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A Public Benefit Corporation

February 3, 2020

Honorable Jay Clayton
Chairman
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

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

Dear Chairman Clayton:

We thank you for the opportunity to respond to the proposed amendments to Rule 14a-8. We take this opportunity to express our concerns about the proposed rules, and to recommend AGAINST adopting them. Nevertheless, in the interest of some of the concerns expressed, we have proposed alternative approaches that we believe could satisfy the interests of all parties involved.

The proposed rules would disenfranchise shareholders, and remove what balance currently exists in the shareholder proposal process. While we recognize that the Commission made an effort to devise new rules address perceived concerns, we respectfully submit that the release neither identifies abuses, nor do the proposed rules serve the purposes for which they are purportedly being advanced.

The proposed rules do nothing to enhance effective communications, which appears to be what is needed to facilitate communications between shareholders and management. In contrast, the rules, as proposed, would foster adversity. As former SEC staff, we believe that is not the SEC's role, and that there are better ways to create an improved environment for shareholder communication with management.

However, the mechanism that could help achieve a better way is not in the context of revising the existing proxy proposal rules. Those rules currently work in a way that balances the attendant tensions with the goals of each of the parties.

The reason the SEC instituted the proxy rules is because state law requires that in order for shareholders to vote, there needs to be a quorum. (*See, e.g.,* Del. Code § 216.) The SEC adopted the rules because the practicalities of the growing corporate system meant that fewer and fewer shareholders could attend meetings in person.

The proxy system is intended to facilitate the corporate franchise, not to restrict it. As the SEC acknowledged at beginning of rule proposal release (which was simply a repetition of prior acknowledgments), the right of a shareholder to vote is rooted in state law. It is precisely because a public company can better afford to disseminate the information that the proxy rules were adopted in the first place. As a result, using cost to the company as a rationale for any new limitations on the franchise is misplaced. In any event, in the age of electronic communications, the costs of producing and disseminating proxy statements have steadily been declining.

It is in this context that we have evaluated the proposed rules. We have concluded that, as proposed, they articulate a set of ineffective, arbitrary and unnecessary requirements that can be better addressed in a different context and by more efficient means.

We set forth our responses to the SEC's questions below.

II.A - ELIGIBILITY REQUIREMENTS (66461-65) 14a-8(b)

1. ***We are proposing to amend Rule 14a–8(b) to establish new ownership requirements for establishing an investor's eligibility to submit a shareholder proposal to be included in a company's proxy statement. Should we amend Rule 14a–8(b) as proposed?***

   Answer: No.

   Reason: Not a single rationale proposed in the release under the section entitled "Need for Proposed Amendments" offers a factual or legal basis for the proposed changes. Rather, the wording relies on subliminally leading the reader to conclusions, but which provide no logical analysis or connection.

   We take each of the rationales cited in the release, and explain why we believe they do not offer sufficient justification to support a change:

   a. **There is no "shifting" of costs to the company. The costs have always been the responsibility of the company.**

      The SEC properly recognizes that "[t]he shareholder proposal process established by Rule 14a-8 facilitates engagement between shareholders and the companies they own." (Release at 66462.) However, the statement goes on to state that "[t]he rule also enables individual shareholders to *shift* to the company, and ultimately other shareholders, the cost of soliciting proxies for their proposals," and that "[b]ecause it *shifts* burdens from proponents to companies, it is susceptible to overuse." (Emphasis supplied.) The statement is written in a way to suggest to the reader that the fact that the company bears the cost is somehow wrong.

      This, however, is a false construct. There is no "shift" of costs to the company. Indeed, the citation in the release supposedly supporting that statement is to an article that correctly identifies that the company pays the cost, but does not use the word "shift," which would be incorrect. There is no shift of costs. Delaware case law going back to as long ago as 1934 established the principle that the company may lawfully bear the costs of proxy solicitation expenses, even in cases where shareholders contest corporate policy. See, *e.g.*, *Hall v. Trans-Lux Daylight Picture Screen Corp.*, 171 A. 226 (1934); *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 130 NE 610 (NY 1955).

