American Federation of Labor and Congress of Industrial Organizations

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AFL-CIO

AMERICA'S UNIONS

November 1, 2017

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for rulemaking to amend Rule 14a-8 under the Securities Exchange Act of 1934 regarding resubmission of Shareholder Proposals [File No. 4-675]

Dear Mr. Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to express our strong opposition to the petition submitted by the U.S. Chamber of Commerce requesting that the Securities and Exchange Commission (the "SEC") amend Rule 14a-8 under the Securities Exchange Act of 1934 regarding resubmission of Shareholder Proposals (the "Petition"). For the reasons set forth below, a rulemaking to modify Rule 14a-8 is a counterproductive use of the SEC's limited resources.

The AFL-CIO is the umbrella federation of U.S. labor unions, including 56 unions representing 12.5 million members. Union-sponsored and Taft-Hartley pension and employee benefit plans hold more than $667 billion in assets. Union members also participate directly in the capital markets as individual members and as participants in pension plans sponsored by corporate and public-sector employers. Altogether, U.S. workers' pension plans hold over $7 trillion in assets. Union members' pension plans routinely vote on shareholder proposals and many of these pension plans are active proponents of shareholder proposals.

The SEC's Rule 14a-8 on shareholder proposals facilitates the private ordering of public companies on a variety of corporate governance issues. The U.S. Chamber of Commerce and the Business Roundtable endorsed this use of the shareholder proposal process in its petition for review of the SEC's proxy access rule by writing that "shareholder choice is entirely appropriate for rules intended to further state law principles of corporate governance, the foundation of which is

self-government and private ordering."[1] It is ironic that these same business groups now seek to limit shareholders' ability to achieve a private ordering under Rule 14a-8.

Shareholder proposals on proxy access show how Rule 14a-8 facilitates the private ordering process. Since the SEC's proxy access rule was vacated in 2011, shareholders have submitted 309 proposals at S&P 500 companies urging the voluntary adoption of proxy access bylaws.[2] Half of these proposals did not go to a vote as companies agreed to adopt their own proxy access bylaws.[3] Proxy access proposals that went to a vote routinely received majority support except in cases of controlled companies.[4] Today, more than 60 percent of S&P 500 companies have adopted proxy access, and this percentage is expected to exceed 75 or 80 percent by 2018.[5]

Over the years, shareholders' ability to submit proposals under Rule 14a-8 has resulted in dramatic changes in the corporate governance of public companies. However, it may take many years for consensus to emerge in the marketplace. For example, shareholder support for proposals urging annual director elections took decades to reach majority vote status.[6] Twenty years ago, more than 60 percent of S&P 500 companies maintained a classified board structure. Today, less than 20 percent of S&P 500 companies have classified boards in large part due to the successful submission of shareholder proposals urging annual director elections.[7]

The private ordering successes of shareholder proposals are not limited to corporate governance issues. In recent years, environmental and social concerns have become an increased focus area for shareholder proposals. This reflects a growing recognition in the capital markets that these issues are material to investors.[8] As requested by shareholder proposals, companies today

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[1] Brief for Petitioners at 9, Business Roundtable and Chamber of Commerce of the United States of America v. U.S. Securities and Exchange Commission, 647 F.3d 1144 (D.C. Cir. 2011). Available at: https://www.uschamber.com/sites/default/files/legacy/files/1009uscc_sec.pdf.

[2] AFL-CIO analysis of Institutional Shareholder Services ("ISS") Voting Analytics database of shareholder proposals submitted between 2011 and 2017 requesting a proxy access bylaw amendment at S&P 500 companies.

[3] *Id.* The vast majority of proxy access proposals that did not go to a vote were either voluntarily withdrawn by the proponent or were omitted from the proxy under Rule 14a-8(i)(10) (substantial implementation).

[4] *Id.*

[5] Marc Gerber, "Proxy Access: Highlights of the 2017 Proxy Season," Skadden, Arps, Slate, Meagher & Flom LLP, July 1, 2017. Available at https://corpgov.law.harvard.edu/2017/07/01/proxy-access-highlights-of-the-2017-proxy-season/.

[6] Noam Noked, "Activism and the Move toward Annual Director Elections," Harvard Law School Forum on Corporate Governance and Financial Regulation, January 15, 2012. Available at https://corpgov.law.harvard.edu/2012/01/15/activism-and-the-move-toward-annual-director-elections/.

[7] Lucian Bebchuk et. al, "Towards the Declassification of S&P 500 Boards," Harvard Business Law Review, Vol. 3, No. 1, pp.157-184 (2013). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400652.

[8] For example, signatories to the U.N. Principles for Responsible Investment that have committed to incorporating ESG factors into their investment decisions now total $62 trillion in assets under management. "Responsible investment market update: a snapshot of signatory action," The Principles for Responsible Investment, March 20, 2017, https://www.unpri.org/news/pri-report-on-progress-signatories-more-committed-than-ever-to-responsible-investment.

routinely provide reporting on environmental sustainability and climate change risks. Social responsibility issues such as employment diversity, political spending disclosure, and respecting human rights are also routinely reported by companies as called for by shareholder proposals.

Over the years, the topics of many shareholder proposals have been incorporated into today's regulatory standards for publicly listed corporations. For example, the NYSE and NASDAQ listing standards now require majority independent boards of directors and entirely independent audit, compensation, and nominating committees – a reform first called for by shareholder proposals. Shareholder proposals also first called for the auditor independence requirements contained in the Sarbanes-Oxley Act, the "say-on-pay" vote requirements contained in the Dodd-Frank Act, and the expensing of stock options that is now mandated by U.S. GAAP.

The importance of shareholder proposals to the private ordering process is evident by the large number of proposals that shareholders withdraw after dialogue with companies. Less than half of all submitted proposals actually go to a shareholder vote. According to the ISS Voting Analytics database, 11,706 proposals were filed at Russell 3000 companies between 2004 and 2017. Only 5,342 of these shareholder proposals (46 percent) went to a shareholder vote. The SEC permitted companies to omit 1,741 proposals (15 percent). The remaining proposals (39 percent) were withdrawn by shareholders after a dialogue with the company or otherwise did not go to a vote.

The U.S. Chamber of Commerce petition does not provide any factual support for the claim that shareholder proposals have increased to unsustainable levels. To the contrary, the number of proposals has been remarkably consistent in recent years. According to the ISS Voting Analytics database, shareholders submitted an average of 836 proposals at 386 companies per year between 2004 and 2017. The number of submitted proposals fell to its lowest point in 2011, with 603 proposals submitted at 307 companies, and reached its highest level in 2015 with 967 proposal submissions at 478 companies. In 2017, shareholders submitted 841 proposals at 420 companies.

Voting on shareholder proposals is not burdensome to shareholders, and the incidental costs of including shareholder proposals in company proxy statements is immaterial. In fact, most public companies do not receive any shareholder proposals in a typical year. On average, only 13 percent of Russell 3000 companies received a shareholder proposal in a particular year between 2004 and 2017 according to the ISS Voting Analytics database. In other words, the average Russell 3000 company can expect to receive a shareholder proposal once every 7.7 years. For companies that receive a proposal, the median number of proposals is one per year.

Nor is the shareholder proposal process taxing on corporate management or boards of directors. Corporate secretaries routinely handle all aspects of the shareholder proposal process, not CEOs or directors. The vast majority of shareholder proposals are submitted at large companies who have experienced and well-staffed corporate secretaries. According to the ISS Voting Analytics database, 77 percent of proposals that shareholders submitted in the first three quarters of 2017

were filed at S&P 500 companies. Large companies are far more likely to receive shareholder proposals because these companies represent a greater portion of investors' equity portfolios.

The U.S. Chamber of Commerce petition falsely claims that the Rule 14a-8(i)(12) resubmission vote thresholds promote a "tyranny of the minority" because shareholders may resubmit proposals indefinitely if they receive more than 10 percent support after three years. This argument presumes that resubmitted proposals that did not receive a majority vote are undesirable for the private ordering process. To the contrary, the resubmission of proposals allows companies to receive annual shareholder feedback on emerging issues. Notably, the SEC itself considered and rejected increasing the resubmission vote thresholds in 1997.[9]

Other proposed changes contained in the Financial Choice Act of 2017 (H.R. 10) threaten to disenfranchise investors by dramatically increasing the Rule 14a-8(b) share ownership requirements. The SEC's shareholder proposal rule has always been available to small investors dating back to its origin in the 1940s. The SEC first adopted a $1,000 share ownership requirement in 1983, and then increased the threshold to $2,000 in 1998. If enacted, the Financial Choice Act will silence the ability of small investors to participate in the private ordering process. Significantly, proposals by individuals enjoy high levels of shareholder support.[10]

For these reasons, we strongly urge the SEC to refrain from undertaking a rulemaking to amend Rule 14a-8. The SEC's shareholder proposal rule has been a longstanding feature of the U.S. capital markets and has facilitated the private ordering of companies on a variety of issues. Like previous SEC rulemakings on Rule 14a-8, a proposed rulemaking will be a long and arduous process that will likely result in only minimal changes to Rule 14a-8. Investors will be better served by deploying the SEC's limited resources on other more pressing concerns.

Thank you for considering the AFL-CIO's views on Rule 14a-8. If we can provide you with additional information, please contact Brandon Rees at [redacted] or [redacted].

Sincerely,

Heather Slavkin Corzo, Director
Office of Investment

HSC/sdw
Opeiu #2, afl-cio

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[9] SEC, "Final Rule: Amendments to Rules on Shareholder Proposals," Release No. 34-40018 (May 21, 1998), available at https://www.sec.gov/rules/final/34-40018.htm.

[10] According to the ISS Voting Analytics database, proposals submitted by the Chevedden, Steiner and McRitchie families received, on average, the support of 40 percent of shareholders between 2004 and 2017.