THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

February 3, 2020

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: File No. S7-23-19 (Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8)

Dear Ms. Countryman:

I write to express my opposition to the proposed changes to the procedural requirements and resubmission thresholds for shareholder proposals set forth in Release No. 34-87458, *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8* (the "Shareholder Proposal Rule").[1]

The Shareholder Proposal Rule, individually and in combination with Release No. 34-87457, *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice* (the "Proxy Advisor Rule"), seeks to remedy non-existent problems with draconian solutions that only further strengthen company management's already strong hand at the expense of shareholders. In discussing the need for the Shareholder Proposal Rule, the Commission points to the "susceptib[ility] to overuse" of Rule 14a-8 and the fact that shareholders now have "alternative ways, such as through social media, to communicate their preferences to companies and effect change."[2] However, the Commission presents no evidence of any "overuse" of Rule 14a-8, nor does it provide any examination of how these "alternative ways" of communicating with companies warrants or justifies the proposed changes to Rule 14a-8. While seeming to take for granted that shareholders making valid use of a legal right is a problem that needs to be fixed, the

[1] Procedural Requirements and Resubmission Thresholders Under Exchange Act Rule 14a-8, Release No. 34-87458 (Nov. 5, 2019) [84 FR 66458 (Dec. 4, 2019)]. Citations in this letter to the Shareholder Proposal Rule are made to the Federal Register.
[2] Shareholder Proposal Rule, 84 FR at 66462.

Commission's economic analysis provides "no sustained description or analysis of the benefits of proxy advisors and shareholder [proposals]."[3]

Also absent from the Shareholder Proposal Rule is any acknowledgment or analysis of the many ways in which company management can influence the shareholder proposal process to entrench its own interests. In light of these deficiencies, I join with the SEC's Investor Advisory Committee ("IAC") in urging the Commission to revise and republish both the Shareholder Proposal Rule and the Proxy Advisor Rule to ensure "balance and compliance with SEC Guidance."[4] Absent such revisions, I respectfully request that the Commission extend the time to comment on both the Shareholder Proposal Rule and the Proxy Advisor Rule from 60 to 120 days. Collectively, these two proposals span 320 pages and each include well over 100 individual questions. An extension of today's deadline is necessary if the Commission truly wishes to afford investors and other interested parties sufficient time to provide detailed feedback concerning these important proposals.

My concerns with the Shareholder Proposal Rule are based on my office's extensive experience with the shareholder proposal process. As the Comptroller of the City of New York, I am, by law, a fiduciary to each of the five New York City Retirement Systems (the "Systems"),[5] which collectively have over $215 billion in assets under management. In particular, I am the investment advisor to, and custodian of assets for each of the five Systems, and I serve as a trustee for four of the five Systems. The five Systems provide retirement security for more than 700,000 of New York City's active and retired teachers, police officers, firefighters, school employees, and general city employees, all of whom have member representatives on the board of trustees overseeing their respective System's investment policies, practices and procedures. *Our members are true Main Street investors.*

As long-term shareholders in more than 3,000 U.S. companies, the Systems expect company management and directors to create long-term, sustainable value. Accordingly, the Systems—by delegation to my office and with the assistance of my office's Corporate Governance and Responsible Investment team—actively and regularly exercise their rights as shareholders. We engage our portfolio companies on various employment, environmental, social, and corporate governance practices and policies, primarily through shareholder proposals and dialogue ensuing from those efforts. In fact, each System's board has established a specific proxy subcommittee whose primary responsibility is to review and approve resolutions for the submission of specific shareholder proposals to portfolio companies.

Since the Systems submitted their first shareholder proposal in 1985, urging companies doing business in apartheid South Africa to adhere to specific human rights principles (the Sullivan Principles), they have filed more than 1,000 shareholder proposals—almost certainly more than any other institutional (or individual) investor in the world. Rule 14a-8 has thus

---

[3] Recommendation of the SEC Investor Advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals ("IAC Letter") (Jan. 24, 2020), *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf.

[4] *Id.*

[5] The Systems are the New York City Employees' Retirement System, the New York City Board of Education Retirement System, the New York City Fire Department Pension Fund, the New York City Police Pension Fund and the Teachers' Retirement System of the City of New York.

allowed the Systems to establish a long and proud history of corporate engagement, which has had the effect of producing significant social benefits and enhancing long-term shareholder value, consistent with the Systems' investment policies and objectives.

Although the Systems—and my office acting on their behalf—are always eager to engage with portfolio companies outside of the shareholder proposal context, it is our experience that, on the most contentious issues, substantive engagement is most productive, and most likely to occur, *after* a non-excludable shareholder proposal has been submitted to the company. Accordingly, the shareholder proposal is an essential tool for ensuring that the voices of our Main Street investors are heard by portfolio companies.

Given the Systems' many successful uses of the current shareholder proposal process, some of which I describe below, we are concerned that the sweeping changes contemplated by the Shareholder Proposal Rule will frustrate the ability of shareholders, both large and small, to effect positive corporate changes though the shareholder proposal process. The changes contained in the Shareholder Proposal Rule have the potential to substantially weaken the concept of corporate democracy that undergirds Section 14 of the Securities and Exchange Act of 1934.[6]

In my comments, I first provide some context concerning the ways in which the shareholder proposal process is already skewed to the benefit of company management. I then discuss several instances in which the Systems have used the shareholder proposal process to spur company-specific and market-wide reform to the benefit of investors and the public. Finally, I comment on specific, proposed changes to the eligibility and procedural requirements that I believe will frustrate the ability of investors to use the shareholder proposal process if implemented.

