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United States Senate
 COMMITTEE ON BANKING, HOUSING, AND
 URBAN AFFAIRS
 WASHINGTON, DC 20510-6075

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August 21, 2020

The Honorable Jay Clayton
 Chair
 Securities and Exchange Commission
 100 F Street, NE
 Washington, DC 20549

Dear Chair Clayton:

I write again regarding the Securities and Exchange Commission's (SEC or Commission) rule proposal: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458, File No. S7-23-19 (the Proposal).¹ Because the Proposal would prevent a substantial portion of individual investors from submitting shareholder proposals, the SEC should withdraw the Proposal and, instead, must work to promote shareholder engagement.

Our nation faces critical questions of how to address structural racism, gender equality, and income and wealth disparities. The protests this year demanding justice for Black Americans who have been victims of violence served to focus our country on the economic and financial systems that perpetuate inequality and systemic racism. In addition, the COVID-19 pandemic's impact on workers, and essential workers specifically, highlights the importance of how corporate America treats its workforce. These are fundamental concerns that institutional and individual shareholders alike must evaluate in assessing a company's long-term value and sustainability. Investors have paid attention, and recent results from corporate annual meetings show that shareholder engagement matters in advancing policies that consider economic justice and workforce policies. Unfortunately, the Proposal would substantially restrict shareholders' ability to hold corporate executives accountable for how corporations are considering and addressing those issues.

Over many decades, shareholder engagement has been instrumental in challenging injustices and driving corporate responsibility on matters from producing napalm for use in the Vietnam War, to promoting nondiscriminatory employment policies, to disclosing climate change impact assessments. Disturbingly, the Proposal would thwart that engagement by substantially increasing the ownership levels for filing an initial proposal and the resubmission thresholds for refiling in subsequent years and could deny a significant number of individual investors the ability to raise concerns to management and other shareholders.

¹ Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458; File No. S7-23-19, <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.

These changes are plainly anti-shareholder and, as proposed, could silence the consideration of gender and racial pay equity, workplace diversity, and racial discrimination and social and economic justice that have increased in recent years and that will undoubtedly be proposed in the future. Instead, the SEC should be encouraging shareholders to engage with companies and allow full consideration of issues relevant to long-term shareholder value.

In annual shareholder meetings through the first six months of 2020, proposals on workforce diversity, pay equity, and racial discrimination received substantial shareholder support.² Many of those proposals received majority support, including proposals requesting reports on policies, performance, and targets related to human capital and diversity,³ on improving board and top management gender, racial, and ethnic diversity,⁴ and on arbitration of employment related claims that can lead to toxic work cultures by covering up sexual harassment and other abuses.⁵

More importantly, for those proposals that did not garner majority support, proponents' ability to resubmit those proposals is critical to gaining greater acceptance and achieve a majority in the future or adoption by company management. The proposed increase to the resubmission thresholds could prematurely terminate consideration of those proposals and discourage future participation by Main Street investors. Moreover, because the Proposal includes a new "momentum requirement" that would exclude repropoals that satisfied even the increased 25 percent resubmission threshold if shareholder support declines 10 percent or more from the last vote, companies would be able to exclude proposals despite substantial shareholder support.

The Council of Institutional Investors (CII) highlighted the potential problematic outcomes under the proposed higher resubmission thresholds in a May 19, 2020, letter and report to the SEC. CII explained the higher levels "would have more than doubled the number of excluded proposals in the period 2011-2019, in particular reducing the number of shareholder proposals for independent chairs and to improve disclosure on political contributions and lobbying."⁶ That is simply undemocratic and inconsistent with your own statement that, "[o]ur capital markets — including the broad participation of the public in our capital markets — are the envy of the world."⁷

² Sullivan & Cromwell LLP, *2020 Proxy Season Review, Part 1, Rule 14a-8 Shareholder Proposals*, <https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf>; Gibson, Dunn & Crutcher, LLP, *Shareholder Proposal Developments During the 2020 Proxy Season*, <https://www.gibsondunn.com/wp-content/uploads/2020/08/shareholder-proposal-developments-during-the-2020-proxy-season.pdf>; comment letter of James McRitchie, Shareholder Advocate (July 21, 2020), <https://www.sec.gov/comments/s7-23-19/s72319-7455261-221048.pdf>.

³ This proposal at Genuine Parts Company received 79% support, <https://www.sec.gov/ix?doc=/Archives/edgar/data/40987/000004098720000019/gpc-20200428.htm>.

⁴ This proposal at Expeditors International of Washington, Inc., received 53% support, https://www.sec.gov/ix?doc=/Archives/edgar/data/746515/000156459020022140/expd-8k_20200505.htm.

⁵ This proposal at Chipotle Mexican Grill, Inc., received 51% support, <https://www.sec.gov/ix?doc=/Archives/edgar/data/1058090/000119312520148795/d857446d8k.htm>.

⁶ Comment letter of the Council of Institutional Investors (May 19, 2020), <https://www.sec.gov/comments/s7-23-19/s72319-7214366-216887.pdf>.

⁷ Jay Clayton, Chair, Sec. & Exch. Comm'n, *The Evolving Market for Retail Investment Services and Forward-Looking Regulation — Adding Clarity and Investor Protection while Ensuring Access and Choice* (May 2, 2018), <https://www.sec.gov/news/speech/speech-clayton-2018-05-02>.

The SEC's own analysis, prepared before the Proposal was issued, but disclosed only last week, indicates a significant portion of individual shareholders would be ineligible to submit proposals under the increased ownership thresholds in the Proposal. In fact, the analysis states, "we estimate that in 82%-99% of all companies (an increase in 38%-55% from the baseline) and 59%-99% of S&P 500 companies (an increase in 52%-93% from the baseline), less than a quarter of accounts would be eligible to submit a shareholder proposal under the proposed amendments."⁸ While your staff suggests the data do not help to analyze the Proposal, I find that hard to believe and am troubled by the belated release of this information. Failing to timely provide that data denied commenters the ability to review and comment on the analysis and undermines the Proposal.

Finally, the Commission recently finalized amendments to rules governing proxy advisors and proxy voting advice: Exemptions from the Proxy Rules for Proxy Voting Advice.⁹ Those amendments will affect longstanding voting practices and procedures. Accordingly, I am concerned that the new framework for proxy advisors is untested and could unnecessarily limit how institutional investors access proxy research and services when voting on shareholder matters, including shareholder proposals. Furthermore, the Commission may need to issue additional guidance to answer questions raised by the amendments and to make the rules workable. Finalizing the Proposal without understanding how the changes to the proxy rules will affect the proxy voting process is misguided and dangerous. The SEC must undertake implementing changes to multiple, interrelated rules with careful consideration and with its mandate in mind. Creating confusion and uncertainty runs counter to protecting investors and maintaining fair and efficient markets.

In short, if the SEC finalizes the Proposal in its current form, it would do a disservice to both Main Street and institutional investors. Workforce, economic justice, and pay equity will almost certainly be at the forefront of investors' minds during next year's annual shareholder meetings. Given the results of dozens of shareholder meetings in 2020 and the encouraging outcomes on the critical issues presented to investors, the Commission should withdraw the Proposal and consider ways to promote, rather than curtail, consideration of the questions dominating our national debate and greater corporate accountability, with the goal of increasing long-term shareholder value.

Thank you for your attention to this matter.

Sincerely,



Sherrod Brown
Ranking Member

⁸ Memorandum of S.P. Kothari, Chief Economist, Sec. & Exch. Comm'n, Analysis of Data Provided by Broadridge Financial Solutions, Inc., (Aug. 14, 2020), <https://www.sec.gov/comments/s7-23-19/s72319-7645492-222330.pdf>.

⁹ Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-89372; File No. S7-22-19, <https://www.sec.gov/rules/final/2020/34-89372.pdf>.