STETSON LAW

January 16, 2020

Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090 Re: File Nos. S7-22-19 & S7-23-19

Dear Chairman Clayton:

I am writing in opposition to the Rules proposed in File Nos. S7-22-19 and & S7-23-19. My primary focus will be S7-23-19, but I strongly urge the Commission to not enact either rule.

I am a Professor of Law at Stetson University College of Law where I teach courses in business law and corporate governance.[1]

Since 2010, I have urged the Commission to adopt a rule that would require disclosure of money in politics spent by publicly traded companies. The past decade had shown that shareholders are similarly concerned with the lack of transparency of corporate political spending. Shareholder proposals about corporate dark money have been one of the most frequently filed topics in the past few years. The Forum for Sustainable and Responsible Investment (US SIF) reported, "[i]n the 2014 season, the bulk of the 130-plus resolutions on political spending and lobbying asked companies to report on their lobbying expenditures, including through indirect channels such as trade associations and non-profit organizations that do not have to report their donors."[2] The trend remained the same years later according to According to the Sustainable Investment Institute (Si2), which tracked these types of shareholder proposals in 2018, "80 resolutions ask[ed] companies to disclose political activity spending …."[3]

As the SEC has refused to act and as Congress has placed riders in the federal budget to prevent the SEC from completing an anti-dark money rule, fortunately hundreds of companies have been responsive to shareholder proposals asking for better reporting of corporate political spending.

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[1] I am writing on my own behalf and not my institution.
[2] *Shareholder Resolutions*, US SIF (2015), http://www.ussif.org/resolutions.
[3] Sustainable Investment Institute, *Proxy Preview Climate, Politics, and Women Top Shareholder Issues for Proxy Season* 2018 (Mar. 8, 2018), https://siinstitute.org/press/2018/Proxy_Preview_2018_PressRelease_pdf.

But the rule proposed by File No. S7-23-19 would make shareholders' ability to ask for accountability from publicly traded companies more difficult by shrinking the pool of eligible shareholders who could legally offer shareholder proposals on dark money as well as a host of other issues of interest to investors.

This proposed rule does not seem consistent with the binding legal precedent of *Medical Committee For Human Rights v. SEC* which recognized the rights of shareholders to raise social and political issues on corporate proxies under Rule 14a-8. As the Medical Committee for Human Rights Court stated:

> It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy. The depth of this commitment is reflected in the strong language employed in the legislative history:
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> > Even those who in former days managed great corporations were by reason of their personal contacts with their shareholders constantly aware of their responsibilities. But as management became divorced from ownership and came
> > under the control of banking groups, men forgot that they were dealing with the savings of men and the making of profits became an impersonal thing. When men do not know the victims of their aggression they are not always conscious of their wrongs . . . . Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange.[4]

The language above appeared in a case where shareholders at Dow used a shareholder resolution to try to implore the firm to stop selling napalm. The D.C. Circuit later reiterated the importance of shareholder proposals in 1992.[5]

Moreover, Supreme Court precedent is also clear that the highest court in the land values corporate democracy.[6] The Supreme Court has referred to the federal securities law as providing for "[f]air corporate suffrage."[7] And in 1991,

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[4] Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970) (citing H.R. Rep. No. 73-1383, at 5, 13 (1934)).
[5] Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 421 (D.C. Cir. 1992) ("Access to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import is a right informational in character, one properly derived from section 14(a) and appropriately enforced by private right of action." (internal citation omitted)).
[6] Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 143 CONSTITUTIONAL COMMENTARY 431 (2015), https://scholarship.law.umn.edu/concomm/143.
[7] J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) ("The section stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach to

in *Virginia Bankshares*, the Supreme Court quoted the legislative history of the Securities Exchange Act of 1934 about the centrality of shareholders' voting rights: "[a]ccording to the House Report, Congress meant to promote the 'free exercise' of stockholders' voting rights, and protect '[f]air corporate suffrage,' from abuses exemplified by proxy solicitations that concealed what the Senate Report called the 'real nature' of the issues to be settled by the subsequent [shareholder] votes."[8] Even in *Citizens United v. FEC*, Justice Kennedy writing for the Court referenced "[s]hareholder objections raised through the procedures of corporate democracy…"[9] File No. S7-23-19 runs counter to corporate democracy because it attempts to artificially shrink access to the proxy to either wealthy investors ($25,000) or very long term (3 year) investors.

I encourage the Commission to either drop these proposed changes or modify them so that they are less onerous and less damaging to the rights of shareholders under American securities law.

Thank you
/s/Ciara Torres-Spelliscy
Ciara Torres-Spelliscy
Professor of Law
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every equity security bought on a public exchange.'") (quoting H.R. Rep. No. 73-1383, at 13 (1934)).

[8] Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1103 (1991).

[9] Citizens United v. FEC, 558 U.S. 310, 370 (2010) (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).