February 3, 2020

Mrs. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (Release No. 34–87458; File No. S7–23–19).

Dear Secretary Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned rule proposal ("Release") noticed for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). The Release,[2] if approved as noticed, would significantly weaken the ability of shareholders to engage with the public companies they co-own. The Release would particularly target retail investors as well as a number of high-profile proposals that have been gaining support in the past several years. The Release takes at face value utterly unsubstantiated claims regarding costs related to the shareholder proposals and uses these apparently made-up costs as rationale for the change. The Release arbitrarily and capriciously ignores benefits offered by shareholder proposals. The Release uncritically sides with the self-serving policy recommendations lobbied for by corporate managers and their trade associations. Finally, the Release was put together and sold to the American investing public based on a fraudulent and compromised public engagement process.

This Release must be withdrawn, and the SEC—as the entity in the Federal government charged to protect and empower America's retirees and savers—must make it easier for current and future shareholders to engage with the management and directors of the companies they co-own, and it must **not** disenfranchise them of their corporate suffrage or silence their voices.

SUMMARY

The Release would harm Main Street investors as it is woefully unbalanced in favor of corporate management. It must be withdrawn for the following summarized reasons:

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 *See* Release No. 34–87458; File No. S7–23–19, 84 Fed. Reg. 66458 (December 4, 2019), *available* at https://www.federalregister.gov/documents/2019/12/04/2019-24476/procedural-requirements-and-resubmission-thresholds-under-exchange-act-rule-14a-8.

- The Release would significantly and unjustifiably weaken retail investors' ability to engage with the companies that they co-own. For example, if the proposed thresholds were in effect for the 2018 proxy season, they would have caused the disqualification of over 56% of shareholder proposals.[3] The vast majority of these disqualifications would apply to retail shareholders who have held at least $2,000 of stock for over a year.

- The Release is a radical, ideologically-driven policy that deliberately ignores the documented value of shareholder proposals. The benefits of shareholder proposals to long-term investors, retirees, and the societies in which they live are demonstrable and significant.

- The Release specifically targets proposals that have been gaining support from shareholders (despite management's vehement opposition), such as those related to environmental, social, and governance-related policies of the company ("ESG Proposals").

- The Release amounts to a policy of collective punishment: using as an excuse the 15 or so entities that file disproportionately large numbers of proposals, the Commission would punish and disenfranchise the corporate rights of millions of shareholders.

- The Release was crafted in reliance upon, and promoted through, a demonstrably fraudulent public engagement and comment process. The public comment file following SEC's Proxy Process Roundtable held in November 2018 was filled with letters that were produced through mail and wire fraud.

- The Release cites and relies upon alleged costs—apparently, on average, $150,000 for a company to merely deal with each shareholder proposal—that are utterly unsubstantiated and have no basis in fact. This regulatory malpractice alone is grounds for this Commission to withdraw the Release, or for a future Commission to rescind these amendments.

- Instead of enacting policies that would obviously harm Main Street investors, the Commission should empower and enable more robust shareholder engagement.

DESCRIPTION OF CURRENT RULE AND THE PROPOSED AMENDMENTS

Currently SEC Rule 14a-8 is the mechanism through which shareholders can submit proposals to be included in the company's proxy statements (both for its regular annual meetings and any special meetings) that then are distributed to all shareholders for consideration and voting. Currently, SEC Rule 14a-8 permits the management of public companies ("management") to exclude shareholder proposals when they do not meet certain procedural or substantive requirements. The procedural requirements include: level of share ownership (i.e., how much stock of the company does a shareholder own); the number of proposals a shareholder submits for any particular meeting; the word-count of the proposal; and whether it meets certain deadlines.[4] The substantive requirements include, among others: whether the proposal would violate applicable law; would violate certain proxy rules; relates to the submitter's personal grievance or

3 *See* Release at 66497.
4 *See* Release at 66459.

clearly personal interest; is not significantly related to the company's business; is not capable of implementation; deals with matters relating to a company's ordinary business operations; is duplicative of similar proposals; or has already been substantially implemented.[5]

While some of these requirements are easily understood and compliance enforced, with others there can be serious contention between shareholders who submit these proposals (*i.e.*, proponents) and the management of the company (*i.e.*, opponents). Because proponents of these proposals and the management of the company do not always agree on the validity of the application of these exclusions (as interpreted by the issuer), "if a company intends to exclude a shareholder proposal from its proxy materials on these grounds or any other ground, it is required under Rule 14a– 8(j) to ''file its reasons'' for doing so with the Commission."[6] In these latter instances, if the management decides to exclude certain proposals that are contentious, it first seeks a "no action letter" from the Commission, which gives comfort to management that the SEC is unlikely to bring an enforcement action against the company for violating Rule 14a-8.

One of the long-standing procedural requirements is the need for a shareholder to hold $2,000 worth of stock of a company for one year or longer to be eligible to offer a proposal that can be included in the proxy statements of that company. The Release would amend this eligibility requirement of Rule 14a-8 to make it substantially easier for management to disqualify and exclude shareholder proposals from the annual proxy statement on procedural grounds. The Release, if approved as noticed, would raise the eligibility requirements so that the shareholder would now need to hold a minimum of $25,000 (instead of the current $2,000) for over a year before he or she can offer a proposal.[7] Or, the shareholder would need to hold $2,000 worth of stock for **over three years** before he or she could offer a proposal.[8]

The Release would further amend Rule 14a-8 to disallow shareholders to aggregate their holdings to meet these holding requirements (*e.g.*, two or more shareholders cannot band together and aggregate their holdings to satisfy the eligibility requirement and offer one shareholder proposal).[9]

The Release also imposes new requirements upon shareholders who utilize the services of representatives (such as solicitors, investment advisers, their lawyers, etc.) who submit proposals on behalf of the same shareholders. The Release would force shareholders using a representative (or a proxy) to supply certain new identifying information about the proposal and the representative (the same proxy who is submitting on behalf of the shareholder), as well as other information.[10]

Additionally, the shareholder must submit in writing multiple dates and times at which the shareholder would avail him or herself (but **not** any representative or proxy) to meet with or talk

5 *See* Release at 66459.
6 *See* Release at 66459.
7 *See* Release at 66459-60.
8 *See* Release at 66463.
9 *See* Release at 66464.
10 *See* Release at 66466.

to the management. The meeting or telephone conversation must take place no less than 10 days and no more than 30 days after the proposal has been submitted.[11]

The Release also imposes a "one proposal per submitter," requirement, which would, for example, disallow a representative or a proxy to submit one proposal on behalf of his/herself and another one for his or her shareholder client.[12] Currently, Rule 14a-8 has been interpreted to permit representatives to offer multiple proposals as long as each proposal is submitted on behalf of a unique shareholder, or a group of shareholders, and each submitted proposal is not substantially similar to another.

Importantly, and again, aimed at disenfranchising shareholders for the benefit of management, the Release would raise the minimum threshold of support an unadopted proposal must garner to be eligible for **resubmission** at another annual or special shareholder meeting. These resubmission threshold erect obvious hurdles before shareholders who decide to **resubmit** their proposals (or a substantially similar one) for a vote (after it has been submitted for a previous annual or special shareholder meeting). These new resubmission requirements would permit management of the company to deny proposals that deal with similar issues presented in a previous one. The Release would permit the management to exclude the proposal if it receives:

- Less than 5% if previously voted once (**currently set at 3%)**;
- Less than 15% if previously voted twice (**currently set at 6%)**; or
- Less than 25% if previously voted on three or more times (**currently set at 10%)**.[13]

The final amendment noticed in the Release is a new "momentum requirement." This would allow the management of a company to exclude a proposal if it had been voted on three or more times in the last five years; it received less than 50% of votes; and it had a 10% decline in support during its previous year. For example, if a shareholder proposal received 49% of all cast votes at year 3 but received less than 44.1% (49-4.9=44.1%) at year 4, the Release would permit the management to disqualify and exclude this proposal from the proxy statements of year 5 since it does not satisfy the new "momentum requirement."[14]

COMMENTS

The Release Would Target Retail Shareholders, in Total Contradiction of the SEC's Mission of Investor Protection and Chairman Clayton's Repeated Declaration That He and the Commission He Leads Will Do What is Best for Mr. and Mrs. 401(k).

