Council of Institutional Investors®
The voice of corporate governance

Via Email

January 30, 2020

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

Re: ***File No. S7–23–19***

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to proposed amendments to Rule 14a-8 (the "Rule") in Release No. 34–87458, *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8* (the "Release").[1]

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $35 trillion in assets under management.[2]

CII opposes the Release, which seeks to reduce shareowner rights. Shareowner proposals, which almost always are nonbinding, are an essential tool for expressing the collective voice of a company's shareowners on particular matters, and have made important contributions to corporate governance over the last 50 years.

We believe the current Rule works well and believe the SEC has not made the case for the changes proposed in the Release. The number of shareholder proposals filed annually has been in decline since 2015, and on average, a company receives only one proposal every seven years.

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[1] SEC, Release No. 34–87458, *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8* and published at 84 Fed. Reg. 66458 (Dec. 4, 2019) https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24476.pdf.

[2] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org. In this letter, the terms "shareowner," "shareholder" and "stockholder" are used interchangeably.

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Average voting support for proposals has increased. That reflects well on the Rule and indicates that shareholder proposals are not a growing burden on public companies.

The SEC's proposal appears to have the potential to have a significant impact in reducing the number of shareholder proposals. The SEC estimates that revision of ownership requirements will reduce the number of proposals by 0% to 56%, in addition to a more than 9% reduction of proposals due to other elements of the proposal.[3] While we believe the SEC's analysis is deeply flawed, the potential for a reduction of shareholder proposals by up to about two-thirds suggests the proposal could have far-reaching effects.

The SEC's proposed increase in votes required for shareowners to raise the same subject in the future puts the cart before the horse; the SEC should fix proxy plumbing that delivers unreliable vote counts before experimenting with new, higher vote requirements.

We also view the SEC's various proposals to intervene in the shareholder/management engagement process as unnecessary, unfair micromanagement. These include limits on the use of representatives by shareholders, and burdens on shareholder proponents to provide their calendars to company managements, with no requirement that management engage with proponents.

This letter presents general comments on the Release (page 3), analysis of specific elements of the SEC proposed amendments (page 10), review of the SEC's analysis of costs and benefits of the proposed amendments (page 24) and responses to the specific questions the SEC poses in the Release (page 31). The latter frequently refer back to the earlier discussion, and we request the SEC to incorporate our full response in consideration of question responses.

We sought to provide as much response to the SEC's questions as we could within the limited time provided for comments on the Release and the SEC's proposal to regulate proxy advisory firms and require them to provide subject company management with the right to pre-review reports, analysis and recommendations. (Both proposals were announced the same day and have the same limited comment period.) We believe the two proposals together (1) are the most significant SEC attempt to limit shareholder rights since the Commission was created; (2) are fundamentally flawed and should be withdrawn so that the SEC can re-think key elements of the proposals and also spend time on credible cost-benefit analysis, should the Commission decide to re-propose changes; and (3) introduce substantial new complexity and micromanagement to proxy voting, while not addressing the major problems in the system. The SEC poses a total of 345 questions in the two releases. We and 90 investors and investor organizations requested longer comment periods, but never received any response to these requests from the SEC.[4] Therefore, we submit these comments now in anticipation of the February 3 comment deadline. We would note that SEC staff has told us they would welcome comments after February 3 but were equivocal about when might be too late; we may offer further comment at a later date.

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[3] Release at 66,510.

[4] Letter from CII and 74 investors and investor organizations, Nov. 15, 2019, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/11_15_19_SEC_request_for_comment_period_extension_final.pdf; and letter from CII and 16 additional investors and investor organizations, Nov. 22, 2019, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/11_22_19_SEC_request_for_comment_period_extension_final.pdf.

General Comments

CII members believe that effective corporate governance and disclosure serve the best long-term interests of companies, shareowners and other stakeholders. Effective corporate governance helps companies achieve strategic goals and manage risks by ensuring that shareowners can hold directors to account as their representatives, and in turn, directors can hold management to account, with each of these constituents contributing to balancing the interests of the company's varied stakeholders.

Council members use a variety of stewardship tools to improve corporate governance and disclosure at the companies they own. These tools include casting well-informed proxy votes; engaging in dialogue with portfolio companies (including with board members, as appropriate), external managers and policymakers; filing shareowner resolutions; nominating board candidates; litigating meritorious claims; and retaining or dismissing third parties charged with assisting in carrying out these activities.

Before responding to the specific elements of the proposed amendments, the Council would like to make several overarching points. Most generally for this proposal, which in every section seeks to curb shareholder rights, we would agree with this comment from Charles Elson, director of the John L. Weinberg Center for Corporate Governance at the University of Delaware:

> If you try to attempt to limit [shareholder resolutions], in one way or another, inadvertently you may remove from consideration a resolution that has greater core significance to the company. A rule that is less restrictive is probably the better rule.[5]

The Commission Has Put the Cart Before the Horse

At the November 2018 roundtable on the proxy process, there was a striking unanimity among participants that the most pressing reforms that are needed lie in the area of "proxy plumbing," that is, the nuts and bolts about the ways that proxies are solicited and votes are counted. The issue has been on the table since even before the Commission issued its Concept Release on the topic in 2010,[6] yet we have seen little progress since then.

CII has repeatedly requested the Commission to give priority to addressing proxy plumbing.[7] In September 2019 the Commission's Investor Advisory Committee (IAC) published a report that

[5] CNN Business, Corporate America is Quietly Working to Suppress the Voices of Small Investors, Nov. 8, 2019 https://www.cnn.com/2019/11/08/investing/shareholder-rights-proxy-proposals/index.html.

[6] SEC, *Concept Release on the U.S. Proxy System*, Rel. 34-62495; IA-3052; IC-29340; File No. S7-14-10 (2010), available at https://www.sec.gov/rules/concept/2010/34-62495.pdf. We also would suggest that the SEC should prioritize completing another project from 2010 – corporate governance rules mandated by Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[7] See, *e.g.*, Letter from Kenneth A. Bertsch and Jeffrey P. Mahoney (Jan. 31, 2019) at https://www.cii.org/files/20190131%20CII%20Follow%20Up%20Letter%20to%20SEC%20on%20Proxy%20Mechanics%20FINAL.pdf ("the SEC should focus its efforts fundamentally on proxy system mechanics, rather than on policy issues related to shareholder proposals and proxy advisors"); and Letter from Kenneth A. Bertsch and Jeffrey P. Mahoney (Nov. 8, 2018) at https://www.cii.org/files/20181108%20CII%20Letter%20for%20SEC%20Proxy%20Roundtable.pdf ("proxy voting infrastructure is, without question, the most important topic under consideration at this Roundtable. In our view, the

made a series of recommendations about how the proxy solicitation process can be more accurate and transparent.[8] Although there may be disagreements over some details, the need for action on this front is greater than it was 10 years ago.[9]

SEC should both (1) consider fundamental longer-term improvement in proxy infrastructure, and (2) provide certain key short-term fixes in the current system.").

[8] *Recommendation of the Investor Advisory Committee: Proxy Plumbing* (IAC Report, September 5, 2019), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf The key recommendations included:

- Requiring end-to-end vote confirmations to end-users of the proxy system, potentially commencing with a pilot involving the largest companies;
- Requiring all parties involved in the system to cooperate in reconciling vote-related information, on a regular schedule, including outside specific votes, to provide a basis for continuously uncovering and remediating flaws in the basic "plumbing" of the system;
- Conducting studies on (a) investor views on anonymity and (b) share lending; and
- Adopting the proposed "universal proxy" rule, with modest changes to address objections raised to that proposal.

[9] For example, the IAC Report cites (at p. 3) a notable example from a 2016 buyout involving Dell, Inc., where T. Rowe Price's significant shares were voted "yes" instead of "no." None of the parties involved in voting the shares (Dell, State Street, DTC, or ISS) could confirm how those shares were voted. It was only because the matter arose in litigation that the erroneous vote was discovered. The bottom-line results included $194 million that T. Rowe Price reimbursed its clients, as well as a higher "yes" vote for a controversial transaction.

Problems in the current system are well described by:

- Delaware Vice Chancellor J. Travis Laster, "The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote," speech to CII, Sept. 29, 2016, https://www.cii.org/files/09_29_16_laster_remarks.pdf ("the current system works poorly and harms shareholders;" "the voting and stockholder infrastructure is complicated. The costs of that complexity fall on stockholders. One type of cost is uncertainty as to voting outcomes, which management uses to its advantage.")
- David Yermack, "Corporate Governance and Blockchains," Review of Finance, 2017, 7-31, https://academic.oup.com/rof/article/21/1/7/2888422 ("the archaic corporate proxy voting system…has endured for hundreds of years with surprisingly few concessions to modern technology"; "the imprecision of vote tabulation under currently used procedures implies a high degree of inaccuracy in the outcome of close corporate elections.")
- George S. Geis, "Traceable Shares and Corporate Law," Northwestern University Law Review, Vol 113, No. 2, 2018, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1354&context=nulr ("the underlying problems are systemic, not episodic. Our stock clearing system is a kludge;" "[T]he financial services industry seems to have cobbled together a functioning settlement and clearing system that is a stark improvement over paper-based trading. But corporate law has paid a price from the resulting complexity. The mechanisms for managing and tallying shareholder votes encompass layers of intermediaries that do not inspire confidence in accurate outcomes.")
- Marcel Kahan and Edward Rock, "The Hanging Chads of Corporate Voting," The Georgetown Law Journal, Vol. 96, 2008, at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1163&context=faculty_scholarship (the "incredibly complicated system of U.S. corporate voting" is "noisy, imprecise, and disturbingly opaque," "far more complex and fragile than the one anticipated by the Delaware legal structure," and "an accident waiting to happen"; "no one designing a system today from the ground up would (or, in fact, does) adopt this structure.")

A potentially related aspect relevant for the SEC to consider is evidence that a very high proportion of close votes are in favor of management. See Bach, Laurent and Metzger, Daniel, How Close Are Close Shareholder Votes? (August 1, 2018), Swedish House of Finance Research Paper No. 17-3, at https://ssrn.com/abstract=2880523 ("close votes on shareholder proposals are disproportionately more likely to be won by management than by shareholder activists. Using a sample of shareholder proposals from 2003 to 2016, we uncover a large and discontinuous drop in the density of voting results at the 50% threshold. We document similar patterns for say on pay votes and director elections. Our findings imply that shareholder influence through voting is limited by managerial opposition." Also "we estimate that approximately 11% of the proposals were rejected by a margin of less than 10% of the votes because management and their allies could alter the voting results.")

This is not just a question of misplaced priorities and lack of focus on investor protection. Proxy plumbing specifically should be fixed before raising shareholder proposal "resubmission" levels, a key element of the SEC Release proposal.[10] Prominent Delaware attorney Gil Sparks famously said that in a contest closer than 55% to 45% "there is no verifiable answer to the question 'who won?'"[11] We believe the margin of error in vote counts today (more than 10 years later) may be less than this when approval of a proposal is at stake, usually at 50% plus one vote, because of special efforts made by intermediaries to fix various anomalies that arise in the proxy voting process. We understand, however, that intermediaries generally do not make special efforts just because eligibility to resubmit shareholder proposals hang in the balance. However, as these thresholds currently are relatively low, the harm is limited. In proposing to raise the resubmission thresholds to 15% the second year a subject matter is considered, and 25% the third year, the issue becomes more serious. More proposals are likely to run up against the higher resubmission thresholds, and with future proposals on the same subject blocked from consideration, in some cases due to erroneous vote counts.[12]

The "Momentum Requirement" proposed in the Release makes it even worse. Under that proposed rule, which we discuss in more detail below, a 10% decline in voting support from a proposal on a particular subject (for example, from 40% to 36%) under some circumstances would be grounds to exclude a proposal on the same subject matter the next time it is proposed. The SEC should discuss whether voting intermediaries will make special efforts to deliver an accurate vote count at, say, a 36.0% threshold.

As part of the SEC's decision on whether to move forward with increased "resubmission" thresholds and the Momentum Requirement, we request the Commission to (1) evaluate the potential interaction of deficiencies in the accuracy of the U.S. proxy voting system with raising the thresholds; (2) research and explain whether companies have sufficient basis to determine that vote counts they are required to report in Form 8-Ks are accurate; and (3) explain whether, and if so how, the Commission will use its authority to require accurate vote counts. As part of this explanation, we request the SEC to describe what specific steps the Commission is taking and will take going forward to require companies to deliver accurate vote counts, specifically including at "resubmission" thresholds and at the critical percentage thresholds for particular proposals under the Momentum Requirement.

Shareholder Proposals Provide an Effective Mechanism for Shareholder Communication

How does a company's board and management learn what its shareholders think about a given issue? To be sure, a company may have an Investor Relations department that stays in close touch with a company's largest shareholders and that may field questions or comments from shareholders. In addition, and apart from earnings calls and similar outreach, individual directors from some companies now engage with shareholders on specific topics of concern, and a recent

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[10] As discussed below, the word "resubmission" is misleading, as the word implies that it references submitting the same proposal again, while the restriction under the current rule is on a proposal that "addresses substantially the same subject matter" as a previous proposal.

[11] *Id.*at 1279.

[12] An example is the proposal at ExxonMobil's 2019 meeting regarding risks to the company's Gulf Coast petrochemical facilities garnered support from 24.991% of the shares voted either "yes" or "no." See Form 8-K (May 29, 2019), available at https://www.sec.gov/Archives/edgar/data/34088/000003408819000025/r8k052919.htm.

Conference Board report indicates that some companies are experimenting with surveys to get a better sense of the views of retail shareholders.[13] It is also possible to get an impression of what shareholders think from the news media, and perhaps as well as from social media.

But none of these methods allows a company to accurately learn the views of its shareholders *as a whole*. Shareholder proposals provide a useful solution and a relief valve far short of a proxy fight. We understand that management of some companies expend resources in an attempt to keep the proxy statement under exclusive control of the board, and oppose including any and all shareholder proposals. It important to understand that part of the resistance by management may stem from the fact that many governance practices that proposals challenge serve to protect or entrench insiders, who have no incentive to make a change. Why, for example, would a company voluntarily end its poison pill unless there is strong support for such a measure, as reflected in shareholder votes? Or declassify its board of directors?

Because a shareholder proposal must address a specific topic, it can provide more information and nuance about what shareholders think than, say, a vote on whether a director should be re-elected or a say-on-pay vote. For example, in an annual meeting, the shareholders may vote to approve a performance-based equity plan, while at the same time supporting a shareholder proposal against accelerated vesting of unearned options. Such a result sends a message that shareholders may be generally satisfied with the company's executive compensation plan, but favor a specific revision. Such information cannot be gleaned from a vote to re-elect the chairman of the board's compensation committee or the say-on-pay vote (and the collective view certainly cannot be learned with any degree of accuracy from social media postings).

The value of shareholder proposals as a means of communication is not limited to shareholders talking to management. Proposals allow shareholders to speak to, inform and test the waters on an issue with their fellow shareholders. A company's proxy materials tell shareholders what the company wants them to know; a shareholder proposal alerts shareholders to an issue that their fellow shareholders think is important – and invites their input on the topic. It may be in the self-perceived interest of some managers or board members to totally control the flow of information to a company's shareholders, but such a result is not in the interest of shareholders as a whole. Keeping the lines of communication open is important in a marketplace that has substantial restrictions on communications between shareholders.

CII views the filing and voting of shareholder proposals to be an important way to promote effective corporate governance. Indeed, over the past three decades in particular, shareholder proposals have been the most important vehicle by which shareholders raised – and helped change – corporate policies on a wide range of core governance issues, including majority voting for and annual election of directors, independent board leadership, appropriate forms of compensation of outside directors, proxy access, board diversity, clawbacks of unearned executive compensation, appropriate accounting for stock options, fair employment practices and meaningful sustainability reporting, to name a few.

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[13] The Conference Board, *Board-Shareholder Engagement Practices: Findings from a Survey of SEC-Registered Companies* 5 (December 2019).

The Current Process is Working Well; The Release Is a Solution in Search of a Problem

Rule 14a-8 is working well. Some Washington lobbyists for management interests have vastly exaggerated the extent to which shareholder proposals are used. As institutional investors who actually vote proxies know, shareholder proposals make up less than 2% of voting items[14], and the vast majority of their time is spent on management proposals. Some commentators also seem to miss that nearly all proposals are non-binding – they are simply requests from shareholders for the board to consider some policy, practice or idea. The effort bynWashington corporate lobbyists to restrict the rule likely relates to the fact that shareholder proposals get much more support now than in decades past. We believe that rising support levels indicate the shareholder proposal rule is working.

Most public companies do not receive *any* shareholder proposals. On average, 13% of Russell 3000 companies received a shareholder proposal in a particular year between 2004 and 2017. In other words, the average Russell 3000 company can expect to receive a proposal once every 7.7 years. For companies that receive a proposal, the median number of proposals is one per year.[15]

In our view this is not evidence of a "problem" that needs to be solved and certainly not on a market-wide basis. In addition, the "problem" is hardly getting worse – quite the opposite, in fact. A 2019 report by Sullivan & Cromwell concluded:

> Overall, the total number of shareholder proposals significantly declined, continuing a downward trend from 2015. A total of 678 shareholder proposals have been submitted to-date in 2019, relative to 751 at this time last year, 788 for 2018 as a whole and 836 for 2017. The decline relative to this time last year is led by a 12.5% drop in environmental, social, and political ("ESP") proposals, closely followed by compensation-related proposals (11.9% drop), with governance-related proposals declining by a smaller proportion (6.2% drop). The overall decline would have been steeper but for the increase in proposals against investing or managing on the basis of ESP factors (so-called anti-ESP proposals).[16]

Moreover, the level of support for shareholder proposals remains strong. The Sullivan & Cromwell report breaks down the 2018 and 2019 level of support as follows:

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[14] See Proxy Insight "Resolution Tracker" database. Proxy Insight collected a total of 25,226 voting results from Russell 3000 annual and special meetings that took place in calendar 2019, of which 434 (1.72%) were shareholder proposals. See also Ning Chiu (Davis Polk), *How Funds View and Vote on Shareholder Proposals* (Nov. 12, 2018), available at https://www.briefinggovernance.com/2018/11/how-funds-view-and-vote-on-shareholder-proposals/.

[15] CII Letter to Senators Michael Crapo and Sherrod Brown (Dec. 4, 2018), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%205%202018%20Letter%20to%20Senate%20Banking.pdf.

[16] Sullivan & Cromwell, 2019 Proxy Season Review, Part I (July 13, 2019), at 1, available at https://www.sullcrom.com/2019-proxy-season-review-part-1-rule-14a-8-shareholder-proposals.

SUMMARY OF 2018-2019 SHAREHOLDER PROPOSALS[17]

	Shareholder Proposals Submitted		Shareholder Proposals Voted On		Average % of Votes Cast in Favor		Shareholder Proposals Passed	
Proposal Type	YTD 2019	2018	YTD 2019	2018	YTD 2019	2018	YTD 2019	2018
Environmental, social and political	323	387	146	139	28%	26%	9	8
Governance-related	303	335	195	234	37%	37%	41	31
Compensation-related	52	66	30	42	24%	23%	2	0
Total	678	788	471	415				

If the "problem" perceived by the Release – too many proposals from too many small shareholders – is, at most, isolated to only a handful of very large companies with resources to handle various issues raised by complex operations, why should the Commission change the Rule to affect the thousands of publicly traded companies that rarely, if ever, receive a shareholder proposal? The Release has no answer.

Lobbyists for corporate executives have suggested there is a particular problem with shareholder proposals that raise issues related to environmental and social impacts on company performance, and that this problem justifies limiting shareholder proposal rights in general (including corporate governance proposals). For example, the Business Roundtable – which advocates mainly for large company CEOs and arguably was the key lobbying group spurring the current efforts (now joined by the majority of the SEC) to reduce shareholder proposal rights[18] – says the shareholder proposal process needs "modernization" because the thresholds for resubmission of proposals are too low and because "excluding proposals relating to general social issues is difficult for companies."[19] It is true that all social policy proposals could be excluded before 1970, based on

[17] *Id.*

[18] See Modernizing the Shareholder Proposal Process, issued by the Business Roundtable (BRT) in October 2016. The BRT appears to have removed the report from its website, but a description can be found at https://www.briefinggovernance.com/2016/11/business-roundtable-urges-improvements-to-rule-14a-8-and-related-processes/, and the BRT paper is on file at CII. The BRT paper recommended raising ownership thresholds to very high levels based on percentage of shares owned, and would have, for example, required ownership of $1 billion or more of stock at the largest companies. Almost all shareholder proposals historically have been submitted by holders with much smaller positions, including the mid-century Greyhound proposals on segregation, and proposals that over the years have led to many corporate governance and disclosure improvements. Historically, other impediments have discouraged large shareholders from submitting shareholder proposals, including SEC 13D requirements and, arguably, antitrust rules.

