**Via Electronic Mail:** Rule-Comments@sec.gov

July 29, 2020

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

**Re: New Evidence and Case Studies from the 2020 Proxy Season: The Harmful Impact of the Proposed Amendments to Rule 14a-8 on Shareholders' Ability to Protect and Promote Long Term Investment Value**

File S7-23-19: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8

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 do. 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 communicate collective shareholder views to the board and to create and protect long-term value.[1] We write now to supplement the comment file with compelling new evidence, including case studies, from the 2020 proxy season about the impact of the SEC's proposed amendments to Rule 14a-8.

This evidence demonstrates that the economic harm that the amendments could cause if they were finalized far outweighs the de minimis purported benefits cited in the Release accompanying the proposed amendments, further supporting investors' widespread requests that the SEC set the proposed amendments aside. The evidence shows that shareholder proposals related to environmental and social matters, in particular, would be sharply curtailed, at a time when significant threats to shareholder value stemming from such issues have emerged, including

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[1] For example, Blackrock recently reported on how it used the shareholder proposal process in the 2020 proxy season to hold corporate boards and managers accountable for the long-term viability and success of the companies in which it invests clients' funds:

> In 2020, we identified 244 companies that are making insufficient progress integrating climate risk into their business models or disclosures. Of these companies, we took voting action against 53, or 22%. We have put the remaining 191 companies 'on watch.' Those that do not make significant progress risk voting action against management in 2021.

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

risks related to the Covid-19 pandemic, diversity and inclusion, human capital management and climate change. These are material issues to many investors. They relate directly to protecting minority shareholder interests through corporate governance – a hallmark of our system of securities regulation that has led to widespread economic growth, but which is under more threat than ever as some companies adopt dual-class share systems that give managers outsized voting power in comparison to their financial interest in the company. Moreover, these matters are not yet captured in existing financial reporting frameworks, making disclosures that may be critical to investment decision-making, monitoring and stewardship dependent on private ordering through shareholder proposals. Shareholder proposals also play a critical role in focusing corporate boards' attention on the need to develop new expertise, new oversight models and new strategies to protect and drive shareholder value, as demonstrated in the 2020 proxy season.

The Release accompanying the proposed amendments took no account of these new risks, or of the potential value-enhancing benefits of shareholder proposals that have confronted these risks, in some cases well before general market awareness of their scope and intensity. Support for such proposals is often understandably low in early years, and support may not grow on a steep curve, as the SEC's proposed amendments would require for a proposal to be resubmitted in future years. An important, value-enhancing shareholder proposal may also be filed by a shareholder with a small or fairly new ownership stake. But as the 2020 proxy season demonstrates, those same proposals can ultimately garner significant support from other shareholders. The Release estimates that the proposed rules would eliminate approximately 37 percent of shareholder proposals,[2] but it does not provide a rational, economic justification for doing so, because there is no justification. The SEC's proposal, by its own admission, would save all companies in the aggregate no more than a meagre $70.6 million dollars, and likely considerably less,[3] whereas in some cases, even one shareholder proposal can result in multiple millions of dollars of positive value or avoided loss to shareholders.[4]

We set forth below key insights from the 2020 proxy season and other recent events that further demonstrate the significant economic harm that could result from the proposed amendments. First, we provide data on the percentage of successful shareholder proposals that would not have been allowed under the proposed amendments. Second, we provide case studies on certain illustrative proposals, to demonstrate the extent of the harm that could befall investors if the proposed amendments were adopted. Third, we analyze whether the claim in the Release that technology and social media have reduced the need for the shareholder proposal process

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[2] A recent report by the Council of Institutional Investors found that "the proposed higher thresholds resubmitting shareowner resolutions would have more than doubled the number of excluded proposals in the period 2011-2019, in particular reducing the number of shareowner proposals for independent chairs and to improve disclosure on political contributions and lobbying." See Letter from Ken Bertsch (Executive Director) and Jeff Mahoney (General Counsel) of the Council of Institutional Investors, dated May 19, 2020.

[3] The Commission estimates that "all Russell 3000 companies together could experience annual cost savings associated with a decrease in the number of voted proposals of up to $70.6 million per year," based on an unsupported claim that a company's costs associated with "management's consideration of a proposal and/or its inclusion in the proxy statement,' which was the highest by far of several other estimates it considered. Numerous investor comment letters addressed the flaws in this estimate. See, e.g., Letter from Ken Bertsch (Executive Director) and Jeff Mahoney (General Counsel) of the Council of Institutional Investors, dated January 30, 2020.

[4] See, e.g., Letter from Scott M. Stringer, Comptroller of the City of New York, dated February 3, 2020.

was borne out in the 2020 proxy season. Fourth, we address the ramifications of indications that, based on the actual impact the amendments would have had on 2020 shareholder proposals and recent comments by Commissioner Roisman, the intended but undisclosed and unanalyzed regulatory goal of the amendments is specifically to reduce shareholder proposals related to certain topics. And, fifth, we discuss the interaction of the proposed amendments with the SEC's contemporaneously proposed changes to Regulation S-K, and the SEC's failure to have analyzed the compound, deleterious impact they jointly would have had in 2020. Based on this evidence, we ask the SEC to set aside the proposed amendments in the interest of investors and the public.

