February 3, 2020

Vanessa A. Countryman, Secretary
US Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: Comments by Oxfam America Inc. on Proposed Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (File Number S7-23-19)

Dear Sec. Countryman,

We are writing to comment on the rulemaking proposal entitled "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8" (the "Proposed Rule"). Thank you for reviewing our comments on this matter.

Oxfam America's Organizational Interest

Oxfam is a global organization working to end the injustice of poverty by leading humanitarian responses to conflicts and disasters, building resilience, and supporting local organizations that develop the capacity of poor communities to grow nutritious food, access land and clean water, and obtain decent work and fair wages. Oxfam also tackles the systems, policies, and practices that keep people trapped in poverty by advocating for human rights, climate justice, gender justice, the dignity of survivors of conflicts and disasters, and against inequities in the food chain.[1] In the United States, Oxfam America is an active participant in the shareholder proposal process, regularly engaging with corporations and other investors on matters in line with its mission.

Like many other participants in the shareholder proposal process, Oxfam plays multiple roles. Our organization holds shares in numerous companies, acts as a human rights risk advisor to firms with impact and ESG investing strategies, and supports other stakeholders in the advancement of human rights and economic development objectives. Because Oxfam engages with communities in more than 90 countries, we bring to the table information from the ground up regarding adverse human rights risks and on the global and national-level context in which companies are operating.

Most notably with regard to shareholder proposals, we frequently support investors and companies in assessing companies' human rights risk management and advocate for improvements in disclosure and oversight of various social and environmental issues that help companies improve their financial prospects through sustainability and long-term value.

[1] Oxfam America website, https://www.oxfamamerica.org/about/.

We view the shareholder proposal process as an essential element of corporate governance in the US economy and believe that this present rulemaking proposal on shareholder proposals is misdirected and will likely harm overall public welfare by decreasing corporate economic outcomes and related efficiencies.

We are submitting this letter to support the commission in fulfilling its legal obligations to analyze the costs and benefits, and impacts on efficiency, that would be posed by the rulemaking. This analysis focuses on the manner in which suppressing shareholder proposals could concomitantly dampen private ordering pathways.[2] Our analysis indicates that eliminating those existing pathways for meaningful shareholder engagement will cause costly delay in the redress of risk management failures at particular companies, or deployment of more expensive vehicles for correcting such agency failures, such as litigation, books and records requests, and regulation.

SUMMARY

In its Proposed Rulemaking Release No. 34-87458; File No. S7-23-19 on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, the SEC proposes a number of changes to the Rule 14a-8 shareholder proposal process. These changes are, overall, aimed at reducing the number of shareholder proposals considered at annual meetings, thereby reducing companies' purported "burden" of responding to and considering shareholder proposals. In our experience, far from burdening corporations, the Rule 14a-8 process as it stands today has significant value-creating and sustaining impacts on the market that are worth maintaining and strengthening.

Private ordering has been defined as the process of setting up private social norms directly by parties involved rather than through mandatory regulation by the State. Private ordering aims to achieve public goals such as efficiency, enhancing the market, and protecting rights.[3] In corporate governance terms, the State of Delaware and other state corporation laws leave many aspects of company-investor relations to be resolved through the market and the active stewardship of investors, through a private ordering regime.

In the context of this comment, private ordering refers to market-wide and company-specific improvements in corporate disclosure and performance that occur as a result of investor engagement, including the particular role investors play in advancing issues that result through the shareholder proposal process. Because such private ordering has a substantial impact on corporate risk management, investor protection, public welfare and systemic risk, the SEC must recognize and evaluate the impacts of the Proposed Rule changes on dampening the market's capacity for private ordering.

The SEC estimates that the changes to the shareholder proposal rule alone would reduce

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[2] As explained further below, private ordering involves action by nongovernmental actors aimed at achieving public goals, such as efficiency, enhancing the market, and protecting rights.
[3] Michael Birnhack, "Principle of Private Ordering", February 2004.

the number of shareholder proposals considered at annual meetings by 37%.[4] The Commission has a legal obligation to calculate the lost benefits and efficiencies of dampening private ordering from the Proposed Rules under several statutory and administrative requirements. Because the Commission has not evaluated the substantial cost from diminishing the power of shareholders to use private ordering to improve corporate governance and reduce risky practices, it has failed to show that the proposed changes are "necessary or appropriate in the public interest or for the protection of investors," 15 U.S.C. § 78n(a)(1). In a similar vein, failure to account for these benefits means the SEC has failed to establish that these proposed changes improve efficiency. *Id.* § 78c(f). It therefore has not carried out the analysis required by the Securities Exchange Act and the Administrative Procedure Act, and neither should – nor legally can – proceed with the proposed changes.

This comment will provide a baseline of information for the Commission to fulfill its legal duties to assess the dampening effect on private ordering posed by its Proposed Rulemaking, by providing order of magnitude evidence regarding the private ordering benefits of several topics on which shareholder proposals are filed: human rights risk, compensation clawbacks, diversity and climate change. As the Commission refines its estimation of the number of proposals it expects its rulemaking to eliminate, it should simultaneously assess the orders of magnitude of impact that the dampening of private ordering associated with the proposals would also bring.

This letter will proceed as follows. In Part I, we will discuss the magnitude of the impact the proposed changes would have on the shareholder proposal process. In Part II, we will introduce the benefits of private ordering and the important role shareholder proposals play in achieving those benefits. In Part III, we will provide examples of how shareholder proposals (and private ordering more generally) provide value to shareholders and limit risks that can cause massive loss to shareholders and the public. In Part IV, we will evaluate how the Proposed Rule would affect the ability to realize these benefits, showing that the Proposed Rule would likely produce significant losses in value that the Commission has not analyzed. Finally, in Part V, we will propose reasonable alternatives that the Commission should consider if it continues to believe that changes to Rule 14a-8 are necessary.

I. EXAMPLES OF PRIVATE ORDERING BENEFITS AND EFFICIENCIES IN THE CURRENT SHAREHOLDER PROPOSAL SYSTEM

There are countless examples of shareholder engagement through the shareholder proposal process that has generated substantial value to companies, investors, and the general public. This section presents examples from some of the settings in which dialogue, negotiation, and action is producing productive outcomes at companies and for investors, as well as across entire sectors of the economy.

[4] The SEC estimates that the impact from the proposed Eligibility Requirement alone could eliminate as much as 56% of proposals. Rulemaking proposal on shareholder proposals, 84 Fed. Reg. at 66510, table regarding Paperwork Reduction Act includes calculations for anticipated reduced proposal submissions, pages 162-165.

In this letter we provide documentation of the extent to which shareholder value would be placed at risk by dampening private ordering of the following:

1. Human rights risk;
2. Clawbacks of executive compensation;
3. Diversity of board and staff; and
4. Climate change risk.

The Commission has projected under the Paperwork Reduction Act Table contained in the Rulemaking proposal[5] that the rule changes would reduce proposals submitted to companies by 37%. To focus on this quantitative reduction without taking into account additional crucial factors leaves this rulemaking incomplete. Under 15 U.S.C. § 78n(a)(1), the SEC has an obligation to consider "the public interest" or "the protection of investors," and refusal to account for the benefits of private ordering renders this critically important consideration incomplete. For a complete rulemaking, the Commission must demonstrate that it has evaluated the lost risk management, financial, and efficiency losses associated with such a dramatic drop in shareholder proposals; it must likewise provide evidence that the proposals eliminated would not exacerbate these costs and risks. In addition, the Commission must evaluate reasonable alternatives to the rule change proposals, include the no action alternative, which would minimize the loss of these benefits.

For each of the categories of proposals, the comments which follow will identify:

1. The evidence of investor interest;
2. Examples of private ordering through the shareholder proposal process;
3. Indicators of value at risk due to the rulemaking proposal.

Our comments are not a comprehensive accounting of the private ordering impacts of the Proposed Rule. The rushed rulemaking timeframe did not allow us to construct a comprehensive list, or to quantify all of the economic impacts and inefficiencies that would be created by the rule change. However, we offer indicia of the value at risk to aid the Commission in conducting an appropriately detailed economic analysis of the impacts of the rule. The responsibility lies with the Commission, not with commenters, to ensure adequate analysis of key economic issues. However, our comments provide a starting point for the Commission's economic and research teams to analyze these losses related to the rulemaking.

A. **Human Rights Risk**

Robust support for effective human rights risk management promotes long-term value creation, and as a result, companies often receive proposals on human rights risks at company operations and supply chains.[6]

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[5] *Id.*

[6] For the 2020 proxy season, for instance, Oxfam joined with other proponents to file proposals on human rights due diligence and/or human rights impact assessment at Amazon, Kroger, Pilgrim's Pride, and Sanderson Farms.

1. Human Rights Risk: Investor Interest

Human rights risks often arise as a result of conflicts over land, water and air resources in the areas where a company, or its supply chain, is active. For instance, natural resource extraction industries tend to generate significant environmental disruption and adverse human rights impacts on local communities. Environmental and public health harms, and conflicts over prior informed consent to operations, can undermine company objectives.

According to a Harvard Kennedy School study, *Costs of Company-Community Conflict in the Extractive Sector,* on stakeholder-related risks for the extractives sector:

> Time and again, companies have experienced how negative environmental impacts – such as a spill from a tailings dam – can generate significant negative social impacts as well, for example on local community health and livelihoods. Local communities' reactions to these impacts can quickly escalate from complaints to protests and road blockades, raising the risks of the company or its security providers using heavy-handed tactics that can lead to even more serious impacts, such as injury or even deaths. This all-too-familiar situation has significant costs – for the community of course, but **also for extractive companies themselves.**[7]

The researchers focused on costs associated with human rights issues, including any negative impacts on a company's tangible or intangible assets, such as value erosion, from failing to avoid, mitigate or resolve conflict at an early stage:

> The greatest costs of conflict identified through the research were the opportunity costs in terms of the lost value linked to future projects, expansion plans, or sales that did not go ahead. The **costs most often overlooked** by companies were indirect costs resulting from staff time being diverted to managing conflict – particularly senior management time, including in some cases that of the CEO. There may also be costs associated with the inability to recruit and/or retain top talent, particularly in the community relations function.[8]

The study's case analysis also revealed that environmental impacts such as pollution typically precipitate or trigger conflict, while broader social and economic issues (such as the unequal distribution of project benefits or the poor quality of the company's ongoing consultation processes) typically underlie situations of conflict. These underlying issues can affect the quality of the relationship between the company and community and lead to a situation in which a trigger is more likely to set off a confrontation. Nearly half of the cases analyzed involved a blockade, while a third involved a fatality or injuries, damage to property, or the suspension or abandonment of a project – all particular risks in the feasibility and construction

[7] Rachel Davis and Daniel M. Franks, "Costs of Company-Community Conflict in the Extractive Sector," Harvard Kennedy School, Corporate Social Responsibility Initiative Report No. 66, Cambridge, MA, 2014, p. 6, Foreword. Emphasis added.

[8] *Id*. at 8.

stages.[9]

In sum, the financial repercussions to extractive companies for failure to engage in strong human rights oversight and governance generate from a range of sources, including both apparent and hidden costs.

2. Human Rights Risk: Private Ordering Through Shareholder Proposals

Shareholder proposals pushing companies to review and disclose the impact of human rights concerns on companies, whether withdrawn or brought to a vote, can be quite significant in preventing losses and protecting value in the extractive industries– and far larger than the savings the Commission projects from its proposed amendments.

In our experience at Oxfam, the shareholder proposal process often proves instrumental in bringing about a privately ordered resolution of human rights concerns. The company, its investors, and impacted communities all benefit as a result of effective engagement.

For instance, in our engagements the question of land rights often is an essential human rights issue. A 2014 proposal at PepsiCo, the world's second largest food and beverage company, led to an agreement to adopt a policy committing to zero tolerance for land grabs in Pepsi's supply chain. A shareholder proposal seeking a company report on land rights was withdrawn in 2014 when the company agreed to begin reporting in this area. The company committed to sweeping social and environmental assessments across its supply chains beginning with its top sugar sourcing country, Brazil by the end of 2014. Unbeknownst to Pepsi prior to assessment, Brazil posed a significant land conflict risk to the company's finances: Brazil had experienced a rapid increase in land conflicts and violence during a recent period of expansion of large-scale agriculture; in 2008 alone, Brazil saw 751 land conflicts, a figure which rose to 1,067 in 2012, when 36 deaths and 77 attempted murders were linked to such tensions.[10] Risk-reducing land assessments in Brazil were next followed by those in Pepsi's supply chain in Mexico, Thailand, and the Philippines. In addition, the company publicly disclosed, for the first time, its top suppliers and sourcing countries for palm oil, soy, and cane sugar, three commodities at the heart of the global land rush.

