

# United States Senate

WASHINGTON, DC 20510

May 19, 2017

The Honorable Jay Clayton  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549

Dear Chairman Clayton,

We write to express our concern over recent “no-action determinations” issued by the Securities and Exchange Commission (SEC) Division of Corporation Finance at the request of ten major pharmaceutical companies. By issuing such determinations, the SEC has bowed to industry pressure, assuring pharmaceutical companies that they will not recommend enforcement actions should the companies deny shareholders a vote on proposals to increase drug pricing transparency. At a time when the United States spends by far the most money on prescription drugs out of any industrialized nation and nearly one out of five Americans under 65 cannot afford to fill their prescriptions, we are disappointed that the Commission would give pharmaceutical companies a permission slip to block shareholder votes on such a significant public policy issue. The Commission’s move is in direct contradiction with its longstanding rules in this area, as well as recent determinations on similar cases.

As you know, in 2016, shareholders at several pharmaceutical companies filed resolutions that would require a vote at each company’s annual general meeting on measures to improve drug pricing transparency. More specifically, these resolutions asked drug companies to “provide rationale and criteria that justify price increases along with an assessment of the legislative, regulatory, reputational and financial risks they represent to these companies.”<sup>1</sup> This would allow shareholders to better understand their investments in each company as well as bring more clarity to Americans concerned with arbitrary and often outrageous drug price increases.

Despite shareholder preferences, these companies received assurances from the Commission that they would not face enforcement action for omitting such proposals from their 2017 proxy materials, thereby denying shareholders their right to a vote. As the companies requested, the Commission found that under rule 14a-8(i)(7), the proposals could be excluded because they relate to the companies’ “ordinary business operations.”<sup>2</sup>

This decision is completely at odds with the Commission’s previous decisions and longstanding rules. In 2015, the Commission denied a similar request from a pharmaceutical company to omit a drug pricing transparency proposal from its proxy materials. Specifically, the

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<sup>1</sup> <http://www.iccr.org/2017-resolutions-pharma-companies>

<sup>2</sup> Information from ICCR [https://www.sec.gov/divisions/corpfin/cf-noaction/2017\\_14a-8.shtml](https://www.sec.gov/divisions/corpfin/cf-noaction/2017_14a-8.shtml)

Commission did not accept the company's argument that the proposal could be excluded because it involved "matters of ordinary business," stating:

In our view, the proposal focuses on Gilead's fundamental business strategy with respect to its pricing policies for pharmaceutical products and does not seek to micromanage the company to such a degree that exclusion of the proposal would be appropriate. Accordingly, we do not believe that Gilead may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(7).<sup>3</sup>

Further, in 1998, the Commission released a rule stating that proposals focusing on "sufficiently significant social policy issues" cannot be excluded on ordinary business grounds because "the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."<sup>4</sup> Regardless of whether the Commission has reversed its 2015 stance that drug pricing transparency proposals cannot be excluded as ordinary business (a stance which, if reversed, should be explained), it appears the Commission is either flouting its 1998 rule or does not believe drug pricing transparency is a sufficiently significant social policy issue impacting the American people.

If the Commission indeed does not believe that drug pricing transparency is a "sufficiently significant social policy issue," they are woefully incorrect. Shareholders clearly understood the social significance of drug price transparency when they wrote to the pharmaceutical companies that "drug pricing has become a high-visibility public policy issue as Americans become increasingly concerned about the affordability of medicines" and stated that they were "deeply concerned about both the public health and business risks created by the excessive pricing of specialty drugs."<sup>5</sup> Further, a strong majority of Americans say drug price increases are a top health care priority.<sup>6</sup> While President Trump has recently stated that drug companies are "getting away with murder."<sup>7</sup> Indeed, drug pricing decisions have been the subject of significant public debate, motivating lawsuits, Congressional inquiries, and federal investigations.

Additionally, to many shareholders, skyrocketing drug prices are not only morally reprehensible, but financially disconcerting. Mylan lost significant market share following outrage over its inexplicable EpiPen Auto-Injector price increases,<sup>8</sup> and that was just one example.<sup>9</sup> In light of this trend, shareholders understandably have concerns over how unscrupulous pricing practices could influence their interests and their investments. They deserve answers from the companies they have a stake in, and it is imperative that the Commission not stand in their way.

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<sup>3</sup> Gilead info from ICCR <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/uawretiree022315-14a8.pdf>

<sup>4</sup> <https://www.sec.gov/interps/legal/cfs1b14h.htm>

<sup>5</sup> [http://www.iccr.org/sites/default/files/resources\\_attachments/letter\\_to\\_non-us\\_drug\\_companies\\_re\\_drug\\_pricing\\_transparency.pdf](http://www.iccr.org/sites/default/files/resources_attachments/letter_to_non-us_drug_companies_re_drug_pricing_transparency.pdf)

<sup>6</sup> <http://kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-october-2016/>

<sup>7</sup> [https://www.washingtonpost.com/news/wonk/wp/2017/01/11/trump-on-drug-prices-pharma-companies-are-getting-away-with-murder/?utm\\_term=.378b06f4e867](https://www.washingtonpost.com/news/wonk/wp/2017/01/11/trump-on-drug-prices-pharma-companies-are-getting-away-with-murder/?utm_term=.378b06f4e867)

<sup>8</sup> <http://fortune.com/2017/03/06/mylan-epipen-competitors-surge/>

<sup>9</sup> <http://www.marketwatch.com/story/push-back-from-drug-price-spikes-hurting-more-than-just-pharma-companies-2016-10-28>

The Commission's failure to follow its own rules is unacceptable. The lack of certainty that the Commission has caused due to conflicting decisions on drug pricing transparency proposals is inexcusable.

Therefore, we request that the Commission reverse its decision and require shareholder resolutions to improve the transparency of drug prices to receive an up or down vote. We also request that the Commission provide a written explanation detailing its rationale for making this decision in the first place. The Commission must provide assurance that it will not stand in the way of future shareholder proposals seeking to increase transparency in drug pricing by refusing to take action against pharmaceutical companies that inappropriately omit such proposals from annual proxy materials.

Finally, we request more information on what steps the Commission is taking to ensure that shareholders and, more broadly, the American people, aren't unduly exposed to financial risks from astronomical drug price increases.

We look forward to your prompt response and to working with you to address this threat to public health and economic stability.

Sincerely,



RICHARD BLUMENTHAL  
United States Senate



BERNARD SANDERS  
United States Senate