**The Proposed Amendments Would Have Disallowed Numerous Shareholder Proposals that Garnered Significant Shareholder Support in 2020, Including in Some Cases Majority Support**

Both the proposed amendments' new resubmission thresholds, including the proposed new momentum rule, and new ownership stake and duration requirements would have barred potential value-enhancing shareholder proposals that garnered significant shareholder support in 2020.

*Resubmission Thresholds*

The Sustainable Investments Institute (Si2) tracks certain environmental, social and political shareholder proposals and submitted data on the retrospective impact of the proposed amendments from 2010-2019, in a comment letter dated February 3, 2020. Si2 has updated its analysis to include the 2020 proxy season. Si2's detailed breakdown and analysis of these results is attached as Appendix 1.

Overall, Si2 found that the proposed resubmission amendments would make 27 percent of social and environmental shareholder proposals voted in 2020 ineligible from consideration in 2021. Under the existing rules, only 9 percent would be ineligible. Specifically, 10 ESG-related proposals would not have been eligible for consideration this year because they were resubmissions that in earlier years had not met the proposed new thresholds, and one would have been blocked for consideration because it did not meet the proposed new momentum requirement in the past. The 5-percent reconsideration threshold would block 16 proposals voted on this year from reconsideration for the next three years. The 15-percent, second-year requirement would disqualify 11 proposals for resubmission. And the 25-percent, third-year proposal would disqualify seven. In addition, two 2020 proposals saw their votes fall by more than 10 percent and thus would not meet the proposed new momentum requirement.

As Si2's analysis shows, **requests for disclosure of political contributions and lobbying expenditures** account for the largest number of proposals that would be blocked under the proposed resubmission rules. Political and lobbying disclosure proposals have accounted for 35 percent of all ESG shareholder proposals voted since 2010 and one-quarter of these (193) would have been disallowed under the proposed amendments had they been in place since 2010, when Si2 began tracking such proposals.

Three-quarters (42 of 56) of the 2020 political and lobbying disclosure proposals earned more than 30 percent support, with majority votes at six companies – lobbying at Alaska Air; climate change advocacy at Chevron; and election spending at Activision Blizzard, Centene, J.B. Hunt Transport Services, and Western Union. Paradoxically, the direction of investor support for political and lobbying disclosure proposals is increasing, yet it would be these proposals that are most affected by the new resubmission thresholds and the proposed "momentum" bar. Also, five resolutions voted in 2020 could have been excluded if the new rule had been in place because they earned less than 25 percent support in earlier years, whereas each would have qualified under the existing 10-percent threshold, with the highest garnering 29.7 percent at AbbVie on election spending. Looking ahead, two such proposals voted in 2020 would be disqualified for reconsideration in the next three years because of the momentum rule, even though they earned substantial support – 38.9 percent for an proposal to disclose election spending at NextEra Energy and 33.7 percent for a proposal to disclose lobbying at Walt Disney. Cutting off further consideration of proposals at these high levels of support is wholly unjustified.

Nearly half the shareholder proposals on **decent work** issues considered by investors in 2020 (primarily pay disparity on the basis of race and gender) would have missed the proposed 15-percent and 25-percent thresholds. This is true even though two-thirds of investors agreed on the need for more information about human capital management, with new 2020 requests for reports earning unprecedented support, with 79.1 percent at Genuine Parts and 66.0 percent at O'Reilly Automotive. Proposals relating to gender and racial wage gaps saw a decline in support during 2020 as a number of companies disclosed information on equal pay for equal work. However, the gender and racial wage gap proposals are geared toward providing a metric to assess *promotion* opportunities for women and people of color – a metric representing the extent to which women and people of color occupy the highest paid positions in the company. Such proposals at Intel, Bank of America, Bank of New York Mellon, and Adobe would be eligible for resubmission in 2021 under the existing resubmission thresholds but would not be eligible under the newly proposed second year thresholds.

Regarding **board ESG matters** (board diversity plus requests for board member oversight and/or expertise on specific issues), 46 percent of the shareholder proposals voted from 2010 to 2020 would not be eligible for reconsideration had the new rules been in effect (64 out of 138 voted). In 2020, two resolutions that would meet current resubmission thresholds would be blocked under the proposed amendments: a second-year proposal asking Chevron to establish a board-level climate change committee earned 8 percent support, below the proposed second-year requirement, while a new proposal seeking a human rights expert on the board at Facebook received 3.7 percent, below the proposed new 5 percent threshold (though as discussed below, Facebook is a dual-class company and 9 percent of independent voting shares at Facebook supported the proposal).

Finally, it remains the case that the new "momentum" rule would affect a vanishingly small number of proposals – just 16 out of 2,193 voted since 2010, or 0.7 percent – demonstrating that there is simply no evidence that such a rule is necessary, appropriate or justified. Rather, it appears designed to assuage a narrow interest group of a few companies and should be dropped in the public interest.

