February 3, 2020

Hon. Jay Clayton
Chair
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, DC 20549

Re: S7-23-19 Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8

Dear Chair Clayton,

I write to provide comments on the SEC's proposed amendments to Rule 14a-8, the Shareholder Proposal Rule. I am a law professor at Washington and Lee University School of Law, where I teach and write about corporate and securities law.[1]

The proposed amendments, which are designed to make it more difficult for an investor, especially a middle- or low-income investor, to successfully submit or resubmit a shareholder proposal, will not benefit corporations, the public, or investors. I oppose the proposed amendments and agree with the objections of numerous other commenters who also oppose them. This letter addresses some points that I have not seen raised in other comment letters, particularly the significance of the SEC's proposals to the upcoming 2020 election.

Why the Rush?

Numerous commenters have objected to the timing of this process and the short public comment period for these proposed amendments, noting the complexity of the issues raised. What has gone unremarked is that adoption of the proposed amendments before the 2020 proxy season **clears the path for companies to silence shareholder proposals about corporate political spending only months before a major election.** Even if these amendments were a good idea—and they are not—the SEC's effort to rush them into enactment creates the appearance of partisanship.

New Shareholder Eligibility Requirements

When the Shareholder Proposal Rule was originally enacted, it had no shareholder eligibility requirements of any kind. In fact, it was well accepted into the 1980s that a shareholder owning even a single share of stock possessed the full range of shareholder rights, including the right to present an appropriate matter for consideration by the company's other investors.[2] Ownership thresholds have never been challenged in court, so their legality remains untested. Strong arguments can be made that

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[1] The views expressed in this letter are my own and should not be attributed to my employer.

[2] *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34,20091, 1983 SEC LEXIS 1011, at *7–8 (Aug. 16, 1983). The eligibility threshold was increased from $1,000 to $2,000 in 1998 to adjust for inflation. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 1998 SEC LEXIS 1001, at *44 (May 21, 1998). The shareholder proposal rule didn't even have a contemporaneous holding requirement until 1976. *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 SEC LEXIS 326, at *8–16 (Nov. 22, 1976) (creating a contemporaneous holding requirement).

any ownership threshold violates Section 14 and/or conflicts with state corporate law, because there is no principled basis for using shareholder wealth to determine who should (or should not) enjoy expressive rights as shareholders. The rules should not grant a special voice to wealthy shareholders—who already have a greater pro rata share of votes to influence the corporation, and more money to spend to influence the political process—while silencing ordinary investors who can afford only a few shares. Under Delaware law, a single share of stock provides the holder with full informational rights. The SEC has failed to explain why expressive rights protected by federal law should be any different.

The rule proposal suggests that the SEC believes a shareholder should have "some meaningful 'economic stake or investment interest' in a company" before the shareholder's expressive rights kick in. Even if this were true, it's not clear why the meaningfulness of the stake should be measured in relation to the corporation's market capitalization rather than the shareholder's own financial condition. The median household income in the U.S. in 2018 was about $62,000, and yet the SEC wants to require a $25,000 investment in a single company for a shareholder to access basic rights during the first year, and $15,000 in the second year. Let's call this what it is: a two-year gag rule for ordinary investors.

Shareholders' Power to Aggregate Shares/Associate for a Common Purpose

Since it first introduced an eligibility requirement in 1983, the SEC has always allowed small stockholders to pool their stock to meet the minimum threshold. Now, the SEC proposes that, in determining whether a shareholder-proponent meets the new, *higher* requirements (ownership of $25,000 worth of a company's stock the first year, etc.), it will not permit shareholders to aggregate their shares. This proposal is brazenly anti-democratic, because it is so obviously designed to silence stockholders who lack wealth, regardless of the merit of their ideas.

The ability to associate for expressive purposes is one of the most cherished American rights. It is also a well-recognized basis for corporate organization. Thus, it should surprise no one that multiple small shareholders would seek to join together to put a proposal before their fellow shareholders. Why does the SEC assume that a proposal endorsed by a single holder of $25,000 has more merit than a proposal endorsed by 25 holders of $1,000 each? The *opposite* presumption should apply. The SEC's proposed amendment is plutocratic and contrary to American speech values.

Resubmission Thresholds & Retroactive Application

Resubmission thresholds, which were first enacted by the SEC in 1948, have been increased only once since then, in 1954. With this amendment, the SEC estimates that between 14% and 27% of proposals eligible for resubmission under the current rules will become excludable under the proposed rules. This represents a significant silencing of shareholder voice.

History has shown that shareholder proposals serve a critical risk function in corporate governance, identifying areas of risk for managers to investigate and address. This has been true even for proposals that companies rejected and fought, for proposals that failed to win a majority vote, and for proposals that failed to meet existing resubmission thresholds. In short, absent real evidence that shareholder proposals are harming firms—which they are not—the SEC should be cautious about allowing companies to ignore risks that shareholders believe are important. We know what kinds of proposals will be silenced if new, high resubmission thresholds are adopted: proposals addressing risks of climate change, the #metoo movement, and cyber security, among others. These concerns need amplification, not silencing.

Shareholder Proposals & Corporate Speech Rights

The calculus involved in changing the Shareholder Proposal Rule is not the same today as it was in 1954, or even 1983. It changed when the Supreme Court decided Citizens United v. FEC in 2010.[3] Because that case justified the protection of corporate political speech in part on the existence of "procedures of corporate democracy," a decision by the SEC to narrow the Shareholder Proposal Rule has broad implications.[4] It whittles away at the logic that supported that controversial, 5-4 decision. In addition, because Citizens United increased the ways in which corporations can spend money to influence elections, that case *increased* the need for shareholders—especially middle- and low-income shareholders—to have a mechanism to demand transparency of corporate political spending, and to weigh in on companies' political activities. The Shareholder Proposal Rule is that mechanism.

Undermining *Citizens United*

Citizens United justified First Amendment protection for corporate independent expenditures in part on the existence of "procedures of corporate democracy." For authority, it cited to First National Bank of Boston v. Bellotti, which had also cited the existence of "procedures of corporate democracy" to justify the protection of corporate political spending.[5] Although the Supreme Court did not acknowledge this in Citizens United, the SEC had already eroded the Shareholder Proposal Rule since Bellotti was decided in 1978. Between Bellotti and Citizens United, the SEC had silenced dissenting stockholders who could afford only a few shares of stock by imposing ownership eligibility requirements in 1983.

Now, the SEC proposes to narrow "the procedures of corporate democracy" again. The SEC should understand that its proposed amendments, if enacted, undermine the legal reasoning that supports corporate speech rights.

Higher Stakes

Moreover, by increasing the ways in which large public companies can participate in the electoral process, Citizens United also increased the need for *all* shareholders to have a mechanism to express their views and hold corporate managers accountable. Before that case was decided, federal law imposed restrictions on corporate independent expenditures in federal elections, reducing the amounts that corporations could spend. Since corporations could spend little, dissenting shareholders had little need to use proposals to express concerns to corporate management about electoral spending.

In 2010, this calculus changed. After Citizens United, corporations were allowed to spend *unlimited* amounts on independent expenditures in state and federal elections. Moreover, after the SpeechNow.org decision in June 2010, corporations were able to give unlimited amounts to Super PACs, a new and controversial vehicle for campaign finance that did not previously exist, and that quickly came to dominate outside spending in federal elections. Public companies responded enthusiastically to

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[4] *Id.* at 370; *see also id.* at 362.
[5] 435 U.S. 765, 794 (1978).

these legal changes and began making (indirect) independent expenditures in elections, especially by giving money to Super PACs and to 501(c) nonprofits.

Thus, from the perspective of shareholders worried about corporate political spending, Citizens United only increased the importance of the Shareholder Proposal Rule, which lets them join their voices to oppose a corporation's spending activities. Indeed, after Citizens United, public companies experienced a surge of shareholder dissent about corporate political spending expressed through shareholder proposals—a surge that continues to this day. The SEC should evaluate, in writing, whether and how its proposed changes will impact the ability of middle- and low-income investors to demand transparency of corporate political activity, or to weigh in on that activity, in the one forum that the Supreme Court left open for that conversation after Citizens United.

The 2020 Election

If the SEC implements the proposed rule amendments before the 2020 election, middle- and low-income shareholders will lose rights they previously enjoyed within corporations to participate in matters important to democracy and the political process. The SEC should not implement the proposed amendments until the 2021 proxy season, at the earliest, to help protect the integrity of the 2020 election.

Conclusion

Shareholder proposals are a critical mechanism for investors to learn about a corporation, to engage in productive dialogue with corporate managers and fellow shareholders, and to raise concerns about business risks, policies, transparency, and governance. They are also the foundation of fair corporate suffrage, which is protected by law. The shareholder proposal mechanism has been in place for roughly eighty years, and is critical to shareholders' expressive rights. But shareholder proposals embarrass corporate managers and focus attention on problems that managers would rather hide. As a result, over the decades, corporate managers have pressed the SEC to narrow the rule in order to silence middle- and low-income investors and to shield the decisions of management from scrutiny.

When it enacted Section 14 of the 1934 Act, Congress authorized the SEC to prescribe rules "in the public interest or for the protection of investors."[6] The SEC's proposed amendments violate the public interest *and* increase the vulnerability of investors to abuses, going further than any changes in the history of the Shareholder Proposal Rule to gag small shareholders. The proposed amendments should not be implemented.

Sincerely,

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[6] Securities and Exchange Act of 1934, Section 14(a)(1).