1. The Shareholder Proposal Rule will Further Tip an Already Uneven Playing Field to Benefit Company Management at the Expense of Shareholders

The playing field for the shareholder proposal process is already heavily tilted in favor of management. Proposals are generally nonbinding and companies can, and regularly do, ignore proposals that receive significant, even majority, voting support. Netflix, Inc., for example, ignored, for four consecutive years, majority shareholder votes for the System's proxy access proposal.

In addition to disregarding votes that are cast against management, companies have unrivaled ability to tip the voting outcome in their favor. A company's written opposition to a shareholder proposal contained in its proxy materials is not limited in length, while the shareholder proponent is limited to 500 words. Management can also significantly influence

[6] *See Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970) ("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.").

votes through their vote recommendations.[7] Additionally, companies have access to preliminary voting tallies, which can help management strategize when there is a close vote. These actions may include the use of company resources to solicit additional voting support, particularly on matters that affect the CEO directly, such as advisory votes on executive compensation and proposals to separate the roles of chairman and CEO.

For example, in response to the Systems' shareholder proposal requesting an independent board chairman at JPMorgan—a proposal that initially appeared on track to receive majority support based on preliminary vote tallies that were, at the time, available to shareholder proponents—the company committed substantial financial, board and staff resources to reversing the vote trend. As reported in Global Proxy Watch, "[l]ike a boxer on steroids battling an opponent with one arm tied, [Chairman and CEO] Dimon and his board threw everything they had into turning the vote. JPM set up a war room to track progress, paired directors with large shareholders to turn votes and spent what industry insiders estimate to be at least $5 million on lawyers and proxy solicitation."[8]

While some might view this as an example of the high costs imposed on companies by shareholder proposals, I view these voluntary, reported expenditures from the corporate treasury by management as evidence of the nearly-unlimited resources that large companies can summon to defeat shareholder proposals that enjoy wide support.

According to research conducted by Tara Bhandari, Peter Iliev, and Jonathan Kalodimos, which is summarized in a post by Bhandari to the Harvard Law School Forum on Corporate Governance, "management resists proposals most strongly where the market appears to value them most highly."[9]

Separate research by Laurent Bach and Daniel Metzger shows that "many corporations have been using this privilege [of access to partial vote tallies in real time] to fight shareholder proposals that have a good chance to obtain a majority and impose substantial governance reforms."[10] Bach and Metzger call this "vote rigging" because "contrary to regular campaign activities, managers may affect the voting results so precisely that the defeat of shareholder proposals appears to be the result of luck rather than managerial action."[11] Analyzing voting results on shareholder proposals in large U.S. companies between 2003 and 2016, they find that "an abnormal share of shareholder proposals … are won with a small margin by management."[12]

---

[7] *See* Fabrizio Ferri & David Oesch, Management Influence on Investors: Evidence from Shareholder Votes on the Frequency of Say on Pay, (Feb. 26, 2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238999

[8] *See* Fallout, Global Proxy Watch (May 24, 2013).

[9] Tara Bhandari, Progress in Understanding Proxy Access and the Shareholder Proposal Process (Jan. 3, 2017), *available at* https://corpgov.law.harvard.edu/2017/01/03/progress-in-understanding-proxy-access-and-the-shareholder-proposal-process/. The full research paper, Governance Changes through Shareholder Initiatives: The Case of Proxy Access (last revised Feb. 21, 2019), is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635695.

[10] Laurent Bach & Daniel Metzger, Are Shareholder Votes Rigged?," *available at* https://corpgov.law.harvard.edu/2017/01/04/are-shareholder-votes-rigged/

[11] *Id.*

[12] *Id.*

Preliminary vote tallies, which can be accessed only by management, ostensibly are intended to help issuers determine whether they have quorum. Alternatively, Broadridge Financial Solutions, which provides public companies with proxy services, could provide an aggregate number of votes cast at a particular meeting, instead of reporting the breakdown of votes for and against on both management and shareholder proposals. By providing this valuable strategic information to its paying clients, I believe that Broadridge is not acting with impartiality, as is required to qualify for its exemptions under Rule 14a-2.

Rather than proposing to amend Rule 14a-2 to impose onerous regulation on proxy advisors, as contemplated by the Proxy Advisor Rule, we encourage the Commission to instead direct its staff to "take the steps necessary to ensure that the exemption in Rule 14a-2(a)(1) is conditioned upon the broker (and any intermediary designated by the broker) acting in an impartial and ministerial fashion throughout the proxy process, including the disclosure of preliminary voting information," as recommended by the Investor as Owner Subcommittee in 2014.[13] Such a step should be part of a broader effort to strengthen the integrity of the proxy voting system.

2. Shareholder Proposals Efficiently Spur Market Reform

In my office's substantial experience, the shareholder proposal process has proven to be an essential and cost-effective tool for the Systems to protect and enhance shareholder value by allowing the Systems to express and aggregate their views, as well as those of other shareholders, to management, boards and other shareholders on major governance issues, corporate policies and—perhaps most importantly and uniquely—emerging risks and opportunities.

Over the past 30 years, the Systems' proposals, frequently filed in conjunction with other (often small) investors have ultimately led to significant market changes, including:

- Substantial independent majorities on many boards of directors;
- Enhanced standards of independence for members of company audit, compensation and nominating committees;
- Strengthened policies to enhance board diversity;
- Enhanced company disclosures on board composition and skills;
- Annual election of all directors;
- Proxy access rights;
- Majority vote standards in the election of directors;
- Shareholder advisory votes on executive compensation;
- Effective clawback policies;
- Company disclosure of corporate lobbying and political spending;
- Emphasis on performance-based awards in executive compensation; and

[13] Recommendations of the Investor Advisory Committee: Impartiality in the Disclosure of Preliminary Voting Results (Oct. 9, 2014), *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/impartiality-disclosure-prelim-voting-results.pdf.

- Company policies prohibiting discrimination based on race, religious affiliation, and sexual orientation or gender identity.

Some of the Systems signature examples of driving market reform relate to their efforts to promote fair labor practices and antidiscrimination policies and, most recently under my leadership, proxy access. I am convinced that the substantive benefits of these initiatives—and of those listed above—significantly outweigh any attendant costs.

CASE #1: FAIR LABOR PRACTICES AND ANTIDISCRIMINATION

The Systems first used shareholder proposals in 1985, in coalition with faith-based investors, to prompt adoption of the Sullivan Principles to prohibit workplace discrimination based on race in South Africa during Apartheid. Building on their successful experience with the Sullivan principles, the Systems helped develop, and subsequently led, the shareholder proposal campaign to promote the MacBride Principles to protect the rights of employees from under-represented religious groups at U.S. companies doing business in Northern Ireland. In 1986, American Brands, in response to a shareholder proposal from one of the Systems, contended that adoption and implementation of the MacBride Principles would violate Northern Ireland law by requiring (then illegal) positive discrimination. The Company requested SEC concurrence with its position that the proposal could be omitted from its proxy materials. The SEC agreed, prompting a lawsuit against American Brands. The federal court held that the MacBride Principles could be legally implemented by the Company's management in its Northern Ireland facility. From 1991 to 2010, in response to shareholder proposals by the Systems and other investors, over 100 companies agreed to comply with the MacBride Principles.

The Systems also employed shareholder proposals to catalyze widespread adoption of policies to protect employees from discrimination based on sexual orientation and gender identity. In 1992, one of the Systems filed a shareholder proposal asking Cracker Barrel, which had a policy against hiring LGBTQ employees, to adopt a policy of non-discrimination based on sexual orientation. The SEC not only permitted the company to omit the proposal from its ballot because it dealt with "ordinary business," but also set a new standard whereby employment-based shareholder proposals would "always be excludable by corporations." The decision was promptly challenged in court. Although the lawsuit was unsuccessful, the resulting investor outcry later prompted the Commission to reverse its position, paving the way for investors to challenge workplace discrimination and address employment practices in shareholder proposals.

In its decision to reverse its position in Cracker Barrel, the Commission stated "we have gained a better understanding of the depth of interest among shareholders in having an opportunity to express their views to company management on employment-related

proposals that raise sufficiently significant social policy issues."[14] Just as the SEC's Cracker Barrel decision threatened to unfairly and permanently exclude shareholder proposals on employee-related issues, the Commission, with its Shareholder Proposal Rule, now risks repeating its past failure to appreciate the deep interest among shareholders in having an opportunity, or more than one opportunity (given the proposed high resubmission thresholds) to express and aggregate their views to company management and other shareholders.

Today, largely in response to hundreds of shareholder proposals submitted by the Systems and other investors, nearly 92% of Fortune 500 companies have non-discrimination policies protecting employees from discrimination on the basis of sexual orientation, and 82% include gender identity in those policies. As one academic study concluded "almost twenty years after the SEC's [Cracker Barrel] decision, the use of shareholder proposals to garner workplace protections for LGBT individuals has been extraordinarily successful."[15] A 2016 analysis by Credit Suisse found that 270 companies that provided inclusive LGBTQ work environments outperformed global stock markets by 3% for the previous six years.[16]

Promoting fair labor practices and antidiscrimination policies has continued to be an ongoing priority for the Systems. For this year's proxy season, the Systems have submitted proposals to multiple portfolio companies seeking enhanced disclosure of contractual arbitration requirements for employment-related claims, a practice that precludes employees from suing in court for wrongs like wage theft, discrimination and harassment.

CASE #2: PROXY ACCESS

In 2014, the Systems launched the Boardroom Accountability Project, a campaign to implement proxy access on a company-by-company basis in the U.S. market using shareholder proposals, following two unsuccessful efforts by the SEC to enact an enduring universal proxy access rule.

Today, largely as a result of the Boardroom Accountability Project, approximately 627 U.S. companies, including more than 70% of S&P 500 companies, have enacted proxy access bylaws with terms similar to those in a vacated 2010 SEC rule, up from only six companies in 2014 when we launched the project.

