February 3, 2020

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice 17 CFR Part 240; Release No. 34-87457; RIN 3235-AM50; File No. S7-22-19
Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 / 17 CFR Part 240; Release No. 34-87458; RIN 3235-AM49; File No. S7-23-19

Dear Ms. Countryman:

The American Securities Association (ASA)[1] is pleased to provide comments on the Securities and Exchange Commission's ("SEC" or "Commission") efforts to reform the proxy system in the United States. The ASA remains concerned about the steep decline in the number of U.S. public companies over the last two decades, which has serious ramifications for economic growth in this country. We believe that modernizing the federal proxy system is necessary to improve the governance of public companies and make it more attractive for growing businesses to enter our public markets.

The SEC's November 5th proposals include amendments to the rules governing proxy advice ("Proxy Advice Proposal") as well as changes to the shareholder proposal system under Exchange Act Rule 14a-8 ("Rule 14a-8" Proposal"). The ASA strongly supports many of the reforms included in both proposals. Collectively, these rules will (1) mitigate the ability of special interests to hijack company proxies, (2) reduce costs this process imposes on American investors, and (3) protect shareholder returns from unnecessary sideshows that have nothing to do with business fundamentals.

Discussion

A vital component of the public company regulatory regime in the United States is strong corporate governance laws and regulations designed to encourage companies to go public and

[1] The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide American businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. We believe this mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

promote long-term, sustainable value creation for investors. This has served our economy remarkably well for decades, helped make our capital markets the deepest, most transparent, and most reliable in the world, and delivered prosperity for generations of Americans.

Regrettably, in recent years federal securities laws have been co-opted by activists and CEOs of large asset managers[2] who believe pushing political agendas with other people's money will endear them to politicians and potential clients in the public pension system. Instead of focusing resources on long-term strategy and the technological disruption impacting every company and sector of our economy, public companies are now forced to waste shareholder money defending any number of social, political, or environmental matters during the annual proxy season.

For example, in 2019, 44% of all shareholder proposals at Fortune 250 companies were submitted by entities that have some type of explicit social, religious, or policy purpose.[3] Moreover, one-third of all proposals were submitted by only four individuals that have repeatedly targeted companies solely to advance their own views.[4] As it turns out, American investors have overwhelming rejected these proposals and the agenda behind them. Of the 387 proposals dealing with environmental, social, and political issues submitted at Fortune 250 companies in 2018, only 2% received majority support.[5]

America's shareholders are also victims of a political groupthink narrative pushed by public pension plans, Wall Street CEOs, and mega-asset management firms. This groupthink considers the interests of just about everyone *except* "Mr. and Mrs. 401k." Most Americans spend their working years saving diligently so that they can have a dignified retirement, send their children to college, and/or pass on their life's work to their family. They have absolutely no interest in fighting political or social battles through their 401k or other savings plans where entrusted fiduciaries are *supposed* to act in their best interest to grow and preserve their nest egg.

A 2018 survey of retail investors and public pension plan beneficiaries completely invalidates the popular narrative that investors support businesses engaging in social matters or issues that are best resolved by our political system.[6] Another recent survey found that investors in U.S. businesses overwhelmingly believe that the top "corporate responsibility" of businesses is providing fair compensation and benefits for employees. That same survey also found that 81% of customers also believe that political correctness has gone too far.[7] There is a glaring

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[2] "Larry Fink's Latest Sermon" Wall Street Journal Review & Outlook. January 17, 2020. https://www.wsj.com/articles/larry-finks-latest-sermon-11579305418
[3] Manhattan Institute – Proxy Monitor Report 2019.
[4] *Ibid.*
[5] https://corpgov.law.harvard.edu/2019/07/26/2019-proxy-season-review-part-1-rule-14a-8-shareholder-proposals/
[6] The survey conducted by Spectrum Group released in January 2018 found that when asked about fund management, 75 percent of members indicated that the most important issue for fund managers should be to focus on maximizing returns and getting the pension fully funded, while just 14 percent want fund managers to focus first and foremost on advancing social and political causes.
[7] American Customers Want Companies to Focus on Employee Investment, Not Politics (Plus Communications and GS Strategy Group) https://pluspr.com/wp-content/uploads/2020/01/PLUS-GSSG-RESPONSIBLE-CORPORATE-LEADERSHIP-

disconnect between those who never stop trying to inject politics into free enterprise and the actual priorities of American investors.

Contrary to the elitist narrative, businesses around this country already incorporate the views of their employees and the communities they live in into their daily decision making. This is especially true of those public companies whose business is primarily focused on the United States. With that said, there is a fine line between considering the interests of a close network of customers or employees and cajoling every public company to fall-in-line with a particular political agenda.

This evidence overwhelmingly supports Commissioner Roisman's recent statement that the primary concern of the SEC as it relates to proxy issues should be the retail investors whose capital is actually at risk, *not* the asset managers who are obligated to act in the best interest of their customers.[8] This is consistent with the SEC's mandate to protect investors and we are pleased the SEC has taken action to stand up for those whose voices have been drowned out by activists and the Wall Street CEOs who pander to the political class.

The Growth of Passive Investing and Its Impact on Corporate Governance

The ongoing debate over corporate governance and the role of business in our society has largely ignored one of the most significant concentrations of corporate power in recent memory: the consolidation of investment and voting decisions into a small number of institutional investors that purport to speak on behalf of all investors.

Money flows into passive index funds have significantly outpaced active funds in recent years. Passive index equity funds now comprise 51% of the $8.5 trillion in all U.S. equity funds.[9] Moreover, nearly nine in ten public companies count one of just three firms – BlackRock, Vanguard, or State Street – as their largest shareholder. This concentration of influence in small number of asset management firms is becoming a major concern for the SEC, American investors, and antitrust authorities[10].

As several commentators have noted, the economics for passive index funds when it comes to corporate governance and voting decisions are much different than actively managed funds. Since passive funds are required to own shares in companies that are part of a broad-based index, they have little incentive to encourage company-specific corporate governance policies. Rather, the largest asset management firms tend to promote generic governance policies at *every* company that is included as part of their index funds.

TOPLINE.pdf?utm_medium=email&utm_source=hf_m&utm_campaign=plus_984077_20200121_surveyrelease_plus_hfm&utm_content=2_3

[8] Statement at the Open Meeting on Commission Guidance and Interpretation Regarding Proxy Voting and Proxy Voting Advice (August 21, 2020). https://www.sec.gov/news/public-statement/statement-roisman-082119

[9] https://www.investmentnews.com/passive-investing-hasnt-taken-over-the-world-2-170287

[10] https://www.ft.com/content/0308f2e2-9e4a-34bf-b40b-745e62a536bb.

Put another way, passive funds cannot sell shares in a company where it feels the management is irredeemably inadequate, which directly exposes the fund's shareholders to a poor investment. Instead, these firms use their considerable economic and voting power to cajole public companies into meeting *their* version of what corporate governance standards should be. This is contrary to the very purpose of the federal proxy rules which are to enhance constructive shareholder communication that considers the unique characteristics of a particular business. Should this trend continue, it will further homogenize the governance standards for U.S. public companies. This presents a real long-term threat to investors and is contrary to the flexibility that current law has typically afforded businesses that wish to go public.

This approach from asset managers was put on stark display recently with BlackRock CEO Larry Fink's letter entitled "A Fundamental Reshaping of Finance." In that letter, BlackRock threatened to vote against directors at companies that it feels are not doing enough to disclose risks related to climate change.[11] The letter also stated that BlackRock expects companies to follow environmental, social, and governance (ESG) standards developed by an non-transparent global elitist outfit called the Sustainability Accounting Standards Board (SASB). Nowhere did the letter mention anything about shareholders in BlackRock funds supporting such a policy, or the fact that SASB standards have been widely derided as both unworkable and irrelevant to long-term profitability. State Street has also recently announced that it will vote against board directors at companies it believes are not meeting the standards of State Street's own "responsibility factor" framework. This perversion of federal securities laws is a threat to our capital markets, and it needs to be strongly rejected by the SEC.

Moreover, there is hypocrisy at play here. The push from asset managers to promote "societal" goals and corporate responsibility through their investment strategies seems to stop at our nation's borders. BlackRock, StateStreet, and others are noticeably silent when it comes to doing business with authoritarian regimes such as China, so long as it profitable for them. Along with index providers such as MSCI, there also appears to be little concern amongst asset managers for exposing American investors to Chinese companies that have not even met the most basic U.S. auditing standards. These oligopolies are more than willing to facilitate the flow of American investor money into countries like China, Russia, and Saudi Arabia who have a long and demonstrated track record of human rights, climate, and civil liberty abuses. Where is their "corporate responsibility" when it comes to this? The reality is this oligopoly uses its market power when it's convenient and turns a blind eye when it's not.

A recent case study emphasizes the enormous risk that BlackRock's politics poses for investors. As reported by Bloomberg, the iShares MSCI USA ESG Select Social Index Fund (SUSA), which is one of the largest and most well-known ESG funds on the market, has trailed the S&P 500 index by *thirty-seven percentage points* over the last ten years.[12] To many Americans, a thirty-seven percent return on your savings can be the difference that allows you to retire early or tell your child they won't have to take out loans for college. It is simply unconscionable that the

[11] https://www.blackrock.com/us/individual/larry-fink-ceo-letter
[12] "Socially Conscious ETFs Have Some Baffling Holes" January 27, 2020. https://finance.yahoo.com/news/socially-conscious-etfs-baffling-holes-110040056.html

largest asset managers are trying to use their market power to import the investment strategy underlying SUSA to *every other investment fund they manage*.

BlackRock's market power has eroded investor returns and harmed the least advantaged within our society. We believe that the horizontal control BlackRock and State Street exert over the U.S. equity market should alarm the SEC and antitrust authorities at the Department of Justice. Thankfully, the Federal Trade Commission and the EU competition authorities have already taken notice of this oligopoly and is looking deeply into how it impacts competition.[13]

As the Open Market Institute has explained, "Since the beginning of the Republic, Americans have used antimonopoly policy not only to preserve market competition, but to preserve the economic opportunity of the individual citizen and to guarantee that power and property would not become concentrated in the hands of the few."[14] This principle applies directly to Blackrock as it wields its vast market power to harm American investors for its own benefit, in complete violation of its legal fiduciary duty to those very same investors.

As a member of the Financial Stability Oversight Council (FSOC), we believe the SEC should also recommend that the FSOC examine the impact the homogenization of corporate governance standards has on financial stability. Failures in corporate governance led to some of the biggest corporate and accounting scandals in 2001 and 2002 and shook investor confidence in our capital markets. BlackRock and other firms have lobbied heavily in the past to avoid being designated a systemically important financial institution (SIFI), but if their standards turn out to be wrong and contribute to a large number of corporate failures, what impact will that have on our financial markets?

These firms use *their size*, *their market power, and their voting power* to push their view of corporate governance standards on unsuspecting American investors who do not have the capital to wield such influence. There is no evidence that "Mr. and Mrs. 401k" support this shift, but it is clear ordinary Americans are the ones who suffer from this egregious abuse of market power. As Commissioner Roisman stated in the August 2018 open meeting where the SEC adopted guidance related to proxy advisory firms, *"I do not consider asset managers to be the "investors" that the SEC is charged to protect. Rather, the investors that I believe today's recommendations aim to protect are the ultimate retail investors, who may have their life savings invested in our stock markets."* We could not agree more. It's time for competition authorities at the SEC to follow FTC and EUs lead and start asking some basic questions.

