

Dear Senator/Representative:

The undersigned organizations representing pension plans, institutional investors, labor unions, religious organizations and consumer groups write to urge you to support the Congressional Review Act disapproval of the Securities and Exchange Commission's shareholder proposal rule amendments (S.J. Res. 16) / (H.J. Res. 36). These rule changes were adopted despite overwhelming investor opposition. The rulemaking process clearly violated the SEC's own guidelines for economic analysis, with the express purpose of limiting shareholders' ability to use the shareholder proposal process to hold corporate boards and executives accountable on corporate governance and risk management. As such, the SEC's shareholder proposal rule amendments are the perfect candidate for Congressional Review Act disapproval.

In amending the shareholder proposal rule, the SEC ignored evidence that shareholder proposals deliver significant benefits for all shareholders. Many corporate best practices have been adopted in response to shareholder proposals including policies on board independence, board diversity, majority voting, limits on golden parachutes, respect for human rights, and sustainability reporting. Shareholder proposals often are the best mechanism for shareholders to elevate neglected issues facing a company that could prove costly, even an existential risk, if the board and management continue to neglect them. Shareholder proposals encourage companies to adopt changes that protect and increase economic value. They provide a cost-effective way for management to better understand the views of its entire shareholder base. They also serve as an early warning of issues that could pose a significant reputational risk to the company.

Commissioner Allison Herren Lee noted in her dissent that the SEC received thousands of letters "explaining why these changes are not in the interests of shareholders or in the long-term interests of the companies they own," with letters in opposition far outnumbering those in support. "Individual investors, asset managers, pension funds and labor unions representing the interests of teachers, firefighters, and service employees, state and local governments, universities, religious institutions, numerous investor organizations representing trillions of dollars in assets under management, US Senators, academics, a Commissioner at the Federal Election Commission, state securities regulators, our own Investor Advisory Committee—shareholders of every ilk and many others wrote in overwhelming numbers to urge us not to adopt these amendments," she added.¹ The SEC chose to ignore that outpouring of investor opposition in rushing through its rule amendments.²

The amended rule harms small investors in particular

With no evidence that shareholder proposals are spiraling out of control – on the contrary the number of shareholder proposals filed each year has recently been in decline – the SEC adopted a more than ten-fold increase in the amount of stock an investor must hold for a year in order to

¹ SEC Commissioner Allison Herren Lee, Statement on the Amendments to Rule 14a-8 (Sep. 23, 2020), <https://www.sec.gov/news/public-statement/lee-14a8-2020-09-23>.

² See, e.g., <https://www.sec.gov/comments/s7-23-19/s72319-7138141-216192.pdf>. See, also, Recommendation of the SEC Investor Advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals (Jan. 24, 2020) at 11-13, <https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf>;

be eligible to submit a proposal for a shareholder vote.³ The SEC also eliminated investors' long-standing ability to aggregate their holdings in order to meet the threshold and placed extensive new restrictions on their ability to rely on representatives to assist them in navigating the process. This was also done without evidence that investors were abusing the process and without consideration of increased costs to investors. Taken together, these restrictions hamstring the ability of smaller investors to submit proposals. The SEC offered no reasonable justification for restricting this role to institutional investors and the wealthiest individuals.

Commissioner Lee and Commissioner Caroline Crenshaw cited the rule's harsh impact on smaller investors in their dissents. "The types of shareholders who will be most affected by these amendments are individual shareholders with smaller holdings who will be shut out of the shareholder proposal process to a startling degree," Commissioner Lee stated. "[I]f shareholders wish to exercise their right to submit a shareholder proposal, they must either invest what is likely a substantial portion of their portfolio into a single company, or be forced to hold an investment for two additional years, giving up the right of active and prudent management of their own assets. Wealthier investors, meanwhile, suffer no such restrictions."⁴ Commissioner Crenshaw put the issue in even starker terms. "I am concerned that we are sending the message that the ideas of retail investors are not worth hearing," she said. She noted that, even using the Commission's inflated estimates of costs, the proposal would save less on a per-company basis than investors would be required to invest to qualify to submit a proposal. "We are raising the bar for retail shareholder proposals to save corporate costs that the Commission's own analysis acknowledges are minimal," she added.⁵

Higher resubmission thresholds will exclude emerging issues

But the SEC did not stop at shutting smaller investors out of the shareholder proposal process. It also took steps to limit the ability of shareholders to resubmit shareholder proposals that gradually gain support over time.⁶ Under the new rule's vote requirements for the resubmission of shareholder proposals, emerging issues such as requests for corporate disclosure of political spending and lobbying activities would be curtailed.⁷ The SEC failed to offer any explanation for why that outcome is desirable, and it ignored evidence that shareholder proposals and proxy voting are economically important mechanisms for shareholders to monitor and hold corporate management accountable, to communicate collective shareholder views to the board and to create and protect long-term value. Notably, these higher vote resubmission thresholds make it

³ Previously, an investor was required to hold at least \$2,000 worth of stock for at least a year to qualify to submit a proposal for a shareholder vote. Under the new rules, that amount sky-rockets to \$25,000 held for one year or \$15,000 for two years. An investor with \$2,000 worth of stock now has to wait three years before becoming eligible, an unreasonably long period of time in light of the typical retail investor's rate of portfolio turnover.

⁴ SEC Commissioner Allison Herren Lee, Statement on the Amendments to Rule 14a-8 (Sep. 23, 2020), <https://www.sec.gov/news/public-statement/lee-14a8-2020-09-23>.

⁵ SEC Commissioner Caroline A. Crenshaw, Statement on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Sep. 23, 2020), <https://www.sec.gov/news/public-statement/crenshaw-14a8-2020-09-23-0>.

⁶ Previously, a first-time proposal had to receive at least 3% of the vote to be eligible for resubmission in future years. The SEC increased that to 5%. For proposals that had been submitted twice, it more than doubled the resubmission threshold from 6% to 15%, and for proposals that had been submitted three or more times, it raised the threshold from 10% to 25%.

⁷ <https://www.sec.gov/comments/s7-23-19/s72319-7502063-221908.pdf>

particularly difficult for shareholders to resubmit shareholder proposals at dual class companies whose unfair voting rights entrench corporate management and exacerbate principal-agent risks.

The SEC's rulemaking process was flawed

In order to cobble together a justification for the shareholder proposal rule amendments, the SEC greatly exaggerated the cost to companies of shareholder proposals and downplayed the impact on investors. Worse, the SEC refused to consider, and tried to suppress, data in its possession it could have used to better estimate the number of investors who would lose the ability to submit shareholder proposals under its new rules. Using this data, the SEC's Division of Economic and Risk Analysis estimated that the proposed stockholding requirement of \$25,000 for at least one year could exclude up to 51.18 million (77.55%) additional accounts. Although the SEC had that data when the SEC proposed the rule changes, it did not make it publicly available until August 2020, long after the public comment period had closed and just 40 days before the SEC voted to adopt the amendments.⁸ The Division of Economic and Risk Analysis also refused repeated requests from the Office of the Investor Advocate for access to that data.⁹

Conclusion

In short, the SEC's amendments to the shareholder proposal rule are an attack on corporate democracy. Commissioner Lee summed it up well in her dissent: "In the end, these amendments will restrict shareholders' ability to oversee and engage with management of the companies they own. They do not properly value shareholder proposals or shareholder rights. And they will restrain shareholder efforts on issues that are of pressing importance to them and to our broader economy."¹⁰ Congress has an opportunity to undo this damage and restore an important component of shareholder oversight and corporate accountability. We urge you to do so by voting "Yes" on S.J. Res. 16 / H.J. Res. 36.

Sincerely,

⁸ Memorandum Regarding Analysis of Data Provided by Broadridge Financial Solutions, Inc. (Aug. 14, 2020), <https://www.sec.gov/comments/s7-23-19/s72319-7645492-222330.pdf>.

⁹ Office of the Investor Advocate Report on Activities Fiscal Year 2020, <https://www.sec.gov/files/sec-investor-advocate-report-on-activities-2020.pdf>, at 4.

¹⁰ <https://www.sec.gov/news/public-statement/lee-14a8-2020-09-23>