[19] See unsigned letter from the Business Roundtable, Nov. 9, 2018, at https://www.sec.gov/comments/4-725/4725-4635930-176425.pdf. The letter expresses concerns that "top shareholder proponents are institutional investors with an express social, religious or policy purpose who may pursue idiosyncratic interests, which may have no rational relationship to the creation of long-term shareholder value and may conflict with typical investor views as material to making an investment or voting decision. In addition, spurred by court-driven changes in SEC policy beginning in the 1970s, companies have had to contend with a continuous influx of proposals focused on general societal issues. Currently, more environmental, social and policy-related shareholder proposals are submitted than any other type of proposal each year. These proposals typically have limited success and very seldom receive the majority support of shareholders." In a June 3, 2019, letter, BRT reinforced its complaints, criticizing presentation of proposals "as a form of social commentary or to advocate for a social aim, regardless of the proposal's financial impact on the company, its relevance to long-term shareholder value or the cost to other shareholders." The letter does not address

SEC precedents that permitted Greyhound Corp. to exclude shareholder proposals in the late 1940s and early 1950s urging the company to desegregate buses.[20] Those proposals to desegregate buses may have been viewed at the time as "idiosyncratic," with "no rational relationship to the creation of long-term shareholder value" and in "conflict with what a typical investor views as material to making an investment or voting decision," to use the Business Roundtable's words on recent social policy matters implicated in shareholder proposals.[21] However, in our view, those proposals were prescient, dealt with a socially important issue with long-term implications both for society and for shareholder value, and were material to how Greyhound operated.

If anything, these data suggest that companies are increasingly engaging in dialogue with proponents and are recognizing the value of folding ESG considerations into their daily operations. Some have referred to a shift in corporate attitudes as a "new paradigm." [22] This

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the facts that the proposals are non-binding and typically receive limited support from shareholders if they do not believe there is a connection to long-term shareholder value. In August 2019, the BRT reversed its earlier position that "the paramount duty of management and of boards of directors is to the corporation's stockholders," but to our knowledge it has not revised its view that proposals on social and environmental matters should be sharply restricted.

[20] See Kenneth Propp, The SEC as Referee: Managing the Shareholder Resolution Process, Investor Responsibility Research Center (September 1980), p. 4. Propp wrote:

> The lack of [SEC] guidance offered by the [14a-8] "proper subject" test became apparent in 1947 when the SEC was faced with a request by Greyhound Corp. to exclude a resolution asking it to abolish segregated seating on its buses….The SEC excluded the resolution, saying it had been submitted for racial reasons. Five years later, in 1952, 14a-8 was amended to exclude resolutions in which "it clearly appears that the proposal is submitted by the security holder…primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

SEC policy began to change in 1970 when the Court of Appeals for the District of Columbia in 1970 reversed the SEC on omission of a proposal to Dow Chemical asking it to stop manufacturing napalm. See *Medical Committee for Human Rights v. Securities and Exchange Commission*, U.S. Court of Appeals, DC Circuit, July 8, 1970, 432 F.2d 659, vacated as moot, 401 U.S. 971 (1971). The court stated:

> We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934.

The *Medical Committee* decision led the SEC to adopt a new round of changes in 1972, when, as Propp wrote, "the SEC turned its decision from one based on a proponent's motives to one based on relatively objective indications of the relation between the resolution and the corporation's business."

[21] BRT, unsigned letter, Nov. 9, 2018, *op. cit.*

[22] In a recent post on the Harvard Law School Forum on Corporate Governance, Martin Lipton, *Embracing the New Paradigm* (January 16, 2020), available at https://corpgov.law.harvard.edu/2020/01/16/embracing-the-new-paradigm/, Lipton (of the prominent law firm Wachtell Lipton) wrote:

> [C]ompanies and investors alike have been rethinking the ways in which they engage and have been providing robust and increasingly tailored disclosures about their approaches to strategy, purpose, and mission; board involvement, composition and practices; board oversight of strategy and risk management; the business case for long-term investments, reinvesting in the business and retraining employees, pursuing R&D and innovation, and other capital allocation priorities; sustainability, ESG and human capital matters; stakeholder and shareholder relations; corporate governance; corporate culture; and other matters that are integral to the new paradigm.

would not appear to be the time to turn off the spigot, as the Release would inevitably do – and is intended to do – for a number of proposals.

For these reasons, the Council views the proposals in the Release as bad policy that cannot be defended on the ostensible ground of cost savings. In the sections that follow, we address the specific elements of the Release and explain our reservations about them. We also provide answers to each of the 69 sets of questions that the Commission posed in the Release.

Analysis of Specific Elements of the Release

Eligibility: Greater Ownership Requirements

Instead of the current eligibility requirements – ownership of at least \$2,000 worth of stock for one year – the Release would introduce tiered ownership requirements, requiring ownership of at least \$25,000 worth of stock for one year, \$15,000 worth of stock for two years and \$2,000 worth of stock for three years.

The rationale for this change entailing increased complexity is that apart from the inflation since the \$2,000 figure was adopted in 1998, a "demonstrated long-term investment interest in a company may make it more likely that the shareholder's proposal will reflect a greater interest in the company and its shareholders, rather than an intention to use the company and the proxy process to promote a personal interest or publicize a general cause."[23]

There are several things wrong with this assertion.

- It assumes – with no empirical support cited – that short-term investors may only be interested in a "general cause," not shareholder value. No examples are cited.
- The quoted sentence candidly admits that the Commission is engaging in speculation, witness the concession that a long-term holding "may" evince a greater interest in the company.
- The higher limits will have the greatest impact on diversified "Main Street investors" with smaller portfolios who may be interested in submitting a proposal. A retail investor trying to maintain a diversified portfolio with no more than, say, 5% of their holdings invested in a given company would need a portfolio of \$500,000 in order to have a \$25,000 investment in one company.

As we begin the new decade, it is clear that corporate governance will play a profound role in shaping the outcome of many of the most pressing challenges we must face together. In this context, there has been an awakening to the idea that corporate governance is not just about the allocation of decision-making authority and accountability as between corporations and shareholders; instead, it is being reconceived in light of the broader purpose and role of corporations as engines of the economy, ladders of socioeconomic mobility, innovators of technological progress and key stakeholders in environmental sustainability. As this new paradigm of corporate governance continues to take root and shape the gestalt of the business world, corporations will be better positioned to create sustainable, long-term value and avoid heavy-handed legislative initiatives.

[23] Release at 66463.

Individual "Main Street" investors are not insignificant actors in this arena. The Release notes that 32% of the proposals that came to a vote between 2011 and 2018 were submitted by individuals, ranging from a low of 25% in 2011 to a high of 49% in 2018.[24] The Release would thus have a disproportionate negative impact on this important sector of the investment community.

There may be solid investment-related reasons for a shareholder to want to submit a proposal after owning a stock for only a year. For example, many "hot" stocks in recent years have been in the technology sector and have included insider-protection measures such as a dual-class stock structure, which is defended as a mechanism to allow the founders to pursue their vision during the company's formative years. Even more common among IPOs are provisions providing for staggered election of directors, supermajority voting requirements to change protective bylaws, and other mechanisms that can serve to entrench management. And some governing documents of companies at IPO have judicial selection and other clauses that are unusual and seen by many shareholders as threats to shareholder value and the interests of holders in the company and in equity in the market generally.[25] Shareholders also have questioned whether boards of some newly IPO'd companies are sufficiently independent, or have the diversity (including of perspective as well as gender and race) that they believe is important to produce long-term shareholder value. A shareholder may well share the vision of a founder and/or those in control of a company when it IPOs, but see some urgency to correct aspects of governance. Why should such a shareholder be barred from filing a proposal unless he or she owns $25,000?

Whether one agrees with the merits of these various shareholder proposals are not, the fact remains that the Rule as now written is an important vehicle for shareholder communications on issues that might otherwise be overlooked, and issues that enjoy strong shareholder support may be offered by investors with very small holdings.[26] Moreover, it is important to recall that the focus of the Release is on proposals that cannot be excluded under the substantive exemptions in Rule 14a-8(i) and thus, by definition, are salient to investors.

Finally, we note that for many of the 70-plus years that this Rule was on the books, there was *no* ownership requirement. A requirement that proponents own $1,000 of stock for one year was adopted in 1983 in response to a concern that individuals could submit a proposal after owning only one share for one day. The dollar amount was raised to $2,000 in 1998, but otherwise the Rule has operated on a basic and salutary principle that access to the proxy should be available to shareholders on a broad basis. As described with specifics in responses to Requests for Comment 5 through 8 (see pages 34-36), the Council would not object to a modest increase in the $2,000 threshold to account for inflation. Raising the eligibility requirements to the levels being proposed, however, would unnecessarily limit availability of the shareholder proposal mechanism to smaller investors with diversified portfolios. The Commission should economically justify any change in limits based on ownership, which it has not done in the proposal, notwithstanding that

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[24] *Id.* at 66460 n.161.
[25] See CII amicus brief to the Delaware Supreme Court in ***Salzberg v. Sciabacucchi***, regarding forum selection provisions, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/CII--Blue-Apron----2019-10-25---Del-amicus-brief.PDF.
[26] See Yaron Nili and Kobi Kastiel, The Giant Shadow of Corporate Gadflies, Univ. Of Wisconsin Legal Studies Research Paper No. 1523, Jan. 15, 2020, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520214.

the Commission's guidance on economic analysis provides that it should do so in a proposal release.

Eligibility Requirements: No Aggregation of Share Holdings

The Release would outlaw the aggregation of shares by individual shareholders to meet whatever any applicable ownership threshold, be it $2,000 or a higher figure as proposed in the Release. In addition, any co-filers must themselves satisfy applicable ownership thresholds.[27]

This is major change from a long-standing feature of the Rule, as the Release acknowledges. The Release asserts that aggregation "would undermine the goal of ensuring that every shareholder who wishes to use a company's proxy statement to advance a proposal has a sufficient economic stake or investment interest in the company."[28] We view this change as unwarranted and out of sync with securities regulation in other areas.

In a variety of securities law contexts, what is significant is the aggregate number of shares represented, regardless of whether those shares are individually or collectively owned, and regardless of whether those shares are expressed in dollar terms (as here) or as a percentage of a larger figure, as in the cited examples.[29] We see no reason for changing that approach here. When eligibility requirements were first introduced in 1983, the goal was to permit access to the proxy for proposals that are substantively worthy of consideration by shareholders as a whole. The 1983 and 1998 revisions did not change that philosophy.

The Commission historically has focused on substance rather than identity of the proponents, allowing proposals that raise issues that are significant enough to warrant consideration by shareholders as a whole (*i.e*., proposals that do not run afoul of any of the 13 exemptions in Rule

[27] An observation on co-filing: The Release correctly identifies as a "best practice" the designation of a "lead filer" who can negotiate with the company and who has authority to withdraw the proposal on behalf of all proponents; further, any co-filer should identify itself as such if for no other reason than to avoid having the latter proposal be excluded as duplicative under Rule 14a-8(i)(11). 84 Fed. Reg. at 66464. We agree with the Release that there is no need to propound any such requirement as part of the Rule, but the Commission could advise proponents of the value of this practice, perhaps in a comment to Rule 14a-8 or a Staff Legal Bulletin.
[28] Release at 66464.
[29] See, for example, the law on filings of Schedule 13D or 13G, the requirements of which are triggered by an ownership level of at least 5%, *regardless of whether those shares are held by one person or a "group" of shareholders.* Similarly, in adopting its "proxy access" rule, the Commission concluded that a shareholder or shareholders should own 3% of the voting power in order to have a board candidate included in the company-prepared proxy materials. *Facilitating Shareholder Director Nominations*, 75 Fed. Reg. 56668 (Sept. 16, 2010), *vacated on other grounds sub nom. Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). We are not suggesting, of course, that the right to submit shareholder proposals should be based on holding a certain percentage of total voting power. Section 13 filings, proxy access nominations and poison pills involve or potentially involve takeover bids or a contested director election, so using outstanding shares or voting power in the denominator is appropriate. In the context of shareholder proposals – which implicates access to the proxy in order to make non-binding recommendations to the board – low dollar thresholds now in the Rule are a more suitable benchmark, consistent with the goal of providing proxy access based on the merit of a proposal, not the identity of the proponent. Our point is simply that regardless of the context in which a certain ownership threshold may arise, what should matter is the level of ownership, not how many shareholders are counted in determining if a specific threshold has been met.

14a-8(i)). If a proposal raises such a substantive policy issue, it should not matter if it is being sponsored by one shareholder or more than one shareholder.

Moreover, we believe that the Commission is looking at this issue from the wrong perspective. If the concern (justified or not) is that too great a proportion of shareholder proposals are being filed by small investors, the Commission should at least explore disincentives for larger investors or institutions to use the shareholder proposal rule. The Release's various "solutions" all aim at narrowing shareholder rights. But if the goal is to improve the shareholder proposal mechanism (and not simply disempower some shareholders), the SEC should consider whether changes in policies are warranted to reduce disincentives on larger institutional holders from using the shareholder proposal mechanism. Would filing a proposal trigger new Schedule 13D or 13G filing obligations? Are there antitrust considerations that need to be addressed?[30] The Release is silent on this point.

Eligibility Requirements: Disclosures Regarding a Shareholder's Engagement Availability

The Release would impose a new and unprecedented requirement on all proponents, namely, that they must "provide the company with a written statement that you are able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. You must include contact information as well as business days and specific times that you are available to discuss the proposal with the company."[31] The express purpose of this requirement is to promote more shareholder engagement with the company. Engagement is certainly a desirable goal, and many Council members use shareholder proposals as a means of having such an engagement. However, we view the Release proposal as unwise micromanagement that, even taken on its own terms, is technically flawed. And we do not understand from the Release that the SEC has authority to impose such a requirement.

From a substantive standpoint, the Release gives no reason or evidence supporting the conclusion that this disclosure requirement would increase shareholder engagement beyond current levels, and the Commission cost estimates assume they will not be effective. The reason is simple: *There is no requirement that a company receiving such information must actually engage with the shareholder.* This, we believe, is the fatal flaw in this provision. In fact, some of the SEC's Requests for Comment on this proposal implicitly acknowledge that the greater problem is the reluctance of company management to engage, at least in some cases.

The SEC itself assumes for purposes of cost-benefit analysis that this provision will not produce significantly more engagement. The Commission says that this provision will increase "the average burden per response" by 2.4 minutes.[32] More specifically, the SEC says "the average amount of time to provide this information" on a given proposal is 20 minutes. The language seems to imply that the SEC is counting only the cost of providing a written statement with calendar times, and the Commission believes this will result in zero additional time on

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[30] *See, e.g.*, Vito Racanelli, *Do Institutional Investors Suppress Competition?*, Barron's (Sept. 17, 2018), available at https://www.barrons.com/articles/do-big-investors-push-the-antitrust-envelope-1537220418
[31] Release at 66514.
[32] Release at 66510, PRA Table 1.

engagement. Even if the Commission simply misstated what was covered by that "20 minutes" and meant to include the engagement itself as well as the statement and time scheduling a meeting, this implies something less than 10 minutes of engagement per proposal. ("Engagement" by definition has to involve at least two individuals – the proponent and some company representative – so at most the SEC concludes there will be a 10-minute engagement minus time spent on the statement and scheduling.) "Less than 10 minutes" can be more than zero minutes, but not a whole lot more.

Council members and other shareholders sometimes file shareholder proposals that are intended to start a dialogue with company management. Sometimes this occurs after other outreach has failed to gain a response. Indeed, the shareholder proposal submissions often invite company management to get in touch with the proponent. Sometimes that happens, but often it does not. Many company managements simply do not answer their mail. Instead, the first "engagement" with a proponent is a deficiency letter or a no-action request or a draft statement opposing the proposal. Is there any reason to believe that companies will be more receptive to picking up the telephone or sending an email than is currently the case? If so, the Release offers no evidence.

The Commission will doubtless receive comments from companies stating that their management is more than willing to engage with a proponent, but the proponent is not interested in doing so. However, we seriously doubt that the Commission will hear from companies stating openly that "our managers have no desire to engage with proponents even if the proponents provide the details spelled out in the Release."

The Release never explains why engagement should be viewed as a one-way street and that only shareholders need to be coaxed by the government to engage. If the Commission's goal is to facilitate communications and to make the proxy solicitation process run more smoothly, the Rule should apply equally to both parties and require that companies in receipt of a proposal must contact the shareholder or its representative and offer to make available a company representative with substantive responsibility for the subject matter (and not simply corporate counsel) to confer with the shareholder and/or its representative.

As a further incentive to promote engagement – and regardless of whether the Commission adopts these restrictions or not – the Commission should state that a company in receipt of a shareholder proposal may not seek no-action relief unless the company certifies in the request letter that the company called, wrote or e-mailed the proponent and offered to talk, but the proponent never responded, or the dialogue did not lead to withdrawal of the proposal. Such a requirement would seem particularly warranted if the Commission finalizes the proposed disclosures. After all, if a proponent is required to express a willingness to engage, should not the company be held to the same standard?

The Release does not explain why the Commission failed to consider this alternative, which is likely to produce significant benefits if the dialogue is successful and to reduce transactional costs of seeking no-action relief. To the extent that this occurs, there would also, of course, be the additional benefit of reducing the staff's workload.[33] We ask the Commission to consider this more effective alternative before enacting 14a-8 rule changes.

These are the policy objections. As we discuss below in responses to Requests for Comment, it is not clear how various challenges in scheduling a meeting might factor in SEC staff consideration of no-action requests. This aspect of the Release also fails to comply with the Commission's own economic guidance.

The Release would mandate that the proponent must provide dates between 10 and 30 days from the date of submission. These dates appear to have been plucked out of thin air. The Commission does not provide any reasoning or evidence on why it chose this window.

We believe that this particular one-size-fits-all window for mandated availability probably is not ideal, but it would have been helpful to understand the basis (if any) on which the SEC chose to propose that window. An example of one concern: in some cases, the lead proponent may file the proposal more than a month in advance of the deadline, and there are co-filers who sign on after the specified window. What then? Also, the Release states that a proponent must identify the "business hours" when the proponent is available to speak. Whose business hours? This may be trickier than it sounds if, for example, the proponent is in London and the company is in California, where there is an eight-hour time zone difference, so 9 AM in Palo Alto is 5 PM in London.

As a general proposition, it is not clear that it makes sense for the SEC to put its staff in the middle of calendarizing engagement between private parties. To our knowledge, this is a novel role for a federal agency to play and has little to do with the Commission's authority under section 14 of the Exchange Act to regulate the solicitation of proxies. We request the SEC to determine and put in the public record whether there are any precedents elsewhere in the federal government for this, and (if so) what lessons might be learned from those precedents as to the wisdom of taking this step.

Eligibility Requirements: Limitations on Using a Representative

In what is probably the most surprising part of the Release, the Commission proposes a number of nanny-state disclosure requirements on shareholders who seek access to the proxy using a representative to assist in drafting and filing the proposal, as well as engaging with the company on a given topic. Specifically, the Release would amend Rule 14a-8(b) to require shareholders who use a representative to provide written documentation identifying the proponent and any representative, the company and the meeting for which the proposal is being submitted, and an attestation that the representative is authorized to represent the shareholder. In addition, the submission should identify "the specific proposal to be submitted" and include a "statement supporting the proposal."

[33] We acknowledge that this proposal may not work perfectly. A company may find that it is not in a position to talk substantively about a proposal before the arrival of the 80-day deadline for filing a no-action request. Even so, if the company does need to file to meet the deadline, there is still considerable value in having a company reach out in the first instance to see if the proponent is interested in a dialogue or if concerns can be addressed.

At one level, using a representative would appear to be a positive good. The shareholder has the services of a professional who knows how the Rule operates and who can navigate both the substantive and technical intricacies of the Rule. In addition, the representative likely has substantive knowledge about the topic of a resolution, thus creating an opportunity to have an intelligent dialogue with the company in question. Using a representative thus benefits both the company and the Commission; if the representative can avoid the sort of errors made by a *pro se* proponent, thus reducing the likelihood and cost associated with seeking no-action relief. The Release does not consider the reduced costs that representatives can bring to the process.

There is scant consideration of this benefit in the Release. Moreover, the Release fails to acknowledge that there are many situations in which a proponent may use a representative. The inadequacy of the proposal is perhaps best illustrated by its most glaring omission, namely, the failure of the Release to acknowledge (except obliquely in one request for comment as noted below) that:

- A proponent who uses a representative may itself be a fiduciary;
- The representative may itself be a fiduciary (e.g., a registered investment agent or law firm of public official with fiduciary obligations); or
- Both the proponent and the representatives may be fiduciaries.

The latter situation presented itself two years ago in the wake of Staff Legal Bulletin 14I (2018), which spelled out some of the data that must be provided on proof of ownership and the authorization of a representative to act for the principal. A company challenged the ability of the New York City Comptroller to file proposals on behalf of the City's five pension systems without going through cumbersome procedural hoops regarding proof of ownership and authorization to file. The Division denied no-action relief, finding that the way New York City's funds had been submitting proposals for decades did not require additional regulation.[34] The Release does not explain why the conclusion reached there is incorrect.

Interestingly, the word "fiduciary" appears only once in the Release, and that is to ask whether representation requirements should be different for fiduciaries than for other representatives.[35] The failure of the Release even to acknowledge that proponents and their representatives may be fiduciaries is a powerful argument that this part of the Release should be withdrawn.

There is no reason to seek this micro-level of detail if a shareholder or a representative is a fiduciary. To be clear, this includes when a fiduciary fund chooses to employ a representative who may not itself be a fiduciary.