Proxy Advice Proposal

Much of the activism and issues described above are bolstered by the work of two proxy advisory firms – Institutional Shareholder Services (ISS) and Glass Lewis, who control an estimated 97% of the proxy advice market. These two firms also operate with significant

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[13] https://www.ft.com/content/0308f2e2-9e4a-34bf-b40b-745e62a536bb

[14] Open Market Institute, "Income Inequality and Monopoly" https://openmarketsinstitute.org/explainer/monopoly-inequality/

conflicts of interest, provide little transparency into how they formulate voting recommendations, and often fail to produce company-specific analysis – instead relying on broad policy 'benchmarks' intended to apply to all public companies. Institutional investors such as BlackRock often use ISS or Glass Lewis to make voting decisions, irrespective of whether they make sense for a particular issue.

However, we believe that past SEC rules and guidance have had an unintended consequence of enlarging the role and influence of proxy advisors without also providing additional oversight. Further, reports have documented the level to which proxy advisory firm recommendations contain factual errors and are poorly developed.[15] Asset managers owe a fiduciary duty to the American shareholders that invest in their funds. Allowing them to rely on shoddy research when they vote harms the ability of retail investors to generate the returns necessary to meet their financial goals.

The reforms included in the Proxy Advice Proposal will do a great deal to make the proxy advisory system work better for American investors. ASA has long supported making the exemption from the SEC's proxy solicitation rules contingent on proxy advisory firms meeting basic standards. As laid out in the proposal, these standards include robust disclosure surrounding conflicts of interest, and granting *all* issuers the opportunity to review and respond to vote recommendations. This will ensure that recommendations are based on the most accurate information available and that shareholders can make the most informed decisions possible. We strongly endorse these changes and reject criticisms that they would impose undue burdens on market participants.

Rule 14a-8 Proposal

Despite significant changes to the U.S. stock market and multiple proposals to raise the shareholder proposal resubmission thresholds under Rule 14a-8, the current system has not been updated since 1954.[16] The ASA strongly supports raising the resubmission thresholds as envisioned under the Rule 14a-8 proposal, including the implementation of a "momentum requirement" that would disqualify proposals that do not receive a certain level of increased support every year.

Companies expend valuable time and resource on shareholder proposals, spending approximately $150,000 per resolution, totaling more than $2 million per year for large companies facing 15 or more shareholder proposals[17]. In those instances where resolutions have already been rejected by a clear majority, continuing to reintroduce them on a perennial basis is not in the financial interest of most shareholders.

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[15] Are Proxy Advisors Really a Problem? American Council on Capital Formation. https://accfcorpgov.org/are-proxy-advisors-really-a-problem/
[16] Clearing the Bar: Shareholder Proposals and Resubmission Thresholds. Council of Institutional Investors (November 2018). https://docs.wixstatic.com/ugd/72d47f_092014c240614a1b9454629039d1c649.pdf
[17] House Report 115-904: https://republicans-financialservices.house.gov/uploadedfiles/crpt-115hrpt904.pdf

Following the SEC's roundtable in November 2018, the Council on Institutional Investors (CII) released a report[18] analyzing shareholder proposals between 2011 and 2018. According to CII at the current resubmission thresholds (of 3%-6%-10%), 95% of proposals are eligible for resubmission after the first attempt and 90% are eligible after the second and third attempts. The changes included in the Rule 14a-8 Proposal will do little to impede legitimate measures, while still weeding out some of the proposals that are serially rejected.

Conclusion

We thank the SEC for undertaking this important review of the proxy process and urge the Commission to implement both proposed rules as swiftly as possible. Our members take seriously their responsibility to advise hardworking and retired Americans on how to create wealth, provide American businesses with access to capital and advisory services, raise capital for schools, hospitals, cities and states and enable institutional investors to increase investment returns. Changes to the proxy process clearly support these efforts.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

[18] See supra note 14