As with the proposals that Si2 tracks, governance proposals also raised important issues that took time to garner significant shareholder support but did in 2020. For example, independent board chair proposals often have received less than 25 percent support from shareholders in years past, but averaged 37.3 percent support at 38 companies in 2020, with proposals at Baxter International and Boeing receiving majority support and proposals at 18 other companies receiving more than 40 percent.[5] Proposals for company policies on executive-

[5] Voting averages are from ISS data on Russell 3000 companies.

pay clawbacks often received limited voting support in early years (e.g., averaging 10.7 percent in 2008), but won strong votes in 2020 at Stericycle (54.5 percent) and Eli Lilly (35.1 percent).

Among proposals voted on in 2020 that are eligible for resubmission in 2021 under existing rules but would be blocked by the proposed increased resubmission thresholds, are proposals to:[6]

- Require independent board chairs (Facebook, Southwest Airlines, Tenet Healthcare)
- Report on incentive-based compensation and risks of material losses (Wells Fargo)
- Consider employee pay in setting CEO pay (3M, Mondelez International)
- Institute a majority vote standard for election of directors (Sinclair Broadcast Group)
- Provide shareholder the right to act by written consent (Cognizant Technology Solutions Group, Kohl's, Norfolk Southern, Pfizer)
- Reduce threshold for shareholders to call special meeting (Howmet Aerospace, Lincoln National)
- Take steps to consolidate share classes to have one vote per share (Coca-Cola Consolidated, Tyson Foods)

The Release accompanying the proposed amendments makes no attempt to grapple with these impacts. It can take time to vet ideas, often multiple cycles of proxy seasons. Many shareholders interested in a proposal prefer to give management one or more seasons to address the ideas and may use that time to participate in the rigorous engagement that the SEC's proposal claims to champion, relying on the fact that Rule 14a-8 as it currently exists allows them the opportunity of time before formally voting in favor. Moreover, risks evolve, a company's shareholder base evolves, and new facts and contexts become known, and shareholders' views on materiality evolve.

*Ownership Requirements*

The proposed amendments would also significantly increase the ownership stake and duration required in order for a shareholder's proposal not to be excluded, essentially shutting out Main Street investors from the shareholder proposal process. The proposed amendments would also disallow aggregation of shares, which is inconsistent with the approach of numerous other SEC rules that allow (and sometimes require) aggregation of shares held by different shareholders for purposes of applying the rules.

These changes could have a substantial, unjustified negative impact on investors and corporate governance in general. This is because many proposals that garnered significant – including even majority – support would have been disallowed because the filer of the proposal would not have met the steep new proposed ownership requirements. This makes no sense. If most shareholders support a proposal, why should it matter that the shareholder who went to the trouble of crafting and filing the proposal owned less than $25,000 in shares for less than three

[6] From Council of Institutional Investors'(CII) review of proxy statements for 2016-2020 from these companies, with ISS voting data. Interpretation of "substantially the same subject matter" under existing and proposed 14a-8 rules can involve a degree of subjectivity. CII based this analysis on its understanding of SEC staff interpretations.

years? This is a substantial sum for individual investors and a substantial period of time for both investors and corporate managers.[7]

Specifically, at least nine proposals in the 2020 proxy season that garnered the support of the majority of the company's shareholders could not have been filed if the proposed ownership thresholds were in effect.[8] In addition, in several cases, the filing of a shareholder proposal triggered important, voluntary actions by the board and management to implement the proposal and/or include on the proxy a substantially similar management version that also garnered significant shareholder support.

As one shareholder explained in a recent comment letter:

> The results are in from Spring 2020 proxy proposals submitted by James McRitchie and Myra Young, two of the five individuals noted by Chairman Clayton above. Most of our proposals won (26 out of 50). They averaged a 59.5% vote FOR. The median vote was 51.4% FOR. Every proposal to declassify boards (move to the annual election of all directors) won by a wide margin. Every proposal to allow directors to be removed without cause also passed. Shareholders apparently want accountable directors and do not believe directors must be criminals to be subject to removal.
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> Fully 38% of our proposals were either adopted by boards without going to shareholders for a vote or they substituted their own proposal after reviewing ours and won high support. If the SEC's proposed rule had been in effect, we would have had to wait an extra year or two to submit 14 out of 50 proposals.[9]

The Commission's apparent attempt to block proposals by small but productive shareholders is of no benefit to securities markets, investors or even corporate managers, who often tend to implement shareholder-suggested corporate governance reforms, but only after a shareholder has filed a proposal first. In any event, the Release provided no justification for blocking such widely supported shareholder proposals.

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[7] Moreover, the proposed restrictions on small investors are inconsistent with Chairman Clayton's own comments at the July 22, 2020, open meeting to adopt new regulations on proxy advisors, in which he noted that "[t]he majority of our Main Street investors participate in our public markets through intermediaries, most commonly through ownership of mutual funds and exchange-traded funds." Given his expressed concerns about protection of Main Street investors, we suggest that the Commission ought not to prevent a Main Street investor from adopting a strategy of investing in index or other mutual funds but also purchasing a small quantity of shares outright in order to file proposals that may improve shareholder value.

