Via Electronic Mail: Rule-Comments@sec.gov

September 4, 2020

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

Re: Improper Exclusion of Evidence on the Impact of the Proposed Amendments to Rule 14a-8 on Retail Investors

File S7-23-19: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (the "Release")

Dear Ms. Countryman:

We the undersigned are deeply involved in the proxy process because we file shareholder proposals pursuant to the Securities and Exchange Commission's ("SEC" or "Commission") Rule 14a-8 or represent member institutions or individuals who file and vote on such proposals. As we have explained in previous comment letters, shareholder proposals and proxy voting are economically important mechanisms for shareholders to monitor and hold corporate managements accountable to create and protect long-term value.

We write now because we are troubled by the 11th-hour submission by the Chief Economist of the Commission's Division of Economic and Risk Analysis ("DERA"), on August 14, long after the February 3, 2020, public comment deadline, of the staff's analysis of previously undisclosed data that is material to the public's understanding of their predicted impact.[1] The August 14 DERA Memo indicates that the Commission has been in possession of the data since at least August 2019 and that DERA staff had used the data to estimate the impact of the proposed amendments before the Commission voted to propose them. Yet the data and the staff's analysis were held back from the Release accompanying the proposed amendments and not released until the Commission announced that it is prepared to vote on final changes to Rule 14a-8, without an opportunity for public comment. We ask that the Commission re-open the comment period to provide the public a meaningful opportunity to address the data.

This request is important because the data reveals that the impact of the proposed amendments would be much broader than the Commission's Release asserted, effectively depriving most retail shareholders of the rights and ability to use the shareholder proposal process to protect and advance their interests as investors.[2] Moreover, the fact that the data was

1 See Memo from S.P Kothari (Chief Economist, SEC) to File No. S7-23-19 dated August 14, 2020 ("August 14 DERA Memo"). The Memo attaches the "preliminary draft analysis conducted by DERA staff as of October 4, 2019, using this data" (Preliminary Draft Analysis").

2 The Preliminary Draft Analysis evaluated the data under proposed ownership and duration requirements that differ from the requirements ultimately proposed in the Release, leaving the public still in the dark about the impact of the proposed amendments on retail investors. The

withheld is a significant breach of the Commission's Current Staff Guidance on Economic Analysis in SEC Rulemaking, which among other things requires that the economic analysis that accompanies a proposed rule provide a fair assessment of the predicted impact of a proposed rule, including costs and benefits, as well as that it "clearly address contrary data or predictions."[3] That guidance was put in place because "[r]ecent court decisions, reports of the U.S. Government Accountability Office . . . and the SEC's Office of Inspector General . . . and Congressional inquiries have raised questions about and/or recommended improvements to various components of the Commission's economic analysis in its rulemaking." We set forth below more specific concerns about the newly disclosed impact of the proposed amendments and about the rulemaking process. These points do not substitute for a meaningful public comment process, as required by the Administrative Procedures Act.

Withholding the Data Hid the Extreme Extent of the Proposed Cut to Investor Rights

The August 14 DERA Memo acknowledges that, based on the data, DERA staff were able to form an estimate that, in up to 55 percent of all companies, less than 5 percent of investor accounts would be eligible to file a shareholder proposal under the proposed amendments. That is an extreme cut to investor rights, which the Release did not disclose. Also, the staff estimated that in up to 99 percent of all companies (and 99 percent of S&P companies), the proposed rules would deprive three-quarters of accounts the rights and ability to file a shareholder proposal. Neither the Release nor the Preliminary Draft Analysis even attempted to justify that impact, as required by the Staff Guidance on Economic Analysis.

DERA's Attempt to Argue that the Data were Not Relevant (or were Confidential) Do Not Justify Exclusion of the Data from the Proposing Release

The August 14 DERA Memo argues that the estimated impact on retail investors is not relevant and that the data were imperfect. On the other hand, the withheld Preliminary Draft Analysis of the data would have asserted merely that "the results should be interpreted with caution," because (1) they only cover retail account holdings, not institutional account holdings[4]; (2)

public is entitled to a meaningful opportunity to comment on the impact, which requires the SEC to update the analysis and provide for a meaningful new comment period.

3 Current Guidance on Economic Analysis in SEC Rulemaking (March 16, 2012), available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf ("Staff Guidance on Economic Analysis").

4 Inconsistently, the August 14 DERA Memo also argues that the data should be disregarded because DERA cannot be assured that the anonymized data isolate retail investors and do not include any institutional investors, seeming to implicitly acknowledge the importance of analyzing the impact on retail investors in particular. In any event, these uncertainties are features of the outdated proxy plumbing system that investors have repeatedly asked the Commission to modernize, but they are not an excuse to avoid economic analysis. Moreover, if the data did inadvertently include any institutional investors, their inclusion would hardly make the impact worse. Rather, it would mean the Preliminary Draft Analysis understates the impact on retail investors, as institutional investors would likely be able to meet any of the proposed ownership thresholds. In any event, the Staff Guidance on Economic Analysis provides a process for handling uncertainty and imperfect data, and it does not include

the SEC does not have data on ownership duration beyond two years; (3) shareholders who have exercised their right to file shareholder proposals in the past may not be as impacted by the proposed amendments as the full distribution of retail investors; and (4) some retail account holders may have multiple accounts holding the same companies and some accounts may represent multiple retail investors, so the data might understate or overstate the impact. The August 14 DERA Memo also asserts that the Commission did not have permission to disclose the data until June 2020. None of these assertions justifies withholding or disregarding this data.

First, the Release specifically stated that the impact on retail investors could be different than on institutional investors.[5] Assessing the impact of a rulemaking on retail investors is undeniably necessary to understanding the overall impact. Indeed, assessing only the combined impact on retail and institutional investors would have masked the more severe impact on retail investors, which should be taken into account. Moreover, as the August 14 DERA Memo explains, the staff <u>had</u> estimated the impact on retail investors. The public was entitled to know that estimated impact and comment on it.

Second, the proposed amendments are expressly structured to impose different restrictions on investors depending on the duration of their ownership of shares in a company. Numerous investors have commented on the complicatedness, and pointed out real, unintended consequences, of the new scheme. It is therefore imperative that the Commission examine the proposed scheme closely, with data, before adopting it. Moreover, the absence of "data on ownership duration beyond two years" does not bear on the impact on retail investors with two years or less ownership. Under the proposed scheme, investors who have owned their shares for less than three years would be the most impacted. It was imperative that the Commission disclose DERA's estimate of the extent of that impact. The data indicates a dramatic constraint on retail investors – a class of investors whose interests the rulemaking and the Commissioners purport to be protecting with this rule.

The third reason given – that the data did not distinguish between retail investors who have filed proposals in the past from those who have not – seems to be based on the idea that investors who have not exercised their rights to file proposals are not likely to be affected if those rights are taken away, and the impact on them should not be counted.[6] A basic principle of

withholding the data. It requires the proposing release to "[i]dentify and discuss uncertainties underlying the estimates of benefits and costs." Staff Guidance on Economic Analysis, at 12.

5 Release, at 127 ("[T]he proposed amendments could have a greater effect on retail investors compared to institutional investors because the average holdings of retail investors are typically lower than the average holdings of institutional investors.").

6 The extremely opaque reference in footnote 245 of the Release to the existence of the data also asserted that "[t]hose data provide some information about level and duration of ownership but do not allow us to identify those shareholders that have submitted or are likely to submit shareholder proposals." The August 14 DERA Memo points to footnote 245 to claim that it "referenced the data set and invited commenters to submit data to the comment file that could inform the rulemaking." Referencing the data is clearly not the same as disclosing the data for comment and conflicts with the approach required by the Staff Guidance on Economic Analysis states that:

economics, not to mention corporate law, is that a right can have value even if it is not exercised. Moreover, this theory flies in the face of the stated need for the proposed amendments to reduce what it calls "overuse" of the shareholder proposal process.[7] Numerous comment letters from investors of all sizes have provided overwhelming evidence that there is no overuse problem to be addressed. But even assuming, arguendo, there were overuse, the fact that the proposed amendments would take away rights from investors who have demonstrably not overused them is an important flaw in the construction of the rule change and should have been disclosed to the public for comment and discussed in the economic analysis.[8]

The Chief Economist's argument is, in essence, that collateral, unintended consequences to retail investors are not relevant to the economic analysis of a rule change that is intended to target only a small group of shareholders:

> [E]conometrically, I do not believe it is reasonable to conclude that analyzing the amount of stock and duration of ownership for all retail shareholders would produce estimates that meaningfully reflect the impact of the proposed Commission action on the small pool of shareholders who submit proposals.

Indeed, an important role of economic analysis is to assess the impact of a rule change, however far from the target it lies. The data show that the proposed amendments are overbroad. It does not matter that they do not isolate the impact "on the small pool of shareholders who submit proposals." Indeed, the impact could hardly be greater on that small pool, since it nearly eliminates the right for most retail investors. And if the impact on the small, targeted group were less, that would indicate that the proposed amendments not only hit an inordinate number of

> [DERA] economists should determine whether there are studies or empirical evidence that would help inform the economic analysis of the proposed rule and of possible alternatives. [DERA] economists should work with the rulewriters to include such information in the proposing release and should solicit comment on it. Where the Commission is giving greater weight to some empirical evidence/studies than to others, it should clearly state the reason(s) for doing so. To the extent that the staff believes that a study or comment should be discounted, the release should explain why and cite available evidence supporting that position.

Staff Guidance on Economic Analysis, at 14.

7 Release, at 18 (articulating "the Need for the Proposal" – a required element of economic analysis – as that, because the shareholder proposal process "shifts burdens from proponents to companies, it is susceptible to overuse"); see also Release, at 6:

> All of [Rule 14a-8's ownership and other requirements] requirements are generally designed to ensure that the ability under Rule 14a-8 for a shareholder to have a proposal included alongside management's in the company's proxy materials—and thus to draw upon company resources and to command the time and attention of other shareholders—is not excessively or inappropriately used.

8 Not to mention, this "use it or lose it" approach to investor rights would seem to create an incentive for investors to use rights even more than they might otherwise.

bystanders, but they missed their target too. This is a casebook example of an arbitrary and capricious rule.

Fourth, the August 14 DERA Memo and Preliminary Draft Analysis raise the possibilities that some accounts may represent more than one investor (such that more investors could lose their rights to file proposals) and that some retail investors may hold shares in a company through multiple accounts (raising the possibility that such investors might be able to meet the proposed higher ownership thresholds by aggregating shares in their respective accounts). These points merely explain why the DERA staff estimate is an estimate, as provided for by the Staff Guidance on Economic Analysis:

> Court decisions addressing the economic analysis in Commission rules have likewise stressed the need to attempt to quantify anticipated costs and benefits, even where the available data is imperfect and where doing so may require using estimates . . . .[9]

Finally, footnote 3 of the August 14 DERA Memo states that, "[a]t the time Broadridge provided the data subset, *i.e.*, August 2019, Broadridge declined to be identified as the source of the data." It is not clear whether this is an implied assertion that the Commission could not have disclosed the results of the analysis until Broadridge agreed to be identified. In any event, the Staff Guidance on Economic Analysis does not contemplate exclusion of evidence or excuse the obligation to conduct a complete economic analysis, because of confidentiality restrictions. Moreover, the footnote indicates that Broadridge had agreed to be identified as the source by June 2020, but the Memo provides no explanation for further delay until August 14, the same day the Commission calendared the proposal for final action.

The Staff Guidance on Economic Analysis Requires the Commission to Clearly Address Contrary Data or Predictions

One of the primary benefits of economic analysis is that it forces policy makers to address inconvenient truths that might otherwise get swept under the rug. This is why the Staff Guidance on Economic Analysis expressly requires SEC proposals to "[s]upport predictive judgments and clearly address contrary data or predictions." It is also why the Guidance imposes rigorous procedures for involvement of economics staff in all stages of rulemaking, and why it requires rulewriting staff to obtain the formal concurrence of the Chief Economist before formal drafts of proposed and final rules are circulated to the Commission for action. This is intended to give the Chief Economist and his or her staff the leverage to demand that the drafts be supported with rigorous analysis that complies with legal and procedural requirements and the independence to use that analysis to sort out political goals from reasoned and economically justified policy goals.

9 Staff Guidance on Economic Analysis, at 13, citing Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005) ("[U]ncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.")

The data at issue is just the kind of inconvenient information that the guidance required the Release to address and seek comment on. Its exclusion indicates that the carefully structured process articulated in the Staff Guidance on Economic Analysis has broken down.

The Comment Record Demonstrates that Retail Investors' Proposals are Valued by Other Investors

The comment record demonstrates that many proposals by retail investors receive significant support from other investors, including large institutional investors, but would be prohibited under the proposed amendments. The newly released data indicate that even more would be blocked than the Commission disclosed in its solicitation of public comment. What possible justification could there be for blocking proposals that a substantial percentage of other shareholders support, including even majorities of shareholders?

These blocked proposals clearly have value to other shareholders. Their loss would be a significant cost, but the SEC's economic analysis failed to account for it, either qualitatively or quantitatively. Given that investors support the proposal process and are overwhelmingly against the proposed amendments, the economic analysis should have explored whether the small, purported benefits claimed by a small group of corporate managers are not economic benefits at all, but rather represent a transfer of private benefits to corporate managers, which in turn increases agency costs (also not accounted for in the Commission's economic analysis).

As Neuberger Berman Investment Advisors LLC, explained:

> We believe the potential costs pointed out by issuers are small compared to the high value of work by shareholder rights advocates who push companies towards more effective management of material risks. The fact that many proposals earn majority support, the history of early identification of many issues that become material issues, and the signal value to both companies and investors from the trends in support of those proposals, justify opposing the application of new burdens in the proxy process.
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> *   *   *
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> We strongly believe minority shareholders deserve a voice, and that it is not only appropriate but advisable that companies balance perspectives from across their shareholder base. In our view, all shareholders are capable of bringing forward good ideas for all shareholders' benefit.[10]

The shareholder proposal on human rights at Tyson Foods is an example of the economic dynamic that the Commission's economic analysis should have grappled with.[11] It was filed by the

10 Letter from Joseph V. Amato, President and Chief Investment Officer – Equities of Neuberger Berman Investment Advisors LLC, dated January 27, 2020.

11 The proposal is described in detail in a comment letter submitted before the new data on the impact on retail investors was released. See Letter dated July 30, 2020.

American Baptist Home Mission Society ("ABHMS"),[12] first for the 2019 AGM and then again for the 2020 AGM, long before the pandemic in the United States and in time for the company to have taken critical measures to protect strategic assets, been more resilient during the pandemic, and avoided enormous disruption to its business. Based on considerable research, the ABHMS's proposal presciently asked the board of Tyson Foods for a report on the company's human rights due diligence process to assess, identify, prevent, mitigate, and remedy actual and potential human rights impacts in the company's operations and value chain. In its most recent vote, it won the support of 57 percent of the non-controlling shareholders, including shares voted by Blackrock, which used its vote to send an important signal to the board and management to do a better job of managing risks that destroy corporate value.[13] Whether the ABHMS is counted in the data as a retail investor or not, we assume it is a target of the proposed amendments, because it does routinely file shareholder proposals. The economic costs associated with Tyson Foods' long-documented health and safety failures should be counted in assessing the cost of removing the rights of smaller shareholders to file proposals that open opportunities for a company's broader shareholder base to hold management accountable for addressing such failures.

What are the economic costs of limiting the matters that shareholders can vote on to only those ideas put forward by management? The shareholder proposal process is an important form of private ordering. Investors have weighed in with extensive evidence that corporate managers take shareholder ideas more seriously if the shareholder has filed a proposal. In many cases, ideas that prove to be value-enhancing were ignored by boards and management until the shareholder filed a proposal.[14] If retail investors lose the ability to file, will the government have

12 American Baptist Home Mission Societies (ABHMS) has a storied history as a long-term investor, both in our capital markets and the United States. It was founded in 1832 to support missionaries serving in North America and, following the Civil War, founded more than 25 educational institutions for newly freed people. In one way or another, ABHMS support contributed to the establishment of Morehouse College and Spelman College as well as the University of Chicago, among other prominent institutions. A result of its mission among Native Americans in the late 1800s was the establishment of the Indian and Theological School in Tahlequah, Okla., now known as Bacone College, the oldest U.S. institution of higher learning focused on meeting the educational needs of Native Americans. ABHMS continues vibrant ministries today by using its funds to support initiatives to serve under-served communities, including through scholarships. This work is grounded in the belief that prudent management of invested funds not only provides a source for funding mission but also a vehicle for doing mission. For more on ABHMS's approach to stewardship, see its website at https://abhms.org/ministries/healing-communities/socially-responsible-investment/; see also https://abhms.org/download/michaele-birdsall-podcast-for-sri/?wpdmdl=9172&masterkey=5719386f49ac7.

13 See Blackrock, Our Approach to Sustainability (July 2020), available at https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-full-report.pdf.

14 See, e.g., Letter from March S. Gallagher, Esq., dated November 21, 2019, who filed an important resolution to close down certain nuclear reactors operated by Entergy Corp., based on extensive research about risks that became apparent after the Fukushima nuclear accident in Japan. After several years of trying to get management's attention, she was only able to

to step in with new regulatory tools to discipline management in their stead? What would be the cost of such a system? What would be the cost of curtailing the shareholder proposal process and not having such a system, if for political reasons the government decided not to act? These are the questions the economic analysis should have explored.

Based on the newly released data, the proposed amendments appear to be designed in a manner that would deprive all but the wealthiest of investors, with the largest direct holdings, the right to file a shareholder proposal. Wealth does not equate with good ideas. Small shareholders have generated value-enhancing ideas, spared other shareholders extensive losses, and play an important role in corporate governance and accountability. These are the unexamined costs and impacts of the proposed amendments.

The Commission Should Also Assess and Seek Comment on the Impact of the Proposed Amendments in Light of Other Laws and Regulations

The Commission should also have used the data to consider the impact of the proposed amendments on the environment, as required under the National Environmental Policy Act.[15] Previously filed comment letters have lodged concerns about the impact of the proposed amendments on shareholders' ability to engage in private ordering to obtain material climate- and other environmental-related disclosures. The Commission's principles-based disclosure framework depends to a great extent on such private ordering to elucidate disclosures that are material to reasonable investors' decisions. Curtailing

do so once she filed and presented a formal shareholder proposal at the company's annual meeting:

> My resolution obtained 3% of the outstanding shares including the support of institutional investors such as the New York State Common Retirement Fund. More importantly I was able to begin meaningful dialogue with Entergy General Counsel and several board members. I did not bring the resolution the following year because Entergy has pursued a course of closing the plant. They did not pursue permit renewals to operate the facilities and instead have agreed to sell the facilities to Holtec Management for decommissioning that will result in faster decommissioning timeframe.
>
> My resolution served the public good, made my family safer and gave me an avenue to have a direct conversation with the management and governance of the company.

See also Letter from NYC Comptroller Scott M. Stringer dated Feb. 3, 2020 ("Although the Systems—and my office acting on their behalf—are always eager to engage with portfolio companies outside of the shareholder proposal context, it is our experience that, on the most contentious issues, substantive engagement is most productive, and most likely to occur, *after* a non-excludable shareholder proposal has been submitted to the company. Accordingly, the shareholder proposal is an essential tool for ensuring that the voices of our Main Street investors are heard by portfolio companies.").

15 See 42 USC § 4332(2)(C); see also SEC Release No. 33-10064, Business and Financial Disclosure Required by Regulation S-K, at 25 (acknowledging that "under the National Environmental Policy Act of 1969 ("NEPA") [42 U.S.C. 4321-4347] Congress required all federal agencies to include consideration of the environment and regulatory action. In response to this mandate, the Commission adopted environmental compliance and litigation disclosure requirements.")

retail investors' shareholder proposals will undoubtedly reduce climate-related and other environmental disclosures, with a concomitant impact on the environment from less transparency about corporate use of resources and related environmental risks and diminished accountability of corporate managements.

In the same vein, the SEC should also examine the interaction of the proposed amendments with the Department of Labor's ("DOL") proposal to impose additional duties on the exercise of shareholder rights, *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*. If both measures are adopted, they will have compounding harmful economic and corporate governance effects on investors and U.S. capital markets that should have been apparent to the Commission, considered and vetted for comment.

Investors have urged the Commission to carefully reflect on the economic harm that would ensue from the proposed amendments and to set them aside. Short of that, we now urge that the Commission at least provide the impact analysis that is required by the Staff Guidance on Economic Analysis and afford a meaningful opportunity for public comment on that analysis.

Thank you for your consideration of these concerns. Should the Commission have any questions or desire clarification, please do not hesitate to contact any of the undersigned.

Respectfully submitted,

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