The over 1,000% increase of the minimum holdings requirement (from the current $2,000 to $25,000) noticed in the Release specifically targets retail shareholders and the kinds of shareholder proposals that have been gaining traction (despite management's strong opposition). This is not an unintended consequence of the Release but is deliberate. If approved as noticed, this policy of targeting retail shareholders would not be a "bug" but an ingrained "feature" of the

11 *See* Release at 66466-7.
12 *See* Release at 66468.
13 *See* Release at 66459-60.
14 *See* Release at 66470.

regulations. The Economic Analysis of the Release itself predicts this assault on retail shareholders:

> We do not expect the proposed amendments to the ownership thresholds to affect all types of shareholders and companies in the same way. First, the 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. Second, to the extent that investors with smaller holdings are more likely to submit proposals on certain topics, by reducing the number of such investors who are eligible to submit proposals, the proposed rule amendments could decrease the number of proposals on those topics more than other types of proposals.[15]

If the thresholds as noticed in the Release were in place in the 2018 proxy season, management could have excluded over 56% of shareholder proposals, the vast majority of which would have come from retail shareholders.[16] Retail shareholders' investment portfolios are significantly smaller compared to institutional or other large shareholders (such as family offices, endowments, or other pooled funds). As Commissioner Allison Herren Lee explained in her dissent over the Release noted, "an analysis of retail investor portfolios indicates that the median portfolio value is approximately $27,700. Thus, Main Street investors would generally have to invest virtually their entire portfolio into one company (something we strongly discourage) to enjoy the same rights as Wall Street investors, or they would have to wait three years to catch up to them."[17] Commissioner Lee's assessment of the impact on retail shareholders (based on incomplete data in the Release)[18] is probably conservative.

During a lengthy and rigorous study conducted by the Department of Labor as part of its rulemaking on the Fiduciary Rule, the Department gathered data on retail shareholders' holdings. It found that the median brokerage account balance of U.S. investors is only $6,200, [19] which means if the Commission approves the Release as noticed, it would essentially disqualify ALL shareholder proposals from retail shareholders who are at or below the median brokerage account balance levels and who do not hold their shares for three years or longer. Shareholder proposals (as outlined in a section below) offer a multitude of benefits, and proposals offered by retail shareholders have been gaining support. Given the size of their investment portfolios or account balances, retail shareholders have the most to lose if a company is mismanaged. It should be in the Commission's paramount interest to empower retail shareholders to engage the companies they co-own to ensure they are not mismanaged. Alas, the Commission's actions, as they appear in the Release, would constitute a deliberate and targeted assault on retail shareholders just as they—as a class—are becoming more effective in standing up against corporate management's practices

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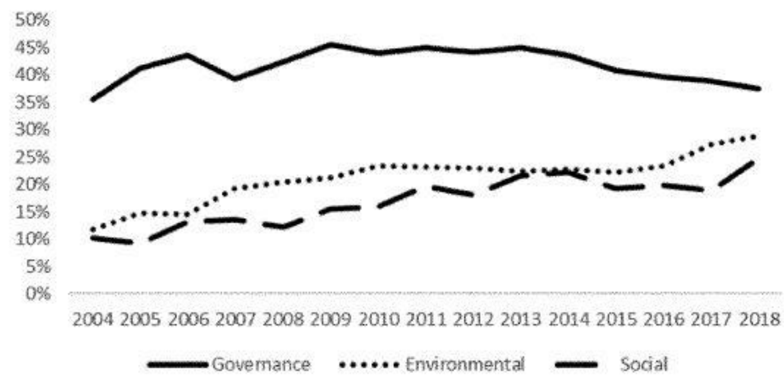
15 *See* Release at 66499.
16 *See* Release at 66497.
17 *See* Commissioner Lee Statement on Shareholder Rights (November 5, 2019), *available* at https://www.sec.gov/news/public-statement/statement-lee-2019-11-05-shareholder-rights.
18 *See* fn. 14 in Commissioner Lee's statement.
19 *See Brokerage Accounts in the United States*, Advanced Analytical Consulting Group and Deloitte, (November 30, 2015), *available* at https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/retirement/brokerage-accountsin-the-us.pdf.

that harm the long-term, sustainable profitability of the company, the welfare of its employees, and the best interests of the society in which the company operates.

<u>The Release Targets Shareholder Proposals That Have Been Gaining Support, Which is Anti-democratic and Harmful to the Interests of Shareholders Who Need SEC Protection and Empowerment.</u>

The resubmission threshold amendments in the Release aim to disqualify certain shareholder proposals that have become increasingly popular with shareholders and have been garnering broad support. Generally, shareholder proposals have the support of a significant portion of the shareholders, and this support has been rising. But certain shareholder proposals have become especially and unusually important to shareholders and they have been gaining more and more votes.

Figure 7B
Average voting support by topic



Source: ISS Analytics.

Source: Release at 66484.

The Release includes the above figure, which shows that while shareholder proposals relating to governance matters has had steady support hovering between 35-37%, the "average voting support for environmental proposals has increased from a low of 11.8% in 2004 to a high of 28.9% in 2018," and shareholder proposals relating to social matters have increased their support "from a low of 9.3% in 2005 to a high of 24.6% in 2018."[20] The Economic Analysis of the Release further discusses that "for those proposals for which voting support increased, the average increase in voting support is approximately 6%."[21] Given this average year-to-year increase in voting support and the new resubmission thresholds noticed in the Release—which from year 1 through year 3 require an increase of 10% every year to be eligible for resubmission—we would expect, depending on the support a proposal receives in its premiering year, that shareholder proposals relating to governance, environmental, or social matters would be disqualified after the second or third year of submission under the Release, since their average

20 *See* Release at 66483.
21 *See* Release at 66493.

increase of 6% of the shareholder vote would be less than the 10% increase that would be required under the Release.

In his dissent over the Release, Commissioner Rob Jackson discussed how the Release would disqualify shareholder proposals that deal with key corporate governance and accountability measures. Based on an analysis his office conducted, Commissioner Jackson concluded that were the resubmission thresholds noticed in the Release applied to recent proposals on executive compensation disclosures, eight out of nine proposals would have been disqualified.[22] His office further analyzed other shareholder proposals that permit large shareholders to place their own candidates to be considered for a board seat. Commissioner Jackson's office concluded that the Release would have removed 40% of these kinds of shareholder proposals after three ballots.[23]

Instead of carefully analyzing the usefulness of shareholder proposals and prescribing precise measures, the majority of this Commission seems to be pursuing an ideologically-driven and regressive social policy. There is now ample evidence that many shareholders—particularly the newer generation of shareholders—care deeply about ESG issues. Taking away their corporate engagement rights just as they are becoming adept in exercising them (and more effective in persuading fellow shareholders) constitutes regressive, anti-shareholder policymaking by the Commission.

The Release Ignores the Benefits That Shareholder Proposals Offer to Shareholders, the Companies They Co-own, the Companies' Employees, and the Society in Which the Shareholders Live.

The Release inexplicably and unjustifiably punts on the critical question of whether shareholder proposals are valuable or not. Disappointingly, the lengthy Economic Analysis section—prepared by a Division within the agency that employs an army of PhD economists and public policy experts with access to an unmatched amount and quality of data—simply says, "Our economic analysis does not speak to whether any particular shareholder proposal or type of proposals are value enhancing, whether the proposed amendments would exclude value-enhancing proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value enhancing."[24] It also fails to explain why the Commission decided not to engage in this critical analysis.

Not only is the Commission derelict in its duty to conduct a proper economic analysis, but it also refuses to fairly present, discuss, and assess analysis done by others. In one jarring example, the Release cites two peer-reviewed academic papers (without discussing or assessing the papers) for the proposition that shareholder proposals could be "value enhancing" but it then makes a claim that these proposals could also ***not*** be value-enhancing, if these proposals serve the interest of a minority of shareholders. And as support for this latter claim, the Release cites a letter from an

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[22] *See* Commissioner Rob Jackson Statement on Proposal to Restrict Shareholder Voting (November 5, 2019), *available* at https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting ("Commissioner Jackson Statement").

[23] *See* Commissioner Jackson Statement, p.2.

[24] *See* Release at 66497.

industry lobby group.[25] As a final insult, a look at that industry lobby group's letter reveals no discussion about how shareholder proposals necessarily fail to enhance value even if the proponents are from a minority of the shareholder base.[26]

The Literature on the Benefits of Shareholder Proposals Tell a Clear Story: Shareholder Proposals Are Valuable and Often Critical for the Interests of Long-Term Shareholders.

Even though shareholder proposals offered through the mechanism of Rule 14a-8 are precatory—that is, they are non-binding advice that management is not required to implement—they serve critically important functions in guiding the policies and practices of public companies. There is ample evidence of the value offered by shareholder proposals, yet that evidence is almost completely ignored in the Release.

