



AFL-CIO

AMERICA'S UNIONS

**American Federation
of Labor and
Congress of Industrial
Organizations**

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November 9, 2018

Mr. Brent J. Fields
Secretary
U.S. Securities & Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: SEC Staff Roundtable on the Proxy Process [File No. 4-725]

Dear Mr. Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I welcome this opportunity to provide comment to the Securities and Exchange Commission (the "SEC") on the SEC Staff Roundtable on the Proxy Process, File No. 4-725. We are deeply concerned that the SEC's review of the proxy process appears to be in response to the demands of the Business Roundtable, U.S. Chamber of Commerce and National Association of Manufacturers, not the investor community. This letter describes our views on the issues that Chairman Jay Clayton has identified as potential topics for consideration by the SEC Staff Roundtable on the Proxy Process.

The AFL-CIO is the umbrella federation of U.S. labor unions, including 55 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. Union members' pension and employee benefit plans routinely participate in the proxy process when exercising their fiduciary duty to vote proxies. Many of these plans also submit shareholder proposals as part of their shareholder engagement activities to promote long-term value creation.¹

Voting Process

Proxy voting is the very foundation of the corporate governance system, and any changes to the voting process must protect shareholder democracy. Under the current proxy voting system, Broadridge Financial Solutions, Inc. ("Broadridge") processes and distributes proxy materials to beneficial owners who hold their securities through brokerages and banks in "street name." Broadridge also

¹ See Interpretive Bulletin 2016-01 and Field Assistance Bulletin 2018-01, Department of Labor.

tabulates these beneficial owners' voting instructions for their bank or broker. Any changes to this voting process must protect the rights of shareholders to communicate with each other on the same terms as corporate issuers. Moreover, shareholders' voting instructions and proxy votes should be tabulated fairly and confidentiality by an independent third party.

Retail Shareholder Participation

Retail shareholder participation fell dramatically after the SEC allowed corporate issuers to send retail shareholders a notice of internet availability of proxy materials ("Notice and Access"). For the 12 months ending June 30, 2017, only 21.7% percent of shares voted after receiving Notice and Access mailings compared to 40.9% of shares that received full packages of printed proxy materials.² Because many retail shareholders are unable or unwilling to obtain proxy materials electronically, the electronic dissemination of proxy materials should be "opt-in" rather than "opt-out." Moreover, the SEC's proxy disclosure rules can only work to inform shareholders if proxy statements and proxy cards are provided together by the same delivery means.

Shareholder Proposals

Shareholder proposals are an integral part of shareholder democracy in the United States. Over the past several decades, shareholder proposals have facilitated the private ordering of companies on a variety of environmental, social and governance issues. The SEC's shareholder proposal rule is a remarkably cost-effective mechanism to elevate shareholder concerns to boards of directors and corporate management. Given the low costs and extraordinary high benefits of this process, it is hard to imagine how any changes to the shareholder proposal rule could satisfy a comprehensive cost-benefit analysis. Increasing the stock ownership requirements or the vote resubmission requirements for shareholder proposals will effectively disenfranchise many shareholders from placing proposals on corporate ballots. Please see our attached comment letter dated November 1, 2017 that explains that there is no evidence that any changes are needed.

Proxy Advisory Firms

The SEC should hold proxy advisory firms to the same standards as other registered investment advisors who owe a duty of loyalty to their clients, not to the managers of the companies that they invest. Corporate issuers do not pre-review stock analyst reports that recommend whether to buy or sell securities. Why should proxy advisory firm reports be treated any differently? Allowing corporate issuers to pre-review proxy advisory firm reports before publication will create the opportunity to delay and interfere with unfavorable vote recommendations. Moreover, institutional investors do not blindly follow proxy advisory firm recommendations as "robot-voters." In reality, the clients of proxy advisory firms use this research as a supplement to their own proxy voting process. For these reasons, we oppose the creation of a special regulatory regime for proxy advisory firms that differs from other registered investment advisors.

² *Analysis of Distribution and Voting Trends Fiscal Year Ending June 30, 2017*, Broadridge Financial Solutions, Inc. (2008), available at <https://www.broadridge.com/white-paper/broadridge-analysis-of-traditional-and-notice-access-issuers-na-adoption-distribution-and-voting>.

Technology and Innovation

The SEC should closely monitor the growing use of “virtual” shareholder meetings. Shareholder meetings are the corporate equivalent of the town hall meeting, a vital part of the democratic process. Retail shareholders including employee-owners are the primary attendees at shareholder meetings. For these investors, the shareholder meeting is the one day of the year that they may ask a question of their company’s CEO and board of directors. We are concerned that the technology of “virtual” shareholder meetings may be abused to unreasonably screen shareholders’ questions and silence dissenting views. For this reason, the use of virtual technology should supplement physical shareholder meetings, but not serve as a replacement.

Other Commission Action

We support amending the SEC’s proxy rules to require the use of universal proxy cards to include the names of all nominees in contested board of director elections. Just as is currently practiced in our electoral democracy, shareholders should have the flexibility to vote for the director nominees of their choice. However, the current proxy process compels shareholders who are voting by proxy to choose between two competing slates of candidates. Shareholders who wish to vote a “split ticket” for directors on both slates of candidates cannot do so if they do not physically attend the shareholder meeting. For this reason, the SEC should adopt its 2016 proposed rule to require the use of universal proxy cards showing all director nominees.

Conclusion

Any changes to the proxy process must be guided by the need to protect shareholder democracy. For this reason, we strongly oppose the SEC undertaking any rulemaking will reduce shareholders’ rights to participate in the proxy process. We believe that the SEC should better use its limited resources on higher priorities than engaging in unnecessary rulemakings that the investor community has not requested. Thank you for considering the AFL-CIO’s views on the proxy process. If we can provide you with additional information, please contact Brandon Rees, Deputy Director of Corporations and Capital Markets, at [REDACTED] or [REDACTED].

Sincerely,



Damon A. Silvers
Director of Policy & Special Counsel

Enclosure



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Elissa McBride
John Samuelson

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

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

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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

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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.