THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

February 3, 2020

Vanessa A. Countryman
Secretary
United States Securities and Exchange Commission
110 F Street, N.E.
Washington, D.C. 20549

Re: Comments on Proposed Rule "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8" [Release No. 34-87458; File No. S7-23-19]

Dear Ms. Countryman:

I write as Trustee of the New York State Common Retirement Fund, which is the third largest public pension fund in the United States, with an estimated $210.5 billion in assets under management as of March 31, 2019. The Fund holds and invests the assets of the New York State and Local Retirement System on behalf of more than 1.1 million members and beneficiaries and pays over $1 billion per month in benefits.

As Trustee of the Fund, I take seriously my duty to invest for the long-term benefit of our beneficiaries. Consequently, through my Bureau of Corporate Governance, I have taken the initiative of engaging in frequent dialogue with many of our portfolio companies to encourage them to implement robust corporate governance practices and sustainable business strategies that foster long-term financial success. The Fund believes that the long-term value of its investments is greatly enhanced by the actions of its Bureau of Corporate Governance.

As a long-term owner that invests in all sectors of the economy (i.e., a "universal owner"), the Fund works to promote sound ESG practices at the public companies in its portfolio through active ownership and targeted public policy advocacy focusing on sustainability, diversity and accountability. Underlying all of the Fund's engagement activities is a commitment to active ownership—using the Fund's voice and votes to ensure the long-term success of our portfolio investments. Filing shareholder proposals is a powerful engagement tool that provides an opportunity to get important issues on the agenda and bring

them to the attention of a company's board, management, and investors. When filing a shareholder proposal, the Fund seeks a productive dialogue with company management. This includes discussing the proposal with company management, allowing the company to highlight its work on the given issue, and negotiating how the company can address the Fund's concerns.

In the 2019 proxy season, the Fund filed forty-six shareholder proposals, resulting in twenty-five agreements with companies to implement the proposals, and record-high votes at a number of companies, including one majority vote and votes of greater than thirty percent on proposals at ten companies. The Fund also votes on a significant number of proposals brought forth by other shareholders (527 in 2019), which I believe is an important aspect of the Fund's stewardship because it increases collaboration among investors and management, which can lead our companies to improved economic outcomes.

I am therefore writing to provide my comments on the proposed rule "Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8" (the "Proposed Rule").

General Comments About the Proposed Rule

As a general matter, I would like to begin my comments with three overarching points. First, I do not believe the rationale for the rule articulated by the Commission is compelling enough to justify the proposed restrictions on the long-held rights of shareholders; the Proposed Rule is a solution in search of a problem. Second, I believe that the Fund, and all investors, receive a significant economic benefit from the full and open discussion of corporate governance matters among shareholders and management. Therefore, even in instances where the Proposed Rule may not directly affect the Fund, it lessens the extent to which we can benefit from the discussion, engagement, and increased shareholder value that results from the filing of shareholder proposals and their subsequent adoption by companies. Third, the Proposed Rule includes elaborate changes that will decrease certainty and increase expenses and regulatory burdens for issuers, shareholders, and the Commission. The Proposed Rule would set up a number of non-substantive, technical requirements that would do little more than encourage gamesmanship and distract from the substantive discussions that are so important to functional corporate governance.

The Proposed Rule appears to stem from the premise that shareholder proposals need to be further restricted. The primary basis for the Proposed Rule seems to be that issuers may incur legal fees as a result of their own decisions to seek no-action relief or minor printing costs by including proposals and statements in opposition in proxy materials. Yet the economic analysis accompanying the Proposed Rule says that "the number of proposals received by both large and small companies has decreased over time." Proposed Rule at 75. Additionally, the average voting support for proposals "has remained stable" during the period considered by the Commission, with an increase in support for social and environmental proposals. Proposed Rule at 85.

In fact, when it comes to resubmission, the Proposed Rule's Figure 10 shows that 83% of social proposals, 90% of environmental proposals, and 97% of governance proposals received at least 25% support on the first submission, with the figures steadily rising on resubmissions. Even the lowest category (social proposals) rises to over 95% receiving such support on the second submission. The fact that a quarter of shareholders have expressed support for a topic is significant and sets a foundation for future engagement. Indeed, company management tends to pay attention to such a large bloc of shareholders because such a large group shows that there is likely an issue worth taking a close look at. Nonetheless, even though 95% of proposals in every category reach a high level of support within two

submissions, the Commission seeks to *restrict* future proposals, rather than preserve an already successful process. Especially in light of the demonstrated benefit to shareholders derived from corporate governance reforms, the logic behind the rationale to add additional regulatory requirements to limit proposals is inverted.

The Commission is no doubt aware that American corporate governance has been drastically reformed in the past three decades, due in major part to the demands for accountability and sustainability from companies' primary stakeholders—their owners. Shareholder proposals have been integral to this transformation. As Kosmas Papadopoulos of ISS Analytics has noted, close to 90% of large firms (as measured by market capitalization) have enacted governance reforms such as independent board chairs, written consent rights, and issues that often were first raised by shareholder proposals.[1] Papadopoulos notes that this trend began in the 1960s and 1970s, when individual investors like Evelyn Davis and the Gilbert brothers began to submit governance proposals.

From 2011 to 2014, the Shareholder Rights Project at Harvard Law School and its institutional investor partners led to the declassification of at least 100 boards of large-capitalization companies. This was followed by the push for proxy access by the New York City Comptroller.

These reforms did not receive a great deal of support initially. According to Papadopoulos, "the percentage of governance shareholder proposals receiving support by majority of votes cast rose steadily from 5 percent of proposals in 1994 to 37 percent of voted proposals in 2003. Support levels have remained high since then." These ideas have become mainstream elements of good corporate governance, thanks in large part to the shareholder proposal process.

These reforms bring significant value to shareholders and various academic studies have suggested that corporate governance reforms can bring economic value to firms.[2] One proxy that can be used for determining the value of corporate governance reforms is the value placed on those reforms in derivative lawsuits. For example, I recently announced a settlement in a derivative case on behalf of Wynn Resorts for which I served as co-lead plaintiff, along with a group of New York City pension funds. The value of the corporate governance reforms achieved amounted to $49 million (although the settlement is still subject to final approval). This included majority elections for board members, an independent chair, a commitment to board diversity, and a succession plan—all of which are common topics of shareholder reforms. It is clear from this that shareholder proposals can bring millions of dollars in value to companies that choose to adopt the reforms, ultimately increasing shareholder value.

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[1] Kosmas Papadopoulos, *The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance (2000–2018)*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Feb. 6, 2019, https://corpgov.law.harvard.edu/2019/02/06/the-long-view-the-role-of-shareholder-proposals-in-shaping-u-s-corporate-governance-2000-2018/.

[2] *See, e.g.*, Larry Fauver et al., *Board Reforms and Firm Value*, 125 J. Financial Economics 120 (2017) (finding increased value in board and audit committee independence, but not separation of chair and CEO); Yutaro Shiraisha et al., *Stewardship Code, Institutional Investors, and Firm Value: International Evidence* (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462453; Bernard S. Black & Vikramaditya S. Khanna, *Can Corporate Governance Reforms Increase Firms' Market Values": Event Study Evidence from India*, 4 J. of Empirical Legal Studies, 749 (2007) (finding that corporate governance reforms in India resulted in a 4% increase in firm value); Reena Aggarwal et al., *Do Corporate Governance Mandates Impact Long-Term Firm Value and Corporate Culture*, 59 J. Corp. Fin. 202 (2019) (finding that mandated reforms reduce the "value gap" between well-governed and poorly governed corporations).

In another example, a derivative action brought against Wells Fargo in 2016 (N.D. Cal. Docket No. 3:16-cv-05541), the corporate governance reforms achieved conferred a benefit of $20 million on the company. The reforms included common topics of shareholder proposals such as separating the Board Chair and CEO, revamping the Board committee structure, limiting the number of boards on which directors may serve and reducing the threshold for calling a shareholder meeting.

These corporate governance reforms are the subject of many shareholder proposals. In 2019, about 45% of proposals submitted related to governance. About 53% of proposals voted on related to governance. Of proposals receiving majority support, 79% were governance-related.[3]

The Proposed Rule, in footnote 214, specifically states that it has not accounted for the long-term value of these reforms on companies. This is a major flaw in the Proposed Rule because shareholder proposals almost always are focused on long-term value through sustainability and accountability. The Commission should focus on the value brought by the reforms achieved, not the shareholder proposals themselves—the proposals are a means to achieving better governance.

Environmental and social shareholder proposals can also bring significant value to shareholders. For example, climate risk is widely considered a major risk factor for almost every industry and yet many companies do not disclose sufficient information about these risks or their plans for mitigating them. Shareholder proposals drawing attention to these issues typically spur companies to take the initiative to formally evaluate their business plans in light of those long-term risks. Climate and environmental risks are not theoretical—we see them playing out though massive liabilities (for example, with emerging PFAS contamination), direct economic losses due to extreme weather and sea level rise, and a changing competitive landscape in a variety of industries, especially in the energy sector.

Because corporate governance reforms can bring substantial value to shareholders, I urge the Commission to instead consider whether to clarify Rule 14a-8 to ensure that *more* of these value-enhancing governance proposals are included on company proxy statements since they typically enhance the value of companies at a cost far lower than the company's cost to print the proposals. Even if the Commission believes that companies incur six-figure costs to challenge a shareholder proposal, it must weigh that against the millions of dollars in shareholder value added or preserved by addressing important issues along these lines.

In addition to these general comments, I wish to share the following answers in response to several of your specific questions. Each of these comments should be considered in light of the fact that I strongly believe no changes to Rule 14a-8 are warranted at this time.

General Comments on Economic Analysis

To begin, I note the following specific issues with Proposed Rule's economic analysis:

- The Proposed Rule says: "On the other hand, we may observe shareholders buying and holding on to their shares for long periods of time because they are following a passive investment strategy and are therefore less likely to engage with management or other shareholders." (Pages 124–25) I believe this observation is inaccurate as many other

[3] H. Rodgin Cohen et al., *2019 Proxy Season Review: Part 1 – Rule 14a-8 Shareholder Proposals*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (July 26, 2019).

investors would take a fundamentally different view of this question. For our part, the Fund engages with companies *more* because we are passive holders. Because we conserve resources by using a low-cost index strategy, we do not have ability to sell many of our shares based on corporate governance concerns. Therefore, knowing that we do not have the option to sell easily means that we are *more* likely to engage to try to reform a company since we would like it to produce the most value for us.

- The only benefits that the Proposed Rule purports to confer on shareholders is that they would be able to spend less time considering how to vote on proposals (since fewer would make it onto proxy ballots), and that they could spend more time advocating for the fewer proposals they are allowed to present. These are woefully thin benefits, especially when considered in the light of the numerous benefits provided to corporations in the Proposed Rule. This mismatch in the Proposed Rule unduly provides lopsided benefits to companies, rather than shareholders. And, as stated above, I believe that all shareholders (and the companies they own) benefit from the discussions engendered by the Rule 14a-8 process.
- The questions following the economic analysis request information about the cost of no-action requests to companies, but never request analysis of the cost to shareholders of no-action requests made by companies that ultimately do not prevail. This is troubling because the Commission staff has encouraged such requests by altering its interpretation of the Rule with each successive Staff Legal Bulletin. A great deal of savings could be had by both companies and shareholders if the Commission staff consistently interpreted Rule 14a-8.
- The Proposed Rule asks: "What are the costs, if any, associated with shareholders' consideration and voting on a shareholder proposal? Do these costs differ depending on the shareholder proposal topic? Do these costs differ depending on whether the shareholder proposal is a first-time submission or a resubmission?" The costs associated with considering and voting on individual shareholder proposals are minimal and focus mostly on staff time allocated to considering these ballot items. (Of course, it goes without saying that these costs would indeed go up if the Commission's proposed rule relating to proxy advisors is implemented and shareholders are required to individually research thousands of companies each season.) A majority of shareholder proposals involve requests that have long been considered by investors, and many—including the Fund—have adopted voting guidelines associated with those issues. Therefore, the costs associated with voting those ballot items are extremely low. Conversely, it is reasonable to assume that when the Fund votes on a new shareholder proposal, it may take time to review, research, and determine a voting positon. However, once a new proposal is voted on, the Fund typically adopts a new voting guideline to guide future votes on the issue, thereby lowering the associated costs of considering a future proposal on the issue or the resubmitted proposal. The Fund acknowledges that in recent years, there have been "new" environmental and social issues that have been subject of shareholder proposals. However, these are not "new" issues to the Fund or the Fund's investment staff. For example, while the use of shareholder proposals to request companies to address the risks associated with facial recognition technology are new, the topic of facial recognition and its associated investment risks are not new to the Fund. The costs therefore are not different or more than any other new proposal.

Question 13. Should we require shareholder-proponents to designate a lead filer when co-filing or co-sponsoring a proposal? Would doing so facilitate engagement and reduce administrative burdens on companies and co-filers? If we required shareholder-proponents to designate a lead filer, should we require that the lead filer be authorized to negotiate a withdrawal of the proposal on behalf of the other co-filers? Could such a requirement encourage shareholders to file their own proposals rather than co-file? Would the number of shareholder proposal submissions increase as a result?

While I agree that explicitly designating a lead filer is a best practice for co-filings, I do not believe that it is an issue that requires rulemaking. The Commission should consider whether the current privately ordered system accomplishes this goal already before imposing potentially burdensome regulations. In my experience, when co-filers join together, they typically designate a lead filer already in order to reduce the administrative burden of negotiation and defense of no-action requests. Ensuring that one party is empowered to negotiate results in cost and time savings for all parties.

The Commission has rightly asked whether requiring this designation through rulemaking would encourage some other filers to file their own proposals. This is possible, especially when one considers that proponents often have different goals in the shareholder proposal process. For example, a socially responsible investor (who may wish to achieve broad changes for the public good) may not be willing to withdraw a proposal under the same circumstances as a public pension fund trustee. A socially responsible investor focused on community issues may wish to push for broader changes, while a public pension plan fiduciary is focused on ensuring that the value to the company has been maximized and sees broader social benefit as collateral. However, I believe this would be a rare occurrence and would often be prevented by the duplication exception under Rule 14a-8.

While some other filers may be encouraged to file their own proposals, alternatively, at times, the strategy of using multiple co-filers is used to show support for a proposal. I do not believe such a strategy would be deterred if the Commission adopted such requirements.

Lastly, if the Commission determines through rulemaking that additional requirements regarding designating lead filers and co-filers are necessary, the Commission should require issuers to disclose the lead filer and all co-filers of a proposal in their proxies. The Fund has long been concerned with the failure of issuers to disclose proponents of shareholder proposals. This requirement would help facilitate engagement between investors and the proponent, and provide investors more information when considering their votes on a proposal.

Question 14: What other avenues can or do shareholders use to communicate with companies besides the Rule 14a-8 process? Has the availability and effectiveness of these other channels changed over time?

My staff and I use a variety of avenues to communicate with companies. Most frequently we speak directly with company management or board members. This usually begins with written correspondence to a company; companies occasionally reach out to us as well. Some companies are more responsive than others, but most are willing to at least engage in conversation with shareholders.

Occasionally, we wish to speak with company directors, because we are seeking information about board oversight or want to discuss changes that only the board can make. Many companies are willing to allow this, with exceptions typically at companies with a combined Board Chairman and CEO.

We also communicate to companies via our proxy votes. We have developed an extensive set of policies in our independent Proxy Voting Guidelines—which we publicly disclose on our website to

promote transparency and public awareness; these policies give us the ability to use our vote to express our views to management and/or request governance changes on a variety of issues. This channel is obviously restricted when the right of investors to offer shareholder proposals is restricted, because many issues appear on the ballot only due to the advocacy of shareholders.

Overall, I believe many issuers have adopted a more positive view towards shareholder engagement over the last five to ten years. This is seen through companies adopting offseason engagement programs and disclosing information gained during those engagements in their proxies and annual reports. While the Fund has seen increased willingness among issuers to engage, this may not be the case for those retail investors who do not hold millions or hundreds of millions of dollars in a company. For those investors, they have limited avenues to bring issues directly to management. For them, the Rule 14a-8 process may be the only way to bring issues directly to management and other shareholders. The Proposed Rule may limit their only avenue to engage with management. While this would not affect the Fund directly, for the reasons listed above, the Fund benefits from the engagement of small investors through the shareholder proposal process and the corporate reforms adopted as a result of their efforts.

The availability and effectiveness of the other channels mentioned by the Commission has notably *not* changed over time. There remain many companies who will actively engage with investors, and many who are less enthusiastic. There are still many issuers who have not developed or prioritized engagement programs. Therefore, Rule 14a-8 may be the only opportunity for owners to articulate their concerns to management. Additionally, there are many issues on which company management will not engage. This includes many controversial issues, issues that directly question management's business strategy and practices, or that challenge an issuer's core governance. For example, we have found that companies that have adopted a multi-class share structure or do not have an independent board chair are less willing to engage on changing this type of governance. Rule 14a-8 allows shareholders to bring governance changes like these to management's attention by going directly to shareholders. Furthermore, it has been the Fund's experience that an issuer feels more compelled to engage on a controversial issue following the filing of a shareholder proposal.

Lastly, I disagree with the Commission's discussion of social media as having fundamentally changed the investor–shareholder relationship. Social media is an unreliable form of communication that necessarily occurs in public, which vitiates its usefulness as a channel between investors and companies, and is no substitute for shareholder engagement.

Question 16: Does the Rule 14a-8 process work well? Should the Commission staff continue to review proposals companies wish to exclude? Should the Commission instead review these proposals? Is there a different structure that might serve the interests of companies and shareholders better? Are states better suited to establish a framework governing the submission and consideration of shareholder proposals?

The Rule 14a-8 process works very well as a process for promoting dialogue and discussion among shareholders and between shareholders and companies. The filing process is smooth and transparent, with generally clear and reasonable filing requirements. I believe that the process is, by and large, used productively by shareholders to increase the value of our investments in the long term.

In our experience, the Rule 14a-8 no-action process has generally also worked well for a long time because it has provided a relatively low-cost method for companies and their shareholders to essentially arbitrate disputes before an independent body—the Commission staff (Staff). However, in recent years,

the Staff has been issuing annual staff legal bulletins that appear to change the manner in which the Staff interprets proposals. Our Fund attorneys (both in-house and retained outside counsel) have had to spend an increasing amount of time grappling with shifting interpretations of Rule 14a-8 in reviewing draft proposals and in defending no-action requests. Furthermore, it is reasonable to assume issuers have incurred increased costs relating to the Commission's guidance on board analyses.

Staff determinations have historically been respected by all involved parties. However, when the determinations appear to shift arbitrarily, the parties may lose confidence in them and increasingly consider turning to the courts. Last September I wrote to Chairman Clayton to express my concerns regarding the Staff's evolving view of the "ordinary business" exclusion. I request that you consider those points when evaluating this question.

I do not believe state governments are better equipped to establish a framework for submission and consideration of shareholder proposals. Having multiple systems for different states would increase administrative and legal costs drastically, more for investors who wish to engage with their companies than the companies themselves, all of whom would be required to obtain state-specific counsel. There is little reason to believe that states would offer a more efficient means for administering the filing of shareholder proposals and resolving disputes than the SEC; this type of change could simply result in an uptick of litigation, imposing significant costs on shareholders and issuers alike.

The Commission appears not to have considered the costs that such a new regime would impose on investors and the resources that would be required to grapple with those changes.

I also recommend that the Commission consider the costs this would impose on all 50 states, which would be required to develop new law, regulations, administration, and oversight of such a procedure. The creation of new agencies or regulatory regimes is expensive and the Proposed Rule does not have data to address this. This would impose significant costs on states and cut against the very purpose of federal securities laws, which sought to recognize that we have a national economy in need of uniformity across geographies.

Question 17: We are proposing to amend Rule 14a-8's eligibility requirements to require certain additional information when a shareholder uses a representative to act on its behalf in the shareholder-proposal process. Should we amend the rule as proposed?

I recommend that the Commission consider explicitly exempting institutional investors from these new requirements. I do not believe the Commission intends to cover institutions in these amendments, but they could be read to apply to institutions like the Fund. I do not believe there is confusion about whether staff members employed by an institution are authorized to act on behalf of that institution.

While these requirements may make sense when representatives act on behalf of natural persons, I believe they are wholly unnecessary for institutional investors.

Question 22: We are proposing to amend Rule 14a-8(b) to add a shareholder engagement component to the current eligibility criteria that would require a statement from the 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. Should we adopt the amendment as proposed? Could the shareholder engagement component be unduly burdensome or subject to abuse rather than facilitating engagement between

the shareholder-proponent and the registrant? If so, how could we address such undue burden or abuse?

I oppose this amendment. Engagement is a cornerstone of our corporate governance program; we frequently meet with company management and will continue to do so. But the Proposed Rule is overly prescriptive in this area and would negatively affect smaller shareholders who may not have the staff and resources to meet with management, which should not be a precursor to having a voice.

Question 23: We are also proposing to require that the shareholder-proponent include contact information as well as business days and specific times that he or she is available to discuss the proposal with the company. Should we adopt this amendment as proposed? Should we specify any additional requirements for the contact information or availability? For example, should we require a telephone number or email address to be included? Should we require a minimum number of days or hours that the shareholder-proponent be available?

Productive conversation and agreements with companies are ideal. This is why my staff always includes contact information and seeks conversation with companies about important issues. But this amendment is overly prescriptive for proponents only and presumes that all shareholder proponents are equally situated in terms of time and resources.

Question 24. Would companies be more likely to engage with shareholders if the proposed amendment was adopted? Are there other ways to encourage such engagement that we should consider? Are there potential negative consequences of encouraging such engagement between individual shareholders and a company, or are there other potential negative consequences of this proposal?

No, I do not anticipate that companies would be more likely to engage with shareholders under this amendment. In the Fund's experience, scheduling is not the barrier to productive conversation. As mentioned above, engagement depends on an issuer's view on shareholder engagement and the topic of the proposal. Conversely, rather than encouraging engagement, the Proposed Rule would impose regulatory technicalities for excluding proposals.

Question 28: What are ways that companies engage with shareholders outside of the shareholder-proposal process?

See answer to question 14 above.

Question 29: We are proposing to amend Rule 14a-8(c) to explicitly state, "Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' 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 shareholders' meeting." Should we amend the rule as proposed?

No. Although I agree that each person should submit only one proposal at a meeting under Rule 14a-8, this is already the case. The proposed amendment could be read to prohibit a shareholder from physically presenting more than one the proposal at the shareholder meeting.

In order to reduce costs, shareholders often coordinate and present other shareholders' proposals at meetings that are far away from their offices. This can result in significant cost savings that the Proposed Rule does not consider, such as the cost of travel and staff time.

Since the overwhelming majority of votes are cast by proxy, attending the meeting has limited benefits in terms of building a vote in favor of our proposal. We find that at most meetings, very few shareholders even attend, so the submission of the resolution is something of a procedural formality, although annual meetings remain valuable because they provide an important opportunity for shareholder engagement with the Board of Directors.

Question 30: Would the proposed amendment have unintended consequences on shareholders' use of representatives or other types of advisers, such as lawyers or investment advisers, and, if so, what are those consequences?

Yes, see the answer provided above to Question 29.

Question 31: Alternatively, should we amend Rule 14a-8 to explicitly state that a proposal must be submitted by a natural-person shareholder who meets the eligibility requirements and not by a representative? If so, should we clarify that although a shareholder may hire someone to draft the proposal and advise on the process, the shareholder must be the one to submit the proposal?

No. Not all shareholders are natural persons. The Fund holds shares on behalf of the New York State and Local Retirement System—there is no natural-person shareholder in our case or in the case of other institutional investors. A representative must therefore always be used.

Question 32: Alternatively, should we require the shareholder-proponent to disclose to the company how many proposals it has submitted in the past to that company? For example, should we require disclosure of the number of proposals the shareholder has submitted directly, through a representative, or as a representative to the company in the last five years? Should companies be required to disclose this information in the proxy statement? Would this information be material to other shareholders when considering how to vote on the proposal?

Disclosure to the company—which was the recipient of those proposals—is unnecessary as the company already has access to this information.

Additionally, requiring the publication of this information in the proxy statement will accomplish little. The fact that the proposal had been submitted before is not a material fact in considering how to vote.

Question 34: In lieu of, or in addition to, limiting the number of proposals a shareholder would be able to submit directly or as a representative for other shareholders, should we adopt a total limit on the number of proposals allowed to be submitted per company per meeting? If so, what numerical limit would be appropriate, and how should such a limit be imposed?

No, I do not believe it would be appropriate to limit shareholder rights in this manner. As various industries have consolidated in recent decades and the number of public companies decreased, companies have grown larger and larger. This means that single companies may control vast swaths of a sector or

industry. Because of their scope, diverse shareholders exercise their rights in a manner that meets their varying needs and should not be silenced arbitrarily.

The cost of allowing this shareholder discussion is minimal—the cost to print 500 words in a proxy statement already required to be dozens of pages long. The benefit, as noted above, can be high.

Question 35: As an alternative or in addition to limiting the number of proposals a shareholder would be able to submit directly or as a representative for other shareholders, should we adopt a limit on the aggregate number of shareholder proposals a person could submit in a particular calendar year to all companies? If so, what would be an appropriate limit, and how would such a limit be imposed?

If a shareholder owns part of a company, that ownership comes with rights, which should not be conditioned in this manner. Any cap on the number of proposals would arbitrarily limit shareholders' rights. As a fiduciary, my obligations run to the entirety of the Fund's portfolio.

Question 36: Should we require companies to disclose how many proposals were withdrawn and therefore not included in the proxy statement, and how many were excluded pursuant to a no-action request?

While I generally support transparency, there does not seem to be a compelling need for new regulation in this manner.

Question 37: Should we maintain the current approach of three tiers of resubmission thresholds but increase the thresholds to 5, 15, and 25 percent, as proposed? Would alternative thresholds such as 5, 10, and 15 percent, or 10, 25, and 50 percent, be preferable? If so, what should the thresholds be? Should we instead adopt the thresholds that were proposed by the Commission in the 1997 Proposing Release (i.e., 6, 15, and 30 percent)? Do the proposed resubmission thresholds better distinguish those proposals that are on a path to meaningful shareholder support from those that are not?

The current thresholds allow for an ongoing and evolving process to raise shareholder issues to management and shareholders. And as noted above, the Commission's own data show that the number of proposals has been decreasing while support for them has been increasing.

Increasing resubmission thresholds for shareholder proposals would restrict an essential and cost-effective tool for investors to protect and enhance value by aggregating and expressing their views to management, boards and other shareowners on major governance issues, corporate policies and important and emerging risks and opportunities. Raising thresholds for resubmitting shareholder proposals would preclude shareholder consideration of many important governance proposals that seek to enhance long-term shareowner value. It has been the experience of many investors that it often takes several years for a proposal relating to emerging issues to gain enough support from investors to achieve double-digit votes. Most often, these proposals eventually receive substantial or majority support, and many companies adopt the proposals as company policy.

Additionally, because of the increase in companies with multiple-class share structures that provide insiders with special voting rights, the current resubmission thresholds are effectively quite high, as they are based on "votes" and not "shares." Raising resubmission thresholds for companies with multiple-class

share structures would make it easier for executives with outsized voting power to keep shareholder proposals off the ballot and further insulate them against corporate policy changes pursued by shareholders. For example, at Facebook's 2019 annual meeting, a shareholder proposal requesting that the board establish a risk oversight committee received support from 11.6% of votes, but that appears to represent 34.2% of shares held in the publicly-traded share class (that is, setting aside the super-voting shares with 10 votes per share held almost completely by insiders). While Facebook downplays the need to improve risk management, others would point to the substantial loss of shareowner value since the company's 2018 annual meeting as validating the concerns of a significant portion of outside shareowners. It would be unfortunate if heightened resubmission thresholds ruled shareholder proposals on risk management at Facebook out of bounds for the next several years.

Question 38: Alternatively, should we remove resubmission thresholds for the first two submissions and, instead, allow for exclusion if a matter fails to receive majority support by the third submission within a certain number of years? Under such an approach, what would be an appropriate lookback period and how long should the cooling-off period be (e.g., three years, five years, or some other period of time)?

No. First, I believe the Commission's focus on majority support is misguided. Significant and valuable corporate governance reforms—which return value to shareholders—are often achieved through the process of engagement after even a small portion of shareholders vote in favor of a proposal. A 40% vote for a proposal can be just as significant to a company as 50%. Majority support is not magical in any sense when it comes to precatory proposals; companies are often more than willing to engage and enact reforms that are supported by less than a majority of shareholders.

Question 40: Is there a voting threshold that, if not achieved initially, a proposal is unlikely to surpass in subsequent years? Conversely, is there a voting threshold that, if achieved, a proposal is unlikely to fall below in subsequent years?

No. There is no way to determine in advance what vote a proposal will receive, and past results are not a guarantee of future success. While the existing resubmission limitations can serve to prevent gross abuse of the Rule 14a-8 process, the Commission should not put too much weight on prior years' vote.

Question 41: Should we shorten or lengthen the relevant five-year and three-year lookback periods? If so, what should the lookback periods be?

There is no need to change the relevant five-year and three-year lookback periods. The purpose of the resubmission thresholds is only to avoid abuse of the shareholder process by shareholders who repeatedly bring fringe proposals. Even these thresholds are a crude metric, for the reason noted in my response to Question 42. But if some objective measure is needed to fulfill the Commission's goal of eliminating abusive proposals, this purpose is already achieved by the existing five-year and three-year lookback periods.

Question 42: Should the vote-counting methodology under Rule 14a-8(i)(12) be revised? For example, should shares held by insiders be excluded from the voting calculation, or should broker non-votes and/or abstentions count as votes "against"? Should there be a different vote-counting

methodology for companies with dual-class voting structures? If so, what should that methodology be?

I do not believe the vote-counting methodology under Rule 14a-8(i)(12) should be revised.

I recommend that the Commission consider adopting a one-share, one-vote policy for counting votes at all companies, regardless of whether they have dual-class voting structures. The purpose of resubmission thresholds is to weed out nuisance proposals. This can be effectively accomplished by look at the total percentage of shares that support a proposal. Counting preferred shares multiple times only serves to entrench insider votes; it does not say anything about whether a shareholder will bring value or serve only as a nuisance.

Question 43: Would the proposed changes in resubmission thresholds meaningfully affect the ability of shareholders to pursue initiatives for which support may build gradually over time? Do legal or logistical impediments to shareholder communications affect the ability of shareholders to otherwise pursue such longer horizon initiatives? If so, how? Are there ways to mitigate any potential adverse effects of the proposed resubmission thresholds while limiting costs to companies and shareholders?

I believe that the ability to raise corporate governance issues early in the process of building support among investors has been beneficial. It has been the Fund's experience that it often takes several years for a proposal relating to emerging issues to gain enough support from investors to achieve double-digit votes. Most often, these proposals eventually receive substantial or majority support, and many companies adopt the proposals as company policy. For example, when shareowners first filed proposals encouraging board diversity, they initially received votes in the low single digits. Now, because of the persistent efforts of shareowners, board diversity policies have received high votes. This includes majority support for board diversity shareholder proposals, as was the case with the Fund's 2016 board diversity proposal at Fleetcor Technologies, Inc., which received 61% support from shareowners.

Another example is the New York City Employees Retirement System's shareholder proposal asking Cracker Barrel to adopt a policy of non-discrimination based on sexual orientation (the company had a policy against hiring gay employees). There is good reason for keeping resubmission thresholds relatively low. It can take many years, and different approaches and iterations, to build investor support for a shareowner proposal. The proposal for a sexual orientation nondiscrimination policy at Cracker Barrel received only 14 percent of the vote when it was first on the ballot in 1993. Similar proposals received less than 10% of the vote into the early 2000s, but by 2011, the NYC Funds received a 62% majority vote at a different company.

Excluding proposals that receive moderate support in the first several years of filing would stymie this development process and ultimately reduce the benefits enjoyed by shareholders when the proposed reforms are ultimately adopted.

Question 44: When considering whether proposals deal with substantially the same subject matter, the staff has focused on whether the proposals share the same "substantive concerns" rather than

the "specific language or actions proposed to deal with those concerns." Should we consider adopting this standard, or its application?

Yes, I believe the staff should focus on the specific language. The topic of a proposal is only one part of what action the proposal is calling for the company to take. For example, two proposals may be related to the topic of climate change and therefore have the same "substantive concerns," but one may call for ending fossil fuel use altogether while the other may simply call for disclosure of coastal real estate in low-lying areas.

Question 45: Should we adopt the Momentum Requirement, as proposed? If so, should we adopt this requirement instead of, rather than in addition to, the proposed resubmission thresholds? Would this requirement be difficult to apply in practice?

No. A proposal that gains more than a quarter of shareholder votes represents a significant enough proportion of the total number of shareholders that it should be allowed to continue to be part of shareholder discussion.

While I understand that the basic resubmission thresholds exist to prevent abuse of the process, proposals receiving over 25% votes are clearly out of that category and are not abusive of the process. This requirement would encourage companies to "wait it out" rather than actually engage with shareholders on topics with significant support. For example, if a proposal receives 49% of the vote three times in a row, but then drops to 44%, it would become excludable under this rule. This drop in votes may simply be due to inattentive voters failing to select an option on this question or other anomalies.

Question 46: As proposed, a proposal that receives a majority of the votes cast at the time of the most recent shareholder vote would not be subject to the Momentum Requirement. Is there a voting threshold below a majority of the votes cast that demonstrates a sufficient level of shareholder interest in the matter to warrant resubmission regardless of whether future proposals addressing substantially the same subject matter gain additional shareholder support? If so, what is an appropriate threshold?

I oppose the momentum requirement for the reasons stated above in Questions 43, 44, and 45.

Additionally, when one considers that—according to the Proposed Rule—the overall average support for shareholder votes was 29% in 2019, it appears that the Proposed Rule would exclude a large percentage of shareholder proposals, even where there remains a significant group of investors that have expressed interest.

Question 47: As proposed, a proposal that receives a majority of the votes cast at the time of the most recent vote would not be excludable under the Momentum Requirement. Should this exception to the Momentum Requirement be limited to the most recent shareholder vote, or should it apply to a different lookback period such as three years or five years?

Extending a lookback period for proposals that have received the support of a majority of shareholders would accomplish little other than encouraging companies to ignore the majority vote. If a company's management knows that a slight dip in votes next year may make the issue go away for several years, it may be worth waiting. This could encourage companies to require multiple years of

majority support before taking action. This, in turn, would impose a cost: the value that could be brought by governance reforms sought in those proposals.

Question 48: Should the Momentum Requirement apply to all resubmitted proposals, not just those that have been resubmitted three or more times? For example, assuming adoption of the proposed resubmission thresholds, should a proposal be excludable if proposals addressing substantially the same subject matter received 19 percent on the first submission and 16 percent on the second submission, even though 16 percent exceeds the relevant proposed threshold of 15 percent for a second submission?

No. This would introduce a complicated process for determining shareholder votes over a period of years that would almost certainly spark disputes and costly disagreements

Question 49: Does a 10 percent decline in the percentage of votes cast demonstrate a sufficiently significant decline in shareholder interest to warrant a cooling-off period for any proposal receiving less than majority support? Would a different percentage—such as 20, 30, or 50 percent—or an alternative threshold, be more appropriate?

No. A 10% decline standard means that the absolute percentage could be as little as 2% overall, which is probably within the margin of error for how votes are counted in the antiquated proxy plumbing system. Such a tiny percentage is statistically insignificant and really says nothing about the extent of shareholder support for a topic.

Question 50: Should the cooling-off period for proposals that fail the Momentum Requirement be shorter than the cooling-off period for proposals that fail to satisfy the existing resubmission thresholds? If so, what would be an appropriate cooling-off period?

No. I oppose this change; if the reason behind both is to avoid abuse of the process, the remedy for both should be the same.

Additionally, "cooling-off" periods can allow for companies to ignore and become more entrenched on the given issue. For example, from 2001 through 2014, shareholders, including the Fund, submitted a shareholder proposal at ExxonMobil requesting the company expand its equal employment and workplace protection policies to prohibit discrimination based on sexual orientation and gender identity. If the Proposed Rule was adopted during this time, the proposal would have failed to satisfy the proposals resubmission thresholds and would be subject to a "cooling-off" period. Looking back, the company would be able to ignore this issue for years before having to address the issue again with shareholders. At the same time, hundreds of S&P 500 companies adopted nondiscrimination policies, leaving ExxonMobil as a laggard and at a competitive disadvantage compared to its peers. After 2014, Exxon Mobil agreed to adopt the proposal as company policy.

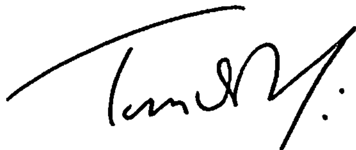
Exxon Mobil Corp. - Shareholder Proposal Regarding Adopting Sexual Orientation and Gender Identity Anti-Bias Policy - 2001-2014	
Year	Percent in Support
2001	13%
2002	23.5%
2003	9.9%
2004	29.9%
2005	29.4%
2006	34.6%
2007	37.7%
2008	39.6%
2009	39.3%
2010	22.2%
2011	19.94%
2012	20.57%
2013	19.78%
2014	19.52%

Question 51: Are there other mechanisms we should consider that would demonstrate that a proposal has lost momentum? For example, should there be a separate basis for exclusion if the level of support has not increased by more than 10 percent in the last two votes in the previous five years? Or, should there be a separate basis for exclusion if the level of support does not reach 50 percent within 10 years of first being proposed? If so, what would be an appropriate cooling-off period?

There should be no momentum requirement.

Thank you for the opportunity to provide comments on this important matter.

Sincerely,



Thomas P. DiNapoli
State Comptroller