JOHN A. ZECCA
EXECUTIVE VICE PRESIDENT,
CHIEF LEGAL AND
REGULATORY OFFICER
805 KING FARM BLVD
ROCKVILLE, MD 20850

February 3, 2020

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

Re: File No. S7-23-19

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq")[1] applauds the Commission for its proposed amendments to update the procedures and resubmission thresholds for shareholder proposals under Exchange Act Rule 14a-8.[2] Rule 14a-8 requires companies filing a proxy statement to include in that document proposals submitted by shareholders, subject to certain procedural and substantive requirements. The proposed amendments are intended to modernize the shareholder proposal process to account for the extensive changes in the marketplace since the process was last revised, as well as to respond to feedback from stakeholders.

The proposed amendments are part of the SEC's ongoing focus on proxy plumbing. As part of this effort, the Commission has collected extensive feedback on the proxy process generally and on shareholder proposals specifically. On November 15, 2018, the Commission's staff held a Roundtable on the Proxy Process, which included a panel on shareholder proposals that was comprised of representatives from issuers and investors. Following the Roundtable, the staff collected further input from members of the public via an invitation to provide written comments.

Nasdaq participated in the Roundtable and submitted two separate comment letters, one on our own behalf on November 14, 2018, and the other as a co-signatory with over 300 other public companies on February 4, 2019.[3] In all these forums and others, we urged the Commission to update Rule 14a-8, as

---

1 Nasdaq (Nasdaq: NDAQ) is a global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute their business vision with confidence. To learn more about the company, technology solutions and career opportunities, visit us on LinkedIn, on Twitter @Nasdaq, or at www.nasdaq.com.

2 *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, Securities Exchange Act Release No. 34-87458 (November 5, 2019), 84 FR 66458 (December 4, 2019) (the "Release").

3 See Transcript of the Roundtable on the Proxy Process (November 15, 2018), available at https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf, comments of John A. Zecca; see also Letter from John A. Zecca, to Brett J. Fields, Secretary, Securities and Exchange Commission, dated November 14, 2018, available at: https://www.sec.gov/comments/4-725/4725-4649196-176472.pdf; see

it proposes to do in the Release. We therefore commend the Commission for its proposed changes to the shareholder proposal process, which strike the right balance between facilitating the ability for shareholders to include their own proposals in a company's proxy statement and reducing the drain on company resources from including proposals that are not likely to win majority support. The Commission's proposed changes also will improve engagement between companies and the proponents of shareholder proposals, for the benefit of all other shareholders in the relevant company.

The Commission posed numerous questions and requests for comment in the Release. Nasdaq will not address all of those in this letter. However, Nasdaq desires to comment on certain matters that may be of particular interest to the more than 3,000 registrants that have chosen to list on The Nasdaq Stock Market. Additionally, as a public company, Nasdaq is itself subject to the proxy rules, and it has experience addressing shareholder proposals submitted for its own proxy statement.

A. Rule 14a-8(b) - Eligibility Requirements

The first aspect of the SEC's proposal addresses the eligibility requirements in Rule 14a-8(b), which allows a shareholder to submit a proposal to a particular company if the shareholder has continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to vote on the proposal for at least one year. As the SEC acknowledges, the 1% ownership threshold historically has not been utilized,[4] so effectively, the current eligibility threshold for submission of shareholder proposals is ownership of $2,000 of a company's voting securities for one year. This eligibility requirement has not been changed in over twenty years, and the Commission therefore proposes to update it by eliminating the 1% ownership threshold and implementing a tiered approach that would provide three options for demonstrating an ownership stake, through a combination of amount of securities owned and length of time held. Specifically, a shareholder could submit a proposal if the shareholder has continuously held the following amounts of a company's voting securities: (i) $2,000 for at least three years; (ii) $15,000 for at least two years; or (iii) $25,000 for at least one year.

Nasdaq has long advocated for increases to the eligibility thresholds and wholeheartedly supports the SEC's proposals in this regard. As we have previously stated, we believe that shareholders should have a meaningful, long-term investment in a company before they are given access to the proxy.[5] This would help ensure that companies' boards of directors and management spend their scarce time focused on shareholder proposals that come from shareholders who are aligned with other shareholders in the long-term success of the company. We believe that the proposed tiered approach much improves upon the current $2,000 threshold in ensuring that a shareholder has a meaningful economic stake in a company before the shareholder is eligible to submit a proposal for inclusion in the proxy. It also is reasonable to require shareholders who own lower amounts of securities to hold those securities for longer periods of time. We do recommend, however, that the Commission include a provision in the final

---

also Letter from Nasdaq et. al., to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission, dated February 4, 2019, available at: https://www.sec.gov/comments/4-725/4725-4872519-177389.pdf.

4 See the Release, at 22-23.

5 See Edward S. Knight, *The SEC's Corporate Proxy Rules Need a Rewrite*, THE WALL STREET JOURNAL, March 26, 2014, available at: https://www.wsj.com/articles/edward-s-knight-why-the-sec-should-rewrite-the-rules-on-proxy-proposals-1395861527?tesla=y; see also Nasdaq, *The Promise of Market Reform: Reigniting America's Economic Engine*, May 2017, available at: http://business.nasdaq.com/revitalize.

rules to adjust the dollar amounts in the eligibility thresholds for inflation on an annual basis.

B. Proposals Submitted on Behalf of Shareholders

The second aspect of the SEC's proposals tightens the eligibility requirements of Rule 14a-8 to require certain documentation when a shareholder uses a representative to submit a proposal on his or her behalf.[6] These proposed documentation requirements address concerns about the use of a representative in the shareholder proposal process, specifically that it may be difficult for companies to verify that the representative is authorized to act on behalf of the shareholder-proponent.

Nasdaq supports the proposed inclusion of these documentation requirements in Rule 14a-8 and believes that it will not be difficult for shareholders and their representatives to fulfill them. In fact, these requirements merely memorialize some of the guidance issued by the staff of the SEC's Division of Corporation Finance in Staff Legal Bulletin No. 14I ("SLB 14I"), which addressed similar concerns as the proposed rules about the use of an agent in the shareholder proposal process.[7] Although SLB 14I is not legally binding, many shareholder-proponents follow it, and therefore, much of the documentation required by the proposed rule is often already provided by shareholders. As a result, the proposed rule will impose minimal burdens on shareholder-proponents, while helping companies ascertain the relationship between the proponent and his or her representative.

However, we believe the Commission should reevaluate the usage of representatives altogether in the shareholder proposal process. As the Commission acknowledges, Rule 14a-8 does not specifically contemplate the use of a representative, except that it allows a representative to present a proposal on the proponent's behalf at a shareholders' meeting.[8] Nevertheless, proponents commonly rely on representatives to submit proposals on their behalf and handle all interactions with a company regarding those proposals. In fact, the most prolific submitter of shareholder proposals is a representative of other individual investors who, together with his associates, accounted for 24% of all shareholder proposals submitted during the 2018 proxy season.[9] As stated in a recent Wachtell memo, "individuals of this ilk are sometimes referred to as 'gadfly investors' as their interests are generally not as typical investors but to instigate and bring about change."[10] While the goals of these individuals may have merit, these goals are not necessarily aligned with those of other investors in the companies to which they submit

---

6 Specifically, the proposed rule would require documentation that: (i) identifies the company to which the proposal is directed; (ii) identifies the annual or special meeting for which the proposal is submitted; (iii) identifies the shareholder-proponent and the designated representative; (iv) includes the shareholder's statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder's behalf; (v) identifies the specific proposal to be submitted; (vi) includes the shareholder's statement supporting the proposal; and (vii) is signed and dated by the shareholder.

7 Division of Corporation Finance, Securities and Exchange Commission, *Staff Legal Bulletin No. 14I, Shareholder Proposals*, November 1, 2017, available at: https://www.sec.gov/interps/legal/cfslb14i.htm.

8 See the Release, at 29.

9 See Gibson, Dunn & Crutcher LLP, *Shareholder Proposal Developments During the 2018 Proxy Season*, July 12, 2018, available at: https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2018-proxy-season/.

10 See Trevor S. Norwitz, Sabastian V. Niles, Avi A. Sutton and Anna S. Greig, Wachtell, Lipton, Rosen & Katz, *Market Trends: Shareholder Proposals*, February 2018, available at: https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26175.18.pdf.

shareholder proposals. In these cases, a company's board of directors and management may legitimately conclude that the proposal is not in the best interests of the company and the other shareholders, and then the company must spend hundreds of thousands of dollars of other shareholders' money to fight the proposal.[11] We believe that this waste of company resources is not in the interests of other investors in the relevant company.

As a result, we advocate that the shareholder proposal rules be amended to prohibit the use of representatives in submitting a proposal. A proponent could still employ a law firm or other advisor to consult on the proposal, but the proponent must actually submit the proposal and engage with the company on it himself or herself. This requirement would ensure that the proponent has a genuine and meaningful interest in the relevant proposal. As a matter of principle, a shareholder should spend his or her own time and money to submit a proposal and interact with the company, if that shareholder is going to cause the company to spend the time and money of other shareholders to respond. Obviously, if the Commission eliminates the use of representatives in the shareholder proposal process as we suggest, that would obviate the need for the proposed amendments to the eligibility requirements to require certain documentation when a shareholder uses a representative, as discussed above.

C. The Role of the Shareholder-Proposal Process in Shareholder Engagement

The third aspect of the proposed updates to Rule 14a-8 adds a shareholder engagement component to the rule's eligibility requirements. Specifically, the proposal would require a written statement from each shareholder-proponent that the proponent is available to meet with the company in person or by teleconference no less than 10 days, nor more than 30 days, after submission of the shareholder proposal. The statement also must include contact information, as well as specific dates and times that the shareholder is available to discuss the proposal with the company. In addition, the contact information and availability must be that of the shareholder, rather than any representative, although the representative could participate in any discussions between the company and the shareholder.

We support this aspect of the SEC's proposal and particularly endorse the requirement that the shareholder, rather than any representative, engage with a company. One of the purposes of the shareholder proposal rule is to promote engagement between a shareholder-proponent and the relevant company,[12] and the proposed amendment furthers that goal. If a proponent truly believes that his or her proposal is in the best interests of the company and its other shareholders, then he or she should have no objection to engaging with the company about it. In fact, 73% of retail investors surveyed by the Spectrem Group supported the engagement aspect of the proposed amendments, and more than a third said that the rules would make them more likely to engage with a company.[13] In many cases, such engagement may lead to a mutually agreeable outcome, such as the company wholly or partially addressing the

---

11 See Steven Davidoff Solomon, *Grappling with the Cost of Corporate Gadflies*, THE NEW YORK TIMES, August 19, 2014, available at: https://dealbook.nytimes.com/2014/08/19/grappling-with-the-cost-of-corporate-gadflies/.

12 See the Release, at 18, stating that "[t]he shareholder-proposal process established by Rule 14a-8 facilitates engagement between shareholders and the companies they own."

13 Spectrem Group, *Reclaiming Main Street: SEC Hears Retail Investors' Cries for Proxy Advisory Oversight*, January 10, 2020, available at: https://spectrem.com/Content_Whitepaper/reclaiming-main-street-white-paper.aspx.

proposal, which can then be withdrawn, saving the time and expense of the company including it in its proxy statement.

We do believe, however, that the final rule should strengthen the engagement requirement so that it includes some "teeth" to incent a shareholder-proponent to engage with the company. Specifically, current Rule 14a-8(h) requires a shareholder-proponent, or his or her representative who is qualified under state law, to present the shareholder proposal at the company's annual meeting. If the proponent or representative fails to appear and present the proposal, without good cause, the company is permitted to exclude all of the proponent's proposals from its proxy materials for any meetings held in the following two calendar years. We recommend that the final amendments to Rule 14a-8 include a similar provision, such that a company may exclude a proponent's proposals from its proxy materials for the next two years if the company offers to meet with the proponent during a time that the proponent has stated he or she will be available, as required by the rule, and the proponent fails to (i) respond to written communications from the company regarding the meeting or (ii) attend such meeting.

D. One Proposal Limit

The next aspect of the SEC's proposals clarifies that a person may submit no more than one proposal, directly or indirectly, for the same shareholders' meeting. Under the current rule, a shareholder may submit no more than one proposal to a company for a particular meeting, but the same representative could submit multiple proposals on behalf of different shareholders for the same meeting. Similarly, a shareholder could submit one proposal for a meeting in his or her own name and other proposals as a representative of other shareholders. The proposed amendments apply the one-proposal rule to "each person" rather than "each shareholder" who submits a proposal. As a result, a representative could not submit more than one proposal to be considered at the same meeting.

We fully support this aspect of the SEC's proposal. Rule 14a-8 allows shareholders to have their proposals included in a company's proxy statement and to be voted upon with little cost to the proponent.[14] While this provides significant benefits to an individual proponent, the cost, which can exceed $100,000 per proposal,[15] is borne by all of a company's shareholders. It is therefore reasonable to limit each person to one proposal per shareholders' meeting. As noted by the Commission in the Release, the submission of multiple proposals by a single person "would constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders."[16]

E. Rule 14a-8(i)(12) - Resubmissions

The final aspect of the SEC's proposals updates the resubmission thresholds for shareholder proposals in Rule 14a-8(i)(12). The current rule allows companies to exclude a shareholder proposal that deals with substantially the same subject matter as previous proposals if, within the preceding five calendar years, the proposal received: (i) less than 3% of the vote if proposed once; (ii) less than 6% of the vote on its last submission to shareholders if proposed twice; and (iii) less than 10% of the vote on its last

---

14 See Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System, November 5, 2019, available at: https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting.

15 See the Release, at 12.

16 See the Release, at 38.

submission to shareholders if proposed three times or more. The SEC's proposed revisions increase these thresholds to 5%, 15% and 25%, respectively. In addition, the revisions add a new momentum requirement that would allow companies to exclude a shareholder proposal that has been previously voted on three or more times in the last five years, if the proposal received more than 25%, but less than 50%, of the vote and experienced a decline in support of 10% or more compared to the immediately preceding vote.

Nasdaq has long advocated for a reexamination of the resubmission thresholds in Rule 14a-8.[17] We believe that companies should not be burdened year after year with proposals that the majority of their shareholders don't support. A study by the U.S. Chamber's Center for Capital Markets Competitiveness referred to such proposals as "zombie" proposals, which it defined as proposals that are submitted three or more times without garnering majority support.[18] The study cited research by FTI Consulting that analyzed shareholder proposals included in proxy statements from 2001 to 2018.[19] According to FTI's research, "zombie" proposals made up 32% of all failed proposals during this time period.[20] These proposals create a significant drain on company time, attention and resources, and they can linger around indefinitely under the current rules as long as they continue to receive at least 10% of votes cast each year. This cannot be in the interests of a company's broader shareholder base.

On February 4, 2019, Nasdaq, along with over 300 other publicly traded companies, sent a letter to the SEC thanking it for conducting the Roundtable on the Proxy Process and urging it to take action on certain critical items discussed during the Roundtable.[21] Among other things, that letter advocated that the SEC adopt reasonable standards for resubmission of shareholder proposals and suggested that standards of 6%, 15% and 30% would be appropriate. These suggested standards were based upon an SEC rule proposal from 1997 that the Commission ultimately decided not to adopt.[22] We note that the SEC's currently proposed standards of 5%, 15% and 25% are very close to the standards we and our co-signatories suggested approximately one year ago. While we encourage the Commission to consider implementing the 6%, 15% and 30% thresholds, we believe that the 5%, 15% and 25% thresholds are reasonable and would go a long way toward improving the shareholder proposal process for the benefit of all stakeholders.

This view is based, in part, on the SEC's proposed addition of the new momentum requirement to the resubmission thresholds. As outlined above, that requirement would allow a company to exclude a proposal that shareholders have voted on three or more times in the past five years, but would not

---

17 See supra notes 3 and 5.

18 See U.S. Chamber's Center for Capital Markets Competitiveness, *Raising the SEC's Resubmission Proposals: "Zombie" Proposals and the Need to Modernize an Outdated System*, October 9, 2018, available at: https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/10/CCMC_ZombieProposal_Digital.pdf.

19 FTI Consulting, *2018 Proxy Season Trends*, August 27, 2018, available at: https://fticommunications.com/2018/08/2018-proxy-season-trends/.

20 Id.

21 See supra note 3.

22 See *Amendments to Rules on Shareholder Proposals*, Securities Exchange Act Release No. 34-39093 (September 18, 1997) 62 FR 50682 (September 26, 1997). Since the SEC did not adopt this proposal, the resubmission thresholds have remained unchanged since 1954.

otherwise be excludable under the 25% threshold, if the proposal did not receive a majority of votes and support declined by 10% or more compared to the immediately preceding shareholder vote. This requirement would relieve companies, and their investors, from the burden of considering proposals for which shareholder support has declined significantly. We therefore support the momentum requirement and believe it, in combination with the increased thresholds, will address many of the concerns we and others have expressed about the resubmission thresholds.

***

As previously noted, we applaud the Commission for its efforts to improve the shareholder proposal process for the benefit of all stakeholders. We urge the Commission to take swift action to implement final rules on this topic.[23]

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,

John A. Zecca

---

23 Notably, the Congressional Review Act contains a lookback provision allowing Congress to disapprove any rules promulgated by government agencies during the final 60 days of the prior session of Congress. See Daniel R. Pérez, "Upcoming CRA Deadline has Implications for Regulatory Oversight by Congress," Regulatory Studies Center, The George Washington University, December 11, 2019, available at: https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/GW%20Reg%20Studies%20-%20CRA%20Lookback%20-DPe%CC%81rez.pdf. Therefore, any rules promulgated after May 19, 2020 may be subject to Congressional review in early 2021 following the 2020 election cycle. Ideally, the Commission would finalize the proposed rules prior to this deadline.