In July 2015, SEC financial economist Tara Bhandari and colleagues at the Commission released a study that analyzed the public launch of the Boardroom Accountability Project and found a 0.53% increase in shareholder value at the first 75 firms that received proxy

[14] Amendments to Rules on Shareholder Proposals, Release No. 34-40018 (May 21, 1998) [63 FR 29106, 29108 (May 28, 1998)].
[15] Neel Rane, *Twenty Years Of Shareholder Proposals After Cracker Barrel: An Effective Tool For Implementing LGBT Employment Protections*, U. Penn. L. Rev. 929, 932 (2014).
[16] Credit Suisse ESG Research (Apr. 15, 2016), *available at* https://plus.credit-suisse.com/rpc4/ravDocView?docid=QYuHK2.

access shareholder proposals in fall 2014 from the Systems.[17] Significantly, the proposal at one of the larger companies, Netflix Inc., would have been excludable under the Shareholder Proposal Rule. Based on the Systems' $5.02 billion[18] invested in the 75 companies upon the November 2014 launch, these initial filings suggest the proposals generated $26 million in excess return for the Systems.

Given that the Systems rarely hold more than 0.5-1.0% of any individual portfolio company, we can extrapolate that the Systems' initiative generated considerably more value to other shareholders of these 75 companies than our $26 million in excess return. While these excess returns were based on the market's expectation that these companies could enact proxy access, we surmise that the eventual enactment of proxy access by over 600 companies is likely to have generated substantially more value for all shareholders. Furthermore, these findings with respect to the launch of the Boardroom Accountability Project were consistent with a 2014 CFA Institute study that found that proxy access on a market-wide basis has the potential to raise U.S. market capitalization by as much as 1%, or $140 billion.[19]

The Boardroom Accountability Project has also been the subject of two other academic research papers, both of which concluded the initiative produced benefits to shareholders:

- According to *The Real Effects of Environmental Activist Investing*, which analyzed the universe of companies where the Systems filed proxy access shareholder proposals due to concerns with respect to environmental risks and practices, firms targeted with proxy access proposals "reduced their total toxic chemical releases, production-related emissions, cancer-causing pollution, environmental accidents, and legal risks. These effects do not come at the expense of lower financial performance or returns. … These findings suggest that shareholders can delegate their pro-social preferences onto firms to maximize their total value between their financial and non-pecuniary benefits."[20] The authors concluded that it was the targeting and engagement by the Systems that drove these results, and that "adopting proxy access bylaws, alone, does no act as a sufficient condition for

[17] *See* Tara Bhandari, Peter Iliev & Jonathan Kalodimos, Governance Changes through Shareholder Initiatives: The Case of Proxy Access (last revised Feb. 21, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635695. This study is among those included in a survey study, *Thirty years of shareholder activism: A survey of empirical research,* cited in footnote 214 of the Shareholder Proposal Rule. This footnote is intended to support the Commission's statement that empirical literature finds that shareholder proposals are, on average, associated with small or negligible changes in target companies' market value. It appears that the survey's authors, when considering Bhandari *et al.*'s findings, are implying that a return of 0.53% as it relates to shareholder wealth is small. If this is also the Commission's interpretation, we would contend that 0.53% translates to substantial value for investors at a typical S&P 500 company. The total market cap of the S&P 500 was $25.6T as of June 28, 2019. Assuming there are 500 constituents, this translates to an average market cap of $51.2B per company, of which 0.53% is approximately $271 million.

[18] The Systems publicly disclosed their company focus list, inclusive of the value of the value of their combined holdings in each company, upon the public launch of the Boardroom Accountability Project. *See* https://comptroller.nyc.gov/wp-content/uploads/2014/11/Board-Room-Accountability-2015-Company-List.pdf

[19] *See* Matt Orsagh, New Research Bolsters Case for Proxy Access: Will SEC Take Action?, *Market Integrity Insights* (Oct. 10, 2014), *available at* https://www.cfainstitute.org/en/advocacy/market-integrity-insights/2014/10/new-research-bolsters-case-for-proxy-access.

[20] S. Lakshmi Naaraayan, Kunal Sachdeva & Varun Shara, The Real Effects of Environmental Activist Investing, at p. 1 (Nov. 18, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483692.

improving sustainability performance"; rather, proxy access "acts as a monitoring and discipline mechanism."[21]

- In *Proxy Access for Board Diversity*, Michal Barzuza "studies the first systemic implementation of proxy access [through the lens of the Boardroom Accountability Project] and finds that while proxy access was rarely used to nominate directors, it was used indirectly—as a bargaining tool—to improve board diversity."[22]

Given the contentious nature of proxy access, we do not believe that the widespread market adoption would have occurred absent the Systems' proposals, and the very strong market signals sent by the large number of proposals that received substantial majority votes from shareholders. For the 66 proposals that went to a vote in the 2015 proxy season, average support was 56%, notwithstanding strong management opposition, and 43 of the proposals received majority support.

To further emphasize the value of the market signals resulting from votes on shareholder proposals, once the 2015 proxy season commenced and the level of voting support became apparent, there was a palpable shift in tone in our discussions of proxy access with our portfolio companies at which the proposal had not yet gone to a vote. We moved away from contentious debates about the merits of proxy access and toward constructive dialogue regarding specific implementation terms.

