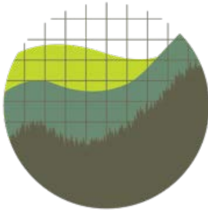

February 3, 2020

VIA ELECTRONIC SUBMISSION

Attn: Vanessa A. Countryman, Secretary, Securities and Exchange Commission

Re: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (File No. S7-23-19, RIN 3235-AM49)

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments to the Securities and Exchange Commission ("SEC") regarding a proposed rule that would impose limitations on investors' ability to file shareholder proposals ("Proposed Rule").[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Our comments are focused on the SEC's flawed economic analysis of the Proposed Rule, which fails to fully consider and account for the Rule's harm to shareholder welfare.

In particular, the SEC fails to:

- Fully consider and account for the significant harms of limiting shareholder monitoring, especially the Proposed Rule's outsized effect on environmental oversight;
- Consider that transparency of proxy voting records helps individual investors monitor their institutional investor agents;
- Explain why amendments to Rule 14a-8 are needed now, when passive investing is rising and the overall number of shareholder proposals is declining;
- Accurately interpret the importance of proposal withdrawals; and
- Accurately estimate the procedural cost savings of the Proposed Rule.

Background

Pursuant to the Securities and Exchange Act of 1934, companies with publicly-traded equities must comply with SEC Rule 14a-8, which requires the inclusion of shareholder proposals in issuer proxy statements, subject to certain limitations. The Proposed Rule seeks to heighten these limitations in several ways, most importantly by changing the ownership thresholds under Rule 14a-8(b) and resubmission thresholds under Rule 14a-8(i)(12).

[1] This document does not purport to present New York University School of Law's views, if any.

[2] Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, 84 Fed. Reg. 66,458 (Dec. 4, 2019) [hereinafter "Proposed Rule"].

Section 3(f) of the Exchange Act, Section 2(b) of the Securities Act of 1933, and Section 2(c) of the Investment Company Act require the SEC to determine whether a contemplated regulatory action is in the public interest and, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[3] Pursuant to this mandate, the SEC conducted an economic analysis of the anticipated benefits and costs of the Proposed Rule.[4] The 2012 memorandum, *Current Guidance on Economic Analysis in SEC Rulemaking* ("*Guidance*"), outlines the agency best practices for conducting economic analysis, recognizing "that a rule's potential benefits and costs should be considered in making a reasoned determination that adopting a rule is in the public interest."[5] As a first step to estimating the Proposed Rule's benefits and costs, the SEC analyzed data on shareholder proposals and proponents. The agency used data from the 2018 proxy season to estimate impacts of changes to 14a-8(b), and data on proposal success rates from 2011 to 2018 to estimate impacts of changes to 14a-8(i)(12).

Ownership Thresholds, Rule 14a-8(b)

The proposed changes to Rule 14a-8(b) would increase the eligibility requirements for submitting a proposal (currently requiring ownership of at least $2,000 of an issuer's securities for at least one year) to a tiered approach, requiring ownership of: at least $2,000 if held for at least three years, at least $15,000 if held for less than three years but at least two years, and at least $25,000 if held for less than two years but at least one year.[6] Shareholders would not be allowed to aggregate their holdings to reach the thresholds.[7]

The SEC has only limited historical data on the size of shareholder proponent holdings, and lacks any data at all on how long shareholder proponents maintain their holdings.[8] Therefore, the agency does not estimate with any precision just how many initial proposals would be excluded by the proposed change to ownership thresholds. As a way of estimating the impact, the agency considers the monetary value of shares held by proponents that submitted proposals in the 2018 proxy season.[9] For those proposals that had information on size of holdings available, the data shows that a significant percentage of proposals were brought by investors holding less than the $25,000 threshold. This means that if these shareholders had held their shares for fewer than two years prior to submitting their proposal, the issuer would have the right to exclude the proposal under the Proposed Rule. For example, for those proposals that had data on the actual amount of holdings, 85 out of 198 proposals were brought by shareholders owning more than $2,000, but

[3] *Id.* at 66,474.
[4] *Id.*
[5] SEC Office of the General Counsel, Current Guidance on Economic Analysis in SEC Rulemaking (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.
[6] 84 Fed. Reg. at 66,463.
[7] *Id.* at 66,464.
[8] *Id.* at 66,489.
[9] The agency gets this information in two different ways: from proxy statements that state size of holdings, *see* Table 1, 84 Fed. Reg. at 66,488, and from no-action letter requests, *see* Table 2, Fed. Reg. at 66,489.

less than $15,000 worth of stock; and 16 proposals were brought by shareholders owning more than $15,000 but less than $25,000 worth of stock.[10]

If the shareholders from this data set had each held their shares for longer than three years, no additional shareholder proposals would be excluded by the Proposed Rule.[11] If instead, however, shareholders submitting proposals had only held shares for a year (the current ownership requirement), then 51% of proponents (and 56% of proposals) would be excluded under the Proposed Rule's ownership requirements.[12]

The agency's range of possible excluded proposals from the Proposed Rule's changes to ownership thresholds alone is large, varying from 0% to 56% of proposals, depending on whether proponents have held shares for more than three years, or less than two years, at the time of submission. While the SEC does not provide an estimate of average share ownership duration, it does acknowledge that there has been an "upward trend in share turnover over time."[13] The agency cites to a range of estimates from the literature, including estimates that average share holding has declined from eight years in 1960 to a handful of months today.[14] One paper found that in 2015, institutional investors had a median duration of shareholdings of approximately two years.[15] This figure suggests that a large percentage of proposals would be ineligible for submission without a change in the ownership share of the proponent, *i.e.*, many concerned shareholders would be forced to buy a larger share of the issuer's stock in order to submit a proposal.

Resubmission Thresholds, Rule 14a-8(i)(12)

Current resubmission thresholds, outlined in Rule 4a-8(i)(12), permit a company to exclude a shareholder proposal from its proxy materials if, in the preceding 5 years, the proposal received less than: 3% of the vote on its first submission, 6% of the vote on its second submission, or less than 10% of the vote on its third submission. The Proposed Rule would permit exclusion of a resubmission if the proposal received less than: 5% of the vote on its first submission, 15% of the vote on its second submission, or less than 25% of the vote on its third submission.[16] In addition, the Proposed Rule would add a "momentum requirement" which would allow the exclusion of

[10] Table 1, 84 Fed. Reg. at 66,488.
[11] 84 Fed. Reg. at 66,497.
[12] *Id.* at 66,497. A different data set of ownership information suggestions similar estimates of impact: "the Proposed Rule would result in the exclusion of 56% of proponents and 40% of proposals." Id.
[13] *Id.* at 66,499 (citing Tarun Chordia, Richard Roll & Avanidhar Subrahmanyam, *Recent Trends in Trading Activity and Market Quality,* 101 J. FIN. ECON. 243 (2011)).
[14] *Id.* at 66,489-90, n. 195 (citing letter in response to the Proxy Process Roundtable from the Shareholder Rights Group dated Dec. 4, 2018, at 9).
[15] K.J. Martijn Cremers & Simone M. Sepe, *Institutional Investors, Corporate Governance, and Firm Value,* 41 SEATTLE U.L. REV. 387, 403 (2018).
[16] 84 Fed. Reg. at 66,464.

proposals that had been voted on 3 or more times in the past 5 years when the preceding vote had received less than a majority and vote support fell by 10% or more compared to the immediately preceding vote.[17]

By the SEC's analysis, the 15% support threshold would result in 14% more second-time proposals being excludable than under the current rules, while the 25% threshold would result in 27% more third-time proposals being excludable.[18] The Momentum Requirement results in an additional 4% of resubmitted proposals being excludable.[19] Overall, the Proposed Rule's amendments to Rule 14a-8(i)(12), which include changes in the resubmission thresholds and the addition of the Momentum Requirement, would result in a 19% reduction in resubmitted proposals, and a 7% reduction in all proposals each year.[20]

The Proposed Rule Underestimates the Harm Imposed on Shareholder Welfare

Contrary to SEC *Guidance*, the agency has failed to "clearly identify the justification" for the Proposed Rule.[21] When shareholders avail themselves of 14a-8, they impose the costs of including the proposal in proxy materials on the target company, costs that are ultimately borne by all the shareholders of the company, not just the advocate submitting the proposal. For this reason, the agency notes, the optimal threshold and holding periods must "strike an appropriate balance" between the benefits of giving shareholders an opportunity to consider and weigh-in on proposals, and the costs imposed on the company and broader shareholder body of processing and considering the proposal.[22] The SEC, however, after noting this important balance, fails to actually weigh the costs of shareholder proposals against the benefits. In particular, the agency fails to: 1. Fully consider and account for the significant costs of limiting shareholder monitoring, including the Proposed Rule's outsized effect on environmental proposals; 2. Consider that transparency of proxy voting records helps individual investors monitor their institutional investor agents; 3. Explain why amendments to 14a-8 are needed now, when passive investing is rising and overall number of shareholder proposals are declining; 4. Accurately interpret the importance of proposal withdrawals; and 5. Accurately estimate the cost savings of the Proposed Rule.

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[17] *Id.* at 66,473.
[18] *Id.* at 66,472 ("using the 2011 to 2018 data on shareholder proposals for Russell 3000 companies, we estimate that the proposed amendments to the resubmission thresholds [regarding percent support] would result in an additional 212 resubmitted proposals being excludable").
[19] *Id.* at 66,510.
[20] *Id.*
[21] *Current Guidance on Economic Analysis in SEC Rulemaking* at 5 (providing that rules "must include a discussion of the need for regulatory action and how the proposed rule will meet that need…. Frequently, the proposed rule will be a response to a market failure that market participants cannot solve because of collective action problems. Traditional market failures include market power, externalities, principal-agent problems (such as economic conflicts of interest), and asymmetric information.")
[22] 84 Fed. Reg. at 66,464.

Failure to Account for Significant Costs of Limiting Shareholder Monitoring and Influence

While the SEC acknowledges that "the potential exclusion of value-enhancing proposals could be detrimental to companies and their shareholders," the agency devotes scarce space to considering the significant effects of limiting shareholder influence over corporate managers and directors.[23] The SEC's analysis indicates that ownership thresholds amendments could exclude up to 58%[24] of *all proposals*, or force shareholders to respond by buying more shares in the target issuer than they otherwise would choose.[25] Further, the changes to the Resubmission Thresholds could exclude another 7% of proposals.[26] These amendments will result in a significant weakening of shareholder voice and ability to monitor and influence the companies that they themselves own. Yet the agency scarcely discusses this result.

In considering the impact of shareholder proposals on investor welfare, the SEC mistakenly focuses on scarce evidence regarding immediate share price impacts following proxy votes. The agency points to a handful of empirical studies that test the impact of majority shareholder votes on issuer share price, and ultimately suggests that these studies are inconclusive.[27] But shareholder proposals need not necessarily be value-enhancing in the short-term, company-specific way that the SEC suggests. For example, an increasing number of proposals request disclosure of environmental-related risks.[28] If proper disclosure reveals that a company is not in fact prepared for certain environmental and social (the E and S of ESG[29]) risks, such as increased intensity of extreme weather events due to climate change, the disclosure may lower the share price of the targeted company. It is nevertheless in the best interest of the investors pursuing the disclosure that this information be revealed. By limiting shareholder ability to pursue disclosure related to E&S issues, the SEC strays from its statutory mandate to ensure that its regulatory action will "promote efficiency."[30]

In addition, many individual retail investors opt in to ESG-specific investment funds and are seeking not just financial returns, but also integration of environmental and social concerns in business decisions. ESG fund managers have a fiduciary duty to their underlying beneficial

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[23] *Id.* at 66,502-03.
[24] This 58% figure comes from the 56% of proposals excludable under changes to ownership threshold, plus the 2% of proposals excludable from proposed changes to changes to Rule 14a-8(c) which limit shareholders to one proposal each. *See* 84 Fed. Reg. at 66,510.
[25] 84 Fed. Reg. at 66,504.
[26] *Id.* at 66,510.
[27] 84 Fed. Reg. at 66,494.
[28] Gabriel Rubin, *Show Us Your Climate Risks, Investors Tell Companies*, WALL ST. J. (Feb. 28, 2019), https://www.wsj.com/articles/show-us-your-climate-risks-investors-tell-companies-11551349800.
[29] ESG stands for "Environmental, Social, and Governance." As the SEC notes in the Proposed Rule, environmental and social issues (E&S) are typically grouped together, apart from G. Analysis often mistakenly assumes that "E&S" issues are less material, or related to bottom-line financial concerns, than "G" issues.
[30] 84 Fed. Reg. at 66,474, *citing* Section 3(f) of the Exchange Act, Section 2(b) of the Securities Act of 1933, and Section 2(c) of the Investment Company Act

owners to pursue ESG policies even though they may not have an immediate post-vote impact observable impact on share price.

Finally, just because a proposal receives less than 25% support after three submissions does not mean it would be harmful to investor welfare for the proposal to be submitted again. Certain subjects of shareholder proposals, like those related to climate change, take a long time to gather shareholder support. As the SEC notes, shareholder proposals related to climate change received an average of 5% support in 1999, but in 2017 these proposals received an average of 38% support.[31] Support for newer issues can grow slowly over time as knowledge spreads throughout the shareholder community. Of these proposals that would now be excludable under the Proposed Rule, 52% had seen increases in support, "averaging 5 percent more votes in favor of the proposal compared with the proposal's prior submission."[32] The heightened shareholder thresholds unnecessarily cut off the opportunity for shareholder opinion to change over time. These thresholds will simply punish activist shareholders for being ahead of their peers on foreseeing the materiality of certain issues. In addition, many institutional investors state that they prefer to communicate concerns with corporate management through other forms of engagement and dialogue, and reserve influencing management through a proxy vote only once they have decided they are disappointed with the progress management has made.[33] By increasing the threshold requirements, the SEC rushes this communication process, forcing a shareholder to possibly vote against management, or lose the opportunity, even while engagement and progress on the issue is ongoing.

Outsized Impact on Environmental Proposals

As the SEC acknowledges, the Proposed Rule will have an outsized impact on proposals related to environmental and social (E&S) issues. Out of the newly excludable proposals, 52% will be those related to E&S topics, even though they only make up 44% of all resubmitted proposals.[34] This is partially due to the fact that "shareholder proposals on social and environmental issues generally take longer to gain support than proposals on governance issues."[35] The SEC finds "there is an increase in the average voting support for environmental and social proposals"[36] and

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[31] 84 Fed. Reg. at 66,469, *citing* letter from Nathan Cummings Foundation dated April 30, 2018.
[32] 84 Fed Reg. at 66,500.
[33] *See, e.g.*, BlackRock, *Supporting a Shareholder Proposal Following Extensive Management Engagement*, https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2017.pdf (explaining why BlackRock switched its vote on a proposal requesting Exxon disclose climate risks from "against" to "for").
[34] 84 Fed. Reg. at 66,479 (finding that environmental proposals increased from 5% in 2004 to 16% in 2018, and that social proposals increased from 25% in 2004 to 39% in 2018). Social proposals may be related to climate change interests as well, as proposals related to the disclosure of spending on lobbying and political contributions are often proposed against oil and gas companies out of concern they are funding climate change denialism or opposition to carbon regulation.
[35] *Id.* at 66,501.
[36] *Id.* at 66,483 (finding that that 55% of resubmitted environmental proposals receive greater support upon resubmission).

an "upward trend in the percent of environmental proposals that receive majority support."[37] The SEC, however, argues that "it is not clear how much of the increased support for certain resubmitted environmental and social proposals is attributable to proposals gaining traction through the resubmission process as opposed to other factors, such as changing opinions on environmental and social issues."[38] This statement implies a false distinction between environmental issues and those of material, or financial, concern to shareholders. Shareholder opinions regarding ESG risks have indeed changed over time, leading to increasing support for ESG issues over time.[39] These effects cannot be separated from one another.

Proxy Vote Records Enable Individual Investor Monitoring of Institutional Agents

Shareholder proposals convey an additional investor benefit that will be partially forgone by the proposed changes: individual investor monitoring of institutional investor policy and stewardship. Institutional investors increasingly make public promises regarding their prioritization of E&S issues, such as climate change-related considerations or board diversity initiatives. These announcements are made, at least in part, to market their fund products to individual investors, many of whom are millennials with an increasing interest in E&S issues.[40] It is difficult, however, for an individual investor to discover whether institutional funds follow through on their promises, as most corporate "engagements" happen behind closed doors. Proxy voting records provide crucial insight into whether institutional investor goals are aligned with those of their underlying beneficiaries as promised.[41] While there are alternative ways for institutional shareholders to influence corporate management, none are nearly as effective as the transparency of voting records for reducing agency costs between individuals and fund managers.

Trends in Capital Ownership and Shareholder Behavior Fail to Justify Amendments

The SEC fails to provide a compelling explanation for why the current Rule 14a-8 thresholds, in place since 1998, ought to be disrupted now. The agency points to inflation and market growth as a reason for raising the ownership thresholds, but provides no justification for duration requirements. In fact, trends in share ownership over the past two decades support the opposite conclusion: shareholder proposals should be encouraged more now, rather than restrained. The

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[37] *Id.* at 66,485.
[38] *Id.* at 66,501.
[39] *Id.* at 66,483; *see e.g.*, Robert Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. 109 (May-June 2019), https://hbr.org/2019/05/the-investor-revolution.
[40] *See, e.g.*, Michal Barzuza, Quinn Curtis, & David Webber, *Shareholder Value(s): Index Fund Activism and the New Millennial Corporate Governance*, *93* S. CAL. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439516.
[41] *See, e.g.*, MAJORITY ACTION, CLIMATE IN THE BOARDROOM: HOW ASSET MANAGER VOTING SHAPED CORPORATE CLIMATE ACTION IN 2019 (2019), https://www.majorityaction.us/asset-manager-report.

past decade has seen a massive flow of capital to passively-managed index and exchange-traded funds (ETFs). The opportunity to consider and vote on shareholder proposals is particularly important for passive funds. These funds track a predetermined index and so fund managers do not have the option of selling the stock of a company they feel is being poorly managed. Left without this option of "exit," passive funds are left only with "voice."[42] Because of their low-fee passive strategy, they typically do not submit their own shareholder proposals. Instead, passive funds rely on active shareholders to raise concerns through the proxy process that they then consider and vote on.[43] While the SEC acknowledges that the "negative effects" of the Proposed Rule "would be more pronounced" for passive funds, it fails to note just what a large part of the market will be impacted by these "negative effects."[44] For more than a decade, money has been flowing out of actively managed funds and into passive funds.[45] In 2019, the amount of equity held in passive funds, \$4.27 trillion, surpassed the amount held in active funds, \$4.25 trillion, for the first time.[46] In 1998, when Rule 14a-8 was last updated, passive funds held only a small fraction of the market.[47]

Further, the agency fails to explain why extending the ownership duration requirement is justified, given that share turnover has steadily increased since Rule 14a-8's initial promulgation and subsequent amendment in 1998.[48] Given that the average shareholder holds on to a given share for only several months, the addition of two-year and three-year holding requirements will exclude a large segment of the shareholder population.[49]

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[42] *See* 84 Fed. Reg. at 66,504 n. 278, *citing* letter in response to the Proxy Process Roundtable from the City of New York Office of the Comptroller dated January 2, 2019, at 1 (noting that ''[b]ecause of our long-term investment horizon, and the fact that we allocate more than 80% of the funds' investments in U.S. public equity through passive index strategies, we cannot readily sell shares in a company when we have concerns about the company's performance, board composition and quality, management, executive compensation, workplace practices or management of risks, including those related to climate change''); "A Q&A with Glenn Booraem, Vanguard's Investment Stewardship Officer," in Bill McNabb, *Investment Stewardship 2017 Annual Report* 2-17, HARV. L. SCH. FORUM CORP. GOV. (Sept. 18, 2017), https://corpgov.law.harvard.edu/2017/09/18/investment-stewardship-2017-annual-report/ ("It's of paramount importance to us that the market is able to reflect risk and opportunity in stock prices, particularly for our index funds, which don't get to select the stocks they own."); ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

[43] *See generally* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).

[44] 84 Fed. Reg. at 66,504.

[45] John Detrixke, *Half of US Stock Fund Assets Are now Invested in Index Funds*, QUARTZ (May 20, 2019), https://qz.com/1623418/index-funds-now-account-for-half-the-us-stock-market/.

[46] Alicia Adamczyk, *Index Funds Are More Popular Than Ever—Here's Why They're a Smart Investment,* CNBC (Sept. 19, 2019), https://www.cnbc.com/2019/09/19/why-indexfunds-are-a-smart-investment.html.

[47] *See* Detrixhe *supra* note 45.

[48] 84 Fed. Reg. at 66,499 *citing* Chordia, Roll & Subrahmanyam, *supra* note 13.

[49] *Id.* at 66,489-90, n. 195 *citing* Shareholder Rights Group letter, *supra* note 14.

Finally, while the SEC reports it can find "no discernable trend in the number of submitted shareholder proposals" since 1997, [50] this obscures the observable and widely acknowledged trend that the annual number of shareholder proposals has been declining since a peak in 2008.[51]

Failure to Account for Withdrawals as a Measure of Success

The SEC's analysis overlooks that receiving majority support through a proxy vote is just one way to judge a proposal's beneficial impact. The objectives sought in many shareholder proposals can be adopted by management even after the proposal fails to receive majority voter support.[52] Further, many resubmitted shareholder proposals are withdrawn prior to voting on subsequent submissions because management acquiesces to shareholder demands. For example, in 2017, 26 climate-related resolutions were withdrawn after a commitment was reached and 12 were withdrawn when the companies agreed to begin dialogue on the issue.[53] In 2018, 33 climate-related resolutions were withdrawn after commitments, and six were withdrawn as a part of beginning dialogue.[54] Because withdrawn proposals signify that the investor's demands have been satisfied, they are "one of the best indicators of activists' success."[55] In both 2017 and 2018, management committed to several proposals that had failed to receive majority support in prior years, in some cases less than 25% support.[56] These numbers suggest that managers gain highly useful information from votes that fail, even those that achieve less than 25% support.

These withdrawal numbers also highlight a flaw in the SEC's analysis of the impacts of the Proposed Rule. The agency's finding that "less than 9 percent of proposals that fail to win majority support the first time go on to pass in a subsequent attempt"[57] masks the high number of resubmissions that result in a withdrawal when the shareholder proponent is satisfied by management's response prior to a vote ever occurring. According to data cited by the SEC, 29%

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[50] 84. Fed. Reg. at 66,476.

[51] *Id.* at 66,477, Figure 1; Matteo Tonello, *Shareholder Voting in the United States: Trends and Statistics on the 2015-2018 Proxy Season*, HARV. L. SCH. FORUM CORP. GOV. (Nov. 26, 2018); *see also*

[52] *See* CLIMATE ACTION 100+ PROGRESS REPORT (2019), https://climateaction100.files.wordpress.com/2019/10/progressreport2019.pdf (documenting shareholder successes pressuring companies to adopt emissions reduction measures).

[53] CERES, Engagement Tracker, available at: https://engagements.ceres.org/.

[54] *Id.*

[55] Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 689 (2016); *see also* 84 Fed. Reg. 66,467 n. 67 *citing* letters in response to the Proxy Process Roundtable from Everence Financial dated Dec. 6, 2018 (''an increasing number of resolutions end up being withdrawn by the proponent because of conversations between [the proponent] and the company'').

[56] For example, in 2018, AES Corporation, Ameren Corp., Devon Energy, DTE Energy, First Energy, and Duke Energy all committed to deliver on the requests of the shareholder proposal even though a similar proposal had failed to receive majority support in 2017. Dominion Energy and TJX both made commitments to proposals that had received less than 25% shareholder support in the prior year. CERES, Engagement Tracker.

[57] 84 Fed. Reg. at 66,469 (citing Brandon Whitehill, *Clearing the Bar, Shareholder Proposals and Resubmission Thresholds*, COUNCIL OF INSTITUTIONAL INVESTORS (Nov. 2018)), https://docs.wixstatic.com/ugd/72d47f_092014c240614a1b9454629039d1c649.pdf.

of all proposals between 2004 and 2018 were withdrawn.[58] This suggests that a majority vote is not necessarily the best indication of the usefulness of shareholder oversight.

The Proposed Rule Overestimates Cost Savings

The SEC claims that shareholders could "benefit from the decrease in the number of proposals because they could spend fewer resources reviewing and voting on shareholder proposals" and that this "could result in more efficient use of shareholder resources."[59] The agencies flawed reasoning misstates the exclusion of proposals as a benefit rather than a cost. Any shareholder that thinks analyzing the proposal is a waste of time and resources can simply decide not to review them. Instead, the shareholder could either follow the advice of a hired proxy advisor,[60] or vote by default with management, thereby supporting the status-quo world without the proposal. The costs of analysis are not imposed on unwilling shareholders as an unavoidable burden. There is no reason to deprive other shareholder interested in reviewing the proposal from the opportunity to do so.

As commenters have highlighted, if shareholders are deprived of the proposal mechanism, they may have to turn to alternative ways of pressuring management, including "availing themselves of the blunt instrument of votes against directors."[61] Other alternatives include making requests for books and records, lobbying for government regulation, and even initiating lawsuits, all of which are more costly to both corporations and shareholders than the proxy process.[62]

Finally, the SEC alleges that a benefit of the Proposed Rule will be that each shareholder proponent will "have a sufficient economic stake or investment interest in the company" in order to justify imposing costs on the company through the proxy process. However, the SEC concedes that they found "no relation between the level of the voting support and the level of proponents' ownership."[63] Therefore, the agency cannot claim that the Proposed Rule is designed to exclude only those proposals from small activists with only personal social interests unaligned with value creation, given that proposals from shareholders with small stakes receive the same amount of support from those with larger ownership stakes.

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[58] 84 Fed. Reg. at 66,477 (data from Russell 3000 companies).
[59] *Id.* at 66,502.
[60] The SEC currently proposes to restrict the use of proxy advisors. Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66,518 (Dec. 4, 2019).
[61] 84 Fed. Reg. 66,504 n. 277 (citing letter to Jeb Hensarling, Chairman, and Maxine Waters, Ranking Member, House Financial Services Committee, from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Apr. 24, 2017), https:// democrats-financialservices.house.gov/ uploadedfiles/letter_-_cii_04.27.2017.pdf).
[62] CERES *ET AL.*, THE BUSINESS CASE FOR THE CURRENT SEC SHAREHOLDER PROPOSAL PROCESS 11 (2017), https://www.ussif.org/files/Public_ Policy/Comment_Letters/ Business%20Case%20for%2014a-8.pdf.
[63] 84 Fed. Reg. at 66,488, n. 188.

Conclusion

Finalizing the Proposed Rule would limit shareholder access to a crucial mechanism for overseeing their investments and acting as good fiduciaries on behalf of their clients and beneficiaries. The SEC has failed to provide a justification for the necessity of the Proposed Rule, and has provided insufficient evidence that the benefits of the Proposed Rule outweigh its significant costs.

Respectfully,

Madison Condon
Institute for Policy Integrity, NYU School of Law