

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In re EXCLUSION OF RESUBMITTED SHAREHOLDER PROPOSALS, 17 C.F.R. §240.14a-8(i)(12)	PETITION FOR RULEMAKING REGARDING RESUBMISSION OF SHAREHOLDER PROPOSALS FAILING TO ELICIT MEANINGFUL SHAREHOLDER SUPPORT
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I. Introduction and Nature of Proceeding

1.1. Pursuant to the Administrative Procedure Act,¹ and Rule 192(a) of the Securities and Exchange Commission’s (“SEC” or “Commission”) Rules of Practice,² the U.S. Chamber of Commerce, National Association of Corporate Directors, National Black Chamber of Commerce, American Petroleum Institute, American Insurance Association, The Latino Coalition, Financial Services Roundtable, Center on Executive Compensation, and Financial Services Forum (collectively, “Petitioners”) petition the Commission to propose an amendment to, seek public comment on, and ultimately amend, the Commission’s existing rule regarding the excludability from company proxy materials

¹ 5 U.S.C. §553(e) (2012).

² 17 C.F.R. §201.192(a) (2013).

of shareholder proposals previously submitted to shareholders that did not elicit meaningful shareholder support (“Resubmission Rule”).³

³ 17 C.F.R. §240.14a-8(i)(12) (2013). Securities Exchange Act (“’34 Act”) Rule 14a-8 is not written the way most SEC rules are written. Rather, the Rule utilizes a question-and-answer format to set forth the circumstances in which a public company may exclude a shareholder proposal from its proxy materials. Subparagraph (i) responds to “Question 9,” inquiring under what circumstances a shareholder proposal may be excluded even if the shareholder has “complied with the procedural requirements” of Rule 14a-8. Subparagraph (12) of Subparagraph (i) deals with “*Resubmissions*.”

Petitioners are aware that the Commission must still respond definitively to a significant number of legislatively-mandated rulemaking directives, and have been mindful of that in fashioning this Petition. While we have no desire to impose additional burdens on the Agency, there are at least four compelling reasons for the Commission to take up this Petition immediately, and give it the careful consideration it deserves:

- The importance of the Petition’s subject matter has been recognized by the Commission itself *twice* within the past fifteen years or so—first, when the Commission itself proposed (but ultimately did not adopt) a significant increase in the requirements of the Resubmission Rule (*see* 1997 Proposing Release, *infra*, n. 11), and second, when the Commission issued its so-called “Proxy Plumbing” Concept Release (*see generally*, SEC, “Concept Release on the U.S. Proxy System,” ’34 Act Rel. No. 34-62495, 75 Fed. Reg. 42981 (July 22, 2010), available at <http://www.sec.gov/rules/concept/2010/34-62495.pdf>), and confirmed the need for substantially updating the entire fabric of the shareholder proposal process;
- There has been a growing crescendo of respected voices—including the Commission’s current Chair (*see* Chair White, The Importance of Independence, *infra* n.33), Commissioner Gallagher (*see* Comm. Gallagher, Tulane Remarks, *infra* n.69) (proposing an alternative Resubmission Rule for consideration), and the incumbent Chief Judge of the Delaware Supreme Court (*see* Chief Judge Strine, Can We Do Better by Ordinary Investors, *infra* n.56)—attesting to the unacceptable negative consequences for investors of the overwhelmingly verbose and often senseless assault on the ability of shareholders and portfolio managers to focus on how to manage their securities investments wisely, as well as the diversion of serious management focus away from the best interests of shareholders;
- In the last several years, since Congress’ mandatory requirement of “say-on-pay” referenda, there has been a proliferation of repetitive submissions of non-economically-oriented proposals, often by investors with trivial stakes, that have been overwhelmingly rejected by the shareholders to whom these proposals are addressed. For example, since 2011, among the Fortune 250, alone, 437 shareholder proposals relating to questions of “social policy” have been submitted. These proposals have been opposed by an average of 83.7% of votes cast, with a median opposition of 88%. *See* Manhattan Institute Proxy Monitor Data, available at <http://proxymonitor.org/> (last visited Mar. 31, 2014); and
- The existence of a docket of matters that keeps an agency fully occupied cannot, by itself, be an acceptable basis for denying any appropriate rulemaking petition, for that argument, if given credence, would effectively nullify the statutory and constitutional right of citizens to petition agencies for the adoption, modification

- 1.2. Specifically, Petitioners seek amendment of the Resubmission Rule to increase significantly the percentage of favorable votes required before the company is obligated to include in its proxy materials the substance of proposals shareholders previously rejected.⁴
- 1.3. While the Commission's Resubmission Rule requires a higher percentage of shareholder support each time a shareholder proposal dealing with "substantially the same subject matter" as another proposal or proposals is submitted to a public company one or more times within a five-year period, Petitioners believe the exclusion as presently written imposes adverse consequences on shareholders, in the form of (a) wasted shareholder resources, (b) diminished comprehension and attention of shareholders on matters of economic significance, and (c) diffused management attention better spent on more economically significant matters.

or repeal of rules, since every administrative agency presumably is fully occupied prior to the filing of *any* petition for rulemaking. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (reversing the EPA's rejection of a rulemaking petition because the timing for such a rule was deemed by the agency to be inappropriate, as a policy matter).

⁴ The Commission's Rule sets forth the percentage of favorable votes required before a public company is required to include in its proxy materials a proposal "with substantially the same subject matter as another proposal or proposals" presented in a previous year or years. 17 C.F.R. §240.14a-8(i)(12). Under the Rule as currently drafted, a shareholder proposal rejected by 97% of a company's shareholders can be resubmitted once within the next five years (including the year following its rejection by 97% of the company's shareholders) (Rule 14a-8(i)(12)(i)), a shareholder proposal rejected by 97%, and then 94%, of a company's shareholders can be re-proposed a third time within the next three years (including the year following the prior two rejections) (17 C.F.R. §14a-8(i)(12)(ii)), and a shareholder proposal rejected by 97%, then 94%, and then 90%, can still be re-proposed within the following two years (17 C.F.R. §14a-8(i)(12)(iii)).

For purposes of determining the percentage of votes cast in favor of a proposal, the Commission only considers votes cast "For" and "Against" the proposal. *See* SEC, Division of Corporation Finance: Staff Legal Bulletin No. 14, Question F.4. "How do we count votes under rule 14a-8(i)(12)?" (July 13, 2001), available at <http://www.sec.gov/interps/legal/cfsib14.htm>. This manner of counting votes tends to exaggerate the amount of shareholder support for a proposal, since "Abstentions," or shares represented at the meeting that are cast neither "For" nor "Against" the proposal, are not counted. A more accurate manner of characterizing shareholder support for a proposal would be to divide votes cast "For" the proposal by all votes cast, including abstentions, since abstentions are shares represented at a meeting that are cast in a manner other than "For" the proposal.