CASE #3: CLAWBACKS

As another example, the Systems had significant influence on company clawback policies through the use of shareholder proposals. Motivated by the small number of top executives held accountable for the excessive risk taking and compliance failures that led to the global financial crisis, the Systems have advocated for strong policies to enable boards at many major banks to take back compensation from senior executives responsible for egregious misconduct that results in financial or reputational harm to their companies. In 2013, in response to a shareholder proposal, we successfully negotiated this enhancement to Wells Fargo's clawback policy. It was this very policy that ultimately enabled Wells Fargo's board to announce in September 2016 that it would recoup $60 million from two senior executives in order to hold them financially accountable for the fake account scandal that involved 5,300 lower-level employees losing their jobs and cost Wells Fargo $185 million in fines and penalties.

Given the Systems' successful use of the current shareholder proposal process, we are concerned that some of the changes contemplated by the Shareholder Proposal Rule may potentially weaken or encumber the Systems' ability to effect positive corporate changes though the shareholder proposal process.

---

[21] *Id.* at 20.

[22] Michael Barzuza, *Proxy Access for Board Diversity*, 99 B.U. L. Rev. 1279 (2019), *available at* http://www.bu.edu/bulawreview/files/2019/06/BARZUZA.pdf.

3. The One-Proposal Rule Will Prevent Fiduciaries from Fulfilling Their Responsibilities

Of particular concern to me is the proposed change to Rule 14a-8(c), which would apply the existing one-proposal rule to "each person" submitting a shareholder proposal, as opposed to the current rule, which applies to "each shareholder." The Commission explains that "a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative would be submitting each proposal on behalf of different shareholders."[23] We hope that it is not the Commission's intent to prevent representatives who are fiduciaries, such as my office, from filing shareholder proposals from more than one shareholder with the same corporation. I note that the Commission's Division of Corporation Finance previously *refused* to grant no-action relief to Blockbuster, Inc. when it tried to exclude two shareholder proposals submitted by the Comptroller's office on behalf of separate Systems on the ground that the two proposals violated the one-proposal rule.[24] At a minimum, the Commission should make clear this proposed rule does not prevent fiduciaries from filing more than one shareholder proposal with a company, provided that each proposal is filed on behalf of a separate shareholder for which it serves as a fiduciary.

More fundamentally though, I see no valid reason for amending Rule 14a-8(c). The Commission's rationale is that the reasoning underlying the one-proposal rule "applies equally to representatives who submit proposals on behalf of shareholders they represent."[25] That prior reasoning was set forth in Release No. 34-12999, *Adoption of Amendments Relating to Proposals by Security Holders* (Nov. 22, 1976) ("Adopting Release"),[26] which explained that the abuse it was addressing was that "several proponents have exceeded the bounds of reasonableness … by submitting excessive numbers of proposals to issuers."[27] The Commission noted that excessive proposals from a single proponent (1) "constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders" and (2) "tend to obscure other material matters in the proxy statements of issuers, thereby reducing their effectiveness."[28] The Adopting Release further explained that its solution—two proposals of 300 words or less per shareholder—would apply to "collectively all persons having an interest in the same securities (e.g., the record owner and the beneficial owner, and joint tenants)" and that the Commission would not tolerate attempts to "evade the new limitations … [by] having persons whose securities they control submit two proposals each in their own names."[29] Unless one starts with the cynical assumption that shareholder representatives actually control the shareholders they purport to represent and act on behalf of, these rationales have no application to duly-authorized representatives that submit no more than one proposal per shareholder to a company. It is the shareholder—not its representative—that is exercising its right by submitting a shareholder proposal, in much the same way that it is a litigant—and not the litigant's attorney—that is attempting to enforce a

[23] Shareholder Proposal Rule, 84 FR at 66468.
[24] *Blockbuster, Inc.* (Mar. 12, 2017), *available at* 2007 WL 817463
[25] Shareholder Proposal Rule, 84 FR at 66467.
[26] 41 FR 52994.
[27] *Id.* at 52996.
[28] *Id.*
[29] *Id.*

legal right when the litigant's attorney files a complaint. Two or more shareholders that happen to select the same representative to submit their proposals to the same company is in no way "an unreasonable exercise" of each separate shareholder's right to submit one proposal, nor does the identity of the selected representative have any bearing whatsoever on whether other material matters in a proxy statement have been obscured.

The proposed change to Rule 14a-8(c) may also potentially raise additional concerns for the Systems, which, as a cost-saving measure, frequently rely on other investors to present their proposals at shareholder meetings. This is most easily accomplished when the other investor is already attending the annual meeting to present its own proposal. In fact, the Boardroom Accountability Project would not have been possible absent such assistance, as some of the Systems' 66 proxy access proposals voted on in 2015 were presented by representatives from other investor groups, some of whom also presented their own proposals at the same annual meeting. [30] It is unclear to us whether the proposed change to Rule 14a-8(c) would prohibit one person from presenting multiple shareholder proposals at one annual meeting. If this is in fact the Commission's intent, we question whether the Commission has the authority to regulate the conduct of the annual meeting, which we understand to be governed by state law.

