TRILLIUM ASSET MANAGEMENT®

February 3, 2020

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Via Email to rule-comments@sec.gov

Re: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (File No. S7-23-19)

Dear Secretary Countryman,

Trillium Asset Management, LLC ("Trillium") submits these comments on the Commission's proposal to amend the Commission's Exchange Rule 14a-8, as set forth in Release No. 34-87458, 84 Fed. Reg. 66458 (Dec. 4, 2019) (the "Proposed Rulemaking").

Trillium Asset Management is a registered investment advisor and investment management firm with approximately $3.2 billion in assets under management. Trillium integrates Environmental, Social, and Governance (ESG) factors into the investment process as a way to identify the companies best positioned to deliver strong long-term performance. Founded in 1982, Trillium has a long history of managing equity and fixed income portfolios for individuals, foundations, endowments, religious organizations, other non-profits, financial advisors and their clients. These clients can vary significantly in size, but no matter what their size, our clients expect portfolios designed to accomplish their long-term financial (and where appropriate, organizational) goals taking ESG factors into consideration, as well as rigorous engagement with portfolio companies on ESG topics.

Trillium regularly engages hundreds of companies on behalf of our clients through conversations, letters, shareholder proposals, and other forms of communication.[1] Descriptions of recent shareholder advocacy can be found on our website.[2] We find that these engagements

[1] We also observe that shareholder engagement is becoming much more common with many large passive indexed mutual funds beginning to see the benefits of shareholder advocacy. But it is also clear that engagement by these uniquely large investors like BlackRock, Vanguard, and State Street is woefully inadequate compared to the high level of broader market interests. As Professor Lucien Bebchuck's scholarship in a recent paper suggests to us, there is a public interest in protecting and supporting small shareholders (eligibility thresholds) and small groups of shareholders (resubmission thresholds) because the evidence shows that very large institutional shareholders such as these three are not actually devoting sufficient resources to holding managers and boards accountable and are not voting in favor of shareholder proposals that we would otherwise expect them to vote in favor of because other shareholders are supporting them at a higher rate. "The Agency Problems of Institutional Investors", Journal of Economic Perspectives, Vol. 31 pp. 89-102 (Summer 2017); Harvard Law School Olin Discussion Paper No. 930; Last revised: 16 Jul 2019. By Lucian A. Bebchuk, Alma Cohen, and Scott Hirst.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982617

[2] https://trilliuminvest.com/wp-content/uploads/2019/12/Q3-Q4-2019-Shareholder-Advocacy-Highlights.pdf

on behalf of our clients are valuable and useful not only to our clients and other shareholders, but also to management, directors, and many stakeholders.[3] Often we are able to withdraw shareholders proposals in conjunction with praise and joint appreciation from the subject company. For example:

- In 2014, Trillium was able to withdraw a shareholder proposal on board diversity at Wabtec following the company's agreement to institutionalize a commitment to board diversity inclusive of gender, race and ethnicity. The withdrawal was announced in a joint press release in which Wabtec's CEO stated "Wabtec values constructive dialogue with its shareholders and commends Trillium for its dedication to shareholder issues."[4] As that shareholder proposal explained, "According to an August 2012 report by Credit Suisse Research Institute, which evaluated the performance of 2,360 companies globally over the six years ending December 2011, companies with one or more women on the board delivered higher average returns on equity, lower leverage, better average growth, and higher price/book value multiples."
- In 2016, Akamai joined Trillium in announcing the withdrawal of a renewable energy target proposal with a commitment to source renewable energy for 50% of its network operations by 2020.[5] Demonstrating the value in this kind of engagement the proposal pointed out that "A report by the Carbon Disclosure Project found that four out of five companies earn a higher return on carbon reduction investments than on their overall corporate capital expenditures."
- In 2016 and 2018, companies like Adobe, Nordstrom, and LogMeIn issued joint statements with Trillium announcing in very positive terms withdrawal of shareholder proposals filed on behalf of our clients. In those statements, the companies embraced the progress that was promoted by the shareholder proposals.[6]
- In 2020, Starbucks announced a broad set of sustainability targets and programs which included commitments regarding plastic and other waste. Trillium had filed a plastic waste shareholder proposal on behalf of clients for two consecutive years at the company and was able to withdraw the proposal after the 44% vote in support of the proposal led to extensive engagement with Starbucks. In announcing the commitments Starbucks noted the importance of "partnerships with others on its journey to be a

