



November 9, 2018

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

**Re: SEC File Number 4-725 on Roundtable on the Proxy Process -
*Shareholder Proposals***

Dear Mr. Fields:

The Society for Corporate Governance (the “Society”) appreciates the opportunity to provide comments in response to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) on the proxy process and related SEC rules in advance of the Roundtable on the Proxy Process.

Founded in 1946, the Society is a professional membership association of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel and other governance professionals who serve approximately 1,700 entities, including 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance and disclosure matters.

The Society recognizes the importance of the shareholder proposal process as it provides an important means for shareholders to engage with the companies in which they invest. However, as noted in the SEC’s announcement of the proxy process roundtable, all shareholders “bear the costs associated with management’s consideration of a proposal and its inclusion in the proxy statement.” Such costs come in many forms including:

- Opportunity costs to boards, management and in-house staff to understand and analyze each of the various issues that could be better utilized managing the business and engaging directly with shareholders. (It is worth noting that recent SEC guidance regarding the no-action process can actually require more board time and resources than previously); and
- Financial costs of outside counsel, in-house staff and consultants.

In 1954, when major amendments to Rule 14a-8 were enacted, these costs were balanced against the fact that the shareholder proposal process was virtually the only way for shareholders to engage with companies. Today, the landscape has changed dramatically. With technology and communication at every shareholder’s virtual fingertips, the ability to communicate with other

shareholders and companies is now readily available at a minimal cost. Further, companies are engaging more as noted by Chairman Clayton in his opening statement announcing the Roundtable: “72% of S&P 500 companies report[ed] engagement with shareholders in 2017, compared to just 6% in 2010.” In addition, with the adoption of proxy access by over 60% of S&P 500 companies, more than ever, shareholders have direct access to seek accountability from the companies they own.

As a result of these engagement opportunities and access, we believe the costs of the existing shareholder proposal process are out of alignment. The areas most in need of reform include:

- 1) The ownership threshold,
- 2) The resubmission thresholds, and
- 3) The ability to submit a proposal by proxy.

Ownership Threshold

Rule 14a-8 allows shareholders who have held \$2,000 of a company’s stock for one year to submit a proposal to be included in the company’s proxy statement for a vote by all shareholders. Unfortunately, the \$2,000 threshold has not been revised since it was increased from \$1,000 twenty years ago (in 1998). In order to provide broad access to the shareholder proposal process while also ensuring the process is fair and not overly burdensome for companies, the Society recommends that the Commission consider raising the ownership threshold. Data provided by the Center for Capital Markets Competitiveness indicates that the average shareholder proposal costs a company \$87,000. Therefore, the Society suggests that the SEC raise the ownership threshold to \$50,000 and continue to index the threshold for inflation on an annual basis.

Resubmission Threshold

Under 14a-8, a company can exclude a shareholder proposal if the proposal received: (i) less than 3% of the vote if proposed once within the preceding 5 calendar years; (ii) less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or (iii) less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years. If a proposal receives over 10% support, it can be resubmitted indefinitely so long as it continues to hit that threshold. These thresholds have not been changed since 1954.

In 1983, the Commission found it appropriate to revise, and did revise, the thresholds to 5% on the first submission, 8% on the second resubmission, and 10% on the third resubmission, stating its rationale as follows: “The Commission believes that given the increased voting activities of institutional investors with respect to security holder proposals and the greater potential support for such proposals, it is appropriate to raise the thresholds for resubmission.”¹

¹ See Release 34-20091 8/16/83

However, after a shareholder group brought a lawsuit and prevailed on summary judgment, a court ordered the Commission to reinstate the prior thresholds, which it did in 1985.²

In 1997, the Commission again proposed to raise the thresholds to 6% on the first submission, 15% on the second submission, and 30% on the third. At that time the Commission stated that “a proposal that has not achieved these levels of support has been fairly tested and stands no significant chance of obtaining the level of voting support required for approval.” The Commission nevertheless failed to adopt these thresholds. The 1998 Adopting Release explained that the SEC decided not to require higher “Shareholder Support Thresholds” because of “serious concerns” from the shareholder community including that the higher thresholds would result in the exclusion of too many proposals—particularly those focusing on social policy issues which at that time tended to receive lower percentages of the shareholder vote. Simply put, circumstances have changed since 1998. Shareholder activism (in its many forms) has drawn more attention to shareholder proposals focused on social policy issues, and as such, many proposals are getting levels of support far beyond the current thresholds. For example, during the 2018 proxy season, the average support for shareholder proposals that resulted in a vote was 32.7%³.

The Society would support the Commission considering increasing the resubmission thresholds to 6%, 15% and 30% -- the levels the Commission previously suggested. As such, a company could only exclude a shareholder proposal if it failed to achieve a 6% favorable vote the last time it was included, 15% support if it was voted on twice in the past five years, or 30% support if it was voted on three or more times in the past five years. If the proposal received over 30% support, it can be resubmitted each year thereafter so long as it continues to hit that threshold. Finally, it is worth noting that the same proposal may be submitted again after three years; starting the process over again.

Proposal by Proxy

A small group of individuals submit numerous proposals to companies without owning a single share, and with no economic stake in the company. Indeed, in 2018 a small group of proponents submitted 24% of all shareholder proposals.⁴

While Rule 14a-8(h) does authorize a shareholder to appoint a qualified representative to present a proposal at the meeting, there is no language authorizing the submission of a proposal by a proxy. The stated purpose of the rule is to provide an avenue for communication between shareholders and companies, as well as among shareholders themselves, but that is not what is occurring. Rather, often non-shareholders with special interests are submitting proposals and companies often cannot communicate with the actual shareholder proponent or, in many cases, the “designated proxy”; nor is the actual shareholder communicating with other actual shareholders. This is an abuse of the shareholder proposal system and runs counter to its primary

² See Release 34-22625 11/14/85

³ <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2018-proxy-season/>

⁴ Ibid

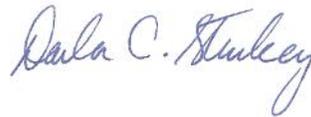
purpose, which is intended to ensure that the voices of shareholders with a true economic and long-term interest in the company are heard.

There may be circumstances where submitting a proposal by proxy is legitimate and may benefit a corporation and its shareholders, so we do not advocate eliminating the practice. We do believe, however, that proposal by proxy is overused to other shareholders' detriment. Accordingly, we believe proposal by proxy should be limited such that an individual or group acting as a proxy for a shareholder should be allowed to submit one proposal per company per year. We further advocate that a shareholder be limited in granting their proxy to a shareholder proponent once per company per year. In addition, the SLB 14I requirements for proposal by proxy should be rigorously applied to ensure that shareholders delegating their proxies understand what is happening, and the ownership thresholds are satisfied.

The SEC should also consider a requirement that shareholder proposal proponents (and their proxies) engage at least once with the target company about an envisioned shareholder proposal; either before such filing of the proposal, or well in advance of the filing deadline for a no action letter. Agreed "rules of the road" could make a significant impact on reducing the burden of proposals on companies while simultaneously preserving the core right to file.

We appreciate the opportunity to provide comments on the proxy process and shareholder proposals and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

A handwritten signature in blue ink that reads "Darla C. Stuckey". The signature is written in a cursive style with a large, looped "D" and "S".

Darla Stuckey
President & CEO
Society for Corporate Governance