

July 23, 2014

The Honorable Mary Jo White  
Chair  
United States Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: Comments in Response to the United States Chamber of Commerce's  
Petition for Rulemaking Regarding Exclusion of Shareholder Proposals,  
File No. 4-675

Dear Chair White:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully submits these comments in response to the United States Chamber of Commerce's ("Chamber") Petition for Rulemaking Regarding Exclusion of Shareholder Proposals ("Petition") submitted on April 9, 2014.<sup>1</sup>

The Chamber seeks to amend the Securities and Exchange Commission's ("SEC" or "Commission") existing rule regarding the exclusion from company proxy materials previously submitted shareholder proposals that did not elicit a certain percentage of shareholder support ("Resubmission Rule"). Currently, the Resubmission Rule allows a company to exclude a shareholder proposal from its proxy solicitation materials if the proposal (or one dealing with the same substantial subject matter) did not receive: (1) the support of three percent of shareholders the last time on which it was voted, if voted on once in the past five years; (2) six percent if it was voted on twice in the past five years; and (3) 10 percent if it was voted on three or more times in the past five years.<sup>2</sup>

The Chamber's petition seeks to amend the Resubmission Rule to significantly increase the voting thresholds, and additionally require a shareholder proposal to gain the support of a "progressively and meaningfully higher proportion" of shareholder support each year it (or one dealing with the same substantial subject matter) appears on a corporate ballot.<sup>3</sup> Under the proposed amendment, if either of these requirements is not met, the shareholder proposal (or one dealing with the same substantial subject matter) could be excluded from a company's proxy materials for a period of three years.<sup>4</sup>

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<sup>1</sup> United States Chamber of Commerce, Petition for Rulemaking Regarding Resubmission of Shareholder Proposals Failing to Elicit Meaningful Shareholder Support, File No. 4-675, April 9, 2014.

<sup>2</sup> 17 C.F.R. § 14a-8(i)(12).

<sup>3</sup> The Petition does not propose specific amounts of support needed for a shareholder proposal to be resubmitted. Petition, ¶ 6.4 & n.69. It proposes the SEC tie the percentages of support needed to "conclusions it gleans from" a cost-benefit analysis. *Id.*

<sup>4</sup> *Id.*, ¶ 6.4.

Adopting the Chamber's proposal would disenfranchise shareholders seeking votes on all types of proposals and eliminate a potential check on corporate expenditures that do not best serve the interests of a corporation. For example, companies would be able to obstruct votes on proposals aimed at ensuring greater accountability for corporate political expenditures through transparency in and greater oversight of the process. Disclosure of corporate political spending is a critical element of shareholder protection, particularly in the wake of the Supreme Court's *Citizens United* decision, which paved the way for corporations to spend large amounts of corporate funds to influence elections. Often, however, such corporate spending is subject to little or no oversight or disclosure. Shareholder interest in proposals requiring greater transparency of this process is on the rise, based on concerns that corporate funds are being spent in a way that does not serve the interests of the corporation. The Chamber's petition contravenes these interests and appears designed specifically to thwart corporate transparency and further the political interests of the Chamber to the detriment of shareholders, investors, and the corporations themselves. Accordingly, we urge the Commission to reject the proposal.

### **CREW's Interest in the Proposed Petition**

CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Tax Code, and is deeply interested in the proposed SEC rule changes. CREW is committed to protecting the rights of citizens to be informed about the activities of public officials, ensuring the integrity of public officials, and protecting the integrity of our political and financial systems against corruption. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions. CREW's work focuses in part on exposing the special interests, including public companies that have secretly poured vast amounts of money into our electoral system.

CREW's interest in the Chamber's petition stems in part from a recent lawsuit against Aetna brought by an Aetna shareholder CREW represents.<sup>5</sup> The lawsuit, brought under § 14(a) of the Securities and Exchange Act, is based on false and misleading statements Aetna made in proxy materials to defeat shareholder proposals that would have required more disclosure and oversight of Aetna's political contributions. Despite publicly supporting health care reform,<sup>6</sup> Aetna made more than \$7 million in contributions to political groups that spent millions of dollars opposing health care reform, including more than \$3.3 million to the American Action Network, and over \$4 million to the Chamber, the same organization that has submitted this petition.<sup>7</sup> Further, Aetna touted itself as a model of transparency, yet these expenditures only came to light when Aetna inadvertently included them in forms filed with the National Association of Insurance Commissioners.

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<sup>5</sup> *Silberstein v. Aetna, Inc., et al.*, Case No. 13-CV-8759 (S.D.N.Y.).

<sup>6</sup> David Whelan, *Aetna's Ron Williams On Health Reform*, *Forbes*, August 6, 2009.

<sup>7</sup> See [http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/6-14-12\\_Aetna\\_Letter\\_Exhibits.pdf?nocdn=1](http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/6-14-12_Aetna_Letter_Exhibits.pdf?nocdn=1).

### **The Petition Denies Shareholders Votes on Corporation Political Spending Proposals**

The Commission should reject the Chamber's proposal because it would deny shareholders votes on transparency and oversight of corporate political spending. At a time when investors increasingly are demanding and approving proposals to enhance transparency of corporate political activity, the Commission should not change the rules to obstruct votes on those proposals.

#### **Transparency of Corporate Political Spending is Essential To Investor Protection**

In general, transparency and disclosure are essential components of investor protection. Shareholders, as the owners of a corporation, have a fundamental right to know how their money is being spent and whether those expenditures are in the best interests of the corporation. Without transparency, corporations may spend company resources without any accountability or monitoring. In the context of corporate political spending, a lack of accountability and transparency allows corporations to spend company funds invested by shareholders to support political candidates who may be directly opposed to shareholder interests, such as a candidate who supports repealing shareholder voting protections. Just as troubling, corporations are free to use corporate funds for activities that do not further corporate interests. The public position taken by Aetna on the Affordable Care Act illustrates this problem. Notwithstanding Aetna's public support for the law, the company secretly funneled money to groups, including the Chamber, actively involved in attempting to defeat its passage.

The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* has further increased the need for corporate transparency.<sup>8</sup> *Citizens United* allows companies to spend unlimited amounts of corporate funds on independent political activities on the theory such expenditures are protected political speech. The Supreme Court also noted, however, that disclosing such spending would allow shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits," thus permitting shareholders "to react to the speech of corporate entities in a proper way."<sup>9</sup> With the way paved for unlimited corporate spending on political activities, the need for transparency in that process could not be greater.

Corporate transparency also is essential for corporate accountability and oversight mechanisms to work.<sup>10</sup> The Supreme Court has pointed to these accountability mechanisms as ameliorating concerns with allowing greater speech in the form of political spending, especially when corporations use shareholder resources for political purposes. For example, in *Citizens United*, the Court relied on "[s]hareholder objections raised through the procedures of corporate democracy" as a method through which shareholders could monitor the use of corporate

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<sup>8</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>9</sup> *Id.* at 370-71.

<sup>10</sup> For detailed analysis of the importance of disclosure in this area for the functioning of corporate accountability mechanisms, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 97 (2010).

resources on political activities.<sup>11</sup> The Court hoped shareholders would be able to “determine whether their corporation’s political speech advances the corporation’s interest in making profits,” and take action against executives who use corporate resources for speech that is inconsistent with shareholder interests.<sup>12</sup>

These mechanisms only work, however, when shareholders have information about how the company is spending corporate funds and on what. Without this information, shareholders are unable to determine whether corporate political spending “advances the corporation’s interest in making profits.”<sup>13</sup> In the absence of disclosure, corporate leaders cannot be held accountable for spending corporate resources on political activities in a way that departs from shareholder and corporate interests.

### *Shareholders Are Demanding Greater Transparency of Corporate Political Spending*

Even before *Citizens United*, shareholders increasingly were demanding greater corporate transparency. In 2006, polls revealed that 85 percent of shareholders believed there is a lack of transparency surrounding corporate political activity.<sup>14</sup> These polls further showed that “[i]ntensity among shareholder opinion was pronounced,” with 57 percent of shareholders “strongly agreeing” there is too little transparency with respect to corporate political spending.<sup>15</sup>

After *Citizens United*, shareholder demands for transparency have greatly – and understandably – intensified, as the magnitude of the problem and potential for abuse have increased significantly. Proposals broadly related to corporate social policies constitute a growing number of shareholder proposals, many of which are related to the disclosure of corporate political spending. During the 2014 proxy season, for example, a majority of proposals involved social and environmental issues, and 126 of the 901 shareholder proposals related to political and lobbying activities.<sup>16</sup>

Moreover, the average shareholder support for proposals requiring disclosure of corporate political contributions has increased significantly, from 10 percent in 2004 to 32

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<sup>11</sup> *Citizens United*, 588 U.S. at 370.

<sup>12</sup> *Id.* The Court has often relied on these mechanisms in its First Amendment analysis. See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794-95 (1978) (“Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.”).

<sup>13</sup> *Id.*

<sup>14</sup> Mason-Dixon Polling & Research, *Corporate Political Spending: A Survey of American Shareholders* 6 (2006).

<sup>15</sup> *Id.*

<sup>16</sup> Amy L. Goodman and John F. Olson, *Shareholder Proposal Developments During the 2014 Proxy Season*, *Harvard Law School Forum on Corporate Governance and Financial Regulation*, July 2014, available at <http://blogs.law.harvard.edu/corpgov/2014/07/02/shareholder-proposal-developments-during-the-2014-proxy-season/>.

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percent in 2013.<sup>17</sup> Support is even higher in some sectors – 39 percent of mutual fund shareholders, for example, supported corporate political transparency proposals in 2013.<sup>18</sup>

*The Chamber's Petition Would Disenfranchise Shareholders*

As these trends demonstrate, shareholders increasingly are interested in social policy proposals that impose on corporations a greater level of transparency and accountability. The Chamber's petition, however, would disenfranchise investors seeking votes on social policy and transparency proposals. Adopting the proposal also would signal to the public that corporations are more concerned with protecting their own interests than listening and responding to the needs and concerns of their shareholders.

The Chamber's petition would obstruct voting on shareholder proposals to increase accountability for corporate political spending. These proposals may receive low levels of support the first time they are voted on, but garner more support as shareholders increasingly demand greater disclosure. Further, the Chamber's proposed rule would create an incentive for corporate officers and executives to use deceptive tactics to depress support for shareholder proposals they oppose, allowing them to stave off future votes on the proposals for years. As CREW's lawsuit against Aetna illustrates, companies can use false and misleading statements about disclosure of their corporate political spending to undermine support for proposals that would lead to genuine transparency and accountability.

Although the Chamber claims the purpose of its proposal is to save investors time and resources, its underlying motivation for seeking a change in the Resubmission Rule seems clear: as a tax-exempt entity engaged in significant political activities funded in part with corporate funds, it seeks to eliminate social policy proposals that would require more transparency and oversight of corporate political spending. With that increased transparency, the Chamber risks losing corporate funding and may not be able to sustain its ever-increasing level of political expenditures.

The Chamber's petition does not expressly single out proposals involving corporate political spending and other social policy proposals. Nevertheless, its proposed amendment likely would have the greatest impact on such proposals. The Commission should encourage more corporate democracy, not less, particularly with regard to political spending. We therefore urge the SEC to reject the Chamber's petition.

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<sup>17</sup> Center for Political Accountability, Shareholder Resolutions on Corporate Political Spending Disclosure and Accountability, available at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8204>.

<sup>18</sup> Center for Political Accountability, 2013 Proxy Season Analysis Mutual Fund Support Hits New High, November 2013, available at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8174>.

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### **The Petition Denies Shareholders Votes on All Proposals**

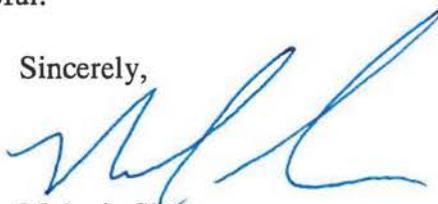
The Commission also should reject the Chamber's proposal because it excludes too many shareholder proposals – on all issues – effectively disenfranchising investors. This is not the first time the Commission has faced a proposed amendment to the Resubmission Rule. In 1997, the Commission elected not to adopt an amendment to the Resubmission Rule that would have increased the current 3/6/10 percent Shareholder Support Thresholds to 6/15/30 percent.<sup>19</sup> The SEC, responding to significant opposition to the proposed amendment, rightfully was concerned it would exclude too many shareholder proposals.<sup>20</sup> These same concerns should compel the Commission to reject the Chamber's current proposal.

### **Conclusion**

For the foregoing reasons, CREW urges the SEC to reject the Chamber's petition, which would obstruct corporate transparency and the accountability it brings, to the detriment of the corporations and its investors.

We appreciate the opportunity to communicate with you about these crucial matters, and hope you find the foregoing comments helpful.

Sincerely,



Melanie Sloan  
Executive Director

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<sup>19</sup> Amendments to Rules on Shareholder Proposals, Release No. 34-39093, 62 Fed. Reg. 50682, at § III.E (proposed Sept. 18, 1997), available at <http://www.sec.gov/rules/proposed/34-39093.htm>.

<sup>20</sup> Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, at § I (May 28, 1998), available at <http://www.sec.gov/rules/final/34-40018.htm>.