      Thus, under corporate law, the cost of proxy solicitations - including shareholder proposals - is legitimately borne by the company when a shareholder is not in a position to bring the proposal individually. Indeed, the obligation of the company to underwrite the cost is among the principal reasons the proxy rules exist.

   b. **Enhanced technology and access to social media do not justify increased thresholds.**

      On page 66462 of the release it states: "Much has changed since the Commission last

considered amendments to Rule 14a-8, including the level and ease of engagement between companies and their shareholders. For instance, shareholders now have alternative ways, such as through social media, to communicate their preferences to companies and affect change."

Social media posts do not give shareholders an avenue to vote, at least in the current iteration of the proxy rules. The ability to communicate through social media has no demonstrable connection to a "need" to increase thresholds.

We are also not certain how the SEC is attempting to connect the general improvements in technology to a "need" to increase dollar amounts and time period ownership, as there is no stated analysis. If anything, the availability of technology has markedly reduced the costs of communicating with shareholders (both in terms of time and monetary resources), as well as the costs of producing and disseminating proxy materials.

Accordingly, even if cost were a valid reason to make a change to the thresholds, the rapidly shrinking costs to produce and disseminate proxy materials do not augur in favor of either a higher ownership threshold or a longer holding period. Costs are a function of electing to be a public company. It is a choice the company makes when it decides to become or continue to be publicly-held. Just as there are costs associated with filing the registration statement (which, according to Form S-1 takes 671 hours to produce - over 4 weeks of full-time engagement), undertaking the responsibility to deal with public shareholders rather than a private overseer is part of the cost of doing business.

What the improvements in technology *do* favor is a mechanism that can be used to enhance communications between shareholders and management in the pre-proposal stage. The Commission has an opportunity to foster constructive dialog that enables a company's management to listen to what shareholders want from the company as a steward of the shareholders' resources for the prosperity of the company. See our proposal articulated in the response to Question 2.

c. <u>The SEC fails to identify what "balance" it is seeking to "strike" that it fears is not currently being met</u>.

As part of the section entitled "Need for Proposed Amendments," the SEC states: "We are concerned that the $2,000/one-year threshold established in 1998 does not strike the appropriate balance today." (Release at 66463.)

The release offers no analysis on this point. Rather, the inference is that the passage of time has somehow rendered the current thresholds outdated.

d. <u>The assertion that long-term shareholders are more "interested" in a company and somehow merit greater access to a company's proxy statement is unsubstantiated</u>.

In proposing to lengthen the required time-period threshold versus minimum dollar amounts, the SEC states: **"In many cases the length of time owning the company's**

securities may be a more meaningful indicator that a shareholder has a sufficient interest that warrants use of the company's proxy statement." (Release at 66463.)

The SEC articulates no basis for its conclusory statement, nor could it. In fact, the practical impact of forcing a shareholder to own its shares for a longer time period before it has access to its state-law statutory right to introduce a proposal effectively converts the public shareholder to an owner of what essentially amounts to restricted stock. That result is untenable, and would not withstand judicial scrutiny.

Apart from not being able legally to support this assertion, the proposal is not supported by public policy. The one-year period is not suddenly outdated because it has not recently been reviewed, nor has there been a reason identified as to why a shareholder invested in a stock for a year should have to demonstrate further that it "has a sufficient interest that warrants use of the company's proxy statement."

Indeed, the proposal that those with more resources to invest get access to management in a shorter period of time is discriminatory.

e. <u>There is no basis for the SEC's statement that shareholders who own shares for a year are more likely to promote their personal interests over those of the company</u>.

In an attempt to justify the "need" for increasing thresholds, the SEC in its release states: **"A shareholder's demonstrated long-term investment interest in a company may make it more likely that the shareholder's proposal will reflect a greater interest in the company and its shareholders, rather than an intention to use the company and the proxy process to promote a personal interest or publicize a general cause."** (Release at 66463.)

With respect to the first clause, there is no basis for claiming that a proposal submitted by a shareholder who has held shares for a longer period of time will reflect a greater interest in the company. The time periods for ownership are solely for administrative efficiency. The one-year period previously adopted by the SEC makes sense from that perspective. If that statement had any basis in fact, what would be the justification for a one-year holding period simply because a shareholder has $25,000 invested in the company? The SEC fails to draw that nexus or to identify a "need" for a change.

With respect to the second clause, it is a non-sequitur (and also insulting) to suggest that the "other" side of the equation are short-term investors who are to be imputed with "an intention to use the company and the proxy process to promote a personal interest or publicize a general cause." The statement is baseless, and does not constitute a "need" for changing the thresholds. In addition, it is not - and has never been - the Commission's job to decide what constitutes a valid investment decision. Rather, its role is to make certain that issuers provide full and fair disclosure to serve as the basis for an investment decision.

Apart from that statement failing to articulate a need to increase thresholds, we note that an issue relating to corporate policy can arise at any time. Corporations are citizens of their local communities, and their actions can have national and even international consequences. A shareholder's interest in a company's impact on its community (via their products, services and supply chains, for example) are relevant and of interest as soon as someone becomes a shareholder. Share ownership, by design, gives the shareholder a voice. We respectfully submit that the current waiting period is sufficient.

f. <u>There is no basis for asserting that longer holding periods are justified for smaller investments</u>.

As its final justification of a "need" to increase the thresholds, the SEC states in the release: **"We believe having a longer holding period is particularly important if the dollar value of ownership is minimal...."** (Release at 66463.)

Pursuant to what standard does the SEC make this assertion? It implies a bias against people who have smaller amounts to invest. And yet, the purpose of the proxy rules is to facilitate access by all investors. If anything, the SEC's focus is supposed to be on smaller investors who do not have the resources to protect themselves, and who are in greater need of the types of disclosures mandated by the securities laws since they lack the ability to do their own due diligence.

By way of example: A $100,000 investment to a billionaire is arguably less material to that person than a $1,000 investment made by someone who earns $60,000 per year. Are persons who have less money to invest presumed to care less about the companies in which they invest? There is no basis for the SEC's statement, particularly in the context of supposedly identifying a "need" for higher thresholds.

This last justification of "need" for the revised thresholds goes on to state that the longer holding period is important **"because a person seeking to misuse the shareholder-proposal process could more easily purchase the smallest possible stake in a company to take advantage of the process."**

This statement - besides making a stunning leap from being a small shareholder to somehow "abusing" the system - fails to state other than hypothetically that an abuse is a potential occurrence. More to the point, the narrative fails to identify what constitutes "tak[ing] advantage of the process." Finally, where is the narrative that quantifies who has "take[n] advantage of the process," and how that has harmed the company or other shareholders?

The SEC presents neither law nor data to support its supposition that people who hold their shares longer will somehow be more prudent and in that manner help bear the costs of their shareholder proposals. As noted by the SEC (Release at 66464), the majority of proposals are submitted on behalf of institutional shareholders. If those institutions were to "churn" their shares for the short-term purpose of introducing proposals (rather than the typical purpose of timing the market) for what might be deemed an "improper

purpose" (though the SEC in its release fails to identify what an "improper purpose" would be), the institutional shareholders' investors or the persons on whose behalf they act as fiduciaries would have a cause of action against the managers.

In short, the SEC has failed to articulate any justification for increasing the existing thresholds. The proxy rules are not intended to restrict the rights of shareholders. The proposed thresholds are arbitrary and do just that.

2. ***The proposed amendments seek to strike a balance between maintaining an avenue of communication for shareholders, including long-term shareholders, while also recognizing the costs incurred by companies and their shareholders in addressing shareholder proposals. Are there other considerations we should take into account?***

Answer: Yes.

Alternative Consideration: By the time shareholders reach the point of needing to submit a proposal of their own, it usually - though not always - suggests that communications have broken down. Unlike the suggestion in the release (at 66464) that communications with management are somehow reserved to those with the greatest resources, all shareholders should have access to management to express their concerns. This becomes easier with today's technology.

The SEC thus has an opportunity to fix the problem. It can do so by finding a means of facilitating and standardizing communications among shareholders and management in the period long before shareholders need to resort to submitting a proposal. By providing a formalized mechanism for communication outside what unfortunately is often the more contentious shareholder proposal process, the SEC may well succeed in facilitating effective communications that yield consensus agreements among the parties, and result in fewer shareholder proposals.

In contrast, changing existing thresholds will only alter the balance of existing problems, but will not solve anything. Indeed, it will likely result in greater enmity and adversarial situations. That does not augur well for any of the players. If, in the alternative, the SEC is able to create a new platform for facilitating engagement among shareholders and management - one that imposes some requirements so that management cannot simply brush off attempts to engage - that process is likely to yield greater satisfaction among shareholders and management. These parties have no choice but to work together. The SEC is the perfect player to make those relationships succeed.

This is not to suggest that there is a need to do away with the shareholder proposal process, or that it is always contentious. Indeed, the process has brought many important changes to corporate practices over the years - ones that at the time seemed normal but would now be unacceptable. Many of those changes might not have occurred were it not for the "encouragement" of shareholders, or at least those communications helped raise the issue and inform the conversation.

The shareholder proposal process is an efficient method of disseminating important information shareholders in connection with the voting of proxies. Good practice dictates that shareholders use the process to inform other shareholders of important policy issues, and that management use proposals as an opportunity to engage with those who support the existence of the business, rather than rushing to find a way to exclude a proposal.

3. ***Should we adopt a tiered approach, providing multiple eligibility options, as proposed? Are there other approaches that would be preferable instead?***

   Answer: No. See answers to Questions 1 and 2.

4. ***How is a sufficient economic stake or investment interest best demonstrated? Is it by a combination of amount invested and length of time held, as proposed, or should another approach to eligibility be used?***

   Answer: Eligibility criteria should be left as is.

   Reason: The suggestion that there needs to be a "sufficient economic stake" or "investment interest demonstrated" is misguided. See responses to Question 1.

5. ***Are the proposed dollar amounts and holding periods that we propose for each of the three tiers appropriate? Are there other dollar amounts and/or holding periods that would better balance shareholders' ability to submit proposals and the related costs? Should any dollar amounts be indexed for inflation or stock-market performance?***

   Answer: No. There should be no changes in the dollar or holding period thresholds.

   Reason: There is no rationale stated in the release for increasing dollar amounts or holding periods. And even if there were, the numbers and time periods proposed are entirely arbitrary. In addition to referring to the answers to Question 1 above, please note the following:

   (a) To the extent the SEC has increased minimum holdings in the past to reflect inflation, that, at least, has some basis in fact.

   (b) In contrast, the suggestion that increases should be linked to a stock market index introduces unnecessary volatility. The illogical result would be that when the market tanks, it becomes bargain-hunting time and more shareholders gain access to management for a lower price. The concept simply makes no sense.

6. ***We are proposing to maintain the $2,000 ownership level, but increase the corresponding holding period to three years. Should we also increase the $2,000 threshold? If so, what would be an appropriate increase? For example, should we adjust for inflation (e.g., $3,000) or otherwise establish a higher amount?***

Answer: Do neither.

Reason: Congress adopted the federal securities laws in part because corporate insiders were deemed to wield too much power, and used that power at the expense of its shareholders. The SEC adopted the proxy rules to facilitate shareholder participation in the process. They instituted the thresholds for participating in the voting process for administrative efficiency, and not to demonstrate a stake in the business. Shareholders already demonstrate a stake in the business by being shareholders. The de minimis thresholds in place are sufficient to keep the process orderly.

The SEC has in the past proposed tightening restrictions on the state-law rights of shareholders to exercise their corporate franchise. In each instance, the SEC has abandoned the proposed initiative, as there has not been a way to implement the changes without impairing shareholders' rights. The SEC should look for alternatives - such as that articulated in the answer to Question 2 - and abandon this effort to impose unsupportable and arbitrary formulae, which will only make the rules vulnerable to administrative challenge.

7. ***Are there potential drawbacks with the tiered approach? If so, what are they?***

Answer: Yes.

Reason: The tiered approach is arbitrary and subject to judicial challenge.

8. ***Instead of adopting a tiered approach, should we simply increase the $2,000/one-year requirement? If so, what would be an appropriate threshold?***

Answer: No.

Reason: See answers to Question 1 above. The current thresholds serve the purpose for which the rules were adopted.

9. ***Should the current 1 percent test be eliminated, as proposed? Should the 1 percent threshold instead be replaced with a different percentage threshold? Are there ways in which retaining a percentage-based test would be useful in conjunction with the proposed tiered thresholds?***

Answer: The 1% test can remain, as long as the current minimum dollar amount remains.

Reason: If the threshold for participating in the shareholder proposal process is too high, management has no incentive to engage with shareholders. If that occurs, management knows it can get away with not responding to shareholder concerns, as the protective device of the proposal process becomes neutralized and ineffective.

The SEC in the release effectively articulated the reason for not raising the threshold: **"[I]nvestors that hold 1 percent or more of a company's shares generally do not use Rule 14a-8 as a tool for communicating with boards or management."** (Release at 66464.) In other words, those with more resources are more privileged and have better access because they have more money. It is not the SEC's role to create a system that fosters such a result. Rather, the SEC should create a system that grants equal access to all shareholders. This is where our response to Question 2 above is a strong contender for what the SEC should do if it chooses to do anything to change this process. All shareholders deserve access to management, and every shareholder deserves to be able to be part of the process, whether it is with respect to pre-proxy communications, or the shareholder proposal mechanism itself.

10. ***Should we instead use only a percentage-based test? If so, at what percentage level? Are there practical difficulties associated with a percentage-based test such as calculation difficulties that we should take into consideration?***

    Answer: No.

    Reason: See answers above.

11. ***Should we prohibit the aggregation of holdings to meet the thresholds, as proposed? Would allowing aggregation of holdings be consistent with a shareholder having a sufficient economic stake or investment interest in the company to justify the costs associated with shareholder proposals?***

    Answer: The SEC should permit aggregation.

    Reason: In the discussion relating to no longer permitting aggregation (Release at 66464), the SEC states that the adopting release did not provide reasons for permitting aggregation. It would appear logical that aggregation would have the effect of giving more people a voice, and perhaps that was so obvious in its time that there did not seem to be a reason to make that explicit.

    Regardless of the original intent, given that a change is being proposed without identifying how the change protects shareholders, the practical effect of the proposed change would be to disenfranchise small shareholders. In contrast, the SEC also proposes to increase resubmission thresholds where an "insufficient" number of shareholders have an interest in a given proposal topic. Yet when shareholders are of a common mind with respect to a proposal, the SEC proposes not to permit them to band together to show their collective strength. These two proposals seem to be inconsistent, except to the extent that they both disenfranchise small investors.

    Two paragraphs after arguing in favor of not permitting aggregation "to meet the applicable minimum ownership threshold," the SEC states: **"We are mindful of concerns that any revisions to the ownership requirements may have a greater effect on shareholders with**

smaller investments. We believe that the amendments we are proposing today adequately preserve that ability of smaller shareholders to submit proposals."

Exactly how does the Commission propose to do preserve that ability? The Commission in its release: (1) identifies no specific widespread abuse - but only the passage of time and the value of money; (2) acknowledges that large shareholders have direct access to management; and (3) offers no justification other than an index for recent stock values to suggest why threshold amounts should go up.

The inconsistent rationales offered as supporting the amendments are arbitrary and capricious, and would not withstand judicial scrutiny.

12. ***If we were to allow shareholders to aggregate their holdings to meet the thresholds, should there be a limit on the number of shareholders that could aggregate their shares for purposes of satisfying the proposed ownership requirements? If so, what should the limit be? For example, should the number of shareholders that are permitted to aggregate be limited to five so as to reduce the administrative burden on companies associated with processing co-filed submissions?***

Answer: No.

Reason: There is no reason to limit aggregation of holdings. The more shareholders who agree on an approach, the more it suggests management would benefit from listening to their policy concerns. The SEC needs to abandon the viewpoint conveyed by this release that shareholders are somehow "using" the companies they own for some nefarious purpose.

Shareholders' concerns are no less valid than those of venture capital firms that purchase a stake in private companies. The difference is that public shareholders have no power to demand a board seat. They also cannot impose change without going through a process. The company that chooses to be public accepts this trade-off, and has an obligation to engage with those who support the company's existence.

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 the withdrawal of the proposal on behalf of the other co-filers? Would 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?***

Answer: No.

Reason: The proposed process seems complicated and unnecessary, and not in furtherance of solving an identifiable problem.

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?

Answer: See response to Question 2 above.

15. Unlike other issuers, open-end investment companies generally do not hold shareholder meetings each year. As a result, several years may pass between the submission of a shareholder proposal and the next shareholder meeting. In these cases, the submission may no longer reflect the interest of the proponent or may be in need of updating, or the shareholder may no longer own shares or may otherwise be unable to present the proposal at the meeting. Should any special provisions be considered, after some passage of time (e.g., two years, three years, five years, etc.), to require shareholders to reaffirm submission of shareholder proposals for open-end investment companies or, absent reaffirmation, for the proposals to expire?

Answer: No.

Reason: The release fails to identify any need for undertaking such action.

16. * Does the Rule 14a–8 process work well?

Answer: Yes. The Rule 14a-8 process does work well. With the encouragement of more interim communications, it could be streamlined even more.

**** Should the Commission staff continue to review proposals companies wish to exclude?***

Answer: No.

Reason: The "no-action" process is supposed to mean only that division staff agrees not to recommend enforcement action if the company excludes the proposal, and no-action letters have no value as precedent. In reality, however, no-action letters are unduly relied on to exclude access to the proxy process by shareholders. When staff opines that a proposal may be excluded, it empowers management. While the staff certainly should and does have the power to conclude that they will not recommend enforcement action, the no-action function should not be used as a device where it alters the relative positions of two adversarial parties.

**** Should the Commission instead review these proposals?***

Answer: No.

Reason: There could be no purpose served by doing so. See above.

**** Is there a different structure that might serve the interests of companies and shareholders better?***

Answer: Perhaps. See response to Question 2 above. The SEC has an opportunity to create a mechanism that can accomplish a great deal in this regard. Tinkering with existing thresholds fails to take into account the potential power of existing technology, which can foster collaborative efforts for the mutual benefit of companies and their shareholders.

Were the staff to get out of no-action business when it comes to evaluating shareholder proposals for exclusion, it would save everyone time and money. The SEC could consider setting up a portal where all shareholder proposals are posted and may be evaluated by both management and shareholders. It would take less time for management to state its conclusions on the portal, and it would cost them far less than hiring counsel to submit no-action requests. As it is, even when there is a majority vote in favor of a resolution, management is not obligated to implement the proposal (though it would be wise to consider the fact that its shareholders are interested in the issue). Likewise, promoting a free flow of information - consistent with the SEC's disclosure mandate and fostering access to information for shareholders - could provide management with useful information about its shareholder base, whether or not it ultimately decides to adopt certain policies.

Are states better suited to establish a framework governing the submission and consideration of shareholder proposals?

Answer: No.

Reason: The proxy rules already standardize the practice, and companies have a national and international reach. The states abandoned that area of the law long ago (except for antifraud purposes), and for them to become involved once again would result in a patchwork of laws that would foster nothing more constructive than we already have.

II.B - PROPOSALS SUBMITTED ON BEHALF OF SHAREHOLDERS (66465-67)

17. 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?

Answer: No.

Reason: The SEC has failed to identify an issue in need of resolution.

18. Are the informational requirements we are proposing appropriate? Should we require any additional information or action? If so, what additional information or action should we require? For example, should there be a notarization requirement? How would these measures affect the burden on shareholders?

Answer: No.

Reason: There is no purpose to be served by this requirement. The proxy rules are there to facilitate shareholder access. When balancing a corporation's time and potential additional expense versus shareholder access, on balance a shareholder should be granted access rather than potentially risking disenfranchisement. Imposing additional burdens do not serve any legitimate purpose with respect to the SEC's mandate of investor protection.

19. Is any of the proposed information unnecessary to demonstrate the existence of a principal-agent relationship and/or the shareholder proponent's role in the shareholder proposal process? If so, what information is unnecessary?

Answer: Yes.

Reason: There is no benefit to adding the information. To the extent any interested party would like additional information, they are free to reach out to determine whether the shareholder has indeed authorized the representation, and to identify any other information deemed important to know. Otherwise it is an unnecessary burden. The SEC in its releases identifies "challenges and concerns." (Release at 66466.) That is insufficient to justify a rule change that imposes additional burdens on the very persons the SEC has been charged by Congress to protect.

20. Are there legal implications outside of the federal securities laws that we should be aware of or consider in allowing a principal-agent relationship in the context of the shareholder-proposal rule?

[This question is outside the scope of our response.]

21. As part of the shareholder proposal submission process, representatives generally deliver to companies the shareholder's evidence of ownership for purposes of satisfying the requirements of Rule 14a–8(b). Where the shareholder's shares are held in street name, this evidence comes in the form of a broker letter from the shareholder's broker. Since a broker letter from the shareholder's broker generally cannot be obtained without the shareholder's authorization, does the fact that the representative is able to provide this documentation sufficiently demonstrate the principal-agent relationship and/or the shareholder's role in the shareholder-proposal process? Is the answer different if the representative is the shareholder's investment adviser that owes a fiduciary duty to the shareholder?

[This question is outside the scope of our response.]

II.C - ROLE OF SHAREHOLDER PROPOSAL PROCESS (66466-67)

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?

Answer: Do not adopt this component.

Reason: Shareholder engagement must take place at a time prior to the shareholder proposal process. See response to Question 2 above. At this stage, the component would likely create a further hurdle for shareholders. Management had its opportunity to engage with shareholders prior to (and potentially to head off) the shareholder proposal process. Implementing a process as recommended in the response to Question 2 facilitates the engagement without forced time deadlines, which would likely operate to the detriment of the shareholder versus the corporation.

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?***

Answer: No.

Reason: See response to Question 22 above. This is too little too late, and would work against the interests of the shareholder.

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?***

Answer: See response to Question 2 above. The shareholder proposal process is not the time that these engagements should suddenly be taking place. They should happen before this point, requiring management to be responsive to shareholder requests to engage.

25. ***As proposed, a shareholder would have to provide a statement 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. Is this timeframe appropriate? If not, what would be an appropriate timeframe?***

Answer: No.

Reason: See response to Question 22 above. This is too little too late, and would work against the interests of the shareholder.

26. If the shareholder uses a representative, should we also require that the representative provide a similar statement as to his or her ability to meet to discuss the proposal with the company?

Answer: No.

Reason: See response to Question 22 above. This is too little too late, and would work against the interests of the shareholder, even with a shareholder representative.

27. Should companies be required to represent that they are able to meet with shareholder-proponents?

Answer: Yes, but prior to the shareholder proposal process.

Reason: Nothing currently prevents management and shareholders from meeting. And if it takes a shareholder proposal to "prod" management into noticing that a shareholder wants to engage, any time is appropriate. There do not need to be regulations in place to "force" the issue at that time. Rather, see the answer to Question 2 for a suggestion to build a platform to facilitate those types of communications outside the shareholder proposal process.

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

Good management is responsive to shareholder requests to engage. Many shareholder concerns are routinely addressed in this manner, and, as a result, those companies potentially receive fewer shareholder proposals. Alternatively, good corporate actors do not mind receiving proposals, and use them as an opportunity to highlight the actions they have already undertaken for the benefit of shareholders and their communities. There is no reason the process needs to be contentious. Indeed, were the staff to get out of no-action business when it comes to evaluating shareholder proposals for exclusion, it would save everyone time and money. The SEC can set up a portal where all shareholder proposals may be evaluated. It would take less time for management to state its conclusions on the portal, and it would cost them far less than hiring counsel to submit no-action requests.

II.D - ONE-PROPOSAL LIMIT: 14a-8(c) (66467-68)

We submit a single answer for questions 29-36:

Answer: There is no reason to restrict the number of proposals that may be submitted.

Reason: The Commission's function is to ensure full and fair disclosure. The SEC is the watchdog of the investor, and in that capacity must facilitate the free flow of information, not

inhibit it. There is no policy reason to be served by limiting the number of resolutions. Let the market control itself as to the issues of importance to shareholders. What is useful is to require that companies respond to shareholder concerns, and facilitating a mechanism such as that proposed in response to Question 2 above can fulfill that purpose.

29. *We are proposing to amend Rule14a–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?*

[See response at the beginning of Section II.D.]

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?*

[See response at the beginning of Section II.D.]

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?*

[See response at the beginning of Section II.D.]

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?*

[See response at the beginning of Section II.D.]

33. *If adopted, would the proposed informational requirements discussed in Section II.B alleviate the concerns addressed in this section such that the proposed amendments to Rule 14a–8(c) would be unnecessary?*

[See response at the beginning of Section II.D.]

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?

[See response at the beginning of Section II.D.]

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?*

[See response at the beginning of Section II.D.]

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?*

[See response at the beginning of Section II.D.]

II.E(i) - RESUBMISSION THRESHOLDS: 14a-8(i)(12)

We submit a single answer for questions 37-44.

Answer: There should be no changes in threshold amounts.

Reason: See responses to Question 1. The proposed changes are arbitrary, serve no policy purpose, and do not address abuses as none have been identified.

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?*

[See response at the beginning of Section II.E(i)]

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)?*

[See response at the beginning of Section II.E(i)]

39. What are the estimated costs companies incur as a result of receiving resubmitted proposals? Are the cost different for resubmitted proposals than for initial submissions? In particular, which specific costs incurred (e.g., printing costs, staff time, fees paid to external parties such as legal advisors or proxy solicitors, management time, board time, etc.) may differ between resubmitted proposals and initial submissions?

[See response at the beginning of Section II.E(i)]

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?

[See response at the beginning of Section II.E(i)]

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

[See response at the beginning of Section II.E(i)]

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?

[See response at the beginning of Section II.E(i)]

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?

[See response at the beginning of Section II.E(i)]

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? Should we consider changing this standard, or its application? For example, should we adopt a ''substantially the same proposal'' standard?

[See response at the beginning of Section II.E(i)]

II.E(ii) - SUBSTANTIALLY SAME MATTER

We submit a single answer for questions 45-51.

Answer: The SEC should not adopt the Momentum Proposal.

Reason: The SEC must not elevate form over substance. The parties must be free to discuss the substance of proposals, and not be bound by arbitrary numbers put into place for what amounts to no discernable reason other than to restrict access to management.

The proposals amount to an attempt to chip away at substantive rights via what SEC is calling administrative "procedural rules." These simply will not achieve any beneficial results, and the SEC is best to leave the existing procedures alone. If anything, establish a portal (as suggested above) and permit all proposals to be posted, and permit management to respond. A reasonable procedure such as that will save the SEC scarce resources, and make the entire process less contentious. The cost to run the process once set up will cost much less and be less confrontational than the existing process of having staff issue no-action letters. Coupled with the procedure set forth in response to Question 2 above, the result will be exactly what everyone seeks: more constructive communication and less need for proposals because there will be an avenue for effective dialogue and letting others know their concerns.

Proxy rules are largely a procedural mechanism for an orderly way for shareholder to exercise their right of getting info from the companies they own. The registration statement / prospectus provides guidelines so as to standardize the type of information a company needs to provide in connection with the purchase or sale of a security. And ongoing info is required to keep that info current. That information flows from company to shareholder - that's the only direction in which it needs to flow, unless the shareholder seeks additional information from the company, in which case it is free to ask (and needs to receive a response). And if a form or set of instructions does not elicit information important to a shareholder, then it becomes the company's job to listen. If it takes some of management's time, that is the trade-off for being a public company. If a shareholder has concerns about the business, the company needs to hear those out and not shut it out because it does not want to take the time to listen.

Just because not all shareholders have the same concerns does not diminish the importance of an issue. In that respect, the thresholds become irrelevant. It's the substance that matters. Let the company explain to everyone precisely why it is not in the company's best interests to undertake whatever policy about which a shareholder is concerned. Let that take place within the mechanism set up for communications with all shareholders whenever an issue arises.

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?*

[See response at the beginning of Section II.E(ii)]

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?*

[See response at the beginning of Section II.E(ii)]

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?*

[See response at the beginning of Section II.E(ii)]

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?*

[See response at the beginning of Section II.E(ii)]

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?*

[See response at the beginning of Section II.E(ii)]

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?*

[See response at the beginning of Section II.E(ii)]

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?

[See response at the beginning of Section II.E(ii)]

IV. Economic Analysis (66474-509)

In this day of electronic communications, there are fewer and fewer proxy statements being printed and mailed to shareholders. Companies accordingly save both printing and mailing costs. The trend will continue to be in that direction.

Rather than attempting to change thresholds that serve little purpose to begin with and potentially create more adversarial engagements, the staff and the SEC should attempt to find creative uses for applying technology to develop mechanisms for fostering engagement among the parties.

Even when companies need to add an additional set of pages to accommodate shareholder proposals, the overall costs are little compared to the enormous expense associated with being a public company. A company that has elected to be public has an obligation to its shareholders, and the better-managed companies are the ones that find ways creatively to engage with shareholders and maintain effective communications. The trade associations that have pushed for "reforms" for "perceived abuses" would be better served by assisting their members in developing ways to engage with shareholders that will ultimately make the companies more attractive investments.

The SEC's job is to look out for the interests of shareholders, and not to take steps that effectively restrict their corporate franchise.

Respectfully submitted,

/s

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