[8] See Letter from John Chevedden dated July 20, 2020, which lists 35 proposals submitted by four proponents that:

> were adopted in whole or in part so far in 2020. Thirteen (37%) of these proposals, noted in bold . . ., could not have been filed by the proponents in the 2020 season if the proposed ownership and holding period thresholds had been in effect.
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> Thus the proposed ownership and holding period thresholds will slow the adoption of corporate governance best practices that an overwhelming majority shareholders are in favor of.

See also Letter from James McRitchie dated July 21, 2020.

[9] See Letter from James McRitchie dated July 21, 2020.

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The results of the 2020 proxy season demonstrate the effectiveness and value of the current rule: shareholders signaled significant support for many shareholder proposals. Yet the data we submit herein shows that many of these proposals would not have met the proposed new resubmission thresholds or they were filed by small shareholders who would not have met the proposed new ownership duration and stake requirements.

**Case Studies on Shareholder Proposals at Facebook, Tyson Foods and Alphabet Further Demonstrate the Importance and Relevance of Shareholder Proposals to Long-Term Shareholder Value.**

The proposed amendments would have blocked many proposals related to economic risks, including risks related to Covid-19 and human capital management; social media platforms' handling of hate speech; and corporate whistleblower and anti-retaliation policies. As public attention to issues of racial justice, diversity and inclusion has intensified this season, so has the importance of an array of ongoing shareholder initiatives seeking to address discrimination and harassment, diversity and inclusion, civil and human rights, and social equity in order to protect and promote shareholder value.[10] The markets do not exist in a vacuum and the shareholder proposal process provides companies and shareholders an orderly, well-understood process for testing ideas about how companies can appropriately respond to current challenges. Yet the SEC's rulemaking proposal could block the ability of investors to continue bringing proposals on key issues at a number of companies that may present the greatest risk to shareholder value and whose shares are widely held (including by Main Street investors in index and other mutual funds). At Appendix 2, we attach a **Report on Case Studies from the 2020 Proxy Season** by the Shareholder Rights Group and the Interfaith Center on Corporate Responsibility, illustrating the important role that shareholder proposals in the 2020 proxy season have played in protecting minority shareholder interests.

*Tyson Foods, Covid-19 and Human Capital Management*

The first case study in the Report is a shareholder proposal that, for the second year in a row, 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 company-owned operations and value chain.[11] The human rights impacts raised in the proposal are material to the company and, as described in the Report, materially impacted the company's business relationships and social license to operate with its employees, suppliers, customers, or communities. The prescient proposal was submitted and voted on before the Covid-19 pandemic, but it highlighted risks to shareholder value due to the company's approach to human rights, which came to fruition during the pandemic.

The shareholder proposal was initially voted on in February 2019 and was resubmitted for 2020. It received the support of 14.65 percent of voting shares at the company's annual

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[10] Long-standing shareholder proposals have scrutinized predatory lending, worker health and safety, board and workforce diversity, racial biases in facial recognition software, prison labor, and gender and racial pay gaps.

[11] See Notice of Exempt Solicitation Pursuant to Rule 14a-103, available at https://www.sec.gov/Archives/edgar/data/100493/000121465920000340/p115201px14a6g.htm.

general meeting in early February 2020, including major institutional investors such as BlackRock. Under the current 6 percent threshold, this level of support would allow it to be refiled for a third year, but it would not be allowed under the proposed amendments' 15 percent threshold. Yet that does not tell the whole story. Because of the dual-class structure of the company's stock, Tyson family interests effectively hold an 89 percent voting stake via Class B stock, each share of which counts for ten times the voting power of a Class A share.[12] Excluding Class B stock, the 2020 voting outcome would have been approximately 57 percent in support. By blocking resubmission of this proposal, the proposed amendments will compound the disenfranchisement of minority investors in dual-class companies. Although dual-class structures are a well-known trend, the Release fails to consider the impact of the proposed amendments on minority investors in dual-class stock companies and fails to provide an economic justification for such an impact for public comment, as the Commission is required to do.

In the time since the vote, more than 9,937 Tyson employees at 37 poultry, pork and beef plants in seven states have tested positive for COVID-19, an infection count reported to be more than double that of any other meatpacker.[13] Many plants were forced to close, notwithstanding an executive order to stay open as part of critical infrastructure. And tragically, as of early July, more than 25 Tyson workers have died from the virus.[14] Families of some of those workers have already begun filing lawsuits. The fallout from the company's poor handling of human rights during the pandemic and related supply chain disruption has damaged shareholder value, and the company is likely to continue to face extraordinary expenses due to human rights violations.[15]

The purpose of Rule 14a-8 is to give public shareholders a mechanism – inclusion on the proxy – to communicate amongst each other and determine the signals they collectively want to send the board that oversees management on their behalf. Indeed, given the family-controlled ownership at Tyson Foods, the right to continue to file shareholder proposals is a critical tool to protect shareholder value by sending public shareholder consensus signals to a board at risk of capture by the control owner. We do not believe any savings Tyson Foods would realize under the proposed amendments, by not having to include the shareholder proposal on its proxy, would justify depriving public shareholders the ability to vote on a matter of relevance to the company's governance.

*Facebook, Hate Speech and Precursors to a Value-Destroying Boycott*

Some shareholders have expressed concern that the failure of Facebook to manage content containing hate speech, including posts conveying racial animus and encouraging violence, presents material risk to shareholder value. After the Black Lives Matter movement catalyzed a boycott by major advertisers due to the company's failure to address hate speech on the

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[12] James P. Miller, "Tyson Foods Holders Defeat Plan to End Dual-Class Stock Structure," Wall Street Journal (Jan. 17, 2020).

[13] Sky Chadde, Gannett Ag, Tracking Covid-19's Impact on Meatpacking Workers and Industry, Midwest Center for Investigative Reporting (April 16, 2020), available at https://investigatemidwest.org/category/agribusiness/.

[14] See Frank Miles, "Tyson Employees' Coronavirus Cases Draw Advocates' Criticism," Fox Business News (July 7, 2020).

[15] See Laura Reilly, "As coronavirus ravaged meatpackers, minorities bore the brunt. Now worker groups say Tyson and JBS violated the Civil Rights Act." Washington Post (July 13, 2020).

platform, [16] the company's stock price dropped precipitously, at one point wiping $60 billion in value off its market capitalization this spring.[17] Underlying the boycott are civil rights groups' requests that Facebook do more to stop hate speech and harassment of African-Americans.

This season, Facebook investors filed a proposal asking Facebook's board to nominate for the next board election at least one candidate with a high level of human and/or civil rights expertise and experience. The proposal received the support of 3.6 percent of investors, qualifying for resubmission in 2021 under existing SEC rules that require a 3 percent vote, but it will be blocked in 2021 if the Commission adopts the proposed amendments. If CEO Mark Zuckerberg's Class B stocks were discounted from the vote, voting support would amount to 9 percent. As with Tyson Foods, the dual class ownership structure of Facebook affects the eligibility of such a proposal for resubmission and exacerbates the impact that the proposed amendments will have, in ways that the Release did not analyze.

*Alphabet/Google and Anti-Discrimination Whistleblowers*

For the last few years, shareholders have expressed concerns about the effect of Google's treatment of internal critics and whistleblowers on shareholder value.[18] A shareholder proposal for the 2020 annual meeting asked the board to evaluate "the company's whistleblower policies and practices and assess[] the feasibility of expanding those policies." The proposal received 4.9 percent support, which surpasses the existing resubmission threshold of 3 percent but is below the proposed 5 percent first-year threshold. As with Tyson Foods and Facebook, Alphabet has a dual class share structure. If over-weighted Class B stock were discounted in assessing the vote, the level of voting support would be approximately 16.7 percent.

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As the data and case studies summarized above indicate, the shareholder proposal process has been effective at allowing shareholders to benefit from each other's ideas and efficiently leverage the time and resources that individual shareholders put into developing those ideas, avoiding the need for duplicative effort. An overwhelming number of comment letters from investors have explained why they ascribe significant value to this process,[19] and the 2020 proxy

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[16] The boycott has been embraced by major Facebook advertisers such Starbucks and PepsiCo.

[17] See Theron Mohamed, Facebook Sees $60 Billion in Market Value Erased in Just 2 Days as Advertisers Like Starbucks and PepsiCo Halt Social-Media Spending, Business Insider (June 29, 2020).

[18] Public revelations of employee perceptions of retaliation for speaking up have exposed risks to Google's reputation and shareholder value. See Nick Bastone, 45 Google employees detailed allegations of retaliation, sexual harassment, and racism in a leaked document, Business Insider (Sept. 23, 2020). The burgeoning crisis over how the company treats employees who speak up led to the January 2020 Newsweek headline, *Google Used To Tell Workers 'Don't Be Evil' Now It Just Wants Them to Be Quiet Former Top Exec Says*. In one example, a lawsuit filed by former employee claims that Google terminated him in November 2017 because of "his political statements in opposition to the discrimination, harassment, and white supremacy he saw being expressed on Google's internal messaging systems."

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[19] Letter from Joseph V. Amato, President and Chief Investment Officer – Equities of Neuberger Berman Investment Advisors LLC, dated January 27, 2020 opposing the amendments:

season has borne that support out. The proposed amendments would cut these benefits, for meagre savings that do not justify the harm to investors. We believe a fair reading of the record and evidence compels the Commission to now set them aside.

**The SEC's Claim That Technological Advances Have Obviated the Need for the Shareholder Proposal Process is Vague, Unsupported and Unjustified by an Economic Analysis.**

As an alternative theory for a justification for the proposed amendments, the Release claims, without explanation or evidence, that the Rule 14a-8 shareholder proposal process may be unnecessary because:

> shareholders now have alternative ways, such as through social media, to communicate their preferences to companies and effect change.[20]

The 2020 proxy season did not bear that claim out. There is no evidence that shareholders used – or could have used – the technology that the Release pointed to, or any other technology, to communicate and deliberate with each other and the company in a way that obviated the need for the shareholder proposal process. To the contrary, it is the technology of the shareholder proposal process that shareholders use to communicate about ESG and other matters. For example, more and more shareholders are voluntarily filing their exempt solicitations regarding shareholder proposals on EDGAR pursuant to Rule 14a-6(g). The Release did not consider this trend or weigh the cost of depriving shareholders of this public technology by disallowing a substantial portion of proposals.

The shareholder proposal process triggers broad market involvement that often leads to meaningful and effective engagement between investors and company officials, among other reasons because it is integrated with legal rights and responsibilities of participation, and procedural requirements. Nothing about technology confers or replaces this framework. Indeed, the experience of the SEC's 2008 electronic forum rule is illustrative. It has had little impact on shareholder engagement, because the legal rights and relationships associated with the shareholder proposal process are critical to effective engagement, while the shareholder forum mechanism, as merely a platform for information exchange, lacks those rights and relationships.

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> 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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> 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. That is especially important when considering that small investors may collectively own more shares than institutional investors, and nearly always own more shares than management. Additionally, we strongly oppose any elements of ownership duration being a part of the process.

[20] Release, page 18.

The only support the SEC provided for its technology claim is a footnote citing a Forbes article about the fintech start up, Say, and a Wall Street Journal article on Tesla's bowing to social media pressure to sever ties with the National Rifle Association (NRA). The latter article is clearly about pressure from consumers and customers; it never mentions shareholders. With regard to the fintech start up, the SEC provided no analysis of whether its service would be an appropriate and effective substitute for the Rule 14a-8 shareholder proposal process. Indeed, Say itself describes its service as facilitating – not replacing – proxy voting.[21] If anything, by disrupting incumbent market leaders in shareholder communication services, fintech startups such as Say will reduce companies' proxy and shareholder communication costs, which the Release should have taken into account to reduce its estimate of future costs of including shareholder proposals on the proxy. In any event, the introduction of technology that facilitates shareholder voting is not a basis to require longer or greater ownerships stakes, or raise the threshold of prior support for a shareholder to be allowed to resubmit a proposal that a company has not addressed.

Nor did social media obviate the need for the shareholder proposal process. Again, the purpose of Rule 14a-8 is to provide a mechanism for a company's shareholders to communicate with each other and with company directors and management. It is inclusion on the proxy that allows shareholders – who are dispersed but have anonymously bound their fortunes together in their ownership of a company – to reach each other. Nothing about social media facilitates the identification of and communication among a discrete group of individuals and institutions that are verified to be shareholders in a company as of a certain date. It would be illogically arbitrary and capricious for the SEC to simultaneously argue both that social media platforms with no mechanism for shareholder verification adequately replace the Rule 14a-8 process and that the continuing, narrower Rule 14a-8 process requires an even more rigorous shareholder verification process than exists today. Moreover, while most shareholder proposals are precatory, some are binding. The SEC has provided no explanation for how technology could replace the Rule 14a-8 mechanism for proposing binding changes. The claim in the Release is simply too vague and unsupported to allow meaningful public comment or be the basis of overhauling a highly effective and economically valuable process that protects shareholder rights.

What technology has done is make it easier for shareholders to become informed about emerging issues and more aware of the context for shareholder proposals. The 2020 proxy season demonstrated that technology helped shareholders research, analyze and judge investment risks emanating from a range of environmental, governance and social circumstances and events. The result was record high levels of support for more shareholder proposals. If the Release's point about technology is that the existing thresholds for resubmission of proposals should be raised to spare management the distraction of increasingly informed shareholders, it should have conducted economic analysis and sought comment on that undisclosed rationale. The APA requires that an agency explain its reasons for a change. A vague reference to technological advances is insufficient to provide the public adequate notice and opportunity to comment on the impact of the change it has in mind.

**The Impact of the Proposed Amendments and a Recent Commissioner Speech Reveal a Different Regulatory Goal than the De Minimis Cost-Reduction Goal Articulated in the SEC's Release**

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[21] See https://www.saytechnologies.com/investor (accessed July 12, 2020).

As described above, many of the 2020 shareholder proposals that enjoyed majority or otherwise significant shareholder support related to environmental or human capital risks. Earlier this month, SEC Commissioner Roisman, who led the development of the proposed amendments, provided a "Proxy Update" on the proposed amendments as well as the SEC's proposed rulemaking on proxy advisors and said that "the completion of those rulemakings is a priority for me and for Chairman Clayton." Under the heading "Full Disclosure: My Thoughts on ESG," the Commissioner expressed his preference that investors use private ordering to motivate companies to report on environmental and social matters in voluntary sustainability reports, as opposed to the SEC mandating such disclosures:

> Many public companies voluntarily provide some form of corporate social responsibility or sustainability reports to investors—by voluntarily, I mean companies are not required to do so by the SEC or other government mandate. I am happy to see this sort of private ordering take place.

Shareholder proposals are a critical mechanism for investors to conduct that private ordering. Indeed, proxy voting on such proposals is the only mechanism that allows all of a company's investors to weigh in on such private ordering desired by Commissioner Roisman.

The Commissioner also acknowledged that "a company may deem certain ESG information material." This is another reason we believe preservation of the existing rules around the shareholder proposal process is essential. Experience has shown that corporate managers have not always appropriately judged materiality, especially when it comes to emerging issues that bear on the long-term viability of a company's business model or otherwise have a latent but material impact on a company's financial position or risk profile.

Shareholder input on proxy votes provides corporate boards and management key information on shareholders' views about the materiality of matters subject to such votes. The Release failed to consider the impact of losing a significant portion of shareholder proposals on shareholders' ability to raise significant issues while engaging in private ordering to protect their long-term interests. We believe it should have done so and subjected that analysis to public comment.

We are also concerned that certain mistakes of fact may have affected the Commissioner's views and development of the proposed amendments. He seems to be under the misimpression that environmental and social matters are not related to corporate governance:

> In my mind, corporate governance stands by itself and rarely has a direct relationship to environmental or social issues. Best practices in corporate governance are usually the result of many years of private ordering experimentation and experience. Also, governance reform focuses on the company itself and what is best for its optimal operation as well as its shareholders.

First, we note that shareholder proposals on environmental and social matters have been the subject of "many years of private ordering experimentation and experience" as well.[22] Given

[22] See, e.g., Sarah C. Haan, Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights, 76 Wash. & Lee L. Rev. 1167 (2019):

the Commissioner's role in developing the proposed amendments, we are concerned that this view underlies the proposed amendments and reveals that the true regulatory goal of the amendments is to curtail shareholder proposals related to environmental or social topics. If so, this goal was not disclosed in the Release, nor did the Release include an economic justification for this goal, as required. It is troubling that the impact of the amendments appears targeted to achieve just the (faulty) principle the Commissioner's recent speech articulated.

Voting results in the 2020 proxy season show that many investors believe environmental and social matters are highly relevant to corporate governance and long-term shareholder value. Suppression of these proposals via the proposed amendments could not only stall value-enhancing initiatives, but it risks harming investor confidence in market fairness. This is more than just a bad idea, though. The public is entitled to the Commission's rationale and economic justification for such a goal, and to a meaningful opportunity to comment on that analysis. Such explanation and process are required before the SEC may consider adopting any final rule, again necessitating that the Commission step back from finalizing the proposed amendments on such shaky and shifting grounds.

**The SEC Has Also Failed to Analyze the Economic Effect of the Interaction Between the Proposed Amendments to Rule 14a-8 and Its Contemporaneous Proposal to Scale Back Disclosures Required by Regulation S-K, by Reducing Required Disclosures in Favor of More Principles-Based Materiality Analyses.**

The Release relied on historical, "descriptive statistics on shareholder proposals to understand the baseline against which [to] compare the effects of the proposed amendments, informing the analysis of the potential effects of the proposed amendments to Rule 14a-8 . . . ."[23] These statistics failed to take into account the added demand for shareholder proposals that will occur as a result of the Commission's companion proposal to amend Regulation S-K. This is a significant failing in the Commission's economic analysis.

The amendments to Regulation S-K would remove certain historical, prescriptive disclosure requirements in favor of a more flexible, principles-based approach to disclosure. They also failed to include new mandatory disclosures that many investors have asked for, particularly to obtain standardized, comparable and fairly presented information on material environmental and human capital matters. Standardized disclosures can be important to address and bring transparency to systemic market risks.

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Between 1968 and 1972, Medical Committee for Human Rights, a civil rights organization, fought the Dow Chemical Company and the U.S. Securities and Exchange Commission over its shareholder rights. The battle focused on a shareholder proposal demanding that Dow stop selling napalm for use in the Vietnam War. Dow rejected Medical Committee's proposal and the SEC approved the company's decision to exclude it from its proxy statement. However, in 1970, on the heels of the most tumultuous proxy season in American history, a unanimous, 3-judge panel of the U.S. Court of Appeals for the D.C. Circuit sided with Medical Committee and suggested that the napalm proposal should have gone to a shareholder vote. The D.C. Circuit's decision, authored by a conservative federal judge, faulted the SEC for failing to justify Dow's inhibition of corporate democracy, in which Dow's shareholders would have considered whether to "have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy."

[23] Release at 68; see also Release at 69 (establishing a baseline solely based on "current and historical practices," as opposed to a baseline based on the status quo without the proposed amendments).

In a report earlier this month, the Government Accountability Office found that the absence of consistent, mandatory disclosure of ESG information that is material to investment decisions has frustrated investors: "Most large investors told us they sought additional ESG disclosures to better understand and compare companies' risks."[24] As a post by lawyers from Wachtell, Lipton, Rosen & Katz in the Harvard Law Forum on Corporate Governance Blog described:

> The GAO's own review of ESG disclosures corroborated the investor perspectives, with the report's authors finding several cases where companies used different definitions or calculations for the same topics. Such inconsistencies were most frequently found in disclosures relating to climate change, personnel management, resource management, and workforce diversity—all of which are priority ESG issues for investors.[25]

Investors are indeed struggling with inconsistently presented and unreliable disclosures that hinder effective investment analysis. Many investors' preference, as expressed in numerous comment letters on the concept release that preceded the SEC's proposal on modernizing disclosure, is that the Commission develop a 21st century disclosure regime that addresses the full spectrum of disclosures needed to manage and reduce system equity market risk. The absence of more comparable disclosures also puts more pressure on shareholders to signal views on materiality.[26]

If the SEC does not require such disclosures, which seems likely, investors will have to use private ordering to motivate companies to provide them, as Commissioner Roisman advocated in

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[24] Government Accountability Office, Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them (Report GAO-20-530, July 2020) ("GAO ESG Report").

[25] David M. Silk, David B. Anders, and Sabastian V. Niles, GAO Report Highlights Dearth of ESG Disclosure, Harvard Law School Forum on Corporate Governance (July 17, 2020), available at https://corpgov.law.harvard.edu/2020/07/17/gao-report-highlights-dearth-of-esg-disclosure/s.

[26] See SEC Release No.33-10668, Modernization of Regulation S-K Items 101, 103, and 105 (Aug. 8, 2019) (S-K Release), at 75, which states:

> An important objective of the proposed amendments is to revise Items 101(a), 101(c), and 105 to be more principles-based. Overall, investors and registrants may benefit from the proposed principles-based approach if the existing prescriptive requirements result in disclosure that is not material to an investment decision and is costly to provide. We acknowledge the risk that emphasizing a principles-based approach and granting registrants more flexibility to determine what and how much disclosure about a topic to provide may result in the elimination of some information to investors. However, we believe that any such loss of information would be limited given that, under the proposed principles-based approach, registrants still would be required to provide disclosure about these topics if they are material to the business.

Many believe this approach has not worked when it comes to key, material ESG disclosures, such as material climate-related disclosures. For example, in 2014 Ceres researchers conducted a retrospective review of S&P 500 issuers' filings after the 2010 guidance. See Ceres, Cool Response: The SEC & Corporate Comate Reporting (2014). They found that on the whole issuers did not report "company specific information" or "quantify[] risks or past impacts." Rather, they found that issuers tended to use "boilerplate language of minimal utility to investors" that only "briefly discussed" climate change. A 2018 report by the Government Accountability Office similarly found that the Commission's principles-based guidance on climate-related disclosures was poorly enforced and ineffective. See GAO-13-188, *Climate-related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements* (Feb. 2018).

his recent speech, and as the Commission's Release accompanying the proposed amendments to Regulation S-K suggests:

> Some of the costs of shifting to a more principles-based approach could be mitigated by external disciplines, such as the Commission staff's filing review program. In addition, registrants would remain subject to the antifraud provisions of the securities laws. There also may be incentives for registrants to voluntarily disclose additional information if the benefits of reduced information asymmetry exceed the disclosure costs.[27]

As discussed above, it is the shareholder proposal process that prompts voluntary disclosure. Indeed, more proposals on these matters are already expected in 2021.[28] The loss of this tool would be an enormous cost to investors as well as the market as a whole, and this cost was not included in the SEC's analysis. Such costs would include the lost opportunities to increase stock market liquidity and decrease the cost of capital, which the S-K Release acknowledges attend more complete disclosures:

> [S]hifting to a more principles-based approach may result in the elimination of disclosure material to an investment decision if issuers misjudge what information is material. To the extent that prescriptive requirements result in more complete disclosures, such requirements could benefit investors by reducing information asymmetry. Reducing information asymmetry may also benefit registrants by improving stock market liquidity and decreasing cost of capital. Further, prescriptive standards could enhance the comparability and verifiability of information.[29]

The SEC's economic analysis for the proposed amendments should have taken into account (and sought public comment on) the status quo without the proposed amendments. Given the proposed changes to Regulation S-K, the Commission should have taken into account a significant increase in demand for privately ordered disclosure, including via shareholder proposals, and then assessed the economic cost of constraining such private ordering by prohibiting use of the shareholder

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[27] S-K Release at 80 (footnote omitted). Note that the GAO's July 2020 ESG Report found that the Commission's filing review program suffers from severe resource constraints, particularly when it comes to ESG disclosures. See GAO ESG Report at 36. This closes off file reviews as a tool to enforce high quality disclosure of material ESG matters at the scale of the market, further increasing demand for private ordering through shareholder proposals.

[28] See Bruce Goldfarb, Companies Need to Engage on ESG Issues Now or Risk A Bruising in 2021, Forbes (July 17, 2020):

> It is especially worth noting that, due to the timing requirements under the proxy rules for submitting shareholder proposals, the ESG items on this year's ballots were mostly submitted in late 2019 or early 2020 – *well before* issues such as Covid-19 and protests over racial and economic inequality began making headlines.
>
> Given the wide range of concerns triggered by these developments, companies are certain to face even more proposals on diversity and inclusion, racial justice, socioeconomic inequality, health and safety, climate change and other ESG-related factors in the 2021 proxy season.

This article also contains important statistical information on 2020 shareholder proposals that should be included in the comment record.

[29] S-K Release at 79 (footnotes omitted).

proposal process. If the Commission had taken these costs into account, the disparity of purported benefits to expected costs would be even greater.

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We urge the Commission to carefully reflect on the economic harm that would ensue from the proposed amendments and to set them aside, as the Commission did twenty years ago in connection with a similar proposal to curtail shareholder proposals. If anything, given the Commission's preference for private ordering over mandatory disclosure, the shareholder proposal process is more important now than ever.

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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Interfaith Center on Corporate Responsibility

Also supporting:

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**Appendix 1 – Voting Results of 2020 Proxy Season**
**Appendix 2 – Report on Case Studies from the 2020 Proxy Season**

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