Even when shareholder proposals do not garner majority votes, they "facilitate 'closer scrutiny of important substantive issues' such as takeover defense and executive compensation."[27] Shareholder proposals improve corporate governance, which has been linked to an increasingly positive impact on shareholder value.[28] Shareholder proposals benefit company managers by providing a cost-effective tool that allows them to gauge issues important to shareholders.[29] Enabling shareholder engagement "increases the likelihood that shareholders will view management and their policies favorably, it also reduces the ability of other shareholders and even proxy advisory firms to influence the actions of their existing shareholder base. In other words, effective shareholder engagement can translate into shareholder support in times of turmoil."[30]

The current minimum holding requirements and resubmission thresholds enable retail shareholders to engage with the management and gain access to the directors of the company they co-own, while at the same time providing adequate protections against frivolous or fringe proposals that may tend to divert corporate resources in unproductive ways. A benefit of this is that shareholder proposals brought forward by small holders usually call attention to issues that need attention and can serve a *canary in the coal mine* function. The communication-benefits created by shareholder proposals are not just between shareholders and company managers, they also help shareholders communicate amongst themselves.

The shareholder proposal and voting process offers "the value of an unambiguous signal from a vote on a specific proposal (as opposed to, for example, registering concern by withholding

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25 *See* Release at 66494.

26 *See* Business Roundtable comment letter in response to SEC's Proxy Process Roundtable (November 9, 2018), *available* at https://www.sec.gov/comments/4-725/4725-4635930-176425.pdf.

27 *See* Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals (2020), *available* at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-advisors-shareholder-proposals.pdf, ("IAC Recommendations"), p.16.

28 *See* Vicente Cunat, Mireia Gine & Maria Guadalupe, *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value,* NBER, (2012), *available* at https://www.nber.org/papers/w16574.pdf

29 *See* USSIF, *The Business Case for the Current SEC Shareholder Proposal Process,* (2017), *available* at https://www.ussif.org/files/Public_Policy/Comment_Letters/Business%20Case%20for%2014a-8.pdf

30 *See* Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?* ILLINOIS LAW REVIEW (2013), *available* at https://www.illinoislawreview.org/wp-content/ilr-content/articles/2013/3/Fairfax.pdf.

support from a director) has an important value not currently considered in the SEC's rule proposal or the accompanying economic analysis."[31] Shareholder proposals give perspective on how shareholder opinions evolve over time. The increased number of shareholder ESG proposals that have in many cases garnered majority support from shareholders are obvious evidence that shareholders' opinions and expectations change, especially as younger generations become shareholders.[32]

And majority support is not necessary for a shareholder proposal to influence or even gain support from a company's board. A shareholder proposal that might remain relatively stagnant for a few years could still be just as influential as a proposal that has reached majority support. Shareholder proposals can introduce new ideas that the company might implement even without a majority vote.[33]

Shareholder proposals are also an efficient tool for risk management because, "they can provide an early warning of risks a company may not be aware of…"[34] In short, the current shareholder rule encourages a beneficial relationship between the company and a wide range of shareholders, not just the largest ones.[35] Yet the Release aims to constrain this relationship, to the detriment of issuers.

The Release Amounts to a Policy of Collective Punishment: Using as an Excuse the So-Called Gadfly Shareholders That File a Disproportionately Large Number of Proposals, the Commission Would Punish and Disenfranchise the Corporate Rights of **Millions of Shareholders.**

A theme throughout the Release is that the current Rule 14a-8 is being misused as shareholders with supposedly insufficient economic interest in a public company are able to "shift to the company, and ultimately other shareholders, the cost of soliciting proxy for their proposals."[36] The Release further suggests that these proposals are misused by proponents "to promote a personal interest or publicize a general cause."[37] In another instance, the Release cites, and seems to rely upon, an academic study that "shows that five individual proponents submitted 78% of all proposals submitted by individuals and 27% of all proposals submitted by all proponents."[38]

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31 *See* IAC Recommendations, p.16.

32 *See* J. Robert Brown, JR., *Corporate Governance, Shareholder Proposals, And Engagement Between Managers and Owners,* DENVER LAW REVIEW, (2017), *available* at https://www.denverlawreview.org/dlr-online-article/2017/5/23/corporate-governance-shareholder-proposals-and-engagement-be.html, ("J. Brown"). p. 302.

33 *See* J. Brown. p. 314.

34 *See* Adam M. Kanzer, "The Dangerous "Promise of Market Reform": No Shareholder Proposals," HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (2017), *available* at https://corpgov.law.harvard.edu/2017/06/15/the-dangerous-promise-of-market-reform-no-shareholder-proposals/, ("Adam Kanzer").

35 *See*, generally, Adam Kanzer.

36 *See* Release at 66462.

37 *See* Release at 66463.

38 *See* Release at 66483.

But instead of crafting a rule that would address these co-called "gadfly" shareholders, the Commission is engaging in collective punishment by weakening the ability of millions of shareholders who may want to engage with the management of the companies they co-own. Commissioner Jackson in his dissent over the Release discussed his concerns about this misguided approach; he cautioned that the Commission should be careful to not take away the rights of the vast majority of shareholders who do not misuse Rule 14a-8 mechanisms. His office showed that shareholder proposals offered by the top ten "gadfly" shareholders are associated with long-term negative returns for the company and suggested that the Commission's rules should be targeted at these types of proposals. [39]

The Release Was Based Upon and Promoted Through a Demonstrably Fraudulent Public Engagement and Comment Process.

As we detailed in a separate letter to the Commission, the Release was crafted and promoted based on a demonstrably fraudulent public engagement process.[40] On November 15, 2018, the SEC held a roundtable in Washington, D.C. focusing on "the current proxy voting mechanics and technology, the shareholder proposal process, and the role of proxy advisory firms."[41] The SEC solicited public comments on those topics and received over 18,000 submissions following announcement of the roundtable.[42] In August of this year, the SEC issued two forms of guidance relating to the proxy process.[43] And on November 5, 2019, the SEC noticed this Release.

At the open meeting on November 5, 2019, Chairman Clayton issued a statement in support of the regulatory proposals, including this Release.[44] In that statement, he singled out as particularly influential seven specific comment letters, purportedly filed by everyday citizens after the roundtable. Those letters all expressed strong support for new measures, including the Release. In Chairman Clayton's words,

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39 *See* Commissioner Jackson Statement, p.3.

40 *See* Better Markets Letter to Chairman Jay Clayton re *The SEC Must Investigate Allegations That Dozens of Fraudulent or Misleading Comment Letters Were Submitted to And Relied Upon By The SEC in Connection With Two Recent Rule Proposals on The Proxy Process* (December 9, 2019), *available* at https://bettermarkets.com/sites/default/files/Fraudulent_comment_letters_-_Letter_to_SEC_12-9-19.pdf (incorporated by reference herein as if fully set forth herein).

41 Securities and Exchange Commission, Spotlight on the Proxy Process (Nov. 15, 2018), *available* at https://www.sec.gov/proxy-roundtable-2018; *see also* Securities and Exchange Commission, Statement Announcing SEC Staff Roundtable on the Proxy Process (July 30, 2018), *available* at https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process

42 Securities and Exchange Commission, Comments on Statement Announcing SEC Staff Roundtable on the Proxy Process, *available at* https://www.sec.gov/comments/4-725/4-725.htm

43 Securities and Exchange Commission, "Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice," Release No. 34-86721 (Aug. 21, 2019), *available at* https://www.sec.gov/rules/interp/2019/34-86721.pdf; Securities and Exchange Commission, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release Nos. IA-5325; IC-33605 (Aug. 21, 2019), *available at* https://www.sec.gov/rules/interp/2019/ia-5325.pdf.

44 *See* Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System (Nov. 5, 2019), *available* at https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting ("Clayton Statement").

> "Some of the letters that struck me the most came from long-term Main Street investors, including an army veteran and a Marine veteran, a police officer, a retired teacher, a public servant, a single mom, a couple of retirees who saved for retirement, all of whom expressed concern about the current proxy process. **A common theme in their letters was the concern that their financial investments—including their retirement funds—were being steered by third parties to promote individual agendas**, rather than to further their primary goals of being able to have enough money to lessen the fear of "running out" in retirement or to leave money to their children and grandchildren."[45]

The clear intent of those comment letters and of Chairman Clayton's public reference to them was to convey the impression that the regulatory proposals were strongly supported by everyday investors, not only by large corporate interests, their boards, and their trade association allies.