[3] In August 2019, the Business Roundtable described the purpose of the corporation is to promote "An Economy That Serves All Americans". The statement was "signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders." https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[4] https://trilliuminvest.com/trillium-successfully-withdraws-board-diversity-proposal-at-wabtec-2/

[5] http://www.trilliuminvest.com/akamai-commits-significant-renewable-energy-goals/

[6] https://trilliuminvest.com/trillium-successfully-withdraws-workforce-diversity-proposal-at-adobe/, http://www.trilliuminvest.com/nordstrom-commits-report-human-rights-risks-supply-chain/, and http://www.trilliuminvest.com/trillium-successfully-withdraws-board-diversity-shareholder-proposal-logmein/

more sustainable company", including Trillium.[7] And Starbuck's CEO emphasized "that the journey we undertake is not only the right one for Starbucks responsibility as a corporate citizen of the world but is also fundamental to our brand relevance and, therefore, our overall business results. As such, we remain committed to our long-term, double-digit EPS growth model and will continue to deliver targeted financial results by prioritizing the right investments across our partners, customers and planet in support of our 'Growth at Scale' agenda."[8]

These are just a few examples of the benefits that investors obtain – and management recognizes – through the shareholder proposal process as it currently exists. We are concerned that the Commission's proposed rulemaking process seems to give short shrift to this kind of evidence and it is our strong belief that upon review of this kind of information that the Commission can only conclude that the proposed rulemaking should be withdrawn entirely. In the event that it does not, we urge the Commission to produce a new analysis that takes into account this information, publish the results of that analysis, and open up a new comment period to allow for further response, comment, and input.

For the reasons provided below, Trillium strenuously objects to the proposed rulemaking and supports the comments made by a number of organizations including:

- US SIF: The Forum for Sustainable and Responsible Investment
- Council of Institutional Investors[9]
- Shareholder Rights Group[10]
- Ceres
- Interfaith Center on Corporate Responsibility[11]
- A group comment letter specifically focused on the representation of shareholders[12]

These comments, represent extremely well researched and analyzed evidence and legal arguments and provide compelling reasons that the Commission should completely abandon the proposed rulemaking. We note that they stand in contrast to the one-sidedness of the data, discussion, and conclusions put forward by the Commission in the proposed rulemaking. For example, the Commission devotes significant time and energy reviewing estimated (and poorly supported by data) costs of the burdens of responding to shareholder proposals, but has made very little effort to detail or discuss the possibility of leaving the rule as it is and the benefits that would be lost if these proposed amendments to the rules are adopted. **This makes it very**

[7] https://stories.starbucks.com/press/2020/starbucks-commits-to-a-resource-positive-future/
[8] https://stories.starbucks.com/stories/2020/message-from-starbucks-ceo-kevin-johnson-starbucks-new-sustainability-commitment
[9] https://www.cii.org/Files/issues_and_advocacy/correspondence/2020/20201030%2014a-8%20comment%20letter%20FINAL.pdf
[10] https://www.sec.gov/comments/s7-22-19/s72219-6610717-202929.pdf
[11] https://www.sec.gov/comments/s7-23-19/s72319-6702907-206070.pdf
[12] https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf

difficult for anyone to provide full and complete comments. We greatly appreciate the rigorous analysis that these organizations have provided in the face of this challenge and urge the Commission to at least make them the basis for a new round of analysis and a new comment period.