Additionally, it becomes obvious when the proposed change limiting "each person" to the submission of no more than one shareholder proposal is read in conjunction with the proposed requirement that representatives submit written documentation from the shareholder confirming that they are authorized to submit the proposal and act on the shareholder's behalf (discussed in more detail below), that the Commission seeks to engage in regulatory overkill. What possible reason is there to limit the number of shareholder proposals a representative can submit if that representative establishes, under the proposed changes to Rule 14a-8(b), that he or she is, in fact, duly authorized to act on behalf of multiple shareholders? It is hard to escape the conclusion that the Commission's ultimate goal here is to put up additional, unnecessary obstacles for shareholders who wish to use representatives in the shareholder proposal process so that fewer shareholder proposals get filed.

4. Proposed Rule 14a-8(b)(4) is Repetitive, Burdensome, and Unnecessary

I object to the burdensome documentation requirements under proposed Rule 14a-8(b)(4) that would be placed on shareholders that wish to use representatives to submit shareholder proposals on their behalf. These additional requirements seem to be designed to drown large institutional shareholders in repetitive, burdensome, and unnecessary paperwork, solely because, for purposes of efficiency and expertise, these large shareholders have chosen to use representatives to submit their shareholder proposals to multiple companies. In the Systems' case, it would potentially require each System's trustees and/or staff to prepare proposal-specific paperwork for each of its approved shareholder proposals. The Systems have explicitly delegated responsibility to my office to prepare precisely this kind of paperwork on their behalf based on our experience and familiarity with the process and ready access, as custodian, to the relevant

[30] These groups include, but are not limited to, AFL-CIO, CalPERS, the Massachusetts Laborers' Pension fund and the New York State Comment Retirement Fund.

ownership information. For example, my office currently obtains all required proof of ownership information directly from the Systems' custodial bank, whose contract with the Systems is overseen by my office. Any concerns about whether a representative is acting with authorization from the shareholder can be addressed through less burdensome means. In particular, the onus for raising any concerns about whether a representative is acting with proper authorization should be placed on issuers, especially in light of the fact that shareholder proposals are only rarely filed without proper authorization.

On January 27, 2020, I collaborated with other investors and advisors who will be adversely affected by these requirements as well as the one-proposal rule and other provisions to jointly submit our concerns and seek clarification as to certain vaguely described aspects of the Shareholder Proposal Rule.[31]

5. The Proposed Ownership Requirements and Prohibition on Aggregation Could Disenfranchise Even Very Large Institutional Investors

The proposed ownership requirements seem intended to exclude smaller investors from the shareholder proposal process. In our view, shareholders of any size should have the opportunity to use the shareholder proposal mechanism. Large institutional investors do not have a monopoly on good ideas. The Systems supported most shareholder proposals in 2019, many of which were submitted by smaller investors, including some retail shareholders.

In choosing not to increase the $2,000 ownership requirement as part of its 1997 proposed Amendments to Rules on Shareholder Proposals, the Commission "sought to avoid increasing the threshold further out of concern that a more significant increase could restrict access to companies' proxy materials by smaller shareholders, who equally with other holders have a strong interest in maintaining channels of communication with management and fellow shareholders."[32] Given Chairman Clayton's focus on "[f]urthering the interests of America's Main Street investors,"[33] we question why the Commission would now propose changes to the existing rules in a manner that will only serve to disenfranchise those Main Street investors from participating as proponents in the shareholder proposal process.

For a small Main Street investor seeking to engage a portfolio company on a particular topic, a shareholder proposal may be the only way for the investor to be taken seriously by, and to receive a response from, the company.

In addition to disenfranchising small investors, the proposed ownership requirements and prohibition on aggregation will make it difficult for Systems to submit shareholder proposals to hundreds of U.S. companies. While the Systems routinely submit shareholder proposals jointly to the same company, in most cases each System individually meets the eligibility requirements and it is seldom necessary to aggregate their shares. This will not continue to be the case under the Shareholder Proposal Rule.

---

[31] *See* https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf
[32] Amendments to Rules on Shareholder Proposals, Release No. 34-39093 (Sept. 18, 1997) [62 FR 50682 (Sept. 26, 1997)]
[33] https://www.sec.gov/biography/jay-clayton

Based on our review of their holdings as of October 31, 2019, there were more than 200 U.S. portfolio companies in which each of the 5 Systems held less than $25,000 worth of stock. The proposed rule would effectively reduce my office's ability to submit shareholder proposals at these companies.

Some of these companies are admittedly small. While many proponents have tended to submit their shareholder proposals to larger S&P 500 companies, the Systems have not shied away from submitting proposals to smaller companies. From 2015 to 2019, the Systems submitted shareholder proposals to 78 Russell 3000 companies outside of the S&P 500. There is good reason to engage with smaller companies via shareholder proposals. From our experience, smaller companies tend to lag their larger S&P 500 peers in terms of their corporate governance structures, board diversity and refreshment, and risk oversight and disclosure practices.