Petitioners also propose an alternative approach if the Commission ultimately decides not to amend the percentage of favorable votes required (*see* pp. 25-26, *infra*).

- 1.4. Because the Resubmission Rule’s current formulation compels shareholders to wade through numerous shareholder proposals that have already been viewed unfavorably by 90% or more of a company’s public shareholders,⁵ the Resubmission Rule effectively disserves the shareholders it seeks to protect—as has been noted frequently, the inclusion of insignificant data can make the material information shareholders need to comprehend more difficult to understand, and less likely to be read.⁶

II. The Resubmission Rule

- 2.1. Under the Commission’s Shareholder Proposal Rule, any (and, in theory, every) shareholder who has owned at least \$2,000 worth of a company’s stock for one year (“Shareholder Proposal Qualifiers”) may require the company to include one shareholder proposal in the company’s proxy statement sent to all shareholders.⁷
- 2.2. ’34 Act Rule 14a-8 provides thirteen bases pursuant to which public companies may exclude proposals from their proxy materials.⁸
- 2.3. This Petition addresses ’34 Act Rule 14a-8(i)(12), the Resubmission Rule, which permits a company to exclude a shareholder proposal from its proxy soliciting materials if the proposal

deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company’s proxy materials within the preceding 5 calendar years,

⁵ See n.4, *supra*.

⁶ See, e.g., Brendan Sheridan, Director of Financial Reporting Services, Deloitte & Touche, “Disclosure—Less Is Often More!” (2014), available at <http://www.financedublin.com/sponsors/article.php?i=2>.

Between 2006 and 2011, the average length of proxy statements of Dow 30 companies grew by 54%, from 46 to 71 pages. See Holly Gregory, Weil, Gotshal & Manges, LLC, “Innovations in Proxy Statements,” at p. 1 (Jul/Aug 2012), available at http://www.weil.com/files/upload/July-August2012_Opinion.pdf. This data does not include information incorporated by reference into the company’s proxy soliciting materials, and does not take account of the even larger size of these materials in the event of a proxy contest or other contested solicitation.

⁷ 17 C.F.R. §240.14a-8(b).

⁸ 17 C.F.R. §§240.14a-8(i)(1)-(13).

and did not receive a specified percentage of the vote on its last submission.⁹

- 2.4. The Resubmission Rule allows a company to exclude a shareholder proposal if the proposal (or one dealing with substantially the same subject matter) failed to receive the support of 3% of shareholders the last time it was voted on (if voted on once in the past five years), 6% if it was voted on twice in the past five years, and 10% if it was voted on three *or more* times in the past five years (“Shareholder Support Thresholds” or “Resubmission Thresholds”).¹⁰

III. Discussion

A. Purposes of the Current Resubmission Rule

- 3.1. The Resubmission Rule is designed, among other things to:
 - 3.1.1. Give effect to the will of a substantial majority of shareholders with respect to proposals that do not further corporate interests or garner the interest of most company shareholders;
 - 3.1.2. Preclude a miniscule minority of shareholders from burdening other shareholders with the inclusion of proposals that a super majority of shareholders has indicated do not further their interests and those of their company;
 - 3.1.3. Restrict shareholder proposals to matters of common interest to a significant number of shareholders;
 - 3.1.4. Avoid the costs and diffusion of management attention to matters lacking relevance to a large portion of a company’s shareholders;
 - 3.1.5. Reduce the number and complexity of shareholder proposals facing the shareholders of many public companies;
 - 3.1.6. Serve as an effective alternative to more restrictive regulations that would limit the ability of shareholders to propose shareholder resolutions for shareholder consideration; and
 - 3.1.7. Enable shareholders to focus on matters that have a reasonable relationship to the improvement of shareholder value.

⁹ 17 C.F.R. §14a-8(i)(12).

¹⁰ *See* n.4, *supra*.

- 3.2. The current Resubmission Rule sets Shareholder Support Thresholds at a level insufficient to preclude repetitive shareholder proposals that have no realistic likelihood of garnering the support or interest of a substantial number of company shareholders.
- 3.3. The current Resubmission Rule effectively permits the nullification of the expressed will of a substantial supermajority of company shareholders with respect to shareholder proposals that do not further corporate interests or enhance shareholder values.
- 3.4. At present, the Resubmission Rule enhances the likelihood that shareholders of public companies will face a profusion of repetitive shareholder proposals having little or no relevance to an overwhelming supermajority of company shareholders.
- 3.5. The current minimal Shareholder Proposal Qualifiers that must be satisfied before a proposal can be submitted for a shareholder vote, makes it critical that the Resubmission Rule be amended to limit the burdens placed on shareholders and their companies by having to wade through repetitive proposals of virtually no interest to an overwhelming supermajority of shareholders.¹¹
- 3.6. These problems are exacerbated by the disproportionate influence of the two largest proxy advisory firms, Institutional Shareholder Services (“ISS”) and Glass, Lewis & Co. (“Glass Lewis”).
 - 3.6.1. Together, ISS and Glass Lewis command approximately 97% of the market for proxy advisory firms.¹²
 - 3.6.2. Given the large number of issues that come before shareholders and their fiduciaries each year, and the need to focus the time available for analysis by considering proxy advisory firms’ recommendations, support by these two firms can virtually dictate

¹¹ As the Commission itself has noted, absent relief in the form of a recalibrated Resubmission Rule, the most logical alternative would be relief in the form of more stringent requirements for submitting shareholder proposals. See SEC, “Proposed Rule: Amendments to Rules on Shareholder Proposals,” ’34 Act Rel. No. 34-39093 (Sept. 18, 1997) (62 Fed. Reg. 50682), available at <http://www.sec.gov/rules/proposed/34-39093.htm> (“1997 Proposing Release”), at §III.E. (“we believe that the proposed approach is preferable to . . . increasing the eligibility criteria for initial submissions . . .”).

¹² J. Glassman & J. Verret, HOW TO FIX OUR BROKEN PROXY ADVISORY SYSTEM, at p. 8 n.4 (Mercatus Center, George Mason Univ.) (Apr. 16, 2013) (“Mercatus Paper”), available at http://mercatus.org/sites/default/files/Glassman_ProxyAdvisorySystem_04152013.pdf.

which shareholder proposals must be included in a company's proxy soliciting materials year after year.¹³

- 3.7. As a result, these firms, individually and collectively—and whether or not a specific shareholder proposal is relevant to, or consistent with, enhancing shareholder value—have the power to cause a shareholder proposal to be deemed “sufficiently important and relevant to the company’s business,”¹⁴ and effectively empower the proponents of that proposal to resubmit it for a shareholder vote year after year.
- 3.8. Given the salutary purposes the Resubmission Rule is intended to serve, it should be a matter of serious concern to the Commission that the current Rule is ineffectual in achieving those goals.
 - 3.8.1. Under the current Rule, shareholder proposals that lack even a casual relationship to the enhancement of shareholder value,¹⁵ and fail to command any meaningful shareholder support, are nonetheless required repeatedly to be placed on companies’ proxy cards.
 - 3.8.2. Shareholder proposals directed at environmental issues illustrate the current Resubmission Rule’s failure to ensure that shareholder proposals, which repeatedly appear on corporate ballots, are “sufficiently important and relevant to the company’s business”:
 - 3.8.2.1. Between 2005 and 2013, 420 shareholder proposals focusing on environmental issues were proposed to U.S. companies.¹⁶
 - 3.8.2.2. Only one passed, a 2009 precatory proposal addressed to IDACORP, suggesting that the company’s Board consider adopting quantitative goals for greenhouse gas reduction.¹⁷

¹³ See Y. Ertimur, F. Ferri, and D. Oesch, “Shareholder Votes and Proxy Advisors: Evidence from Say on Pay,” 7th Annual Conference on Empirical Legal Studies Paper, at p. 3 (Feb. 25, 2013), (“Report on Shareholder Votes and Proxy Advisors”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019239.

¹⁴ See 1997 Proposing Release, *supra* n.11, at §III.E.

¹⁵ See, e.g., A. Ingraham & A. Koyfman, “Analysis of the Wealth Effects of Shareholder Proposals”—Vol. III, Navigant Consulting, at p. 13 (May 2, 2013) (“Navigant Study”), available at <http://www.workforcefreedom.com/sites/default/files/Navigant%20Study%20III.pdf>.

¹⁶ See FactSet Shark Repellant data (“FactSet Data”), Ex. A.

- 3.8.2.3. The other 419 shareholder proposals on environmental issues did not garner anything approximating significant shareholder support.¹⁸
- 3.8.2.4. Despite minimal support, these proposals repeatedly have been required to appear in companies' proxy statements.
- 3.8.3. Proposals requesting companies to amend their labor policies provide another example of the current Resubmission Rule's inability to protect shareholders from repetitive reconsideration of proposals previously overwhelmingly rejected:
- 3.8.3.1. Between 2005 and 2013, 237 labor-related shareholder proposals were submitted to U.S. companies. Only three proposals (or approximately 1% of all proposals submitted) received majority shareholder support.¹⁹
- 3.8.3.2. The other 234 labor-related proposals on average garnered less than 20% support (a margin of greater than 4 to 1).²⁰
- 3.8.4. Nevertheless, despite rejection by shareholder supermajorities, and steadily decreasing shareholder support, the current Resubmission Rule permits proponents of these proposals to compel shareholders and companies to devote significant amounts of time and resources to issues that repeatedly fail to attract any significant shareholder support.
- 3.9. The current Resubmission Rule disserves the shareholders it was intended to serve.
- 3.9.1. Despite repeated instances of shareholder rejection of these proposals, and considerable evidence that they have no likelihood of receiving significant support, the current low Shareholder Support Thresholds force shareholders and their fiduciaries to continue to expend additional time and resources reconsidering these issues.

¹⁷ See IDACORP, Inc., Proxy Statement (DEF 14A), at p. 13 (Apr. 6, 2009), available at http://www.sec.gov/Archives/edgar/data/1057877/000118811209000880/t64788_def14a.htm.

¹⁸ On average, the remaining 419 proposals received the support of approximately 14% of votes cast. See FactSet Data, Ex. A.

¹⁹ See FactSet Data, Ex. B.

²⁰ These proposals gained support, on average, of only 18.2% of votes cast. *Id.*

3.9.1.1. Shareholders and their fiduciaries expend considerable time to adequately review corporate disclosures reasonably related to the value of their investments, even before considering and voting on shareholder proposals.

3.9.1.1.1. At the SEC's recent Proxy Advisory Firms Roundtable, institutional investor participants uniformly noted the difficulties engendered by the volume of proxy proposals presented for shareholder votes, often forcing shareholders and their fiduciaries to economize their approach to, and consideration of, proxy voting issues.²¹

3.9.1.1.2. The need to economize the time devoted to, or outsourcing consideration of, proxy voting issues, in whole or in part, risks the result that voting decisions may not be thoroughly considered, potentially jeopardizing fiduciaries' ability to effectively serve the interests of the ultimate owners.²²

²¹ See, e.g., remarks of M. Edkins, Managing Director and Global Head of Corporate Governance and Responsible Investment, BlackRock, Inc., at p. 45, SEC Proxy Advisory Services Roundtable (Dec. 5, 2013), transcript available at <http://www.sec.gov/spotlight/proxy-advisory-services/proxy-advisory-services-transcript.txt> (“[b]ecause so much of the voting, so many shareholder meetings are held in the second quarter of the year, we are all under time pressure, huge time pressure. There are days when we are voting 25, 30 meetings across our team”). See also remarks of J. Brown, Head of Legislative and Regulatory Affairs, Charles Schwab, *id.* at p. 78 (“[A]t Schwab in 2012 for the investment adviser we had 27,000 ballots and about 270,000 separate votes. Those would take an enormous amount of time for an index shop to manage if you didn't outsource that process.”).

²² See, e.g., T. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, Wash. U. L. Quarterly, at p. 3 (June 1, 2003), available at <http://ssrn.com/abstract=413180>.

[S]tudies show that when faced with complicated tasks that involve vast quantities of information, people tend to adopt simplifying decision strategies that require less cognitive effort but that are less accurate than more complex decision strategies. The net result of having access to more information in combination with using a less accurate decision strategy as the information load increases is often an inferior decision. In other words, people might make better decisions by bringing a more complex decision strategy to bear on less information than by bringing a simpler decision strategy to bear on more information. Borrowing Brandeis' terminology, in addition to being a disinfectant, sunlight can also be blinding.”

See also C. Nathan, *The Parallel Universes of Institutional Investing and Institutional Voting*, *The Harvard Law School Forum on Corporate Governance and Financial Regulation*, (Apr. 6, 2010),

3.9.2. This raises the risk that more important issues, that may have an indisputable impact on companies' bottom lines and shareholder values, could be lost in the morass of additional disclosures investors must wade through before they are able to focus on the essential issues that impact the value of their investment.²³

3.9.3. Moreover, companies subject to repeated resubmissions of rejected shareholder proposals must devote senior management time and resources responding to the same (or similar) shareholder proposals year after year, potentially affecting their focus on more important considerations and issues.²⁴

B. Prior History

3.10. In 1997, the Commission proposed, but ultimately did not adopt, an amendment to the Resubmission Rule that would have increased the current 3/6/10% Shareholder Support Thresholds to 6/15/30%.²⁵

3.11. In deciding not to adopt its own proposal to increase Shareholder Support Thresholds, the Commission noted this proposed rule change was intended to provide shareholders and companies with a greater opportunity to decide for themselves which proposals are sufficiently important and relevant to the company's business to justify *repeated* inclusion in its proxy materials.²⁶

3.11.1. This statement in the Adopting Release contrasts with the Commission's surprising assertion in its Proposing Release that only "[i]n *some* circumstances shareholders *may* be the best judge

available at <http://blogs.law.harvard.edu/corpgov/2010/04/06/the-parallel-universes-of-institutional-investing-and-institutional-voting/>.

²³ *Id.*

²⁴ See Navigant Study, *supra* n.15, at p. 7. In some cases, companies have been forced to seek judicial relief to prevent proposals by proxy, in which one proponent, who cannot meet even the minimal requirements to bring a shareholder proposal, seeks to bring a proposal on behalf of another. See n.60, *infra*.

²⁵ See 1997 Proposing Release, *supra* n.11; SEC, "Final Rule: Amendments to Rules on Shareholder Proposals," Securities Exchange Act Rel. No. 34-40018 (May 28, 1998), at §I, "Executive Summary," and n.9, available at <http://www.sec.gov/rules/final/34-40018.htm> ("1998 Adopting Release").

²⁶ See 1998 Adopting Release, *supra* n.24.

of which rule 14a-8 proposals deserve space on the company's proxy card."²⁷

3.12. Although the Commission's 1998 Adopting Release contained a cursory cost-benefit analysis,²⁸ the cost-benefit analysis did not:

3.23.1. Have the benefit of the series of cases decided by the U.S. Court of Appeals for the District of Columbia Circuit since 1996 that have rejected all challenged Commission rules to come before that Court;²⁹ or

²⁷ See 1997 Proposing Release, *supra* n.11, at §III.E. (emphasis supplied). This statement suggests the Commission believed that it could do a better job deciding what matters should be presented to shareholders than shareholders themselves; hardly consistent with shareholder democracy.

²⁸ *Id.* at §VIII, "Cost-Benefit Analysis." The cost-benefit analysis discussion is four paragraphs, and does not contain any empirical data or quantitative analysis. *Id.*

²⁹ See, e.g., Comment, "*Business Roundtable v. SEC*: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation," 15 UNIV. OF PENNSYLVANIA J. BUS. L. 542, 549 (2013) ("In the twenty-one years bookended by the D.C. Circuit's decisions in *Business Roundtable I* and *Business Roundtable II*, the SEC defended securities-related rules against challenges seven times in the same court. It lost every time."); *Bus. Roundtable and Chamber of Commerce v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) ("*Business Roundtable II*") (the Commission's so-called proxy access rule) ("Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters. For these and other reasons, its decision to apply the rule to investment companies was also arbitrary."); *Am. Equity Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010) (overturning the SEC's rule making fixed indexed annuities subject to federal regulation) ("The SEC could not accurately assess any potential increase or decrease in competition, however, because it did not assess the baseline level of price transparency and information disclosure under state law."); *Net Coalition v. SEC*, 615 F.3d 525, 543-44 (D.C. Cir. 2010) (Commission's approval of Exchange fees vacated and remanded because the Commission did not provide evidence to support its assumption of a competitive market for Exchange data products); *Chamber of Commerce v. SEC*, 412 F.3d 133, 143-44 (D.C. Cir. 2005) ("*Chamber I*") (vacating the independent mutual fund chairman rule on two grounds—uncertainty in the calculation of costs cannot relieve the Commission of its responsibility to estimate, as best it can, a range of possible costs; and the Commission gave inadequate consideration to a known alternative proposal, endorsed by two dissenting Commissioners); *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 ("*Chamber II*") (D.C. Cir. 2006) (vacating the SEC's independent mutual fund chairman rule on the ground that the Commission relied on extra-record material critical to its costs estimates, without affording the public an opportunity for comment); *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006) (striking down SEC rule requiring hedge fund managers to register with the Commission); *Financial Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (striking down the Commission's rule exempting broker-dealers from the requirements of the Investment Advisers Act of 1940 when they receive special compensation for their services).

Even before 1996, the D.C. Court of Appeals had expressed concerns about the Commission's failure to perform proper cost-benefit analyses. See, e.g., *Timpinaro v. SEC*, 2

3.23.2. Provide a cost-benefit analysis for the rules the Commission declined to adopt at that time.³⁰

3.24. Indeed, the 1998 Adopting Release explained that the Commission decided not to require higher Shareholder Support Thresholds because “[m]any commenters from the shareholder *community* expressed serious concerns about this proposal.”³¹ In particular, the 1998 Adopting Release noted that:

These commenters were concerned that the increases [in Shareholder Support Thresholds] would operate to exclude too great a percentage of proposals—particularly those focusing on social policy issues which tend to receive lower percentages of the shareholder vote.³²

3.25. In offering this rationale for rejecting its own proposal, the Commission did not reference its three core mandates under the federal securities laws—protection of investors, facilitation of capital raising, and enhancing the effectiveness and efficiency of the Nation’s capital markets—or how the rejection of its own proposal would serve *any*, much less *all*, these core mandates.

F.3d 453, 458 (D.C. Cir. 1993) (feasibility of conducting a test to confirm the theoretical costs and benefits of theory underlying the SEC’s rule requires that the test be conducted).

Since 2004, the Commission has prevailed in only one case in the District of Columbia challenging the adoption of its rules—challenging the Commission’s Conflict Minerals Rule—but that case, decided by the D.C. District Court, *Nat’l Ass’n of Mfrs., Chamber of Commerce, and Bus. Roundtable v. SEC*, No. 13-635 (D.D.C. Jul. 23, 2013), is presently awaiting decision by the DC Court of Appeals, *appeal docketed*, No. 13-5252 (D.C. Cir. Aug. 18, 2013).

³⁰ See, e.g., *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d. 5, 21 (D.D.C. Jul. 2, 2013) (upholding a challenge to the Commission’s adoption of a Dodd-Frank Act rule requiring public companies engaged in extractive industries to disclose payments made to foreign governments in connection with the commercial development of oil, natural gas, or minerals), where the District Court took issue with, and found arbitrary and capricious, the Commission’s decision that it would not provide an exemption from its general rule that would substantially have reduced compliance costs (wholly apart from any statutory duty to act, “an agency decision as to exemptions must, like other [rulemaking] decisions, be the product of *reasoned decisionmaking*”) (emphasis supplied).

³¹ 1998 Adopting Release, *supra* n.25, at §VI, “Proposals Not Adopted: Resubmission Thresholds.”

³² *Id.*, at n.81. There was no discussion or indication in the Adopting Release of what would constitute “too great a percentage of proposals . . . focusing on social policy issues . . .” or how that benchmark had been selected.

- 3.26. Nor did the Commission address the fact that social policy issues—at least to the extent they are not material to investors—are not one of the Commission’s core functions, or statutory responsibilities under the federal securities laws.³³
- 3.27. In rejecting higher Resubmission Thresholds, the Commission also did not address alternatives it had earlier acknowledged (in its Proposing Release) could be necessitated if it did not adopt its proposed higher Resubmission Thresholds—to wit, limiting the number of proposals any public company would be compelled to include in its proxy materials, or increasing Shareholder Proposal Qualifiers (length of holdings and number of shares held) to limit the number of proposals.³⁴
- 3.28. In sum, the Commission neither increased Resubmission Thresholds nor pursued any alternatives it acknowledged it might be compelled to consider in the absence of an increase in Resubmission Thresholds.
- 3.29. In the fifteen years since the Commission eschewed higher Shareholder Support Thresholds, significant changes have arisen in the submission and voting of shareholder proposals.
- 3.29.1. There has been a steady trend of concentration in institutional ownership of U.S. equities and a concomitant decrease in direct ownership by retail shareholders.³⁵ This effectively has removed corporate governance decision-making from individual shareholders, ceding that authority to institutional portfolio managers.
- 3.29.2. Discretionary broker voting³⁶ on behalf of individual shareholders has diminished markedly,³⁷ effectively increasing the impact of

³³ See SEC Chair White, “The Importance of Independence” (Oct. 3, 2013), available at http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.UspgZ_aPY18. See also SEC Chair Mary Jo White, “The Path Forward on Disclosure” (Oct. 15, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#.UspgovaPY18>.

³⁴ 1997 Proposing Release, *supra* n.11, at §III.E.

³⁵ Institutional share ownership among the top 1,000 U.S. companies increased from 59.9% in 1997 to 73.0% in 2009. See M. Tonello & S. Rabimov, “The 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition,” The Conference Board Research Report, at p. 27 (Nov. 11, 2010), available at <http://ssrn.com/abstract=1707512>.

³⁶ Broker voting signifies votes by securities brokers for securities they hold in their own name on behalf of individual investors. In the absence of specific instructions on how to vote these securities with respect to specific issues, brokers could exercise their discretion in

institutional investors and, concomitantly, the proxy advisory firms on which they rely.³⁸

- 3.29.3. Between 1986 and 1995, 80% of shareholder proposals would have been ineligible for resubmission after the third year under the 6/15/30% thresholds the Commission proposed in 1997, nearly four times the number that actually would have been rendered ineligible under the current Rule's 3/6/10% levels.³⁹
- 3.29.4. In contrast, out of 618 proposals in 2013 for which voting data was available, only eleven, or 1.8%, failed to achieve the initial minimal 3% support threshold, and only 98, or 15.8%, failed to achieve the *most stringent* 10% threshold.⁴⁰
- 3.29.5. In 2013, due in large measure to support from the two dominant proxy advisory firms, shareholder proposals on issues that are not financially significant (or so-called social issues), despite overwhelming rejection by a supermajority of shareholders, nonetheless averaged more than twice as much support than

deciding how to vote. See SEC, Investor.gov Website, "Glossary," available at https://www.investor.gov/glossary/glossary_terms/broker-vote#.Uwy4M-NdV5A.

³⁷ On July 1, 2009, the SEC approved amendments to New York Stock Exchange ("NYSE") Rule 452, to eliminate broker discretionary voting for the election of directors. See SEC Release No. 34-60215 (July 1, 2009), available at <http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf>. Discretionary broker voting on other governance issues was further reduced in 2012. See NYSE, Information Memo No. 12-4, "Application of Rule 452 to Certain Types of Corporate Governance Proposals" (Jan. 25, 2012), available at http://www.nyse.com/nysenotices/nyse/rule-changes/pdf?memo_id=12-4. Since NYSE Rule 452 applies to all brokers that are NYSE members, these changes affect *all* public companies, not just NYSE-listed companies. See Smith Anderson LLP, "New Limits on Broker Discretionary Voting on Corporate Governance Proposals and other Proxy Season Considerations," at pp. 1-2 (Feb. 6, 2012), available at http://www.smithlaw.com/media/alert/7_Client%20Alert%202-6-12%20New%20Limits%20on%20Broker%20Discretionary%20Voting.pdf.

³⁸ See pp. 23-25, *infra*.

³⁹ See Social Investment Forum, Comment Letter on Amendments to Rule on Shareholder Proposals, SEC File No. S7-25-97 (Jan. 2, 1998), available at <http://www.sec.gov/rules/proposed/s72597/schueth1.htm>.

⁴⁰ See FactSet Data, Exs. C (proposals for which data was available) and D (proposals that failed to achieve 10% support). The data presented here does not take account of the number of times that a shareholder proposal has been presented and voted on at annual meetings within a five-year period. See *supra*, n.4. Therefore, it is likely that some of the 98 proposals that failed to meet the 10% support threshold were nonetheless able to be presented the following year, because the applicable Resubmission Threshold was either 3% or 6%.

required for continuous eligibility under the Commission's current Resubmission Rule.⁴¹

3.29.6. Significantly, these social issue proposals have not seen any increase in average shareholder support since the imposition of limitations on discretionary broker voting starting in 2010,⁴² indicating that structural changes in proxy voting, not any broadened shareholder support for social issue proposals, is the principal cause of the degraded utility of current Resubmission Thresholds.⁴³

3.30. These changes have further reduced the effect of the already *de minimis* Shareholder Proposal Qualifiers that individual (or small groups of) shareholders sponsoring proposals must satisfy. Specifically:

3.30.1. In contrast to the original purpose of the Commission's shareholder proposal rule,⁴⁴ shareholder proposals are now a central tool for shareholders seeking to advance social change agendas. In 1997, about 900 proposals were received by U.S. public companies,⁴⁵ compared to a high of 1,242 submitted in 2008.⁴⁶

3.30.2. After the passage of the Dodd-Frank Act, the number of shareholder proposals dropped from 2010 to 2011,⁴⁷ principally

⁴¹ See FactSet Data, Ex. E.

⁴² *Id.*

⁴³ See *supra*, nn.35-37.

⁴⁴ Initially, the purpose behind '34 Act Rule 14a-8 was a simple fraud concept—if a company was aware that a shareholder would raise an issue for a shareholder vote at the annual meeting, it would be fraudulent for the company to solicit discretionary proxy authority without advising shareholders of all voting issues of which the company was aware. See, e.g., *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 677 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); *SEC Proxy Rules: Hearings on H.R. 1493, H.R. 1821, & H.R. 2019 Before the House Comm. on Interstate and For. Commerce*, 78th Cong. 169-70 (1943).

⁴⁵ See 1997 Proposing Release, *supra* n.11, at n.13 and associated text.

⁴⁶ See FactSet Data, Ex. C.

⁴⁷ *Id.* 1,109 shareholder proposals were filed in 2010, but that number fell to 811 in 2011 (given the mandatory consideration of “say-on-pay” proposals, see *infra*, n.49).

due to the decrease in specific “say-on-pay” proposals,⁴⁸ which had previously been a major focus of shareholder proposals.⁴⁹ The number of proposals has climbed since 2010.⁵⁰

3.30.3. Those shareholders with social agendas now leverage electronic communications and other collective action tools to promote and proliferate shareholder proposals espousing their particular agendas.

3.30.4. One website, www.theshareholderactivist.com, proudly opines that “[s]hareholder advocacy is a *participatory sport*,” and candidly acknowledges that today, “investor activists . . . submit similar proposals to multiple companies to advance a larger agenda.”⁵¹

3.31. In addition to burdening shareholders with non-financial and non-material proposals they must read and then vote, the proliferation of shareholder proposals that fail to elicit meaningful shareholder support imposes direct and indirect costs on those companies receiving these repetitive proposals.

3.31.1. Costs directly incurred by companies have been estimated at \$87,000 per proposal, or an aggregate of \$90 million annually.⁵²

3.31.2. But, even these figures understate the potentially more significant and unquantifiable indirect opportunity costs associated with

⁴⁸ In 2010, U.S. companies became subject to periodic advisory votes on executive compensation (“say-on-pay”) on a nearly universal basis. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd Frank Act”), Pub. L. No. 111-203, 124 Stat. 1376, §951 (2010). This dramatically increased the already-significant workload of those responsible for proxy voting at institutional portfolio managers. See n.6, *supra*. As a result, institutional portfolio managers’ proxy voting operations must devote greater resources to say-on-pay votes, a high priority corporate governance issue.

⁴⁹ See FactSet Data, Ex. F. Between 2010 and 2011, the number of say on pay proposals filed fell from 67 to just 3.

⁵⁰ See FactSet Data, Ex. C, indicating that 928 proposals were filed at US public companies in 2013, an increase of nearly 14% in two years.

⁵¹ See Craig McGuire, “Can Anyone File a Shareholder Proposal?”, available at <http://theshareholderactivist.com/shareholder-activism-spotlight/can-anyone-file-a-shareholder-proposal/> (emphasis supplied).

⁵² See Navigant Study, *supra* n.15, at p. 7.

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.⁵³

IV. Nature of Petitioners' Interest

4.1. The U.S. Chamber of Commerce ("Chamber")

4.1.1. The Chamber is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector and region.

4.1.1.1. The Chamber's Center for Capital Markets Competitiveness ("CCMC") promotes a modern and effective regulatory structure for capital markets to function fully in the 21st Century economy.

4.1.2. To achieve this objective, CCMC's important priority is to advance a modern and efficient corporate governance system that promotes shareholder value through effective communication between company boards of directors, management and shareholders, without enabling special interests to exploit companies' proxy statements to advance narrow interests not shared by, and at the expense of, all shareholders.

4.2. National Association of Corporate Directors ("NACD")

4.2.1. NACD is the recognized authority focused on advancing exemplary board leadership and establishing leading boardroom practices. Informed by more than 35 years of experience, NACD delivers insights and resources that more than 14,000 corporate director members rely upon to make sound strategic decisions and confidently confront complex business challenges. NACD provides world-class director education programs, national peer-exchange forums, and proprietary research to promote director professionalism, ultimately enhancing the economic sustainability of the enterprise and bolstering stakeholder confidence. Fostering collaboration among directors, investors, and governance stakeholders, NACD is shaping the future of board leadership.

4.3. National Black Chamber of Commerce ("NBCC")

4.3.1. The purpose of the NBCC shall be to teach capitalism and expand

⁵³ *Id.* This diversion of management time does not diminish merely because the same proposal has previously been rejected.

access to capitalization, technical support, procurement opportunities, effective networking, and sharing of information for Black owned businesses and other minority owned businesses as well as the African descendent community as a whole. The main vehicle of disseminating information concerning this purpose is through the Black chambers located throughout the United States and the entire Black Diaspora and via mass marketing. The activities are driven by a strategic plan. The NBCC is nonprofit, nonpartisan and nonsectarian and abides by the rules set forth via IRS 501(c)3 classification.

4.4. American Petroleum Institute (“API”)

4.4.1. API is a national trade association representing over 580 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API’s members include numerous publicly-traded companies, several of which are among the largest public companies in the United States.

4.5. American Insurance Association (“AIA”)

4.5.1. AIA represents approximately 300 major U.S. insurance companies that provide all lines of property-casualty insurance to consumers and businesses in the United States and around the world. AIA members write more than \$117 billion annually in U.S. property-casualty premiums and approximately \$225 billion annually in worldwide property-casualty premiums.

4.6. The Latino Coalition (“TLC”)

4.6.1. TLC was founded in 1995 by a group of Hispanic business owners from across the country to research and develop policies relevant to Latinos. TLC is a non-profit nationwide organization with offices in Southern California, Washington, DC and Mexico. TLC addresses policy issues that directly affect the well-being of Hispanics in the United States. TLC’s agenda is to develop initiatives and partnerships that will foster economic equivalency and enhance overall business, economic and social development of Latinos.

4.6.2. TLC analyzes and reports to the public about the impact of Federal, State and local legislation, and government regulations, has on the Latino communities. TLC is a 501(c)(6) membership organization.

4.6.3. TLC has become one of the most effective national Latino groups addressing issues that directly impact Hispanic businesses and consumers through aggressive issue advocacy campaigns, legislative initiatives and endorsement. In addition, TLC surrounds our constituents with effective tools that enhance their success.

4.7. Financial Services Roundtable (“FSR”)

4.7.1. FSR represents the largest integrated financial services companies providing banking, insurance, payment and investment products and services to the American consumer. Member companies participate through the CEO and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

4.8. Center on Executive Compensation (“CEC”)

4.8.1. The CEC is a research and advocacy organization dedicated to a principles-based approach to executive compensation and corporate governance policy and practice.

4.8.2. The CEC is a division of HR Policy Association, which represents the chief human resource officers of over 350 large companies from a broad cross-section of industries, and the CEC’s more than 100 subscribing companies are HR Policy members.

4.8.3. In support of its mission, the CEC seeks to promote policies and practices that encourage highly customized and carefully tailored executive compensation arrangements based on sound corporate governance practices which are tailored to business strategy thereby enhancing long-term shareholder value. Consistent with that objective, it is necessary to ensure that special interest shareholders promoting a narrow subset of goals do not have the ability to exploit the proxy system inconsistent with the best interests of shareholders generally.

4.9. Financial Services Forum (“FSF” or “Forum”)

4.9.1. FSF is a non-partisan financial and economic policy organization comprising the CEOs of 18 of the largest and most diversified financial services institutions with business operations in the United States. The purpose of the Forum is to pursue policies that encourage savings and investment, promote an open and competitive global marketplace, and ensure the opportunity of

people everywhere to participate fully and productively in the 21st century global economy.

4.10. Petitioners' Shared Interests

4.10.1. Petitioners' specific concern with the Resubmission Rule is that, in recent years, and year-after-year, a small minority of shareholders seeks to promote causes that do not advance the financial (as opposed to political or social) interests of any shareholders, evidenced by repeated rejection of these proposals by compelling super majority percentages of public company shareholders.

4.10.2. These shareholders use public companies' proxy statements to advance their special interests, even though the concerns reflected by their shareholder proposals are not shared by, or relevant to, the vast majority of shareholders, and do not promote or enhance shareholder value.

4.10.2.1. For example, in 2013, a shareholder proposal was submitted at financial services firm The Goldman Sachs Group, Inc., suggesting that the *firm* should run for elective office.⁵⁴ While the company successfully vindicated its right to exclude the proposal by obtaining SEC Staff "no-action relief," it undoubtedly incurred significant costs.⁵⁵

4.10.2.2. This is but one example of the ease with which special interests may pursue frivolous or narrowly-based proposals and cause all shareholders unnecessary expense.

4.10.3. With its low Resubmission Thresholds and the absence of any meaningful requirement that a shareholder proposal already overwhelmingly rejected by shareholders receive the support of a substantial and progressively higher percentage of shareholders each time the proposal's subject matter is resubmitted, the current iteration of the Resubmission Rule burdens the vast majority of

⁵⁴ See The Goldman Sachs Group, Inc., SEC Staff No-Action Letter (Feb. 19, 2013), available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/johnharrington021913-14a8.pdf>.

⁵⁵ See Navigant Study, *supra* n.15, at p. 7.

shareholders by permitting a miniscule minority of shareholders to compel repeated reconsiderations of the same proposals.⁵⁶

4.10.4. Repeated resubmission of shareholder proposals embodying the substance of past proposals that have failed to command significant general shareholder interest diverts shareholders from considering the panoply of legitimate issues directed at preserving or promoting the financial well-being of the companies in which they have invested, wastes management time, and misallocates corporate resources.

4.10.5. Even more pernicious, this allows a minority of shareholders to demean the utility of corporate disclosure that the Commission has endeavored from its inception to promote, and transfers the locus of decisionmaking about proper subjects for shareholder consideration from shareholders, where the locus properly belongs.

4.10.6. Petitioners' members are publicly held corporations and institutional portfolio managers that have a legitimate and legally cognizable interest in preventing the dissipation of finite corporate resources as well as management and shareholders' attention.⁵⁷

⁵⁶ The Chief Judge of Delaware's Supreme Court, Leo Strine, Jr., recently emphasized "the need to reduce the number of [proposals submitted to shareholder] votes so that good decisions can be made and unnecessary costs can be avoided," explaining that, "[i]f stockholder input is to be useful and intelligent, it needs to be thoughtfully considered," and stating further that it "raises the cost of capital to require corporations to spend money to address annually an unmanageable number of ballot measures that the electorate cannot responsibly consider and most investors do not consider worthy of consideration." Hon. Leo E. Strine Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUMBIA L. REV. 449, 483 (2014). In short, Chief Judge Strine aptly suggested:

[I]t is counterproductive for investors to turn the corporate governance process into a constant Model U.N. where managers are repeatedly distracted by referenda on a variety of topics proposed by investors with trifling stakes. Giving managers some breathing space to do their primary job of developing and implementing profitable business plans would seem to be of great value to most ordinary investors.

Id., at p. 475.

⁵⁷ See, e.g., *Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005) ("*Chamber I*") ("Under our precedent, therefore, the Chamber has suffered an injury-in-fact and, because a favorable ruling would redress that injury, it has standing to sue the Commission").

V. Purpose of the Resubmission Rule

- 5.1. The Commission has explained that the Resubmission Rule is crucial to avoid rendering shareholder decisions futile, and to avoid requiring companies to respond to “too many proposals of little or no relevance to their businesses.”⁵⁸
- 5.2. The Commission has also stated that an increase in the required demonstration of shareholder support for these proposals is “preferable” to likely alternatives, such as “increasing the eligibility criteria for initial [shareholder proposals], or further restricting the types of proposals that may appear in proxy materials.”⁵⁹
- 5.3. Unfortunately, when the Commission revised its Shareholder Proposal Rule, it neither increased the Shareholder Support Thresholds nor altered the eligibility requirements applicable to shareholders who submit shareholder proposals.
- 5.4. In effect, as a result of the Commission’s abandonment of its rulemaking efforts, public companies are faced with the worst of both worlds—irrelevant proposals that fail to garner meaningful shareholder support can nonetheless be compulsorily included in companies’ proxy materials repeatedly, while proponents must satisfy minimal standards to compel inclusion of their shareholder proposals.
 - 5.4.1. In fact, companies may be forced to grapple with proposals propounded by proponents who do not even own the shares upon which the eligibility of the proposal is based; rather, in some instances, proposals have been submitted “by proxies” that could not satisfy Rule 14a-8’s minimal Shareholder Proposal Qualifiers.⁶⁰

⁵⁸ See 1997 Proposing Release, *supra* n.11, at §III.E. (The purpose of requiring progressively higher Shareholder Support Thresholds within a five-year time period is that “a proposal that has not achieved these [proposed heightened] levels of support has been fairly tested and stands no significant chance of obtaining the level of voting support required for approval.”).

⁵⁹ *Id.*

⁶⁰ See, e.g., *Waste Connections, Inc. v. Chevedden, et al.*, Civil Action 4:13-CV-00176-KPE (S.D. Tex. June 3, 2013) (order granting summary judgment), *aff’d*, (5th Cir. Feb. 13, 2014) (Per Curiam Unpublished Opinion), available at <http://docs.justia.com/cases/federal/appellate-courts/ca5/13-20336/502532100>; *KBR v. Chevedden*, 478 F. App’x 213 (5th Cir. 2012) (Unpublished). See also N. Chiu, “Companies Challenge Proposals Submitted on Behalf of Shareholders,” Davis Polk Governance Briefing (Nov. 13, 2013), available at

- 5.5. After a proposal has appeared three times in a company's proxy soliciting materials within a five-year period, the highest shareholder support threshold that a failed shareholder proposal must currently achieve is 10%. Moreover, as long as such a proposal continues to be rejected by 90% or fewer of a company's shareholders, proponents can submit the same proposal year after year.
- 5.6. This effectively results in so-called Minoritarianism—the tyranny of a minority⁶¹—in which 10% of shareholders, motivated by concerns unrelated to enhancing shareholder value, can override the expressed will of 90% of the shareholders, indefinitely.
- 5.7. Exacerbating this situation is the fact that two proxy advisory firms—ISS and Glass Lewis—together control approximately 97% of the market for proxy advisory services.⁶²
- 5.8. Institutional shareholders often retain proxy advisory firms to advise them in the exercise of their fiduciary duties to vote proxies for the securities portfolios they manage. Proxy advisory firms provide varied forms of assistance, including analysis and/or voting recommendations, and often manage all aspects of the proxy voting process for the investment adviser.⁶³
- 5.9. Proposals that are favored by ISS may receive up to 24.7% greater support than those that do not, absent a concerted effort in opposition to the proposal.⁶⁴ This means that ISS support, *alone*, may result in a shareholder proposal being included in a company's proxy soliciting materials year after year, independent of any other factors, including,

<http://www.davispolk.com/briefing/corporategovernance/companies-challenge-proposals-submitted-behalf-shareholders/>.

⁶¹ See, e.g., J. Derbyshire, "Minoritarianism," NATIONAL REVIEW (Jan. 29, 2002), available at <http://old.nationalreview.com/derbyshire/derbyshire012902.shtml>.

⁶² See Mercatus Paper, *supra* n.12.

⁶³ See e.g., ISS, "Proxy Advisory Services," available at <http://www.issgovernance.com/proxy/advisory>.

⁶⁴ ISS and Glass Lewis effectively ordain an average of 24.7% and 12.9%, respectively, of the vote on shareholder proposals in many companies, in either case a large enough percentage of the vote to meet even the highest shareholder support threshold in the current Resubmission Rule. See Report on Shareholder Votes and Proxy Advisors, *supra* n.13.

- for instance, whether the proposal would have any significant impact on the value of shareholders' investment.⁶⁵
- 5.10. Proposals that are favored by Glass Lewis may receive up to 12.9% greater support than those that do not, absent a concerted effort in opposition to the proposal.⁶⁶ This means that Glass Lewis' support, *alone*, may result in a shareholder proposal being included in a company's proxy soliciting materials year after year, independent of any other factors, including, for instance, whether the proposal would have any significant impact on the value of shareholders' investment in the company.
 - 5.11. In this way, ISS' and Glass Lewis' influence over votes on shareholder proposals rises to a level of *de facto* control.
 - 5.12. As a result, the current process does not permit shareholders collectively to determine whether a proposal is "sufficiently important and relevant to the company's business," but rather, concentrates that decision in the hands of a very miniscule shareholder minority, frequently motivated not by improving shareholder value, but rather motivated by the pursuit of their narrow special interests.
 - 5.13. Worse, this tyranny of the minority is achieved only at a significant cost borne by all shareholders, aided by two proxy advisory firms that operate outside any internal or external oversight vis-à-vis shareholder proposals, and without any accountability for the positions they take, or the conflicts from which they suffer in reaching their voting advice.⁶⁷

⁶⁵ Even lower estimates of ISS' influence on shareholder votes reflect that ISS recommendations, without more, carry enough influence over the outcome of voting on shareholder proposals to ensure that a proposal can achieve the 10% support that, in all cases, is sufficient to ensure that the proposal can be resubmitted the following year. See J. Copland, *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism* (Manhattan Inst. for Policy Research, 2012), at p. 3 (estimating the influence of ISS on shareholder proposals to be 15% on average) ("Proxy Monitor 2012 Report"), available at http://www.proxymonitor.org/pdf/pmr_04.pdf.

⁶⁶ See Report on Shareholder Votes and Proxy Advisors, *supra* n.13.

⁶⁷ See, e.g., *In the Matter of ISS*, Inv. Advisers Act. Rel. No. 3611 (May 23, 2013), available at <http://www.sec.gov/litigation/admin/2013/ia-3611.pdf> (Imposing a cease-and-desist order on, and making findings about, ISS for its failure to adopt and enforce appropriate internal procedures regarding employee disclosures of voting information in return for personal benefits); and see generally, SEC Proxy Advisory Services Roundtable, *supra* n.21.

- 5.14. This lack of oversight and accountability effectively enables these proxy advisory firms to function as *de facto* standard setters of U.S. corporate governance, and gives them great influence over the operation of the Commission’s Shareholder Proposal Rule.⁶⁸

VI. Relief Requested

- 6.1. The Commission should formally reconsider its Resubmission Rule.
- 6.2. Because the existing Resubmission Rule was adopted without any meaningful cost-benefit analysis, and the amendments previously proposed were rejected without any meaningful cost-benefit analysis, the Commission should conduct a thorough cost-benefit analysis of the current Rule and the previously proposed, but unadopted, revisions thereto.
- 6.3. The Commission should formulate an amendment to the Resubmission Rule that would significantly increase the voting thresholds and additionally require that a shareholder proposal must gain the support of a progressively and meaningfully higher proportion of shareholder support each year that it (or one dealing with substantially the same subject matter) appears on a corporate ballot and, if either of these requirements are not met, the shareholder proposal (or one dealing with substantially the same subject matter) may be excluded from a company’s proxy materials for a period of three years.⁶⁹
- 6.4. Alternatively, The Commission should consider the adoption of more meaningful limitations on the number of shareholder proposals that

⁶⁸ See Chamber, BEST PRACTICES AND CORE PRINCIPLES FOR THE DEVELOPMENT, DISPENSATION, AND RECEIPT OF PROXY ADVICE (Mar. 2013), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/Best-Practices-and-Core-Principles-for-Proxy-Advisors.pdf>. See also T. Quaadman, Letter to Hon. Mary Jo White, SEC Chair, re ISS Proposed Amendment to Benchmark Policies Regarding Mandatory Auditor Rotation (Feb. 25, 2014), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2014-2.25-Letter-to-the-SEC-on-ISS-Proposal-for-Mandatory-Audit-Rotation.pdf>.

⁶⁹ We do not propose specific percentages of support, believing that the Commission should, after conducting a rigorous cost-benefit analysis, tie the percentages it selects to the conclusions it gleans from its cost-benefit analysis. The Commission’s prior proposal for increasing the Resubmission Thresholds should provide a good starting point for analysis, as would Commissioner Gallagher’s proposal for a “three strikes and you’re out” policy. See D. Gallagher, “Remarks at the 26th Annual Corporate Law Institute, Tulane University Law School: Federal Preemption of State Corporate Governance,” (Mar. 27, 2014) (“Tulane Remarks”), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370541315952#.UzT9lcd17Zs>.

can be included in any company's proxy materials, and reduce the availability of the shareholder proposal process to shareholders who do not have a significant stake in the corporation.⁷⁰

- 6.5. The Commission should provide such additional or other relief that it, in its discretion, deems appropriate under the circumstances.

Respectfully Submitted,



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U.S. Chamber of Commerce

National Association of Corporate Directors
National Black Chamber of Commerce
American Petroleum Institute
American Insurance Association
The Latino Coalition
Financial Services Roundtable
Center on Executive Compensation
Financial Services Forum

⁷⁰ There are an infinite number of ways to reduce the burdens discussed *supra*, however, the Petitioners believe that they should leave to the Commission the consideration of how best to achieve this objective. Should the Commission prefer to receive from Petitioners a considered discussion of possible alternatives, the Petitioners will promptly supply potential options.