 1971. I will not attempt to do a comprehensive review of all aspects of the Proposing Release, but merely to highlight a couple of issues that risk being obscured by the vast number of responses that you will be receiving with respect to the proposed amendments to Rule 14a-8.

A. Filing Requirements

First, I believe that the analysis contained in Release 34-87458 (the "Release") is seriously flawed because it fails to differentiate adequately between retail (individual) investors and institutional investors. There is no real data in the Release on the projected impact of the proposed rule on individual investors. For example, what proportion of individual investors have a portfolio that contains the stock of even a single issuer with a market value of at least $25,000? What portion of the total portfolio of those individuals consists of stock with such a market value? The same data is lacking with respect to the $15,000. requirement.

Similarly, what is the average holding period for individual investors? What percentage of an individual's portfolio is held for three Years? For two years?

The data on which the Release rely are set forth on page 66488 of the Federal Register and in Table 1 on that page (data from proxy statements). It aggregates both institutional shareholders and individual shareholders (e.g. *average* holdings in the sample of 198 proponents were $17,000,000). It states that 55% of the proponents held at least $15,000 in stock and 47% of the time the proponent owned more than $25,000 in stock. Were *any* of such holders individual investors? Or were 100% of them institutions? Since the median ownership was $16,758, and since it can reasonably be assumed that all or virtually all, institutions owned above the median (in order to have an average of more than 1,000 times the median) it may be a reasonable guess that perhaps NO individual proponent owned $25,000. worth of stock.

Table 2 (on page 66,489) reveals a similar flaw in analysis, since it also aggregates both individual and institutional shareholders. (Average holdings in the sample of 284 proponents were $11,800,000. and median holdings were $13,076.) It states that 48% of the time the proponent held at least $15,000 in stock and 48% of the time the proponent owned more than $25,000 in stock. Once again, it is unclear whether *any* of the proponents meeting such thresholds were individuals. Once again, the average was hundreds of times the median.

Furthermore, although the text of the Release provides no data on average holding periods for individual shareholders, the Proposal's drastic restriction on individual submissions is illustrated by footnote 195. That footnote references academic studies that suggest that average holding periods for individuals are in the order of 41 to 65 weeks. If those studies are accurate, the average dollar holding required for an individual to submit a proposal would be $25,000., an increase of 1250% from the present requirement. No justification for such a drastic increase is set forth in the Release.

The difficulty for individual shareholders is exacerbated by another proposed provision which would prohibit shareholders from combining their holdings in order to meet the dollar requirement. The justification is an ipse dixit that shareholders should not be allowed to aggregate. Why this is so is not made clear. To illustrate, for the first three decades of shareholder proposals, literally almost all were corporate governance proposals submitted by the Gilbert brothers, Lewis and John, with some support from Wilma Soss. (Cf. *SEC v. Transamerica*, 163 Fd 511 (3d Cir, 1947). Why should not Lewis and John be able to aggregate

their family holdings in order to meet the minimum dollar requirement? Why should a shareholder not be able to aggregate the stock owned directly and the stock in her/his retirement account? Or in a family trust? Indeed, the Release utterly fails to give an adequate justification for this change.

B. Resubmission Requirement

"[R]esubmission thresholds may not have the same effect today on resubmissions as they did when initially adopted". Federal Register, page 66471. In other words, because shareholders are more enthusiastic about a shareholder proposal, that is a reason to prevent them from voting on the proposal. The logic escapes me.

Furthermore, the Release fundamentally misconceives what constitutes "success" with respect to a shareholder proposal. The goal is not to achieve majority support (although that is nice). The goal is to change an issuer's policies, either with respect to its governance or with respect to some aspect of its activities. This is true in part because shareholder proposals are precatory and need not be implemented by management even if passed by an overwhelming majority. Thus, whether a proposal receives 49% or 51% makes little practical difference. Therefore, in analyzing the readmission requirements, the Release's use of whether a proposal achieving a majority vote as the lodestone fundamentally misses the essence of the of the interaction between the proponent and the company.

C. Artificial Procedural Impediments

1.

The proposed requirement that shareholders specify in their letters a date and time for a meeting with the issuer is silly. First of all, almost invariably the proponent requests a meeting in the letter submitting the proposal. If the proponent has no desire whatsoever in negotiating, whether or not there is a designation of a time and date, there will be no substantive negotiation. If the proponent is interested in negotiating, it will occur if the issuer is interested in negotiating whether or not a date and time is specified in the letter which accompanies the proposal. Indeed, although statistics are hard to come by, experience suggests that a very large proportion of proposals that issuers do not

challenge are withdrawn by the proponent after negotiation. For example, that was true of the 2019 proposals submitted by the Episcopal Church as the primary sponsor and also true of those where Mercy Investment acted as advisor in 2019 to various organizations. The statistics from ISS noted on page 66478 suggest that some 37% of all proposals not omitted by the Staff are withdrawn. (The 37% figure assumes that ISS is actually able to capture all of the withdrawals.)

On the other hand, experience suggests that issuers often refuse to enter into negotiations with the proponent. Mercy Investments (primarily acting for the Episcopal Church) has a list of 9 companies which, over the current and past proxy seasons years, have failed to respond to a request to meet on a given issue.

Furthermore, some years ago, the undersigned represented a mid-western state's Pension Plan which had submitted a corporate governance proposal to an issuer in which it held 9.9% of the common stock. Not only did the issuer refuse to meet with the proponent, but at meeting of the American Bar Association's Section on Business Law, the issuer's General Counsel, on a panel on shareholder proposals put on by the Section's Corporate Counsel Subcommittee, the issuer's general counsel referred to its shareholder, a member of the Council of Institutional Investors, as that year's "designated tormentor".

This proposal is neither workable nor wise.

2.

The proposed new version of the "one proposal" rule flies in the face of the Commission's frequent reiteration that qualification to submit a proposal is based on a shareholder having a "sufficient economic stake or investment interest in the company". (Release, p. 66464.) This proposal would bar a proponent with a huge stake in the company from submitting a proposal if the proponent was represented by an attorney who was simultaneously representing another shareholder proponent with respect to the same company. Similarly, if two clients of a brokerage firm such as Morgan Stanley ("MS"), wished to submit different proposals to, say Exxon, and each owned millions of dollars of Exxon stock, they could not do so under the proposed rule. (Investment advisory clients of MS sign an advisory contact that delegates all proxy activity to MS. See Section 7 of Part 3 of MS's Single Advisory Contract.) Therefore, they would have to get MS to act for them in submitting the proposal. But under the proposal, MS could not act for both of them.

In conclusion, the Commission has no warrant to tell a shareholder which agent, if any, she or he may employ.

3.

The proposal to require elaborate paperwork if the shareholder uses a "representative" is fatally flawed.

First of all, it applies to any shareholder who submits a proposal. It therefore applies to corporations and other entities. But entities can only operate via representatives. Who is supposed to supply the requisite documentation if a proposal is submitted by the corporation's CEO?

Secondly, it applies to using "a representative to . . . act on your behalf in connection with the shareholder proposal". This would appear to apply to the shareholder hiring an attorney to contest a no-action letter request, since such action would be in connection with the proposal. Such interference with the attorney-client relationship is wholly unwarranted and illustrates the unnecessary scope of the proposed "representation" requirement.

D. Costs

The cost analysis is fundamentally flawed, primarily because the categories into which issuers are divided are fatally flawed. The discussion in the Release purports to "compare the average number of proposals submitted to large and small companies". (Release page 66476.) Thus, the discussion divides issuers into two groups: S&P 500 companies and the Russell 3,000. However, since the Russell 3,000 includes the S&P 500, the examination of the impact of shareholder proposals on smaller companies is incorrect. Thus, on page 66478 of the Release, Figure 3 (page 66479) is said to show that S&P issuers received about 1.56 proposals per year and that Russell 3,000 issuers received an average of one third of a proposal per year. However, if one looks at the number of proposals received by Russell 3,000 companies that were *not* S&P companies, it turns out that these smaller companies receive an almost infinitesimal number of proposals. Once the S&P companies are excluded from the Russell 3,000 the remaining companies receive not an average of 0.33 proposals per year, but rather an average of 0.088 per year, or about one every 12 years. (Total proposals: 33% of 3,000 = 1000 proposals per year; S&P 500 receive 1.56 proposals per year, or about 780

proposals; this leaves only 220 proposals for the remaining 2,500 small issuers, or about 0.088 per year.)

Consequently, the costs to the smaller companies are de minimus (about $4,000 per year assuming an average cost per proposal of $50,000; $12,000 if the average cost is $150,000.). The annual costs for S&P companies would be considerably higher ($78,000), but these companies have an average market cap of $22,000,000,000., so a cost of $78,000 per year should hardly drive policy. In this connection, we note that the Release itself (page 66506) notes that the costs of shareholder proposals are "minimal"

Finally, a word about estimated costs incurred by companies that are recipients of shareholder proposals. Essentially, this figure is unknown. As can be seen by the wide dispersal of estimates in response to the question posed in the 1998 Release, companies really don't know their costs, but they are undoubtedly prone to exaggerate the cost in pursuit of arguments against Rule 14a-8. Consequently, the $50,000. figure arrived at by Ms. Stuckey (see footnote 272 of the Release) would appear to be more reliable.

Finally, it should be borne in mind that the push for revision of the Rule has been motivated by the opposition of management (via the Chamber of Commerce and the NAM) to climate change and other "social" proposals. The Release appears to ignore the extensive literature that suggests that companies which incorporate consideration of such factors into their operations tend to outperform. Long term value is enhanced by attending to such factors. No reference is made in the Release to such studies. Rather, the Release ignores the fact that investors, in the US and worldwide, have increasingly called on companies to act in a more socially responsible manner. Even the Business Roundtable recently stated that corporations have a responsibility to the wider community and not merely to their shareholders. All such considerations are absent from the Release.

Very truly yours,

Paul M. Neuhauser