However, on November 19, 2019, just two weeks following Chairman Clayton's statements and the Commission's vote to release the regulatory proposals, a Bloomberg article appeared that cast grave doubts on the authenticity of dozens of comment letters submitted to the SEC, including the seven comment letters highlighted by Chairman Clayton.[46] The article included the appalling revelation that those seven letters, along with at least 19 additional letters in the comment file, were either fraudulent or materially misleading with respect to the identities of the signers. According to the article, several people denied ever signing the letters that bore their names; several people were prevailed upon to sign their letters without any understanding of the issues they were supposedly addressing; and numerous signers were people with close connections to an advocacy group known as "60 Plus Association" ("60 Plus"), which is funded by corporate supporters of the regulatory proposals. As further reported in the article, those signers included former employees of 60 Plus; a contractor for the group; and friends and relatives of the President of the organization—none of whom disclosed their connection to 60 Plus in their letters.

The alleged conduct may have violated the criminal code, including 18 U.S.C. § 1001(a) (prohibiting materially false statements to the federal government) and 18 U.S.C. §§ 1341 and 1343 (prohibiting the use of the mails or wires in any "scheme or artifice to defraud"). For example, a person violates the mail and wire fraud provision if, with specific intent to defraud, he or she uses the mail or interstate wire communications in furtherance of a scheme to defraud.[47] Forging the names of ostensibly sympathetic retail investors, such as a retired teacher and a single mom, to letters that in fact reflect the industry's desired policy goals, for the purpose of generating a false impression of popular support for corporate-friendly policies, betrays a clear intent to

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45 *See* Clayton Statement (emphasis added).

46 Zachary Mider & Ben Elgin, "SEC Chairman Cites Fishy Letters in Support of Policy Change", BLOOMBERG, *available at* https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change.

47 *United States v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003); *see also United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996) ("To prove mail and wire fraud, the government must prove, beyond a reasonable doubt: (1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme.").

defraud. Moreover, it is obvious in light of Chairman Clayton's statements, discussed above, that if the letters were forged or misrepresented as alleged, this deception involved ***material*** false statements, i.e. false statements that are "capable of influencing the decision of the decision-making body to which [they] are addressed."[48] In fact, the Department of Justice has opened criminal investigations in similar situations where groups have engaged in fraud by submitting forged comment letters urging regulators to take particular actions.[49]

These defects in the rulemaking process are unacceptable. They have contaminated the Release and they must be addressed through a thorough investigation and a series of remedial measures, including, without limitation, a reassessment of the Release without reliance on the fraudulent or misleading comment letters described above. It would be impermissible for the Commission to attempt to finalize the Release on the current record.

The Release Cites and Relies Upon Unsubstantiated Costs Relating to Shareholder Proposal Process.

The central theme of the Release is that shareholder proposals impose a huge cost upon other shareholders (of the same company) who either have no interest in the proposal or affirmatively oppose it. The Release—in multiple instances—laments the Commission's lack of recent data about the actual costs related specifically to shareholder proposals (as opposed to the total costs associated with producing and mailing all proxy materials).[50]

But instead of conducting a new survey or commissioning an independent survey to understand in detail the costs related specifically to shareholder proposals (and how, for example, those costs vary according to the size of company, or how those costs compare to other educational or promotional materials the management produces and mails periodically to shareholders, etc.), the Commission inexplicably decides to rely upon the highest cost estimate offered to the Commission by one commenter (out of the tens of thousands who filed comments in response to the Proxy Process Roundtable). This commenter estimated that it costs on average $150,000 for companies to deal with one shareholder proposal (per submission).[51] Based on this comment letter and estimate, the Commission—in multiple instances throughout the Release—estimates that the Release would help all Russell 3000 companies save in aggregate $70.6 million a year (as they will be able to disqualify over 50% of all shareholder proposals).[52]

Upon scrutiny, it appears that this estimate is unsubstantiated. The commenter's letter cites a House Financial Services Committee report that accompanied a bill (which did not pass the House) that required the SEC to change resubmission thresholds through measures similar to those

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48 *Neder v. United States*, 527 U.S. 1, 16 (1999).

49 Kevin Collier & Jeremy Singer-Vine, *Millions Of Comments About The FCC's Net Neutrality Rules Were Fake. Now The Feds Are Investigating*, BUZZFEED NEWS (Dec. 8, 2018), *available at* https://www.buzzfeednews.com/article/kevincollier/feds-investigation-net-neutrality-comments.

50 *See, e.g.*, Release at 66496 where the Release discusses that the most recent dataset on costs comes from a 1996 SEC questionnaire.

51 *See* American Securities Association Comment Letter re File No. 4-725 *Reforms to the U.S. Proxy System* (June 7, 2019), *available* at https://www.sec.gov/comments/4-725/4725-5646621-185668.pdf.

52 *See, e.g.*, Release at 66502.

in the Release.[53] That House Report includes the $150,000 number but offers absolutely no substantiation, such as witness testimony or written statements, trade group surveys, academic studies, or even anecdotal evidence. This number seems to be simply made-up. We further examined a House Financial Services Committee hearing in which this very bill was discussed, and the only mention of $150,000 comes from a witness who discusses costs related to Sarbanes-Oxley related audits, not shareholder proposals.[54]

In fact, several other cost estimates known to the Commission seem to average about 1/3 of the number that the Commission chose to rely upon.[55] The Commission should either abandon any attempt to estimate the "savings" offered by the Release or conduct a thorough and credible analysis. The current state of the record on this issue is unacceptable.

Instead of Enacting Policies That Would Obviously Harm Main Street Investors, the Commission Should Empower and Enable More Robust Shareholder Engagement.

As demonstrated above, the Release suffers from multiple material defects and should be withdrawn and fundamentally reconsidered. But it is not enough for the Commission to withdraw a toxic Release; it can and should go further and actively pursue a number of reforms in the proxy process that will better equip shareholders to play an appropriately robust role in the governance of public companies. Two examples stand out as worthy of the Commission's immediate attention:

- The Commission Must Approve Its Universal Proxy Rule: Today, the choices available to shareholders voting for duly nominated directors through the proxy process are not the same as those available to shareholders who attend shareholder meetings in person. Shareholders voting by proxy are effectively required to choose either the company's nominees or those submitted by the dissidents, but not a mixture of both slates. In late 2016, the Commission proposed a sensible rule to solve this problem by requiring both the company and the dissident shareholders to use a Universal Proxy listing all duly nominated candidates (with no regard to the nominating party). This change will afford those voting through the proxy process the same selection as that available to shareholders attending the shareholder meetings in person.[56] The Commission should expeditiously approve this pro-shareholder proposal.

- The Commission Should Further Empower Shareholders to Engage: The Commission should allow a longer word count for shareholder proposals. The current limit of 500 may

53 *See* H. Report 115-904, *available* at https://republicans-financialservices.house.gov/uploadedfiles/crpt-115hrpt904.pdf.

54 *See* Subcommittee on Capital Markets, Securities, and Investment of the House Financial Services Committee hearing on "Legislative Proposal to Help Fuel Capital And Growth on Main Street," (May 23, 2018, *available* at https://www.govinfo.gov/content/pkg/CHRG-115hhrg31459/pdf/CHRG-115hhrg31459.pdf.

55 The Release notes various estimates but does not use them to calculate the "savings." For example, the Commission notes that another commenter from Society for Corporate Governance (the very people who deal with shareholder proposals) estimated that it costs on average $50,000 per shareholder proposal, *see* Release at 66496 n.230.

56 *See* Better Markets Comment Letter re Universal Proxy (January 9, 2017), *available* at https://www.sec.gov/comments/s7-24-16/s72416-1470144-130398.pdf (incorporated by reference herein as if fully set forth herein).

limit shareholders' ability to fully describe their proposals, including defining technical terms and providing examples. That in turn limits the ability of shareholders to persuade other shareholders, needlessly reducing support for otherwise worthy proposals. The Commission should level the playing field, as currently, the management of the company is not under any word-count limit in their rebuttal or opposition letters. The Commission should also allow shareholders to include hyper-links and images in their proposals. Allowing the use of hyper-links would permit shareholders to include appendices that could define terms and offer supporting data while saving space and word count. The inclusion of appropriate and relevant images would permit shareholders to more effectively communicate with other shareholders.

Conclusion

We hope the Commission finds our comments helpful. The Commission must withdraw this patently anti-shareholder Release and instead focus on protecting and empowering today's shareholders so they can more effectively engage with the companies they co-own.

Sincerely,

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