SHAREHOLDER RIGHTS GROUP

June 10, 2020

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Electronic address: rule-comments@sec.gov

RE: Proposals on Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (File Number S7-23-19)
Focus: Impact of Rulemaking Proposals on Shareholder Rights: Stakeholder Capitalism and the Pandemic Recovery

Dear Ms. Countryman:

We wish to add the enclosed article, "Stakeholder Capitalism and the Pandemic Recovery" to the materials in the rulemaking record regarding the proposed changes to Rule 14a-8. This article summarizes the crucial role being played by shareholder proposals in the 2020 season in fostering discussion of next steps and implementing mechanisms to fulfill 183 corporate CEO's 2019 pledge to commit to meet the needs of stakeholders. The governance questions raised by the proposals are more important than ever in light of the need to the ensure support from stakeholders during the pandemic recovery and in response to the current social justice protests.

The Securities and Exchange Commission's own estimate indicates that implementing the proposed changes in the shareholder proposal rule would reduce the number of proposals by 37%. Many proposals discussed in the article would be at risk. This exemplifies concerns many investors have already raised in the rulemaking record, as these shareholder proposals raise crucial, material investor concerns regarding corporate adaptation during the pandemic recovery. The filing thresholds would prevent some of the investor proponents from filing proposals since their modest holdings might not meet the new requirements; the complex representation requirements would interfere with proponents' opportunity to hire an appropriate representative to help them advance these important and complex issues; and the resubmission thresholds would interfere with the need for iterative discussion of these complex issues of stakeholder governance over the course of years as may be needed to develop an investor consensus on the best approach to implementing "stakeholder capitalism."

Sincerely,

Sanford Lewis
Director

PO Box 231 Amherst, MA 01004 • 413 549-7333

Stakeholder Capitalism and the Pandemic Recovery

Posted by Sanford Lewis, Shareholder Rights Group, on Monday, June 8, 2020

Editor's note: Sanford Lewis is Director at the Shareholder Rights Group. This post is based on a Shareholder Rights Group memorandum. Related research from the Program on Corporate Governance includes The Illusory Promise of Stakeholder Governance by Lucian A. Bebchuk and Roberto Tallarita (discussed on the Forum here) and Socially Responsible Firms by Alan Ferrell, Hao Liang, and Luc Renneboog (discussed on the Forum here).

As of this writing, the US COVID-19 pandemic impacts include 100,000 dead and almost 40 million newly unemployed. The reopening process is anticipated to yield a "roller coaster" recovery in which businesses will restart and then shut down again in response to workforce and regional outbreaks. Although all members of society are affected by this extended crisis, the pain is unequally distributed, with front-line workers and people of color among the hardest hit.

The pandemic is testing all of us, and it is also a litmus test for the 2019 pledge of 183 corporate CEOs to operate their businesses in the interests of employees, consumers, suppliers, and communities, as well as shareholders. When announced last year, it the new Statement on the Purpose of a Corporation ("the Statement") by the Business Roundtable was seen by some as heralding a new era of Stakeholder Capitalism—an era of corporate responsibility to stakeholders that moved beyond shareholder primacy. Yet the Statement and the concept of Stakeholder Capitalism are devoid of implementing principles.

If *stakeholder capitalism* is to be made real, shouldn't there be corresponding rules and concepts of *stakeholder governance?* Isn't there a need for a coherent set of legal and operational principles for implementation? How will the fiduciary duties of directors and executives change to reflect these new commitments?

Walking Their Talk?

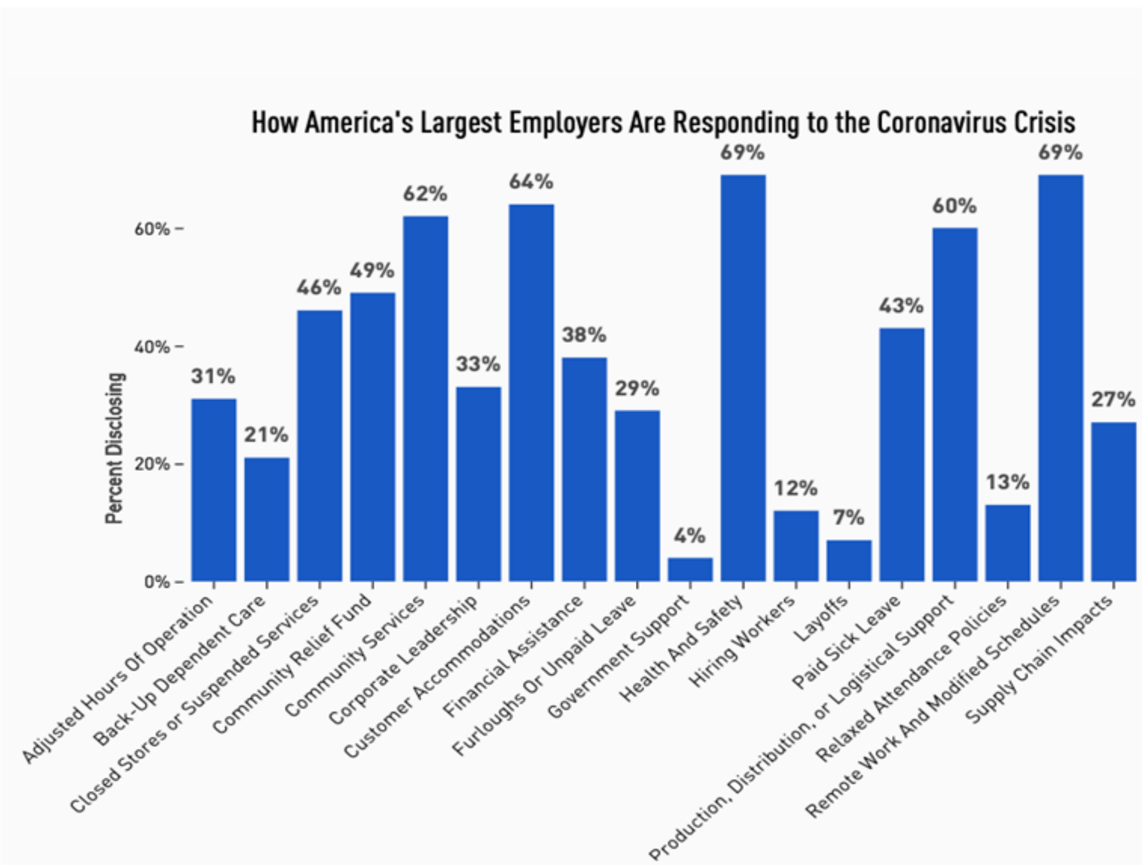
The endorsers of the Roundtable's Statement have an opportunity to "walk their talk" in this deeply challenging time. Various market efforts are underway to frame and assess stakeholder-supportive action by corporations in the pandemic. For instance:

- The World Economic Forum has issued a COVID Action Platform articulating the responsibilities of "corporate global citizenship" in the pandemic.
- A group of investors holding $9.2 trillion USD in assets under management have issued an Investor Statement on Coronavirus Response urging companies to consider providing paid leave, prioritize health and safety, maintain employment, maintain customer and supplier relationships, and exercise financial prudence.
- The nonprofit JUST Capital has established a COVID-19 response tracker on corporate responses to coronavirus on those stakeholder impacts. The organization is

> tracking company announcements related to: paid sick leave, temporary closures, one-time bonuses, treatment of vendor and contract workforces, work from home policies, layoffs and furloughs, outplacement services, and commitments to rehiring employees, executive compensation and pay cuts, as well as buyback and dividend programs.

JUST Capital notes:

> “When companies provide paid sick leave, workers can stay home and protect their customers and the community from the virus, while also maintaining their economic security. When workers are fairly compensated, they can continue to buy the products they need, benefitting the overall economy. When companies prioritize customers’ health and meet their changing needs, this better serves Americans and strengthens customer loyalty. When companies recognize the importance of maintaining the financial stability of their suppliers, local communities reap the benefits. And when business executives lead by example by reducing executive compensation and companies pursue creative frontline job solutions like shift-sharing, we can minimize job loss while restoring trust.”
>
> Source: JUST Capital



The thrust of these efforts tends to focus on the idea that when companies treat stakeholders with respect, the decisions that result will be better for employees, the economy, and long term health of company.

However, the pandemic is also presenting object lessons in the *failure* of companies to live up to their stakeholder commitments, including shortages of personal protective equipment, inadequate sick leave and healthcare for front line employees, and high numbers of furloughs and layoffs. It has been noted by the *Washington Post* that a number of companies have, for example, laid off employees and at the same time continued dividends or stock buybacks for shareholders.

To cite one example of investor concern, New York City Comptroller Scott M. Stringer on behalf of the New York City Retirement Systems and Anna Pot of APG Asset Management US wrote to Amazon.com on May 14, 2020 to inquire how the company is managing the crisis, noting that "media reports indicate that many Amazon employees remain fearful about coming to work, and concerned for their own safety as well as that of their families, their coworkers, and the customers and communities they serve."

Other examples include FedEx employees alleging that some drivers and warehouse employees did not feel comfortable taking sick leave during the pandemic, and that the "macho" environment in their warehouses discouraged employees from taking the pandemic seriously. Employees at Walmart have similarly stated concerns about the lack of responsiveness of management to basic health and safety concerns regarding social distancing of customers, access to healthcare, and availability of PPE for workers.

Stakeholder Governance as a New Normal?

The potential role of stakeholder governance seems apropos to the new challenges in reopening and recovery. As we collectively embark upon defining the "new normal" of COVID-19 life, corporations will rely heavily on the stakeholders of the company that are not shareholders. Employees' status in a company, including their own confidence in their safety, trust in managers, and comfort in coming to work, will become even more critical at all companies. Communities and suppliers will likewise be vital as companies seek to keep their employee pipeline and supply lines strong. Unique challenges exist for companies as we move towards this "new normal." Yet a focus on stakeholder governance—might allow companies to "build back better" and stronger.

Given the advisory and sometimes ambiguous nature of federal and state reopening guidelines, corporations will need to find their own way through this recovery process, including decisions regarding testing, workplace contact tracing, quarantining, and contagion-based operational pauses. These challenges will require an extraordinary level of teamwork among board, management, and rank-and-file employees. Companies that fail to involve employees in these decisions may struggle to thrive as they seek to move forward. One such challenge will arise in fostering a workplace safety culture that ensures that all employees and stakeholders fight back against contagion in the workplace. Science-based decision-making and engagement through all levels of company employees will be needed to drive crucial practices that address PPE, masks, social distancing, and more.

The recovery and rebuilding process for companies and the nation poses a multifaceted challenge to build back better: coronavirus, wealth inequity, and climate change are all risk factors for company prosperity. Recovery plans for companies will likely need to bridge those three substantial "stakeholder" challenges. For large institutional investors with highly-diversified and long-term portfolios, long term investing outcomes may be significantly undermined by corporate externalities that affect the whole economy. To these "universal investors," all three of these elements of recovery bear directly on investing strategy and beneficiary interests.

2020 Shareholder Proposals Suggest Stakeholder Governance

Companies' annual shareholder meetings are an annual check-in through which investor and stakeholder concerns surface. Shareholder proposals often represent the leading edge for identifying and advancing new models of corporate governance, disclosure, and performance. This spring, several shareholder proposals added to the evolving public conversation regarding who the corporation serves and how it should be governed, and advanced new ideas regarding *stakeholder governance*.

For instance, at Bank of America, Blackrock, Citigroup, Goldman Sachs, and McKesson, proposals voted this season requested that their boards assess whether there are changes to governance, metrics, or board membership criteria that could more fully implement the Statement. In each instance, there is evidence that, despite the CEO's pledge to the Statement, ongoing business practices sometimes appear to be in conflict with the commitment to stakeholders on issues such as climate change and equitable treatment of employees. For instance, BlackRock's CEO Larry Fink has been an outspoken advocate for ideals of corporate purpose and stakeholder capitalism, noting in his 2020 letter to corporate CEOs that "[c]ompanies must be deliberate and committed to embracing purpose and serving all stakeholders—your shareholders, customers, employees, and the communities where you operate…[and] Climate change has become a defining factor in companies' long-term prospects." Yet according to an exempt solicitation filed by As You Sow, BlackRock holds companies with reserves in fossil fuels amounting to a 9.5 gigatonnes of CO2 emissions—or 30 percent of total energy-related carbon emissions from 2017, and BlackRock's past disclosures reveal consistent votes against virtually all climate-related resolutions (having voted for only 6 of 52 such resolutions).

Disclosure of Material ESG Metrics Wins Mainstream Support

In the pandemic, ESG performance has been seen as a good indicator for assessing corporate resilience. Before 2020, ESG disclosure and performance has become well-understood by investors and analysts as a key benchmark against which long-term value creation and performance can be tracked and enhanced. For instance, a Morningstar analysis reported in *Institutional Investor* found that voting support of ESG proposals by mainstream funds is on the rise, due to the clear connection to financial value. Bank of America Merrill Lynch studies had indicated that attention to ESG matters could have helped avoid or at least forewarned of 90% of bankruptcies.

Now, the ESG strategy has been shown to buffer financial impacts in the pandemic. For instance, Morningstar reported in March that "Sustainable Equity Funds Are Outperforming in Bear Market: While ESG equity funds have taken big hits this month, their losses have been less severe than those of conventional peers."

During the current annual meeting season, voting outcomes demonstrate investor buy-in to ESG. A majority of the shareholders of industrial supply giants Genuine Parts, O'Reilly Automotive, and Fastenal voted in support of resolutions asking for disclosure on human resources management and labor practices according to Sustainable Accounting and Standards Board (SASB) metrics. 74% (Genuine Parts) and 61% (Fastenal) and 66% (O'Reilly Automotive)

Corporate Purpose, Fiduciary Duty, and Public Benefit

A proposal by Harrington Investments Inc. at Wells Fargo & Company, a company deeply wounded by its consumer fraud scandals, urged the Board of Directors to consider re-incorporating the company as a benefit corporation under Delaware law. In an unusual move, the board promptly commissioned the study requested by the proposal without awaiting a vote, but ultimately rejected the suggestion of reincorporation as a benefit company.

The Harrington proposal also sought evaluation of actions containing elements of the Delaware public benefit corporation law without fully reincorporating. Most companies' articles of incorporation merely state that the company can conduct any business legally allowed. Is it legally possible to expand the fiduciary duty of directors to encompass a commitment to stakeholders through a simple revision to the company's purpose statement in its incorporation articles? At least one prominent expert on the Delaware law has suggested that actions short of fully reincorporating as a Public Benefit Corporation might not prove enforceable in the courts.

In his seminal book on the Delaware Public Benefit Corporation, *Benefit Corporation Law and Governance*, Frederick Alexander suggests that a "private ordering" arrangement by merely modifying the corporate purpose might be found to be an impermissible attempt by private parties to amend fiduciary duty.

However, Delaware courts have confirmed that the scope of a director's fiduciary duties can be articulated in board committee charters, which implies that there is some room to move in corporate governance reforms short of reincorporation. The Delaware Supreme Court affirmed that a board member's fiduciary duties can be defined through a committee charter in *In re Walt Disney Co. Derivative Litigation,* 906 A.2d 27, 53-54 (Del. 2006), which described the duties of Disney's compensation committee as a "charter-imposed duty."

Employees on Board

One possible approach to making a "stakeholder" commitment real would be to allocate slots on the board to representation of those stakeholders. The model of "codetermination" long adopted in Germany, for instance, fills as much as half of a corporation's supervisory board's slots with rank-and-file employees. Proposals this season have asked companies to explore the potential for adding a bloc of rank-and-file employees to the board of directors. The proposals were filed at Walmart and AT&T by current or retired employees, and by NorthStar Asset Management, Inc. at other companies (IDEX Corporation, Square, Badger Meter, Stryker, Boston Scientific, FedEx, and ADP). During a time in which the reopening and recovery process will involve increasingly complex health and safety requirements, and in which a strong element of trust will need to be established in order to secure continued employee cooperation in contact tracing and other health and safety measures, the empowerment of the workforce by a direct channel of communication and influence within the Board of Directors seems promising.

Building Back Better: Climate Change In Recovery Strategies

As noted above, any company with a stakeholder commitment that is worth its salt will need to ensure that the company's actions comport with aspirations. One of the immediate ways to do this is to assure that the recovery process of emerging from the pandemic helps to curtail the global climate crisis. On May 20, 49.6% of voting shares supported a proposal at J.P. Morgan Chase & Co. asking the company to outline if and how it intends to reduce the GHG emissions associated with its lending activities in alignment with the Paris Agreement's global temperature rise goals. If one were to discount the voting of insider shares, which are predictably aligned against the proposal, it appears that the proposal would have passed.

The groundswell of support for this proposal followed news articles highlighting a report that the Company had published, for its clients, containing economic research documenting the *devastating impacts of climate change* and the *failure of governments to control the risks*. The Guardian article "*JP Morgan economists warn climate crisis is threat to human race; Leaked report for world's major fossil fuel financier says Earth is on unsustainable trajectory*," states:

> The world's largest financier of fossil fuels has warned clients that the climate crisis threatens the survival of humanity and that the planet is on an unsustainable trajectory, according to a leaked document.
>
> The JP Morgan report on the economic risks of human-caused global heating said climate policy had to change or else the world faced irreversible consequences.
>
> The study implicitly condemns the US bank's own investment strategy and highlights growing concerns among major Wall Street institutions about the financial and reputational risks of continued funding of carbon-intensive industries, such as oil and gas…

Given the company's position as the leading funder of fossil fuel development, it should not be surprising that so many investors probably believe that the company needs to pivot away from fossil fuels and toward the clean energy economy of the future. The scale and challenge associated with climate change will certainly need to be part of every large company's recovery trajectory.

Conclusion

In the pandemic recovery process, stakeholder governance vehicles will likely garner new consideration in boardrooms, investment houses, union halls, civil society, and legislatures. There may be an opportunity for companies to unify their stakeholders to invest in the company's long-term survival and to pull together through this crisis.

We note in closing that the shareholder proposals discussed here might not even be considered in the future if the Securities and Exchange Commission goes forward, despite the pandemic, to adopt a rulemaking that would place numerous new hurdles in the shareholder resolution filing process in an effort to discourage shareholders from filing and resubmitting such proposals. We urge the SEC to reject the proposed changes to Rule 14a-8 and allow investors and companies to continue using the shareholder proposal process as a vehicle for the development of stakeholder governance models that will rebuild trust and stakeholder support during the recovery.