The company's report on this noted that respect for land rights, particularly in developing countries and in areas populated by indigenous people, is vital to economic development. The report touts its new policies,[11] clearly indicating the value that PepsiCo derived from its productive engagement with Oxfam. Indeed, Pepsi acknowledged the importance of these issues to the company's own profitability, noting that its "products depend on a safe, high quality, and affordable supply of agricultural raw materials to meet the demand of

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[9] *Id.* at 8. This research stemmed from the fact that extractive companies do not typically identify and aggregate the full costs arising from conflict with local communities; instead, they tend to be rolled into local operating costs. This masks the costs from review and analysis by the Board, and in, turn makes it difficult for the Board to provide accurate and meaningful disclosure to shareholders.
[10] Oxfam Briefing Note, "Sugar Rush," Oct. 2013, https://s3.amazonaws.com/oxfam-us/www/static/media/files/sugar-rush-land-supply-chains-food-beverage-companies-Oxfam.pdf.
[11] PepsiCp, "Pepsi Land Policy," https://www.pepsico.com/docs/album/esg-topics-policies/pepsico_land_policy.pdf?sfvrsn=fce24e93_8.

[its] business as well as the expectations of [its] consumers, customers and other stakeholders."[12] Pepsi's decision to advertise these new policies on its own website also underscores the financial value it sees in disclosing these robust land rights standards. Pepsi – and in turn, its investors – reap financial value from the stronger human rights commitments that flow from the private ordering process that shareholder resolutions spark.

Another outstanding example of shareholder engagement on human rights is with Newmont Mining Corporation, one of the world's largest gold producers. Newmont was accused of committing egregious environmental and human rights violations around the globe, including: the creation of a Superfund site on the Spokane Indian Reservation in Nevada with mismanagement of the company's open-pit uranium mine, causing radiation and heavy metal contamination of the Spokane River and Lake Roosevelt; polluting the water supplies around the Yanacocha gold mine in Peru; and dumping arsenic and mercury into a bay of Sulawesi Island in Indonesia in conjunction with illegal mining practices, leading villagers to become ill as a result of eating contaminated fish. The criminal case against the head of Newmont's subsidiary in Indonesia alone cost the company tens of millions of dollars, including a $30 million settlement over pollution in the bay, according to Newmont's then chief executive Wayne Murdy. Newmont investors saw a pattern of community opposition at company mine sites in Indonesia, Ghana, Peru, and in the traditional lands of the Western Shoshone Nation in Nevada.

Investors decided to confront Newmont over its expensive human rights record. The 2007 proposal by faith-based investor group Christian Brothers Investment Services, Inc. sought global review of the company's social and environmental guidelines, policies and practice. The proposal was one of the first such proposals to have the support of the company's board of directors as well as Institutional Shareholder Services, and as a result was approved by nearly 92 percent of shareholders, likely the first time a U.S. mining company had embraced such a social justice resolution. Newmont understood and accepted that the ask behind the ESG resolution would ultimately improve long-term value at the company and chose to adopt the proposal to safeguard against costly human rights impacts going forward. Communities, investors, and the company all benefitted as a result of this private ordering effort.

3. Human Rights Risk: Indicators of Value at Risk from the Rulemaking Proposal

The SEC's proposed rule jeopardizes the boon to investors and affected communities alike that shareholder proposals generate. The Kennedy School report, *Costs of Company-Community Conflict in the Extractive Sector,* further details the impacts of the thwarted submission of human rights related shareholder proposals:

The most frequent costs were those arising from lost productivity due to temporary shutdowns or delay. For example, a major, world-class mining project with capital expenditure of between US$3-5 billion will suffer costs of roughly US$20 million per week of delayed production in Net Present Value (NPV) terms, largely due to lost sales. Direct costs can accrue even at the exploration stage (for example, from the standing down of drilling programs)…One company

[12] PepsiCo, Sustainable farming Program, Aug. 2018, at p.4, https://www.pepsico.com/docs/album/esg-topics-policies/sfp-scheme-rules.pdf?sfvrsn=fb5b95cf_4

had undertaken a systematic review of the potential costs of non-technical risks connected to its various projects and identified a significant figure – **a value erosion of more than $6 billion over a two-year period, representing a double-digit percentage of its annual profits** – which it used to attract Board-level attention to these issues. [13]

Even a single shareholder proposal preventing a cost of this magnitude would dwarf the benefits SEC purports to see in the rule.

Where private ordering fails to redirect company activities, the impact on value on a company-by-company basis is often reflected in diminution of goodwill and reputation, which can be a substantial part of value. Consider the example of Nike. Throughout the 1990s, shareholders urged the company to review the labor practices of its subcontractors. A 1995 proposal on this topic received only 3% of the vote. At the same time, Nike faced public targeting by labor activists, campus organizers, and anti-globalization forces for allowing its suppliers in poor countries to abuse and exploit workers. In 1996, Life magazine published a story headlined “Six Cents an Hour,” with a photo of a Pakistani boy sewing Nike soccer balls. This negative press had an impact on stock prices, which fluctuated widely as the media reported scandal after scandal at the companies' factories.[14]

If the company had been responsive to shareholder concerns earlier, significant negative reputational impact, as well as harm to human rights, could have been avoided. Phil Knight, who was then CEO, promised reform in a 1998 speech, famously stating, “The Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse. I truly believe that the American consumer does not want to buy products made in abusive conditions.” [15]

Today, Nike asserts its position as a corporate sustainability leader. “Our greatest responsibility as a global company,” according to the company’s sustainability page on its website, “is to play a role in bringing about positive, systemic change for workers within our supply chain and in the industry.”[16] A company like Nike that had pervasive abusive practices eventually pays the price, as do its investors. Retaining the possibility that shareholder proposals will gain support over time or spur management to address the issue through engagement with proponents is a key means of protecting companies against such outcomes.

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[13] In order to understand the cost to companies of human rights violations, the report systematically evaluated both confidential and publicly available data of the costs of company-community conflict, drawing on 45 confidential interviews with leading practitioners and 50 public cases of sustained company-community conflict.

[14] See for example, 'Athletic Apparel Stories and Stock Reports', on the New Mexico State University College of Business website, which documents the relationship between reports on Nike human rights abuses and stock price shifts. https://business.nmsu.edu/~dboje/nikestockstories.html. (last checked January 27, 2020).

[15] John H. Cushman, J.H., Jr., "Nike Pledges to End Child Labor and Apply U.S. Rules Abroad", *New York Times*, May 13, 1998, https://www.nytimes.com/1998/05/13/business/international-business-nike-pledges-to-end-child-labor-and-apply-us-rules-abroad.html.

[16] Note that Nike is currently a defendant in litigation filed by former Nike female employees over pay discrimination. Four women filed a class-action lawsuit claiming that Nike violated the Equal Pay Act by engaging in systematic gender pay discrimination and ignoring rampant sexual harassment. Alexia Fernandez Campbell, A.H., “Why the gender discrimination lawsuit against Nike is so significant”, *Vox.com*, August 15, 2018. https://www.vox.com/2018/8/15/17683484/nike-women-gender-pay-discrimination-lawsuit. (last checked January 27, 2020).

B. Executive Malfeasance and Clawbacks

1. Executive Malfeasance and Clawbacks: Investor Interest

In addition to human rights and environmental improvements in the extractive industry, governance practices have also proven to be significantly improved by the shareholder resolution process. Today's news headlines are full of examples in which executive malfeasance leads to massive costs for society and investors alike. Decisions by CEOs and other executives drive societal crises – examples include the indefinite grounding of Boeing 737 MAX aircrafts, the Wells Fargo's consumer fraud scandal, and public health crises like the opioids epidemic. One key strategy for reducing the incentives for malfeasance in the executive suite is establishing clawback policies which allow companies to recoup incentive-based pay or benefits in the event of executive malfeasance.[17] In numerous instances, implementing or expanding clawback policies has generated immense benefit for companies, including in instances where the adoption of the policy was directly attributable to the shareholder resolution process. Because such policies are often implemented only when shareholder proposals are filed, an open resolution process is key to ensuring that shareholders can protect the value of their investments.

The Dodd-Frank Act enacted in 2010 mandated the establishment of clawback provisions for public companies that would require clawbacks of incentive pay in the event of an accounting restatement due to "material noncompliance" with a financial reporting requirement. Despite Proposed Rules issued in 2015, the rules are not yet finalized. [18] In the intervening years, it has been incumbent on the market and the private ordering process to put in place effective rules on a company-by-company basis.

A recent article from the law firm of Pillsbury Winthrop Shaw Pittman LLP, notes that in the midst of the uncertainty surrounding the rules being finalized in light of the current political landscape, companies are beginning to implement executive compensation recoupment rules on their own in response to investor sentiment,[19] which is often expressed through shareholder proposals.

2. Executive Malfeasance and Clawbacks: Private Ordering Through

[17] There are a variety of approaches to clawback policies. Some policies allow recovery only where fault has been demonstrated; other policies allow for recovery where an accounting restatement occurs, regardless of demonstration of fault. According to a 2013 Clawback Policy Report by Equilar, assessing clawback policies at Fortune 100 companies, the most common triggers for clawback were materially inaccurate financial statements (85.4% of companies) and ethical misconduct (81.6% of companies); nearly 72% of policies had two triggers, with most requiring inaccurate financial statements to be caused by ethical misconduct. "Nearly 90% of Fortune 100 Companies Now Disclose Clawback Policies, According to Equilar Survey", *Center on Executive Compensation*, October 25, 2013. https://execcomp.org/News/NewsStories/nearly-90-pct-of-fortune-100-companies-now-disclose-clawback-policies-according-to-equilar-survey. (last checked January 27, 2020).

[18] See SEC Press Release for a summary of the proposed new Rule 10D-1, "SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation", July 1, 2015. https://www.sec.gov/news/pressrelease/2015-136.html. (last checked January 27, 2020).

[19] Jonathan M. Ocker, Justin Krawitz, Benjamin T. Gibbs, The State of Play on Clawbacks and Forf Based on Misconduct, Pillsbury, 2019. Also summarized at https://corpgov.law.harvard.edu/2019/07/07/the-state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct/.

Shareholder Proposals

In numerous instances, implementing or expanding clawback policies has generated immense benefit for companies that have adopted such policies as a result of the shareholder resolution process. Shareholders often view clawbacks as an effective means to hold executives accountable for misconduct, and accordingly submit shareholder proposals requesting their companies to adopt clawback policies.

To cite one powerful example, in 2013 shareholders filed a proposal urging Wells Fargo to expand their clawback policy; they withdrew the proposal once the company agreed to the shareholders' requests. This expanded clawback policy was then utilized in 2016 to recover $60 million from two executives in the wake of Wells Fargo's 2016 corruption scandal, when it came to light that employees of Wells Fargo had been opening fraudulent accounts for years, and the company was forced to pay a settlement of $185 million for this consumer abuse.[20] This return of $60 million clearly benefitted the company and investors alike, not only returning tens of millions of dollars back into company coffers, but by drawing a clear reputational distinction between the rogue behavior of certain executives and the company as an entity. Wells Fargo may have had far less incentive to adopt the proposal's recommendations if it had been able to exclude the proposal or been less likely to face the proposal multiple times, as could be the case under the proposed amendments.

The 2019 clawback proposal submitted to Mallinckrodt Pharmaceuticals presents another recent example of the benefits of private ordering. In 2019, shareholders at Mallinckrodt submitted a misconduct clawback proposal, addressing the role of executives in the opioid epidemic. Mallinckrodt is the maker of the generic opioid drug Oxycodone, the infamously addictive medication that has played a significant role in this public health crisis. The shareholder proposal on clawbacks[21] was one of a number of resolutions brought to major pharmaceutical companies and retailers in 2019 (for example, other proposals went to Johnson & Johnson, Rite Aid, CVS, and Walgreens) explicitly motivated by legal and regulatory scrutiny of business practices related to opioids and reputational risk amplified by media attention to company lobbying around drug-related legislation. [22]

The Mallinckrodt proposal garnered 52.92% of the vote.[23] It bears emphasis that such a high percentage of votes would have been unimaginable in early years of clawback resolutions, highlighting the value of reasonable resubmission thresholds that create space for investors to

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[20] Gretchen Morgenson, "Meet the Legislation Designed to Stifle Shareholders", *New York Times*, June 16, 2017, https://www.nytimes.com/2017/06/16/business/wells-fargo-clawback-fair-choice-act-shareholders.html.