The Release does not articulate a reason why the Commission's authority to regulate proxy solicitations should be wielded to regulate and redefine principal-agent relationships when a fiduciary is involved. Likewise, there are other situations that do not involve fiduciaries where the use of an agent provides benefits to all concerned. The Rule 14a-8 process can be difficult to navigate, and many investors rely on knowledgeable and experienced consultants who provide

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[34] *Hospitality Property Trusts* (March 20, 2018), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/nycersetal032018-14a8.pdf.

[35] Release at 66466. There is a reference to "fiduciaries" in the context of shareholder proposals perhaps being a distraction to "shareholders and their fiduciaries." *Id*. at 66469.

their professional services for compensation pursuant to written contracts, e.g., faith-based organizations may act on behalf of religious investors who lack the resources to act on their own.

The Release does not demonstrate an awareness of these considerations or how radically the Release would alter existing professional relationships without reference to any perceived "problem" posed by these relationships. Any discussions of costs and benefits should consider the benefit to a company in having a knowledgeable representative who is willing and able to engage with a company on the substance of a proposal and who is likely to know how to avoid the procedural pitfalls. We are unaware of any complaints as to the competence or value of such representatives or reasons why they pose a "problem" that needs to be addressed through heavy-handed regulatory requirements.[36]

Finally, we note that to the extent the Release wishes to encourage engagement with a company, one would think that the Commission and companies alike would welcome the presence and participation of a knowledgeable and professional representative who was selected because of her experience and who may be able to engage thoughtfully and productively with a company.

We would observe that a particularly useful letter providing more analysis of problems with the SEC's contemplated restrictions on use of representation was filed in the proposal comment file (S7-23-19) on Jan. 27, 2020. The letter was submitted to Timothy Smith (Boston Trust Walden), Illinois State Treasurer Michael W. Frerichs, New York City Comptroller Scott M. Stringer, Kevin Thomas (SHARE), Danielle Fugere (As You Sow), Susan Smith Maco (Mercy Investment Services, Brandon Rees (AFL-CIO) and Bruce T. Herbert (Newground Social Investment).[37]

Eligibility Requirements: One Proposal Per Person, Not One Proposal Per Shareholder

The "one proposal per shareholder per company" limitation was adopted more than 40 years ago to apply "collectively to all persons having an interest in the same securities," such that joint tenants holding shares could not file multiple proposals.[38] The Release posits – but cites no evidence – that this concern applies with equal force to representatives of a shareholder, such that a lawyer could not file a proposal on behalf of two separate clients at the same company for the same meeting. The Release seems to acknowledge that a lawyer or other representative can work behind the scenes and do all the drafting and other work and then turn the paperwork over to the shareholder to do the actual filing.[39] But what is the benefit of that approach, which increases

[36] There is a short-term transactional cost associated with imposing stringent new requirements, namely, an upswing in the number of no-action requests that nitpick proposals for one reason or another under any new Rule. The *Hospitality Properties Trust* decision cited above is an example of the alacrity with which some companies will seize on any new rule or new guidance to oppose a proposal – unless of course the Commission should condition the filing of a no-action request upon a company reaching out to the proponent or its representative, as we recommend in these comments.

[37] The authors have provided us with a copy of the letter, which as of the filing of this letter has not appeared on SEC comment file S7-23-19 at https://www.sec.gov/comments/s7-23-19/s72319.htm. We anticipate the SEC will include the letter in that comment file, and it also is on file with CII.

[38] Release at 66468.

[39] *Id.* at 66469.

transactional costs for the shareholder and has no impact on whether the proposal is worthy of consideration by the company's shareholders?[40]

On several occasions the Release wisely notes that limiting the ability of representatives to act on behalf of shareholders may have "unintended consequences." That is, if anything, an understatement. The Release would effect a radical change from existing practice, namely, that who is submitting a proposal and with what assistance are more important considerations than the substance of the proposal. The Council believes that the focus of the Rule should be on the substance and merits of any proposal.

"Resubmission" Thresholds[41]

Rule 14a-8 currently states that a proposal may not be submitted if a proposal on "substantially the same subject matter" received support of less than 3% of shares if voted on once in the preceding five years; 6% if voted on twice in the preceding five years; and 10% if voted on three times or more in the previous five years.

Under the proposed changes, the resubmission thresholds would be raised to 5% the first year; 15% the second; and 25% the third. The operation of this rule would be the same – that is, it applies if a proposal "addresses substantially the same subject matter" as an earlier proposal that failed to meet the threshold requirement.

The Release would add a new element, namely that if a proposal receives between 25% and 50% support, but that vote decreased by 10% or more from the immediately preceding vote, for example, from 40% to 36%, it would be excludable (4=10% x 40). We discuss the higher thresholds and then the "momentum rule" in turn.

CII believes that the Commission should retain the current 3/6/10 resubmission requirements. We discuss a critical element in our opposition to raising resubmission requirements above, in a section of this letter entitled "The Commission has the cart before the horse" (page 3). As discussed at some length there, proxy plumbing should be fixed before raising resubmission thresholds. Simply stated, the substantial margin of error in counting votes has relatively less

[40] Also surprising is the Commission's request for comment on whether to "eliminate the practice of allowing natural-person shareholders to use a representative to submit a proposal." Release at 66469. For the reasons given in the text, the benefits of allowing individuals to use a qualified knowledgeable representative would seem even stronger than arguments for allowing an institution to rely on outside professional help.

[41] The word "resubmission" is misleading. The existing Rule (and the Rule as the SEC proposes to amend it) provides that if a proposal "addresses substantially the same subject matter as a proposal, or proposals, previously included" in proxy materials, it may be excluded based on previous level of support. Interpretation of the term "same subject matter" is of course subjective, but it can encompass a slight variation on a previous proposal (seemingly the main intent in the rule), or even proposals that recommend the opposite of what a previous proposal has requested. We believe both issuers and proponents have been reasonably satisfied with how the staff of the SEC Division of Corporation Finance has interpreted this over the years. But given this context, the issue is not really "resubmission" of an identical proposal, but "Shareowner A's" right to raise a subject matter that Shareowner A or another shareowner (potentially totally unconnected with Shareowner A) has raised previously. The consequence of a poorly drafted shareowner proposal, or a mischievous proposal intended to remove a subject from potential for future consideration, is significant, and considerably worsened by such a substantial increase in "resubmission" levels as the Commission proposes.

impact with low resubmission thresholds. And if the SEC is intent on raising resubmission thresholds now, it should focus attention on proxy voting intermediaries to work to remediate known problems at the critical thresholds that spell the difference on eligibility to resubmit, as we understand that intermediaries do now when there is a vote close to 50%.

Aside from that concern, we believe that the perceived need to raise the thresholds rests on a flawed assumption, namely that proposals that fail to achieve the proposed thresholds are not “on a path to meaningful shareholder support” and should therefore be omitted.[42]

The false premise is that the true value of a shareholder proposal is its ability to garner a majority vote from shareholders. That has never been the criterion for measuring a proposal’s substantive merit. Shareholder proposals usually are precatory, not binding, and even if a proposal does not command a 51% “yes” vote, there may be value to a company in learning that a significant percentage of its shareholders have a certain view on what should be done to enhance the value of their investment. If, say, 40% of a company’s shareholders favor certain action, a well-run company should respond in some fashion.

Well-established governance norms (*e.g.*, shareholder approval for poison pills, clawbacks of unearned pay, proxy access, independent board majorities and fully independent board compensation and nominating committees, shareholder votes to approve executive pay, board diversity, equal employment policies including gender pay equity and policies for non-discrimination based on sexual orientation; disclosure on carbon emissions and other climate change impacts, and sustainability reporting more generally) rarely received a majority vote in their early years, and it was far from clear that they were “on a path to meaningful shareholder support.”[43] One of many examples: In the 1990s individual shareholders William Steiner,

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[42] Release at 66472.

[43] For example, shareholder proposals to require shareholder approval for so-called “shareholder rights plans” (also known as poison pill defenses that disempower shareholders) received average support from 29.4% of shares voted at 32 companies where such proposals were voted on in 1987. Proposals for annual election of directors (rather than staggered elections based usually on three-year terms) were supported by an average of 16.8% of shares voted in 1987. Average support on the 11 proposals voted on at Russell 3000 companies in 2018-19 was 84.2% (82.3% for the nine proposals opposed by management). Even the six proposals to reduce or eliminate supermajority voting requirements for mergers or repeal so-called “fair price” requirements received an average of only 25.8% support in 1987. Average support for confidential voting was 9.5% in 1987. Two shareholder proposals in 1987 sought to end greenmail, and they received average support of only 13.0%. One was at a dual-class stock company, but even the other proposal – at General Motors, which had paid “hush money” to H. Ross Perot – received support from only 20.5% of shares voted. Over time, companies developed polices to prohibit greenmail (which has largely vanished at least in the form we saw it in the 1980s), the large majority of S&P 500 companies decided that all directors should be elected annually, supermajority voting requirements at major companies have mostly disappeared, and boards generally have stopped adopting poison pills without shareholder approval. Partly because of these changes, the market for corporate control is robust, with significant positive impacts for the economy and for shareholders. Proposals to redeem or vote on golden parachutes for executives received average support of 29.0% support in 1990. By 1996, average voting support increased to 40.6%. Today, excessive golden parachutes are rare. Proposals for independent nominating committees were supported by 17.7% of shareholders in 1992. Proposals for board independence received even lower support that year, although that issue is a bit murkier because some of the disagreement related to the definitions of director independence. Subsequently, independent boards and independent nominating committees became universal among non-controlled companies, through company changed influenced by shareholder pressure, and then by stock exchange rules. Shareholder proposals that initially received limited support also led to regulatory changes including appropriate accounting for stock options and shareholder votes on executive pay. Proposals to report on political contributions received support from an average of 7.4% of shares voted in 1990.

Kenneth Steiner, Howard H. Witsma and others submitted proposals to companies requesting an end to pension plans for outside directors. The proposals received strong support, but well less than a majority of shares voted.[44] But within a few years, many investors and company board members came to see pension plans for outside directors as a suboptimal form of compensation for part-time board members, most of whom had received substantial benefits in their main employment, and as undercutting board independence and focus on shareholder value.

Another example: Shareholder proposals requesting more racial and gender diversity on boards initially received support from less than 10% of shares voted, and one could argue that boards were slow to change.[45] But there is evidence that even in the 1990s, when votes were very low and change slow to take place, the matter actually did get on the radars for some board members, concerned that they were unnecessarily limiting the talent pool from which they drew new directors. And in fact, while a few shareholder proposals urging board diversity have received majority support, on average in any given year support for the proposals has never exceeded

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Average support on proposals for reports on political contributions was 34.6% in 2018-2019. The first shareholder proposal of which we are aware squarely on carbon emissions and climate change was submitted by a small individual shareholder in Exxon in 1990. That proposal was supported by 6.3% of shares voted. In 2017, in contrast, a shareholder proposal to ExxonMobil asking for the company to assess and disclose how it is preparing its business for the transition to a low-carbon future was supported by 62% of shares voted, and many large companies now have announced aggressive efforts to become carbon-neutral. Proposals for minimum director stock ownership requirements averaged 15.9% in 1996; such rules are now the accepted norm. Proposals for independent chairs averaged 12.0% in 1996. Progress on that precise formulation has been slow, but eventually virtually all public companies adopted policies to have either an independent chair and/or an independent lead director. The first shareholder vote asking a company for a policy of nondiscrimination based on sexual orientation was voted on at Cracker Barrel in 1993, and received support from 15.6% of shares voted. Now virtually all S&P 500 companies have policies prohibiting discrimination based on sexual orientation and gender identity. See Sharon Marcil and Peg O'Hara, Voting by Institutional Investors on Corporate Governance Issues in the 1987 Proxy Season, IRRC (1987); IRRC Corporate Governance Bulletin, May/June 1991; IRRC Corporate Governance Bulletin, November/December 1993; Carolyn Mathiasen, The SEC and Social Policy Shareholder Resolutions in the 1990s (November 1994); Summary of 1996 U.S. Shareholder Resolutions, IRRC (April 12, 1997).

[44] For example, in 1993, Witsma proposed winding down pension benefits for "outside" directors, and the proposal was supported by 27.8% of shares voted (see IRRC Corporate Governance Bulletin, May/June 1993, p. 28). In 1994 and 1995, the proposal received about the same support. In 1996, a slightly different proposal with the same essential request was submitted by Kenneth Steiner (see American Brands DEF 14A, March 12, 1996) and voting support increased somewhat, to 33.1% of shares voted (see American Brands 10-Q, August 9, 1996). William Steiner led a number of individual investors, including his son Kenneth, in an effort to reverse the trend toward paying pension benefits to outside board members. American Brands and other companies received shareholder proposals asking them to do so in 1996 and/or 1997 then eliminated pension plans for outside directors (See Sana Siwolop, Shareholder Activist, From Basement to Boardroom, The New York Times, June 15, 1997, at https://www.nytimes.com/1997/06/15/business/shareholder-activist-from-basement-to-boardroom.html.) The key argument that appeared to persuade company board members, despite lack of majority support, was put this way by Kenneth Steiner at American Brands in 1996: "Although outside directors are certainly entitled to compensation for their time and expertise, pensions have the pernicious effect of compromising their impartiality. In essence, pensions are management's grants to outside directors to [ensure] their unquestioning loyalty and acquiescence to whatever policy management initiates, and at times, serving their own self interests. Thus, pensions become another device to enhance and entrench management's controls over corporate policies while being accountable only to themselves."

[45] Three shareholder proposals asking for greater efforts to recruit women and minority board members were voted on in 1993. The proposals received support from an average of 6.8% of shares voted. By 1996, average support was 12.6%. Most boards have made efforts to ensure that individuals considered for nomination to boards are not limited to white males. See IRRC Corporate Governance Bulletin, November/December 1993; Summary of 1996 U.S. Shareholder Resolutions, IRRC (April 12, 1997).

50%.[46] Notwithstanding that, boards came to pay much more attention to their own diversity and whether they were recruiting new members from a pool that was limited for the wrong reasons. Today, every single S&P 500 company has at least one female director, and many boards have more than one.[47] A few boards (for example General Motors and Best Buy) are now majority female.[48]

During the apartheid era, shareholder proposals directed to companies doing business in South Africa rarely received more than 25% of the vote, but companies were moved to respond. Many companies responded to requests for more and better reporting on environmental risks, climate change impacts, oversight of supply chain practices and risks, even as shareholder proposals that highlighted concerns received much less than majority support.

Historically, even much lower levels of support have prodded change. In 1979, New York lawyer and real estate investor Lawrence A. Wien initiated a shareholder proposal campaign to increase corporate philanthropy. He believed public corporates should assume a larger share of the burden for social outcomes, and that increasing philanthropic gifts would help to preserve the private enterprise system and improve the public image of corporations. Wien "appeared to have considerable success at some firms," said an Investor Responsibility Research Report authored by one of the signers of this letter, even though voting support averaged 3.5% in 1980-81.[49]

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[46] In 2016-19, five shareholder proposals advocating for board diversity received majority support, although only three of those proposals (Cognex 2017, Hudson Pacific Properties 2017, and Waste Connections, Inc. 2019) were opposed by management. Average voting support on board diversity matters over that period was 20.0%, although this was pulled down by a number of proposals receiving very little support that were submitted by the National Center for Public Policy Research. The proposals appeared to be intended to promote disclosures that some shareholders considered to be redundant, and that put particular emphasis on ideological diversity, on the assertion that companies, as indicated in one proposal, "operate in ideological hegemony that eschews conservative people. One effect of the low votes was to preempt for a period of time consideration of proposals that might support gender and racial diversity on boards, since the SEC resubmission thresholds apply to "substantially the same subject matter."

[47] See Maggie Fitzgerald, There Is Now a Woman Board Member at Every S&P 500 Company, CNBC, July 25, 2019, at https://www.cnbc.com/2019/07/25/there-is-now-a-woman-board-member-at-every-sp-500-company.html.

[48] See https://www.gm.com/our-company/leadership/board-of-directors.html (last viewed Jan. 27, 2020); and http://investors.bestbuy.com/investor-relations/governance/board-of-directors/default.aspx (last viewed Jan. 27, 2020).

[49] Kenneth A. Bertsch, Corporate Philanthropy, Investor Responsibility Research Center (1982), pages 47-48 and page 78. In the year ending June 30, 1981, according to IRRC and the American Society of Corporate Secretaries, Wien was known to have submitted 65 shareholder proposals asking for increases in corporate philanthropic contributions. Most were withdrawn when companies said they already had plans to do so or committed to increases. The impact appeared meaningful even though the 23 proposals that came to votes were supported by an average of 3.5% of shares voted. Another six companies were asked in that year to report on charitable contributions, three of which came to votes with average support of 3.2%. IRRC indicated that Wien "helped prod United Technologies to increase its giving from $3.8 million in 1979 to $7.8 million, or 1.6% of pretax domestic earnings, in 1981. His most widely touted success—persuading AT&T to increase giving to 1% of pretax net earnings, or $100 million (up from $28 million) by 1981 or 1982—now seems to be in dispute. By 1981, the company had increased its giving to 0.4% of pretax net earnings. R.H. Thill, secretary of AT&T's contributions committee, says that while the corporation hopes to increase giving to the 1% threshold eventually, it did not agree to do it so fast. Thill gave Wien credit, though, for helping to push the company to step up contributions, which increased 23% between 1979 and 1981." IRRC found that 24 companies that received shareholder proposals from Wien in 1979 had by 1981 increased corporate contributions by 16%, compared with 12% for other companies. Wien and his Committee to Increase Corporate Giving reported approaching 100 companies in 1979, and his resolution came to a vote at 36 companies that year. Overall in1980 and 1981, Wien reported on 123 companies, including 26 he approached for a second time.

Finally, we would ask that if the SEC raises resubmission thresholds, it review whether it should narrow the definition of "Resubmissions" in (12)(i). Currently and as proposed, the rule provides that "if the [shareholder] proposal addresses substantially the same subject matter" as a proposal previously submitted that received a low vote, it may be omitted. This appears to permit a proposal that has minimal support and would go in the opposite direction of what a significant group of shareholders would advocate, and could be used (intentionally or not) to take an item off the agenda for a period of three years. In other words, the higher resubmission thresholds could expand the ability of a shareholder to preempt future proposals by submitting (intentionally or not) an unpopular idea that "addresses substantially the same subject matter" as an idea that many shareholders support.

Momentum Requirement

We oppose the SEC's proposed additional overlay of a novel new "Momentum Requirement."[50] The Momentum Requirement is a complicated and ill-designed attempt to block some proposals that receive support from more than 25% of shares voted. There may be any number of reasons why, for example, a 40% "yes" vote one year drops to a 36% "yes" vote the next, including that the proposal has changed (remember that we are talking about proposals on "substantially the same subject matter"); short-term change in perceptions of company performance; and modest change in the shareholder base. And on its face, this proposal could result in exclusion of a proposal that received up to 44.9% support based on a view that this level of support was inadequate to indicate continuing investor enthusiasm.

Of course, the lack of accurate vote counts also should provide reason for caution on introducing this change, which will block a proposal based on a relatively small change in votes; the margin of error is too great. In fact, based on the suggestion noted above that the margin of error may be + or – 5%, error alone could drive a proposal into ineligibility territory.

But setting proxy plumbing problems aside, the SEC should think through why support for a proposal may be volatile year-to-year. An example: Support for a shareholder proposal requesting that the chair of the board be independent of management may rise or fall depending on the performance of the company's stock at any given time. A good example of this is provided by the recent experience at Boeing, where a 2018 proposal for an independent board chair garnered a 25.2% "yes" vote, down from 31.7% support in 2016, the previous time such a proposal came to a vote. The proposal could not have been refiled for 2019 if the Momentum Requirement been in effect. As it happens, under existing rules a proposal for an independent chair was voted on in a 2019 proposal, and support increased to 34.8%. No doubt this was influenced by subsequent

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By 1982, Wien declared success, saying there were "very few companies where it is necessary to put on the pressure," as companies had received the message and were increasing corporate contributions. Wien's associates in his effort included Courtney C. Brown, dean emeritus of Columbia Business School; William F. May, retired chairman of American Can; Charles F. Luce, chairman of Consolidated Edison; and William S. Renchard, retired chairman of Chemical Bank.

[50] In discussing this with CII members and others, we have found consistent confusion about, and surprise around, what the SEC is proposing. Repeatedly, individuals have said they thought the proposal meant that if the proposal was for exclusion of a proposal if there was an absolute decline of 10% compared with the total vote – e.g., from 40% to 30%, rather than from 40% to 36%. The confusion suggests another reason the SEC should be cautious in adopting such arcane rule provisions.

events – two fatal air crashes and the grounding of the 737 MAX aircraft worldwide. Then, in October 2019, after increasing questions on handling of the crisis and sharp decline in Boeing's share price, the Boeing board finally named an independent chair, citing reasons that a significant minority of shareholders had made for years.[51]

What is significant is not the drop, but the continuing interest of a significant proportion of investors to implement a corporate governance change even in the face of very strong short-term share price performance. The SEC proposal would in effect provide excessive deference to relatively small changes in the shareholder base (for example, if momentum investors disinclined to vote against a management position modestly buy into a stock between record dates for one annual meeting and the next based on what may prove in hindsight to be poor perception of underlying value, even as value investors modestly sell down their positions). We would request that the SEC analyze specifically the extent to which the Momentum Requirement would limit shareholder proposals based on changes in the composition of the shareholder base, and whether through such dynamic promote short-termism. We are particularly concerned here about shareholder proposals supporting independent board leadership, which we believe can have long-term effects on corporate and shareholder value.[52]

The Council believes the SEC should welcome shareholder proposals that promote long-term value creation, even on ideas that may be vigorously opposed by chair/CEOs. The Council believes that the marginal costs of including such a proposal for an additional year does not constitute a significant burden or "distraction" sufficient to warrant the proposed exclusion of a proposal on a topic that many investors support.

Although the Council opposes the Momentum Requirement, we believe that any such restriction, should it be adopted, should be accompanied by an exception in the event of a material change in the company's situation between the previous vote and the filing deadline.

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[51] See Boeing Co., *Boeing Board of Directors Separates CEO and Chairman Roles* (Oct. 11, 2019), available at https://boeing.mediaroom.com/2019-10-11-Boeing-Board-of-Directors-Separates-CEO-and-Chairman-Roles ("splitting the chairman and CEO roles will enable [the CEO] to focus full time on running the company….This decision is the latest of several actions by the board of directors and Boeing senior leadership to strengthen the company's governance and safety management processes"). The board subsequently fired the CEO, but kept the chair and CEO roles separate following that leadership transition. Shareholder proposals requesting appointment of an independent chair received support from 42.4% of shares voted for or against the proposal in 2013, 32.4% in 2014, 30.9% in 2015, 31.7% in 2016, 25.2% in 2018 and 34.8% in 2019. No such proposal came to a vote in 2017. The 2018 vote was 20.4% lower than in 2016 ((31.7 – 25.2)/31.7 = 20.4). Given that result, the proposal would not have been excludable under the old rules, or even under the very high 25% hurdle the SEC would impose under the Release. Only the Momentum Requirement would have blocked shareholders from expressing their view on this in 2019 given the earlier vote results. Of course, if 25% had been a significant threshold, given the importance CEO/chairs often place on preserving their titles, one would have expected Boeing to go to extra lengths to push the 2016 vote from 25.2% to just below 25%.

[52] It was good that boards of Bank of America, Boeing and a number of other companies recognized the advantages of independent board leadership, but it could be said that they came to this realization too late – after the horse was out of the barn and substantial shareholder value was destroyed, along with damage to interests of other stakeholders. We believe that some CEO/chairs are particularly agitated about shareholder proposals that say they should hold only one of those roles. The counterbalance from shareholders who have another view has been historically important.

Costs and Benefits of the Proposed Amendments

As is often the case in rulemaking proceedings, certain short-term costs are (or should be) easy to calculate, while the benefits (either long-term or short-term) are more difficult to associate with a dollar figure. To take a classic example, what was the benefit to shareholders of shareholder resolutions in the 1980s that urged adoption of the "Sullivan Principles" by companies doing business in apartheid-era South Africa? What is the quantifiable benefit today of proposals urging companies to engage in long-term planning for climate change? How does one balance any such benefit against the short-term cost?

But looking at the cost/benefit analysis of this Release on its own terms, there are some significant deficiencies. For example, the Release views continued presentation of proposals as a "distraction" to the larger body of shareholders. This is not based on survey research of investors, or any other evidence, so far as we can see in the Release.[53] We believe that shareholder proposals, which constitute less than 2% of voting items at U.S. corporate meetings, do not consume significant time for most members except at some times when a shareholder is raising a particularly important and novel matter, or circumstances have changed.[54] The Release asserts another view – the "distraction" theory – without evidence.

[53] It appears that clearest impact of the proposed 14a-8 amendments will be from the new "resubmission" rules. SEC analysis suggests the Commission believes investors spend as much time on resubmitted proposals as on those considered previously, which is a highly questionable assumption that the Commission should test. Many of our members indicate that they spend little time on truly resubmitted proposals (those identical or nearly identical to a previous proposal at a company that the investor voted on previously) than they did the first time, unless there is a change in their own policies (which does sometimes take place after a new issue surfaces) or a significant change in particular circumstances at the company or more generally. But if there is substantial change in circumstances and investors spend time reconsidering prior views, that indicates on its face that the new vote will bring new information to management and shareholders on the collective view of shareholders. Moreover, if the SEC is concerned that in voting, shareholder proposals "distract" and therefore lessen shareholder time to consider more important matters, the Commission should reconsider its proposal to require proxy advisors to pre-clear reports with company management, adding more than one week before proxy advisor reports can become available to paying clients, drastically reducing time to consider all proxy voting issues if the investor would like all resources to be available, including research and opinion from their proxy advisor, before voting.

[54] Changed circumstances can include a dramatic downturn in company performance, changes in law (see letter from Hal Scott), increased attention and concern on corporate governance generally (as occurred rapidly in the wake of the Enron and WorldCom collapses in 2002-2003) or for a particular risk (the much heightened concern for climate change impacts in the last several years in most of the world, and certainly in the investment community generally, following losses from weather events and gathering evidence of the likelihood of dramatic impacts in the absence of global change in policy). An example of company performance impacts is provided by efforts by different shareholders at Bank of America in 2006-2009 for an independent chair. The holders were concerned that concentration of control in the single chair/CEO could drive the bank to take an unacceptable level of risk. Support for shareholder proposals for an independent chair at Bank of America increased dramatically between 2007 and 2009. In 2007, the SEIU Master Trust proposed a binding bylaw amendment (which is done rarely) for an independent chair. The binding nature of the proposal was novel at the company, and voting support declined as compared with a nonbinding proposal from individual shareholder proponent Nick Rossi in 2006 (support declined from 38.2% on the nonbinding 2006 proposal to 16.5% for the binding 2007 proposal). The SEIU Master Trust persisted with the binding bylaw amendment, and in 2008, support increased to 37.6%. The increased vote in 2008 likely was a combination of time for shareholders to consider the implications of supporting a binding proposal as opposed to a nonbinding one, and negative shareholder return of 14% between April 1, 2007 and April 1, 2008. In 2009, shareholders approved a binding proposal for an independent chair, with support from 50.3% of shares voted. In that year, returns had been negative 82%. Shareholders perceived a 90%+ fall in share price in two years and the near collapse of massive bank (arguably averted only because of a bailout by the federal government) as a significant

Moreover, the Release fails to consider the benefit from introducing an issue that is important enough to avoid exclusion under the 13 exceptions in Rule 14a-8(i) and having a dialogue not just between shareholders and the board or management, but between all shareholders. History demonstrates that shareholder proposals have prompted important debates on corporate governance issues and have produced reforms that were initially opposed, often quite vehemently, by managements and boards. As indicated elsewhere in this letter, even if there is opposition or skepticism in early years, attitudes on some matters change over time. There is positive value in keeping the lines of communication open.

Turning to cost analysis: The Commission has identified six areas where costs may be incurred. One of the data deficiencies that becomes apparent whenever changes to Rule 14a-8 are being considered is a lack of reliable empirical data on individual companies' costs. While the SEC provides little or no reliable empirical data on this, we can be confident that costs vary widely depending on a variety of circumstances, including whether the company management engages in any outreach to the investor, whether the company management chooses to challenge inclusion of a proposal, and if so whether it handles any no-action issues in-house or through private counsel. Large variable costs from one company to the next mean that "average" or "median" figures may not be a reliable basis for decision-making.

Moreover, companies generally oppose shareholder proposals, so in the absence of time sheets or similar evidence, the units of work outlined in the question are inherently subject to inflated estimates with little opportunity for scrutiny or verification. All that being said, we respond below to the specific items raised in the Commission's questions and note one additional consideration not covered in those six categories:

1. Reviewing the proposal: The amount of time may vary depending on (a) whether the proposal is one that the company has not previously considered; (b) whether the topic is one with which the Corporate Secretary's office is familiar (such as governance issues) rather than non-governance topics that might require consultation with company personnel having substantive experience (*e.g.*, climate issues, international supply chain sourcing practices), and (c) whether there are models that other companies employ that are responsive.

2. Engaging the shareholder: Here again, costs can vary widely. Some companies do not engage with shareholder proponents at all. At others, the engagement may be a single phone call, while still other forms of engagement may include a face-to-face meeting. Estimates of the time spent on engagement would be useful only to the extent that there are accurate estimates of time spent on these specific elements of engagement.

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concern. Shareholder mandate for an independent chair in 2009 through support for the shareholder proposal played a key role in substantial leadership and policy change at the bank following that vote. Of course, with a slightly different history (if shareholders had voted on a proposal for an independent chair any one year in 2003-2005, which did not occur) the low 2007 vote would have taken the proposal off the table for all shareholders in 2008 and 2009 under the SEC's proposed raised resubmission thresholds (the 16.5% vote would be below the SEC's proposed 25% threshold for a proposal considered three times in five years).

3. Print and distribute proxy materials and tabulate votes: These costs will have to be assumed by a company, whether shareholder proposals are or are not included. Since shareholder proposals constitute only a small fraction of these costs, any identification of costs would have to explain the cost at the margin of including one or more proposals.

4. Communicating with shareholders and their advisors: The cost of shareholder proposals is only a fraction – presumably a small fraction – of these costs, so any estimates would have to identify in some way the proportion of effort that is directed to shareholder proposals, as opposed to other items including election of directors and approval of executive compensation and of incentive plans.

5. The cost of excluding a proposal: We discuss below, in response to Request for Comment E5, the 1997 estimates of cost, which are seriously flawed. For present purposes, we note that many variables can affect any cost estimate: Why use an outside law firm instead of responding with in-house personnel? Did the company first attempt to engage with the shareholder, explore options to satisfy the shareholder's interest in a topic, or point out the risk of having a proposal excluded?

   There is a separate factor here should be considered, yet is not enumerated in the list of questions: How successful are the no-action requests? We know from experience that no-action requests normally raise a number of arguments for exclusion, yet if a company succeeds, it is often as to only one of those claims. In addition, there is a significant failure rate, which suggests an over-reliance on no-action requests to exclude proposals. Differently put, many no-action requests may be viewed as overkill and, since the no-action process is entirely optional, so any estimate of the "cost" of seeking no-action relief should be quantified separately from the "cost" of dealing with shareholder proposals, and any such "cost" should apply a discount for what we might call the "overkill factor."

   Emerging data compiled by Gregory Burke, an accounting researcher at Duke University, suggests that many companies take a "kitchen sink" approach to no-action request. Specifically, this data indicates that in a sample of 3,336 no-action requests from October 1, 2007, to December 21, 2019, companies made a total of 4,825 claims (with multiple claims in some requests) under the "substantive" exemptions in Rule 14-a-8 and a total of 1,716 claims under the "procedural" exemptions elsewhere in the Rule. Burke found that companies filing requests were successful 70% of the time, and perhaps not surprisingly, objections based on the "procedural" objections were more successful, presumably because these criteria are more objective (e.g., the proponent either held shares for less one year, or she did not; the shares are either worth $2,000, or they are not).[55]

   The 70% rate of Staff concurrence masks the fact that companies are *not* successful on a large number of individual claims. Burke found that companies raised 174 objections under the (i)(1) exemption, but succeeded on only 24 (or 13%) of those claims. That said, no-action letters that raised an (i)(1) exemption were granted exclusion 118 times on another exemption.

[55] Source: Gregory Burke, accounting research at Duke University's Fuqua School of Business. Mr. Burke's table is on file with CII.

Given these data, we posit the low rate of concurrence on individual claims suggests a "see-what-sticks" approach towards the no-action process. Rather than reflect a careful choice of what might be the company's best argument, the data suggest some issuers raise many issues and hoping that at least one of them works.

This "kitchen sink" strategy may inflate the costs of the no-action process to companies and their shareholders. It also may inflate costs for proponents (in responding to company arguments) and potentially to the SEC staff.

More generally, some denied no-action requests present only weak objections, and any attempt to derive the "cost" of filing no-action letters needs to discount for a company's failure rate.

6. Preparing a rebuttal: Rebuttals that appear in the proxy statement can vary in length, sometimes dwarfing the 500 words in a proposal and supporting statement. In addition, to the extent that the Release considers re-submitted proposals, the cost should be minimal, as rebuttals often repeat the arguments made in a prior year.

The key question is: What cost data do we have today? The answer is "nothing that is reliable." As the Release points out, there was a discussion of cost issues in 1997-98 rulemaking (1998 Rule), which the Release characterizes as follows:

> Some respondents indicated that costs associated with determining whether to include or exclude a shareholder proposal averaged approximately $37,000 (which figure may have included estimates for considering multiple proposals). The Commission also sought information about the average printing cost and 67 respondent companies reported that the average cost was approximately $50,000.[56]

These two cost estimates do not track the six categories identified in the Release, and we do not believe that these two figures accurately capture any costs that are relevant to this discussion.

What is more striking about these two figures, as well as the cost discussion in the 1997-98 rulemaking, is the lack of hard data to support them. During that rulemaking the Commission candidly admitted on multiple occasions that it lacked hard data:

> "No commenters submitted empirical data demonstrating how much it costs companies to consider and prepare an individual no-action submission under rule 14a-8." [57]

[56] Release at 66508. The problems with these data from the 1997-98 rulemaking have been pointed out previously and are well summarized in a 2017 paper by Adam Kanzer entitled The Dangerous 'Promise of Market Reform': No Shareholder Proposals, which appears on the Harvard Law School Forum on Corporate Governance and is available at https://corpgov.law.harvard.edu/2017/06/15/the-dangerous-promise-of-market-reform-no-shareholder-proposals/.
[57] 63 Fed. Reg. at 29114.

> "[W]e received no empirical data on the number of small businesses that receive shareholder proposals each year."[58]

> "We also received no empirical information in response to our request for data on the marginal cost of including an additional shareholder proposal in companies' proxy materials."[59]

> "No commenters responded to our request for empirical data on the potential cost savings."[60]

The cost estimates in the 1998 rulemaking are thus built on a foundation of sand, as the Commission freely admitted.

Despite the admitted lack of empirical data, the 1998 Rule took a stab at estimating the costs and came up with cited figures, *i.e.*, deciding whether to exclude a proposal cost an average of $37,000, while the average cost of including one additional proposal was pegged at $50,000. These averages were derived based on responses to a questionnaire from 80 and 67 companies, respectively. These figures, flawed as they are, quickly passed into the popular mythology about the "cost" of shareholder proposals.

To begin with, these estimated averages understate the wide variations between companies. With respect to the estimated costs for deciding whether to seek no-action relief, the Commission stated: "Reported costs ranged from a low of $10 to a high of approximately $1,200,000. The median cost was $10,000."[61] There is a considerable gap between the low point of $10, a median of $10,000, an average of $37,000 and a high estimate of $1,200,000. The Commission stated after citing these figures: "We do not believe, however, that the cost is likely to vary depending on the size of the company. That is, the cost to a small entity is likely to be the same as the cost to a larger entity."[62] We believe this indicates the Commission did not believe responses were accurate.

In discussing the estimated costs for printing an additional proposal, the Commission noted that the reported costs ranged from a low of $200 to a high of nearly $900,000. The median cost was $10,000 – significantly below the $50,000 figure that the Commission cited in the text and that has been the basis for subsequent discussions of cost issues.[63]

The 1998 Rule did not explain why it was using the average figure, rather than the much lower median figure or some other figure, given that companies seeking to restrict shareholder proposals have an incentive to inflate the costs, particularly if there is no obligation to submit empirical data to support such claims. In addition, the very high numbers provided by some companies make the average a distorted figure (outliers on the high side will distort an estimate upward as compared with outliers on the low side, which are bounded by zero).

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[58] *Id.*
[59] ***Id.***
[60] *Id.*
[61] 63 Fed. Reg. 29114 n.95.
[62] ***Id.*** at 29114
[63] ***Id.***

Another striking, yet unexplained, inconsistency in the Release is that it cites (sometimes indirectly) elements from the 1998 Rule release, but takes no notice of what was said elsewhere in that earlier document. In discussing changes under Rule 14a-4, the Commission stated: "Daniels Financial Printing informed the staff that in most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company, and that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company."[64]

Notwithstanding a year-long period of seeking comments after announcement of the November 2018 proxy roundtable, evidence presented to and by the SEC this time is even thinner than in 1997-98. We have traced the genealogy of all the cost citations cited in the Release, and none of them rests on reliable empirical data about individual firm costs. Indeed, most estimates actually derive from the figures in the 1997-98 rulemaking ($37,000 plus $50,000). Even if these figures had been reliable at the time, they may be outdated now given evolution in practices, increased proposal withdrawal rates and proxy materials increasingly provided electronically rather than in print. And the SEC is explicitly and implicitly relying on numbers it generated before it put in place its current guidance for economic analysis.

The Release cites four potential data points:

- an "upper bound" estimate of $150,000 based on an estimate by the American Securities Association that has been widely repeated, but never substantiated;
- an estimate of $100,000 by ExxonMobil;
- the estimate of $87,000 from the 1997-98 citations discussed above (sourced in the Release to letters in the November 2018 proxy roundtable file that themselves cited sources that eventually cite to the 1997-98 citations); and
- a "lower bound" estimate of $50,000 based on an isolated comment from the Society for Corporate Governance.

All these costs are very low in comparison with the large size of most of the companies involved, as well as the size of the potential benefits to shareholder value that would be lost for the sake of avoiding these costs.

That said, none of the cited costs above can be credited as the sort of foundation upon which to base a rule. We already discussed why the $87,000 estimate is not reliable.

The "upper bound" estimate of $150,000 is taken from a letter from the American Securities Association to the Commission in July 2019. Taken on its own terms, the figure is not reliable, as it is not based on anything empirical or data provided by the Association's members. As described in Footnote 10 of the Association's letter, it derives from a figure cited in a 2018 House of Representatives committee report on shareholder proposals. [65] Specifically, the House report asserted that "the cost of a proposal can run $150,000 per measure, and some companies face 15 or more a year—equating in such instances to $2 million of time and resources being diverted

[64] *Id.* at 29114.
[65] The letter appears in File 4-725 and is available at https://www.sec.gov/comments/4-725/4725-5646621-185668.pdf.

from the core fiduciary responsibility to maximize shareholder value."[66] There is *no* source for that figure. One searches in vain the prepared testimony of the seven witnesses at that hearing, but none of them proffered the $150,000 estimate.[67]

Surely, any plausible "upper bound" cost estimate should rest on more than a phantom number that cannot be sourced and substantiated. And in its discussion of "benefits and costs of the proposed amendments," the SEC relies on this phantom upper bound number to determine that Russell 3000 companies "could experience annual cost savings associated with a decrease in the number of voted proposals of up to $70.6 million a year."[68] The SEC relegates to a footnote the comment that the "lower bound of cost savings would be $1.4 million."[69] The SEC's comment in the main text is misleading. A more straightforward statement would be that estimates used by the SEC imply cost savings of $1.4 million to $70.6 million a year.

As for the intermediate estimate, based on ExxonMobil's estimate of a $100,000 cost, no specifics are provided, and the number cannot be accepted at face value. We also would note that ExxonMobil likely faces higher costs for proxy distribution than the average company, as the company is larger than average and has a relatively substantial shareholder base. As for the "lower bound" figure of $50,000, that figure was supplied by a membership organization whose members do have relevant knowledge, but the figure was offered with the candid admission that the number is based on "anecdotal" reports.[70]

Things get even murkier from here. The discussion in the Release concerning the Paperwork Reduction Act cites a 2009 survey of 67 Business Roundtable members in connection with that year's "proxy access" proposal, and the estimate of the "average burden for a company associated with printing and mailing a single shareholder proposal is 20 hours with associated costs of $18,982, whereas the same study said that the average burden of preparing a no-action request related to a shareholder proposal is approximately 47 hours with associated costs of $47,784."[71]

These wildly divergent – and unexplained – estimates add to doubts about SEC reliance on them in promulgating the proposed 14a-8 amendments. And it makes even more serious the fact that the SEC did not attempt to do any of its own original research on costs before proposing the amendments.

These are not the only methodological shortcomings on the economic analysis in the Release.

The cost estimates use average savings, whereas the actual savings will be at the margin. In addition, any consideration of aggregate cost savings also is flawed, as any savings achieved by excluding a proposal at company A may be offset if a proponent decides to file the same proposal at company B. This is not speculation, as there are limits on how many proposals a given

[66] See H.R. Rep. No. 115-904. 115th Cong., 2d Sess. (2018), available at https://www.congress.gov/congressional-report/115th-congress/house-report/904/1

[67] "*Legislative Proposals to Help Fuel Capital and Growth on Main Street* (May 23, 2018), available at https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=401374

[68] Release at 66502

[6969] *Id*. n.272

[70] Release at 66496 n.230, 66510 n.312.

[71] *Id.* at 66510 n.312.

shareholder can file in a given year, and some topics (relating to, say, climate or sustainability issues) may have applicability to many companies across the market.

