

SHAREHOLDER RIGHTS GROUP

October 25, 2019

The Honorable Jay Clayton
Chairman
US Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Potential Rulemaking on Shareholder Proposal Filing and Resubmission Thresholds

Dear Chairman Clayton,

We are writing to you, as some of the leading proponents of shareholder proposals, to urge you to truly take a stand for retail and Main Street investors by resisting current efforts to curtail our rights to file proposals. Your recent public remarks raise new concerns for us that you may be on the verge of succumbing to that pressure. We learned today in a report by Reuters and FT, that it appears that the Commission may be poised to vote on proposed rule changes on November 5.

Please don't silence retail investors by rigging the rules against us

In a September 24 House Financial Services Committee Oversight hearing, you publicly stated that you “don't like it that 25 or 30% of proposals are filed by a few proponents.” The implication seemed to be that you are looking to adjust the thresholds for shareholder proposal filing and resubmission to reduce or curtail the ability of the “few” proponents to file proposals.

Given your focus on protecting the rights of retail and Main Street investors, this leads us to believe that you may have been misled by the advocates for amendments to the shareholder proposal rule. Therefore, we are writing to correct a number of misperceptions implicit in this statement and to ensure that the Commission has adequate information before initiating an unnecessarily costly, contentious and harmful rulemaking.

The filing of a significant portion of proposals by a few individual proponents is neither new, nor unsupported by fellow investors. In fact, the 14a-8 proposal process, since its inception, has always had the effect of empowering a few shareholders who have made it part of their investing strategy and mission to improve the governance of the companies in which they invest. From the 1950s onward, there were active shareholders with limited stock holdings

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Arjuna Capital

As You Sow

Boston Common Asset
Management, LLC

Boston Trust Walden

Clean Yield Asset
Management

First Affirmative Financial
Network, LLC

Harrington Investments, Inc.

Jantz Management, LLC

John Chevedden

Natural Investments, LLC

Newground Social
Investment, SPC

NorthStar Asset
Management, Inc.

Pax World Funds

Sustainability Group of
Loring, Wolcott &
Coolidge, LLC

Trillium Asset
Management, LLC

like the Gilbert brothers and Wilma Soss who pressed for sensible and practical governance changes by companies through the proxy process. Over time, many of the changes they sought were implemented and even adopted as SEC rules. Compared with historical numbers, the proportion of proposals currently filed by so-called gadflies, the active corporate governance proponents, has fallen from 100% when the shareholder proposal rule was first instituted, down to 50% some years ago, and to 30% today.

What has changed over these years, and the reason we believe you are under pressure to suppress the “gadflies,” is that gadflies are winning much more support for their proposals. Large numbers of mainstream, institutional, and values or faith based investors are voting in favor of those proposals, very often leading to majority support or higher.¹ Disrupting such productive corporate governance engagements is not in the best interest of the investing community or the capital markets.

You stated in the House Financial Services Oversight hearing: “What will the new threshold be? We are working on it, but in an ideal world it’s a threshold that has access for a long term investors in the company and have a meaningful stake at a personal level.” We believe the existing thresholds accomplish exactly that goal, and do not merit a rulemaking to make changes.

Significantly elevating the filing or resubmission thresholds would not just affect the “gadflies,” it would hobble a wide array of investors who are raise risk management and governance issues with their investee companies and achieve significant progress through both voting and engagement. The ownership thresholds of the current rule are relevant to many of our organizations and funds which promote other governance or ESG proposals. Our proposals for ESG disclosure and performance improvement have also seen a significant spike in voting support among investors. This is in alignment with the general interest of the investing community in ESG investing strategies and disclosure.²

Our concerns about specific threshold changes

We understand that one proposal pending before the Commission would significantly raise the required number of shares, or the holding period, needed to file a proposal. Raising the threshold significantly would prevent small diversified shareholders from participating in the shareholder proposal process. If you lead the Commission to increase the filing threshold significantly, you risk depreciating the bundle of rights associated with share ownership. Those rights include the right to file proposals.

¹ For instance, see: <https://www.sec.gov/comments/4-725/4725-6009672-190810.pdf>

² https://siinstitute.org/special_report.cgi?id=80

Raising the filing threshold significantly would harm retail investors whose diversified portfolios and acquired shares were sufficient to engage with their companies, and now may find that those rights have been depreciated and eliminated. Moreover, abrupt declines in share prices at mismanaged companies would block the filing of proposals when they are most needed, by impeding the submission of proposals from shareholders whose stock has lost market value during the preceding year.

A second proposal under consideration apparently involves a steep increase in the resubmission threshold, undermining our ability to sustain necessary focus on emerging issues for which support tends to grow over time. Issues that draw concern of four or five percent of investors often prove financially material over time; our proposals often serve as a needed alert, rather than a diversion.³

The resubmission thresholds are already functional. Shareholders are quite able to reject ill-advised proposals through the current resubmission thresholds. For example, in 2019 shareholders consistently provided less than 3% support to proposals seeking an ideological litmus test for board members at Discovery, Starbucks, Apple, Twitter and Amazon. Shareholders at Exelon similarly rejected a proposal to “burn more coal” with only 1.6 percent support. Investors also rejected a request to report on how Gilead Sciences spent its share of the federal tax cut, a proposal that earned only 2.2%. Those proposals are barred under the resubmission thresholds from reappearing on the proxy.

In addition, if the resubmission thresholds are increased significantly, the recent growth of multi-class share ownership will combine with predictable insider share voting to distort the outcomes even in the face of substantial support by external investors. Undoubtedly, if the CEO, board, and other insiders oppose the proposal, they will vote against it. Where companies have multi-class share structures, company insiders will typically represent a majority percent of the vote (while owning far less in economic stake of the company).⁴ It makes no sense to allow dual class

³ Shareholders that in aggregate account for 3% or 6% of the vote may hold a significant minority view that proves accurate and prescient in identifying company risks. For example 5% of Monsanto investors supported a proposal to require the company to assess the looming public health risks of its product glyphosate; within a few years, it appeared that the liabilities associating glyphosate with cancer causation are expected to drive Monsanto’s purchaser, Bayer, into bankruptcy. <https://corpgov.law.harvard.edu/2018/12/17/the-prescience-of-5-of-investors-a-monsanto-case-study/>

⁴ In effect, a shareholder proposal opposed by management at multi-class companies may never have a fair opportunity to reach threshold vote levels. For example, the 2018 shareholder proposal at Alphabet (which has three classes of stock including an insider class with ten votes per share) seeking to “Give Each Share an Equal Vote” garnered 28% of the overall vote after being resubmitted for several years. However, the filer of this proposal estimates that 87% of non-insider votes supported the proposal. The stark difference between 28% (including insider

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share owners and insiders to have such an oversized opportunity to block proposals from recurring, effectively silencing the voice of minority shareholders.

Major changes to submission or resubmission thresholds under consideration could place the right to file shareholder proposals out of reach of true Main Street and retail investors. In the event that the Commission nevertheless votes to propose rule changes on November 5 as reported by Reuters, we strongly recommend that you allow ample time for public comment, at least 90 days.

We urge you to stand up for our rights.

Sincerely,



Sanford Lewis

Director

Shareholder Rights Group

Cc:

Docket: Staff Roundtable on the Proxy Process 4-725

Hon. Michael D. Crapo, Chair, Committee on Banking, Housing, and Urban Affairs, United States Senate

Hon. Sherrod Brown, Ranking Member, Committee on Banking, Housing, and Urban Affairs, United States Senate

Hon. Maxine Waters, Chair, Committee on Financial Services, United States House of Representatives

Hon. Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets Committee on Financial Services, United States House of Representatives

Hon. Patrick T. McHenry, Ranking Member, Committee on Financial Services, United States House of Representatives

votes) and 87% (only non-insiders) illustrates the peril posed by calculating refiling ability when including insider ownership at multi-class share companies. Had this proposal received this vote under revised resubmission thresholds that require 30% vote in third and subsequent years, the proposal would have been excluded from future filings despite the high level of non-insider support. After refiling in 2019, this proposal earned 30% of the overall vote which represents an estimated 92% of the non-insider vote. More generally on the disastrous implications of dual class share structures, see <https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster>

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Hon. Robert J. Jackson Jr., Commissioner, U.S. Securities and Exchange Commission

Hon. Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission

Hon. Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission

Hon. Allison Herren Lee, Commissioner, U.S. Securities and Exchange Commission

Mr. William Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission

Mr. Rick Fleming, Investor Advocate, Office of the Investor Advocate, U.S. Securities and Exchange Commission

Ken Bertsch, Executive Director, and Jeff Mahoney, General Counsel, Council of Institutional Investors

Josh Zinner, CEO, Interfaith Center on Corporate Responsibility

Lisa Woll, CEO, US SIF: The Forum for Sustainable and Responsible Investment

Heather Slavkin-Corzo, Head of US Policy, UN Principles of Responsible Investment