February 3, 2020

Via E-mail and Regular Mail

Rule-comments@sec.gov

Vanessa A. Countryman, Secretary
Securities and Exchange Commission (SEC)
100 F Street, NE
Washington, D.C. 20549-1090

Re: File Number S7-23-10: Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (the "Proposal")

Dear Ms. Countryman:

I appreciate the opportunity to comment on the Proposal by the two Republican Commissioners and the current SEC Chair, Jay Clayton, comprising the majority of Commissioners voting for the proposed new rules (voting 3-2).

Introduction

I began my professional career as a Legislative Analyst in the California Assembly Office of Research (California Legislature) in 1972, eventually writing numerous legislative reports on state and public employee pension funds and public policy. I wrote the first such report in 1972 concerning the inconsistencies between California laws regarding racial discrimination and state pension and public investments in corporations and banks financially supporting racial dictatorships in Rhodesia and South Africa (apartheid), and the Portuguese military occupation in Southern Africa.

My public sector career also included serving as a Consultant to a State Senate Committee on Energy and Public Utilities and as a Consultant to the Select Committee on Investment Priorities and Objectives, as a city pension fund trustee and later as Chair of the Governor's Public Investment Task Force. I was also fortunate to work with the Governor and the State Department of Finance to create a proxy voting policy for CALPERS and CALSTRS. I have also founded and served as a principal in several financial services companies, a tech mutual fund, a social venture fund, and as CEO of the family-owned corporation as a Registered Investment Advisor (RIA) (1982). Throughout my 47-year career I have served as a shareowner, a stakeholder, and filed and co-filed numerous proposals on a variety of public policy issues as well as attending multiple corporate shareholder meetings. I am a contractual fiduciary, and have served as a principal, agent, and as a corporate investment and pension fund fiduciary.

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Following undergraduate degrees, I received my MA Degree in Humanities from Dominican University of California in 2006 and my PhD in Philosophy from Australian National University, Centre for Moral, Social and Political Theory in 2014. My MA thesis was entitled: The Morality of Materialistic Self-Interest, the Corporation and the State, and my PhD Dissertation was entitled: The Failure to Constrain Corporate Social Injury: The State, the Stakeholder and the Fiduciary. I wrote two books: *Investing With Your Conscience: How to Achieve High Returns Using Socially Responsible Investing* (John Wiley & Sons, 1992) and *The Challenge to Power: Money, Investing and Democracy* (Chelsea Green Publishing, 2005).

General Comments

Not only do I find the proposed rules unnecessary in their entirety, I specifically find them without merit, unduly restrictive, biased against what the SEC Chair calls the "main street investor," capricious, and fraught with inconsistencies that will result in litigation, and harmful unintended consequences for companies and shareholders alike. The proposal is incomprehensible to the average retail investor, not to say demeaning to investment professionals, and other agents representing the investing public.

State legislatively created and federally and state supervised, corporations are valuable social institutions. By 2018, 69 of the 100 world's largest economies were corporations, and 157 of the largest 200 economic entities were corporations. They are, however, legal fictions, and simply another business construct, publicly funded by a multitude of financial, social, and political interests, however, controlled by managers, self-contained and united in their materialistic self-interest, separated from majority ownership, primarily recognized in an often troubled relationship with shareholders. Conversely, ownership itself is unorganized as well as diverse, disparate, diffused, and detached; the desired and obtained goal of corporate management and their directors. The Proposal only makes matters worse and discriminates against the small investor.

In my career as a shareholder advocate, through many Republican and Democratic Administrations, I have never witnessed such a blatant political act by a federal regulatory agency to disembowel or eviscerate a regulatory framework, that while highly flawed, at least upholds a process that up until recently has been transparent, allowing for some minimal engagement and dialogue between corporate management and shareowners.

What I find more shameful is the manner in which the SEC has been corrupted and manipulated by supposedly "main street" investors, only to discover that these rules were orchestrated by corporate interests. One media report described it as "an affront to the credibility of the SEC," which ". . . undermines the integrity of the rule making process"; so much for Chairman Clayton's "modernizing" the proxy voting system.

The so-called "Main Street Investors Coalition" (MSIC), in reality was corporate-funded, with no real ties to retail investors, using inflammatory language, and unsupported assertions to discredit investors that file proposals related to environmental, social, and governance (esg) issues. MSIC's "partners" is a corporate lobbying group including the National Association of Manufacturers and the anti-public pension fund, American Council for Capital Formation. In addition to these organizations, corporate management groups supporting these rules include the Chamber of Commerce, Business Roundtable, and the Association of Manufacturers; "special interests" some would say.

Lastly, in the context of politicizing the rule making process, the SEC has so contemptibly maneuvered its timing of this rule making, to propose the 60-day comment period to be calendared in the middle of the holiday season, and at the end of the year and beginning of a new year, which is the busiest time for financial professionals. It is also an important time when many shareholders and their advisors are preparing and writing resolutions to meet corporate filing deadlines, attempting to engage and dialogue with management, and respond to the inevitable legal challenges filed by law firms retained by corporate management. Suspicious of coincidences, I also note, that the SEC never responded to a request by the shareholder community for additional time in the official comment period.

Advisory Only

The current Proposal presented by the SEC is predicated, according to the Commission, on the fact that the proxy solicitation process has become the "forum for shareholder suffrage." Suffrage is defined as a vote given in deciding a controversial question or electing a person for an office or trust; the right of voting.

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Suffrage does specifically relate to the right to vote, it does not delineate whether the vote is counted, and, if counted, is accurate, or if the results of the vote is mandated, implemented, or simply advisory.

On page 91 of the 179-page Proposal, the Commission abstrusely draws a distinction between binding and non-binding advisory, or precatory (a prayer or wish) shareholder resolutions. The SEC, however, does not examine its own data to specifically disclose what percentage of all shareholder resolutions appearing on the corporate proxy ballot are non-binding or binding. The SEC cites a previous study to report on S&P 500 companies between 1997 and 2011, but only related to governance proposals.

The reality is that almost all shareholder-filed resolutions are non-binding, have no force of law, do not amend by-laws, articles of incorporation, or even board committee charters – they are not mandatory and do not in any way change the governance documents (corporate constitution). Even if 95% of shareowners vote in favor of a resolution, the corporation is under no legal obligation to do anything. The owners have no power over management. Ownership is separate from control.

Nor has the Commission actually collected data to show us how many resolutions that have received majority support were actually implemented by corporate management. It only reports that the probability of those resolutions being implemented depends on the influence of the proponent, the type of proposal, the past performance of the company, and whether voting support exceeds majority support as defined by the company's governing documents.

Since the Proposal and 14a-8 SEC Rules relate specifically to the shareholder resolution process, primarily covering non-binding shareholder proposals, it is imperative that the SEC immediately conduct an independent study analyzing and evaluating all shareholder proposals relating to governance, social and environmental (esg) resolutions. The SEC data provided is incomplete and meaningless in light of the relevance of such need for the data based upon the entire scope of the Proposal, which relate primarily to advisory resolutions.

Additionally, it is almost impossible for shareholders to nominate company director candidates and as owners, are commonly faced with voting, in a Soviet / Communist style procedure, for one slate of directors (nominated by incumbent directors), either "elected" by plurality voting or majority voting. While most of the large-cap corporations have switched to majority voting, even when a nominee does not receive a majority vote, the nominee may not be required to

relinquish their seat on the board. Many companies also still use plurality voting, which allows one "for" vote to elect the entire slate of self-nominated directors. Corporations continue to exercise authoritarian rule, while shareholders are relegated to advisory votes and rubber-stamping management decisions.

So, why does the SEC propose to restrict shareowners from filing precatory proposals? Is this part of the Trump Administration's plan to deconstruct the entire regulatory framework to further limit the voices of stakeholders raising critical public policy issues relating to corporate governance, climate change, human rights, and other material issues?

Proposals Submitted on Behalf of Shareholders

The SEC is proposing to intervene and intrude in the contractual agency relationship between the client and the Registered Investment Advisor (RIA), requiring additional time-consuming work on the part of the client in the documentation process in order to confirm the relationship between the client and her agent. This is another form of pernicious bureaucratic interference on the part of the SEC to undermine and disrupt the relationship between an agent, as a fiduciary, and their client.

RIAs act as contractual agents for clients pursuant to California laws. Your proposed rule change relative to 14a-8(c) restricts our ability to represent our client's interest as our fiduciary duty. It also interferes with and conflicts with our duty to protect our client's privacy (including our client's non-public information), which restricts any information being divulged to a "non-affiliated third party." In this case, the non-affiliated third party would include an employee of the corporation who would be designated by the company to "dialogue" with an agent or the shareholder pursuant to SEC Rule 14a-8(c). Shouldn't there also be specific rules relating to a corporate employee?

This would raise several privacy concerns relating to the requirement for the client to sign an Authorization and Consent Form which allows an RIA to disclose non-public information to a third party. For an RIA this raises a very serious liability issue with your new Rule 14a-8(c). Could you please comment on and clarify this issue?

California State law requires RIAs to have on record an Authorization and Consent for Use and Disclosure of Nonpublic Personal Information for all clients. This is required for every individual we communicate with on the client's behalf that is a non-affiliated third party!

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Current rules already provide the SEC with accessible documentation that verifies that the client meets the ownership and holding requirement to act as a shareholder proponent. The RIA as an agent has contractual discretionary authorization by the client to introduce a resolution, present the contents of the resolution, identify the company where the proposal is presented, where the proposal will be introduced, who the agent is that represents the client,

and the authority by the client for representation based upon contractual agreement. This is simply another convoluted, bureaucratic hurdle to hassle and intimidate the client and RIA in order to discourage participation in shareholder / company engagement. Can you provide evidence that the current rules verifying the process stated above have been violated?

The proposed rules also require; "a statement from each shareholder – proponent that he or she is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal."

To add a personal conduct requirement, or a forced "meet and confer" for the shareholder is intrusive, intimidating, and an abuse of administrative power, subject to litigation. I note that it is only for the shareholder, not the company. What are the requirements of proper conduct by the company representative? How is the forced "meet and confer" process enforced? What are the penalties for involuntary delays or interruptions?

Shareholders have lives, responsibilities, family duties, and employment requirements, as well as a constitutional right to privacy. This is a form of intimidation and pettiness and should have no place in SEC rulemaking.

<u>One Proposal Limit</u>

One of the most obnoxious and deleterious proposals to be submitted for consideration by the Commission is that "Each person may submit no more than one proposal directly or indirectly to a company for a particular shareholder meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholder meeting."

The Commission knows exactly what it is doing, which is politically motivated and petty: it is prohibiting a shareholder or agent from attending a meeting, proposing a resolution, and while

attending that meeting, as a courtesy to another shareholder or agent, moving their resolution and/or presenting the resolution their behalf. This is also subject to litigation. It is a violation of free speech.

This rule, if adopted, would make it extremely difficult and expensive for shareholders to be able to file resolutions in more than a few companies and then be able to represent clients as shareholder proponents in different companies in different parts of the country. This rule is so contentious and truly harmful to any chance of continuing dialogue between owners and corporate management. It encourages confrontation not civil disagreements. It would largely discourage engagement, deny client representation and dialogue and create increasing confrontation between shareholders and management, all part and parcel of the Trump Administration's attitude regarding human contact, moral behavior, and good manners and conduct. It would also increase the cost for agents and shareholders alike.

The current Proposal is also predicated on the Commission's view that shareholders have alternative ways in which to engage with companies and their shareholders, other than through the 14a-8 process. To engage with something is being fully occupied or having your full attention, while being engaged with someone is to interact with that person, or "get involved with" them.

Corporations are not living, breathing human beings, but a business construct or legal fiction. You can engage with people employed by the corporation, but you cannot engage with a non-human entity. You can, however, engage with other shareholders, but currently, based upon securities laws and privacy standards, you cannot identify the human beings that are owners or beneficial owners of your company. A shareholder theoretically could hire a company to solicit proxies on their behalf, but they would need to go through a legal morass and expend great amounts of money. Corporate management currently is the only party that can solicit proxies.

While it is possible to utilize social media to communicate with "the masses," without being able to identify the shareholders of your company's stock, there is no direct way to communicate with them, because they are mostly institutions, as well as other beneficial owners investing through mutual funds, Exchange Traded Funds (ETFs), sovereign wealth funds, pension and retirement funds, and literally thousands of individuals; investors that are diverse, disparate, diffused, and detached. Good luck "engaging" with other shareholders "to consider and vote upon the proposal," and there is no "ease of engagement between companies and their shareholders," nor "alternative ways, such as through social media, to communicate their

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preferences to companies and effect change." This is not going to happen through social media (unless the shareholder has access to corporate social media data), and it is almost impossible to interact with companies, and certainly not ". . . to affect change," other than having legal access to the proxy ballot. Companies are not legally required to respond to shareowners, and they do not. They will not unless required to by law!

Shareowner Eligibility and Thresholds

The current SEC Eligibility Requirements are already excessively restrictive relative to the requirement that a stockholder must hold a minimum of $2,000 for at least one year prior to the introduction of a proposal of a maximum of 500 words. The current threshold for resubmission requires shareholder affirmative votes of 3% the first year, 6% the second and 10% the third. Increasing the initial minimum holding from $2,000 to $25,000 is excessive and should be discarded.

Similarly, raising resubmission thresholds to 5%, 15%, and 25% is also excessive and weights the engagement process in favor of the largest investors, not "main street" investors.

This bias is significantly strengthened against small investors by also prohibiting investors to aggregate their shares with other shareholders to meet the new minimum thresholds.
By the SEC denying or restricting small shareholders the opportunity to communicate with corporate management pursuant to SEC Rule 14a-8, it is not consistent with the agency's stated mission to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." Instead, it is attempting to discourage large widespread share ownership and encourage only the participation of large wealthy ownership.

Recent Ten-Year Shareholder Engagement

The current SEC Rule 14a-8 provides a mechanism or process for shareowners to communicate with management and other shareholders through the corporate proxy voting process; almost exclusively on precatory or advisory issues. Many investors and their agents attempt to utilize 14a-8 to raise substantive material issues with corporate management and boards of directors as fiduciaries. The primary purpose is not necessarily to win majority votes on proposals that are strictly precatory or advisory, but to engage management and openly raise serious financial and esg concerns and attempt to exchange ideas and solutions to complex issues facing the

corporation as a social institution that so dominates our economy and political system. It is also a stakeholder process that creates a historical public record of corporate conduct.

Harrington Investments, Inc. (HII) recently decided to look back over the most recent ten-year period of our shareholder engagement and this is what we found:

- Less than one in ten companies respond to letters and/or e-mails with which we attempt to make inquiries, comment on company policies, or question management. This often includes making several attempts to elicit a response.

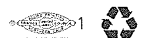
- Less than one in ten companies acknowledge receipt of our shareholder proposal, other than signing a receipt for a certified letter, and challenging our resolution at the Commission.

- A significant number of companies after signing a receipt for a certified letter, fail to respond when contacted, again, and several have claimed that they have "lost" our resolution or misplaced it in the company's mail room, and therefore discover that our resolution missed the company's filing deadline. Often receiving a copy of a signed certified receipt of delivery from us, leads to the magic of uncovering our missing resolution.

- Almost all companies in which we introduce a proposal will automatically file a challenge. Most companies do not contact us to initiate dialogue unless they lose the challenge.

- All of the "dialogue" that we have with corporate staff is one-sided. Keep in mind that we have no leverage other than raising material issues to the company. Almost all of our resolutions are precatory.

- In a recent dialogue with a major bank, HII agreed to withdraw a proposal and continue dialogue, based upon an agreement with the company to withdraw its challenge. The bank, however, attempted to require our signature on an acknowledgment to the agreement that stated: ". . . this acceptance is predicated upon the understanding that ________ does not intend to amend its Bylaws, Corporate Governance Guidelines, Board Committee Charters, or other Board-related corporate governance documents to



- address this subject matter." This corporate "attitude" about shareholder dialogue and advisory resolutions is consistent across the board with management.

- A major tech company did not respond to our sign-on letter with over a dozen institutional investors raising serious human rights concerns over facial recognition surveillance technology. When our resolution was filed, it was unsuccessfully challenged by the company. The company "dialogued" with us for 30 minutes only, after calling other shareholder proponents in a 30-minute time slot. The resolution received a 28% affirmative vote by shareholders and has been refiled. The company has not made any effort to dialogue this year.

- The results of a 3-year dialogue with a major beverage company resulted in the company creating a sustainability committee of the board. Another dialogue with a major herbicide company resulted in the creation of a board committee on Sustainability.

- Several proxy access resolutions were filed that resulted in majority affirmative votes (one had a 65% approval vote).

- Dialogues with a major tech company and a major herbicide corporation resulted in legal opinions clarifying the corporations' fiduciary duties pursuant to Delaware law.

Conclusion

In the twentieth century, corporations transitioned from ownership wedded to control, to ownership almost totally divorced from control. This resulted in independent managers gaining almost unlimited power over shareholders, who remain diverse, diffused, and have little, if any, ability to exercise ownership responsibility, much less control over senior management. Management has been able to nominate and elect themselves as well as other selected and thoroughly vetted board members, set their own and directors' compensation, which is often excessive, and have become self-perpetuating. This management dominance has led to corporate and management selfishness, indifference, and autonomous behavior.

On the other hand, shareholders, as one class of stakeholders, since 1947 have had at least some access to the shareholder ballot (Rule 14a-8). The SEC later, in 1983, and again in 1998,

set the amount of stock value required to be eligible to submit a proposal. In 2019-20, the SEC appointed by President Trump, by a 3-2 vote, has proposed amendments to Rule 14a-8 to severely restrict shareholders, especially main street investors, to file advisory shareholder proposals.

The SEC proposed amendments to Rule 14a-9 are politically motivated and without merit. This rule proposal follows increasing staff guidance and numerous directives to suppress shareholder free speech and the protection of our clients' property rights pursuant to state and federal law.

I have provided specific comments opposed to the proposed amendments and suggested additional clarification, and the need for further study and analysis, including the need for extensive supporting documentation and data.

While I have no expectation that the current Commission will consider my opinion or the opinions of my colleagues submitting many more comments and extensive and comprehensive data to support their opposition, I am hopeful that successive Commissions and SEC staff will reverse these discriminatory rules and encourage dialogue between corporate management and all stakeholders.

Sincerely,

John C. Harrington
President / CEO