Moreover, a major focus of the Release is the cost of *re*submissions, namely, the cost to a company of considering a proposal for a second or third time (maybe more). Whatever costs may be entailed in the time it takes management and the board to consider a first-time shareholder proposal, those costs should diminish significantly as to any re-submissions. This would be true particularly in situations where the company unsuccessfully sought no-action relief as to the first-time proposal. For example, our experience has been that for many re-submitted proposals, the company does not respond or seek a dialogue and simply prints the opposition statement that was printed the prior year. Thus, the cost of a resubmitted proposal cannot be captured by an "average" figure that of how much it costs a firm to process the same proposal on multiple occasions, much less an "average" figure that totals the cost of responding to all shareholder proposals and then divides that number by the number of proposals received. To the extent that the cost of resubmitted proposals is cited as the basis for altering the resubmission thresholds in Rule 14a-8-(i)(12), *the only reliable data would be the costs to a firm of addressing that proposal in the second, third or later years*. A single figure to capture the "cost" of handling shareholder proposals will inevitably mask significant disparities from one year to the next.

In short, neither the cost estimates in the Release nor the cost estimates from the 1997-98 rulemaking provide a sound analytical basis for considering the potential costs of excluding shareholder proposals in the manner contemplated in the Release.

In addition, the Release errs by not proposing or considering the regulatory alternative of requiring companies to respond to shareholder proposals by reaching out to the shareholder. To the extent that the Commission views engagement as a positive good, the Release does nothing to encourage engagement by the many companies that currently refuse to engage and see the no-action process and the first (and probably only) appropriate response.

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Our detailed responses to the requests for comment in the Release are set forth below. The SEC questions to which we are responding appear in italics.

I. Rule 14(a)-8(b) - Eligibility Requirements

SEC Request for Comment 1. *We are proposing to amend Rule 14a–8(b) to establish new ownership requirements for establishing an investor's eligibility to submit a shareholder proposal to be included in a company's proxy statement. Should we amend Rule 14a–8(b) as proposed?*

CII Response. No. We do not believe that more stringent ownership requirements are warranted, except to adjust for inflation since the $2,000 benchmark was adopted in 1998, as discussed further below. For most of the years that Rule 14a-8 was on the books, there was no ownership requirement, thus making access to the proxy something available to all shareholders of a company. When ownership limits were adopted in 1983, the focus was on barring proposals by persons who may have owned as little as one share for one day. The SEC justified raising the threshold to $2,000 in 1998 based largely on inflation, which made sense as the rule worked well. We see no need to restrict access to the proxy beyond this. See also the discussion on “Eligibility: Greater ownership requirements” on page 10 above.

Request for Comment 2. *The proposed amendments seek to strike a balance between maintaining an avenue of communication for shareholders, including long-term shareholders, while also recognizing the costs incurred by companies and their shareholders in addressing shareholder proposals. Are there other considerations we should take into account?*

CII Response. Yes, there are other considerations that the SEC should have taken into account in making this proposal, as described in this letter throughout. In addition, the SEC in developing this proposal should have attempted to quantify some of the benefits of shareholders proposals. The proposal generally describes theoretical benefits and costs of its proposed amendments to limit shareholder proposals (or, to reverse the formulation, costs and benefits of shareholder proposals).[72] But it only seeks to quantify certain aspects involving the cost of shareholder proposals (or benefits from the SEC amendments to reduce shareholder proposals).

As discussed above, we acknowledge the benefits of shareholder proposals are difficult to quantify, and as an engine for improving governance and disclosure, appear to far exceed even the highest cost estimates conjured in the SEC analysis. In particular, ideas on policy and practice surfaced and advanced through shareholder proposals over the years that have become accepted, valuable components of practice. These include (to name just a few):

- Independent boards, committees and board leadership
- Strengthened shareholder rights, including majority vote standards in election of directors, annual election of directors, shareholder approval for poison pills and proxy access
- Better disclosure, including on various aspects of executive compensation, long-term risks and systemic challenges from environmental and other matters, appropriate accounting for stock options
- Better structures for executive and outside director compensation, clawbacks and limits on pay-for-failure

But some benefits of shareholder proposals actually can be quantified. To take just one, a clawback policy that Wells Fargo adopted in response to a shareholder proposal from New York City pension funds enabled the company to claw back $136 million from two executives after the company’s scandal over fraudulent accounts.[73] This compares with the SEC’s estimate that

[72] *Id.* at 66,502-66,508.

[73] See Stacy Cowley and Jennifer A. Kingson, Wells Fargo to Claw Back $75 Million from 2 Former Executives, The New York Times, April 10, 2017, at https://www.nytimes.com/2017/04/10/business/wells-fargo-pay-executives-accounts-scandal.html; and Emily Glazer, Wells Fargo Claws Back Millions From CEO After Scandal, The Wall Street Journal, Sept. 27, 2017, at https://www.wsj.com/articles/wells-fargo-board-actively-considering-executive-clawbacks-1474985652. The SEC proposal, particularly its representation and “one-proposal-per-person” rule potentially would complicate and add to the expense of the ability of the New York City Comptroller in pursuing shareholder proposals, although in ways that we believe are hard to determine due to uncertainties about the SEC proposal. We are uncertain how many other clawback proposals would have been eliminated over the years by the SEC’s proposed new red tape requirements, or from ownership below the proposed higher thresholds. Clawback proposals have received significant support for a number of years, but some would have been excluded under the SEC’s proposed higher new resubmission thresholds. The proposal to Wells Fargo was withdrawn when the company

reduction in the number of shareholder proposals from its proposed changes to 14a-8(b) and 14a-8(c) would reduce total costs to all Russell 3000 companies in a year from $1.4 million to $70.6 million per year.

We believe the SEC should have made some attempt to quantify benefits from shareholder proposals. And we believe the SEC should have done some of its own research on costs to companies, rather than rely on highly unreliable estimates.

Finally, throughout much of the Release, the SEC casts shareholder proposals as just one among many means of communication between shareholders and companies. The Release does not recognize the role of the shareholder proposal as a unique vehicle for boards, management and shareholders to find out what shareholders as a whole are thinking on a given topic. That sort of information should be of substantial value to a well-run board and management team (even if the SEC cannot quantify the benefit), and it cannot be provided by even the most skilled Investor Relations department, much less through shareholder use of social media "to communicate their preferences to companies and to effect change," as the SEC suggests in the Release.[74]

Request for Comment 3. *Should we adopt a tiered approach, providing multiple eligibility options, as proposed? Are there other approaches that would be preferable instead?*

CII Response. We believe that there is considerable value in having a single set of eligibility options, as is now the case. We believe that before enacting the rule, the SEC should weigh costs of adding to the complexity of the rule, including in investor understanding of the rule, and to whether management challenges for proponents to prove continuous ownership for a longer period will add to frivolous no-action requests.

To the extent that the Release proposes tiered holding requirements, the Release does not adequately address the concern that a $25,000 holding requirement affects shareholders differently depending on the size of the company. A $25,000 investment in a single company – particularly a midcap or smallcap company – may be a disproportionate investment in an individual's portfolio.

Moreover, there may be sound reasons for a shareholder to submit a proposal having owned only $2,000 worth of stock for a year. For example, in recent years, some companies have done initial public offerings, mostly in the tech sector, with governance structures that serve the interest of insiders and have what many investors regard as significant deficiencies harming longer-term value (e.g., dual class stock structures, staggered election of directors, lack of board and/or workforce diversity and/or aspects of corporate culture that may harm competitiveness in the market for talent). While shareholders submit shareholder proposals to companies with recent IPOs relatively infrequently, in particular cases the questions can be urgent, and shareholder

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agreed to change its clawback policies, but of course agreements reached in exchange for withdrawal of shareholder proposals are exactly where proposals arguably have the most, and best-defined, impact, and this is based on rules not hostile to the introduction of shareholder proposals.

[74] *Id.* At 66,462. We note that an early form of social media, now discontinued, consisted of Yahoo! "chat rooms" in which investors could share their views on how a particular company was performing. The Release does not cite any evidence that this form of social media provided valuable information to an individual company, nor does the Release suggest why the current forms of social media would improve communications.

proposals offer a way for shareholders to express that concern in a focused way and involving collective voice of shareholders as a group.

Request for Comment 4. *How is a sufficient economic stake or investment interest best demonstrated? Is it by a combination of amount invested and length of time held, as proposed, or should another approach to eligibility be used?*

CII Response. We believe that the current eligibility criteria adequately assure that proponents have an economic stake in a given company. We think requirements committing an investor to future restrictions on investment decisions likely have more problems than advantages. But if the SEC is committed to further restrict shareholder rights to offer proposals under 14a-8, we think the Commission should at least consider a forward-looking policy. Obviously having owned a stock for years or even decades does not assure that a shareholder is committed to holding it for any length of time in the future. Before implementing the proposal, the SEC should explore benefits and costs of a forward-looking regime, for example requiring the shareholder to attest that the holder will maintain ownership of at least $2,000 of shares (as valued at submission date) for at least one year after the annual meeting. The SEC also could consider a statement of attestation on any short interest in the company. We see no evidence that the SEC considered this type of alternative to restricting the shareholder right.[75]

Finally, given the SEC's concern on size of holdings, the Commission should consider simply requiring companies to disclose the name and holdings of proponents (and any short interest), so that shareholders could make their own determinations if they believe a stake is too small. We do not see evidence that the SEC considered this straightforward approach that is highly consistent (1) with the SEC's traditional reliance on disclosure, and (2) the notion that shareholders are capable of thinking for themselves if they have adequate information.

Request for Comment 5. *Are the proposed dollar amounts and holding periods that we propose for each of the three tiers appropriate? Are there other dollar amounts and/or holding periods that would better balance shareholders' ability to submit proposals and the related costs? Should any dollar amounts be indexed for inflation or stock-market performance?*

CII Response. As noted, we believe that the current criteria are adequate. However, we also believe the SEC used sound reasoning and reached a good balance when it last considered this issue in 1997-98. We believe it may make sense to adopt the same approach now. In 1998, the SEC raised the threshold from $1,000 to $2,000. The SEC said that it chose the round $2,000, which exceeded the increase in price levels between 1982 and 1997, to "account for future inflation, and because it will be easier to use for calculations."[76] While the Release has not

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[75] The SEC does assert that "A shareholder's demonstrated long-term investment interest may also make it more likely that a shareholder will continue to hold the shares after the shareholder's proposal is voted on." *Id*. at 66462. We take this in the context of the paragraph to mean that past length of time owning shares is likely to be correlated with future ownership. It would be helpful if the SEC provided some evidence for this.

[76] In proposing raising the threshold in 1997, the SEC said, "While the actual inflation adjustment from the date of adoption to today would increase the existing requirement by approximately $600, we propose $2,000 to account for future inflation, and because it will be easier to use for calculations. We sought to avoid increasing the threshold further out of concern that a more significant increase could restrict access to companies' proxy materials by smaller shareholders, who equally with other holders have a strong interest in maintaining channels of communication with

justified any change, if the Commission were to raise the ownership thresholds it should use a round number (e.g., $3,000, $3,500 or $4,000) for the reasons it did so in 1998.[77] And the Commission should subject any change to economic analysis, as the SEC's guidance on economic analysis provides that it should have done in the proposing release.

We believe the simplicity of raising the threshold to a clear, rounded threshold is superior to the complexity in the SEC's proposal, or to annual indexing for inflation going forward. The benefit of clarity provided by a rounded, set threshold would more than outweigh the fact that it would in the near-term overcompensate for inflation, and potentially in the longer term undercompensate for inflation, depending on price stability and future SEC amendments. We believe the basis should be on price levels as the SEC decided in 1998, not on a stock market index. And, in any event, as discussed above, we believe no change should be made without careful consideration of the impact on investors', including individual investors', ability to participate effectively and efficiently in the proxy process.

Request for Comment 6. *We are proposing to maintain the $2,000 ownership level, but increase the corresponding holding period to three years. Should we also increase the $2,000 threshold? If so, what would be an appropriate increase? For example, should we adjust for inflation (e.g., $3,000) or otherwise establish a higher amount?*

CII Response. As noted above, we see no reason to raise the holding period to three years. The SEC has provided no evidence that the number of proposals that would be eliminated is significant or that whatever would be eliminated would provide benefits that outweigh costs. And the SEC has provided no evidence that investors who have held stock for three years have a greater commitment to a company going forward than investors who have held stock for one year. We would support a simpler approach described in Request for Comment 5.

Request for Comment 7. *Are there potential drawbacks with the tiered approach? If so, what are they?*

CII Response. Major drawbacks of a tiered approach include (1) adding more complexity to the rule, and on a matter that is particularly important for availability of this shareholder right to

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management and fellow shareholders." The SEC confirmed this approach in adopting this amendment in 1998. See Amendments to Rules on Shareholder Proposals, Release No. 34-39093, 62 Fed. Reg. 50682 (proposed rule Sept. 26,1997) at 50694 https://www.govinfo.gov/content/pkg/FR-1997-09-26/pdf/97-25448.pdf; and Final Rule: Amendments to Rules on Shareholder Proposals, at https://www.sec.gov/rules/final/34-40018.htm#foot5.

[77] Using the CPI-U and as baseline dates the SEC's shareholder proposal amendment dates of October 1982, September 1997 and November 2019: If the SEC raised the threshold to just reflect inflation since the original $1,000 threshold proposed in October 1982, the threshold would be set now at $2,619. If the SEC raised the threshold just to reflect inflation between September 1997 and November 2019, it would raise it now to $3,191. If the SEC were to raise the threshold by the same proportion over inflation that it proposed in September 1997 and used October 1982 as the baseline, the threshold would increase to $3,143, that might reasonably be rounded down to $3,000 or up to $3,500. If the SEC were to raise the threshold by the same proportion over inflation that it proposed in September 1997 and that month as the baseline, the threshold would increase to $3,888, which our view would reasonably be rounded up to $4,000. In our view, it would make sense to round up to the rounded number of $4,000. For CPI-U, see https://www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/.

smaller, potentially less sophisticated shareholders; and (2) limiting the ability of shareholders to call attention to governance and disclosure matters that are not receiving adequate attention.

Request for Comment 8. *Instead of adopting a tiered approach, should we simply increase the $2,000/one-year requirement? If so, what would be an appropriate threshold?*

CII Response. See our response to Request for Comment 5. As noted, we favor maintaining the one-year holding requirement, but would not object to raising the $2,000 figure to account for inflation. We think the level the Commission should consider based on its past sound reasoning in 1982-82 and 1997-98 is either $3,000, $3,500 or $4,000.

Request for Comment 9. *Should the current 1% test be eliminated, as proposed? Should the 1% threshold instead be replaced with a different percentage threshold? Are there ways in which retaining a percentage-based test would be useful in conjunction with the proposed tiered thresholds?*

CII Response. We do not see a need to maintain the 1% test. We are not aware of instances where it has been used to support a shareholder proposal.

Request for Comment 10. *Should we instead use only a percentage-based test? If so, at what percentage level? Are there practical difficulties associated with a percentage-based test such as calculation difficulties that we should take into consideration?*

CII Response. We would oppose changing to a percentage test. When lobbyists for company executives have proposed percentage tests, it generally has been to eliminate the opportunity for smaller investors to use shareholder proposals, who in our experience make important contributions through shareholder proposals, as discussed elsewhere.

Request for Comment 11. *Should we prohibit the aggregation of holdings to meet the thresholds, as proposed? Would allowing aggregation of holdings be consistent with a shareholder having a sufficient economic stake or investment interest in the company to justify the costs associated with shareholder proposals?*

CII Response. We oppose the SEC's proposed change to prohibit aggregation of holdings, which has been allowed for many years with no indication that it presents a problem with respect to the solicitation of proxies. If several shareholders collectively believe in the importance of a specific reform at a specific company, we see no reason why they should be barred from collective action. What should matter is the content of the proposal, not whether it is the view of one shareholder or five shareholders. See our discussion above on Eligibility Requirements: No Aggregation of Share Holdings, page 12.

Request for Comment 12. *If we were to allow shareholders to aggregate their holdings to meet the thresholds, should there be a limit on the number of shareholders that could aggregate their shares for purposes of satisfying the proposed ownership requirements? If so, what should the limit be? For example, should the number of shareholders that are permitted to aggregate be* *limited to five so as to reduce the administrative burden on companies associated with processing co-filed submissions?*

CII Response. We see no need to impose an artificial restriction unless the SEC requires disclosure of proponent names in the proxy statement (as we suggest in our response to Request for Comment 11). The reason we believe a limit may make sense in that case is so the registrant is not required to name a large number of proponents in the proxy statement. This could be resolved by requiring the registrant to provide the name of a designated lead proponent (see below) and, for example, up to 10 additional proponents, based on the order in which the company received submissions.

Under existing rules, the "best practice" in this area for some years has been to have a designated "lead filer," who is authorized to act on behalf of itself and all co-filers, and to require co-filers to indicate that they are co-filing, not filing a separate proposal. We are aware of a handful of cases where company management is not clear on who among a number of proponents of the same proposal is the lead filer. To our knowledge, this concern has not related to whether there are sufficient shares to submit a proposal, but rather with whom a company representative should seek to engage on the proposal. See Request for Comment 13.

Request for Comment 13. *Should we require shareholder proponents to designate a lead filer when co-filing or co-sponsoring a proposal? Would doing so facilitate engagement and reduce administrative burdens on companies and co-filers? If we required shareholder-proponents to designate a lead filer, should we require that the lead filer be authorized to negotiate the withdrawal of the proposal on behalf of the other co-filers? Would such a requirement encourage shareholders to file their own proposals rather than co-file? Would the number of shareholder proposal submissions increase as a result?*

CII Response. We understand that the "best practice" of designating a lead filer is not always followed. As such, it would be reasonable for the SEC to advise shareholder proponents (perhaps in a comment to Rule 14a-8 or a Staff Legal Bulletin) who seek to work as a group to designate a lead filer when co-filing or co-sponsoring a proposal, with authority to negotiate. Designating a lead filer who is authorized to represent all co-filers would seem to be a fair trade-off for allowing shareholders to aggregate their holdings and to act collectively in support of a single proposal, and also would promote better engagement, with less confusion and administrative burdens. Where the same proposal is received without such designation, it is fair for the company to omit the proposal as duplicative. We do not believe that, in the absence of clear communication from proponents, company management should be required to determine whether shareholders submitting the same proposal are working together or not. We doubt that such a procedure would prompt shareholders who might otherwise co-file a proposal to instead file a separate proposal. But in any case, the current rule permits exclusion of second and subsequent proposals on the same subject matter.

Request for Comment 14. *What other avenues can or do shareholders use to communicate with companies besides the Rule 14a–8 process? Has the availability and effectiveness of these other channels changed over time?*

CII Response. We believe that this question is framed the wrong way. It is possible – and always has been – for an individual shareholder to communicate with management of a portfolio company. It is encouraging that in recent years, according to reports of our members, management is more likely to be responsive, and that boards are more receptive to shareholder requests for interaction with one or more board members. What is more important is the availability of the shareholder resolution process to let shareholders as a whole express their views on a given topic.

Shareholders collectively also can seek to express views by withholding support or voting against incumbent board members, which can be appropriate, but is a clumsy tool as compared with a shareholder proposal when raising a concern on a particular matter. Of course, the market provides its own corrective mechanism, and shareholders can sell their shares in the company. But that deprives a shareholder of participation in the company in the future, and indexed investors will stay invested in the company long-term as a matter of policy. The Commission states that "much has changed since the Commission last considered amendments to Rule 14a-8," but it then cites social media as the single example of what has changed. We believe that social media can enrich (or degrade) the general media and commentary environment, but it is seriously mistaken to suggest that Twitter, Facebook, YouTube, Instagram, LinkedIn, Snapchat or Reddit postings, or some other forms of social media engagement, are a substitute for shareholder expression of collective voice through voting at company meetings.

Request for Comment 15. *Unlike other issuers, open-end investment companies generally do not hold shareholder meetings each year. As a result, several years may pass between the submission of a shareholder proposal and the next shareholder meeting. In these cases, the submission may no longer reflect the interest of the proponent or may be in need of updating, or the shareholder may no longer own shares or may otherwise be unable to present the proposal at the meeting. Should any special provisions be considered, after some passage of time (e.g., two years, three years, five years, etc.), to require shareholders to reaffirm submission of shareholder proposals for open-end investment companies or, absent reaffirmation, for the proposals to expire?*

CII Response. We are not aware that the fact that fund meetings may be few and far between has created a significant problem in this regard. However, we would be open to a requirement for reconfirmation of the proponent's interest, as long as the procedural requirements are well-designed and not geared only to suppressing voicing of dissent. The Commission provides little detail on what it has in mind, but we would be open to commenting favorably on an actual proposal if the Commission provides some evidence and actually makes a proposal on this.

Request for Comment 16. *Does the Rule 14a–8 process work well? Should the Commission staff continue to review proposals companies wish to exclude? Should the Commission instead review these proposals? Is there a different structure that might serve the interests of companies and shareholders better? Are states better suited to establish a framework governing the submission and consideration of shareholder proposals?*

CII Response. Experience suggests that most participants view the Division of Corporation Finance as a fair arbiter, even if one may disagree with the result in a given case. The 1983 rulemaking did consider several alternative structures, including leaving the area to state law.

There was nearly universal opposition to such alternatives, and we do not believe that the situation has changed to the extent that such a radical change is warranted. We believe the SEC's Rule 14a-8 no-action process generally is superior to litigation of differences over inclusion of shareholder proposals. We also believe that the Release has not taken into account how difficult significantly higher resubmission thresholds – and a new momentum requirement – will be to administer fairly given the failings of the vote counting process. This is an independent reason not to significantly raise the thresholds until the proxy plumbing problems have been addressed.

We also believe that the 14a-8 process can be made to work better if the Commission were to adopt our proposal, discussed below, that companies seeking no-action relief must certify in that request that they have reached out to the proponent (or its representative) and sought to engage on the topic.

II. Proposals Submitted on Behalf of Shareholders

Request for Comment 17. *We are proposing to amend Rule 14a–8's eligibility requirements to require certain additional information when a shareholder uses a representative to act on its behalf in the shareholder-proposal process. Should we amend the rule as proposed?*

CII Response. We believe that use of a representative is appropriately governed by a state agency law, and it is unnecessary and inappropriate for a federal agency to intervene in the intrusive manner proposed by the Commission. Moreover, this provision would do serious harm to the shareholder proposal process in some cases and should be withdrawn. See our comments on this issue on page 15.

Request for Comment 18. *Are the informational requirements we are proposing appropriate? Should we require any additional information or action? If so, what additional information or action should we require? For example, should there be a notarization requirement? How would these measures affect the burden on shareholders?*

CII Response. We oppose the proposed information requirements, as they seek to micromanage the process in ways that have nothing to do with the efficient solicitation of proxies. We would subtract from the SEC's proposed red tape requirements, rather than add to them as some of these questions suggest.

Request for Comment 19. *Is any of the proposed information unnecessary to demonstrate the existence of a principal-agent relationship and/or the shareholder proponent's role in the shareholder proposal process? If so, what information is unnecessary?*

CII Response. In many situations it should be obvious that there is no need for additional information, most notably if (a) the shareholder has fiduciary responsibilities and/or (b) the representative has fiduciary responsibilities. That the shareholder really does own the shares is confirmed by the ownership letter from a bank or broker. The fact that a shareholder seeks to exercise its rights as a shareholder by using an experienced professional should not be a matter that requires elaborate proofs or probing of the relationship.

Request for Comment 20. *Are there legal implications outside of the federal securities laws that we should be aware of or consider in allowing a principal-agent relationship in the context of the shareholder-proposal rule?*

CII Response. The principal-agent relationship is governed by state law, and there are complexities that are not adequately addressed by the one-size-fits-all approach in the proposed rule. We see no discussion in the Release about the effects of pre-empting state law provisions governing the principal-agent relationship, analysis the SEC should have done before making this proposal.

Request for Comment 21. *As part of the shareholder proposal submission process, representatives generally deliver to companies the shareholder's evidence of ownership for purposes of satisfying the requirements of Rule 14a–8(b). Where the shareholder's shares are held in street name, this evidence comes in the form of a broker letter from the shareholder's broker. Since a broker letter from the shareholder's broker generally cannot be obtained without the shareholder's authorization, does the fact that the representative is able to provide this documentation sufficiently demonstrate the principal-agent relationship and/or the shareholder's role in the shareholder-proposal process? Is the answer different if the representative is the shareholder's investment adviser that owes a fiduciary duty to the shareholder?*

CII Response*.* See our response to Request for Comment 19. The ability of a bank or broker to provide proof of ownership should be sufficient to establish the bona fides of the shareholder and the representative**.**

Request for Comment 22. *We are proposing to amend Rule 14a–8(b) to add a shareholder engagement component to the current eligibility criteria that would require a statement from the shareholder proponent that he or she is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. Should we adopt the amendment as proposed? Could the shareholder engagement component be unduly burdensome or subject to abuse rather than facilitating engagement between the shareholder-proponent and the registrant? If so, how could we address such undue burden or abuse?*

CII Response*.* As indicated above, we believe that this proposal seeks to micromanage and strays far beyond the Commission's authority for regulating the solicitation of proxies. We believe the proposal will be subject to abuse by company management, depending on the extent to which the SEC is serious on having its staff micromanage this process. The Commission could address this by dropping the proposal.

Aside from being too micromanaging, the Release does not explain why this shareholder engagement process is proposed as a one-way street. Experience of some of our members is that some companies are not willing to engage shareholders, even to the point of acknowledging receipt of a shareholder proposal. In a significant number of instances, a no-action request is the first and only indication that the company has received a proposal. Our members are institutional investors and tend to have rather large investments. We imagine that responsiveness of company managers to smaller shareholders, including individuals, is no better and probably worse.

If the Commission is determined to move ahead with such an intrusive proposal, the Commission should explain and provide evidence for the detailed rules it seeks to put in place. On what basis does the Commission require proponent expression of availability to a teleconference no less than 10 calendar days and no more than 30 calendar days after submission of a shareholder proposal? Has the Commission surveyed either issuer management or shareholder proponents whether that time frame makes sense from their standpoints? Before it micromanages meetings between proponents and shareholders, the Commission should provide empirical data justifying this time frame, as opposed to, say "no less than 5 days and no more than 50 days," or some other formulation. Should this same time frame apply if the proposal is submitted at a very early date?

There are further questions that may sound picayune, but are real questions that the Commission needs to answer before proceeding with this mandate, given its ambition to micromanage relationships. Will Commission staff in the no-action process get involved with scheduling meetings, *e.g.* judging whether the proponent offered sufficient reasonable times of sufficient length, if the company claims that was not the case in a no-action request? On a matter raised in Request for Comment 23: we would ask the SEC what it thinks is sufficient length for the meeting as prescribed for proponents, should company management want it (15 minutes? 3 hours?)? If the company accepts a time offered by the proponent and schedules a meeting, would it be a basis to omit the proposal if the proponent does not call in at the designated time? If so, would a medical excuse from the proponent be accepted by Commission staff and (and if that is the case, would the staff require a doctor's note?)? If the company claimed the proponent did not call in, but there was confusion on time perhaps due to differing time zones, what standards would the Commission staff employ to adjudicate the dispute, as the fault could lie with issuer staff? Whose "business hours" are relevant for the proposal (various proponents and various company representatives may be in various time zones in North America and elsewhere). If company management does not make itself available for an agreed phone meeting or fails to call in, would that weigh on any no-action request made by the company?

Without answers, this will increase staff's workload as companies file no-action letters.

III. The Role of the Shareholder-Proposal Process in Shareholder Engagement

Request for Comment 23. *We are also proposing to require that the shareholder-proponent include contact information as well as business days and specific times that he or she is available to discuss the proposal with the company. Should we adopt this amendment as proposed? Should we specify any additional requirements for the contact information or availability? For example, should we require a telephone number or email address to be included? Should we require a minimum number of days or hours that the shareholder-proponent be available?*

CII Response. As indicated by our prior answers, we believe that this is needless micromanagement. To the extent that shareholder engagement is to be encouraged, the more sensible approach would be to require that companies reach out to shareholders (or their representatives) upon receipt of the proposal to acknowledge receipt and to offer to discuss the company's policies on the topic at hand.

As discussed above on pages 14 to 15, a useful first step, to the extent there is a problem, would be to amend the current practice regarding no-action relief to require that company management seeking such relief must certify that they have reached out to the proponent, but have been unable to resolve the issue to the mutual satisfaction of the parties.

Request for Comment 24. *Would companies be more likely to engage with shareholders if the proposed amendment was adopted? Are there other ways to encourage such engagement that we should consider? Are there potential negative consequences of encouraging such engagement between individual shareholders and a company, or are there other potential negative consequences of this proposal?*

CII Response. We do not believe that the proposed amendment would make company management more likely to engage with shareholders. And, as discussed above under Eligibility Requirements: Disclosures Regarding a Shareholder's Engagement Availability, page 13, it appears from its economic analysis that the SEC also does not believe that more engagement would result.

Companies currently have every opportunity to engage, yet many do not, as we have observed. There is no reason to believe that the proposed amendment would spur companies to respond any more than they do now. Under the circumstances, it is unwise to place a burden on proponents but permit management to opt out from engagement. As noted above, a simpler, more direct and more effective approach would be to amend the current practice regarding no-action relief to require that company management seeking such relief must certify that they have reached out to the proponent, but have been unable to resolve the issue to the mutual satisfaction of the parties.

Request for Comment 25. *As proposed, a shareholder would have to provide a statement that he or she is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. Is this timeframe appropriate? If not, what would be an appropriate timeframe?*

CII Response. We discuss this above (page 13). We suspect this window is not optimal even presuming the authority and need for a rule mandating this statement (and a one-size-fits-all rule at that). But we would be in a better position to comment if the SEC had explained why it chose to propose this particular window (ideally accompanied by some evidence).

Request for Comment 26. *If the shareholder uses a representative, should we also require that the representative provide a similar statement as to his or her ability to meet to discuss the proposal with the company?*

CII Response. No. The Council's members are investment professionals, and if they submit a shareholder proposal, they are willing to engage with the company. If they use representatives to engage with portfolio companies, those representatives are also professionals who, because of their expertise, are likely quite willing to engage. These proposed requirements have very little to do with regulating the solicitation of proxies and seem to rest on the erroneous notions that (1) companies are uniformly willing to engage with a proponent or representative on a shareholder proposal, even though experience teaches that this is not the case, and/or (2) shareholders who are unwilling to engage is a “problem” that needs to be resolved by placing new burdens on proponents while giving companies no new incentive to engage with shareholders.

Rather than write detailed requirements into a rule, the Commission could encourage shareholders and companies alike to engage in dialogue, either in the explanatory statement accompanying any final rule here or a Staff Legal Bulletin.

To the extent that the Commission believes that a Rule change is needed, we recommend that any request for no-action shall state the company contacted the shareholder, offered to discuss the substance of the proposal and outlined the reasons for seeking no-action relief.

Experience suggest that in many instances, the reason for any disqualification is clear (*e.g.*, failure to meet the filing deadline or to own stock for one year) and if proposals can be withdrawn without the need for seeking no-action relief, that would make the process work more smoothly.

Request for Comment 27. *Should companies be required to represent that they are able to meet with shareholder-proponents?*

CII Response. As we indicate above, to the extent there is a problem, rather than write a detailed requirement, the Commission could encourage shareholders and companies alike to engage in dialogue, either in the explanatory statement accompanying any final amendments or in a Staff Legal Bulletin. And if the SEC believes that is not adequate, the SEC should amend the current practice regarding no-action relief to require that company management seeking such relief must certify that they have reached out to the proponent, but have been unable to resolve the issue to the mutual satisfaction of the parties.

Request for Comment 28. *What are ways that companies engage with shareholders outside of the shareholder-proposal process?*

CII Response. Aside from both required and non-required reports, company managers engage with shareholders and (shareholders engage with company managers) through letter writing, emails, phone calls, telephonic meetings and in-person meetings, including meetings at corporate and investor facilities, investor days and other investor meetings. Investors and managers and board members also often meet and talk at many conferences, including those that have a governance focus such as conferences conducted by CII, the International Corporate Governance Network, the Society for Corporate Governance and the National Association of Corporate Directors. Quarterly earnings calls also provide an opportunity for engagement, although generally dominated by sell-side research staff rather than investors, and often arguably overly-focused on short-term financial results and prospects. Traditionally, annual meetings also have provided an opportunity for face-to-face engagement, but we perceive that management at many companies has sought to marginalize the opportunity for dialogue and face-to-face discussion at those meetings, in part by making them virtual meetings.

Again, we would say that the framing of this question misses an essential element of the shareholder resolution process: the ability of shareholders, acting collectively, to express themselves to management and the board and to other shareholders on a question of corporate policy that affect shareholders as a whole.

It is notable that the Release does not propose any changes to the exclusions in 14a-8(i), which one might construe as a tacit concession that there is not a problem with the substance of proposals that go into a proxy statement – and that the only “problem” is the identity of proponents, who must be subjected to new and burdensome procedural requirements aimed at reducing the number of shareholder proposals through process requirements and red tape.

III. One-Proposal Limit

Request for Comment 29. *We are proposing to amend Rule 14a–8(c) to explicitly state, ‘‘Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders’ meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders’ meeting.’’ Should we amend the rule as proposed?*

CII Response. No. This is another solution in search of a problem. If a shareholder wants to submit a proposal in his or her own name and also act as representative for another shareholder, we do not see that as a problem that requires a solution. The Release does not provide evidence or reasons why the Commission should change its previous analysis on a one-proposal limit as applied to shareholders and now believes that this should apply “equally to representatives who submit proposals on behalf of shareholders they represent.” In the absence of clear reasoning and evidence, the Commission with this question seems to seek commentary on, including potentially rebuttal of, an argument that is not clear to us.

Request for Comment 30. *Would the proposed amendment have unintended consequences on shareholders’ use of representatives or other types of advisers, such as lawyers or investment advisers, and, if so, what are those consequences?*

CII Response. Yes. If there is one lesson that is clear after 70 years, it is that the more rules that the Commission piles onto the no-action process, the greater will be the impulse to engage in nit-picking objections. For example, it is not unheard of for companies to demand that a law firm representing an investor must show that the firm does, in fact, represent the investor. (The bona fides of corporate counsel is assumed.)

Request for Comment 31. *Alternatively, should we amend Rule 14a–8 to explicitly state that a proposal must be submitted by a natural-person shareholder who meets the eligibility requirements and not by a representative? If so, should we clarify that although a shareholder may hire someone to draft the proposal and advise on the process, the shareholder must be the one to submit the proposal?*

CII Response. No. The Commission would simply open a Pandora’s Box of objections as to what exactly it means to “submit” a proposal.

Request for Comment 32. *Alternatively, should we require the shareholder-proponent to disclose to the company how many proposals it has submitted in the past to that company? For example, should we require disclosure of the number of proposals the shareholder has submitted directly, through a representative, or as a representative to the company in the last five years? Should companies be required to disclose this information in the proxy statement? Would this information be material to other shareholders when considering how to vote on the proposal?*

CII Response. No, the proponent should not be required to disclose to company management how many proposals it has submitted in the past to the company. Again, this additional red tape is overkill. Company processes and controls should include keeping these records, including who has submitted proposals in the past and who has appeared at a past annual meeting as a representative.

Moreover, we do not see how this information would be deemed material by another shareholder. What should matter is the substance of the proposal, not the sponsor.

That said, as indicated above, we do suggest that the SEC consider requiring a company to disclose the name of the shareholder proponent and shares held in the proxy statement, and the SEC could consider requiring disclosure of any short interest. These simple facts are more important to an investor than all the trivial processes that the Release seeks to add, and we think it odd the Commission has not considered these simple steps that are in line with its strength in defining disclosure obligations rather than prescribing process.

We do believe that company management should be <u>permitted</u>, as is the case now, to disclose information including how many proposals a proponent has submitted in the past, including, if management chooses, the proponent as a previous representative of a proponent. We see no reason why the government should mandate this disclosure at all, much less for the last five years, or any other arbitrary one-size-fits-all period. If company management believes it is insufficient to make the case against a proposal and wants to discuss the proponent(s), it is free to do so, so long as comments are not false or misleading or defamatory. We perceive that most companies focus on the merits of a proposal rather than the proponent. This likely is the case in part because management perceives that shareholders are interested in substance. It is not necessary for the SEC to run interference for company management by federal mandates for various types of disclosure about proponents and their history.

Request for Comment 33. *If adopted, would the proposed informational requirements discussed in Section II.B alleviate the concerns addressed in this section such that the proposed amendments to Rule 14a–8(c) would be unnecessary?*

CII Response. We disagree with the premises underlying both the proposed information requirements and the proposal to limit the one-proposal rule to a single “person” rather than a single “shareholder.”

Request for Comment 34. *In lieu of, or in addition to, limiting the number of proposals a shareholder would be able to submit directly or as a representative for other shareholders, should we adopt a total limit on the number of proposals allowed to be submitted per company per* *meeting? If so, what numerical limit would be appropriate, and how should such a limit be imposed?*

CII Response. There should not be a limit on the number of proposals at a given company, and the Release provides no justification for doing so. It would be hard to administer, and it would be difficult to determine who gets priority. Should the shareholders with the largest holdings have priority? Or should the first to file a proposal be successful? And what happens if one or more proposals gets withdrawn after an engagement or else gets knocked out through the no-action process? Will the "fallback" proposals that were not eligible in the first instance then go into the proxy?

Request for Comment 35. *As an alternative or in addition to limiting the number of proposals a shareholder would be able to submit directly or as a representative for other shareholders, should we adopt a limit on the aggregate number of shareholder proposals a person could submit in a particular calendar year to all companies? If so, what would be an appropriate limit, and how would such a limit be imposed?*

CII Response. We do not support such an action. Filing multiple proposals on the same topic at a number of companies is a time-honored way to raise issues that have a broad impact on the market. Council members routinely file a number of proposals each year at a number of companies on major governance topics, and there is no evidence that this has posed a problem. A recent example is the successful effort by New York City pension funds to persuade dozens of companies to adopt a proxy access regime.

Request for Comment 36. *Should we require companies to disclose how many proposals were withdrawn and therefore not included in the proxy statement, and how many were excluded pursuant to a no-action request?*

CII Response. We are not sure investors would be particularly interested in the number of proposals withdrawn or excluded, but also believe the proposal appears harmless, and it could add further information on extent of shareholder proposal activity. One caution: It seems possible that this requirement could mildly discourage companies from negotiating withdrawal agreements, as a motive can be to keep a particular situation private. However, it seems unlikely that disclosure only of the <u>number</u> of proposals withdrawn (rather than content) would be of concern.

We would note that there is some information already provided by the private sector on withdrawn proposals. Institutional Shareholder Services (ISS) and the Sustainable Investments Institute (SI^2) each seek to track proposals submitted but not voted, although they of course are reliant on disclosure by shareholders and/or companies of proposals. The SEC should explore the adequacy of their data, perhaps surveying companies on withdrawn proposals over some period of time, and then comparing that to ISS and SI^2 data. That would help establish whether this requirement would produce additive information such that the costs would be worth the benefit.

Information on proposals excluded pursuant to a no-action request of course is published on the SEC's website, so a requirement for disclosure of such proposals does not add anything to public knowledge. The language in this Request for Comment does not necessarily capture all shareholder proposals omitted from a proxy statement, since in theory a company is not required to request a no-action letter. However, our understanding is that Rule 14a-8(j) requires a company to notify the Commission of its intention to omit a proposal even if does not request no-action relief.[78] We do not think a requirement for companies to disclose the number of excluded proposals in the proxy statement is necessary, in light of posting of no-action letters and notices to omit a proposal on the SEC website.

IV. Rule 14a-8(i)(12)- Resubmissions

Request for Comment 37. *Should we maintain the current approach of three tiers of resubmission thresholds but increase the thresholds to 5, 15, and 25 percent, as proposed? Would alternative thresholds such as 5, 10, and 15 percent, or 10, 25, and 50 percent, be preferable? If so, what should the thresholds be? Should we instead adopt the thresholds that were proposed by the Commission in the 1997 Proposing Release (i.e., 6, 15, and 30 percent)? Do the proposed resubmission thresholds better distinguish those proposals that are on a path to meaningful shareholder support from those that are not?*

CII Response. We believe that the Commission should retain the current requirements of 3%, 6% and 10%. In our view, the perceived need to raise the thresholds rests on a flawed assumption, namely that proposals that fail to achieve the proposed thresholds are not "on a path to meaningful shareholder support" and should therefore be omitted.

The false assumption is that the true value of a shareholder proposal is its ability to garner a majority vote from shareholders. That has never been the criterion for measuring the merit of a proposal. Shareholder proposals usually are precatory (not binding), and even if a proposal does not command a 51% "yes" vote, there may be value to a company in learning that a significant percentage of its shareholders have a certain view on what should be done to enhance the value of their investment. See our discussion above on "Resubmission" Thresholds, page 18.

Request for Comment 38. *Alternatively, should we remove resubmission thresholds for the first two submissions and, instead, allow for exclusion if a matter fails to receive majority support by the third submission within a certain number of years? Under such an approach, what would be an appropriate lookback period and how long should the cooling-off period be (e.g., three years, five years, or some other period of time)?*

CII Response. Please see our answer to Request for Comment 37. We do not believe that the current thresholds need to be changed. Moreover, ultimate majority support is not a proper benchmark for considering the cost of proposals.

Request for Comment 39. *What are the estimated costs companies incur as a result of receiving resubmitted proposals? Are the costs different for resubmitted proposals than for initial submissions? In particular, which specific costs incurred (e.g., printing costs, staff time, fees paid*

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[78] Apache Corporation in 2012 decided to omit a shareholder proposal. The company filed notice with the SEC pursuant to 14a-8(j) even though it was not requesting a response from the SEC staff. See letter from Apache Corporate Secretary Cheri L. Peper, Jan. 13, 2012, at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/johnchevedden011312noresponse-14a8-incoming.pdf.

to external parties such as legal advisors or proxy solicitors, management time, board time, etc.) may differ between resubmitted proposals and initial submissions?

CII Response. Logically, costs on resubmitted proposals usually should be less than for initial submission, assuming good expense management from company executives. From the proponent's side, the costs of resubmission tend to be the same or lower, particularly if a company unsuccessfully sought no-action relief in the prior year. We see no reason why the cost to a company would be higher in a second or subsequent year unless there has been a change in the underlying facts or new considerations have been brought to bear.

Certainly, a company opposition statement in Year 2 that is identical to the opposition statement in Year 1 takes less effort; super-copying text is much easier than the act of original writing. The same is true for a no-action request similar to one submitted in a previous year (as we observe is happens sometimes). If circumstances have not changed and the company is not engaging, time invested in considering an idea already reviewed will be less.

All that said, publicly available estimates of management costs are entirely unreliable, including those on which the SEC relied in its cost-benefit analysis in the Release. See Costs and Benefits of the Proposed Amendments starting on page 24. Perhaps the current comment process will produce some reliable evidence on cost, although that did not happen, as the SEC itself conceded, in its 1997-98 rulemaking on the shareholder proposal rule.

Request for Comment 40. *Is there a voting threshold that, if not achieved initially, a proposal is unlikely to surpass in subsequent years? Conversely, is there a voting threshold that, if achieved, a proposal is unlikely to fall below in subsequent years?*

CII Response. We do not believe that there is a reliable threshold that would predict either result. Events are not static, and neither are investor opinions as to what constitutes good corporate governance or good corporate policy.

Request for Comment 41. *Should we shorten or lengthen the relevant five-year and three-year lookback periods? If so, what should the lookback periods be?*

CII Response. We do not see a need for changing existing periods.

Request for Comment 42. *Should the vote-counting methodology under Rule 14a–8(i)(12) be revised? For example, should shares held by insiders be excluded from the voting calculation, or should broker non-votes and/or abstentions count as votes ''against''? Should there be a different vote-counting methodology for companies with dual-class voting structures? If so, what should that methodology be?*

CII Response. We do not believe that there should be a change from the current regime of counting only the "yes" and "no" votes, and the Release has not justified any change. That approach has worked well for decades and provides a level of simplicity. We acknowledge that some companies count abstention votes as "no" votes under applicable state law or bylaws, but the practice varies from one company to the next, and an alternative such as "look to the company's bylaws or state law" would create needless complications. It is useful for all market participants that the SEC uses a consistent methodology.

If the SEC moves forward with raising resubmission thresholds, particularly to the very high levels it has proposed in the Release, it should mandate that for purposes of determining eligibility of a proposal, votes must be counted on a one-share, one-vote basis. Some of the most pressing governance and other problems we see occurring now are at dual-class stock companies. The current thresholds already make it difficult to press proposals at some dual-class stock companies over several years. For example, Mark Zuckerberg controls about 60% of votes at Facebook but a much smaller percentage of shares. Facebook is a highly controversial company with serious weaknesses in corporate governance, in our view and the view of many outside shareholders. Right now, for a proposal to be resubmitted after the third year, it must receive support of approximately 25% of shares not controlled by Zuckerberg. If the SEC raises the nominal threshold to 25%, then more than 60% of non-Zuckerberg shares would have to support a proposal merely for it to be eligible for resubmission after the third year. And there has been a recent trend toward 20:1 vote ratios, rather than the 10:1 ratio at Facebook. If the founder owned 13.1% of shares at a 20:1-vote-ratio company, voting support by 100% of other holders would be insufficient to make a proposal eligible for resubmission after three years under the SEC's proposal with no adjustment for super-voting shares.[79]

As noted above, we have a related concern: vote counting methodology is not as scientific or accurate as one would like. Even though the Commission has acknowledged the need for basic proxy plumbing reform for the past decade, and even though such reform was a topic on which every participant agreed at the 2018 roundtable, not even the most rudimentary steps have been taken, such as end-to-end verification or even the relatively simple issue of universal proxy cards (for which the SEC made a strong proposal on 2016 that it never enacted).

Request for Comment 43. *Would the proposed changes in resubmission thresholds meaningfully affect the ability of shareholders to pursue initiatives for which support may build gradually over time? Do legal or logistical impediments to shareholder communications affect the ability of shareholders to otherwise pursue such longer horizon initiatives? If so, how? Are there ways to mitigate any potential adverse effects of the proposed resubmission thresholds while limiting costs to companies and shareholders?*

CII Response. For small investors (including institutional investors that may own only a small fraction of the company's float), there may be no mechanism as effective as a shareholder proposal, which must come to a vote unless the proposal is excluded or negotiated to a resolution.

From the perspective of retail investors and many institutional holders, the alternatives are not as satisfactory, limited as they are to letter writing, telephone calls and other communications, to which the company may respond with anodyne answers, but perhaps nothing more.

[79] WeWork planned to IPO with a 20:1 vote ratio last year, and it had a number of other governance, disclosure, risk management and cultural deficiencies, in our view. The IPO collapsed, but other sizable 20:1-vote-ratio companies went public last year. Perhaps the WeWork IPO debacle will change the trendline on voting rights, but this remains to be seen.

At the other extreme is an independent solicitation, most likely to elect new directors in order to pursue a different strategy at the target company. This strategy too rests on the fact that shareholders as a whole have the right to decide things by a vote if management's response is inadequate.

Shareholder resolutions are an important and low-cost safety valve between these two extremes. They allow shareholders as a whole to express their collective views on significant matters affecting the company and their investment in that company.

One way to mitigate some of the damage from increased resubmission thresholds would be to create an exception if there is a material change in circumstances. The SEC says that it considered an exception allowing "an otherwise excludable proposal to be resubmitted if there are material developments that suggest a resubmitted proposal may garner significantly more votes than when previously voted on," but the Commission decided against such an exception.[80] Should the Commission move ahead with raising resubmission thresholds, we request the Commission to consider this proposal more fully. We generally agree with this comment from Harvard Law School Professor Hal S. Scott:

> The Resubmission Proposal should include an exception allowing resubmission if legal or regulatory circumstances relevant to the proposal have materially changed since its last submission. The SEC itself acknowledged that past shareholder support is a poor predictor of the likelihood of success when there has been a "significant change in circumstances." For example, some shareholder proposals address novel issues, such as mandatory securities claim arbitration, or evolving regulatory regimes, such as energy and climate.' Votes on these proposals are necessarily influenced by existing legal and regulatory uncertainty, which may militate against approval. To the extent intervening legislation, regulation or litigation eliminates this uncertainty or otherwise changes the law applicable to the subject matter of a proposal, it profoundly changes the relative merit of the affected proposal. As such, in such cases, shareholders should be afforded the opportunity to reconsider the proposal in a timely fashion free of the new restrictions imposed by the Resubmission Proposal. [81]

However, we believe this exception also should apply to material change at a particular company. For example, assume that a compensation-related proposal failed to achieve a third-year threshold of 25%, and shortly thereafter, there is a significant crisis or scandal of the sort that in recent years confronted Wells Fargo or Boeing. That sort of change would argue powerfully in favor of shareholders being allowed to vote on a proposal that seeks to align executive pay with performance. Similarly, if there is a sharp drop in share values, shareholders are likely to take a more skeptical attitude toward management, and more favorable view on certain shareholder proposals opposed by management (witness increased support for an independent chair at Bank of America in 2009, after share values had declined by more than 90%).

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[80] Release at 66472.
[81] See letter to the SEC from Hal S. Scott, Jan. 6, 2020, at https://www.sec.gov/comments/s7-23-19/s72319-6613222-202938.pdf.

The current low resubmission thresholds present less potential for excluding a proposal that would be supported by shareholders if circumstances change. But if the Commission raises the thresholds, it is critical, in our view, that it develop an exception policy to mitigates the negative effects of the rule change.

Request for Comment 44. *When considering whether proposals deal with substantially the same subject matter, the staff has focused on whether the proposals share the same ‘‘substantive concerns’’ rather than the ‘‘specific language or actions proposed to deal with those concerns.’’ Should we consider adopting this standard, or its application? Should we consider changing this standard, or its application? For example, should we adopt a ‘‘substantially the same proposal’’ standard?*

CII Response. Although there may be judgment calls that differ in individual cases about whether two proposals deal with “substantially the same” subject matter, we do not believe that there is a need to change the current practice. There is a familiarity with existing principles that argues against a change.

V. Momentum Requirement for Proposals Addressing Substantially the Same Subject Matter as Those Previously Voted on Three or More Times in the Preceding Five Calendar Years

Request for Comment 45. *Should we adopt the Momentum Requirement, as proposed? If so, should we adopt this requirement instead of, rather than in addition to, the proposed resubmission thresholds? Would this requirement be difficult to apply in practice?*

CII Response. No. See our discussion above on “Momentum Requirement,” page 22.

Request for Comment 46. *As proposed, a proposal that receives a majority of the votes cast at the time of the most recent shareholder vote would not be subject to the Momentum Requirement. Is there a voting threshold below a majority of the votes cast that demonstrates a sufficient level of shareholder interest in the matter to warrant resubmission regardless of whether future proposals addressing substantially the same subject matter gain additional shareholder support? If so, what is an appropriate threshold?*

CII Response. Yes. We believe 10% is an appropriate threshold to warrant resubmission of a proposal. We see no problem that should lead the SEC to adopt a more restrictive rule, and we certainly do not see the need for the Momentum Requirement that would eliminate some proposals from consideration the next year notwithstanding receiving support from 25% to 44.9% of shares voted. See our discussion above on “Momentum Requirement,” starting on page 22. Also, see our discussion on why potential to receive majority support is not the correct test, starting on page 19.

Request for Comment 47. *As proposed, a proposal that receives a majority of the votes cast at the time of the most recent vote would not be excludable under the Momentum Requirement. Should this exception to the Momentum Requirement be limited to the most recent shareholder vote, or should it apply to a different lookback period such as three years or five years?*

CII Response. We oppose the Momentum Requirement, including for proposals that have received majority support in the past. We suppose that changing the rule proposal so that it would not be operative if the shareholder previously received majority support (even if not the last time considered) should be slightly better than the rule as proposed. But the whole Momentum Requirement idea is ill-considered.

Request for Comment 48. *Should the Momentum Requirement apply to all resubmitted proposals, not just those that have been resubmitted three or more times? For example, assuming adoption of the proposed resubmission thresholds, should a proposal be excludable if proposals addressing substantially the same subject matter received 19% on the first submission and 16% on the second submission, even though 16% exceeds the relevant proposed threshold of 15% for a second submission?*

CII Response. No. We oppose the Momentum Requirement, including for proposals that receive less than 25% support regardless of how many times the proposals were resubmitted. The SEC's traditional escalating support requirements are complex enough, and sufficient.

Request for Comment 49. *Does a 10% decline in the percentage of votes cast demonstrate a sufficiently significant decline in shareholder interest to warrant a cooling-off period for any proposal receiving less than majority support? Would a different percentage—such as 20, 30, or 50 percent—or an alternative threshold, be more appropriate?*

CII Response. As noted above, we do not see a modest decline in support as a reason to deny access to a company's proxy statement. That said, if the Commission believes that the evidence supports a cooling-off period based on a drop-off in support or failure to achieve a certain percentage of the vote, we believe that there should be an exception if there is a change in the company's circumstances or an external event that heightens shareholder interest in the topic in question.

Request for Comment 50. *Should the cooling-off period for proposals that fail the Momentum Requirement be shorter than the cooling-off period for proposals that fail to satisfy the existing resubmission thresholds? If so, what would be an appropriate cooling-off period?*

CII Response. As noted above, we do not support a Momentum Requirement and thus have no view on an appropriate cooling-off period other than to say that, if a Momentum Requirement is adopted, there should be an exception for changed circumstances, as discussed in our response to Request for Comment 49.

Request for Comment 51. *Are there other mechanisms we should consider that would demonstrate that a proposal has lost momentum? For example, should there be a separate basis for exclusion if the level of support has not increased by more than 10% in the last two votes in the previous five years? Or, should there be a separate basis for exclusion if the level of support does not reach 50% within 10 years of first being proposed? If so, what would be an appropriate cooling-off period?*

CII Response. We do not support alternatives, as we disagree with the premise that there is a need for a Momentum Requirement in the first place.

VI. Economic Analysis

Economic Analysis (EA) Request for Comment 1. *Are there any entities affected by the proposed rule amendments that are not discussed in the economic analysis? In which ways are those entities affected by the proposed amendments? Please provide an estimate of the number of any additional affected entities.*

CII Response. The proposal does not consider the effect of excluding shareholder proposals on the value of investments of a proponent's fellow shareholders. Research indicates that there is a positive association between shareholder value and a company's record on ESG issues.[82] To the extent that the 14a-8 amendments eliminate such proposals, the result may be to reduce a company's short-term transactional costs in terms of preparing a proxy, but stifling a dialogue on the topic in question. Eliminating the opportunity for shareholders collectively to discuss emerging issues may impose greater costs on shareholders over the long haul.

The proposed rule amendments also do not adequately consider the potential for long-term impacts on companies and society, including various stakeholders, from shareholder proposals. We discuss above, exclusion of early proposals urging desegregation, which we would argue 70 years later proved prescient, and involved major social impacts as well as implications for long-term shareholder value. Of course, it is impossible for the SEC to have the perspective of observers in the year 2090 to identify what issues from our time proved of particular long-term significance. But the SEC should make some attempt to consider benefits of shareholder proposals. We are uncertain whether the first shareholder proposal squarely on climate change, proposed by an individual shareholder in 1990 and discussed above in a footnote on page 20, would have been excluded under the SEC's proposed ownership thresholds. However, that and relatively numerous shareholder proposals in the 1990s and subsequently, particularly those submitted by Ceres and groups connected to Ceres, as well as religious groups affiliated with the Interfaith Center on Corporate Responsibility, clearly raised awareness on the part of company managers about the potential for climate change risks to harm long-term company performance, as well as cause very significant damage (including death) to many humans. The potential for financial harm appears to be in the tens of trillions of dollars, so even modestly increased

[82] A range of issues have been raised through shareholder proposals over the years, including a number of environmental and social policy matters with large potential impacts on long-term shareholder value. There is huge literature on these subjects, with a range of views. A particularly good review of the literature is Roy Henriksson, Joshua Livnat, Patrick Pfeifer, Margaret Stumpp, and Gloria Zeng, "ESG Literature Review," QMA (Quantitative Management Associates LLC) and Stern School of Business Administration, New York University, June 2018, at https://www.qma.com/assets/pdf/QMA_ESG_Literature_Review_June2018.pdf ("good ESG firms may have lower cost of capital, higher valuations, but at best comparable future returns to bad ESG firms"; the review notes "positive association between ESG ratings and firms' accounting measures, mostly those related to profitability"). See also Mozaffar Khan, George Serafeim, and Aaron Yoon, "Corporate Sustainability: First Evidence on Materiality," The Accounting Review, Vol. 91, No. 6, 2016., 1697-1724, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575912 ("firms with strong ratings on material sustainability issues have better future performance than firms with inferior ratings on the same issues"); and "ESG Matters: 10 Reasons You Should Care About ESG, Bank of America Merrill Lynch, Sept. 23, 2019, at https://www.bofaml.com/content/dam/boamlimages/documents/articles/ID19_1119/esg_matters.pdf.

corporate response is significant, including in comparison with the unreliable and apparently inflated cost figures presented in the Release. The SEC economic analysis is weak generally, but particularly on potential benefits from shareholder proposals for society generally and for various non-shareholder stakeholders.

EA Request for Comment 2. *Are there any costs or benefits of the proposed rule amendments that are not discussed in the economic analysis? If so, please describe the types of costs and benefits and provide a dollar estimate of these costs and benefits.*

CII Response. Please see our discussion on "Costs and benefits of the proposed amendments," starting on page 24; our response to Request for Comment 2 (page32) on long-term costs that the proposed amendment may impose; and our response to EA Request for Comment 1 (page 53).

EA Request for Comment 3. *What would be the effects of the proposed rule amendments, including any effects on efficiency, competition, and capital formation? Would the proposed rule amendments be beneficial or detrimental to proponents, companies, and the companies' shareholders, and why in each case?*

CII Response. As noted previously, shareholder proposals have prompted important debates on corporate governance issues and have produced reforms that were initially opposed, often quite vehemently, by managements and boards. Many of these reforms involve improved governance standards and better, more investor-friendly disclosure. These reforms and promote efficiency, effective competition and improved capital formation.

To the extent that such proposal-driven reforms have raised the bar, these changes have had a positive impact on the "going public" process. Companies contemplating such as a move are aware that public investors know about and care about such practices, as well as other less desirable governance practices, such as a multi-class stock structure. We think some opponents of shareholder proposals exaggerate the degree to which shareholder proposals loom large for owners of private companies considering going public. But there is a positive impact from knowing that long-term shareholders in newly public companies do have some ability through shareholder proposals to influence governance practices and raise good ideas, even at dual-class stock companies other those that offer public shareholders zero votes.

To the extent that the proposed amendments would block shareholder proposals that could lead to similar positive reforms, there could be a long-term negative impact from the changes on companies and investors, although in some cases negative effects on company executives (which we realize this question does not ask about). Clearly, for example, strong clawback policies could have limited appeal to executives, except to the extent that they feel they benefit from policies that promote fairness. It is impossible to predict in advance what those reforms might turn out to be, which is why the potential benefits far outweigh the modest costs of printing and voting proposals.

EA Request for Comment 4. *What is the dollar cost for companies to engage with proponents, process, and manage a shareholder proposal (including up to or after a vote on the proposal)? In particular, what is the dollar cost for companies to: (i) Review the proposal and address issues* *raised in the proposal; (ii) engage in discussion with the proponent; (iii) print and distribute proxy materials and tabulate votes on the proposal; (iv) communicate with proxy advisory firms and shareholders (e.g., proxy solicitation costs); (v) if they intend to exclude the proposal, file with the Commission a notice that they intend to exclude the proposal; and (vi) prepare a rebuttal to the proposal? Do these costs vary with the issue raised in the proposal? Do these costs vary with the type of shareholder-proponent (i.e., institutional versus retail investor)? Are these costs different for first-time submissions relative to resubmissions? Do these costs vary with the number of resubmissions? Do these costs vary with the number of proposals received by the company? Do these costs vary with company size? Do these costs differ in cases in which a no-action request is prepared and in other cases, such as where a proposal's exclusion is challenged in court? Do managers have discretion with respect to these costs?*

CII Response. As we state elsewhere (including on our response to the next item, EA Request for Comment 5), there are little or no reliable data on company costs. Moreover, there may be enormous variables in terms of those costs from one company to the next, such that "average" or even "median" figures are not a reliable basis for decision-making. And in the absence of time sheets or similar evidence, the units of work outlined in the question are inherently subject to inflated estimates with little opportunity for scrutiny or verification.

Moreover, the economic analysis should differ if one is considering the cost of an initial submission versus the cost of resubmissions. The two are analytically distinct. We would anticipate that the raised resubmission thresholds would have a bigger impact than the increased ownership thresholds, although we do not really know on the latter as the SEC has not provided good data. We also would anticipate that the increased resubmission thresholds would have a larger impact than the SEC's proposed new red tape requirements.

Because raising the resubmission thresholds looms large, it is important to realize that a resubmitted proposal generally will require less time to review and answer, or for writing of a no-action request letter. Thus, in considering the cost of resubmissions – and how that cost might affect an appropriate threshold – the only proper benchmark should be the cost of responding to proposals *in the second, third or later years*. A firm-wide "average" of the cost of responding to all shareholder proposals will not yield useful data for analyzing the two distinct subjects in this Release, namely, eligibility thresholds to submit a proposal and the criteria under which a proposal may be resubmitted.

The Commission has identified six areas where costs may be incurred. We discuss the six areas in some detail under "Costs and benefits of the proposed amendments" above on page 25. That discussion includes new analysis on no-action request letters, clearly the source of a large portion of company spending related to shareholder proposals.

EA Request for Comment 5. *In response to a questionnaire the Commission made available in 1997, some respondents indicated that costs associated with determining whether to include or exclude a shareholder proposal averaged approximately $37,000 (which figure may have included estimates for considering multiple proposals). The Commission also sought information about the average printing cost and 67 respondent companies reported that the average cost was approximately $50,000. How do these costs compare with costs today? Has ''notice and access''* *or other technological advancements had an effect on the costs associated with disseminating proxy materials? If so, what are those effects?*

CII Response. As discussed in greater detail in our comments above on "Costs and benefits of the proposed amendments" (page 24), the 1997-98 data are seriously flawed, as is the cost discussion in the Release. We have traced the genealogy of all the cost citations cited in the Release, and none of them rests on reliable empirical data about individual firm costs. Indeed, most estimates actually derive from the figures in the 1997-98 rulemaking ($37,000 plus $50,000), although sometimes laundered through layers of subsequent citation. Even if these figures had been reliable at the time (which the SEC admitted they were not), they may be outdated now given evolution in practices, increased proposal withdrawal rates and proxy materials increasingly provided electronically rather than in print.

The Commission itself indicated it was not able to get good cost data.[83] Nevertheless, in that rulemaking, and despite the admitted lack of empirical data, the Commission at the time cited an average cost of deciding whether to exclude a proposal of $37,000 and average cost of including one additional proposal of $50,000. These averages were derived based on responses from 80 and 67 companies, respectively. As the Commission notes in the Release, the $37,000 figure may have been for multiple proposals in some cases.

The use of averages rather than median clearly distorted the 1998 rule amendments discussion. There was a very wide variation between companies (for example, estimated costs for deciding whether to exclude a proposal ranging from $10 to $1,200,000). The high end – that it cost one or more companies $1.2 million to decide whether to exclude a proposal – strains credulity (or suggests extremely poor management), and obviously lifts the average, on which the SEC relied, substantially. A very high number ($1.2 million) will raise the average more than a low-end outlier, which is bounded by zero. Thus, the median figure of $10,000 would have been substantially more reliable for the SEC to cite in the 1997 rule for costs of deciding whether to exclude a proposal, particularly as the Commission then said, "we do not believe, however, that the cost is likely to vary depending on the size of the company. That is, the cost to a small entity is likely to be the same as the cost to a larger entity." In other words, the SEC did not believe some of the survey responses. And the 1997 questionnaire response very likely suffered from selection bias, with companies not much bothered by shareholder proposals, which likely spent little effort deciding whether to include a proposal that met procedural requirements, unlikely to respond. For the current SEC to reify these defective numbers in the current release is misguided.[84]

In footnote 97, dealing with estimated costs for printing an additional proposal, the Commission noted that the reported costs ranged from a low of $200 to a high of nearly $900,000." The median cost was $10,000 – significantly below the $50,000 figure that the Commission cited in the text and that has been the basis for subsequent discussions of cost issues.

The 1998 release did not explain why it was using the average figure, rather than that much lower median figure or some other figure, given that companies seeking to restrict shareholder proposals

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[83] 63 Fed. Reg. at 29114
[84] *Id.*

have an incentive to inflate the costs, particularly if there is no obligation to submit empirical data to support such claims.

Another striking, yet unexplained, inconsistency in the 1998 rule is that the SEC conclusions in 1998 (and reference to that in the current Release) take no notice of what was said in the part of that 1998 release in discussing changes under Rule 14a-4, where the Commission stated: "Daniels Financial Printing informed the staff that in most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company, and that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company."[85]

As to estimates in the Release that do NOT derive from the flaws 1997-98 data:

- The "upper bound" estimate of $150,000 is taken from a letter from the American Securities Association to the Commission in July 2019, which traced back to a 2018 House of Representatives committee assertion that cites no source for this number.
- The mid-range estimate comes from ExxonMobil, which is substantially larger than most companies, and provided no substantiation.
- The lower-bound figure was provided by a membership organization based on "anecdotal reports," with no substantiation.

This is discussed more fully above under Costs and benefits of the proposed amendments" (page 24). In the Release, the Commission uses the "upper bound" figure to say that the decrease in the number of shareholder proposals anticipated by the Commission would result in savings to companies of "up to $70.6 million." Buried in unclear language in a footnote is that the savings could be as little as $1.4 million. We believe it would have been more accurate for the SEC to say in the main text that the range in these cost estimates was from $1.4 million to $70.6 million.

But those are not the only numbers that are explained or addressed as part of this analysis. The Paperwork Reduction Act discussion notes that a 2009 survey of 67 Business Roundtable members in connection with that year's "proxy access" proposal estimate the "average burden for a company associated with printing and mailing a single Shareholder proposal is 20 hours with associated costs of $18,982," whereas that same study said that the average burden of preparing a no-action request related to a shareholder proposal is approximately 47 hours with associated costs of $47,784."[86] The latter figure, of course, measures something different from the estimates in the 1998 rulemaking, which focused on the decision to seek no-action relief.

These are not the only shortcomings on the economic analysis in the Release. The cost estimates use average savings, whereas the actual savings will be at the margin. Consideration of aggregate cost savings is flawed, as any savings achieved by excluding a proposal at company A may be offset if a proponent decides to file the same proposal at company B.

[85] *Id.* at 29117.
[86] Release n. 312.

In short, the cost estimates from the 1997-98 rulemaking, and the flawed additional data offered in the current Release, do not provide a sound analytical basis for considering the potential costs of excluding shareholder proposals in the manner contemplated in the Release.

EA Request for Comment 6. *What are the differences in cost incurred by companies with respect to proposals for which a no-action request is prepared and submitted to the staff and those for which a no-action request is not prepared? What are the specific costs incurred?*

CII Response. Please see our response to EA Request for Comment 4 and EA Request for Comment 5.

EA Request for Comment 7. *In general, how do costs differ for proposals that are submitted during shareholder meetings and not presented in the proxy and those that are presented in the proxy?*

CII Response. We believe that in general, enabling voting by proxy is important, and that pure floor-vote proposals (with no one providing shareholders proxy statements and proxy cards) are of limited use. Shareholder proposals that involve serious solicitation efforts outside the 14a-8 process (that is, with the shareholder distributing a separate proxy card and separate proxy materials) are far more expensive for the shareholder proponent, although we do not have relative cost data. If the proposal is serious, it may garner substantial support, and if it is opposed by management, the management opposition efforts also are likely to be more expensive. We would suggest that if this question does not elicit good comparative cost data from proxy solicitors or others, the SEC undertake research on this question.

Shareholder proposals raised outside the 14a-8 process generally would be within one of the following categories:

1. If a proposal is raised from the floor with no advance notice to the company, the proposal is likely out of order under an "advance notice" bylaw. Nearly all public companies now have advanced notice bylaws.[87] Dismissing the proposal would take a few seconds of the meeting's time. So, the cost would be low, but as the value will be nil, this seems like an unsatisfactory alternative.

2. If there is no such "advance notice" bylaw, and if the proponent has failed to advise the company of an intent to solicit at least the number of shares needed to adopt the proposal, then the proxies that are returned by all other shareholders will give management a proxy to vote in its discretion, so the cost is minimal.[88]

[87] 2,601 Russell 3000 companies (or 94.3%) have advance notice bylaws, and 486 S&P 500 companies (98.4%) have advance notice bylaws.

[88] In the late 1990s, there were a number of shareholder proposals moved from the floor. For example, IRRC identified 14 shareholder proposals moved from the floor in 1996. (IRRC, Summary of 1996 U.S. Shareholder Resolutions, April 12, 1997). However, in part due to the spread of advance notice bylaws, to the best of our knowledge that practice has mostly disappeared. Floor votes in the absence of an advance notice bylaw of course can be consequential in certain circumstances, but where more comparable to other forms of proxy fight rather than to shareholder proposals (see the floor vote change in control at Take-Two Interactive Software Inc. in March 2007).

3. If the proponent does give advance notice and advises of an intent to solicit at least the number of shares needed to adopt the proposal, the company has two options: (a) effectively ignore the proposal by printing a few lines in the proxy to give notice, but no opportunity to vote on the company proxy – a virtually cost-free response; or (b) run a counter-solicitation by printing the proposal with supporting and opposing statements, and allow shareholders to vote on the shareholder proposal using the company proxy card. In the latter situation, the cost to the company is the marginal cost of printing and counting votes on an additional item.

EA Request for Comment 8. *What are the costs, if any, associated with shareholders' consideration and voting on a shareholder proposal? Do these costs differ depending on the shareholder proposal topic? Do these costs differ depending on whether the shareholder proposal is a first-time submission or a resubmission?*

CII Response. We believe shareholders spend varying amounts in considering shareholder proposals. In the limited time period that the SEC provided for comment, we did not solicit members for input, and note the SEC also apparently has not conducted research on this (or many other matters raised in the Release). Clearly, some topics take more study and review than others. Most CII members have policies supporting annual election of directors, which have been proposed for many years, so they do not spend a great deal of time on those proposals. However, an important issue of first impression will require more time. That is one reason shareholders sometimes refrain from support for a new shareholder proposal the first year, and revisit it following the spring proxy season.

It is very clear that as a general matter, shareholders spend less time considering a resubmitted proposal than on the initial proposal. Of course, the rule defines as a "resubmission" a proposal on "substantially the same subject matter" as an earlier proposal, and so the actual proposal may be novel and require review even if it is a "resubmission" in the SEC's nomenclature. If the proposal is a resubmission, on a settled policy matter (from the standpoint of the particular investor), with no material changes in circumstance around the issue or at the company, a resubmitted proposal can take little time to consider.

Shareholder proposals account for less than 2% of voting items at U.S. shareholder meetings, and the large majority of time spent by shareholders and their proxy advisors relates to management proposals. We would estimate very roughly that shareholder proposals may account for up to 10% of voting items regarded as non-routine, but the proportion probably is less than that. To the extent the SEC proposal drives up the cost of proxy advice – and we believe there is potential for very substantial increases in cost – the cost of considering both management and shareholder proposals will increase. The SEC proxy advisor regulations as proposed may make proxy advice so late that it is not incorporated into decision-making by particular investors. If that is the case, we would anticipate that costs at an institution that wants to make its own proxy voting determinations, and permit time for internal discussion, will be much higher (since this would have to be done before proxy voting research becomes available). Others may be inclined to more closely follow recommendations of proxy advisors (usually as based on client policies), and put fewer recommendations to robust internal discussion. In that case, cost of consideration for management and shareholder proposals would decline.

EA Request for Comment 9. *How likely is it that market practices would change in response to the proposed rule amendments? What type of market practices that are not discussed in the economic analysis would change in response to the proposed rule amendments? For example, would larger shareholders become more likely to submit proposals in cases where smaller shareholders would no longer be eligible to submit proposals on their own? Are there frictions associated with this type of reallocation? To what extent would these changes in market practice or other effects mitigate the potential effects of the proposed amendments?*

CII Response. It is not possible to predict whether the practices described in the question may come to pass. We do believe that some larger shareholders may become more active in submitting shareholder proposals, but that this response will be muted by regulatory disincentives to larger investors undertaking such proposals. Also, larger investors have more one-on-one access to company management and board members than smaller investors, and in some cases such one-on-one engagement is sufficient (but smaller holders have a harder time getting that). Also, typically larger institutions are less nimble than individuals and smaller investors, who have more freedom to raise cutting-edge issues that will have impact in the long-term, but have not yet hit prime-time. CII's U.S. asset owner members tend to be among the larger asset owners, and our non-U.S. asset owner associate members and asset manager associate managers also tend to be relatively large. In our view, large institutions (and the portfolio companies in which they invest) have benefited from the issues raised early by smaller investors.

As discussed elsewhere, we would anticipate that suppression of shareholder proposals also will lead to more "vote no" campaigns on corporate directors, but this generally is less effective and less efficient than shareholder proposals.

EA Request for Comment 10. *To what extent would the proposed amendments affect incentives for shareholders to engage with companies prior to and/or following the submission of a shareholder proposal? What are the costs to shareholders and companies associated with such engagement? To what extent would the proposed amendments affect the outcome of such engagement? Would the requirement that the proponent provide a statement that he or she is willing to meet with the company after submission of the shareholder proposal promote more frequent resolution of the proposals outside the voting process? What would be the cost savings, if any, to proponents and companies associated with such resolutions? Do answers to the above questions differ when considering individual or institutional shareholder-proponents?*

CII Response. The economic analysis shows little recognition of a fundamental fact about shareholder proposals: Company management in some case has little or no incentive to act on the environmental, social or governance issues presented by shareholders unless there is a shareholder proposal that gives shareholders collectively a voice to ask company management to address the issue head-on. The shareholder proposal is a unique mechanism for expressing the collective voice of shareholders, to management and to each other. We believe that to the extent the shareholder proposal right is diminished, it will reduce the efficacy of engagement, and also will reduce incentives to engage.

Part of the resistance by management may stem from the fact that many governance practices that proposals challenge serve to protect or entrench insiders, who have no incentive to make a change. Why, for example, would a company voluntarily end its poison pill unless there is strong support for such a measure, as reflected in shareholder votes? Or declassify its board of directors?

Opposition to change is often passionate, as during the debate on whether directors should be elected by majority vote, when companies argued that a majority vote standard was legally and practically impossible to implement. Until it happened, of course, in response to shareholder votes on the topic.

Or, to take a more recent example, the principal argument against a mandatory proxy access rule was that the issue should be addressed by "private ordering." When the rule was vacated, however, very few companies voluntarily adopted proxy access bylaws. It was only after investors filed dozens of shareholder proposals – which got strong shareholder support – that things changed.

This experience points out one of the virtues of Rule 14a-8, namely, that it operates as it was intended to operate, namely to permit shareholders – even small owners – to raise important issues that are or should be significant to investors as a whole. Although one may quibble about specific decisions (particularly the definition of "ordinary business), the exemptions generally serve as an effective mechanism to exclude issues that do not have policy significance.

These comments are meant as a prelude to our answer to the first question posed here: To what extent would the proposed amendments affect incentives for some shareholders (particularly those other than a handful of the largest asset managers) to engage with companies prior to and after submission of a shareholder proposal? It is doubtful that most or all shareholders who historically have submitted shareholder proposals, and who lose eligibility to submit a proposal, will seek to engage by letter writing or telephone calls. Why? Because it is unlikely to produce results. Company representatives may listen politely, perhaps even sympathetically, and may attempt to convince the shareholder that the company understands the concern and has considered the matter deeply. And that will likely be the end of the discussion. The company at most has no incentive to change its policy.

What about engagement after a proposal is submitted? A more productive reform would be to require companies simply to answer their mail, i.e., to respond to shareholder proposals by acknowledging receipt and offering to speak with the proponent and/or its representative. To the extent there are technical problems with the proposal, they can be addressed there and perhaps avoid the need to make a no-action filing. If the company has already implemented the requested policy or has plans to do so, that too may lead to withdrawal.

In any event, requiring a company to respond to a proposal in the first instance would have a beneficial result and produce savings for all concerned. Shareholders would know that if they file a proposal, they will hear from the company, and shareholders and their representatives may be more than willing to talk, particularly if they know that the option of going to a vote is still a possibility.

This proposal could be made even more effective if the Rule were amended to require that any no-action request must certify that the company contacted the proponent before submitting the no-action request.

Doubtless there are or will be some small number of proponents (or their representatives) who are not interested in a dialogue and who will refuse to talk to company representatives. That is inevitable. However, there is no evidence in the record about how often this happens, and a rule that has generally worked well for many decades should not be hobbled by burdensome overregulation of the sort proposed here.

CII's study of shareholder proposals that were voted during the eight years from 2011 to 2018 identified 3,600 proposals at Russell 3000 companies, apart from the hundreds more that were excluded under the Rule. The proposed rule contains no indication of how many of these shareholder proposals were the subject of dialogue or attempted dialogue before a vote.

Without such basic information, it would seem premature at best to impose a draconian new disclosure regime on proponents, when the simpler and more effective approach would be to require an outreach in the first instance from the company.

EA Request for Comment 11. *Relatedly, would the proposed amendments affect shareholder engagement outside of the shareholder proposal process? Would the possible reduction in the number of shareholder proposals allow company resources to be directed towards alternative engagement efforts? What are the costs associated with alternative types of shareholder engagement to companies and shareholders?*

CII Response. To the extent that the proposed amendments would relieve companies of the cost of dealing with certain shareholder proposals, it is highly doubtful that those resources would be directed towards alternative forms of engagement. As discussed in response to Request for Comment E10, experience suggests that corporate dealings with shareholders tends to be reactive, not pro-active, at least as to the sorts of topics raised by shareholder proposals.

We do believe that suppression of shareholder proposals is likely to result in more "vote no" campaigns focused on election of corporate directors. Unfortunately, withholding support from directors (in the absence of a proxy contest) generally is a less satisfactory form of collective engagement than are shareholder proposals.

Inevitably, shareholders have a variety of concerns and priorities in voting on corporate directors. CII writes to boards at which one or more members failed to receive majority support to inquire on whether the board member will continue to serve on the board. We sometimes find it difficult to discern the main reason for negative votes, in part because in some cases there were multiple reasons, with different shareholders withholding support for different reasons.

In addition, some investors would like director elections to be meaningful, and for their votes to reflect whether they want an individual to continue serving on the board, rather than casting a protest vote in an expression of views on a policy issue that, if other shareholders agree, would lead to a director's exit from a board. The director vote can be a clumsy tool for shareholders to express collective view on a policy matter, as opposed to a non-binding shareholder proposal. We think the costs of this type of collective engagement are higher than with shareholder proposals, and the benefits less.

Shareholders also could run costly proxy contests to advocate for shareholder proposals outside the 14a-8 framework. This type of effort, if serious and on a matter of importance to shareholders, is much more expensive than 14a-8 shareholder proposals for both proponents and the company.

EA Request for Comment 12. *What are the opportunity costs to companies and shareholders of shareholder proposal submissions? Please provide a dollar estimate per proposal for these opportunity costs. Do these opportunity costs vary with the type of proposal, the type of proponent, or the type of company? Please provide an estimate of the hours the board of directors and management spend to review and process each shareholder proposal.*

CII Response. There is no evidence that any company has had to forswear value-enhancing opportunity costs because of the need to respond to shareholder proposals. We have reviewed the authorities cited in the Proposal (at note 213), and they cite not a single example of lost opportunities. The most specific reference to opportunity costs is in the 2014 Chamber/Roundtable rulemaking petition, which asserts (without evidence) that the perceived costs of responding to shareholder proposals "understate the potentially more significant and unquantifiable indirect opportunity costs associated with responding to these proposals, including the management time and effort expended despite the fact that these proposals have already been rejected by supermajorities of shareholders." To this sentence is appended a footnote asserting: "This diversion of management time does not diminish merely because the same proposal has previously been rejected." No explanation is given for why management needs to spend the same amount of time on a proposal in multiple years.

Moreover, to the extent that the proposed amendments reduce only some of the "costs," the newly available time is likely to be minimal, certainly not enough to decide whether to open a new facility or roll out a new product.

The argument about lost opportunity costs recalls a canard that periodically crops up at investor sessions, namely, that shareholder resolutions are one reason why so few companies want to go public these days. When pressed, however, those making such a claim cannot identify a single company.

Moreover, and taken on its own terms, the cost issue suggest that lost opportunity costs are not significant.

First of all, shareholder proposals are an infrequent occurrence at most companies, which would mean that there is little or no diversion of resources from greater value-enhancing activities.

Second, for those companies that do get these proposals, it is important to note that the proposed amendments will not eliminate all proposals and would probably not eliminate more than one or two proposals per company. What sort of opportunity gain would that present?

EA Request for Comment 13. *Is the distribution of the dollar value and the duration of firm-specific holdings different for institutional and individual investors? Are there distributional differences when comparing the subsets of individual and institutional shareholders likely to submit shareholder proposals? Please provide any relevant data or summary statistics of the holdings of retail and institutional investors recently and over time.*

CII Response. These questions appear to be aimed at academics, proxy voting intermediaries and perhaps company management. We do not have additional information to share at this date.

EA Request for Comment 14*. Does the majority of shareholders that submit a proposal through a representative already provide the documentation that would be mandated by the proposed rule amendments? To the extent that the practices of certain proponents are not consistent with the proposed amendments, would the costs to proponents to provide this additional documentation be minimal? Are there any costs and benefits of providing the additional disclosures that we haven't identified in the economic analysis? If so, please provide a dollar estimate for these costs and benefits. Would the proposed amendments related to proposals submitted by a representative have any effect on efficiency, competition, or capital formation?*

CII Response*.* Council members are generally more than willing to talk to company representatives about the topic of a resolution, and they may express that interest in the cover letter, although not with the sort of granular detail the proposal contemplates, *i.e.,* what hours of what days of the week and at what telephone numbers.

The extreme specificity of the additional information that the proposal would require will inevitably raise transactional costs for proponents and representatives, *e.g.,* trying to find a mutually satisfactory time for those two parties plus the company representative. Moreover, since the deadline for many proposals is in late November and the month of December, attempting to find free time for those three parties during that time period may be difficult.

EA Request for Comment 15. *What is the relation, if any, between the level and duration of proponent's ownership and the likelihood of submitting shareholder proposals? What is the relationship, if any, between the level and duration of proponents' ownership and the likelihood of submitting shareholder proposals that are more likely to garner majority support and be implemented by management? Do answers to the above questions vary based on the shareholder type or proposal topic?*

CII Response. We are unaware of a correlation, positive or negative, between the size of a proponent's holdings, the duration of a holding and the size of a vote on a given topic.

EA Request for Comment 16. *What are the concerns, if any, associated with drawing inferences about the effects of the proposed amendments from analysis of data on proponents' ownership from proxy statements and proof-of-ownership letters?*

CII Response. We are unaware of any specific concerns, though we doubt that the information would be material to a conclusion one way or another.

EA Request for Comment 17. *To what extent are there additional costs to companies and shareholders associated with applying a three-tiered ownership threshold instead of a single-tier threshold in determining a shareholder's eligibility to submit shareholder proposals?*

CII Response. We cannot comment on what those costs might be, but it seems doubtful that there would be additional costs.

EA Request for Comment 18. *We have observed instances of shareholder proposals going to a vote despite being eligible for exclusion under Rule 14a–8. What are the costs and benefits to companies of including such proposals in the proxy statement? To what extent may these practices change if proposed amendments are adopted?*

CII Response. We are unaware of the instances in question, but to the extent that companies are willing to do so, that would suggest that the cost of letting a matter go to a vote are minimal.

VII. Initial Regulatory Flexibility Act Analysis

Request for Comment Regarding:

- *How the proposed rule and form amendments can achieve their objective while lowering the burden on small entities;*
- *The number of small entities, including shareholder-proponents that may be affected by the proposed amendments;*
- *The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis;*
- *How to quantify the impact of the proposed amendments.*

CII Response. We believe that our prior responses address these questions from a shareholder perspective. Indeed, the entire thrust of the Release is *raising* costs on smaller shareholders.

Sincerely,

Kenneth A. Bertsch
Executive Director

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel