Jon Lukomnik
[redacted]

February 3, 2020

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-22-19

Dear Ms. Countryman:

I am writing to oppose the proposal entitled "Amendments to Exemptions from the Proxy Voting Rules for Proxy Voting Advice," as well as the proposal entitled "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8" the ("Shareholder Proposal Rule").

By way of background, I am currently the Pembroke Visiting Professor of International Finance at the Judge Business School of Cambridge University. I am an independent trustee of the Van Eck mutual funds and business trusts. Previously, I was the New York City official responsible for investing the City's pension assets and served as a trustee on defined benefit and defined contribution pension funds for hundreds of thousands of workers. I also spent a decade running the IRRC Institute, which originated, funded, quality-controlled and disseminated academic and practitioner research on capital markets issues, including a number which relate directly to the issues under consideration by these proposed rules. Finally, I was one of the informal negotiators convened by Harvey Goldschmidt, then General Counsel to SEC and later Special Advisor to then-SEC Chair Arthur Levitt, who examined rule 14a-8 some 20 years ago. Finally, I am a retail investor. So I believe I have seen the shareholder proposal process from a multiplicity of viewpoints.

I oppose the proposals for the following reasons.

The proposed rules are bad economics. Proponents of the proposed rules focus on the marginal costs that issuers incur in including shareholder proposals in their voting materials and at their meetings. While there are incremental costs, there are material benefits. The fact that the costs are routine and incurred by a single corporate entity makes them measurable. The fact that the benefits are widespread and both issuer specific and market wide does not mean they do not exist or that they do not outweigh the marginal costs. Indeed, any fair analysis would conclude that both the realized and prophylactic benefits of a robust shareholder proposal regime far outweighs the costs.

As an example, consider the case of proxy access. As the SEC knows, it had proposed proxy access, a method to allow investors to allow direct nominations to the Boards of issuers in 2010, but a lawsuit vitiated the rule. However, the court ruled that shareholders of an individual company could, if they so wished, adopt proxy access.[1] As of 2014, only six American companies featured a proxy access rule. Previous attempts to institute proxy access had met with very meagre success

In 2014, the New York City Comptroller Scott Stringer, as the investment advisor for the New York City Pension Funds announced a campaign to, in effect, use shareholder resolutions to establish a new standard of proxy access across the market. The initial year saw the funds propose resolutions at 75 companies.[2]

The unusual circumstances around the SEC adopting a rule, then a court staying the rule, then an exception being used to try to partially implement the rule by the NYC Funds across a material subset of the marketplace and the surprise announcement by Comptroller Stringer announcing that effort, created a natural experiment. As three researchers, including an SEC researcher, found, Stringer's announcement caused those 75 companies to experience a 53-basis point excess return. At the time of Stringer's announcement, the City's funds held $5.023 billion in those 75 companies' stock[3]. Based on the 53 basis points of excess return, that means the BAP created some $266 million in excess return. As the City's funds usually hold less than 1% of a company's shares, it is reasonable to assume that the rest of the market experienced benefits of more than $25 billion. Notably, the Funds' announcement did not guarantee proxy access would be adopted, and the study suggested that market-wide regulation/adoption likely would have resulted in an even larger rerating across the entire marketplace.[4] Even just using

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[1] Bhandari, Tara and Iliev, Peter and Kalodimos, Jonathan, Governance Changes through Shareholder Initiatives: The Case of Proxy Access (February 18, 2019). Fourth Annual Conference on Financial Market Regulation. Available at SSRN: https://ssrn.com/abstract=2635695 or http://dx.doi.org/10.2139/ssrn.2635695 Accessed December 24, 2019

[2] Comptroller Stringer press release of November 6, 2014.

[3] Boardroom Accountability Project 2015 Company Focus List. Available at: https://comptroller.nyc.gov/wp-content/uploads/2014/11/Board-Room-Accountability-2015-Company-List.pdf. Accessed on December 27, 2019.

[4] Op Cit. Bhandari et al.

the 53 basis points which as the number, extending the attempt to install proxy access across every listed company would have resulted in an increased value of some $132.5 billion overall.[5]

Stringer and the New York City's funds' efforts have largely worked. Proxy access has become something of a de facto market standard, at least among large capitalization US public companies. As of July 2019, less than five years after Stringer's 2014 Boardroom Accountability Project announcement, more than 600 US public companies featured proxy access rules, and the number was consistently climbing.[6] How many billions of value has that one instance of use of shareholder resolutions created?

The lesson is that the benefit side of the cost benefit analysis shows great optionality in impact. When ideas build across the marketplace (and remember, only six issuers featured proxy access when the NYC Funds decided to act), the results are likely value creating in the hundreds of billions of dollars of created value range. The SEC's proposals will, likely, abort good ideas before they can gain traction. Indeed, the higher resubmission thresholds almost certainly will slow or stop ideas that would have found acceptance if allowed exposure over time. This is a classic cost benefit problem of obvious, small, incremental and certain costs, but huge benefits which have some degree of optionality. As far as I can tell, the SEC's analysis did not adequately consider this aspect of the potential impact of the proposed rules.

The proposed rules are bad policy. The lessons learned by regulators around the world following the 2008-2009 global financial crisis were that command and control regulation are rigid, slow to respond to market conditions, and need to be supplemented by market-enabled reaction.

Capital markets evolve rapidly. There is a need for checks and balances built into the capital markets as well as regulation imposed from the outside. Towards that end, many jurisdictions around the world created stewardship codes, designed to encourage investors – the ultimate providers of capital – to act as responsible stewards of their investments and the portfolio companies in which they invest. For instance, the FRC in the UK recently published its newest code, "The UK Stewardship Code 2020."[7] The Code states: "Environmental, particularly climate change, and social factors, in addition to governance, have become material issues for investors to consider when making investment decisions and undertaking stewardship. The Code also recognises that asset owners and asset managers play an important role as guardians of market

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[5] Public listed equities in the United States aggregate market value was approximately $25 trillion at the time. Market capitalization of listed domestic companies (current US$), World Federation of Exchanges data. Available at: https://data.worldbank.org/indicator/CM.MKT.LCAP.CD. Accessed December 27, 2017.

[6] Boardroom Accountability Project. Available at: https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/ Accessed December 24, 2019

[7] https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf

integrity and in working to minimize systemic risks as well as being stewards of the investments in their portfolios."

I recognize that the United States is a sovereign, and that the rules of the UK or other jurisdictions do not apply. But American exceptionalism does not negated the economics and incentives of global capital markets. The fact that scores of other jurisdictions are seeking ways to strengthen the feedback mechanisms between owners and issuers at the very moment that the proposed rules would weaken what has been a bulwark of that relationship in this country should give pause for concern.

The proposed rules are contrary to the SEC's mission. These proposed rules run counter to two of the missions of SEC. They do not protect investors, and they will harm the "fair orderly and efficient capital markets.

I note that the primary opponents of the rules are asset owners.[8] When asset owners, by a vast majority, oppose the proposed rules, and the executives of issuers, by and large, support the proposed rules, then there is a clear demarcation of who benefits. And it is not the investors, despite the SEC's mission. While I am not Cassandra, and do not think that the proposed rules will return us to the 1980s and the era of completely entrenched managements, it is certainly a step in that direction, rather than a step along the road of accountability to investors.

As for fair and orderly markets, many of the shareholder proposals which these rules would inevitably abort, call for disclosures. I have yet to meet an economist who believes markets function better when opaque. In addition to the information communicated through the votes on shareholder resolutions themselves, the disclosures many such resolutions seek have illuminated the market on such subjects as human capital management, environmental issues, and executive compensation. The proposed rules will inevitably increase opacity, not transparency. Again, I do not believe the Commission's cost benefit analysis adequately considered that.

The proposals disproportionately penalize smaller, retail investors, that is, the Chairman's "Mr. and Mrs.401k". While well-funded, organized pressure groups tried to don the mantle of retail investors, even going to far as to fund organizations with "main street" in their name, to support these constraints on actual owners and providers of capital, the reality is that the asset owners who have opposed the proposed rules, such as those in the Council of Institutional Investors, are the real "main street investors". They are, literally, tens of millions of teachers, clerks, police, firefighters, social workers, sanitation workers, drivers and other workers. Many of the board members of these organizations are elected by those workers. They are both retired and working.

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[8] See, for example, the comment submission from the Council of Institutional Investors.

The proposed rules are, at least partially, a result of a misinformation campaign which should be disqualifying, not rewarded. As the SEC is ware, the lead up to these proposals featured a misleading pressure campaign funded by various issuer groups.[9] At the least, those letters and submissions should be stricken from the record. Even more than that, however, the tactics and vehemence of the disinformation campaign should alert the SEC to what is at stake, of who really benefits and who really suffers. Reversing the momentum towards a more accountable capitalism, where investors take stewardship of their assets seriously may be desirable for executives to want to be left alone, but, to quote former Regan Administration Labor Department official Robert Monks, "Capitalism without owners will fail."[10]

In conclusion, the two proposed rules 1)subjugate the rights of the owners of (and capital providers to) American corporations to the managers of those companies, 2) Reduce the ability of the capital providers to self-regulate in real time the companies they collectively own, thereby increasing the likelihood of the need for broad stroke and market-disrupting invasive actions by lawmakers and regulators as opposed to ongoing micro-corrections by market participants themselves; 3) run counter to the vast majority of economic studies of the impacts of engaged shareholder on markets; 4) represent an attempt to increase the comfort of officers of public companies rather than the well-being of true main-street investors who invest through pensions, 401k plans and other direct and collective savings; and 5) are a result, at least partially, of a disingenuous campaign.

For all those reasons, I urge the SEC to not implement the proposed rules. I would be pleased to discuss any issue you or the Commissioners, or other members of staff desire. I can be e-mailed at [redacted]

Sincerely,

Jon Lukomnik

Cc: Hon. Jay Clayton
Hon. Robert J. Jackson, Jr.
Hon. Hester M. Peirce
Hon. Elad L. Roissman
Hon. Alison Herren Lee

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[9] Zachary Midler and Ben Elgin, "SEC Chairman Cites Fishy Letters in Support of Policy Change," Bloomberg, November 19, 2019.