[21] In a proposal titled, "Executive Incentive Pay Clawback", shareholders asked the company to "...report to shareholders by December 31, 2019 on the governance measures Mallinckrodt has implemented since 2012 to more effectively monitor and manage financial and reputational risks related to the opioid crisis in the United States (U.S.), given Mallinckrodt's sale of opioid medications and active pharmaceutical ingredients in opioid medications, including whether Mallinckrodt has assigned responsibility for such monitoring to the Board or one or more Board committees, revised senior executive compensation metrics or policies, adopted or changed mechanisms for obtaining input from stakeholders, or altered policies or processes regarding company lobbying activities."

[22] Two-Year Progress Report, Investors for Opioid Accountability (IOA), 2019, https://www.iccr.org/sites/default/files/page_attachments/ioa_two_year_summary_report.pdf.

[23] *Id.* at 21.

educate other investors on emerging ESG issues. In response, the company updated its Incentive Compensation Clawback Policy to include a provision requiring the company to annually disclose the recoupment of any incentive compensation from senior executives undertaken in the previous fiscal year, and allowing recovery of performance-based cash and equity incentive compensation in various circumstances, including for misconduct.[24] The benefits to the general public are clear. As Donna Meyer, Director of Shareholder Advocacy at Mercy Investment Services, observed:

> When the latest data show prescription opioids are responsible for over 47,000 deaths annually, clearly no one is untouched by the opioid crisis. We are heartened to see our efforts having such a profound impact. As a result of our engagements, opioid companies are fundamentally changing their governance structures to strengthen oversight and better mitigate the risks of addiction and overdose, and investors are increasingly supporting resolutions asking for these commonsense measures.[25]

According to Mallinckrodt, as of December 10, 2019, the company's Incentive Compensation Clawback Policy has been "updated to include a provision requiring the Company to annually disclose the recoupment of any incentive compensation from senior executives undertaken in the previous fiscal year. A summary of these changes will be disclosed in the Company's proxy statement to be filed next year in conjunction with the 2020 Annual General Meeting. In addition, the Board will create and publish a report by March 31, 2020 describing its approach to oversight of opioid-related matters."[26] It is clear that shareholder engagement has helped Mallinckrodt internalize the high cost of contributing to the opioid crisis, which ultimately benefits the general public, the company, and investors. Because the SEC is legally bound to consider the public or investor interest when proposing a new rule, benefits like this must be taken into account when evaluating the Proposed Rule.

3. Executive Malfeasance and Clawbacks: Summary of Value at Risk From the Rulemaking Proposal

The examples of clawback proposals submitted to Wells Fargo and Mallinckrodt demonstrate that private ordering that protects shareholder value as well as society occurs both when proposals go to vote and when they are withdrawn following a successful negotiation between proponents and their companies. These clawback policies protect companies and shareholders from financial losses associated with board and management malfeasance and improve incentives for boards and managers to act to protect the interests of all stakeholders.

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[24] "Mallinckrodt Announces Plans to Update Its Incentive Compensation Clawback Policy and Create Opioid Report", *CISION PR Newswire*, December 10, 2019.

[25] "Shareholders told opioid companies they had an oversight problem; they're starting to listen," *Interfaith Center on Corporate Responsibility*, September 11, 2019. https://www.iccr.org/shareholders-told-opioid-companies-they-had-oversight-problem-theyre-starting-listen. (last checked January 28, 2020).

[26] "Mallinckrodt Announces Plans to Update Its Incentive Compensation Clawback Policy and Create Opioid Report", *Cision PR Newswire*, announcement provided by Mallinckrodt plc, December 10, 2019. https://www.prnewswire.com/news-releases/mallinckrodt-announces-plans-to-update-its-incentive-compensation-clawback-policy-and-create-opioid-report-300971730.html.

The continued adoption of clawback policies would advance the public interest; should the new rule be passed and reduce the number of such proposals, billions of dollars are at risk. The value of clawback proposals is evident; indeed, attorneys from Pillsbury Winthrop Shaw Pittman LLP recommended that all companies develop clawbacks:

> Until the proposed Dodd-Frank rules are finalized, companies should adopt clawback policies that, in the event of a financial restatement, give them the discretion to select the executives from which to clawback and whether to recoup cash and equity incentives that were in excess of what should have been paid or earned based on the financial restatement. Based on enforcement issues, companies may not want to expand clawbacks beyond financial restatements or fraud. Companies should also review their executive employment agreements, severance policies, equity award agreements and cash incentive plans to make sure they have the ability to forfeit unpaid cash bonuses or severance and unvested and/or unexercised equity incentives in the event a CEO or other high-profile executive engages in misconduct whether or not it results in reputational harm or adverse publicity to the Company.[27]

The potential prevention of shareholder proposals addressing clawbacks would undermine this process and be costly to shareholders. By restricting the ability of investors to submit proposals and reducing the likelihood that a company will need to include a proposal, the proposed amendments would lessen companies' need to even engage with such proposals.

C. Addressing Board and Staff Diversity through Private Ordering and the Shareholder Proposal Process

1. Diversity: Investor Interest

Board diversity resolutions that have generated significant value under the current rules are also under threat by the proposed rule's restrictions, cutting off a source of real value to investors. The business case for greater diversity and inclusion was noted in a shareholder proposal at Omnicom Group Inc.: "Numerous studies have found that workplace diversity provides a competitive advantage by generating diverse, valuable perspectives, creativity and innovation, increased productivity and morale, while eliminating the limitations of 'groupthink.'"[28] A 2018 report by McKinsey and Company reached the same conclusion, writing, "Companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians. Companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective

[27] Jonathan M. Ocker, Justin Krawitz, and Benjamin T. Gibbs, "The State of Play on Clawbacks and Forfeitures Based on Misconduct", Pillsbury, *available at* https://www.pillsburylaw.com/en/news-and-insights/state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct.html.

[28] NYC Comptroller, Item 4: Shareholder Proposal Regarding Annual Disclosure of EEO-1 Data, at Omnicon Group Inc., 2015, *available at* Shareholder Proposal Regarding Annual Disclosure of EEO-1 Data.

national industry medians."[29] The report also found that companies with less diversity perform worse: "Companies in the bottom quartile both for gender and for ethnicity and race are statistically less likely to achieve above-average financial returns than the average companies in the data set (that is, bottom-quartile companies are lagging rather than merely not leading)." The 2018 report concluded:

> More diverse companies…are better able to win top talent and improve their customer orientation, employee satisfaction, and decision making, and all that leads to a virtuous cycle of increasing returns. This in turn suggests that other kinds of diversity—for example, in age, sexual orientation, and experience (such as a global mind-set and cultural fluency)—are also likely to bring some level of competitive advantage for companies that can attract and retain such diverse talent.[30]

Despite the strong business case for diversity, there remains enormous opportunity to improve this aspect of corporate performance.

2. Diversity: Private Ordering Through Shareholder Proposals

Shareholders have brought an array of proposals urging laggard companies to take action - diversifying the hiring of employees and board members, expanding equal opportunity employment (EEO) standards to expressly include factors such as sexual orientation and gender identity, and encouraging executive compensation incentives to include diversity metrics as a performance indicator.

Many proposals suggest companies set timebound benchmarks to increase diversity. Aflac shareholders argued that "diversity benchmarks can help ensure companies hiring hundreds of financial professionals, such as Aflac Inc., create competitive workforces. Companies that are publicly accountable to diversity goals are most likely to make rapid progress toward achieving their goals."[31] Shareholders of Aflac Inc., Visa Inc.[32], and Fifth Third Bancorp,[33] just to name a few, requested diversity reports and timebound benchmarks from their companies to ensure company diversity.

The private ordering process prompted by shareholder proposals has led to numerous successes. For example, in 2018, Nike agreed to evaluate the shareholder request regarding diversity and meet quarterly to discuss progress. Priceline Group, Stifel Financial, KeyCorp,

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[29] Vivian Hunt, Dennis Layton, and Sara Prince, "*Why Diversity Matters*", McKinsey & Company, January 2015. https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters.

[30] Vivian Hunt, Dennis Layton, and Sara Prince, "*Why Diversity Matters*", McKinsey & Company, January 2015, https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters.

[31] Trillium Asset Management, Aflac Workplace Diversity, https://trilliuminvest.com/shareholder-proposal/aflac-workplace-diversity-2016/

[32] Trillium Asset Management, Visa Inc Workplace Diversity, https://trilliuminvest.com/shareholder-proposal/visa-inc-workplace-diversity-2016/

[33] Trillium Asset Management, Fifth Third Bancorp Workplace Diversity, https://trilliuminvest.com/shareholder-proposal/fifth-third-bancorp-workplace-diversity-2017/.

CVS Health Corp, Sealed Air, Ansys Corp, PNC Financial, and Cigna Corp all pledged to improve their diversity data and reporting following shareholder resolutions as well. LogMein agreed to implement the "Rooney Rule" which states that one candidate from each applicant pool must be of a diverse gender, race, or sexual orientation. Consistent with a proposal by Arjuna Capital, Citigroup agreed to compile gender/race wage gap data—the first big bank to do so.[34]

In 2017, Fifth Third Bancorp agreed to increase diversity reporting while Aflac, Visa, and Jones Long LaSalle agreed to improve diversity reporting and disclose findings.[35] Xilink agreed to improve board executive diversity and F5 Networks agreed to set targets, action plans and submit reports on improving diversity.[36] In the 2019 proxy season alone, Trillium Asset Management secured commitments from Carter's, Xilinx, and F5 Networks to expand their workforce diversity reporting,[37] and Boston Trust Walden reached a similar agreement with SEI Investments.[38] Boston Trust Walden also secured a commitment from Atrion that its next board seat would be filled by a woman.[39] Trillium convinced Cambrex to adopt "Rooney Rule" language for each new pool of Board candidates,[40] which states that at least one candidate must be diverse race, sexual orientation, or gender, and persuaded IQVIA, Ligand Pharmaceuticals, and Wisdom Tree to strengthen diversity commitments in its governance documents and proxy statement.[41] IQVIA and Wisdom Tree expanded gender diversity on their boards one month after the proposals were withdrawn[42]. Additional board diversity agreements were reached at Discovery (Nathan Cummings), Mohawk (Boston Common), and Digital Reality (Proxy Impact), at Assertio Therapeutics and Gardner Denver by the UAW, at En-tegris by Wespath, and at Beacon by Impax.[43] Trillium reached additional agreements on executive leadership team

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[34] "Citi is First U.S. Bank to Respond to Shareholder Pressure to Close Gender Pay Gap", *Cision PR Newswire*, announcement provided by Arjuna Capital, Boston; Citibank, New York City, January 15, 2018. https://www.prnewswire.com/news-releases/citi-is-first-us-bank-to-respond-to-shareholder-pressure-to-close-gender-pay-gap-300582388.html

[35] *See* Trillium Asset Management, Fifth Third Bancorp Workplace Diversity, s*upra* note 33; Trillium Asset Management, Aflac Workplace Diversity, *supra* note 31; Trillium Asset Management, Visa Inc Workplace Diversity, s*upra* note 32; Trillium Asset Management, Jones LaSalle Workplace Diversity, *available at* https://trilliuminvest.com/shareholder-proposal/jones-lang-lasalle-workforce-diversity-2017/.

[36] Trillium Asset Management, Carter's - Executive Leadership Diversity, https://trilliuminvest.com/shareholder-proposal/carters-inc-executive-leadership-diversity-2019/; Trillium Asset Management, Xilink - Board Diversity (2017), https://trilliuminvest.com/shareholder-proposal/xilinx-board-diversity-2017/; Trillium Asset Management, F5 Networks – Workforce Diversity, https://trilliuminvest.com/shareholder-proposal/f5-networks-workforce-diversity-2019/.

[37]Trillium Asset Management, F5, *supra* note 36; Trillium Asset Management, Xilink – Workplace Diversity, https://trilliuminvest.com/shareholder-proposal/xilinx-inc-workplace-diversity-2019/; Trillium Asset Management,

[38] Boston Trust Walden, ESG Impact Report, 2019, p. 1, https://www.bostontrustwalden.com/wp-content/uploads/2019/08/Impact-Report-6-30-19.pdf.

[39] *Id. a*t 2.

[40] Trillium Asset Management, Cambrex Corporation – Board Diversity, https://trilliuminvest.com/shareholder-proposal/cambrex-corporation-board-diversity-2019/.

[41] Trillium Asset Management, IQVIA Holdings – Board Diversity, https://trilliuminvest.com/shareholder-proposal/iqvia-holdings-inc-board-diversity-2019/; Trillium Asset Management, Ligand Pharmaceuticals – Board Diversity, https://trilliuminvest.com/shareholder-proposal/ligand-pharmaceuticals-board-diversity-2019/; Trillium Asset Management, Wisdom Tree - Board Diversity, https://trilliuminvest.com/shareholder-proposal/wisdom-tree-investments-board-diversity-2019/.

[42] *Id.*

[43] ICCR, 2019 Withdrawals, https://www.iccr.org/sites/default/files/page_attachments/2019withdrawalsnr03.20.19_b.pdf.

diversity at Bank of New York Mellon and Marathon Petroleum.[44]

The popularity of diversity resolutions with investors of all stripe demonstrates that (1) investors perceive the significant log-term financial value of embracing diversity in company ranks, and (2) many companies continue to fail to adopt such norms regardless. This disjuncture means that shareholder resolutions have transformed into a critical tool for protecting financial value for shareholders and promoting the public interest alike. Notably, this has been the case even where it is not clear that proposals will receive significant voting support, as is the case with many proposals that nonetheless have spurred productive negotiations or actions under the current rules. The risk of reducing the number of shareholder proposals, which the proposed rule will certainly do, will decrease the number of companies that engage along these lines – investors, companies, women and minority groups that have benefitted from such proposals will suffer as a result.

Oxfam has successfully utilized private ordering through shareholder proposals targeting gender discrimination at Mondelēz International, the world's biggest chocolate maker. Oxfam filed a shareholder resolution requesting greater attention to gender issues in Mondelēz's supply chain and withdrew in April 2013 when Mondelēz agreed to take steps to address inequality facing women in their cocoa supply chains.[45] Oxfam welcomed Mondelēz International's commitment to:

- Conduct and publish impact assessments by third party organizations on women in their cocoa supply chains in order to understand and show how women are undervalued.
- Put in place a specific action plan to address issues raised by the assessments and lead to the improvement of poor conditions faced by women in their supply chains in Ghana and Cote D'Ivoire.[46]

The company began by publishing impact assessments in Ghana and Cote d'Ivoire in 2014. By 2018, Mondelēz International published action plans for the Cocoa Life program's top four origin countries.

All parties benefitted from this private ordering process: Mondelēz clearly has taken advantage of its improved policies, touting its improvements for customers and the general public to see – and indeed, now specifically champions its work with Oxfam on its website, proclaiming "Oxfam praises Mondelēz International's commitment and consistent contribution to women's empowerment."[47] The value of the company's leadership in women's empowerment will also accrue to long-term investors, and to the

[44] *Id.*
[45] Oxfam International, "Mondelez International Agrees to Address Women's Inequality in Chocolate Production," April 23, 2013, https://www.oxfam.org/en/press-releases/mondelez-international-agrees-address-womens-inequality-chocolate-production
[46] *Id.*
[47] Mondelēz International, "Mondelēz International Expands Women's Empowerment Plans in Cocoa Communities," (Oct. 2018) https://ir.mondelezinternational.com/news-releases/news-release-details/mondelez-international-expands-womens-empowerment-plans-cocoa.

women in their cocoa supply chain alike.

Furthermore, Oxfam understands that these action plans deliver better capacity towards a sustainable livelihood to women farmers and workers, meaning the public likewise benefits. Because Oxfam did not own $25,000 or even $15,000 in stock in Mondelēz at the time the resolution was filed, such a resounding success – to investors, the public and the company alike – would have been impossible under the SEC's proposed new rule.

3. Diversity: Leading Indicators of Value at Risk from the Rulemaking Proposal

These activities represent a significant factor in setting the pace for market responsiveness to diversity challenges. Significant progress has been made in advancing board diversity over the past decade, but there is still a long way to go to achieve diversity on Fortune 500 boards. For example, according to an article reviewing the Board Monitor US 2019 report by Heidrick & Struggles, the percentage of women appointed to fill new board seats on U.S. Fortune 500 companies in 2018 was the highest ever at 40%, and a doubling of the percentage over the past decade, but the total share of seats held by women on these boards in 2018 was only 22.5%. Racially and ethnically diverse new board appointments in 2018 remained unchanged from 2017's record high of 23%.[48]

Reflecting on these figures, Bonnie Gwin, Vice Chairman and Co-Managing Partner of the CEO & Board Practice of the company noted that, "there's still much work to be done to reach gender parity by 2023 and to create more diverse boards."[49]

Shareholder engagement advocating for companies to increasingly consider and address diversity is demonstrably a significant area of success for the current shareholder engagement process that creates value for companies and the economy overall**.** It likewise creates significant value for the women, men, and children that benefit from improved gender parity. It is vital that existing channels of engagement between shareholders and their companies remain open for shareholders to continue to support advancement of this important social issue.

It also bears emphasis that the risks of failing to improve on gender and diversity performance are likely to increase – the #MeToo movement, the Women's March, and analogous campaigns and societal shifts mean that the private sector will be expected to keep pace. Shareholder advocacy remains a key lever for investors to alert companies to important issues that are emerging but may have yet to be fully internalized at companies.

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[48] "Board Monitor US 2019: What's Changed in 10 Years, What Hasn't, and What's Next", *Heidrick & Struggles*, p. 4.

[49] "Closing the Gaps: More Work Needed to Accelerate Gender and Racial Diversity on Fortune 500 Boars according to Heidrick & Struggles 2019 U.S. Board Monitor", *Heidrick & Struggles,* News Release, May 29, 2019. https://heidrick.mediaroom.com/2019-05-29-Closing-the-Gaps-More-Work-Needed-to-Accelerate-Gender-and-Racial-Diversity-on-Fortune-500-Boards-according-to-Heidrick-Struggles-2019-U-S-Board-Monitor.

Where private ordering fails, shareholders and stakeholders are increasingly turning to other strategies to reach their goals that may leave less flexibility for companies or involve more risk to the company's reputation and value: companies are losing millions as a result of #MeToo-related sexual misconduct claims.[50] For instance, on the issue of board diversity a number of states are considering legislation. In one example, a bill would require all publicly held corporations to have a woman, a Latino person, and a black person on their boards by the end of 2020 (a bill passed by the Illinois General Assembly in May 2019); other legislation urges all nonprofit, privately held, and publicly traded institutions and companies to have a minimum of 30% of female directors on their boards by December 31, 2022 (legislation effective Oct. 1, 2019 in Maryland).[51] As will be explicated at further length below, alternatives to the shareholder proposal process can prove far more costly.

D. Addressing Climate Change

Another example of the progress on ESG disclosure produced by private ordering is the impact of shareholder proposals on climate change related disclosures. In the absence of disclosure mandates from the SEC, shareholder activism is eliciting greater disclosure of firms' exposure to climate change risks. Companies that voluntarily disclose climate change risk following environmental shareholder activism also achieve a higher valuation, with post disclosure valuation increasing by 4.8-4.9%.[52] This stands in direct contrast to the Commission's suggestion that the effect of shareholder proposals on valuation is negligible.

This section will first establish the financial ramifications of failure to account for climate footprint and the financial benefits of proactively embracing greenhouse gas (GHG) reduction targets and similar policies. Next, it will turn to how the private ordering sparked by shareholder proposals have helped protect investor value and promote the public interest.

1. Climate change: Financial Impacts

From 2015-2020, the world has experienced a series of unprecedented extreme weather events, which are anticipated to occur with greater frequency as a result of climate change. Investors recognize that their portfolios will increasingly be negatively impacted by climate change as natural resources become unavailable; storms, droughts, floods, and fires cause damage and reduce commerce; supply chain dislocations occur; production declines; infrastructure is damaged; crops are lost; energy is disrupted: and political instability increases, to name a few impacts. Shareholders reasonably are asking the companies in which they invest to decrease emissions and align operations with global climate goals and needs. This is underscored by recent statements by the world's largest asset managers: BlacRock CEO Larry Fink's Annual Letter to CEOs examined the ways in which "Climate Risk is Investment Risk," observing,

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[50] Samantha Cooney, Companies are Losing Millions After Allegations Like #MeToo Kate Upton's Claim Against Guess' Paul Marciano, Time, https://time.com/5130340/kate-upton-guess-stock-price/.

[51] Kathy Gurchiek, "Report: Diversity on Boards Growing Slowly but Steadily", *SHRM*, June 13, 2019.

[52] Caroline Flammer, Michael W. Toffel, Kala Viswanthan, "Shareholder Activism and Firms' Voluntary Disclosure of Climate Change Risks," Harvard Business School, Working Paper 20-049 (October 2019), page 26.

> "**Climate change has become a defining factor in companies' long-term prospects.** Last September, when millions of people took to the streets to demand action on climate change, many of them emphasized the significant and lasting impact that it will have on economic growth and prosperity – a risk that markets to date have been slower to reflect. **But awareness is rapidly changing, and I believe we are on the edge of a fundamental reshaping of finance**. The evidence on climate risk is compelling investors to reassess core assumptions about modern finance."[53]

The cascade effect of Mr. Fink's January 2020 statement is already underway: BlackRock peer State Street followed suit soon after, issuing a statement that not only reaffirmed that climate poses a serious investment risk, but telling companies that inertia on ESG issues poses a material risk and is unacceptable.[54]

A state of the industry report, "Tipping Points 2016," collected data from 50 institutions, including 28 asset owners and 22 asset managers.[55] The report found that institutional investors (1) consider and manage their impacts on environmental, societal, and financial systems, and (2) consider those systems' impacts on their portfolios, with financial returns and risk reduction being two primary motivators for approaching investment decisions on a systemic basis. The report shows asset owners not only consider the financial hazards they perceive from ESG risk at the level of specific securities and industries but are also concerned with measuring and managing climate risk on an overall portfolio basis. The combined effects of climate change across the economy are projected to have substantial negative, long-term, portfolio-wide implications.

Institutional investors have clarified this focus. Anne Simpson, Director of Board Governance and Strategy at California Public Employees' Retirement System stated: "Mapping a company's carbon footprint, or the emissions it produces, and measuring its progress in this area is an important and growing part of our portfolio analysis. Over the long-term investors are saying to these companies that we want them to align their business strategy with the Paris Agreement."[56] Ingrid Dyott, Portfolio Manager of $2.5 billion Neuberger Berman Socially Responsive Fund notes the weaknesses companies expose themselves to when not setting Science-based Targets (SBTs): "If [companies] can't show that they've systems in place to manage their environmental challenges then it suggests that management may not be up to standard in other areas too."[57] Likewise, Jeanett Bergan, Head of Responsible Investment at KLP states: "If we as active owners improve the performance of CO2 intensive companies, that will help us secure better returns in the future."[58]

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[53] Larry Fink," A Fundamental Reshaping of Finance," BlackRock, Jan. 2020 https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.
[54] Emily Chasan, State Street Tells Companies That ESG Moves Are No Longer Optional, Bloomberg, Jan. 28, 2020, https://www.bloomberg.com/news/articles/2020-01-28/state-street-tells-companies-esg-moves-are-no-longer-optional.
[55] William Burckart, Steve Lydenberg, and Jessica Ziegler, "Tipping Points 2016", *IRRC Institute*, 2016.http://tiiproject.com/tiiping-points-2016.
[56] Science Based Targets, What Investors Are Saying, http://sciencebasedtargets.org/what-investors-are-saying/.
[57] *Id.*
[58] *Id.*

The Interfaith Center for Corporate Responsibility (ICCR) notes these financial impacts as well, writing:

> The companies that set ambitious targets now will lead innovation and transformation tomorrow… Setting ambitious targets now ensures a lean, efficient, and durable company in a future where resources become increasingly more expensive – particularly resources derived from fossil fuels. Rising prices of raw materials can mean the difference between profit and loss… Companies taking a leadership position on climate bolster their credibility and reputation among stakeholders, including investors, customers, employees, policy makers and environmental groups. Approximately half of consumers worldwide believe climate change will have a negative effect on their own lives, and 65 per cent of consumers agree that human activity is responsible for climate change. Meanwhile, companies increasingly want to do business with suppliers that are taking climate change seriously so that they can reduce GHG exposure in their value chain…ambitious action now helps companies stay ahead of future policies and regulations to limit GHG emissions. Companies that are seen as leaders are better able to influence policy makers and help shape developing legislation.[59]

Examples of Investing Institutions Tracking Portfolio Carbon Trajectory

The increasing attention that climate change resolutions attract from investors of all size and mandate, when held up against the continued reticence of many companies to adopt strong climate policies, makes clear that the SEC should continue to protect investors' rights to file resolutions on this financially and socially critical topic. The attention that investors pay to climate change is demonstrated in part by the numerous investing institutions that have begun to track the carbon footprint and trajectory of equities portfolios to support private ordering to improve climate risk disclosure, as described below:

Principles of Responsible Investment (PRI). The United Nations-supported Principles of Responsible Investment (PRI) launched the **Montréal Carbon Pledge** at its annual conference in September 2014. The pledge commits those that sign it to measure and disclose the carbon footprint of part or all of their equities' portfolio. Such a footprint helps investors better understand, quantify and manage climate change-related impacts, risk and opportunities. The Pledge has attracted commitment from over 120 investors with over USD 10 trillion in assets under management, as of the United Nations Climate Change Conference (COP21) in December 2015 in Paris..[60] **The PRI "Inevitable Policy Response" Investment Strategy for portfolio allocation** anticipates the disruptive economic impacts of global regulatory responses as climate change worsens, and therefore provides strategies for diversification, engagement and risk transfer to protect the investors long-term portfolio value. The PRI, supported by investors with $80 trillion

[59] ICCR Investor Packet for Campaign for a Clean Energy Economy: Science-Based Corporate GHG Reductions, *available at* http://www.iccr.org/sites/default/files/resources_attachments/iccr_investor_sbt_briefing_packet.pdf.
[60] PRI Montreal Pledge, https://montrealpledge.org/.

in assets under management, has begun a focus on the implications for investors of the "***inevitable policy response***" (IPR) when national and global policymakers come to realize that they must impose rapid, stringent carbon constraints to head off a worsening global climate change catastrophe.[61]

Portfolio Decarbonization Coalition (PDC). Building on the PRI's Montréal Carbon Pledge, the global Portfolio Decarbonization Coalition currently has members representing $800 billion in AUM that are taking decarbonization approaches to their portfolios to support the transition to a low-carbon economy. PDC's members implement decarbonization commitments including formal decarbonization related objectives and targets covering some or all of their investment portfolios, including measurement and periodic disclosure of their carbon exposure (or 'footprint') — in other words, the carbon intensity of their capital.[62]

Asset Owners Disclosure Project (AODP). The largest investing institutions are also being monitored by the Asset Owners Disclosure Project (AODP), based in the UK, which rates and ranks the world's largest institutional investors and assesses their response to climate-related risks and opportunities.

Task Force on Climate-Related Financial Disclosures (TCFD). The Financial Stability Board (FSB) set up the Task Force on Climate-Related Financial Disclosures (TCFD) under the chairmanship of Michael Bloomberg. The report focuses on recommendations for disclosure of climate risk in annual financial reports. The goal of the TCFD is to develop recommendations for voluntary climate-related financial disclosures that are consistent, comparable, reliable, clear, and efficient, and provide decision-useful

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[61] PRI notes: "In effect, an IPR is what would need to happen if the world was to move towards a target of 1.5-1.75°C with 50-66% probability. Indeed, if policy actions do not ratchet up from current levels, we would need urgent and forceful policy action today to achieve anything close to attaining a 1.5°C outcome. IPR can thus be considered a "backstop" scenario — and a call to action — to accelerate current efforts to align with the Paris Agreement. An IPR trajectory is not being actively considered by most corporations and investors, hence the PRI's support for assessing its effects and the preparatory actions that are needed. There are many permutations for an IPR in terms of when and what will occur. This outline contains assumptions about an announcement in 2025 for a 2030 implementation to address the overshoot, and specific policies that could be considered."
PRI has prepared papers to assist investors concerned with this future market disruption, including a paper on projecting the timelines and severity of the inevitable policy response:
At its simplest level, an IPR would precipitate (in aggregate) substantial shifts in capital from high- to low-carbon activities that require preparatory actions for investors to take today. The technical papers build a framework for exploring the policy and technology pathways that would deliver a rapid economic transition. They also consider the investment risk and return implications at the sector and asset level to integrate an IPR into strategic asset allocation (SAA) and portfolio construction frameworks. Finally, the papers consider the actions that investors would need to take both prior to, during and in the aftermath of an IPR, in terms of reviewing governance arrangements, risk management processes and engagement activities, including the management of stranded assets. … It is evident that the longer the delay in reducing emissions, the higher will be the need for rapid transition and forceful policy action. … We believe this work bolsters the rationale for an escalation in actions now to refine and make decisions more efficiently, and to ultimately improve the resilience of investment portfolios and decision-making processes to what could soon be a more volatile environment. "The Inevitable Policy Response: When, What and How; Policy pathways to below 2° and estimating the financial impacts," Vivideconomics (September 2018), https://www.unpri.org/download?ac=5368.
[62] Portfolio Decarbonization Coalition, https://unepfi.org/pdc/.

information to lenders, insurers, and investors. The TCFD released its final recommendations report in June 2017.

The Transition Pathway Initiative (TPI). The Transition Pathway Initiative (TPI) is a global investor initiative that assesses companies' preparedness for the transition to a low-carbon economy by evaluating companies' management of GHG emissions, management of climate-related risks and opportunities, how planned or expected future carbon performance compares to the Paris Agreement, and by publishing the analyses through a publicly-available tool hosted by its academic partner, the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science.[63] The TPI was launched in January 2017 and is currently supported by investors with over $14 trillion AUM (as of 2019).[64]

Sustainable Energy Investment (SEI) Metrics. In 2018, SEI Metrics tested $500 billion of equity for 2° C alignment. The project was recently relaunched as Paris Agreement Capital Transition Assessment (PACTA), which aims to measure the current and future alignment of investment portfolios with a 2° C scenario analysis, allowing investors to measure climate performance and address the challenge of shifting capital towards clean energy investments. Since its launch, over 2,000 portfolios have been tested for 2° C alignment with over $3 trillion in assets under management. **Of the 25% of surveyed investors that SEI involved in the road-test, 88% said they were likely or very likely to use the assessment in portfolio management, engagement, and/or investment mandate design**.[65]

International Standards Organization (ISO). In 2019, the International Standards Organization began developing a climate finance standard, ISO 14097, which will track the impact of investment decisions on GHG emissions, measure the alignment of investment and financing decisions with low-carbon transition pathways and the Paris Agreement, and identify the risk from international climate targets or national climate policies to financial value for asset owners. The standard will help define benchmarks for decarbonization pathways and goals, and track progress of investment portfolios and financing activities against those benchmarks; identify methodologies for the definition of science-based targets for investment portfolios; and develop metrics for tracking progress.[66]

There are numerous indicia of the financial value at risk associated with climate change in these comments and in others submitted on the rulemaking record. For example, an estimated $30 trillion in global damages can be avoided simply by maintaining warming under 1.5° C rather than 2° C.[67] The capital markets have begun to register and implement

[63] Transition Pathway Initiative, Overview, https://www.transitionpathwayinitiative.org/tpi/overview.
[64] Simon Dietz, "Transition Pathway Initiative (TPI) Annual State of Transition Report", *Transition Pathway Initiative*, 2019. http://www.lse.ac.uk/GranthamInstitute/tpi/wp-content/uploads/2019/07/TPI-State-of-Transition-Summit-presentation-20190712.pdf.
[65] SEI Metrics Project, https://2degrees-investing.org/sei-metrics/. In 2017, the model was expanded to corporate bonds and credit, as well as a broader range of sectors.
[66] ISO, ISO/CS 14097, https://www.iso.org/standard/72433.html.
[67] Damian Carrington, "Hitting Toughest Climate Target Will Save World $30tn in Damages, Analysis Shows", *The*

this mandate by including carbon risk in portfolio analysis and, through engagements with portfolio companies, requesting disclosure and improved performance in aligning company emissions with the global climate goal. This includes well-known initiatives like TCFD, and lesser-known efforts to develop new accounting standards associated with carbon-related risks.

Researchers have studied the impact of shareholder proposals on climate change related disclosures and found that shareholder activism is eliciting greater disclosure of firms' exposure to climate change risks. The researchers also found that companies that voluntarily disclose climate change risk following environmental shareholder activism also achieve a higher valuation, with post disclosure valuation increasing by 4.8-4.9%.[68]

There are numerous examples of science-based targets (SBTs) improving companies' returns due to efforts to increase energy efficiency in order to meet GHG emission goals. For example:

- Honeywell reports in its 2015 Climate Disclosure Project (CDP) response that it has projects related to energy efficiency underway that will result in annual savings exceeding $8 million, all with payback periods of 3 years or less.

- In 2013, CDP found that four out of five companies earn a higher return on carbon reduction investments than on their overall corporate capital investments, and that energy efficiency improvements earned an average return on investment of 196%, with an average payback period between two and three years.[69]

The converse is also true – not only does strong climate disclosure help companies, but poor performance is expensive. The risk of litigation runs high in the absence of shareholder proposals, for example, Exxon faces litigation in multiple states over its climate performance, with plaintiffs bringing claims of securities fraud, violations of consumer protection, and arguing that the company intentionally masked the impact of global warming on Exxon's finances.[70] More than a dozen "public nuisance" lawsuits seek to hold energy companies responsible for billions of taxpayer dollars spent on acclimating to a warming world, or picking up the pieces following unprecedented hurricanes, floods and wildfires. Rhode Island filed such a complaint last year, while a dozen city governments from California, Washington, Colorado, Maryland and New York have also sued. Regardless of whether these claims succeed in the courts, the companies must expend considerable time, energy, and funds responding to this wave of litigation. [71]

Guardian, May 23, 2018. https://www.theguardian.com/environment/2018/may/23/hitting-toughest-climate-target-will-save-world-30tn-in-damages-analysis-shows.

[68] Caroline Flammer, Michael W. Toffel, and Kala Viswanthan, "Shareholder Activism and Firms' Voluntary Disclosure of Climate Change Risks," *Harvard Business School*, Working Paper 20-049 (October 2019), p. 26.

[69] These examples taken from supporting statement of a shareholder proposal at Emerson Electric. The proposal's full text is available online at: http://www.iccr.org/sites/default/files/page_attachments/emerson_-_ghg_reduction_sbt.pdf.

[70] Erik Larson, "Exxon's climate trial is over in New York. But the legal war is just beginning.", *LA Times*, November 15, 2019. https://www.latimes.com/business/story/2019-11-15/exxons-climate-change-trial.

[71] *Id.*

2. Climate change: Private Ordering Through Shareholder Proposals

One key approach of shareholder proposals in addressing climate change risk is asking companies to explore the establishment of science-based targets for their GHG production. According to the Science Based Targets initiative (SBT), a collaboration between the Carbon Disclosure Project, World Resources Institute (WRI), the World Wide Fund for Nature (WWF), and the United Nations Global Compact (UNGC), science-based targets "provide companies with a clearly defined pathway to future-proof growth by specifying how much and how quickly they need to reduce their greenhouse gas emissions."[72] Activity in support of these proposals was boosted in December 2017, when investors launched *Climate Action 100+*, an initiative which is backed by more than 370 investors with more than $35 trillion in AUM to date, including 87 North American investors. The group of investors has a focus list of 161 companies that are the world's largest GHG emitters, including 53 companies based in North America.[73]

Shareholders have filed proposals urging their companies to establish SBTs, encouraging their companies to set goals that align with the Paris Climate Accord and to keep global temperature rise below 2 degrees Celsius. There are numerous instances where shareholder proposals seeking adoption of science-based targets have spurred company action. This has occurred where a shareholder proposal seeking SBT received a minority vote, where shareholder proposals were withdrawn following an agreement, and by creating an atmosphere in which strong support for shareholder proposals persuaded some companies to adopt the goals rather than waiting for a shareholder vote. All told, in the United States, about 60 companies completed validated science-based targets with the organization SBT Initiative between September 2015 and December 2019.[74] As of January 2020, another 73 companies have committed to do so.[75]

In contrast to the Commission's steep thresholds for interpretation of proposal "success," a significantly lower amount than 50% shareholder support has prompted company action on SBTs. For example in 2017, Verizon shareholders filed a proposal titled, "Report on Feasability of Adopting GHG Emissions Targets."[76] Neither Glass Lewis nor ISS supported the proposal,

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[72] Science Based Target Initiative, What Is a Science Based Target, http://sciencebasedtargets.org/what-is-a-science-based-target/.
[73] Climate Action 100+, Global Investors Driving Business Transition, http://www.climateaction100.org.
[74] Companies working with the Science Based Targets Initiative (SBT) make a commitment to develop greenhouse gas emissions reduction targets within 24 months of the submission of their commitment letter. Companies can choose to develop their targets within one of two temperature goals, either "1.5 degrees" or "well-below 2 degrees" (SBT previously supported target-setting in line with a 2-degree goal, but this option was eliminated as of October 2019). The Initiative assesses companies' Scope 1 and Scope 2 targets - plans to address direct greenhouse gas emissions from owned or controlled sources (Scope 1), and indirect greenhouse gas emissions from the generation of purchased energy (Scope 2). Its assessment does not include a classification of full supply chain indirect emissions - also known as Scope 3 emissions. Once SBT has validated a company's proposed targets, the targets are announced and the company showcased on the Science Based Targets website. https://sciencebasedtargets.org/step-by-step-guide/. At the moment, as of January 2020, Science Based Targets reports that **732** companies around the world are taking science-based climate action and **312** companies have SBT approved science-based targets. https://sciencebasedtargets.org/companies-taking-action/.
[75] Science Based Target Initiative, Companies Taking Action. https://sciencebasedtargets.org/companies-taking-action/.
[76] Trillium Asset Management, Verizon – Greenhouse Gas Emissions, https://trilliuminvest.com/shareholder-proposal/verizon-greenhouse-gas-emissions-2017/.

and perhaps as a result of the impact of those recommendations, it garnered just 15% of the vote.[77] However, in spite of the lack of majority vote on this matter, the company committed to creating SBTs as of September 2019, two years later.[78] Maintaining the current shareholder resolution process opens up space for precisely this type of cost-effective, forward-looking proposal to take shape, ultimately benefiting investors and the general public.

Other proposal withdrawals have similarly played a critical role in shareholders addressing climate risk. For example, Oxfam withdraw a General Mills shareholder proposal in 2014 following the company's agreement to be more transparent about its scope 3 GHG emissions.[79] The commitments announced made it the first major food and beverage company to pledge to implement long-term science-based targets to cut emissions across all of its operations and supply chains with the goal of keeping global temperature rise below 2°C.. Importantly, these targets include a clear commitment to reduce "Scope 3" GHG emissions, where 92% of the company's value chain climate pollution occurs.

Our organization publicly praised General Mills, calling its commitment "a bold step to be an industry leader in addressing the clear and present threat climate change poses to our food system."[80] The press favorably covered the story, providing a public reputational boost for General Mills.[81] As with so many other examples in this comment, this example highlights a win-win-win scenario: the company received public praise, shareholders reap the rewards of investing in a company that can advertise itself as an industry leader, and the general public benefits from lower GHG emissions.

II. ASSESSING REQUIREMENTS FOR COMMISSION ANALYSIS OF PROPOSED RULE CHANGES IMPACT ON PRIVATE ORDERING

A. Historical Context: the Commission and Private Ordering

The Commission has a long tradition of recognizing the importance of private ordering, including the important role of the shareholder proposal process. For example, Commission Chair Mary Jo White gave a speech in 2016 describing the prominent examples of market-wide success in private ordering, including the near disappearance of staggered boards, majority vote standards becoming the norm across the S&P 500, and the recent successes of proxy access proposals resulting in 35% of the S&P 500 adopting proxy access, compared to 1% two years ago.[82] For each of these examples of private ordering, the shareholder proposal process was a

[77] Trillium Asset Management, Verizon, *supra* note 76.
[78] Edie, Verizon Targets Carbon Neutrality by 2035, https://www.edie.net/news/6/Verizon-targets-carbon-neutrality-by-2035/.
[79] Irit Tamir, Investors to Companies: Going Green is Good for Business, Oxfam, https://politicsofpoverty.oxfamamerica.org/2014/09/investors-companies-going-green-good-business/.
[80] Oxfam America, General Mills Takes Bold Stand for Climate Action, https://www.oxfamamerica.org/press/general-mills-takes-bold-stand-for-climate-action/.
[81] Marc Gunther, "General Mills Joins Climate Change Fight and Requires Pledges from Suppliers Too," *The Guardian*, July 28, 2014. https://www.theguardian.com/sustainable-business/2014/jul/28/general-mills-climate-change-lobbying-suppliers-kelloggs-oxfam.
[82] Mary Jo White, Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and

pivotal engine for change.

More recently, on February 8, 2019, SEC Commissioner Hester Peirce delivered a keynote speech a public symposium on "Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for Effective Regulation." Peirce quoted from Professor Thomas Lambert's book *How to Regulate: A Guide for Policymakers* in her speech:

> Private ordering is the baseline because, as the book explains, 'when property rights are well defined and transferable, and individuals are able to strike trustworthy exchange agreements, markets will emerge and channel productive resources to ... [the] production of the goods and services individuals value most.' Regulation involves overruling private arrangements, substituting a government mandate, and imposing a penalty of some sort on people who fail to comply with that mandate. Given the potential consequences of doing these things, the regulator and the people on whose behalf it regulates must think carefully about whether and how regulation should be employed. [83]

This perspective is salient to the present rulemaking, which has the potential effect of significantly reducing the private sector's ability to engage in private ordering. The evidence, including the materials included in this letter, provide overwhelming documentation that reducing the applicability of the rule would quite clearly have the effect of reducing the private ordering capacity at corporations. Because investors have for decades now played a pivotal role in advancing ESG disclosure and performance through this technique, the SEC's proposed rule would be counterproductive.

The Commission has not proposed alternative mechanisms that would take the place of the hundreds of shareholder proposals that would be blocked. Instead of protecting investor interests, this rulemaking would force impacted shareholders and stakeholders into less efficient and more adversarial arenas to bring corporate malfeasance and downside risk in line, which will be elaborated below.

One of the most recent times in which the Commission significantly debated an issue of private ordering was when it attempted to create a general rule of proxy access in June 2009. Ironically, corporate commenters asserted that **rather than establishing a general rule of proxy access, the Commission should allow private ordering (through shareholder proposals) to set the terms** of proxy access on a company-by-company basis:

> Corporate governance practices have changed over the past several years, largely due to 'private ordering' which is based on the willingness of companies to engage in dialogue with their shareholders on issues to determine the appropriate course of action for the company. **Private ordering has led to significant changes in corporate governance policies** including with respect to majority voting in uncontested director elections, cumulative voting rights, the significant

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Sustainability, June 27, 2016, https://www.sec.gov/news/speech/chair-white-icgn-speech.html

[83] Hester Peirce, Keynote Speech: Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for Effective Regulation," University of Missouri, (Feb. 8, 2019) https://www.sec.gov/news/speech/peirce-regulation-view-inside-machine.

> decline in anti-takeover measures and similar matters. **Each of these initiatives has been, and continues to be, implemented without the need for federal prescriptive action**. We believe that with the adoption of the proposed amendments to Rule 14a-8(i)(8), proxy access, like these other initiatives, would become widely available in public companies where shareholders wanted, or thought they needed, those rights. Thus, the prudent approach would be for the SEC to wait and give the private ordering process an opportunity to succeed before imposing a federal solution.[84]

Many commenters on the proxy access rulemaking docket pointed out that proxy access was an important and valuable mechanism, because it enabled the owners of companies to avoid the costs of waging separate proxy contests when they are dissatisfied with the performance of a corporate board and want to run their own candidates for election. However, private ordering - as opposed to imposing the universal access proposed by the Commission - was considered to offer shareholders and companies the flexibility to pursue initiatives for proxy access, and for boards to implement such access, only at those firms and in those situations where proxy access was actually expected to be value-enhancing. **One comment from a major corporation noted, "In our experience, state law and maintaining open and effective lines of communication with our shareholders has been, and will continue to be, the best method of implementing corporate governance reforms.** We believe the simplicity and other perceived benefits of applying one federal proxy access standard to all companies regardless of their specific circumstances are far outweighed by the negative consequences of adopting such an approach, including a disregard for shareholder preference, significant disruption in board and management focus, increased costs and a further decrease in the willingness of qualified board candidates to sit on boards."[85]

The American Bar Association also suggested that a private ordering solution was a preferable approach: "Unlike a Commission rule, which can only be interpreted and therefore cannot be readily adaptable and responsive to changes at individual companies, private ordering permits these changes in circumstances to be dealt with in an efficient and timely manner."[86]

The proposal to establish a general rule requiring all companies to allow proxy access was adopted on August 25, 2010, and the SEC accordingly adopted Rule 14a-11, mandating proxy access at all public companies. The new Rule provided that any shareholder or shareholder group that held more than 3% of a public company's shares for more than three years would be eligible to nominate candidates for up to 25% of the company's board seats. However, the rule was vacated on July 22, 2011 by the United States Court of Appeals for the District of Columbia, which found the SEC's action "arbitrary and capricious" for failing to adequately assess the economic effects of the new rule.[87] In the opinion, the Court stated:

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[84] Ryder System, Inc., Comment Letter Re: Facilitating Shareholder Director Nominations, Release Nos. 33-9046; 34-60089; IC-28765. File No. S7-10-09 (June 10, 2009), August 17, 2009.
[85] *Id.* Emphasis added.
[86] American Bar Association, Comment Letter Re: File No. S7-10-09, Release Nos. 33-9046; 34-60089; IC-28765, Facilitating Shareholder Director Nominations, August 31, 2009.
[87] *Business Roundtable v. Securities & Exchange Commission*, 647 F.3d 1153 (D.C. Cir. 2011).

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again--as it did most recently in American Equity Investment Life Insurance Company v. SEC, 613 F.3d 166, 167-68 (D.C. Cir. 2010), and before that in Chamber of Commerce, 412 F.3d at 136--adequately to assess the economic effects of a new rule. Here the Commission **inconsistently and opportunistically framed the costs and benefits of the rule;** failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.[88]

While the rule that would have required proxy access at all companies was vacated, it left in place the Commission rule allowing investors to vote to establish proxy access at their companies on a case-by-case basis. In many private ordering processes, third-party institutions also provide an impetus for building best practices in the market, along with the nudge provided by shareholder proposals. In one example, as proxy access proposals began to win at numerous companies, the Council of Institutional Investors developed a "Proxy Access: Best Practices" guide[89] to provide a framework for companies to adopt a shareowner-supportable proxy access bylaw provision and released "Proxy Access by Private Ordering" to provide a summary of prevailing practices.[90]

When the rule was vacated by the court, the SEC was admonished by the judge for not thoroughly analyzing Rule 14a-11's effect upon efficiency, competition, and capital formation. We believe the same logic would apply to the current rulemaking in its poorly rationalized efforts to roll back the rights of shareholders to submit and resubmit proposals - that the negative and costly effect on efficiency, corporate welfare and public welfare are not justifiable by the available evidence.

The Commission's rules set the stage for private ordering by establishing a process that creates engagement between companies and investors that would not exist in the absence of the right to place proposals on the proxy. **Both SEC and Delaware law place limits on the degree to which companies can *bargain away* the rights of investors**. The right to place proposals on the proxy statement is a core element of those rights that are structurally significant to the market's capacity for private ordering. **Curtailing these activities significantly, as the Commission rulemaking proposes, comes with significant downsides for the economy**. As Professor Joe Pitts notes, "NGOs and advocacy organizations exploiting these more fluid boundaries between legal and social norms may at times appear as adversaries, but may also be serving in effect as unpaid consultants to the corporation, **playing a vital social role that inures to the business's long-term benefit by explicating the social expectations** that form the

[88] *Id.* at 1148-1149 (emphasis added).
[89] "Proxy Access: Best Practices", Council of Institutional Investors Research and Education Fund publications (August 2015). https://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf.
[90] "Proxy Access By Private Ordering", Council of Institutional Investors Research and Education Fund publications (February 2017). https://www.cii.org/files/publications/misc/02_02_17_proxy_access_private_ordering_final.pdf.

contemporary business milieu."[91] These sorts of benefits will be further detailed below. At a minimum, the Commission must conduct a far better economic analysis to calculate the related losses to private ordering imposed by the combined rules.

The history of the shareholder proposal rule revision process is, as one astute observer describes, a continuing series of carve outs of the general rule and right of shareholders to file proposals – each time made at the behest of companies that are trying to silence investor voices, and each time against a backdrop of only anecdotal evidence of abuse.[92]

Today however, the rollback of shareholder rights proposed by the Commission will likely face a steeper legal test. As a result of litigation brought against the Securities and Exchange Commission by the US Chamber of Commerce and the Business Roundtable, the courts have established rigorous legal doctrines for evaluation of an SEC rulemaking that may be instructive in considering the current matter.

As we will discuss further below, in the event the Commission moves forward with the Proposed Rulemaking, the court decisions require consistent, coherent analysis of the major impacts of a rulemaking – assessment of the costs as well as the benefits of the rule change. The rulemaking proposal will not stand up to scrutiny under modern economic analysis requirements applicable to the Commission, nor is it consistent with the Commission's 2012 internal guidance on economic analysis that is supposed to be conducted prior to issuing a Proposed Rule.

B. Measuring the Proposed Rule's Impact, Dampening of Private Ordering

1. Overall Data: Projected Outcomes of the Proposed Rule on Resolutions

The Commission has projected that the Proposed Rulemaking may reduce the number of shareholder proposals submitted to companies by 37%.[93] We believe this projection may be lower than the actual outcome. We encourage the Commission to refine this estimate by integrating proposals that are submitted and then withdrawn prior to a company's meeting or even prior to a no action request.

To assess the impact of the Proposed Rule on private ordering, it is important for the Commission's economic analysis to look backwards in time to consider how the Proposed Rule, were it in place a decade ago, would have shaped the outcomes of shareholder proposals and engagement. Looking at the topics of proposals that would have been excluded based solely on failure to meet the proposed 5%, 15% and 25% re-filing thresholds, we can see that the majority of the proposals that would have been excluded focused on topics of multi-year efforts by shareholders to bring companies up to speed on science and changing consumer and employee

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[91] Joe Pitt, Business, *Human Rights & the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 Berkeley J. Int'l L. 479, 488 (2012).

[92] Robert J. Brown, "The Evolving Role of Rule 14A-8 in the Corporate Governance Process" (April 20, 2016). Denver University Law Review Online, Vol. 93, p. 151, 2016; U Denver Legal Studies Research Paper No. 16-16. Available at SSRN: https://ssrn.com/abstract=2767712.

[93] Rulemaking proposal on shareholder proposals, table regarding Paperwork Reduction Act includes calculations for anticipated reduced proposal submissions, pages 162- 165.

expectations, and to improve disclosure and performance on issues that materially affected many firms' futures.

Recent analysis published in Standard & Poor's Global Market Intelligence, based on work performed by the Sustainable Investments Institute, indicates that hundreds of proposals would have been blocked over the last decade if the Proposed Rule on resubmissions had been in effect. As demonstrated in the summary graph below, of the 2,019 ESG proposals voted in the past decade, 30% would have been excluded for failure to meet the proposed 5%, 15% and 25% thresholds.

Resolutions that proposed rule would block

Topic	Total resolutions voted	Resolutions that failed proposed 5%, 15% and 25% thresholds	Percentage of failed resolutions per topic
Social	**1,199**	**378**	**32%**
Political activity	711	183	26%
Human rights	188	78	41%
Workplace diversity	98	28	29%
Health	35	24	69%
Decent work	93	24	26%
Animal welfare	31	23	74%
Ethical finance	21	10	48%
Media	22	8	36%
Environmental	**520**	**145**	**28%**
Climate change	343	73	21%
Industrial agriculture	79	41	52%
Environmental management	98	31	32%
Governance	**300**	**91**	**30%**
Board diversity, expertise, topic oversight	124	57	46%
Sustainability oversight and management	176	34	19%
Grand total	**2,019**	**614**	**30%**

Chart applies hypothetical scenario in which proposed rule was finalized in 2009 and applied starting in 2010.
Covers resolutions voted on from the beginning of 2010 through Nov. 18, 2019.
Not all governance-related resolutions included.
Includes resolutions that would fail under proposed momentum requirement.
Includes resolutions that would have failed under existing threshold requirements.
Source: Sustainable Investments Institute

Source: Esther Whieldon,"SEC Proposed Rule would have blocked 614 ESG resolutions since 2010, data shows", S&P Global Market Intelligence, January 6, 2020.

Importantly, this data characterizes only a fraction of the damage done by reducing shareholder submissions by the proposed resubmissions thresholds, because it reflects only proposals that were ***voted on*** at corporate annual meetings. The data does not reflect the numerous additional proposals that were submitted to companies each year but never voted on, thanks to effective engagement between shareholders and companies resulting in proposals withdrawn via negotiation. Since companies frequently agree to act on requests made in ESG shareholder proposals, the lost value of these "behind the scenes" proposals, that are a vital part of the shareholder proposal ecosystem, must also be considered in evaluation of the Proposed Rule.

The Commission in its Paperwork Reduction Act calculations has suggested that the proposed changes to *filing thresholds* alone would reduce proposals by 28%. Elsewhere it estimates that this reduction could be as high as 56%. This change would be above and beyond the reduction in proposal consideration shown above, based on *resubmission threshold* changes.

Furthermore, Ceres, in its report, *The Business Case for Shareholder* Proposals, notes:

> An average of 37.5 percent of shareholder proposals related to climate change during the 2012-2016 proxy seasons were withdrawn by filers in response to the company agreeing in some form to the request. Withdrawal rates for some other topics is far higher. The New York City Comptroller's Office withdrew 80 percent of the 45 proxy access resolutions it filed during the 2016 and 2017 proxy seasons due to commitments by 36 companies. These examples of high 'agreement rates' suggest that many companies find benefits in committing to act on shareholder proposals before they go to a vote.[94]

In order to effectively calculate the dampening of the private ordering impact posed by the Proposed Rulemaking, the Commission would need to calculate the **total losses to deliberation and engagement** posed by disqualifying shareholder proposals from being voted upon at annual meetings, and the number of engagements that would be thwarted or never initiated by preventing the filing of shareholder proposals. From these figures, the Commission should then develop estimates of the level of value at risk, including risks such as bankruptcies, systemic risk, externalities, and social license and reputation risk.

2. Costs of Alternatives to Private Ordering for Redress of Investor and Stakeholder Concern are High

The Commission's economic analysis for the Proposed Rule must consider the costs shareholders and stakeholders will incur from pursuing alternatives to private ordering that will likely result from the rule. There is significant evidence to suggest that the shareholder proposal private ordering process for advancing corporate practices relative to ESG issues is one of the

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[94] "The Business Case for the Current SEC Shareholder Proposal Process", *Ceres, ICCR, and US SIF*, April 2017, p. 11.

most efficient and least costly paths for encouraging corporations to adjust to changing societal demands and circumstances. Blocking 37% or more of shareholder proposals on critical ESG matters will result in many of those interests seeking redress in other forums. Since the current private ordering system is relatively efficient, dampening the efficacy of this system will inevitably increase costs to both companies and the economy.

For instance, the elimination of a portion of shareholder proposals might be construed to be a "leave it to state law" solution. As Professor Lambert has explained in his book "How to Regulate":

> The biggest problem with state law solutions to agency costs in the corporate context lies not in the fiduciary duties themselves, but in the primary means of enforcing them: shareholder lawsuits. The fundamental difficulty is that the relationship between the plaintiffs' lawyer and the shareholders is itself a source of agency costs.[95]

In reducing the private ordering capacity of the shareholder proposal process, the Commission must consider the relative costs to society that will be imposed by alternatives to that private ordering, **including value placed at risk for investors, as well as the costs associated with securities litigation, regulatory responses by the states and books and records requests**.

Securities litigation due to failed or fraudulent disclosure by public companies is pervasive – and is guaranteed to increase with the introduction of this rule. For instance, in 2017 the Wall Street Journal reported that:

> 131 class-action securities suits were filed in federal court in the first six months of the year — a historic high, according to data from Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse.
>
> The volume, which doesn't include suits challenging mergers and acquisitions, is higher than in any equivalent period since the Clearinghouse began tracking data in 1996, after the passage of landmark securities-litigation legislation. Under securities laws, investors can sue to recoup losses after a stock drops by proving a company or its employees fraudulently misstated or withheld information that would have been material to buying or selling shares.
>
> * * *
>
> At the current pace, 9.5% of the 4,411 U.S. exchange-listed companies will face a securities suit this year, including merger suits, according to Cornerstone—the highest rate since 1997. That would be up from 5.6% last year.[96]

Litigation is not the most efficient way of resolving a company's issues. A 2008 analysis found

[95] Thomas A. Lambert, *How to Regulate*, Cambridge University Press, 2017, p. 134.
[96] Sara Randazzo, "Companies Face Record Number of Shareholder Lawsuits", *Wall Street Journal*, August 21, 2017.

that "the high transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases."[97] Noting that few empirical studies document the costs and utility of discovery, and that confidentiality concerns and costs prevent companies from providing relevant data to researchers, researchers developed a Litigation Cost Survey to assess costs related to major cases (defined as cases with litigation costs greater than $250,000 reported by survey respondents) to try to close this empirical data gap. The survey, distributed to the Fortune 200, found that litigation costs continued to rise and were consuming an increasing percentage of corporate revenue:

- The average outside litigation cost per respondent was nearly $115 million in 2008, up 73% from $66 million in 2000. This represents an average increase of 9 percent each year.
- For the 20 companies providing data on this issue for the full survey period, average outside litigation costs were $140 million in 2008, an increase of 112 percent from $66 million in 2000.
- Between 2000 and 2008, average annual litigation costs as a percent of revenues increased 78 percent for the 14 companies providing data on average litigation costs as a percent of revenues for the full survey period.
- Increases in hourly rates do not appear to be driving the increase in litigation costs, as the available data show relatively little change in outside legal fees over time.[98]

Overall, the survey found that companies are spending billions of dollars annually on litigation. Litigation transaction costs, independent of judgments awarded in disputes or settlements reached between parties, constitute a significant economic cost of doing business in the United States.[99] While not all of this litigation is attributable to mismanagement of ESG type issues, a significant portion is related ESG mismanagement. For instance, legal actions responding to consumer fraud, workplace discrimination, environmental liability, and product toxicity torts make a significant portion of these costly lawsuits. Truncating the private ordering process with the Proposed Rulemaking will inevitably produce an increase in such litigation and liability costs.

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[97] "Litigation Cost Survey of Major Companies", Statement Submitted by Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, For Presentation to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, 2010 Conference on Civil Litigation, Duke Law School, May 10-11, 2010.

[98] *Id.*

[99] See: Institute for the Advancement of the American Legal System, Electronic Discovery: A View from the Front Lines, pp. 3-4, 25 (2008) (e-discovery costs are about $3.5 million for a typical mid-size lawsuit); Oracle Corp. v. SAP AG, 2008 U.S. Dist. Lexis 88319, pp.4-5 (N.D. Cal. 2008) (court refuses to order discovery of 165 document custodians at cost of $16.5 million, apart from other discovery costs from searches of centralized repositories and targeted searches, not to mention lay and expert depositions and interrogatories); In re Fannie Mae Securities Litigation, 552 F.3d 814, 817 (D.C. Cir. 2009) ("The total amount [nonparty agency] spent on the individual defendants' discovery requests eventually reached over $6 million, more than 9 percent of the agency's entire annual budget".); Medtronic v. Michelson, 229 F.R.D. 550, 557-8 (W.D. Tenn. 2003) (costs of privilege review $16.5 million to $70 million); and Murphy Oil USA v. Fluor Daniel, Inc., 2002 WL 246439, *2 (E.D. La. 2002) (in deciding a motion to compel and cost shift, court considered costs to produce ESI which included over $6.2 million for vendor restoration of backup email tapes).

And it's not only companies whose additional costs must be catalogued: the SEC failed to account for the **significant costs to proponents of complying with the new rules,** including:

> (a) the increased costs of buying/holding stock to meet the new eligibility thresholds (and the accompanying market distortion);
> (b) the costs of alternative means of engaging with management or bringing pressure to bear, such as media campaigns;
> (c) the costs to investors of traveling to AGMs, now that they can no longer collaborate with other investors to present resolutions; and
> (d) the costs of additional efforts to get voter support to ensure that proposals clear the resubmission thresholds.

3. Excluding Small Proponents Weakens Stewardship and Private Ordering Due to Free Rider Phenomenon

In our experience, companies often decline to engage with smaller investors until a shareholder proposal is filed. The "small" proponents that the Commission seems inclined to shut out play a pivotal role in the ecosystem of investment relations, because they mitigate the tendency of many other shareholders to engage in "free riding" and underinvestment in stewardship. As Lambert has noted:

> Shareholders tend to be rationally ignorant of what their agents are doing because each shareholder owns such a small portion of the stock that his benefit from learning what the agent is doing is too small to justify his cost of becoming informed. Shareholder monitoring is subject to the free-rider problem because any shareholder who does monitor and thereby hold his agents in check confers benefits on all shareholders. Each shareholder may hold off on monitoring, hoping to take a free ride on some other shareholder's monitoring effort.[100]

In the current investing ecosystem, the shareholder proposal process serves as a corrective to this tendency by empowering smaller investors with special expertise to file proposals that surface key areas of concern at their portfolio companies. It is well established to investors that in many instances, companies declined to productively engage with investors raising ESG concerns until a proposal is filed. Since the Commission's analysis indicates a substantial drop of 37% of proposal submissions would result from its Proposed Rulemaking, principally from the changes to filing and resubmission thresholds, the Commission must calculate the loss to both companies and the economy in curtailing a significant amount of private ordering activity that serves as a corrective to the free riders.

4. Private Ordering Through Shareholder Proposals is Addressing Critical Data Needs of Investors

[100] Thomas A. Lambert, *How to Regulate*, Cambridge University Press, 2017, p. 134.

Recent history has shown that investors want more, not less, ESG disclosure that shareholder proposals typically seek. In 2016, the Commission issued a Concept Release regarding potential reforms of Regulation S-K, the Commission rule which relates to core disclosures regarding information relevant to a company's prospects. [101] The invitation for comments for these potential reforms yielded a groundswell of comments asserting that the commission needs to enhance ESG related disclosures to meet the needs of the market. Of the 227 original comment letters responding to the comment release, 66% discussed sustainability disclosures. Of the 149 public comment letters that discussed sustainability, more than half were from investors and investor groups with an aggregate AUM of over $168 trillion. 85% of sustainability-related letters call for improved disclosure of sustainability factors in SEC filings.[102]

The Commission has not adopted the shareholder recommendations on this issue, nor shown significant commitment or initiative to fulfill this market demand for consistent ESG data. In fact, on January 30, 2020 the Commission issued its proposed amendments to Regulation S-K. In spite of the groundswell of investor interest in improving ESG disclosure through the regulation, the Proposed Rulemaking fails to even *mention* ESG or sustainability - it even seems to ignore the investor sentiment in favor of more uniform disclosure in this area.[103]

Therefore, the Commission is forcing any **progress on ESG data disclosure practices and standards to be determined by the market through private ordering, principally through shareholder proposals.** Thus, eliminating a substantial portion of shareholder proposals will in reality have the impact of disrupting progress on an issue of substantial investor concern and interest, and is inconsistent with the Commission's other regulatory activity.

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B. The Commission's Legal Obligations

The dampening effect of the Proposed Rulemaking on private ordering is an important issue that the Commission must consider in its economic and efficiency analyses. The evidence we have presented in this letter demonstrates that the potential for dampening private ordering by stifling shareholder proposals is a substantial impact of the Proposed Rulemaking. In addition to the statutory provisions outlined above, it bears emphasis that the courts view Commission rulemaking action as arbitrary when it fails to adequately address or respond to comments on "an important aspect of the problem."[104]

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[101] BUSINESS AND FINANCIAL DISCLOSURE REQUIRED BY REGULATION S-K, 17 CFR Parts 210, 229, 230, 232, 239, 240 and 249, Release No. 33-10064; 34-77599; File No. S7-06-16, RIN 3235-AL78, Securities and Exchange Commission, April 13, 2016.
https://www.sec.gov/rules/concept/2016/33-10064.pdf.

[102] Jean Rogers, *Investors Ask SEC for Better Sustainability Disclosure*, SASB, August 16, 2016, *available at* https://www.linkedin.com/pulse/investors-ask-sec-better-sustainability-disclosure-jean-rogers/.

[103] SEC, *Proposal to Eliminate Item 301 of Regulation S-K, Selected Financial Data and Item 302 of Regulation S-K, Supplementary Financial Information*, https://www.sec.gov/rules/proposed/2020/33-10750.pdf.

[104] *Business Roundtable v. Securities and Exchange Commission,* 647 F.3d 1144 (DC Cir. 2011).

We note that the Commission has not calculated the losses and inefficiencies associated with dampening of the private ordering process by the stifling of shareholder proposals.

The courts have further noted that if the Commission believes that no "reliable basis" exists for estimating costs of a rule, then it must "hazard a guess" and, at a minimum, estimate the costs to one particular company.[105]

In this instance, there is sufficient evidence on the record to find a "reliable basis" for estimating the costs of the rule. Therefore, the Commission must develop reasonable estimates of the losses to companies and shareholders, and to efficiency, associated with the shareholder proposals blocked by the Proposed Rules.

1. Public Interest and Efficiency: The Commission is Obliged to Consider Public Interest and Efficiency Impacts Caused by Dampening of Private Ordering

The Capital Markets Efficiency Act established the requirement that when "the Commission is engaged in rulemaking…. and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[106]

We believe that the *public interest* impact of the rulemaking that must be assessed by the Commission includes impact on stakeholders other than shareholders.

Moreover, the efficiency impact of encouraging private ordering is well-known, and economic analyses suggest that private ordering can maximize cost efficiency for all stakeholders--shareholders, the government and the public alike. This is because, when it comes to privately ordered systems, rules that are tailored to match a firm's circumstances can prove less costly for firms to adapt than if imposed externally.[107]

Under the Commission's existing proxy rules, shareholder proposals efficiently offer the opportunity for investors with information from the field to raise the visibility of emerging concerns – raising issues that the Board or management may optimistically assume "are working themselves out." As documented in this letter, in the absence of hundreds of shareholder proposals, shareholders and other stakeholders will be forced to resort to alternative, often less efficient mechanisms for resolving issues such as litigation.

2. Costs and Benefits: The Commission is Obliged to Consider Costs and Benefits of the Proposed Rule, Including Costs Associated with the Dampening

[105] *Chamber of Commerce of the United States of America v Securities and Exchange Commission*, 412 F.3d 133 (D.C. Cir. 2005) at 143.
[106] Capital Markets Efficiency Act of 1996 15 U.S.C. Sec 78 c(f).
[107] Anthony Ogus, Self Regulation - 9400, *Encyclopedia of Law & Economics* (1999), University of Manchester, page 596.

of Private Ordering

The Commission is required to consider costs and benefits of a Proposed Rule change in order to implement the Commission's 2012 "Current Guidance on Economic Analysis in SEC Rulemakings," whose intent is to allow the Commission "to meaningfully compare the proposed action with reasonable alternatives, including the alternative of not adopting a rule."[108] Among other things, that Guidance requires that the Commission "frame costs and benefits neutrally and consistently" and combine the economic analysis considering costs and benefits with consideration of the effects on efficiency, competition, and capital formation.[109]

Notably, the Commission has not identified *any* significant downside to "not adopting a rule." It does not identify any way in which the current situation is unsustainable, inefficient, or otherwise problematic. Indeed, if anything, the current rules seem to be having the desired effect of limiting proposals: the number of shareholder proposals has stayed relatively flat since 1997 and, SEC's data shows, generally *declined* since 2004.[110] The Commission therefore must explain what problems the present rules pose for the protection of investors, the public interest, efficiency, and the other goals of the Exchange Act.

3. Consistency: The Commission is Required to be Consistent in Analysis Related to Lost Efficiency Through Dampening of Private Ordering

There is a requirement for consistency in commission analysis of this issue as against other potential costs or benefits of the Proposed Rule. The Commission must apply a consistent method of calculating economic costs versus benefits of the shareholder proposal rule. Internal inconsistency in the rulemaking would be considered arbitrary.[111]

We note that the Commission in the rulemaking proposal estimated the cost-savings from the excluded shareholder proposals at $70.6 million by taking the highest available estimate of costs to a company and multiplying it across all companies. It does not explain why it accepts the highest estimate; it simply takes it as a given. With that as its approach, the judicially imposed requirement of consistency compels the Commission to use the highest plausible *loss* figures as well in estimating how dampening private ordering will affect cost-benefit and efficiency, based on this and other comments analyzing private ordering and the magnitude of value at risk.

4. OMB requirement for calculation of uncertainty is triggered by billions of dollars at risk in the current rulemaking

[108] Memorandum to Staff of the Rulewriting Divisions and Offices Re: Current Guidance on Economic Analysis in SEC Rulemakings, March 16, 2012, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.
[109] *Id.*
[110] 84 Fed. Reg. at 66,477.
[111] *Business Roundtable*, 647 F.3d at 1154. The court gave the example that the Commission cannot anticipate frequent use of its rule when estimating benefits, but assume infrequent use of the rule when estimating costs.

We have provided documentation in this comment that the economic amounts at stake in the rulemaking can be estimated in the range of billions, or even trillions of dollars. An "economically significant regulation"—defined as a regulation with annual economic effects of at least $100 million or meeting certain other criteria—must have an analysis that quantifies the benefits of the regulation and the alternatives considered.[112] Further, the order of magnitude of billions or trillions of dollars affected by this rulemaking at issue in this proposal triggers the requirement that a regulation with $1 billion or more in annual economic impact must have a formal analysis of uncertainties associated with the estimates.[113]

5. Commission Guidance Required More Economic Analysis Prior to Rule Proposal

The proposing release gave such scant attention to the lost benefits of shareholder proposals that would be excluded, that it did not comply with the Commission's internal guidance on economic analysis. That analysis states: "Proposing stage. The proposing release should include a substantially complete analysis of the most likely economic consequences of the rule proposal."[114]

6. Incorrect Information Provided to Commission Before Voting on Proposed Rule

At the November 5, 2019 Commission meeting, Chairman Clayton introduced the proposed amendments to the full Commission in advance of their vote. During his remarks, Chairman Clayton discussed the input that he had received while developing the proposal. He stated:

> we received almost 300 unique comment letters and helpful suggestions to improve our proxy voting system. Some of the letters that struck me the most came from long-term Main Street investors, including an Army veteran and a Marine veteran, a police officer, a retired teacher, a public servant, a single Mom, a couple of retirees who saved for retirement, all of whom expressed concerns about the current proxy process.[115]

As Bloomberg reported two weeks later, however, *every one* of those "letters that struck [Chairman Clayton] the most" was "the product of a misleading – and clumsy – public relations campaign by corporate interests.[116] Two of the seven "signatories" said that they never sent any letter at all; most of the others were relatives of staff at a single industry front group.

An agency cannot rely on comments that it knows to be "not based on actual experience"

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[112] Exec. Order No. 12,866 § 6(a)(3)(C).
[113] *OMB Circular A-4, 2003.*
[114] Memorandum: Current Guidance on Economic Analysis in SEC Rulemakings, From: RSFI and OGC, To: Staff of the Rulewriting Divisions and Offices (March 16, 2012).
[115] https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting#_ftnref8
[116] 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.

or “falsified.”[117] Here, the Commission was presented with falsified comments immediately before voting; indeed, it was told that those fake comments were some of the most important evidence before them. The Commission vote therefore cannot be regarded as sound, as some Commissioners may have had their votes affected by falsified evidence.

To address this serious procedural defect, the Commission should acknowledge on the record that several of the comments they previously considered were falsified, and that others to were coordinated by the same people who falsified them. It should then revote on the proposed rule. At an absolute minimum, the error should be disclosed to all Commissioners on the record before any vote on the Final Rule, to ensure that any lingering misimpression in any Commissioner’s mind owing to the deceptive campaign is eliminated.

III. RECOMMENDATIONS

Based on the defects in the current rulemaking, we believe that the Commission would be obliged to reissue a rule proposal with an adequate economic analysis before proceeding to a final rulemaking.

Toward completing a rule evaluation process, the Commission must evaluate, consider and compare the economic impact of eliminating a significant percentage of shareholder proposals - estimated at a reduction of 37% under the Proposed Rulemaking, versus the economic impact of making no change in the rule. As described in detail above, we believe the relative efficiency of private ordering conducted through the current shareholder proposal process allows companies to be responsive to shareholder concern and make meaningful progress on the environmental, social and governance matters that impact shareholders, stakeholders, companies and the economy at large, at least cost to companies and the economy. As we have documented above, shareholder engagement on ESG topics generates significant value for companies, investors, and the public welfare. The Commission should identify and quantify the lost value of eliminating a significant portion of proposals, attending to loss of efficiency and potential cost of shareholders and stakeholders engaging companies through alternative mechanisms, such as litigation.

In particular, the Commission should consider and contrast scenarios in which shareholder proposals surface highly material issues. As an example, if the rulemaking will, as projected by the Staff, result in the submission of 37% fewer proposals, we recommend that the Staff develop a calculation in which a portion of those excluded proposals could have surfaced material issues. For example, in the comments submitted by the Shareholder Rights Group proposals at Boeing, Wells Fargo, and Chevron that implicated billions of dollars of value at risk would have been excluded if the Proposed Rule had then been in effect. [118]

Even if these three examples were the only proposals in such a category, it would seem

[117] *Helicopter Ass’n v. FAA*, 722 F.3d 430, 436 (D.C. Cir. 2013).
[118] Sanford Lewis, Director, Shareholder Rights Group, Comments to record of current rulemaking, January 6, 2020.

that the savings associated with exclusion of all proposals would have been overshadowed by the loss to investors associated with excluding the proposals at the three companies. Therefore, the Commission would need to, at a minimum, demonstrate how the diminution in the private ordering capacity of the investment ecosystem would make sense from the standpoint of relative savings associated with fewer proposals.

CONCLUSION

The SEC's Proposed Rule has failed to consider the benefits that accrue to investors, the general public, and companies from the private ordering process that shareholder proposals encourage. As chronicled above, this has left the rulemaking process out of step with a host of legal obligations that the SEC must adhere to, and a review of recent caselaw reveals that the Proposed Rule's failure to include an evenhanded and methodical economic analysis means that the current rule would be unlikely to survive an APA challenge in court. Oxfam urges the SEC to reissue a new rule proposal that incorporates an accurate reflection of the costs and benefits of private ordering.

Respectfully submitted,

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Oxfam America