



Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F. Street NE  
Washington DC 20549-1090

Dear Ms. Countryman:

In response to the SEC’s request for comments, I would urge the Commissioners to leave Rule 14a-8(b) as-is and not to make any changes to the eligibility requirements. In addition, I believe that the SEC should not eliminate the current 1 percent threshold. This will maintain an appropriate level of shareholder engagement and access.

As has been demonstrated by the Business Roundtable’s recent public comments on the subject,<sup>1</sup> corporations are becoming increasingly open to issues that do not strictly fall within the spectrum of financial reporting but, nonetheless, can have a material impact on the reasonable investor.<sup>2</sup> In addition, one of the key tenets of the SEC’s core mission has been to protect investors.<sup>3</sup> To that end, the SEC has undertaken many initiatives that would serve to protect particularly retail investors.<sup>4</sup>

While institutional investors (such as firms that employ quantitative trading formulas) are the dominant players in the market, it is often retail investors (who are also consumers in the marketplace) that frequently express great concern for issues such as: corporate social responsibility and business

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<sup>1</sup> “Business Roundtable Redefines the Purpose of the Corporation to ‘Promote an Economy that Serves all Americans’” (Aug. 19, 2019) *available at* <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

<sup>2</sup> *See e.g., ICAR, Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure*, at 14 (2013) *available at* <https://www.icar.ngo/publications/2017/1/4/knowning-and-showing-using-us-securities-laws-to-compel-human-rights-disclosure> (discussing the evolving materiality standard for human rights related impacts).

<sup>3</sup> “The Role of the SEC” *available at* <https://www.investor.gov/introduction-investing/basics/role-sec> (stating “the Securities and Exchange Commission has a three part mission ... [including to] protect investors.”); Mary Jo White, “Protecting the Retail Investor,” Speech at the Consumer Federation of America, SEC (Mar. 21, 2014) *available at* <https://www.sec.gov/news/speech/mjw-speech-032114-protecting-retail-investor> (stating that “While we may not always agree on every issue, we are both focused on protecting the consumers in our securities markets – especially the individual investors, who we often refer to as “retail” investors – who invest their own money to save for retirement, or to buy a home or to send their children to college. The retail investor must be a constant focus of the SEC – if we fail to serve and safeguard the retail investor, we have not fulfilled our mission.”)

<sup>4</sup> *See, e.g., Peter Driscoll, “How we Protect Retail Investors,” SEC (April. 29, 2019) available at* <https://www.sec.gov/news/speech/speech-driscoll-042919> (discussing a number of initiative specifically aimed at helping retail investors).



and human rights related issues.<sup>5</sup> As such, it also seems increasingly likely that firms who fail to take into consideration the concerns of these retail investors can face liability under Rule 10b-5 of the Securities Exchange Act.<sup>6</sup> Having an earlier mechanism for shareholders to be able to engage with companies about issues such as this can help avert disaster (and attendant litigation exposure) *before* it happens. This will provide cost savings to both the corporation and shareholders who would otherwise bear the brunt of decreased share value in the wake of class action litigation or SEC enforcement actions. In short, maintaining the thresholds as-is allows companies to engage with retail investors who care about such issues before significant damages result.

I have spent time researching the SEC's proxy access rules (specifically in connection with its 2009 proposed amendments to Rule 14(a)-8(i)(A) and Rule 14(a)(11)). In an article I wrote at the time regarding the rules relating to director elections, I noted that:

Getting shareholders involved, in a meaningful way, in the process of changing the corporate governance structure could have far-reaching impact beyond any one particular election. And, while shareholders might not have the instant gratification that would be gained from a victory in a specific election, a much greater impact could come from thinking about the underlying fundamental structure of a company and finding ways to change that structure in a way that best suits the shareholders' needs. This difference in the method of engagement, i.e., in process-oriented engagement versus outcome-oriented engagement, is significant. In essence, both methods present a framework for accessing power ... [however] legal and sociological research ha[s] shown that the procedural methods for accessing justice can be just as significant in determining whether social justice is promoted as substantive (or outcome-driven) issues.<sup>7</sup>

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<sup>5</sup> See, e.g., Meredith Miller, *Corporate Codes of Conduct and Working Conditions in the Global Supply Chain*, THE BUSINESS AND HUMAN RIGHTS LANDSCAPE, MOVING FORWARD, LOOKING BACK at 464 (Martin & Bravo eds)(Cambridge Univ. Press)(2016)(stating that "research suggests that consumers (especially younger ones) do in fact care and they are willing to pay more for ethically produced products.") It is exactly these types of consumers who would also be entering the market at the lowest threshold of eligibility under current SEC rules – see also White, *supra* note 3 (making the connection between retail investors and consumers).

<sup>6</sup> See, e.g., *In re BHP Billiton Ltd.*, 276 F. Supp.3d 65, 75 (S.D.N.Y. 2017)(holding that class action investors had satisfied the "materiality" threshold related to certain statements made by BHP Billiton within the context of a dam bursting - what was largely considered one of the worst business and human rights related disasters of 2015); Tuncak, B, *Lessons from the Samarco Disaster*, BUSINESS AND HUMAN RIGHTS JOURNAL, 2(1), 157-162 (2017)(discussing the impact of the dam burst from a business and human rights perspective).

<sup>7</sup> Jena Martin (Amerson), *In Praise of Process: Examining the SEC, Rule 14(a)-8(i)(a), and AFSCME v. AIG*, 5 J. BUS. & TECH. L. 23 (2010) available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1134&context=jtbl>



The research and logic I used with regard to director elections applies with equal force here: shareholders must be given an opportunity to engage with corporations in the least filtered, process-orientated way possible. Providing them with minimal obstacles for filing shareholder proposals is one significant way to achieve this goal. This will be beneficial not just for the shareholders themselves but also for the corporations who could listen to these proposals and heed their concerns before it leads to greater liability.

Sincerely,

**Jena Martin**

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