We would also highlight a comment made by Heidi W. Hardin, General Counsel Executive Vice President, MFS Investment Management, November 14, 2018 in response to the Proxy Voting Roundtable in 2018:

> As an active investor, we believe that it is to our client's benefit to understand the views of other shareholders, as this information can augment our understanding of the risks and opportunities inherent in the companies we own. As such, we would view any action to limit some shareholders' rights to file proposals as an action to limit all shareholders' ability to fully consider all risks and opportunities of their investment.[13]

Trillium concurs with this comment and urges the Commission to consider that it is in the interest of the market and all investors to not further limit the rights of some shareholders. The markets function on information, and shareholder proposals and the votes they produce are useful, not just for the filers and the companies, but all investors. **We are concerned that the Commission has not taken into account this perspective of active investors and would recommend that it conduct and provide a full analysis of the informational needs of the market that shareholder proposals provide.**

The following are Trillium's comments which are intended to provide first-hand insights into Trillium's experience with rule 14a-8, evidence of the actual use of rule 14a-8, and analysis of the potential impacts of the proposed rulemaking if it is adopted.

Eligibility Requirements

Trillium believes that the proposed changes to the eligibility requirements of Rule 14a-8 are not necessary and are harmful. They also appear to be without basis. On pages 18-20 of the proposed rule the Commission asserts that:

> the ownership threshold and holding period in Rule 14a-8(b) aim to strike an appropriate balance such that a shareholder has some meaningful "economic stake or investment interest" in a company before the shareholder may draw upon company resources to require the inclusion of a proposal in the company's proxy statement, and before the shareholder may use the company's proxy statement to command the attention of other shareholders to consider and vote upon the proposal.

[13] https://www.sec.gov/comments/4-725/4725-4645875-176484.pdf

The reason this balance is necessary appears to be that if the correct balance is not struck, the shareholder proposal rule is "susceptible to overuse". As the Commission suggested in 1983 when settling on the $1,000 threshold, the goal was to curtail abuse of the shareholder proposal rule. Release No. 34-20091 (August 16, 1983). The current Commission goes on to express that it is "concerned that the $2,000/one-year threshold established in 1998 does not strike the appropriate balance today."

If there is abuse and overuse, however, there does not appear to be any evidence of that presented in the proposed amendments to the rule. In fact, the Commission's discussion of the number of proposals filed does not even include a simple examination of how many proposals have been filed historically compared to today. If one does conduct such a comparison, it is clear that Rule 14a-8 is not getting overused or abused.

- According to the ISS Voting Analytics database of Russell 3000 companies, shareholders submitted an average of 836 proposals at 386 companies per year between 2004 and 2017. The number of submitted proposals fluctuated between approximately 800-900 proposals per year, except for a dip to 603 proposals in 2011 and 673 proposals in 2012 after the SEC's adoption of say-on-pay vote requirements. In 2019, the total number of proposals, 814, was below that average of 836.
- Most public companies do not receive any shareholder proposals. On average, 13% of Russell 3000 companies received a shareholder proposal in a particular year between 2004 and 2017 according to the ISS database. In other words, the average Russell 3000 company can expect to receive a proposal once every 7.7 years. For companies that receive a proposal, the median number of proposals is one per year.
- Large companies are far more likely to receive shareholder proposals because these companies represent a greater portion of investors' equity portfolios. According to the ISS database, S&P 500 companies received 659 proposals as of the end of the 2017 third quarter. This equals 77% of the 852 proposals received by Russell 3000 companies, and corresponds to the S&P 500's coverage of the Russell 3000's market capitalization. Small companies rarely receive proposals - only 3.7% of shareholder proposals in the ISS database were filed at companies with a market cap under $1 billion.
- According to The Conference Board's 2019 *Proxy Voting Analytics* report:[14]

> In 2019, shareholder proposal volume decreased by 6.6 percent in the Russell 3000 and 10.5 percent in the S&P 500. The declines came on top of the 8.9 percent and 11.6 percent drops The Conference Board documented last year. In

[14] https://cclg.rutgers.edu/wp-content/uploads/Proxy-Voting-Analytics-2016-2019.pdf

> the Russell 3000, shareholders filed a total of 596 proposals at companies with AGMs during the examined 2019 period, compared to 638 during the same period in 2018 and 700 in 2017. In the S&P 500, the number of shareholder proposals decreased from 550 in 2017 to 486 in 2018 and 435 in 2019.
> …
> Compared to the same examined period exactly ten years ago, the number of investor-sponsored resolutions submitted in 2019 is down more than 35 percent in the Russell 3000 and almost 40 percent in the S&P 500.

Thus, the evidence demonstrates that the rule is not used significantly more today than in the past. It also shows that that the balance struck in 1998 appears to have been maintained. For these reasons the Commission has not demonstrated any need for the proposed amendments. It also suggests that the Commission **should explore further what caused the dip in the number of proposals in 2011 and 2012 and what lessons can be learned from that period of time that can inform not only this rulemaking, but also the merits of further requirements for company disclosures and shareholder input.** The Conference Board Report data also raises questions for the Commission. For example, on page 20 of the report it indicates that for "the last few years these resolutions have been gaining wider endorsement by retail investors." Given the Commission's interests in main street investors, **we recommend a further research of this finding – rising retail investor support should be supported by the SEC, not discouraged.**

We would also take this opportunity to speak to an issue raised on page 127, where the Commission identified one of the problems that the proposed eligibility thresholds could create: at "firms with smaller market capitalization, proponents' holdings are more likely to be below the proposed ownership thresholds." It is clear to Trillium that this is concern is well founded and **deserves further inquiry by the Commission**.

For example, one of the strategies that Trillium offers its clients is an all cap core (ACC) strategy, which invests in companies whose market capitalization, at the time of purchase, are consistent with the market capitalizations of companies in the S&P 1500 Index. The strategy adheres to the following: hold 70-80 companies; has a maximum position size of 5%; and a target tracking error of 3-4%.[15] This is not atypical in the market and as a result, at any given time, one would expect only a couple of companies to constitute 2.5% of the strategy and roughly a quarter of the strategy would be in positions that each constituted more than 1.5% of the strategy.

For a Trillium client with a $1 million account in the ACC strategy, e.g. a religious organization endowment, what one quickly realizes is that it would be extremely difficult for them to meet

[15] https://trilliuminvest.com/wp-content/uploads/2020/01/Q4-2019-ACC-factsheet.pdf

the proposed $25,000 or $15,000 thresholds for the vast majority of the companies in the strategy. Furthermore, these holdings would be almost exclusively large or mega cap companies because it is a challenge to have that much more conviction in a smaller company. Specifically, if one considers position size, size in the benchmark is a factor, such that a 1.5% position in a company that is 0.05% of the benchmark requires significantly more conviction than a 3% position in a company that is 3.5% of the benchmark. As a result, a potential unintended consequence of this proposed rulemaking could be to significantly diminish opportunities to file shareholder proposals at smaller issuers.

Given the evidence provided above that small companies rarely receive proposals - only 3.7% of shareholder proposals in the ISS database were filed at companies with a market cap under $1 billion **– there appears to be no justification for raising the eligibility thresholds. At the very least, it does not appear the Commission fully considered the impact of these proposed changes on small and mid-cap companies** and we believe the Commission should not move forward until it has done a comprehensive analysis of these potential impacts and the advantages of not making any changes to the eligibility thresholds.

Proposals Submitted on Behalf of Shareholders

In Section II.B., "Proposals Submitted on Behalf of Shareholders", the Commission appears to base the proposed amendments to Rule 14a-8 on the need to "safeguard the integrity of the shareholder-proposal process." The Commission cites to a trade association representative that suggested "that it may be difficult in some cases to ascertain whether the shareholder in fact supports the proposal that has been submitted on their behalf" and that "there may be a question as to whether the shareholder has a genuine and meaningful interest in the proposal". Aside from these suggestions, the Commission, however does not provide *any* evidence that the integrity of the shareholder proposal process has been question by investors or the public - or is not adequately safeguarded. This lack of reasoning in support of or a factual basis for this amendment leads one to conclude that the amendments are being arbitrarily developed and proposed – and accordingly should be abandoned.

Furthermore, assuming for the sake of argument that there is a need to bolster the integrity of the process sufficient to warrant these amendments, **why do the proposed amendments place all of the burden on the shareholder proponents, but none on the issuers? This approach strongly suggests a failure to consider alternative ways to safeguard the integrity of the shareholder-proposal process.** We would recommend that the Commission revisit this issue and consider, for example, requiring the Board of Directors to provide a statement that they support no-action requests made on behalf of the company by outside counsel or company employees. Doing so would help to make clear that the representative of the company filing the no-action request has been in fact authorized to file the no-action request. It would also help ensure that the interest being advanced by the no-action request are in fact the company's

interests. The burden on companies of providing this information would be minimal and would reduce the some of the burden on the shareholders in assessing whether employees or outside counsel are in fact acting according to the board's wishes.

Shareholder Engagement

It is not clear what problem the Commission is trying to solve for in Section II.C. on Shareholder Engagement. In this section, the Commission recognizes an existing positive trend in shareholder-company engagement including a letter from Chevron. As the Chevron letter put it "We reach out to investors and they reach out to us."[16] In contrast, we were unable to see evidence identified by the Commission of any current problems with shareholder-company engagement that requires or suggests government intervention.

When Trillium, on behalf of a client or clients, files a shareholder proposal, we always include an invitation to speak about the topic that is raised in the shareholder proposal. As with Chevron, we arrange meetings with our counterparts and reach out to companies in a variety of forms in the hopes of having meaningful dialogues about ESG issues. However, having the SEC dictate the form of that outreach by requiring the proponent to include "business days and specific times that he or she is available to discuss the proposal with the company" is an extreme form of micromanagement. **Has the Commission considered less intrusive or more balanced approaches?** While not an exact comparison, this proposed amendment seems to be cut from the same cloth as federal court local rules that require opposing counsels to confer.[17] Adding the level of technical intervention that is seen in litigation and the federal courts would not be a positive addition to the existing culture of engagement and dialogue that permeates current shareholder-company interactions. How does the Commission propose to avoid turning a current system of positive engagement into a litigation-style system of forced conferring?

However, despite the work of some companies to reach out to shareholders, we often see companies being completely unresponsive to our efforts at engagement. For example, this year we reached out to twelve companies regarding their non-discrimination policies and specifically whether these include protections based on gender identity — language that is considered crucial to protect LGBT employees at work. We did so, in part, because evidence shows that companies that are inclusive and welcoming of their LGBT employees are better financial performers.[18] Of those companies, six were responsive and met with us to discuss our concerns. However, six of them were not and only became responsive once we filed, on behalf of and at the request of a client, a shareholder proposal asking them to update their non-discrimination policies. At this point all twelve companies have committed extending their employment non-discrimination polices to include LGBT people.

[16] Chevron Corporation dated August 20, 2019 - https://www.sec.gov/comments/4-725/4725-5996021-190371.pdf
[17] See for example https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/LocalRulesApril2016.pdf
[18] https://research-doc.credit-suisse.com/docView?document_id=x695480&serialid=u0qj22TwXJAwyF/reBXW/eSFdVyYwRIZQGZP1IAumTo=

Even when we do file shareholder proposals, companies are not always willing to have conversations. This year, for example, we expect approximately twelve companies to either ignore a filed shareholder proposal and simply put it in the proxy, or only respond by seeking a no-action letter from the Division of Corporation Finance.

While there may be companies that are eager to engage, there are many that are not. For this reason, it strikes us as one-sided to require shareholders to be the parties that must bear all the administrative costs and burdens that are being proposed in these amendments to the rule. **We believe that alternative approaches should be considered**, such as a rule requiring the company to certify that it has made a good-faith effort to meet with and confer with investors before seeking a no-action letter. Such a certification could include documentation wherein the company provides the proponent with the availability (days and times) of a representative. In addition to making staff our outside representatives available, a balanced approach would be for the company to ensure that the appropriate fiduciary within the company (e.g. a named executive officer or director) also provided days and times that they would be able to meet.

Such an amendment to the Rule could also include penalties and sanctions for failure to engage. Currently, under Rule 14a-8(h)(3), if a shareholder fails to appear and present the shareholder proposal at the company meeting, they are barred from filing any proposal at the company for the next two years. A more balanced approach would be to bar companies from seeking to exclude a shareholder proponents proposals for a period of two years if they fail to make good-faith efforts at engagement. **We believe, at the very least, the Commission should more fully explore these and other alternatives and open a new comment period.** Or preferably, abandon this set of proposed changes to Rule 14a-8.

We also want to speak to a seemingly small point that is buried in footnote 70: "The contact information and availability would have to be the shareholder's, and not that of the shareholder's representative (if the shareholder uses a representative)." This is a deeply flawed approach that we are completely opposed to.

Part of the services that Trillium provides its clients is shareholder advocacy. As we state on our website:

> Since 1982, Trillium has been striving to provide competitive financial returns for clients while helping them leverage the power of their assets to create concrete positive social change. We use an integrated and robust approach to advocacy that includes proxy voting, corporate engagement, and influencing the development of public policy.[19]

[19] https://trilliuminvest.com/approach-to-sri/advocacy-policy/

When our clients engage us for our services, shareholder advocacy is part of the package of services that we provide. Accordingly, when a client requests and authorizes Trillium to file a shareholder proposal on his or her behalf, the authorization letter includes a statement from the client that it "intends all communications from the company and its representatives to be directed to Trillium Asset Management, LLC".[20] **We firmly believe, that under state agency law, freedom of expression, and freedom of association that individuals and organizations are fully entitled to designate an entity of their choosing, like Trillium, to represent them in a matter such as this.** To require the contact information and availability to be our client's not only appears to be beyond the scope of the SEC's authority, but is contrary to our clients reasonable expectations and history of practice. For these reasons, the Commission should abandon this idea entirely.

Finally, we would observe that in statements made at the November 5, 2019 meeting where the proposed rules were made, Chairman Clayton and Commissioner Roisman articulated extremely limited views of the purposes of Rule 14a-8. For example, Chairman Clayton discussed "facilitating constructive, information-rich engagement among shareholders and issuers" and Commissioner Roisman stated "When used properly, Rule 14a-8 can facilitate productive communication between companies and individual shareholders and lead to positive outcomes for all shareholders."[21]

However, we believe this focus on engagement and facilitated productive communication, while valid, should not over showdown other purposes of the Rule. As the D.C. Circuit explained in 1992, "Congress did not narrowly train section 14(a) on the interest of stockholders in receiving information necessary to the intelligent exercise of their [voting] rights under state law" but to "give true vitality to the concept of corporate democracy."[22] It is well established that the law and accompanying rules have important anti-fraud and corporate franchise purposes. Corporate democracy, as investors, directors, and managers know, can be messy and filled with vigorous disagreements. It involves shareholders holding boards of directors and managers accountable – and it is valuable and necessary for those reasons. So while we do agree that constructive engagements that lead to positive outcomes for all shareholder can be a desirable use of shareholder proposals, it is not the sole purpose of the Rule. Very often it is the push and pull of a public dispute where investors have the ability to overcome the directors' and managers' vise grip on the agenda and control over information where shareholder democracy can provide the discipline and oversight that companies and our markets need.

---

[20] See for example, https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/trilliumoneida121319-14a8-incoming.pdf at page 12 of the PDF document.

[21] https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting and https://www.sec.gov/news/public-statement/statement-roisman-2019-11-05-14a-8

[22] *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 at 421 (D.C. Cir. 1992) (reviewing the purpose of Section 14(a) of the Exchange Act)

For this reason, we are concerned that any amendment to the Rule that compels a meeting of shareholder and management or a director (particularly in such a specific fashion) may inadvertently undermine the shareholder democracy and anti-fraud goals of section 14(a).

One-proposal Limit

As discussed earlier, shareholder advocacy is an important part of the services that Trillium provides its clients. In our experience, investors who chose to become clients of asset managers understand that firms like Trillium have developed professional expertise in various ESG issues and can bring that professional expertise to bear in terms of engaging with a company in depth and at a level that the average investor may not be able to muster. This means that Trillium will, for example, file a shareholder proposal on an environmental issue on behalf of an individual or organizational client that places a high priority on environmental issues. Trillium also has clients that prioritize human rights issues and find value in shareholder advocacy focused on social issues.

We are therefore strongly opposed to the one-proposal limit described in Section II.D. , as it may create tension between our clients. For example, if Client A, a climate change focused foundation with a mission and fiduciary obligation to conduct its affairs consistent with its mission to address climate change, seeks to have Trillium file a shareholder proposal at Company X on climate change, and Client B, a racial justice focused foundation with a mission and fiduciary obligation to conduct its affairs consistent with its mission to address racial justice, wants Trillium to file a shareholder proposal on workforce diversity at Company X, the proposed amendment will create a conflict between those two clients. Doing so is not only counterproductive and may threatens existing contracts with Trillium, but it adds burdens and costs on asset owners who may be compelled to take on the costs of moving forward with a shareholder proposal without the assistance of their chosen representative. It may also have significant implications for organizational fiduciary duties. Before proceeding, **the Commission should further investigate and consider the impact that this proposed rulemaking may have on shareholders that use representatives.**

Perhaps this proposed rulemaking would be justified if there were evidence that firms like Trillium were filing excessive numbers of proposals at single companies, but there is no such evidence. The “Background” portion of Section II.D. provides some *theoretical* discussions of an abuse of the rule, but no actual evidence that this problem is in fact occurring. And as discussed earlier in this letter, there is no evidence that the number of shareholder proposals is exploding. In fact, the number of proposals appears to be shrinking and most companies do not have shareholder proposals filed in any given year.

These facts leave us wondering **whether the Commission has genuinely tried to understand the needs of mission based investors and the marketplace for investment services that provide shareholder advocacy?** There do not appear to be any questions in the proposed rulemaking on this topic. We therefore recommend the Commission not adopt this proposed change to Rule 14a-8 and in the alternative provide a discussion of any additional considerations it has made and provide an additional comment period.

Resubmissions

The most immediate concern raised by the resubmission thresholds proposed by the Commission is that created by dual-class[23] share companies and/or companies with significant insider ownership. In these cases, a one-size fits all threshold at higher levels, as proposed by the Commission, will clearly exclude shareholder proposals that have significant support amongst ordinary shareholders. This undermines what limited shareholder democracy and accountability exists at these companies and should be of material concern to the Commission. While the Commission briefly touched on this issue in the proposed rulemaking, it has not given the topic any real consideration.

From our experience, this topic is ripe for further data collection and consideration. For example, on behalf of a number of clients and with co-filers such as the Treasurers of Illinois, Connecticut, Rhode Island, and the New York City Comptroller, Trillium filed a shareholder proposal on behalf of our clients for the 2019 annual meeting of Facebook encouraging the company to establish an independent board chair proposal. This was the second year the proposal had been filed – in 2017 the proposal had been filed by another investor. In 2017, the proposal received a 12.4% vote of all shares, Class A and Class B. This vote result was largely because Class B shares have 10 votes per share, Class A shares have 1 vote per share, and most importantly the Chairman and CEO of Facebook, Mark Zuckerberg controlled most of the Class B shares thereby possessing 59.7% of total voting power.[24] In 2019, the proposal again went to a vote and received 20% of the vote. Again this vote result was because in 2019 Mark Zuckerberg controlled 57.7% of voting power.[25] By our calculation, if Mr. Zuckerberg's voting was excluded from the calculation, 68% of votes were cast in favor of the shareholder proposal in 2019.

In 2020, this proposal is expect to be on the company proxy as Trillium clients and many state treasurers have re-filed the proposal. Under current resubmission thresholds, we would expect that the proposal would be able to exceed the 10% vote level that would currently be required. However, if the resubmission threshold were to be the proposed 25%, the proposal would need

[23] We agree with SEC Investor Advocate Rick Fleming's October 15, 2019 description of dual-class shares as a "recipe for disaster". https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster

[24] http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/9455e35f-a8eb-4ea9-9264-44889de58b05.pdf at page 37.

[25] http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/ffdb441a-71d1-4bd0-9d7b-c1583143b218.pdf at page 41.

to attract another 300 million votes – approximately 12% of Class A shares – in order to meet the threshold. Put slightly differently, this would require approximate 80% of votes not controlled by Mark Zuckerberg to vote in favor of the proposal, in order to meet the threshold. This scenario is, for obvious reasons, deeply concerning. Promulgating thresholds that will silence 80% of the vote of main street investors at a company does not achieve any of the policy goals of Rule 14a-8. In fact, it significantly undermines shareholder democracy and the ability of shareholders to hold corporate managers and directors accountable.

This scenario is also concerning because the shareholder proposal is one that usually garners so much support from good governance experts and investors. But issues that have less universal, but still very high levels of support would struggle even more. For example, another proposal on the ballot at the 2017, 2018, and 2019 Facebook meetings focused on the significant policy issue of the gender pay gap. That proposal received 7.4%, 10%, and 10% of the vote respectively – approximately 25% and 33% of the vote not controlled by Mark Zuckerberg.

Under the proposed resubmission amendments, that proposal would not have appeared in the 2019 proxy and the issue would have not received the consideration of fellow investors. **For these reasons we believe the Commission should gather more data on the impact of the proposed rules on shareholder proposals at dual-class companies. How common are they? Are there ways to structure Rule 14a-8 to ensure that main street investors in dual-class share companies are protected?**

We would also point out that the Commission's analysis of resubmission thresholds only considers backwards looking data and how proxy advisors have behaved in the past. However, the Commission is also contemplating changes to how proxy advisors will be regulated. There is no reason to think that the voting results in a world with the proposed proxy advisor rule in place will be the same, in fact there are reasons to believe that vote results will be lower. **Has the Commission conducted an analysis of the proposed resubmission thresholds under a scenario where proxy advisor support for shareholder resolutions drops 5%, 10%, or 20%? Would the results of that analysis change the Commission's perceived need for this rulemaking?** For these reasons we believe the proposed rulemaking is unsupported and should be abandoned. In the alternative, we strongly recommend this analysis be conducted and made public for consideration and comment before finalizing the rule.

<u>Momentum Rule</u>

On behalf of our clients, Trillium has been involved in a number of shareholder proposals that illustrate the fundamental flaws in the so-called momentum rule. First, if the momentum rule had been in place in the 2000s and 2010s it would have prevented very large pluralities from expressing support for shareholder proposals that sought to reduce LGBT, gender, and racial discrimination.

Take for example a shareholder proposal filed at ExxonMobil asking that company amend ExxonMobil's written equal employment opportunity policy to explicitly prohibit discrimination based on sexual orientation and to substantially implement that policy. The proposal was first filed in 2001 and was voted on for the next 15 years. Eventually, the company decided that it would commit to not firing people for who they love or who they are, joining thousands of other companies who had made this promise much earlier. The voting history of this proposal is useful to review:

2001: 13%
2002: 23.5%
2003: 9.9%
2004: 29.9%
2005: 29.4%
2006: 34.6%
2007: 37.7%
2008: 39.6%
2009: 39.3%
2010: 22.2%
2011: 19.94%
2012: 20.57%
2013: 19.78%
2014: 19.52%

If the momentum rule been in effect, this shareholder proposal would have been excluded after the 2010 meeting, when the vote dropped from 39.3% to 22.2%. It was not until 2015, however, that ExxonMobil responded by adopting a fully inclusive EEO-1 non-discrimination policy.

Conclusion

For the reasons provided above, Trillium Asset Management firmly believe that this proposed rulemaking is entirely misguided. There is no evidence that changes are required. The proposed changes lack any analysis of alternatives and place all burdens on shareholders without any consideration of ways in which issuers might contribute to the alleged problems or provide solutions to perceived inadequacies in the existing rule. After having spent significant time reviewing and considering the proposed rule, Trillium is left concluding that the only thing it achieves is to strengthen the hand of corporate managers in their efforts to escape the discipline and rigor of the marketplace of shareholder oversight.

Sincerely,

Jonas D. Kron
Senior Vice President

CC
Hon. Jay Clayton, Chairman
Hon. Robert J. Jackson Jr., Commissioner
Hon. Allison Herren Lee, Commissioner
Hon. Hester M. Peirce, Commissioner
Hon. Elad L. Roisman, Commissioner

Senator Elizabeth Warren
Senator Ed Markey
Senator Kamala Harris
Senator Diane Feinstein
Senator Ron Wyden
Senator Jeff Merkeley

Speaker of the House Nancy Pelosi
Representative Ayanna Pressley
Representative Suzanne Bonamici