6. Proposed Rule 14a-8(b)(1) is Overly Prescriptive and Burdensome, and, in Our View, Constitutes Micromanagement and Regulatory Overreach

I next object to the newly proposed Rule 14a-8(b)(1)(iii), which requires that shareholders provide a "written statement that they are able to meet with the company in person or via teleconference no less than 10 calendar days nor more than 30 calendar days after submission of the shareholder proposal."[34]

While I believe corporate engagement is to be encouraged, newly proposed Rule 14a-8(b)(1)(iii) seems to assume that any lack of engagement in connection with shareholder proposals rests entirely with shareholders. While we are aware that some companies have expressed concerns regarding a small number of shareholder proponents who have been unwilling or unavailable for engagement, our experience is that nearly all shareholder proposal proponents are eager for engagement and that responsibility for the lack of any discussion rests almost entirely with company management. Often, the first time my office hears from a company in response to a shareholder proposal is when it receives either a no-action request or the company's opposition statement, which it is legally required to provide the shareholder no later than 30 calendar days before it files its definitive proxy statement.

The Boardroom Accountability Project, discussed above, is a good example. To launch the project, the Systems submitted proxy access shareholder proposals to 75 companies during the last two weeks of October 2014. Following a December 1, 2014 decision by the Division of Corporation Finance to permit Whole Foods to exclude a proxy access shareholder proposal submitted by a retail shareholder, 18 of the Systems' 75 focus companies submitted no-action requests to the Commission, making the same arguments that Whole Foods successfully deployed. In all but one case, it was the first time my office had heard *anything* from the companies concerning the proposals.

Although we are willing to engage each and every company at which the Systems file a proposal—and routinely express our interest in dialogue in the cover letter that accompanies our shareholder proposals—we are unclear what authority, if any, the Commission has to potentially

[34] Shareholder Proposal Rule, 84 FR at 66510

condition a shareholder's substantive right to have a proposal included in a company's proxy materials on whether or not to the shareholder affirmatively seeks to informally engage the company on that proposal, especially when no such reciprocal engagement obligation is placed on companies.

Furthermore, the prescribed window for availability in proposed Rule 14a-8(b)(1)(iii) is unduly restrictive. Because most U.S. companies hold their annual meetings in April and May, and thus have remarkably similar filing deadlines, the proposed window places an unreasonable scheduling burden on investors. This is particularly true for representatives like myself who serve as fiduciaries for multiple shareholders that may file shareholder proposals at multiple companies. This proposed change has the potential to require my office to pre-determine an engagement calendar complete with engagement meetings, leaving little time for professional staff to manage other responsibilities and demands that may arise during this exceptionally busy time of the year.

Although the Shareholder Proposal Rule requires that shareholders be available, and block time on their calendars to meet with management, it imposes no similar requirement that management—nor the board members to whom many of the Systems' shareholder proposals are directed—meet with shareholder proponents or their representatives. Given that it is mainly company representatives not shareholder proponents, who are most resistant to meeting, placing such a meeting requirement on companies and their boards would provide greater balance. We encourage the Commission to consider such a requirement for board members. Significantly, while my office, as the Systems' representative, is authorized to withdraw the Systems' shareholder proposals, based on a negotiated settlement, management, as the board's delegated engagement representative, is not authorized to make decisions on behalf of the board, including with respect to the CEOs compensation, by-law amendments, and the like.

Finally, we do not believe requiring the actual shareholder—as opposed to a shareholder representative—to attend a meeting with the company is likely to engender greater or more informed dialogue. Because the Systems have explicitly delegated experienced representatives to engage with corporations concerning their proposals, requiring the actual shareholder to attend each of these meetings is unduly burdensome and counterproductive.

7. Resubmission Thresholds are Not Aligned with Shareholder Interests in the Long Term

I next object to the resubmission thresholds of proposed Rule 14a-8(i)(12), which would dramatically raise the resubmission thresholds for a proposal from 3% to 5% in year one, from 6% to 15% in year two, and from 10% to 25% in year three, and allow a company to exclude a proposal that has been submitted three or more times in the preceding five years if the proposal "received more than 25%, but less than 50%, of the vote and support declined by more than 10% the time substantially the same subject matter was voted on compared to the immediately preceding vote."[35] It is our experience that the percentage of votes a proposal receives is a poor barometer for whether a shareholder proposal has been successful in effectuating the desired

[35] Shareholder Proposal Rule, 84 FR at 66471

change. The mere introduction of a shareholder proposal can be a powerful tool to influence a corporation's behavior. In the 2019 proxy season, for example, approximately 72% (42 of 58) of the Systems' proposals addressing a broad range of environmental, social and corporate governance matters were withdrawn after the companies agreed to take steps to implement the Systems' request. We consider these proposals a success, even though they were withdrawn.

In defending its proposed Rule 14a-8(i)(12), the Shareholder Proposal Rule asserts that "public interest in revisiting the resubmission thresholds has grown,"[36] an assertion it supports by citing a Rulemaking Petition from a coalition of nine business trade associations[37] that is neither disinterested nor a reasonable barometer of public interest or opinion with respect to either the Shareholder Proposal Rule in general, or its resubmission thresholds in particular.

There is good reason for keeping resubmission thresholds relatively low. It can take many years, and different approaches and iterations, to build investor support for a shareholder proposal. In particular, institutional investors often need additional time to consider shareholder proposals on new issues, because of the need for consideration by their proxy committees and codification into written proxy guidelines. The proposal for a sexual orientation nondiscrimination policy at Cracker Barrel received only 14% of the vote when it was first on the ballot in 1993. Similar proposals received less than 10% of the vote into the early 2000s, but by 2011, the Systems received a 62% majority vote on such a proposal at KBR, Inc. I am confident that the majority vote at KBR was unlikely the result of company-specific concerns regarding the company's employment practices, but rather the culmination of evolving policies as more institutional investors amended their guidelines in response to similar proposals submitted to other companies in the preceding years. Similarly, proposals for annual election of all directors, increased board diversity, and better disclosure on environmental impacts and risks all started out with limited support that grew substantially over the years.

Moreover, a proposal with limited support in a given year can become highly relevant if circumstances change. In 2007, a nonbinding shareholder proposal for an independent chair at Bank of America won only 16% support. Two years later, an unusual binding proposal for an independent chair was approved by Bank of America shareholders, after the company's share price had declined more than 90% in a compressed period during the financial crisis. This proposal became a vehicle by which shareholders expressed their views on changing leadership at the bank, without the disruption of a proxy contest to refresh the board. While acknowledging regulatory influence in improving Bank of America's governance, this successful shareholder proposal, which received such limited support two years earlier, helped set the stage for a bank that was more accountable to shareholders, as well as regulators.

To highlight another concern, the SEC resubmission rule applies broadly to proposals on "substantially the same subject matter."[38] A proxy access proposal at Netflix received support from 4.4% of the vote in 2013. As noted above, from 2015 through 2018, the majority of Netflix shareholders supported a different Systems proxy access proposal each year—advocating for

[36] *Id.* at 66469

[37] These business trade associations include: the U.S. Chamber of Commerce, National Association of Corporate Directors, National Black Chamber of Commerce, American Petroleum Institute, American Insurance Association, The Latino Coalition, Financial Services Roundtable, Center on Executive Compensation, and Financial Services Forum.

[38] Shareholder Proposal Rule, 84 FR at 66460.

different eligibility requirements. Such a proposal would have been excludable if thresholds had been raised consistent with the resubmission thresholds of proposed Rule 14a-8(i)(12).

Recently, we have seen ideologically-motivated efforts to preempt proposals in a given year urging stronger policies on climate change, board diversity and disclosure of corporate political spending by a group, the National Center for Public Policy Research's Free Enterprise Project (FEP), which has submitted proposals that go in the opposite direction. By filing its proposals early, FEP has successfully used what it calls its "first-to-file" tactic to block proposals it opposes. The FEP typically seeks to submit its proposals, which resemble more commonly filed resolutions before other shareholders since companies are only required to include in their proxy statement the first proposal they receive on the same subject matter. This is what happened to the New York State Comptroller DiNapoli's proposal requesting disclosure of corporate political spending, including through trade associations, at General Electric in 2018. As explained by FEP Director Justin Danhof in an FEP press release, "While the bedrock language of our proposal was almost the same as theirs, the fact that we asked the company to support its affiliations sent the left running for the hills…. The goal of the New York Comptroller's proposal was to silence speech. Two can play at that game. We beat them to the punch and ensured their proposal would never see the light of day …."[39]

The FEP's mischief-making proposals typically receive low voting support. The FEP submitted 13 proposals in 2019, eight of which went to a vote (due to some permitted exclusions); voting support averaged 8.35% and six of the proposals received less than the current resubmission threshold of 6%.

With the high resubmission thresholds included in the Shareholder Proposal Rule, this type of gamesmanship would be encouraged on a broader scale as long as the SEC policy refers to "the same subject matter" rather than "the same proposal."

Finally, we do not believe that repeat proposals impose significant costs on companies beyond the minimal printing costs, given that boards and management are less likely to invest time and effort into proposals that they do not believe will garner significant support.

Conclusion

The Shareholder Proposal Rule, if adopted, will further tip an already unbalanced playing field to benefit company management at the expense of both large and small investors. We contend that the shareholder proposal process has been an efficient tool to drive market reform, and have included some of our past experiences that we hope will help illustrate this perspective. We have also detailed how the proposed rule will potentially prevent investors from fulfilling their fiduciary duty and have focused our discussion on parts of the rule that we find particularly prescriptive and burdensome. Taking a long-term perspective, we also assert that increasing resubmission thresholds is not in the best interest of all shareholders, as it can often take many years for investors' views to coalesce.

[39] *See* https://nationalcenter.org/ncppr/2018/04/25/free-market-activists-block-leftist-investors-from-general-electric-shareholder-agenda/

In Conclusion, I concur with the IAC that the Shareholder Proposal Rule and the Proxy Advisor Rule "simply do not address the most serious issues in the current proxy system" and join in urging the Commission to "revise and republish the rule proposals for balance and compliance with SEC Guidance."[40]

Thank you for your consideration. If you would like any additional information, please contact Michael Garland, Assistant Comptroller for Corporate Governance and Responsible Investment ([redacted]; [redacted]).

Sincerely,

Scott M. Stringer

CC: The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Jay Clayton, Commissioner
William H. Hinman, Director, Division of Corporation Finance
Rick Fleming, Investor Advocate

[40] IAC Letter, *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf.