September 12, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8
Release No. 34-95267; File No. S7-20-22; RIN 3235-AM91

Via https://www.sec.gov/cgi-bin/ruling-comments

Dear Ms. Countryman:

I am pleased to provide these comments in response to the proposed rule entitled "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8."[1]

Given the recent pace of Commission rulemaking and that of other financial regulators and the short comment period afforded by the Commission with respect to this proposed rule, my comments are necessarily abbreviated.

The proposed rule is not inherently unreasonable. Nor is it warranted by the evidence. Any rulemaking in this area requires the Commission to balance two competing interests, to wit, (1) fostering shareholder suffrage and holding management accountable to shareholders and (2) limiting the costs that a minority of shareholders can impose on a company and other shareholders.[2] This is necessarily a fact-based assessment involving prudential judgments based on the evidence. Since, however, the Commission engaged in a rulemaking in this area in late 2020 which did not take effect until January 4, 2021[3] (a mere year and half before this rule was proposed) and because data regarding the impact of the 2020 rulemaking is scant (as is noted in the proposing release), it is manifestly unclear why the Commission has chosen to prioritize this rulemaking. The Commission has not seriously assessed the impact of the 2020 amendments nor demonstrated a need for a new rulemaking. *Ergo*, one must assume that the true motivation for the rulemaking is politics and an interest in promoting ESG-related shareholder resolutions.

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[1] "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a–8," Securities and Exchange Commission, Proposed Rule, *Federal Register*, Vol. 87, No. 143, July 27, 2022, pp. 45052 45075 https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf and https://www.sec.gov/rules/proposed/2022/34-95267.pdf.

[2] The cost to other shareholders is both the costs that they company must bear to issue a proxy statement and secure the votes (which ceteris paribus reduces the return) and the costs that other shareholders directly incur when evaluating a proposal and voting on it.

[3] "Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8," Securities and Exchange Commission, Final Rule, *Federal Register*, Vol. 85, No. 214, November 4, 2020, pp. 70240-70295 https://www.govinfo.gov/content/pkg/FR-2020-11-04/pdf/2020-21580.pdf.

Obviously, there is a need for balance between the power accorded to management and the board of directors and that accorded to shareholders. In my judgment, the power accorded to management and the board of directors has become too great and management and boards too often are permitted to act in their own interest to the detriment of beneficial shareholders. The SEC has been complicit in permitting this state of affairs to develop although the Commission is by no means the only actor at fault.

Instead of tweaking Rule 14a-8 to make it easier to offer duplicate or substantially similar resolutions or to resubmit failed resolutions, the Commission should take other actions regarding proxies, how registered investment advisers (RIAs) vote proxies and proxy advisory firms.

In 1932, Adolf Berle and Gardiner Means published *The Modern Corporation and Private Property* which emphasized the separation between ownership and control of modern corporations. Management and the board of directors (the agent of stockholders) had come to control most large corporations and, although diffuse, numerous shareholders owned the corporation, they exercised little control. This contrasted to privately held, usually smaller firms where there was substantial control exercised by shareholders. Berle, Means and others regarded this as largely a good thing. Others were less sanguine.[4] The inability, or at least difficulty, of shareholders to exercise effective control over corporate managements and boards has come to be known as the principal-agent problem, the agent-principal problem or the collective action problem.

Over time, fewer and fewer shareholders owned less and less stock directly. Instead, they (1) owned shares in mutual funds, and later exchange traded funds or index funds (usually in an employer-sponsored 401(k), 403(b) or similar qualified account or analogous government employee account such as the TSP), (2) had an interest in a pension or retirement fund managed by an ERISA fiduciary or (3) owned a variable life-insurance policy that invested in funds. This was driven largely by the tax rules. Relatively few qualified accounts or life-insurance policies permit self-directed investment in individual stocks. Thus, the fund managers and fiduciaries typically were the people voting corporate shares, not the beneficial owners. Thus, ownership and control were now twice removed. This could be called the principal-agent-agent problem or the agent of an agent of a principal problem.

Enter the proxy advisory firms. The ubiquity of these firms is relatively new and largely a function of Commission and DOL ERISA rules that reduce the legal exposure of RIAs and fiduciaries if they rely on third-party recommendations as to how to vote the shares. There are indications that proxy advisory firms can move the votes of over a third of shares in a publicly traded firm. Two firms dominate this field. Thus, ownership and control are now thrice removed. This could be called the principal-agent-agent-agent problem or the agent of an agent of an agent of a principal problem. We are now in a situation were a very small group of proxy-advisory firms and RIAs exercise effective control over most public companies. This is deeply problematic.

This is highly relevant to the current rulemaking because RIAs and proxy-advisory firms are making the real decisions about how to vote most shares, not actual beneficial shareholders. As

[4] Murray Weidenbaum and Milton Friedman come to mind.

the proxy advisory firms and RIAs become increasingly woke, I fear that interests of beneficial shareholders – overwhelmingly ordinary people investing for retirement income – will be subordinated to the political, social and ideological interests of RIAs and proxy advisory firms. This is the problem that the Commission should be addressing.

As an ethical matter, RIAs should be required to secure the actual consent of beneficial owners in their funds before they sacrifice the financial interests of beneficial shareholders to the RIA's (and proxy advisory firms') political, social or ideological objectives. For the sake of tens of millions of American investors, the Commission should be addressing this problem, not facilitating the ability of RIAs to throw investors under the proverbial bus. It is, after all, the job of the Commission to protect investors not to enable their harm.

As I mentioned at the outset, I am sympathetic to efforts to enhance beneficial shareholder suffrage and address the principal-agent-agent-agent problem. The proposed rule does not do this. I oppose further empowering a small group of proxy advisory firms and RIAs. In the absence of other changes to the rules, the proposed rule simply enhances the power of RIAs and other politically motivated actors to act to the detriment of shareholders. At the very least, the Commission should withdraw the proposed rule until substantial evidence about the impact of the 2020 amendments is available and some factual basis is shown for this rulemaking.

Sincerely,

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