SHAREHOLDER RIGHTS GROUP

March 18, 2020

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Electronic address: rule-comments@sec.gov

RE: Proposals on Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (File Number S7-23-19)

Dear Ms. Countryman:

We are writing to comment further on the above-captioned rulemaking proposal on behalf of the Shareholder Rights Group. The Shareholder Rights Group is an association of investors formed in 2016 to strengthen and support shareowners' rights to engage with public companies on governance and long-term value creation. We previously wrote on January 6 and February 3.

This letter will further establish that the SEC's proposed requirements are incompatible with the fundamentals of representative relationships, especially the proposed requirements that: (a) that agents must obtain and demonstrate client preapproval of the text of shareholder proposals prior to filing, (b) that shareholders must personally participate in engagement with companies, and (c) that any representative is limited to filing only one proposal per year at a company, even where they represent different clients.

The investment marketplace is a field in which it is routine to hire individuals or organizations with professional expertise – both to make investment decisions upon which a person's or entity's future wellbeing relies, and to engage with the portfolio companies purchased or held on behalf of the investor, including the filing of proposals on their behalf. Such expertise has, over many decades, been established in investment firms, foundations, law firms, investor membership organizations, and nonprofits. The proposed rules would disrupt the functional ecosystem of relationships established by investors, and effectively bypass their right to engage, and to instruct an agent or representative to speak and act on their behalf.

Shareholder Rights Group

Arjuna Capital

As You Sow

Boston Common Asset Management, LLC

Boston Trust Walden

Clean Yield Asset Management

First Affirmative Financial Network, LLC

Harrington Investments, Inc.

Jantz Management, LLC

John Chevedden

Natural Investments, LLC

Newground Social Investment

NorthStar Asset Management, Inc.

Pax World Funds

Sustainability Group of Loring, Wolcott & Coolidge, LLC

Trillium Asset Management, LLC

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Representation and Delegation are an Investor's Right

The investment arena is full of *arrangements of representation*. Investors typically delegate to advisors, lawyers, investment firms and other agents the buying and selling of stock, voting of shares, and engagement in active stewardship of their portfolios. The right to seek professional counsel and representation on financial and legal matters is a well-established legal and cultural norm of the investment and business marketplace. In particular, the ability to hire and delegate to a representative or a fiduciary to carry out an investing strategy is core to investors' rights and in their best interest. Shareholders also seek representation from outside entities for purposes of engaging effectively with companies on their behalf. These engagements may or may not involve preapproval of the transactions by investors. Each agency relationship is determined individually to align with the shareholders' goals and desire for oversight or interaction with their representative.

It is arbitrary and inconsistent with other SEC policies to single out the shareholder proposal process as the one place where the SEC *demands* micromanagement -- for example to insist that the details of a proposal prepared by the investor's trusted advisor be *preapproved* by the investor. Similarly, eliminating the ability of an investor to fully delegate a representative to speak on behalf of the investor raises fundamental constitutional issues and should not be adopted by the Commission.

To summarize some germane points raised in our February 3 letter, the requirements that an *individual proponent* pre-approve proposals and make themselves personally available for direct engagement with the company, bypassing representative relationships, raises fundamental questions:

- **<u>Does the requirement to meet with the company personally preclude delegation of such a meeting to any representatives</u>**? What if the shareholder wishes to delegate to their attorney the responsibility to speak with the company? Their Registered Investment Advisor? An individual who has been given power of attorney? Or others? Are certain of these agents allowed to represent their clients, but others are not? If so, on what legal or factual basis does the SEC differentiate representation? How does the requirement that the investor personally engage the company align with legal, constitutional, and business norms?

- **<u>How is the bias toward institutional investing justifiable?</u>** Many proponents are not natural persons, but rather institutions, such as foundations and pension funds. Anyone whose investments are made through these institutions are automatically and necessarily represented in the course of filing or engagement with a company. Therefore, in denying an individual investor the right of representation allowed to institutional shareholders, the requirement for a "personal" appearance and to pre-approve a proposal establishes a poorly justified competitive distinction between individualized and institutionalized shareholdings.

Leadership by investment firms and nonprofits is not an abuse of the shareholder proposal process

Some comments submitted to the SEC on the rulemaking proposal from corporate issuers and trade associations argue in favor of constraints on representative relationships. Those comments question the leadership role that investment firms and other representative organizations should have in the shareholder proposal process. When such representatives play a central role in a shareholder proposal, this is neither inappropriate nor abusive of the process. To the contrary, the leadership of investment firms, nonprofits, and others in crafting and filing proposals on behalf of shareholders is reflective of the state of the investment marketplace in which well-informed professionals aid investors in advancing the issues about which investors are concerned.

The expertise and leadership of shareholder representatives and agents are ingrained features, not *bugs*, of the shareholder proposal process. Many investors concerned about ESG issues seek out service providers with the expertise and programmatic capacity to pursue concerns about ESG issues such as climate change and human rights that are germane to companies' long-term success, as well as the economy's and investment portfolios' long-term financial performance.

Such issues of financial sustainability and corporate risk management are core to the shareholder proposal process, and investors appropriately rely on representatives and advisors to develop and file proposals. For example, as we noted in our January 6 comment letter, risk management proposals that addressed issues at Chevron, Wells Fargo, and Boeing implicated billions of dollars of company value at risk.[1] Many of these leading edge proposals were filed by *representatives* of investors who have been entrusted by an array of clients and investors to raise those issues.

Investors of all types work with their financial advisors who are seeking *returns on investment* for their clients. As we see in trends described in news outlets such as Barrons, Bloomberg, and The Wall Street Journal, interest in ESG factors has led to exponential increases in the number of investors who seek positive returns blended with ESG considerations. Understanding that the financial return of their portfolios is tied to companies' environmental, social, and governance performance, investors increasingly seek integration of ESG issues into their portfolios due to what they rationally view as the long-term effects of ESG factors and externalities on company performance, and the performance of their portfolios as a whole. For example, signatories of the PRI (Principles for Responsible Investment) seek ESG information to help build portfolios, while PRI also encourages engagement with companies. This necessitates, in some instances, the filing of proposals at companies whose externalities are considered to pose systemic or company risk for investors. ESG considerations, including climate change, are particularly important to the Universal Owner (UO), who, by being

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[1] We noted in our January 6 comment that these proposals would have been blocked if the Commission's proposed resubmission thresholds were in effect at the time of the proposals.

> ... invested in a broadly diversified portfolio, essentially owns shares in the global economy. The UO hypothesis "states that a portfolio investor benefiting from a company externalizing costs might experience a reduction in overall returns due to these externalities adversely affecting other investments in the portfolio, and hence overall market return.[2]

Adam Seitchik cites this in 2007 "Climate Change from the Investor's Perspective":

> Therefore, investors have a strong vested interest in public policy and private activity that lowers the global risk of climate-related economic disruption.
>
> Carbon emissions are a classic example of a negative externality, to the extent that the full cost of the pollution is not factored into the price of a barrel of oil but borne by society at large. The key insight from UO analysis is that for a diversified investor, there is no place to hide from these costs: they come back into the portfolio as taxes, insurance premiums, inflated input prices and the physical cost of disasters.

It is thus appropriate for investor representatives to deploy the shareholder proposal process to address broad public policy concerns of investors, including long-term value at the company *and* companies' impacts to the value of clients' portfolios based on economic and market-wide effects from company action.[3] As the Mercer report, *Investing in a Time of Climate Change: The Sequel* stated:

> Investors such as pension funds, insurers, wealth managers, and endowments and foundations typically have multidecade time horizons, with portfolio exposure across the global economy. The implications of climate change are systemic and are already apparent…Financial regulators, and particularly for pension funds, are increasingly reinforcing this message by formalizing the expectations that investors should consider the materiality of climate-related risks and manage them accordingly, consistent with their fiduciary duties.[4]

Natasha Lamb of Arjuna Capital has explained in support of proposals that her firm has filed at Exxon Mobil:

> ….while we will not take big stakes in Big Oil, we do plan to continue to engage with the oil majors on behalf of our clients. Because, while a minority will directly hold stock in these companies, as "universal owners," all of our clients' portfolios remain at risk from climate change. In fact, the systemic risks associated with a rapidly warming planet will impact any investor investing in a broad and diversified portfolio. And we don't plan to

[2] Raj Thamotheram and Helen Wildsmith, "Putting the Universal Owner Hypothesis into Action," paper presented at the Universal Ownership Conference, Saint Mary's College, Moraga, CA, April 2006.

[3] The guardrails of the process ensure that the focus of the proposal is of salient interest to investors in the company – both "economically relevant" pursuant to Rule 14a-8(i)(5) and "significant to the company" for purposes of Rule 14a-8(i)(7) and recent Staff Legal Bulletins 14 I, J and K.

[4] Mercer, *Investing in a Time of Climate Change: The Sequel,* page 6.

sit on the sidelines.

Registered Investment Advisors and Nonprofits Follow Client Instructions

A Registered Investment Advisor typically has an investment policy or thesis through which clients choose to hire them -- a system and strategy through which financial returns, and, in some instances, impact, are offered. For example, socially responsible investment advisors may have a number of clients who have asked for specific exclusion of kinds of securities—screening out certain kinds of assets, sectors, markets, or specific companies and potentially their <u>*conditional inclusion with criteria for investment*</u> including requiring shareholder engagement on particular issues of concern to the client. Likewise, both investment companies and Registered Investment Advisors can have a diversity of investment theses and strategies they employ that are individualized; these may exclude any kind of asset based on any criteria and may require practices related to voting proxies and shareholder engagement.[5]

Active stewardship arrangements often include engaging with portfolio companies and filing shareholder proposals when necessary. The active stewardship process dovetails with screens and divestment strategies. The goal of engagement may be to elicit good-faith consideration by the issuer of actions necessary to prevent the company from moving onto the "divest" list. *Incremental conditional investment* paired with shareholder engagement is one strategy deployed by some firms in which the proposal process is a step toward *greater or continued* investment.

The filing of a proposal may thus reflect both a broader market concern regarding climate change and a risk management interest of the firm's clients. Because many firms specialize in ESG investing strategies,[6] a focus on a particular portfolio company that includes the filing of a proposal on behalf of an individual investor often is reflective of a firm wide investing strategy.

Typically clients do not require pre-approval of the text of proposals submitted on their behalf. They engage with representatives and advisors because of their expertise in conducting engagement on behalf of clients, including drafting and filing proposals. Altering these working relationships by requiring clients to pre-approve the text of proposals, or to participate directly in company engagements, is an unnecessary and inappropriate intrusion on these client relationships. Where an investor seeks to allow the experts to conduct the drafting of a resolution, they should be free to do so. Where an investor seeks input and review of a proposal, their agent will appropriately meet such conditions. Where such input is not requested, it is inappropriate for the SEC to dictate that it must occur as a pre-condition of filing a proposal.[7]

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[5] Legal frameworks for protection of investors in these relationships is enshrined in the Securities and Exchange Act of 1934, the Investment Advisors Act of 1940, the Employee Retirement Income Securities Act of 1974 (ERISA), and the Uniform Securities Act. It is the legal obligation of Registered Investment Advisors to "know our client", to identify risk, return and other investment preferences and to represent the best interest of clients, particularly and explicitly if the client has an Investment Policy Statement.

[6] This is a very large part of the market. More than $12 trillion — nearly $1 of every $4 under professional management — is invested using ESG criteria, shareholder advocacy, and community investing strategies.

[7] If there were some reasonable basis for a company to believe that proposals were being filed without shareholder

While many investment firms have developed organizational expertise in engagement and proposal filing, nonprofits also develop these capacities to support investor rights and interests. One such nonprofit is *As You Sow,* which has built a program of assisting financial advisors to empower their clients to boost the impact and decrease the risk of their investments by engaging with companies. *As You Sow* works with investment firms, foundations, and individual investors to identify impact areas, and to implement engagement plans, including the filing of proposals when necessary, without unduly constraining investment strategies. Like Registered Investment Advisors, *As You Sow* fills an essential role in the engagement ecosystem by providing investors the opportunity to raise issues of concern, and to rely upon experts who will advance their arguments professionally.

In light of the substantial investment marketplace concerns regarding climate risk in particular, it is significant that ExxonMobil, one of the leading contributors to climate change in the global economy, would choose in its comment letter on the proposed rule changes to target the leading proponents of shareholder proposals on climate change filed at the company. The Exxon Mobil letter particularly targeted the nonprofit *As You Sow* and the investment firm Arjuna Capital ("Arjuna"). The criticism results from these organizations having filed a series of proposals on climate change at ExxonMobil, making it clear that they believe that a "business as usual" plan at Exxon will be harmful to the company, the economy, and other holdings. A 2013 Arjuna/Baldwin Brothers and *As You Sow* shareholder proposal[8] at Exxon highlighting carbon risk preceded the company's responsive publication of the groundbreaking climate risk report, *Managing the Risks,* in 2014. While the report constituted a breakthrough in risk disclosure, the investment marketplace and ExxonMobil management have parted ways regarding whether the Company's underlying strategy and long-term risk exposure is in alignment with the globally necessary energy transition.

Building on the work of the smaller investors who exercised leadership in 2013-2014, by 2017 nearly 65% of investors voted in favor of a proposal by the New York State Common Retirement Fund and the Church of England's investment fund, calling for Exxon to consider the impact of carbon restrictions on its business as well as rules such as the global Paris Agreement to limit global average temperature increases this century to well below 2 degrees Celsius. Climate change raises existential concerns for the company and its stockholders. Significantly, it also raises portfolio-wide and systemic risks for investors.

Restraint of Investors' Voice is a First Amendment Issue

Because the shareholder proposal process directly affects the ability of shareholders to express themselves on these critical issues, and to affiliate and collaborate with other investors to guide

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knowledge, a more reasonable and appropriate alternative to requiring preapproval of the text of proposals, or of requiring clients to directly participate in company engagement, is to allow issuers, as part of the deficiency process, to set forth the basis of their concern and to request documentation from the client that authority was given to the representative.

[8] Notably, the proposal was co-filed by *As You Sow* on behalf of a shareholder in Texas whose family purchased Esso stock many years ago and who is today concerned about climate change implications of the company's actions.

and influence company behavior, the proposed rule changes raise significant concerns. The proposed amendments would limit the rights of shareholders to delegate representatives to file proposals and to speak on their behalf, amounting to a very substantial incursion on First Amendment rights of expression and association.

As Ellen L. Weintraub, commissioner of U.S. Federal Election Commission has written in a comment on the proposed rule:

> The rule proposed by File No. S7-23-19 operates to restrict the speech of some U.S. citizen shareholders to enhance the relative voice of other U.S. citizen shareholders.…
>
> If corporations are to express the political views of their shareholders, S.E.C. rules must allow all U.S. citizen shareholders an equal ability to convey their political views to corporate management. "[P]olitical speech cannot be limited based on a speaker's wealth." *Citizens United,* 558 U.S. at 905. The *Citizens United* majority wrote that in matters of political speech, the rights of dissenting shareholders would be protected "through the procedures of corporate democracy." *Id*. at 911. The S.E.C. should not adopt rules that undermine or eliminate those protections.
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> The S.E.C. must not create a situation in which the Supreme Court – and the Constitution – say that all citizens are equal, but the S.E.C. says that some citizens are more equal than others.

Conclusion

The advocacy for proposed rule changes seems intended to disrupt the organized and contracted market arrangements of investors to exercise their rights under the shareholder proposal rule. The Commission should not adopt these rules that constrain these representative relationships.

Sincerely,

Sanford Lewis
Director

cc:
The Honorable Jay Clayton, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner