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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-87458; File No. S7-23-19]

RIN 3235-AM49

Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend certain procedural requirements and the provision relating to resubmitted proposals under the shareholder-proposal rule. The proposed amendments to the procedural requirements would replace the current ownership requirements with a tiered approach that would provide three options for demonstrating an ownership stake through a combination of amount of securities owned and length of time held; require certain documentation to be provided when a proposal is submitted on behalf of a shareholder-proponent; require shareholder-proponents to state when they would be able to meet with the company in person or via teleconference to engage with the company with respect to the proposal; and provide that a person may submit no more than one proposal, directly or indirectly, for the same shareholders' meeting. The proposed amendments to the resubmission thresholds would raise the current resubmission thresholds of 3, 6, and 10 percent to 5, 15, and 25 percent, respectively; and add a new provision that would allow companies to exclude proposals under certain circumstances where shareholder support for the matter has declined.

DATES: Comments should be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/concept.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-23-19 on the subject line.

Paper comments:

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

All submissions should refer to File Number S7-23-19. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on our website (https://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Matt McNair, Senior Special Counsel in the Office of Chief Counsel, at (202) 551-3500, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to 17 CFR 240.14a-8 ("Rule 14a-8") under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq*.] ("Exchange Act").

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I. INTRODUCTION

A. Background

Under state corporate law, shareholders have the right to vote their shares to elect directors and to approve or reject major corporate transactions at shareholder meetings, and shareholders may appoint proxies to vote on their behalf at such meetings.[1] Because most shareholders do not attend public company shareholder meetings in person and, instead, vote their shares by the use of proxies that are solicited before the shareholder meeting takes place, the proxy solicitation process rather than the shareholder meeting itself has become the "forum for shareholder suffrage."[2]

Issuers with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") and issuers that are registered under the Investment Company Act of 1940 ("Investment Company Act") are generally required to comply with the federal proxy rules in Regulation 14A when soliciting proxies from shareholders.[3] These rules include the requirement that issuers publicly file and provide shareholders with a proxy statement containing certain information. Individual shareholders and other persons may also solicit proxies in support of proposals that a shareholder wishes to present for a vote at a shareholder meeting. Such solicitations must also generally comply with the federal proxy rules.

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[1] See Concept Release on the U.S. Proxy System, Release No. 34-62495 (Jul. 14, 2010) [75 FR 42982 (Jul. 22, 2010)], at 42984 ("Proxy Plumbing Release").

[2] See Proposed Amendments to Rule 14a-8, Release No. 34-19135 (Oct. 14, 1982) [47 FR 47420 (Oct. 26, 1982)], at 47420–21 ("1982 Proposing Release"); Proxy Plumbing Release, supra note 1, at 42984; Roosevelt v. E. I. Du Pont de Nemours & Co., 958 F.2d 416, 422 (D.C. Cir. 1992) (quoting 1982 Proposing Release).

[3] Foreign private issuers are exempt from the federal proxy rules. See 17 CFR 240.3a12-3(b). In addition, debt securities registered under Section 12(b) are exempt from the federal proxy rules, with some exceptions. See 17 CFR 240.3a12-11(b).

Rule 14a-8 requires companies that are subject to the federal proxy rules to include shareholder proposals in their own proxy statements to shareholders, subject to certain procedural and substantive requirements.[4] By giving shareholder-proponents the ability to have their proposals included alongside management's in the company's proxy statement, Rule 14a-8 enables shareholder-proponents to easily present their proposals to all other shareholders, and to have proxies solicited for their proposals, at little or no expense to themselves. The rule, the concept of which was first adopted by the Commission in 1942, thus facilitates shareholders' traditional ability under state law to present their own proposals for consideration at a company's annual or special meeting, and it facilitates the ability of all shareholders to consider and vote on such proposals.[5]

However, this mechanism for shareholders to require inclusion of their proposals in companies' proxy materials is not without limits. Rule 14a-8 permits a company to exclude a shareholder proposal from its proxy statement if the proposal fails to meet any of several specified substantive requirements, or if the shareholder-proponent does not satisfy certain eligibility or procedural requirements. All of these requirements are generally designed to ensure that the ability under Rule 14a-8 for a shareholder to have a proposal included alongside management's in the company's proxy materials—and thus to draw upon company resources and

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[4] Unless otherwise noted, references to "shareholder proposal," "shareholder proposals," "proposal," or "proposals" refer to submissions made in reliance on Rule 14a-8.

[5] See, e.g., *Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce*, 78th Cong., 1st Sess. 17–19 (1943) (Statement of the Honorable Ganson Purcell, Chairman, Securities and Exchange Commission) (explaining the initial Commission rules requiring the inclusion of shareholder proposals in company proxy materials: "We give [a stockholder] the right in the rules to put his proposal before all of his fellow stockholders along with all other proposals . . . so that they can see then what they are and vote accordingly. . . . The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on.").

to command the time and attention of other shareholders—is not excessively or inappropriately used.[6]

A proposal may be excluded if the rule's procedural requirements are not satisfied. These rules set forth the level of share ownership necessary to be eligible to submit a proposal, the number of proposals that a shareholder may submit for a particular shareholders' meeting, the proposal's permitted length and the deadline for submitting proposals.

The substantive requirements permit a company to exclude a proposal if the proposal would violate applicable law; would violate the proxy rules; relates to a proponent's personal grievance or personal interest; is not significantly related to the company's business; is not capable of being implemented by the company; deals with matters relating to the company's ordinary business operations; or has already been substantially implemented, among other grounds. Proponents and companies do not always agree on the application of these exclusions. Accordingly, if a company intends to exclude a shareholder proposal from its proxy materials on these grounds or any other ground, it is required under Rule 14a-8(j) to "file its reasons" for doing so with the Commission. These notifications are generally submitted in the form of a no-

[6] The Commission has expressed recurring concern over the years that Rule 14a-8 is susceptible to misuse. In 1948, the Commission adopted three new bases for exclusion to "relieve the management of harassment in cases where [shareholder] proposals are submitted for the purpose of achieving personal ends rather than for the common good of the issuer and its security holders." See Notice of Proposal to Amend Proxy Rules, Release No. 34-4114 (July 6, 1948) [13 FR 3973 (Jul. 14, 1948)], at 3974 ("1948 Proposing Release"). In 1953, the Commission amended the shareholder-proposal rule to allow companies to omit the name and address of the shareholder-proponent to "discourage the use of this rule by persons who are motivated by a desire for publicity rather than the interests of the company and its security holders." See Notice of Proposed Amendments to Proxy Rules, Release No. 34-4950 (Oct. 9, 1953) [18 FR 6646 (Oct. 20, 1953)], at 6647. In amending the resubmission basis for exclusion in 1983, the Commission noted that commenters "felt that it was an appropriate response to counter the abuse of the security holder proposal process by certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue." See Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983) [48 FR 38218 (Aug. 23, 1983)], at 38221 ("1983 Adopting Release"). In addressing the personal-grievance basis for exclusion in 1982, the Commission noted that "[t]here has been an increase in the number of proposals used to harass issuers into giving the proponent some particular benefit or to accomplish objectives particular to the proponent." See 1982 Proposing Release, supra note 2, at 47427.

action request seeking the staff's concurrence that they may exclude a shareholder proposal under one or more of the procedural or substantive bases under Rule 14a-8. The staff of the Divisions of Corporation Finance and Investment Management, as a convenience to both companies and shareholder-proponents, has for many years engaged in the informal practice of expressing whether the staff would recommend enforcement action to the Commission if a company excludes a proposal from its proxy materials. This is done to provide guidance as to the staff's views and to assist both companies and shareholder-proponents in complying with the federal proxy rules.

We are proposing modifications to, and seeking public comment on, two of the rule's procedural requirements and one of its substantive requirements.

The first proposed amendment is to Rule 14a-8(b), which establishes the eligibility requirements a shareholder-proponent must satisfy to have a proposal included in a company's proxy statement. Under the current rule, to be eligible to submit a proposal, a shareholder-proponent must have continuously held at least $2,000 in market value or 1 percent of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the proposal is submitted.[7] The $2,000 ownership threshold was last substantively reviewed and updated by the Commission in 1998.[8]

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[7] 17 CFR 240.14a-8(b)(1).

[8] See Amendments To Rules On Shareholder Proposals, Release No. 34-40018 (May 21, 1998) [63 FR 29106 (May 28, 1998)] ("1998 Adopting Release").

The second proposed amendment is to Rule 14a-8(c), which provides that each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.[9]

The third proposed amendment is to Rule 14a-8(i)(12), which allows companies to exclude a shareholder proposal that "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" if the matter was voted on at least once in the last three years and did not receive at least:

(i) 3 percent of the vote if previously voted on once;

(ii) 6 percent of the vote if previously voted on twice; or

(iii) 10 percent of the vote if previously voted on three or more times.[10]

These resubmission thresholds have been in place since 1954[11] and, like the ownership thresholds in Rule 14a-8(b), were last substantively reviewed by the Commission in 1998.[12]

B. Roundtable on the Proxy Process

On November 15, 2018, the Commission's staff held a roundtable on the proxy process ("Proxy Process Roundtable"), which included a panel discussion on Rule 14a-8 and the shareholder-proposal process. The shareholder-proposal panelists expressed their views on the

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[9] 17 CFR 240.14a-8(c).

[10] 17 CFR 240.14a-8(i)(12).

[11] See Adoption of Amendments to Proxy Rules, Release No. 34-4979 (Jan. 6, 1954) [19 FR 246 (Jan. 14, 1954)] ("1954 Adopting Release").

[12] See 1998 Adopting Release, supra note 8. The Commission sought public comment on the ownership and resubmission requirements in 2007 in connection with a proposed rule on proxy access, but these requirements have not been substantively revisited since 1998. See Shareholder Proposals, Release No. 34-56160 (Jul. 27, 2007) [72 FR 43488 (Aug. 3, 2007)] ("2007 Proxy Access Proposing Release").

application of Rule 14a-8 and shared their experiences with shareholder proposals and the related benefits and costs involved for companies and shareholders. Among the topics addressed were ownership and resubmission thresholds under Rule 14a-8(b) and Rule 14a-8(i)(12), respectively, and the extent to which these thresholds are in need of updating.

Panelists from the issuer community recommended revising the ownership and/or resubmission thresholds,[13] while the panelists who have submitted shareholder proposals generally opposed revisions to these rules.[14] Among those favoring changes to these thresholds, several cited the costs to companies and their shareholders as a primary basis for raising ownership and/or resubmission thresholds.[15] Among those who support the current thresholds, one panelist stated that Rule 14a-8 already appropriately balances the costs and benefits of the shareholder-proposal process,[16] and another panelist suggested that Rule 14a-8 is currently a cost-effective mechanism that facilitates private ordering.[17]

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[13] See Transcript of the Roundtable on the Proxy Process (Nov. 15, 2018) ("Roundtable Transcript"), available at https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf, comments of Ning Chiu, Counsel, Capital Markets Group, Davis Polk & Wardwell LLP; Maria Ghazal, Senior Vice President, Business Roundtable; Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness; and Dannette Smith, Secretary to the Board of Directors and Senior Deputy General Counsel, UnitedHealth Group.

[14] See Roundtable Transcript, supra note 13, comments of Michael Garland, Assistant Comptroller, Corporate Governance and Responsible Investment, Office of the Comptroller, New York City; Jonas Kron, Senior Vice President and Director of Shareholder Advocacy, Trillium Asset Management; Aeisha Mastagni, Portfolio Manager, Corporate Governance Unit, California State Teachers' Retirement System; James McRitchie, Publisher, CorpGov.net; and Brandon Rees, Deputy Director of Corporations and Capital Markets, American Federation of Labor and Congress of Industrial Organizations.

[15] See Roundtable Transcript, supra note 13, comments of Ning Chiu, Counsel, Capital Markets Group, Davis Polk & Wardwell LLP, at 127; Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness, at 136; and Dannette Smith, Secretary to the Board of Directors and Senior Deputy General Counsel, UnitedHealth Group, at 148–49.

[16] See Roundtable Transcript, supra note 13, comments of Aeisha Mastagni, Portfolio Manager, Corporate Governance Unit, California State Teachers' Retirement System, at 134.

[17] See Roundtable Transcript, supra note 13, comments of Jonas Kron, Senior Vice President and Director of Shareholder Advocacy, Trillium Asset Management, at 124.

In connection with the Proxy Process Roundtable, the staff invited members of the public to provide their views on the proxy process via written comments.[18] We received many comment letters addressing Rule 14a-8. Some of these commenters recommended raising the ownership and/or resubmission thresholds,[19] while others were supportive of the current thresholds.[20] Several commenters expressed concern about the costs associated with

[18] Comment letters related to the Proxy Process Roundtable are available at https://www.sec.gov/comments/4-725/4-725.htm.

[19] See letters in response to the Proxy Process Roundtable from Advent Capital Management, LLC dated July 29, 2019; American Securities Association dated June 7, 2019; Braemar Hotels & Resorts Inc. dated January 4, 2019; Business Roundtable dated June 3, 2019; U.S. Chamber of Commerce Center for Capital Markets Competitiveness dated November 12, 2018 and December 20, 2018; Center on Executive Compensation dated August 1, 2018; Chevron Corporation dated August 20, 2019; Exxon Mobil Corporation dated July 26, 2019; Group 1 Automotive, Inc. dated January 11, 2019; Institute for Policy Innovation dated October 11, 2018; Investment Company Institute dated March 15, 2019; National Association of Manufacturers dated October 30, 2018; Nareit dated November 12, 2018; Nasdaq, Inc. dated November 14, 2018; Nasdaq, Inc. et al. dated February 4, 2019; Society for Corporate Governance dated November 9, 2018; The Capital Group Companies, Inc. dated November 14, 2018; The Vanguard Group dated September 20, 2019; Tyler Technologies, Inc. dated September 20, 2019.

[20] See letters in response to the Proxy Process Roundtable from Addenda Capital et al. dated November 13, 2018; Adrian Dominican Sisters dated December 11, 2018; American Federation of Labor and Congress of Industrial Organizations dated November 9, 2018; Anonymous (19 commenters); California Public Employees' Retirement System dated December 11, 2018; California State Teachers' Retirement System dated November 30, 2018; City of New York Office of the Comptroller dated January 2, 2019; Conference for Corporate Responsibility Indiana and Michigan dated December 4, 2018; Council of Institutional Investors dated January 31, 2019; Theodore S. Cochrane dated January 2, 2019; Congregation of Sisters of St. Agnes dated December 4, 2018; Congregation of St. Basil dated December 3, 2018; CtW Investment Group dated January 16, 2019; Dana Investment Advisors dated November 30, 2018; Decatur Capital Management Inc. dated August 13, 2019; Dominican Sisters Grand Rapids dated December 2, 2018; Dominican Sisters of Springfield Illinois dated December 3, 2018; The Episcopal Church received December 11, 2018; Everence Financial dated December 6, 2018; FAIRR Initiative dated December 4, 2018; Franciscan Sisters of Perpetual Adoration dated December 5, 2018; Glass Lewis dated November 14, 2018; Green Century Capital Management, Inc. dated December 5, 2018; Interfaith Center on Corporate Responsibility dated November 6, 2018; Investor Voice, SPC dated November 14, 2018; Jantz Management LLC dated October 7, 2019; Jesuit Committee on Investment Responsibility dated December 10, 2018; Loring, Wolcott & Coolidge dated December 4, 2018; James McRitchie received November 27, 2018 and August 22, 2019; Mercy Investment Services, Inc. dated December 3, 2018; MFS Investment Management dated November 14, 2018; Midwest Coalition for Responsible Investment dated December 6, 2018; Missionary Oblates of Mary Immaculate dated December 12, 2018; Morningstar, Inc. dated December 17, 2018; NorthStar Asset Management, Inc. dated December 4, 2018; Pax World Funds dated November 9, 2018; Pension Investment Association of Canada dated April 17, 2019; Praxis Mutual Funds dated December 6, 2018; Presbyterian Church U.S.A. dated November 13, 2018; Priests of the Sacred Heart dated December 3, 2018; Province of St. Joseph of the Capuchin Order dated December 3, 2018; Racine Dominicans dated December 5, 2018; Robert E. Rutkowski dated November 15, 2018; Shareholder Rights Group dated September 17, 2018; Sisters of Charity – Halifax dated December 5, 2018; Sisters of St. Joseph of Orange dated December 18, 2018; Sisters of the Holy Cross dated December 10, 2018; Sisters of the Presentation of the Blessed Virgin Mary dated December 3, 2018; State of New York Office of the State Comptroller dated November

management's consideration of a proposal and/or its inclusion in the proxy statement.[21] Two commenters cited an estimate indicating an average cost to companies of $87,000 per shareholder proposal,[22] another commenter estimated its cost at more than $100,000 per proposal,[23] and another commenter cited a cost of approximately $150,000 per proposal.[24] Other commenters suggested the costs to companies are low and noted that most companies receive few, if any, shareholder proposals.[25] Some commenters expressed concern that a large number of proposals are submitted by a small number of individuals who own nominal stakes in the companies to which they submit proposals.[26] One commenter disagreed with this concern because proposals submitted by these individuals between 2004 and 2017 received an average level of support of 40 percent and, in the commenter's opinion, this level of support "indicates

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13, 2018; Trinity Health dated November 9, 2018; US SIF dated November 9, 2018; ValueEdge Advisors dated July 17, 2019; Washington State Investment Board dated November 14, 2018; Kyle Wright dated December 4, 2018.

[21] See, e.g., letters in response to the Proxy Process Roundtable from American Securities Association dated June 7, 2019; Blackrock, Inc. dated November 16, 2018; Business Roundtable dated November 9, 2018; Exxon Mobil Corporation dated July 26, 2019; Nasdaq, Inc. dated November 14, 2018; Society for Corporate Governance dated November 9, 2018.

[22] See letters in response to the Proxy Process Roundtable from Blackrock, Inc. dated November 16, 2018; Society for Corporate Governance dated November 9, 2018.

[23] See letter in response to the Proxy Process Roundtable from Exxon Mobil Corporation dated July 26, 2019.

[24] See letter in response to the Proxy Process Roundtable from the American Securities Association dated June 7, 2019 (citing H.R. REP NO. 115-904, at 2 (2018)).

[25] See, e.g., letters in response to the Proxy Process Roundtable from Council of Institutional Investors dated November 8, 2018 (citing CERES ET AL., THE BUSINESS CASE FOR THE CURRENT SEC SHAREHOLDER PROPOSAL PROCESS 11–12 (2017), available at https://www.ussif.org/files/Public_Policy/Comment_Letters/Business%20Case%20for%2014a-8.pdf ("Ceres Business Case")); Addenda Capital et al. dated November 13, 2018 (citing Adam M. Kanzer, *The Dangerous "Promise of Market Reform": No Shareholder Proposals*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Jun. 15, 2017), available at https://corpgov.law.harvard.edu/2017/06/15/the-dangerous-promise-of-market-reform-no-shareholder-proposals/).

[26] See, e.g., letters in response to the Proxy Process Roundtable from Business Roundtable dated November 9, 2018; Center on Executive Compensation dated August 1, 2018.

these filers provide a valuable service to fellow shareholders by promoting good corporate governance."[27]

Below we discuss the proposed amendments to Rule 14a-8, which have been informed by the public input we have received, including in response to the Proxy Process Roundtable. We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

II. DISCUSSION OF PROPOSED AMENDMENTS

A. Rule 14a-8(b) – Eligibility Requirements

1. Relevant History and Background of Rule 14a-8(b)

At the time the shareholder-proposal rule was initially adopted, a shareholder-proponent's eligibility to submit a proposal was not conditioned on owning a minimum amount of a company's securities, or holding the securities for a specified period of time. Instead, the rule enabled "a qualified security holder" to submit a proposal for inclusion in the company's proxy materials.[28] In 1947, the rule text was revised to specify that "any security holder entitled to vote at a meeting of security holders of the issuer" could submit a proposal.[29] In 1976, the Commission considered, but decided not to adopt, minimum ownership requirements, believing

[27] See letter in response to the Proxy Process Roundtable from Mercy Investment Services, Inc. dated December 3, 2018.

[28] See Release No. 34-3347 (Dec. 18, 1942) [7 FR 10655 (Dec. 22, 1942)].

[29] See Adoption of Revised Proxy Rules, Release No. 34-4037 (Dec. 17, 1947) [12 FR 8768 (Dec. 24, 1947)].

that there was not "sufficient justification" at that time for such requirements because the existing eligibility requirements "have not been abused."[30]

However, the Commission later reconsidered the matter in response to "criticisms of the current rule that have increased with the pressure placed upon the existing mechanism by the large number of proposals submitted each year and the increasing complexity of the issues involved in those proposals, as well as the susceptibility of certain provisions of the rule and the staff's interpretations thereunder to abuse by a few proponents and issuers."[31] The Commission found merit in the views of many commenters that "abuse of the security holder proposal rule could be curtailed by requiring shareholders who put the company and other shareholders to the expense of including a proposal in a proxy statement to have some measured economic stake or investment interest in the corporation."[32] The Commission accordingly amended the rule in 1983 to require shareholder-proponents to own "at least 1% or $1,000 in market value of securities entitled to be voted at the meeting" and to "have held such securities for at least one

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[30] See Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994 (Dec. 3, 1976)] ("1976 Adopting Release").

[31] 1982 Proposing Release, supra note 2. at 47421. The Commission further explained: "It has been suggested that under current construction of the rule, a few proponents have been able to use the rule as a publicity mechanism to further personal interests that are unrelated to the interests of security holders as security holders and that certain sophisticated proponents, who submit proposals annually to a variety of issuers, are able to require the inclusion of a proposal which has generated little security holder interest by simply changing its form or minimally varying its coverage. The rule was not designed to burden the proxy solicitation process by requiring the inclusion of such proposals." Id. at 47422 n.8.

[32] See 1983 Adopting Release, supra note 6.

year."[33] Co-proponents, however, were permitted to aggregate their holdings for purposes of meeting the ownership requirements.[34]

In 1998, the Commission raised the $1,000 threshold to $2,000.[35] When it proposed this increase, the Commission explained that the revision was partly to adjust for inflation.[36] Upon adoption of the $2,000 threshold, the Commission noted that "[t]here was little opposition to the proposed increase among commenters."[37] While the Commission had elected not to propose an amount higher than $2,000 "out of concern that a more significant increase could restrict access to companies' proxy materials by smaller shareholders,"[38] the Commission noted upon adopting the $2,000 threshold that several commenters "do not believe the increase is great enough to be meaningful, especially in light of the overall increase in stock prices over the last few years."[39] The Commission accordingly indicated that it had "decided to limit the increase to $2,000 *for now*."[40] The Commission also sought comment on whether to shorten or lengthen the one-year holding period,[41] but it was not revised because, at that time, "there was no significant support

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[33] Id. In addition, the Commission noted in 2007 that the one-year holding period ensures that shareholder proposals are submitted "by shareholders with a significant long-term stake in the company." See 2007 Proxy Access Proposing Release, supra note 12.

[34] See 1983 Adopting Release, supra note 6.

[35] See 1998 Adopting Release, supra note 8.

[36] The Commission explained that the actual inflation adjustment would have been $600, which would have set the new threshold at $1,600. A new threshold of $2,000 was proposed, however, to account for future inflation and to simplify the calculation process. See Amendments to Rules on Shareholder Proposals, Release No. 34-39093 (Sep. 18, 1997) [62 FR 50682 (Sep. 26, 1997)] ("1997 Proposing Release").

[37] See 1998 Adopting Release, supra note 8.

[38] See 1997 Proposing Release, supra note 36.

[39] See 1998 Adopting Release, supra note 8.

[40] Id. (emphasis added).

[41] See 1997 Proposing Release, supra note 36.

for any modifications" to that aspect of the rule.[42] The Commission has not revised the share ownership requirements since 1998.

2. Public Views on Rule 14a-8(b)

In recent years, some observers have advocated increasing the amount of securities a shareholder must own to be eligible to submit a shareholder proposal.[43] These groups have suggested alternative ownership requirements, such as eliminating the flat dollar threshold in favor of relying solely on a percentage-of-shares-owned test,[44] or raising the ownership threshold to $50,000, indexed annually for inflation.[45] Some observers have suggested raising the ownership requirements to lessen the burden on companies,[46] or to ensure that shareholder-proponents have a meaningful stake in the companies to which they submit proposals.[47] Others

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[42] See 1998 Adopting Release, supra note 8.

[43] See, e.g., BUSINESS ROUNDTABLE, RESPONSIBLE SHAREHOLDER ENGAGEMENT AND LONG-TERM VALUE CREATION (Oct. 31, 2016), available at https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Shareholder%20proposal%20paper-final.pdf ("BRT Report"); NASDAQ, THE PROMISE OF MARKET REFORM: REIGNITING AMERICA'S ECONOMIC ENGINE (last updated Feb. 2018), available at https://www.nasdaq.com/docs/Nasdaq_Blueprint_to_Revitalize_Capital_Markets_April_2018_tcm5044-43175.pdf ("Nasdaq Report"); U.S. DEP'T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES 32 (Oct. 2017), available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf ("Treasury Report"); see also letters in response to the Proxy Process Roundtable from Advent Capital Management, Inc. dated July 29, 2019; Braemar Hotels & Resorts Inc. dated January 4, 2019; Business Roundtable dated November 9, 2018 and June 3, 2019; Center on Executive Compensation dated August 1, 2018; Group 1 Automotive, Inc. dated January 11, 2019; National Association of Manufacturers dated October 30, 2018; Nasdaq, Inc. dated November 14, 2018; Nasdaq, Inc. et al. dated February 4, 2019; Society for Corporate Governance dated November 9, 2018; The Capital Group Companies dated November 14, 2018. At the Commission's 38th Annual Government-Business Forum on Small Business Capital Formation held on August 14, 2019, one of the forum participant recommendations was to amend the submission thresholds.

[44] See BRT Report, supra note 43; Nasdaq Report, supra note 43.

[45] See letter in response to the Proxy Process Roundtable from Society for Corporate Governance dated November 9, 2018.

[46] See id.

[47] See, e.g., Nasdaq Report, supra note 43.

have suggested keeping the existing $2,000 requirement, or limiting any increase, to avoid excluding smaller investors,[48] and some have suggested that dropping the flat dollar threshold in favor of a percentage-only test would significantly limit shareholders' ability to submit shareholder proposals for inclusion in companies' proxy materials.[49] Several observers also have suggested lengthening the current one-year holding period requirement,[50] while at least one observer has suggested shortening it.[51]

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[48] See CERES ET AL., AN INVESTOR RESPONSE TO THE U.S. CHAMBER'S PROPOSAL TO REVISE SEC RULE 14A-8, (Nov. 9, 2017), available at http://www.iccr.org/sites/default/files/resources_attachments/investor_response_to_chamber_14a-8_nov_9_final_2.pdf; see also letters in response to the Proxy Process Roundtable from Addenda Capital et al. dated November 13, 2018; Dominican Sisters of Adrian, Michigan dated December 11, 2018; American Federation of Labor and Congress of Industrial Organizations dated November 9, 2018; Anonymous (19 commenters); California Public Employees' Retirement System dated December 11, 2018; California State Teachers' Retirement System dated December 3, 2018; Conference for Corporate Responsibility Indiana and Michigan dated December 3, 2018; Congregation of Sisters of St. Agnes dated December 4, 2018; Council of Institutional Investors dated January 31, 2019; Theodore S. Cochrane dated January 2, 2019; Congregation of St. Basil dated December 3, 2018; CtW Investment Group dated January 16, 2019; Dominican Sisters – Grand Rapids dated December 2, 2018; Dominican Sisters of Springfield Illinois dated December 3, 2018; The Episcopal Church received December 11, 2018; Everence Financial dated December 6, 2018; FAIRR Initiative dated December 4, 2018; Form Letter A (18,614 letters); Franciscan Sisters of Perpetual Adoration dated December 5, 2018; Glass Lewis dated November 14, 2018; Interfaith Center on Corporate Responsibility dated November 6, 2018; Investor Voice, SPC dated November 14, 2018; Jesuit Committee on Investment Responsibility dated December 10, 2018; Loring, Wolcott & Coolidge dated December 4, 2018; James McRitchie received November 27, 2018; Mercy Investment Services, Inc. dated December 3, 2018; MFS Investment Management dated November 14, 2018; NorthStar Asset Management, Inc. dated December 4, 2018; Pax World Funds dated November 9, 2018; Pension Investment Association of Canada dated April 17, 2019; Praxis Mutual Funds dated December 6, 2018; Presbyterian Church (U.S.A.) dated November 13, 2018; Priests of the Sacred Heart dated December 3, 2018; Province of St. Joseph of the Capuchin Order dated December 3, 2018; Racine Dominicans dated December 5, 2018; Robert E. Rutkowski dated November 15, 2018; Shareholder Rights Group dated December 4, 2018; Sisters of Charity – Halifax dated December 5, 2018; Sisters of the Presentation of the Blessed Virgin Mary dated December 3, 2018; Sisters of St. Joseph of Orange dated December 18, 2018; Sisters of the Holy Cross dated December 10, 2018; State of New York Office of the State Comptroller dated November 13, 2018; Trinity Health dated November 9, 2018; Washington State Investment Board dated November 14, 2018.

[49] See Letter to Jeb Hensarling, Chairman and Maxine Waters, Ranking Member, House Financial Services Committee from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated April 24, 2017, available at https://democrats-financialservices.house.gov/uploadedfiles/letter_-_cii_04.27.2017.pdf.

[50] See BRT Report, supra note 43; see also letters in response to the Proxy Process Roundtable from Advent Capital Management, LLC dated July 29, 2019; Business Roundtable dated November 9, 2018; Nasdaq, Inc. dated November 14, 2018; The Vanguard Group, Inc. dated September 20, 2019.

[51] See Roundtable Transcript, supra note 13, at 150, comments of Brandon Rees, Deputy Director of Corporations and Capital Markets, American Federation of Labor and Congress of Industrial Organizations.

3. Need for Proposed Amendments

The shareholder-proposal process established by Rule 14a-8 facilitates engagement between shareholders and the companies they own. The rule also enables individual shareholders to shift to the company, and ultimately other shareholders, the cost of soliciting proxies for their proposals. Because it shifts burdens from proponents to companies, it is susceptible to overuse.[52] As the Commission has previously recognized, the ownership threshold and holding period in Rule 14a-8(b) aim to strike an appropriate balance such that a shareholder has some meaningful "economic stake or investment interest" in a company before the shareholder may draw upon company resources to require the inclusion of a proposal in the company's proxy statement, and before the shareholder may use the company's proxy statement to command the attention of other shareholders to consider and vote upon the proposal.[53]

Much has changed since the Commission last considered amendments to Rule 14a-8, including the level and ease of engagement between companies and their shareholders. For instance, shareholders now have alternative ways, such as through social media, to communicate their preferences to companies and effect change.[54]

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[52] See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 85 (1991) (Under Rule 14a-8, "the majority must subsidize the activities of the minority who are allowed to make proposals without incurring the costs.").

[53] See 1982 Proposing Release, supra note 2; 1983 Adopting Release, supra note 6.

[54] See, e.g., Donna Fuscaldo, Say Gives Retail Investors A Voice And Tesla Listens, FORBES (Feb. 19, 2019), https://www.forbes.com/sites/donnafuscaldo/2019/02/19/say-gives-retail-investors-a-voice-and-tesla-listens/; Vanessa Fuhrmans, Some U.S. Companies Bow to Social-Media Pressure, Sever NRA Ties, WALL STREET JOURNAL (Feb. 24, 2018), https://www.wsj.com/articles/some-u-s-companies-bow-to-social-media-pressure-sever-nra-ties-1519431715.

We are concerned that the $2,000/one-year threshold established in 1998 does not strike the appropriate balance today. We believe that holding $2,000 worth of stock for a single year does not demonstrate enough of a meaningful economic stake or investment interest in a company to warrant the inclusion of a shareholder's proposal in the company's proxy statement. As the table below demonstrates, the $2,000 threshold, adjusted for inflation, would be equal to $3,152 in 2019 dollars.[55] Moreover, using the cumulative growth of the Russell 3000 Index as a proxy for the average increase in companies' values, a $2,000 investment in a company in 1998 would be worth approximately $8,379 today.[56] We believe that the increase in price of shares and changes in inflation have contributed, in part, to the need to revisit the one-year holding period associated with the $2,000 threshold.

Ownership Threshold Comparison		
Threshold Established in 1998	1998 Threshold Adjusted for Inflation	Change in Russell 3000 Index
$2,000	$3,152	$8,379

We recognize that the amount of stock owned is not the only way to demonstrate an interest in a company, particularly for small investors. In many cases, the length of time owning the company's securities may be a more meaningful indicator that a shareholder has a sufficient interest that warrants use of the company's proxy statement. A shareholder's demonstrated long-term investment interest in a company may make it more likely that the shareholder's proposal

[55] $3,152 = $2,000 x 1.576 (cumulative rate of inflation between May 1998 and August 2019 using the CPI inflation calculator, available at https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=11%2C600.00&year1=201011&year2=201906).

[56] $8,379 = $2,000 x 4.190 (cumulative rate of growth of the Russell 3000 index between May 1998 and August 2019 assuming dividends are reinvested). Data is retrieved from Compustat Daily Updates – Index Prices.

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. 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 upon, and thus more likely that any costs of implementing the shareholder's proposal will be borne in part by the shareholder responsible for the proposal. We believe having a longer holding period is particularly important if the dollar value of the ownership interest is minimal because a person seeking to misuse the shareholder-proposal process could more easily purchase the smallest possible stake in a company to take advantage of the process.

4. Proposed Amendments

We are proposing to establish enhanced ownership requirements under Rule 14a-8(b) that take into account both the amount of securities owned and the length of time held, in determining a shareholder's eligibility to submit a shareholder proposal. Under the proposed ownership requirements, the shareholder-proposal process would remain available to a wide range of shareholders, including those with smaller investments, but would require those with smaller investments to hold their shares for a longer period of time. We believe these new thresholds would more appropriately balance the interests of shareholders who seek to use the company's proxy statement to advance their own proposals, on the one hand, with the interests of companies and other shareholders who bear the burdens associated with the inclusion of such proposals, on the other hand. We also believe the new thresholds would be a better indicator of a shareholder's investment interest in the company.

Under the proposed rule, a shareholder would be eligible to submit a Rule 14a-8 proposal for inclusion in a company's proxy materials if the shareholder satisfies one of three

ownership requirements, each of which is designed to show that the shareholder-proponent has a demonstrated economic stake or investment interest in the company to which the proposal is submitted. Specifically, a shareholder would be eligible to submit a Rule 14a-8 proposal if the shareholder has continuously held at least:

- $2,000 of the company's securities entitled to vote on the proposal for at least three years;
- $15,000 of the company's securities entitled to vote on the proposal for at least two years; or
- $25,000 of the company's securities entitled to vote on the proposal for at least one year.[57]

The proposed rule would retain the key elements of a minimum amount of securities owned and minimum time period held, including retaining the current $2,000 threshold for shares held continuously for at least three years. The tiered approach under the proposed revision would provide multiple options for demonstrating an ownership stake through a combination of amount of securities owned and length of time held. We believe this approach takes into account the varying situations of shareholders and would be preferable to a one-size-fits-all approach. Under the proposed rule, shareholders owning a smaller amount of securities could utilize the rule, provided that ownership was continuous over a longer period of time. The

[57] Due to market fluctuations, the value of a shareholder's investment in a company may vary throughout the applicable holding period before the shareholder submits the proposal. In order to determine whether the shareholder satisfies the relevant ownership threshold, the shareholder should look at whether, on any date within the 60 calendar days before the date the shareholder submits the proposal, the shareholder's investment is valued at the relevant threshold or greater, based on the average of the bid and ask prices. See 1983 Adopting Release, supra note 6.

tiered approach would enable other shareholders to demonstrate an economic stake or investment interest through larger ownership interests and shorter holding periods.

Under the proposed rule, the current $2,000 threshold would remain the same to preserve the ability of long-term shareholders owning a relatively small amount of shares to continue to utilize Rule 14a-8, but these investors would be required to hold the securities for at least three years to be eligible to submit a proposal. In light of the small investment amount required under this ownership tier, we believe that a longer holding period is warranted to demonstrate a shareholder's sufficient investment interest in the company and, in turn, to justify requiring the company to include such a shareholder's proposal in its proxy statement.

We are proposing two additional eligibility options for shareholders, reflecting differences in amount of securities held and length of time held. We believe that the proposed thresholds of $15,000 for at least two years and $25,000 for at least one year are each indicative of a shareholder having an economic stake or investment interest in the company that would justify requiring the company to include such a shareholder's proposal in its proxy statement.

We also propose to eliminate the current 1 percent ownership threshold, which historically has not been utilized. The vast majority of investors that submit shareholder proposals do not meet a 1 percent ownership threshold.[58] In addition, we understand that the

[58] See letter to Bill Huizenga, Chairman and Carolyn B. Maloney, Ranking Member, Subcommittee on Capital Markets, Securities, and Investment Committee on Financial Services from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated May 22, 2018 (explaining that "[e]ven [the Council of Institutional Investors'] largest public pension fund members rarely hold 1% of a public company"), available at https://www.cii.org/files/May%2022,%202018%20Letter%20to%20Capital%20Markets%20Subcommittee%20(final).pdf; letter to The Honorable Maxine Waters, Ranking Member, Committee on Financial Services from Jack Ehnes, Chief Executive Officer, CalSTRS, (June 5, 2017), at 1 ("While one percent may sound like a small amount, even a large investor like the $200 billion CalSTRS fund does not own one percent of publicly traded companies."), available at https://www.calstrs.com/sites/main/files/fileattachments/06-05-2017_maxine_financial_choice_act.pdf; Statement of New York City Comptroller Scott M. Stringer on the April 19th Discussion Draft of the Financial CHOICE Act of 2017 (Apr. 25, 2017), at 1 ("Despite being among the largest pension investors in the world, we rarely hold more than 0.5% of any individual company, and most often hold less."), available at

types of investors that hold 1 percent or more of a company's shares generally do not use Rule 14a-8 as a tool for communicating with boards and management.[59]

The following table compares the proposed dollar thresholds as a percentage of market value as of December 2018 for the S&P 500 Index constituents and May 2019 for the Russell 3000 Index constituents:[60]

Registrant	**$2,000 Threshold as a Percentage of Market Value**	**$15,000 Threshold as a Percentage of Market Value**	**$25,000 Threshold as a Percentage of Market Value**
Largest Registrant in the S&P 500 Index	0.0000003	0.0000019	0.0000032
500th Registrant in the S&P 500 Index	0.0001	0.0005	0.0009
3,000th Registrant in the Russell Index	0.0013	0.0098	0.0164

The proposed rule would not allow shareholders to aggregate their securities with other shareholders to meet the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal. Although the Commission allowed shareholders to aggregate their holdings when it first adopted ownership thresholds in 1983, it did not provide reasons for doing so. We believe that allowing shareholders to aggregate their securities to meet the new proposed thresholds

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https://comptroller.nyc.gov/newsroom/testimonies/statement-of-new-york-city-comptrollerscott-m-stringer-on-the-april-19th-discussion-draft-of-the-financial-choice-act-of-2017-act/.

[59] See, e.g., Roundtable Transcript, supra note 13, at 150, comments of Brandon Rees, Deputy Director of Corporations and Capital Markets, American Federation of Labor and Congress of Industrial Organizations.

[60] Data for the S&P 500 constituents is retrieved from CRSP and data for the Russell 3000 constituents is retrieved from *Market Capitalization Ranges*, FTSE RUSSELL MARKET, https://www.ftserussell.com/research-insights/russell-reconstitution/market-capitalization-ranges (last visited Oct. 31, 2019).

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.

Shareholders, however, would continue to be permitted to co-file or co-sponsor shareholder proposals as a group if each shareholder-proponent in the group meets an eligibility requirement. Shareholder-proponents often co-file or co-sponsor a shareholder proposal for a variety of reasons, such as conveying to the company's management, board, and other shareholders that the proposal has support from other shareholders. A lead filer is sometimes designated as the primary point of contact for the proposal, and each co-filer authorizes the lead filer to negotiate with the company and/or withdraw the proposal on the co-filer's behalf. Currently the rules do not require shareholder-proponents to designate a lead filer or make explicit other arrangements, but we believe this practice could facilitate engagement and reduce administrative burdens on companies, co-filers, and the staff. We believe that, as a best practice, shareholder-proponents should clearly state in their initial submittal letter to the company that they are co-filing the proposal with other proponents and identify the lead filer, specifying whether such lead filer is authorized to negotiate with the company and withdraw the proposal on the co-filer's behalf. Although we are not proposing to require this practice in our rules, we request comment as to whether we should revise the rules to require that co-filers identify a lead filer.[61]

[61] We note that ambiguities in the nature of coordination on a proposal's submission could prompt companies to seek exclusion under Rule 14a-8(i)(11). Specifically, if two or more shareholder-proponents submit substantially duplicative proposals but fail to clearly indicate that they intend to co-file or co-sponsor the proposal, the later-received proposal may be susceptible to exclusion under Rule 14a-8(i)(11).

We believe the proposed tiered thresholds would appropriately balance shareholders' ability to submit proposals with the attendant burdens. We are mindful of concerns that any revisions to the ownership requirements may have a greater effect on shareholders with smaller investments. We believe that the amendments we are proposing today adequately preserve the ability of smaller shareholders to submit proposals. Importantly, the proposed thresholds allow small and large shareholders to continue to participate in the shareholder-proposal process. We are, however, seeking comment on whether we should use other thresholds and/or criteria for determining eligibility to submit shareholder proposals and, if so, what thresholds or criteria should be considered.

We request and encourage any interested person to submit comments regarding the proposed amendments, specific issues discussed in this release, and other matters that may have an effect on the proposals. We note that comments are of the greatest assistance if accompanied by supporting data and analysis of the issues addressed in those comments.

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?
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?

3. Should we adopt a tiered approach, providing multiple eligibility options, as proposed? Are there other approaches that would be preferable instead?
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?
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?
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?
7. Are there potential drawbacks with the tiered approach? If so, what are they?
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?
9. Should the current 1 percent test be eliminated, as proposed? Should the 1 percent 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?

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?
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?
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?
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?

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?
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?
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?

B. Proposals Submitted on Behalf of Shareholders

1. Background

Companies receive proposals under Rule 14a-8 from individuals and entities that may not qualify to submit proposals at a particular company in their own name, but have arrangements to serve as a representative to submit a proposal on behalf of individuals or entities that have held a sufficient number of shares for the requisite period. We also understand that shareholders may wish to use a representative for a number of reasons, including to obtain assistance from someone who has more experience with the shareholder-proposal process or as a matter of administrative convenience. Often, the shareholder has an established relationship with the representative (e.g., the shareholder has previously used the representative to submit proposals on his or her behalf, or the representative serves as the shareholder's investment adviser). In practice, the representative typically submits the proposal to the company on the shareholder's behalf along with necessary documentation, including evidence of ownership (typically in the form of a broker letter) and the shareholder's written authorization for the representative to submit the proposal and act on the shareholder's behalf. After the initial submission, the representative acts on the shareholder's behalf in connection with the matter, and communications between the shareholder and company related to the shareholder proposal are generally handled by the representative.

Rule 14a-8 does not address a shareholder's ability to submit a proposal for inclusion in a company's proxy materials through a representative; absent Commission regulation, this practice has been governed by state agency law.[62] Nevertheless, proposals are submitted by

[62] Although Rule 14a-8 does not address a shareholder's ability to submit a proposal through a representative, it contemplates a representative presenting a proposal on the shareholder's behalf at a shareholders' meeting. Specifically, Rule 14a-8(h) states that the shareholder, or a "representative who is qualified under state law to

representatives who may or may not themselves have an economic stake in the relevant company. Some commenters have raised concerns about the use of a representative in the shareholder-proposal process.[63] For example, some observers have suggested that it may be difficult in some cases to ascertain whether the shareholder in fact supports the proposal that has been submitted on their behalf.[64] When a representative speaks and acts for a shareholder, there may be a question as to whether the shareholder has a genuine and meaningful interest in the proposal, or whether the proposal is instead primarily of interest to the representative, with only an acquiescent interest by the shareholder. This uncertainty may also raise questions about whether the eligibility requirements of Rule 14a-8(b) have been satisfied.[65] We also note that it can be burdensome for companies to verify the purported agency relationship where the documentation provided by the person or entity submitting the proposal does not clearly establish that relationship.

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present the proposal on [the shareholder's] behalf, must attend the meeting and present the proposal." 17 CFR 240.14a-8(h).

[63] See, e.g., BRT Report, supra note 43; Statement of Darla C. Stuckey, President and CEO, Society for Corporate Governance, Before the H. Comm. on Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises, Sept. 21, 2016; see also letter in response to the Proxy Process Roundtable from Exxon Mobil Corporation dated July 26, 2019.

[64] See, e.g., Statement of Darla C. Stuckey, President and CEO, Society for Corporate Governance, Before the H. Comm. on Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises, Sept. 21, 2016.

[65] In 2017, the staff of the Division of Corporation Finance (the "Division") issued Staff Legal Bulletin No. 14I ("SLB 14I") to address some of the challenges and concerns stemming from a shareholder's use of an agent in the shareholder-proposal process. In SLB 14I, the Division explained that, in evaluating whether the eligibility requirements of Rule 14a-8(b) have been satisfied, it would look to whether a shareholder who uses an agent in the shareholder-proposal process provides documentation describing the shareholder's delegation of authority to the agent. SLB 14I also explained that, where this information is not provided, there may be a basis to exclude the proposal under Rule 14a-8(b). SLB 14I represents the views of the staff of the Division. It is not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved its content. SLB 14I, like all staff guidance, has no legal force or effect, it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

2. Proposed Amendments

To help address these challenges and concerns, we are proposing to amend the eligibility requirements of Rule 14a-8 to require shareholders that use a representative to submit a proposal for inclusion in a company's proxy statement to provide documentation attesting that the shareholder supports the proposal and authorizes the representative to submit the proposal on the shareholder's behalf. Specifically, the proposed rule would require documentation that:

- Identifies the company to which the proposal is directed;
- Identifies the annual or special meeting for which the proposal is submitted;
- Identifies the shareholder-proponent and the designated representative;
- Includes the shareholder's statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder's behalf;
- Identifies the specific proposal to be submitted;
- Includes the shareholder's statement supporting the proposal; and
- Is signed and dated by the shareholder.

We believe an affirmative statement that the shareholder authorizes the designated representative to submit the proposal and/or otherwise act on the shareholder's behalf would help to make clear that the representative has been so authorized. In addition, we believe that a shareholder's affirmative statement that it supports the proposal would help to ensure that the interest being advanced by the proposal is the shareholder's own.

We believe that these proposed amendments would help safeguard the integrity of the shareholder-proposal process and the eligibility restrictions by making clear that representatives are authorized to so act, and by providing a meaningful degree of assurance as to the shareholder-proponent's identity, role, and interest in a proposal that is submitted for inclusion in

a company's proxy statement. We also believe that the burden on shareholders of providing this information would be minimal, and we note that much of it is often already provided by shareholders. We also believe that these requirements would reduce some of the administrative burdens on companies associated with confirming the principal-agent relationship.

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?
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?
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?
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?
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?

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

1. Background

While Rule 14a-8 provides a means for shareholder-proponents to advance proposals and solicit proxies from other shareholders, the rule is only one of many mechanisms for shareholders to engage with companies and to advocate for the measures they propose. Other forms of engagement, including dialogue between a shareholder and management, may sometimes accomplish a shareholder's goals without the burdens associated with including a proposal in a company's proxy statement. Company-shareholder engagement can thus be an important aspect of the shareholder-proposal process, which we encourage both before and after the submission of a shareholder proposal. Proactive company engagement with shareholders has increased in recent years,[66] and shareholders frequently withdraw their proposals as a result of company-shareholder engagement.[67] We believe that encouraging this trend would be beneficial both to companies and to shareholders.

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[66] See letters in response to the Proxy Process Roundtable from Business Roundtable dated June 3, 2019; Chevron Corporation dated August 20, 2019; Society for Corporate Governance dated November 9, 2018.

[67] Company-shareholder engagement with respect to shareholder proposals has led to an increase in the number of withdrawn proposals in recent years. See, e.g., letters in response to the Proxy Process Roundtable from Everence Financial dated December 6, 2018 ("an increasing number of resolutions end up being withdrawn by the proponent because of conversations between [the proponent] and the company"); Praxis Mutual Funds dated December 6, 2018

We understand that shareholder proposals are at times used as the sole method of engaging with companies despite a company's willingness to discuss, and possibly resolve, the matter with the shareholder.[68] In those cases, Rule 14a-8 may cause a shareholder to burden a company and other shareholders with a proxy vote that may have been avoided had meaningful engagement taken place. While we recognize that engagement may not always obviate the need for a proposal to be put to a vote, we believe that shareholders should be required to state when they are available to engage with a company when they submit a proposal for inclusion in the company's proxy statement. We believe that such a statement of availability would encourage greater dialogue between shareholders and companies in the shareholder-proposal process, and may lead to more efficient and less costly resolution of these matters.

2. Proposed Amendment

We are proposing to amend Rule 14a-8(b) to add a shareholder engagement component to the current eligibility criteria. Specifically, the proposed amendment would require a statement from each 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.[69] The shareholder would be required to include contact

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(same); Principles for Responsible Investment dated November 14, 2018 ("a growing number of shareholder proposals are withdrawn due to corporate management developing workable solutions with investors").

[68] We recognize that some shareholder-proponents use a shareholder proposal as a way to open a dialogue with management and not with the objective of having the matter go to a vote. See Roundtable Transcript, supra note 13, comments of Michael Garland, Assistant Comptroller, Corporate Governance and Responsible Investment, Office of the Comptroller, New York City.

[69] The proposal's date of submission is the date the proposal is postmarked or transmitted electronically. In the event the proposal is hand delivered, the submission date would be the date of hand delivery.

information as well as business days and specific times that he or she is available to discuss the proposal with the company.[70]

We believe that this proposed eligibility requirement would encourage shareholders to engage with companies, and could facilitate useful dialogue between the parties by enabling the company to reach out directly to a shareholder-proponent to understand his or her concerns, potentially leading to a more mutually satisfactory and less burdensome resolution of the matter.

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?
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

[70] The contact information and availability would have to be the shareholder's, and not that of the shareholder's representative (if the shareholder uses a representative). A shareholder's representative could, however, participate in any discussions between the company and the shareholder.

or email address to be included? Should we require a minimum number of days or hours that the shareholder-proponent be available?

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?
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?
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?
27. Should companies be required to represent that they are able to meet with shareholder-proponents?
28. What are ways that companies engage with shareholders outside of the shareholder-proposal process?

D. One-Proposal Limit

1. Background

Rule 14a-8(c) provides that "each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting." As the Commission explained when it adopted this restriction in 1976, the submission of multiple proposals by a single shareholder-proponent "constitute[s] an unreasonable exercise of the right to submit proposals at the expense of other shareholders" and also may "tend to obscure other material matters in the proxy statement of issuers, thereby reducing the effectiveness of such documents."[71]

At the time the one-proposal limitation was adopted, the Commission explained that it was "aware of the possibility that some proponents may attempt to evade the new limitations through various maneuvers, such as having other persons whose securities they control submit . . . proposals each in their own names."[72] To combat this type of abuse, the Commission clarified that the limitation "will apply collectively to all persons having an interest in the same securities (e.g., the record owner and the beneficial owner, and joint tenants)."[73]

We continue to believe that this one-proposal limit is appropriate. In our view, the Commission's stated reasoning for the one-proposal limit applies equally to representatives who submit proposals on behalf of shareholders they represent. We believe permitting representatives to submit multiple proposals for the same shareholders' meeting would undermine the purpose of the one-proposal limit.

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[71] See 1976 Adopting Release, supra note 30.

[72] Id.

[73] Id. This limitation would continue to apply under the proposed amendments.

2. Proposed Amendment

We propose an amendment to Rule 14a-8(c) to apply the one-proposal rule to "each person" rather than "each shareholder" who submits a proposal. The amended rule would 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." Under the proposed rule, a shareholder-proponent may not submit one proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting. Similarly, a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative would be submitting each proposal on behalf of different shareholders. In our view, a shareholder submitting one proposal personally and additional proposals as a representative for consideration at the same meeting, or submitting multiple proposals as a representative at the same meeting, would constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders and also may tend to obscure other material matters in the proxy statement. We believe this amendment to the rule text would more consistently apply the one-proposal limit to shareholders and representatives of shareholders.

The amendment is not intended to prevent shareholders from seeking assistance and advice from lawyers, investment advisers, or others to help them draft shareholder proposals and navigate the shareholder-proposal process. Providing such assistance to more than one shareholder would still be permissible. However, to the extent that the provider of such services submits a proposal, either as a proponent or as a representative, it would be subject to the one-

proposal limit and would not be permitted to submit more than one proposal in total. We seek comment, however, on whether the proposed amendment would have unintended consequences on the practice of shareholders using representatives to submit shareholder proposals.

We also are seeking comments on whether we should eliminate the practice of allowing natural-person shareholders to use a representative to submit a proposal. We request comment on whether the concerns raised by a shareholder's use of a representative would be better addressed with an amendment to the rule text, as proposed, or by prohibiting such use of a representative for the purpose of Rule 14a-8.

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?
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?
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?

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?
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?
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?
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?
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?

E. Rule 14a-8(i)(12) – Resubmissions

1. Relevant History and Background of Rule 14a-8(i)(12)

Since 1948, the Commission has not required a company to include a proposal in its proxy statement "if substantially the same proposal was submitted to the security holders for action at the last annual meeting of security holders or at any special meeting held subsequent thereto and received less than three percent of the total number of votes cast in regard to the proposal."[74] The Commission explained that the purpose of the provision was "to relieve the management of the necessity of including proposals which have been previously submitted to security holders without evoking any substantial security holder interest therein."[75] In 1954, the Commission observed that the ability to resubmit proposals that received 3 percent or more of the vote "resulted in the repetition year after year of proposals which have evoked very modest stockholder interest," and amended the provision to add two additional resubmission thresholds; 6 percent if the matter had been previously voted on twice and 10 percent if the matter had been previously voted on three or more times.[76] As a result from 1954 to until today, a shareholder proposal was excludable if substantially the same proposal, or substantially the same subject matter, had previously been submitted during the relevant lookback period and received less than 3, 6, or 10 percent of the vote the last time it was voted on if voted on once, twice, or three or more times, respectively.[77]

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[74] See Adoption of Amendments to Proxy Rules, Release No. 34-4185 (Nov. 5, 1948) [13 FR 6678 (Nov. 13, 1948)].

[75] See id.

[76] See 1954 Adopting Release, supra note 11.

[77] See id.

In 1983, the Commission raised the 3 and 6 percent thresholds to 5 and 8 percent, respectively, but these new thresholds subsequently were vacated because a court found that the Commission had not provided adequate notice of its proposal to raise the thresholds. The Commission accordingly reinstated the 3 and 6 percent thresholds in 1985, and it elected not to propose new thresholds at that time.[78]

In 1997, the Commission proposed increasing the resubmission thresholds to 6, 15, and 30 percent and, in doing so, stated that "a proposal that has not achieved these levels of support has been fairly tested and stands no significant chance of obtaining the level of voting support required for approval."[79] The Commission also explained that it "propose[d] to increase the second and third thresholds by relatively larger amounts because the proposal will have had two or three years to generate support."[80] While the Commission adopted other amendments (including increasing the share ownership threshold), it chose not to adopt this proposed amendment to the resubmission thresholds because "many commenters from the shareholder

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[78] See Proposals of Security Holders, Release No. 34-22625 (Nov. 14, 1985) [50 FR 48180 (Nov. 22, 1985)]. The U.S. District Court for the District of Columbia held that there was inadequate notice of the proposed rulemaking under the Administrative Procedure Act, explaining that the Commission had requested comment on "the appropriate levels for the percentage tests," but "did not propose new percentage thresholds," did not "reveal the theories that prompted the SEC to propose the change," and did not indicate "whether the agency proposed the percentages to be raised, lowered, or maintained." See United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, 839 (D.D.C. 1985).

[79] See 1997 Proposing Release, supra note 36.

[80] See id. These new thresholds were introduced as part of a broader rulemaking that included other proposed revisions to Rule 14a-8 that, if adopted, were expected to result in fewer excludable proposals under the rule, and one of the reasons the Commission gave for proposing these revised resubmission thresholds was that higher thresholds would "counter-balance" the effect the other revisions would have had on the excludability of proposals.

community [had] expressed serious concerns."[81] The resubmission thresholds have remained 3, 6, and 10 percent since 1954.

2. Public Views on Rule 14a-8(i)(12)

Over the last several years, public interest in revisiting the resubmission thresholds has grown. For example, in April 2014, the Commission received a rulemaking petition in support of revising the thresholds (the "Rulemaking Petition").[82] In response to the Rulemaking Petition, the Commission received twenty-three comment letters, expressing a range of views on possible changes to the thresholds.[83] There have also been other calls for reform in this area,[84] as well as congressional interest.[85]

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[81] See 1998 Adopting Release, supra note 8. Some commenters had expressed concern that the increases "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." Id.

[82] See Rulemaking Petition from 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, April 9, 2014, available at https://www.sec.gov/rules/petitions/2014/petn4-675.pdf.

[83] Comment letters received in response to the Rulemaking Petition are available at https://www.sec.gov/comments/4-675/4-675.shtml.

[84] See, e.g., BRT Report, supra note 43; CENTER FOR CAPITAL MARKETS COMPETITIVENESS, SHAREHOLDER PROPOSAL REFORM: THE NEED TO PROTECT INVESTORS AND PROMOTE THE LONG-TERM VALUE OF PUBLIC COMPANIES (2017), available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/023270_CCMC-SEC-Shareholder-Proposal-Reform-Report_Online_Report.pdf ("CCMC Report"); Nasdaq Report, supra note 43; Treasury Report, supra note 43. At the Commission's 38th Annual Government–Business Forum on Small Business Capital Formation held on August 14, 2019, one of the forum participant recommendations was to amend the resubmission thresholds.

[85] See, e.g., *Corporate Governance: Fostering a System That Promotes Capital Formation and Maximizes Shareholder Value: Hearing Before U.S. H.R. Subcomm. on Capital Markets and Government Sponsored Enterprises of the Committee on Financial Services*, 114th Cong. (2016); *Proxy Process and Rules: Examining Current Practices and Potential Changes: Hearing Before U.S. S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. (2018); H.R. 5756, 115th Cong. (2018); Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 844 (2017).

Some groups have expressed support for raising the resubmission thresholds because they believe the current thresholds no longer serve their intended purpose.[86] These observers suggest that resubmitted proposals distract shareholders and their fiduciaries from potentially more important matters by requiring them to spend additional time and resources reconsidering issues that have already been rejected by a majority of shareholders.[87]

In contrast, other groups suggest that, while the process may take time, resubmitted proposals can increase interest in, and shareholder support for, issues that at least some shareholders consider important.[88] In response to the Rulemaking Petition, one commenter cited as an example of an issue that took time to gain broader shareholder support, climate-change proposals, which averaged voting support of approximately 5 percent in 1999 and approximately 38 percent by 2017.[89]

Some groups have suggested that a significant number of shareholder proposals are resubmissions of previously-submitted proposals. For example, one study indicates that 1,063 of 3,392 proposals that were included in the proxy statements of Fortune 250 companies between 2007 and 2016 were resubmitted proposals.[90] This report also states that 100 proposals were resubmitted three or more times between 2006 and 2013.[91]

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[86] See, e.g., CCMC Report, supra note 84; Rulemaking Petition, supra note 82.

[87] See, e.g., Rulemaking Petition, supra note 82, at 8–9.

[88] See Ceres Business Case, supra note 25; letter in response to the Proxy Process Roundtable from Dominican Sisters of Springfield Illinois dated December 3, 2018; letter in response to the Rulemaking Petition from The Nathan Cummings Foundation dated April 30, 2018.

[89] See letter in response to the Rulemaking Petition from The Nathan Cummings Foundation dated April 30, 2018.

[90] See JAMES R. COPLAND & MARGARET M. O'KEEFE, AN ANNUAL REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM, MANHATTAN INSTITUTE FOR POLICY RESEARCH (2016), available at https://media4.manhattan-institute.org/sites/default/files/pmr_2016.pdf.

[91] Id.

A separate report states that one-third of proposals voted on between 2011 and 2018 were submitted two or more times at the same company.[92] This report also finds that approximately 95 percent of proposals are eligible for resubmission after the first submission and 90 percent are eligible after the second and third submission, and that "nearly all proposals that clear those thresholds and are submitted again remain eligible in subsequent submissions."[93] In addition, the report indicates that the overwhelming majority of proposals that win majority support do so the first time they are submitted, and less than 9 percent of proposals that fail to win majority support the first time go on to pass in a subsequent attempt.[94] It further notes that "[w]hen the SEC first adopted the [resubmission] thresholds, between one-half and three-quarters of proposals failed to win sufficient support for resubmission," and that "the 3%, 6% and 10% resubmission thresholds preclude a much smaller proportion of shareholder proposals today than in the past."[95]

Members of other groups have indicated that "[r]esubmissions for a third or fourth time are very rare," stating that since 2010 (and presumably through the report's publication date in 2017), a total of 35 environmental and social proposals that received less than 20 percent of the

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[92] See BRANDON WHITEHILL, CLEARING THE BAR, SHAREHOLDER PROPOSALS AND RESUBMISSION THRESHOLDS, COUNCIL OF INSTITUTIONAL INVESTORS (Nov. 2018), available at https://docs.wixstatic.com/ugd/72d47f_092014c240614a1b9454629039d1c649.pdf ("CII Report"). For a discussion of our findings with respect to this data, see infra note 197.

[93] Id.

[94] Id. at 8.

[95] Id.

shareholder vote for two or more years were resubmitted.[96] According to this report, these 35 proposals were resubmitted to 26 companies.[97]

Some observers argue that the resubmission thresholds should be raised because companies incur significant expense as a result of receiving shareholder proposals, including resubmitted proposals, that are unlikely to win majority support.[98] In response to the Proxy Process Roundtable, some commenters expressed views that: resubmitted shareholder proposals often take a disproportionate amount of time compared to annual management proposals;[99] resubmitted proposals exacerbate the costs of shareholder proposals;[100] the cost in terms of corporate resources spent to deal with resubmitted proposals is significant;[101] resubmitted proposals divert management time and resources;[102] and all shareholders bear the costs associated with resubmitted shareholder proposals.[103] Others contend that the costs are much

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[96] See Jonas Kron, Trillium Asset Management & Brandon Rees, AFL-CIO Office of Investment and co-chair CII Shareholder Advocacy Committee, *Frequently Asked Questions about Shareholder Proposals*, COUNCIL OF INSTITUTIONAL INVESTORS (last visited Oct. 30, 2019), available at https://www.cii.org/files/10_10_Shareholder_Proposal_FAQ(2).pdf.

[97] Id.

[98] See, e.g., Rulemaking Petition, supra note 82, at 16; Statements of James R. Copland, Senior Fellow and Director, Legal Policy, Manhattan Institute for Policy Research and Darla C. Stuckey, President and CEO, Society for Corporate Governance, Before the H. Comm. on Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises, Sept. 21, 2016; see also letters in response to the Proxy Process Roundtable from American Securities Associations dated June 7, 2019; Exxon Mobil Corporation dated July 26, 2019 (stating that the company's cost per shareholder proposal, including resubmitted proposals, is more than $100,000).

[99] See letter in response to the Proxy Process Roundtable from Investment Company Institute dated March 15, 2019.

[100] See letter in response to the Proxy Process Roundtable from Business Roundtable dated June 3, 2019.

[101] See letter in response to the Proxy Process Roundtable from U.S. Chamber of Commerce Center for Capital Markets Competitiveness dated December 20, 2018.

[102] See letter in response to the Proxy Process Roundtable from National Association of Manufacturers dated October 30, 2018.

[103] See letter in response to the Proxy Process Roundtable from Society for Corporate Governance dated November 9, 2018.

lower.[104] It has also been suggested that the inability to resubmit shareholder proposals may drive shareholders to pursue alternative strategies that would be more costly and time-consuming for companies.[105] We are interested in obtaining, and request comment on, additional data about the costs incurred as a result of receiving shareholder proposals, including resubmitted proposals.

Various alternatives have been suggested for addressing the concerns with resubmitted proposals. A number of those who support raising the resubmission thresholds have suggested that raising them to 6, 15, and 30 percent would be appropriate.[106] One commenter suggested thresholds of 10, 25, and 50 percent, where failure to achieve the thresholds would render a proposal excludable for an amount of time equal to the number of years the proposal had previously been included in the company's proxy statement.[107]

3. Need for Proposed Amendments

We continue to believe, as the Commission stated when it first proposed a resubmission threshold for shareholder proposals in 1948, that resubmission thresholds are appropriate to

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[104] See Adam M. Kanzer, *The Dangerous "Promise of Market Reform": No Shareholder Proposals*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Jun. 15, 2017), available at https://corpgov.law.harvard.edu/2017/06/15/the-dangerous-promise-of-market-reform-no-shareholder-proposals/ ("Kanzer 2017"); letter in response to the Rulemaking Petition from the Shareholder Rights Group dated October 5, 2017, at 11.

[105] See, e.g., letters in response to the Rulemaking Petition from The McKnight Foundation dated June 11, 2018; Nathan Cummings Foundation dated April 30, 2018.

[106] See, e.g., BRT Report, supra note 43; CCMC Report, supra note 84; letters in response to the Proxy Process Roundtable from American Securities Association dated June 7, 2019; Braemer Hotels & Resorts dated January 4, 2019; U.S. Chamber of Commerce Center for Capital Markets Competitiveness dated November 12, 2018; Center on Executive Compensation dated November 12, 2018; Group 1 Automotive, Inc. dated January 11, 2019; Nareit dated November 12, 2018; Nasdaq, Inc. et al. dated February 4, 2019; Society for Corporate Governance dated November 9, 2018; Tyler Technologies, Inc. dated September 20, 2019.

[107] See letter in response to the Proxy Process Roundtable from Exxon Mobil Corporation dated July 26, 2019.

"relieve the management of the necessity of including proposals that have been previously submitted to security holders without evoking any substantial security holder interest therein."[108]

Having considered the feedback discussed above, and recognizing the range of views expressed, we are concerned that the current resubmission thresholds may allow proposals that have not received widespread support from a company's shareholders to be resubmitted—in some cases, year after year—with little or no indication that support for the proposal will meaningfully increase or that the proposal ultimately will obtain majority support. Companies and their shareholders bear the burdens associated with management's and shareholders' repeated consideration of these proposals and/or their recurrent inclusion in the proxy statement. While we recognize that some proposals may necessitate resubmission to obtain majority support, we do not believe shareholders whose proposals are unlikely ever to obtain or at least without a significant change in circumstances obtain such support—and thus to reflect the interests of a majority of shareholders—should be permitted to require companies and other shareholders to bear the costs associated with their proposals. If a proposal fails to generate meaningful support on its first submission, and is unable to generate significantly increased support upon resubmission, it is doubtful that the proposal will earn the support of a majority of shareholders in the near term or without a significant change in circumstances.[109] In light of these concerns, we are proposing to increase the resubmission thresholds to allow companies to exclude resubmitted proposals that have not received broad support and appear less likely to be on a sustainable path toward achieving majority shareholder support. In these circumstances, we

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[108] See 1948 Proposing Release, supra note 6.

[109] Based on our review of shareholder proposals that received a majority of the votes cast between 2011 and 2018, approximately 90% received such support on the first submission. Of the remaining 10%, 60% received 40% or more of the votes cast on the initial submission. See discussion infra Section IV.B.3.iv.

believe a "cooling-off" period may be warranted to help ensure that the inclusion of such proposals does not result in unjustified burdens on companies and shareholders.

Under the current rule, proposals that are not supported by up to approximately 97 percent of votes cast on the first submission, 94 percent on the second submission, and 90 percent on the third or subsequent submissions remain eligible for resubmission. We recognize that initially lower levels of shareholder support do not always indicate how shareholders will vote on an issue in the future. Nevertheless, we are concerned that thresholds of 3, 6, and 10 percent may not demonstrate sufficient shareholder support to warrant resubmission, or adequately distinguish between proposals that ultimately are more likely to obtain majority support upon resubmission and those that are not. As one commenter has noted, "the current thresholds leave no less than 90% of proposals eligible for resubmission."[110] These resubmitted proposals are permitted despite the fact that, according to the commenter, less than 9 percent of proposals that fail to win majority support the first time go on to pass in a subsequent attempt.[111] Thus, it appears that under the current thresholds the vast majority of shareholder proposals are eligible for resubmission regardless of their likelihood of gaining broader shareholder support or, ultimately, garnering a majority of the votes cast, at least in the near term.

In addition, the current resubmission thresholds may not have the same effect today on resubmissions as they did when they were initially adopted. According to one commenter, the

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[110] See CII Report, supra note 92, at 16. Based on our analysis, approximately 94% of proposals remain eligible for resubmission after the initial submission, 90% after the second submission, and 94% after the third or subsequent submission under the current resubmission thresholds. In total, approximately 93% of proposals remain eligible for resubmission under the current resubmission thresholds. Of these eligible proposals that were submitted from 2011 to 2018, approximately 6.5% garnered majority support at some point during that period following initial submission. See discussion infra Section IV.B.3.iv.

[111] See CII Report, supra note 92, at 8. Based on our analysis of proposals submitted between 2011 and 2018, 6.5% of resubmitted proposals that failed to win majority support on the first submission went on to pass in a subsequent attempt.

percentage of shareholder proposals eligible for resubmission today is considerably higher than at the time the thresholds were first introduced, when "between one-half and three-quarters of proposals failed to win sufficient support for resubmission."[112] It has been suggested that this difference may be due to a number of factors, including the role proxy advisory firms now play in the shareholder voting process,[113] and greater participation by institutional investors in that process.[114] Consequently, we are concerned that the current thresholds may not be functioning effectively to alleviate companies and their shareholders of the obligation to consider, and spend resources on, matters that have previously been voted on and rejected by shareholders without sufficient indication that a proposal will gain traction among the broader shareholder base in the near future.

4. Proposed Amendments

To address these concerns, we are proposing revisions to Rule 14a-8(i)(12) that would replace the current resubmission thresholds of 3, 6, and 10 percent with new thresholds of 5, 15, and 25 percent, respectively, and add an additional provision to the rule that would allow companies to exclude proposals that have been submitted three or more times in the preceding five years if they received more than 25 percent, but less than 50 percent, of the vote and support declined by more than 10% the last time substantially the same subject matter was voted on compared to the immediately preceding vote. We believe these proposed amendments would allow proposals to receive due consideration without imposing on companies and their

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[112] See CII Report, supra note 92, at 6 (citing LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY 108 (1956) (noting that "[b]etween half and three quarters of the proposals being submitted would be banned" by the Commission's proposed thresholds of 3%, 7%, and 10%)). We note that the Commission ultimately adopted thresholds of 3%, 6%, and 10%.

[113] Cf. Rulemaking Petition, supra note 82, at 6–7.

[114] See CII Report, supra note 92, at 6.

shareholders the burden of having to repeatedly consider matters on which they have already indicated a lack of interest, or where interest has waned.

(i) Proposed Resubmission Thresholds

Under proposed Rule 14a-8(i)(12), a shareholder proposal may be excluded from a company's proxy materials if it deals with substantially the same subject matter as a proposal,[115] or proposals, previously included in a company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and that vote was:

- Less than 5 percent of the votes cast if previously voted on once;
- Less than 15 percent of the votes cast if previously voted on twice; or
- Less than 25 percent of the votes cast if previously voted on three times or more.[116]

We are proposing a modest increase to the initial resubmission threshold of 2 percent, and more significant increases to the second and third thresholds of 9 and 15 percent, respectively. As a result, there will be a 10 percent spread between the first and second threshold and the second and third threshold. We believe that more significant revisions to the second and

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[115] The condition in Rule 14a-8(i)(12) that the shareholder proposals deal with "substantially the same subject matter" does not mean that the previous proposal(s) and the current proposal must be identical. In 1983, the Commission amended the language in the exclusion from "substantially the same proposal" to "substantially the same subject matter." See 1983 Adopting Release, supra note 6. In doing so, the Commission explained that the purpose of amending the exclusion was to "counter the abuse of the security holder proposal process by certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue." Id. 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." Id. We are not proposing changes to the "substantially the same subject matter" standard, but seek comment on whether such a change would be appropriate or necessary in light of the proposed amendments.

[116] Only votes for and against a proposal would be included in the calculation of the shareholder vote. Abstentions and broker non-votes would not be included in the calculation.

third thresholds are appropriate due to the fact that a proposal will have already been considered by shareholders two or three times before becoming subject to these thresholds.

Currently, 90 percent or more of all proposals are eligible for resubmission at each threshold.[117] Under the current thresholds, many of these proposals fail to obtain meaningful, or majority, support upon resubmission. From 2011 to 2018, there were 864 unique proposals that were resubmitted.[118] Of these, only 54 (6.5%) ultimately garnered majority support (as noted in Table 9 in Section IV.C.2.iii below, only one of these would have been excludable under the proposed resubmission thresholds). The proposed increases in the resubmission thresholds to 5, 15, and 25 percent reflect our experience with shareholder proposals and are intended to reduce the number of proposals eligible for resubmission that have little or no chance of gaining meaningful, or majority, shareholder support while still providing shareholders with the opportunity to build support for their proposals.

In particular, our proposed increase for the initial resubmission threshold from 3 to 5 percent would exclude proposals that are very unlikely to earn majority support upon resubmission, but would still permit a very large percentage of proposals to be resubmitted.[119] We believe that a cooling-off period is warranted if a matter is unable to garner the support of at least 1 in 20 shareholders upon its initial submission. Based on our analysis of the proposals that ultimately garnered majority support from 2011 to 2018, 90 percent did so on the first submission, and more than half of the proposals that were resubmitted garnered more than 40

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[117] See supra note 110.

[118] The number of unique proposals that were resubmitted refers to the count of proposals that were resubmitted and voted on at least once during the sample period 2011 to 2018. The number of proposals (864) differs from the number referred to in the tables in Section IV.B.3.iv (1,442) because the latter is not limited to unique proposals.

[119] Of the proposals resubmitted between 2011 and 2018, we estimate that approximately 85% would have been eligible for resubmission under the proposed resubmission thresholds. See infra Table 9 in Section IV.C.2.iii.

percent on the first submission.[120] Of the remaining proposals, nearly all garnered support of at least 5 percent on the first submission.[121] While we recognize that there have been a few instances in which proposals that have failed to receive at least 5 percent of the votes cast have gone on to garner significantly greater shareholder support, these instances appear to be infrequent and may be the result of factors other than or in addition to the resubmission.[122]

The proposed increase for the second and third resubmission thresholds to 15 and 25 percent are also intended to provide a better indicator of proposals that are more likely to ultimately obtain majority support than the current thresholds. We believe that proposals receiving these levels of support will have better demonstrated a sustained level of shareholder interest to warrant management and shareholder consideration upon resubmission, subject to the discussion in Section II.E.4.ii below. As indicated in Section IV.B.3.iv below, these thresholds are below the average and median support for initial submissions of 34 and 30 percent, respectively. Of the resubmitted proposals that ultimately obtain majority support, the overwhelming majority garner more than 15 percent on their second try and more than 25 percent on their third submission.[123] As with the initial resubmission threshold, these thresholds would exclude proposals that are unlikely to earn majority support, but would still permit a

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[120] See infra Section IV.B.3.iv.

[121] Id.

[122] Based on our review of shareholder proposals that received a majority of the votes cast on a second or subsequent submission between 2011 and 2018, only 2% of the proposals that have failed to receive at least 5% of the votes cast have gone on to garner majority support. See infra Section IV.B.3.iv.

[123] Based on our review of shareholder proposals that received a majority of the votes cast on a second or subsequent submission between 2011 and 2018, 95% received support greater than 15% on the second submission, and 100% received support greater than 25% on the third or subsequent submission. In addition, of the 22 proposals that obtained majority support on their third or subsequent submissions, approximately 95% received support of over 15% on their second submission, and 100% received support of over 25% on their third or subsequent submission. See infra Section IV.B.3.iv.

significant number of proposals to be resubmitted.[124] We believe that a cooling-off period also is warranted if, after three or more submissions, more than 75 percent of the votes cast have not supported the matter.

We recognize, as discussed in Section IV below, that raising the resubmission thresholds would be expected to result in the exclusion of more proposals than currently. Our analysis in Table 9 in Section IV.C.2.iii indicates that under the proposed 15% / 25% thresholds, there would be 14% / 27% more proposals that would be excludable than under the current rules. While these are increases in the overall number of excludable proposals, we believe these thresholds would better distinguish those excludable proposals that are on a path toward more meaningful shareholder support from those that are not. In other words, we believe that, under the proposed resubmission thresholds, any increase in the number of excludable proposals that would have been on a path toward more meaningful shareholder support would be small.

We also believe that the proposed resubmission thresholds would reduce the costs associated with management's and shareholders' repeated consideration of these proposals and their recurrent inclusion in the proxy statement while still maintaining shareholders' ability to submit proposals, and engage with companies, on matters of interest to shareholders. We believe that the proposed resubmission thresholds may lead to the submission of proposals that will evoke greater shareholder interest in, and foster more meaningful engagement between, management and shareholders, as the proposed thresholds would incentivize shareholders to submit proposals on matters that resonate with the broader shareholder base to avoid exclusion under Rule 14a-8(i)(12).

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[124] See infra Section IV.B.3.iv.

We believe that the proposed resubmission thresholds strike an appropriate balance between reducing the costs to companies of responding to proposals that do not garner significant shareholder support and may be unlikely to do so in the future, with preserving shareholders' ability to engage with a company and other shareholders through the shareholder-proposal process. In addition, as is currently the case, the resubmission thresholds would not act as a permanent bar and, thus, shareholders would be able to resubmit substantially similar proposals after a three-year cooling-off period. We recognize, however, that there may be alternative thresholds that could also achieve this balance, and we seek public comment on whether the proposed thresholds strike the correct balance.

We also considered whether to propose any changes to the vote-counting methodology. For example, we considered whether votes by insiders should be excluded from the calculation of votes cast for purposes of determining whether the resubmission thresholds have been satisfied. In addition, we considered whether to apply a different vote-counting methodology for companies with dual-class voting structures.[125] We elected not to propose alternative vote-counting methodologies, however, because we believe that including these votes in the voting calculation more accurately captures the sentiment of all shareholders, including insiders and controlling shareholders. Nevertheless, we seek comment on whether changes to the current vote-counting methodology are necessary. We also considered whether to adopt an exception to the rule that would allow an otherwise excludable proposal to be resubmitted if there are material

[125] Cf. letter in response to the Proxy Process Roundtable from CtW Investment Group dated January 16, 2019 (noting that increasing the resubmission thresholds will make it more difficult to satisfy the resubmission thresholds at companies with dual-class voting structures); letter in response to the Rulemaking Petition from the Shareholder Rights Group dated October 5, 2017 ("When one considers dual class share ownership, insider ownership and the non-involvement of passive investors, the percent of support for a proposal reflected by the Rule's counting methods may reflect a sharp underestimate of the support by those investors known to actively consider shareholder proposals.").

developments that suggest a resubmitted proposal may garner significantly more votes than when previously voted on. We elected not to propose such an exception, however, because we believe it would be difficult in many cases to determine how the intervening developments would affect shareholders' voting decisions. We seek comment on whether such an exception should be added to the rule.

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?
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)?
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 to external parties such as legal advisors or proxy solicitors,

management time, board time, etc.) may differ between resubmitted proposals and initial submissions?

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

(ii) 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

In addition to raising the resubmission thresholds to 5, 15, and 25 percent, we are proposing to amend Rule 14a-8(i)(12) to allow companies to exclude proposals dealing with substantially the same subject matter as proposals previously voted on by shareholders three or more times in the preceding five calendar years that would not otherwise be excludable under the 25 percent threshold if (i) the most recently voted on proposal received less than a majority of the votes cast <u>and</u> (ii) support declined by 10 percent or more compared to the immediately preceding shareholder vote on the matter (the "Momentum Requirement"). For example, under such a requirement, a proposal would be excludable where proposals dealing with substantially the same subject matter had previously been voted on three times in the preceding five calendar years and received 26 percent of the votes cast on the third submission compared to 30 percent on the second submission. In this case, the percentage of votes cast on the third submission (26 percent) declined by more than 10 percent compared to the percentage of votes cast on the second submission (30 percent) and, thus, proposals dealing with substantially the same subject matter would be excludable during the relevant lookback period.

The purpose of this requirement would be to relieve management and shareholders from having to repeatedly consider, and bear the costs related to, matters for which shareholder interest has declined. We note that it would apply only to matters that have been previously voted on three or more times in the preceding five years, giving shareholder-proponents a

number of years to advocate for, and the broader shareholder base ample opportunity to consider, the matters raised. We further believe that a 10 percent decline in the percentage of votes cast may demonstrate a sufficiently significant decline in shareholder interest to warrant a cooling-off period. Nevertheless, we seek comment on whether 10 percent is an appropriate figure, or whether some other method or figure would be more appropriate, to gauge shareholder interest.

The Momentum Requirement would not apply where the previously voted on proposal(s) received a majority of the votes cast at the time of the most recent shareholder vote, even if shareholder support had declined by 10 percent or more compared to the immediately preceding vote.[126] We believe proposals that receive a majority of the votes cast have demonstrated a sufficient level of shareholder interest to qualify for resubmission. In addition, it is our understanding that companies frequently act on proposals, including non-binding proposals, that receive a majority of the votes cast, which can reduce the likelihood of resubmitted proposals.

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?
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

[126] If, after receiving a majority of the votes cast, a matter receives less than a majority of the votes cast upon a subsequent submission, the Momentum Requirement would apply. We believe that the same rationale underlying the Momentum Requirement applies where shareholder support declines below a majority of the votes cast, but we seek comment on this point.

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?

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?

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 percent on the first submission and 16 percent on the second submission, even though 16 percent exceeds the relevant proposed threshold of 15 percent for a second submission?

49. Does a 10 percent 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?

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?

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 percent 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 percent within 10 years of first being proposed? If so, what would be an appropriate cooling-off period?

III. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the proposed amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. ECONOMIC ANALYSIS

A. Introduction

We are proposing to amend certain procedural requirements and the provision relating to resubmitted proposals under the shareholder-proposal rule. We are sensitive to the economic effects that may result from the proposed rule amendments, including the benefits, costs, and the effects on efficiency, competition, and capital formation. Section 3(f) of the Exchange Act, Section 2(b) of the Securities Act of 1933, and Section 2(c) of the Investment Company Act require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Additionally, Section 23(a)(2) of the Exchange Act requires us, when making rules or regulations under the Exchange Act, to consider, among other matters, the impact that any such rule or regulation would have on competition and states that the Commission shall not adopt any such rule or regulation which would impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act.

We discuss the potential effects of the proposed rule amendments as well as possible alternatives to the proposed amendments below. Where possible, we have attempted to quantify

the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the proposed rule amendments. In some cases, however, we are unable to quantify the economic effects because we lack the information necessary to provide a reasonable and reliable estimate. Where we are unable to quantify the economic effects of the proposed rule, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs, and the potential impacts of the proposed rule amendments on efficiency, competition, and capital formation.

B. Economic Baseline

The baseline against which the costs, benefits, and the impact on efficiency, competition, and capital formation of the proposed rule amendments are measured consists of the current regulatory framework and the current practices for shareholder proposal submissions.

1. Current regulatory framework

State laws, corporate bylaws, and federal securities laws jointly govern the shareholder-proposal process. Under state law, a shareholder generally has the right to appear in person at an annual or special meeting and put forth a resolution to be voted on by the shareholders. Such resolutions can include, for example, proposals to adopt, amend, or repeal bylaws or to request the board to take certain actions. State law also governs shareholders' ability to submit a proposal through a representative.[127] Company bylaws can limit shareholders' ability to attend or present at shareholder meetings. Federal securities law governs communications in advance of shareholder meetings, including solicitation of proxies for items to be voted on at the meeting. Federal securities law also requires companies to allow shareholders to vote by proxy at shareholder meetings and requires companies to include a shareholder's proposal in the

[127] See supra Section II.B.

company's proxy statement unless a ground for exclusion is met. Most shareholders currently vote in advance of shareholder meetings through the proxy process.

Rule 14a-8 addresses when a company must include a shareholder proposal in its proxy statement at an annual or special meeting of shareholders.[128] Rule 14a-8 also sets forth procedural and substantive bases upon which a company can exclude a shareholder proposal from its proxy statement. Under Rule 14a-8(b), to be eligible to submit a proposal, a proponent "must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date [the proponent] submit[s] the proposal." The Commission currently allows investors to aggregate their securities with other investors to meet the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal. The rule does not currently require a shareholder-proponent to provide information specific to the use of a representative in the shareholder-proposal process, or state when he or she is able to meet with the company to discuss the proposal.

Rule 14a-8(c) provides that a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

Rule 14a-8(i)(12) allows companies to exclude a shareholder proposal that "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" if the matter was voted on at least once in the last three years and did not receive: (i) 3 percent of the vote if previously voted on once; (ii) 6 percent of the vote if previously voted on twice; or (iii) 10 percent of the vote if previously voted on three or more times.

[128] A shareholder may alternatively solicit proxies by filing its own proxy statement that complies with the federal proxy rules.

2. Affected Entities

The proposed amendments to Rule 14a-8(b), Rule 14a-8(c), and Rule 14a-8(i)(12) could affect all companies subject to the federal proxy rules that receive shareholder proposals, the proponents of these proposals, and other non-proponent shareholders of these companies.[129] Companies that have a class of equity securities registered under Section 12 of the Exchange Act are subject to the federal proxy rules, including Rule 14a-8.[130] In addition, there are certain registered companies that voluntarily file proxy materials. Finally, Rule 20a-1 under the Investment Company Act subjects all management companies to the federal proxy rules.[131]

As of December 31, 2018, there were 5,746 companies that had a class of securities registered under Section 12 of the Exchange Act (including 98 Business Development Companies ("BDCs")).[132] As of the same date, there were 120 companies that did not have a

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[129] The proposed amendments could also have second-order effects on providers of administrative and advisory services related to proxy solicitation and shareholder voting.

[130] We are not aware of any asset-backed issuers that have a class of equity securities registered under Section 12 of the Exchange Act. Most asset-backed issuers report pursuant to under Section 15(d) of the Exchange Act and thus are not subject to the federal proxy rules. Nine asset-backed issuers had a class of debt securities registered under Section 12 of the Exchange Act as of December 2018. As a result, these asset-backed issuers are not subject to the federal proxy rules.

Foreign private issuers are exempt from the federal proxy rules under Rule 3a12-3(b) of the Exchange Act. 17 CFR 240.3a12-3(b).

[131] Rule 20a-1 of the Investment Company Act requires management companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act. See 17 CFR 270.20a-1.

"Management company" means any investment company other than a face-amount certificate company or a unit investment trust. See 15 U.S.C. 80a-4.

[132] We estimate the number of companies with a class of securities registered under Section 12 of the Exchange Act by reviewing all Forms 10-K filed during calendar year 2018 with the Commission and counting the number of unique companies that identify themselves as having a class of securities registered under Section 12(b) or Section 12(g) of the Exchange Act. Foreign private issuers that filed Forms 20-F and 40-F and asset-backed issuers that filed Forms 10-D and 10-D/A during calendar year 2018 with the Commission are excluded from this estimate. See supra note 130.

class of securities registered under Section 12 of the Exchange Act that voluntarily filed proxy materials.[133] As of August 31, 2019, there were 12,718 management companies that were subject to the federal proxy rules: (i) 12,040 open-end funds, out of which 1,910 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share class; (ii) 664 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies.[134] The summation of these estimates yields 18,584 companies where there is a possibility of being affected by the proposed rule amendments.[135]

The above mentioned estimates are an upper bound of the number of potentially affected entities because a substantial portion of these entities would not be expected to file proxy

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BDCs are all entities that have been issued an 814- reporting number. Our estimate includes BDCs that may be delinquent or have filed extensions for their filings, and it excludes 6 wholly owned subsidiaries of other BDCs.

[133] We identify registered companies that voluntarily file proxy materials as companies reporting pursuant to Section 15(d) of the Exchange Act but not registered under Section 12(b) or Section 12(g) of the Exchange Act that filed any proxy materials during calendar year 2018 with the Commission. The proxy materials we consider in our analysis are Forms DEF14A, DEF14C, DEFA14A, DEFC14A, DEFM14A, DEFM14C, DEFR14A, DEFR14C, DFAN14A, N-14, PRE 14A, PRE 14C, PREC14A, PREM14A, PREM14C, PRER14A and PRER14C. Form N-14 can be a registration statement and/or proxy statement. We manually review all Forms N-14 filed during calendar year 2018 with the Commission and we exclude from our estimates Forms N-14 that are exclusively registration statements.

To identify companies reporting pursuant to Section 15(d) but not registered under Section 12(b) or Section 12(g) of the Exchange Act, we review all Forms 10-K filed in calendar year 2018 with the Commission and count the number of unique companies that identify themselves as reporting pursuant to Section 15(d) of the Exchange Act and not registered under Section 12(b) or Section 12(g) of the Exchange Act.

[134] We estimate the number of unique management companies by reviewing all Forms N-CEN filed between June 2018 and August 2019 with the Commission. Open-end funds are series of trusts registered on Form N-1A. Closed-end funds are trusts registered on Form N-2. Variable annuity separate accounts registered as management companies are trusts registered on Form N-3.

The number of potentially affected Section 12 and Section 15(d) reporting companies is estimated over a different time period (i.e., January 2018 to December 2018) than the number of potentially affected management companies (i.e., June 2018 to August 2019) because there is no complete N-CEN data for the most recent full calendar year (i.e., 2018). Management companies started submitting Form N-CEN in September 2018 for the period ended on June 30, 2018 with the Commission.

[135] 18,584 = 5,746 companies with a class of securities registered under Section 12 of the Exchange Act + 120 companies without a class of securities registered under Section 12 of the Exchange Act that voluntarily filed proxy materials + 12,718 management companies.

materials or receive a shareholder proposal in a given year. Out of the 18,584 potentially affected entities mentioned above, 5,690 filed proxy materials with the Commission during calendar year 2018.[136] Out of the 5,690 companies, 4,758 (84%) were Section 12 or Section 15(d) reporting companies and the remaining 932 (16%) were management companies.[137]

Proponents of shareholder proposals also could be affected by the proposed rule amendments. We estimate that there were 170 proponents—38 individual proponents and 132 institutional proponents—that submitted a shareholder proposal that was included in a proxy statement and was subsequently voted on as lead proponent or co-proponent during calendar year 2018.[138]

Non-proponent shareholders of companies also could be affected by the proposed rule amendments. As broad context, we note that the ratio of the number of estimated proponents whose proposals appeared in proxy statements during 2018 (170) to the number of direct and indirect investors in companies subject to the proxy rules is extremely small. According to a recent study based on the 2016 Survey of Consumer Finances, approximately 65 million

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[136] See supra note 133 for details on the estimation of companies that filed proxy materials with the Commission during calendar year 2018.

[137] According to data from Forms N-CEN filed with the Commission between June 2018 and August 2019, there were 965 management companies that submitted matters for its security holders' vote during the reporting period: (i) 729 open-end funds, out of which 86 were ETFs registered as open-end funds or open-end funds that had an ETF share class; (ii) 235 closed-end funds; and (iii) one variable annuity separate account (see Form N-CEN Item B.10). The discrepancy in the estimated number of management companies using proxy filings (i.e., 932) and Form N-CEN data (i.e., 965) likely is attributable to the different time periods over which the two statistics are estimated.

[138] Data is retrieved from proxy statements (see infra note 182). See infra Section IV.C.2.i for a discussion of limitations of the proxy statement data.

We also estimate that there were 278 proponents that submitted a voted, omitted, or withdrawn proposal as lead proponent or co-proponent during calendar year 2018. Data is retrieved from ISS Analytics. See infra Section IV.B.3.i for a discussion of limitations of the ISS Analytics data.

households owned stocks directly or indirectly (through other investment instruments).[139] Our analysis of institutional investor data also shows that there were 4,558 unique institutional investors during 2018.[140] The ratio is roughly three proponent shareholders per million investors.

3. Current Practices

i. General discussion

In this section, we provide descriptive statistics on shareholder proposals to understand the baseline against which we compare the effects of the proposed amendments, informing the analysis of the potential effects of the proposed amendments to Rule 14a-8 in later sections. In particular, we provide descriptive statistics on all proposals and descriptive statistics by proposal outcome over time (i.e., voted, omitted, and withdrawn proposals). We provide these statistics to understand how the number of proposals has changed over time, including because, from the perspective of a company, the costs and benefits of a shareholder proposal may vary with the outcome of the proposal.

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[139] See Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL., Sept. 2017, at 20, 39, available at https://www.federalreserve.gov/publications/files/scf17.pdf (51.9% of the 126.0 million families represented owned stocks). This is a triennial survey, and the latest data available as of this time is from the 2016 survey.

Based on industry data provided by a proxy services provider, we estimate that there were 22.2 million retail accounts that directly held shares of U.S. public companies during calendar year 2017. The number of retail accounts is an approximation of the number of retail investors because each retail investor can hold multiple accounts and multiple retail investors can hold a single account. Further, the data covers a subset of all retail accounts (i.e., approximately 80% of all retail accounts).

[140] Data is retrieved from the Thomson Reuters Institutional (13f) Holdings dataset. Unique institutional investors are the unique Manager Numbers that filed a Form 13F at least for one quarter during calendar year 2018 with the Commission. The estimated number of institutional investors is a lower bound of the actual number of institutional investors because only institutional investors that exercise discretion over $100 million or more in Section 13(f) securities must file Form 13F with the Commission.

Similarly, we provide descriptive statistics by the type of company that receives the proposal (i.e., large versus small companies), by proposal topic (i.e., governance, environmental, and social proposals), and by proponent type (i.e., institutions versus individuals). These factors are relevant to our analysis of the proposed amendments to the ownership and resubmission thresholds because the economic effects of the proposed amendments may depend on company size, proposal topic, and proponent type.[141] Further, we provide descriptive statistics on the concentration of proposals to better understand how the proposal submission is distributed across the various proponents.[142]

Finally, we provide descriptive statistics on the voting support and the probability of obtaining majority support for all proposals, by proposal topic, and by proponent type. This analysis allows us to provide some evidence on the effects of the proposed amendments on proposals that may garner high and/or majority shareholder support, and to examine whether the proposed amendments to the resubmission thresholds may have larger effects for some types of proposals and proponents than for others.

To understand current and historical practices for shareholder proposals, we study a sample of submitted shareholder proposals to Russell 3000 companies that were either (i) included in companies' proxy statements; (ii) identified by companies for exclusion through the SEC staff no-action process (whether ultimately voted on by shareholders, excluded by the company, or withdrawn by the proponent); or (iii) submitted by the proponents (based on information provided by the proponents) but never appeared on the company's proxy

[141] These statistics are also relevant in light of commenters' concerns that the proposed amendments may affect certain proposals and proponents differently. See, e.g., letter in response to the Proxy Process Roundtable from Shareholder Rights Group dated October 25, 2019.

[142] These statistics are also relevant in light of commenters' concerns that a few shareholders submit the majority of the proposals. See infra note 166.

statement.[143] The study of a sample of submitted shareholder proposals allows us to establish a baseline against which we will compare effects of the proposed amendments. Figure 1 shows the number of shareholder proposals submitted to Russell 3000 companies between 1997 and 2018. The dashed line in Figure 1 shows the number of submitted shareholder proposals between 1997 and 2003, and the solid line shows the number of submitted proposals from 2004 to 2018. Data on submitted proposals prior to 2004 is incomplete. Hence, our economic analysis focuses on shareholder proposals submitted between 2004 and 2018. Nevertheless, to provide an understanding of longer term trends in the number of submitted proposals, we use data prior to 2004 for the purposes of Figure 1 only.

Between 1997 and 2018, shareholders submitted a total of 20,804 proposals to Russell 3000 companies. Out of the 20,804 proposals, 14,860 were submitted in the 2004 to 2018 period. Shareholders submitted 831 proposals to Russell 3000 companies in 2018, representing a 4 percent decrease relative to the number of shareholder proposals submitted in 2017. As Figure 1 shows, the number of submitted shareholder proposals has fluctuated from a low of 745 in 2001 to a high of 1,136 in 2008, with an average of 946 submitted shareholder proposals between 1997 and 2018. Our analysis shows no discernible trend in the number of submitted shareholder proposals in the 1997 to 2018 period.[144]

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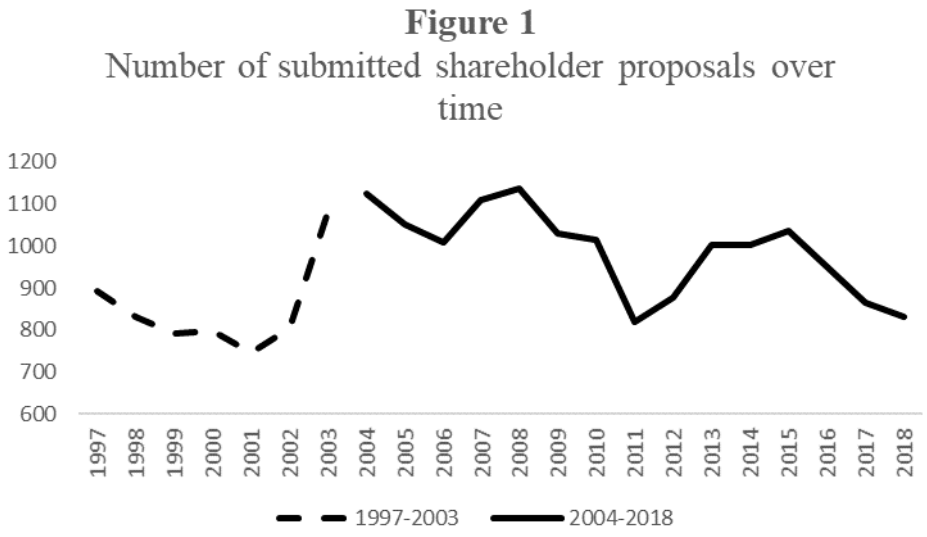
[143] Unless stated otherwise, all data in this section is retrieved from ISS Analytics. ISS Analytics identifies proposals that were withdrawn based on whether the proponent had submitted a withdrawal letter to the company as part of the no-action process, or whether the proponent had informed ISS or otherwise made known (for example, through its website) that it had withdrawn the proposal. To the extent that a proponent did not submit a withdrawal letter to the company or did not inform ISS Analytics or otherwise make known that it had withdrawn the proposal, our sample may not include all withdrawn proposals.

We exclude from our analysis shareholder proposals related to proxy contests for the election of directors because these proposals are usually included in shareholders' (as opposed to companies') proxy statements and thus are not subject to Rule 14a-8.

[144] In this and all subsequent analyses, to examine if there is a statistically significant time trend in the data, we regress the variable of interest to a year trend variable, and we test whether the coefficient on the trend variable is



Source: ISS Analytics.

Figure 2 shows the percentage of voted, omitted, and withdrawn shareholder proposals for Russell 3000 companies between 2004 and 2018. We study the percentage of voted, omitted, and withdrawn proposals separately because each of these categories of proposals may impose different burdens on—and also provide different benefits to—companies and their shareholders. Voted proposals are those that went to a shareholder vote. Omitted proposals are those that were omitted following an issuance of a no-action letter by Commission staff.[145] Withdrawn

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statistically different from zero. We use a two-tailed t-test and a 90% confidence interval. See, e.g., WILLIAM H. GREENE, ECONOMETRIC ANALYSIS (6th ed. 2007) ("Greene (2007)").

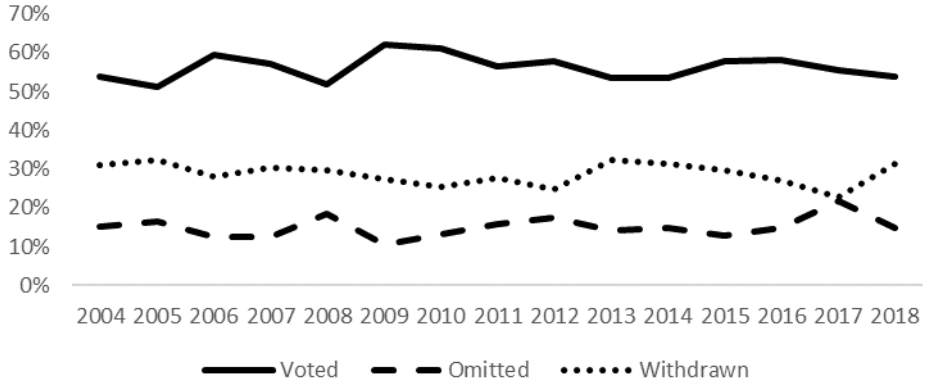
The *p*-value on the trend variable is equal to 0.35.

[145] A proposal may be omitted without a no-action letter from the Commission staff. In particular, a company may give notice to the Commission that it will exclude the proposal or give notice to the Commission that it plans to exclude the proposal and seek relief from a court. Those proposals likely are captured in the withdrawn proposals category in our ISS Analytics dataset because ISS Analytics only classifies proposals for which the Commission staff has issued a no-action letter as omitted proposals.

proposals are primarily those that the proponent voluntarily withdrew after reaching an agreement with management or without reaching an agreement.[146]

As Figure 2 shows, out of all proposals submitted to Russell 3000 companies between 2004 and 2018, 56 percent went to a shareholder vote, 15 percent were omitted following a no-action letter issued by Commission staff, and 29 percent were withdrawn. The percentage of voted, omitted, and withdrawn proposals has largely remained stable during our sample period.[147]

Figure 2
Percentage of shareholder proposals by outcome over time



Source: ISS Analytics.

[146] We classify as "withdrawn" proposals that: (i) were withdrawn by the proponent (3,292 or 76.8% of all withdrawn proposals); (ii) were not found in the company's proxy materials and for which it is yet to be determined whether they were withdrawn or omitted (802 or 18.7% of all withdrawn proposals); (iii) were on the ballot but never came to a vote because the proponent did not appear at the meeting to present the proposal (120 or 2.8% of all withdrawn proposals); (iv) the proponent indicated it intended to submit but that were never actually submitted (52 or 1.2% of all withdrawn proposals); (v) were not voted on because the meeting was cancelled, usually due to a merger, acquisition, bankruptcy, or calling of a special meeting (18 or 0.4% of all withdrawn proposals); and (vi) were not voted on because the meeting was postponed, usually due to a merger, acquisition, bankruptcy, or calling of a special meeting (4 or 0.1% of all withdrawn proposals). The above mentioned proposal categories are available through ISS Analytics.

[147] Untabulated analysis shows no statistically significant trend in the number of voted, omitted, and withdrawn proposals over time (*p*-values are equal to 0.93, 0.37, and 0.34, respectively).

Out of the 831 proposals submitted in 2018, 447 were voted, 123 were omitted, and 261 were withdrawn.[148] The proposed rule amendments would enhance disclosure requirements for proposals submitted through a representative. To understand how frequently proposals are submitted through a representative, we manually collect information on the identity of the proponents and representatives from the proxy statements, and we estimate that from the 447 voted proposals submitted for inclusion in a company's proxy materials for 2018 shareholder meetings, 363 provided some information related to the identity of the proponents, out of which 67 (or 18% = 67/363) were submitted by a representative.[149]

In all subsequent analysis in this section (except for the analysis that relates to voting support), we examine all submitted proposals (rather than focusing on just one of voted, omitted, or withdrawn proposals) to determine the potential impact of the proposed amendments because Rule 14a-8 applies to all submitted proposals.

Next, we compare the average number of proposals submitted to large and small companies because the frequency of submitted proposals, and thus the effects of the proposed amendments, may vary with company size. In particular, Figure 3 compares the average number of proposals submitted to large companies relative to our universe of companies (i.e., Russell 3000 companies). Large companies are represented by the S&P 500 constituents.[150] As Figure 3

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[148] A few proposals were submitted to companies outside of the Russell 3000 index. Using FactSet's corporate governance database, SharkRepellent (available at https://sharkrepellent.net), we estimate that in 2018, there were 19 voted shareholder proposals at 11 companies outside of the Russel 3000 index. Our analysis focuses on proposals submitted to companies within the Russell 3000 index because this sample represents the vast majority of submitted shareholder proposals.

[149] We potentially underestimate the percentage of proposals submitted by a representative because companies might provide information on the identity of the proponent but might not mention that the proposal was submitted via a representative in the proxy statement.

[150] The median market capitalization of Russell 3000 constituents was $1.7 billion as of May 10, 2019 and the median market capitalization of S&P 500 constituents was $22 billion as of August 30, 2019. See *Market Capitalization Ranges*, FTSE RUSSELL MARKET, https://www.ftserussell.com/research-insights/russell-

shows, S&P 500 companies (i.e., solid line in Figure 3) received on average 1.56 proposals each year, and Russell 3000 companies (i.e., dashed line in Figure 3) received on average 0.33 proposals each year during our sample period. The average number of proposals submitted to S&P 500 companies is statistically significantly higher than the average number of proposals submitted to Russell 3000 companies during our sample period.[151] The average number of proposals submitted to S&P 500 companies has decreased from 1.85 in 2004 to 1.24 in 2018, representing a 33 percent decrease during our sample period, and the average number of proposals submitted to Russell 3000 companies has decreased from 0.38 in 2004 to 0.28 in 2018, representing a 26 percent decrease during our sample period.[152] Results are qualitatively similar when we compare voted rather than all submitted shareholder proposals for S&P 500 and Russell 3000 companies.[153]

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reconstitution/market-capitalization-ranges (last visited Sept. 23, 2019); *S&P 500*, S&P DOW JONES INDICES, https://us.spindices.com/indices/equity/sp-500 (last visited Sept. 23, 2019).

We retrieve data on whether a proposal was submitted to an S&P 500 and/or a Russell 3000 company from ISS Analytics.

The ISS Analytics data only covers Russell 3000 companies. S&P 500 companies usually are a subset of the Russell 3000 companies. To the extent that some S&P 500 companies are not part of the Russell 3000 index, our analysis underestimates the average number of proposals submitted to S&P 500 companies, because those proposals are missing from our data.

[151] In this and all subsequent analysis, we use a two-tailed t-test and a 90% confidence interval to compare differences in means across groups.

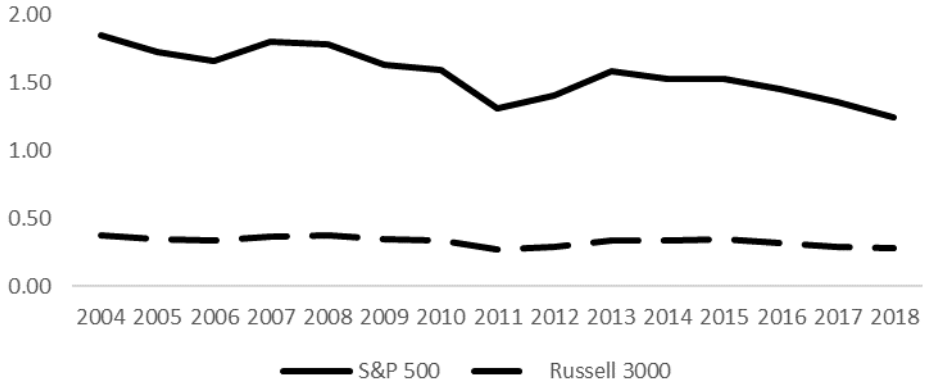
The *p*-value is equal to zero.

[152] Untabulated analysis shows a statistically significant downward trend in the average number of proposals submitted to S&P 500 and Russell 3000 companies during our sample period (*p*-values are equal to zero).

[153] Untabulated analysis shows that the average number of voted proposals for S&P 500 companies has decreased from 0.99 in 2004 to 0.70 in 2018, representing a 29% decrease during our sample period, and the average number of voted proposals for Russell 3000 companies has decreased from 0.20 in 2004 to 0.15 in 2018, representing a 26% decrease during our sample period.

Overall, our analysis shows that larger companies receive more proposals than smaller companies, and the number of proposals received by both large and small companies has decreased over time.

Figure 3
Average number of proposals submitted to S&P 500 vs. Russell 3000 issuers



Source: ISS Analytics.

We also examine the frequency of submitted proposals by proposal topic because the effects of the proposed amendments may vary by proposal topic. More specifically, the effects of the proposed amendments to the resubmission thresholds may vary by proposal topic because the topic of a proposal may be related to the voting support of a proposal as well as the time it may take for a proposal to garner majority support. However, we also recognize that the garnering of support over time may be the result of a variety of factors other than or in addition to the continued inclusion of the proposal in the proxy. In addition, the effects of the proposed amendments to the ownership thresholds may vary by proposal topic to the extent that the proposed amendments have a disproportionate effect on different types of proponents and the type of proposal varies by proponent type.

Figure 4 shows the percentage of all submitted shareholder proposals by proposal topic over time. ISS Analytics classifies proposals into three categories: governance, environmental, and social proposals.[154] The results of any analysis that involves classification of proposals into various categories should be interpreted with caution for various reasons, including because there is a level of subjectivity involved in the classification of the proposals to the various categories. For example, proposals on board diversity could be considered either governance or social proposals. In addition, each proposal category includes a wide range of proposals. For example, governance proposals can include proposals related to executive compensation as well as proposals related to the sale of company assets.

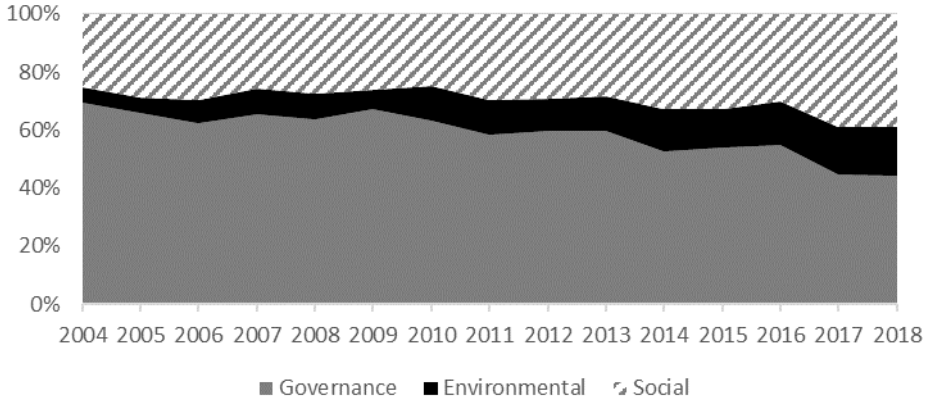
Our analysis shows that, during our sample period, 59 percent of the submitted shareholder proposals (i.e., 8,829 proposals) regarded governance issues, 11 percent (i.e., 1,601 proposals) regarded environmental issues, and 30 percent (i.e., 4,397 proposals) regarded social issues. The percentage of governance proposals relative to all submitted proposals has decreased from 70 percent in 2004 to 44 percent in 2018, with a corresponding increase in the percentage of environmental proposals from 5 percent in 2004 to 16 percent in 2018 and an increase in the

[154] We retrieve data on the topic of the shareholder proposal from ISS Analytics. In this dataset, proposals are classified in three categories: governance, environmental, and social. Governance proposals include, among others, proposals related to audits, board issues, compensation, voting, proxy matters, and shareholder meetings. Environmental proposals include, among others, proposals related to sustainability, greenhouse gas emissions, climate change, community/environmental impact, and renewable energy. Social proposals include, among others, proposals related to political contributions, sexual orientation, political lobbying disclosure, human rights, and board diversity. We manually classify 250 proposals with missing shareholder proposal topics into one of the three above-mentioned topics by reviewing the description of the shareholder proposal in the ISS Analytics dataset. We do not reclassify other proposals in the ISS Analytics dataset to ensure the replicability of our analysis. We exclude from this analysis 33 proposals with missing shareholder proposal topics and missing descriptions of the shareholder proposal because we lack the necessary information to classify these proposals into one of the three above-mentioned categories.

percentage of social proposals from 25 percent in 2004 to 39 percent in 2018.[155] Results are qualitatively similar when we examine voted (rather than submitted) shareholder proposals by topic.[156]

Overall, our analysis shows an increase in the frequency of social and environmental proposals and a decrease in the frequency of governance proposals during our sample period.

Figure 4
Percentage of submitted shareholder proposals by topic over time



Source: ISS Analytics.

Next, we analyze the frequency of submitted proposals by proponent type because the effects of the proposed amendments may vary with the type of proponent. This is because the level and duration of holdings, as well as chosen proposal topics, may vary with proponent type. Figure 5 shows the percentage of submitted shareholder proposals by proponent type over time.

[155] Untabulated analysis shows a statistically significant downward trend in the percentage of governance proposals (*p*-value is equal to zero) and a statistically significant upward trend in the percentage of environmental and social proposals over time (*p*-values are equal to zero).

[156] Untabulated analysis shows that the percentage of voted governance proposals relative to all voted proposals has decreased from 69% in 2004 to 62% in 2018, with a corresponding increase in the percentage of voted environmental proposals from 3% in 2004 to 11% in 2018, and a small decrease in the percentage of voted social proposals from 28% in 2004 to 27% in 2018.

We classify proponents into three categories: individuals, institutions, and unknown.[157] As Figure 5 shows, the average percentage of proposals submitted by individuals (i.e., gray-shaded area in Figure 5) was 31 percent during our sample period, and it ranged from a low of 26 percent in 2011 to a high of 39 percent in 2018. Further, as Figure 5 shows, the average percentage of proposals submitted by institutions (i.e., line-patterned area in Figure 5) was 67 percent during our sample period, and it ranged from a low of 59 percent in 2018 to a high of 71 percent in 2011. Our analysis shows no significant time-series trends in the percentage of proposals submitted by individuals and institutions.[158] Institutions submitted approximately twice the number of proposals submitted by individuals, and the difference in the number of proposals submitted by institutions and individuals was statistically significant.[159] The percentage of proposals with missing proponent information (i.e., black-shaded area in Figure 5) has decreased from 6 percent in 2004 to 2 percent in 2018, but this decrease is statistically

[157] We retrieve data on proponent types from ISS Analytics. Whenever there are multiple proponents submitting a proposal, the proponent type corresponds to the type of the lead proponent. Whenever the proponent type is missing, we manually classify the proponent into one of the three categories (i.e., individual, institution, or unknown) using the proponent name. Individual proponents are all retail investors. Institutional proponents comprise: (i) asset managers (25% of all institutional proposals); (ii) unions (25% of all institutional proposals); (iii) pension funds (20% of all institutional proposals); (iv) religious organizations (12% of all institutional proposals); (v) nonprofit organizations (11% of all institutional proposals); and (vi) others (8% of all institutional proposals). An institutional proponent is classified as "other" whenever the proponent does not fall into any of the other institutional proponent categories. "Unknown" proponents are those with missing identities. The identity of the proponent presumably is missing in the ISS Analytics dataset because companies are not required to disclose the identity of the proponent in the proxy statements. See 17 CFR 240.14a-8(l) (Rule 14a-8(l)).

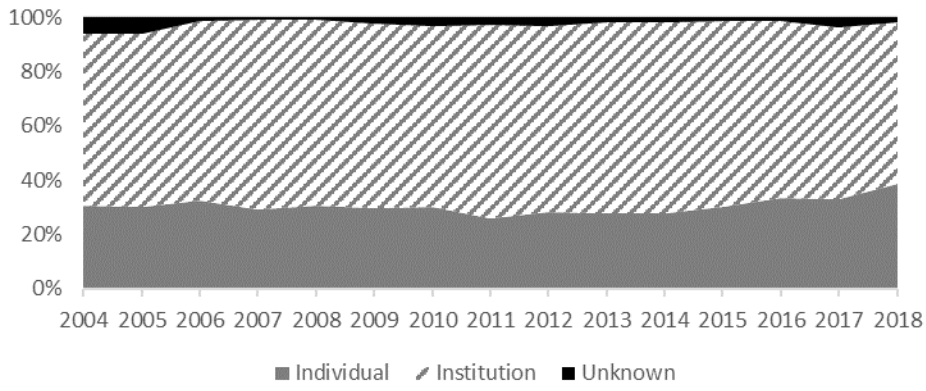
[158] The *p*-values are equal to 0.19 and 0.64, respectively.

[159] The *p*-value is equal to zero.

insignificant.[160] Our results are qualitatively similar when we examine the percentage of voted rather than submitted shareholder proposals by proponent type over time.[161]

Overall, our analysis shows that institutions submitted proposals more frequently than individuals, and the percentage of proposals submitted by institutions and individuals has not changed significantly during our sample period.

Figure 5
Percentage of submitted shareholder proposals by proponent type over time



Source: ISS Analytics.

We also study the number of unique proponents and average number of proposals submitted by each proponent to shed some light on the concentration of shareholder proposals across proponents. Figures 6A, 6B, and 6C show the number of unique proponents (i.e., gray bars) and the average number of proposals submitted by each proponent over time (i.e., black

[160] Untabulated analysis shows a statistically significant downward trend in the percentage of proposals submitted by proponents with missing identity over time (the *p*-value is equal to 0.17).

[161] The average percentage of voted proposals that were submitted by individuals was 32% during our sample period, and it ranged from a low of 25% in 2011 to a high of 49% in 2018. The average percentage of voted proposals that were submitted by institutions was 64% during our sample period, and it ranged from a low of 48% in 2018 to a high of 71% in 2011.

line) for all proponents, for proponents that are individuals, and for proponents that are institutions, respectively. For this analysis, we count separately proposals submitted by proponents and proposals submitted by co-proponents. We exclude proposals with missing proponent identity. To avoid over-counting the number of unique proponents and undercounting the average number of proposals submitted by each proponent, we review and manually correct the proponent names whenever ISS Analytics uses variations of the same name for a proponent (e.g., "CalPERS" and "California Public Employees' Retirement System"). Nevertheless, to the extent that the same proponent appears with a slightly different name in our dataset, our analysis potentially overestimates the number of unique proponents and underestimates the average number of proposals submitted by each proponent.

As Figure 6A shows, the average number of unique proponents was 228 during our sample period, and it ranged from a low of 181 in 2011 to a high of 286 in 2004. The average number of proposals submitted by each proponent was 4.9 during our sample period, and it ranged from a low of 3.9 in 2004 to a high of 6.7 in 2015. Untabulated analysis shows no time-series trends in the number of unique proponents and the average number of proposals submitted by each proponent during our sample period.[162]

A different picture emerges when splitting the observations into proposals submitted by individuals (Figure 6B) and institutions (Figure 6C).[163] As Figure 6B shows, the average number of unique proponents that were individuals was 90 during our sample period, and it ranged from a low of 64 in 2012 to a high of 155 in 2004. The average number of proposals submitted by

[162] The *p*-values are equal to 0.84 and 0.45, respectively.

[163] For proposals that are submitted through a representative, when classifying proponents into institutions and individuals, ISS takes into account the identity of the shareholder rather than the identity of the representative that submitted the proposal.

each individual proponent was 3.9 during our sample period, and it ranged from a low of 2.3 in 2004 to a high of 5.2 in 2017. Untabulated analysis shows a statistically significant downward trend in the number of unique individual proponents and a statistically significant upward trend in the average number of proposals submitted by each individual proponent.[164]

As Figure 6C shows, the average number of unique proponents that were institutions was 143 during our sample period, and it ranged from a low of 107 in 2006 to a high of 207 in 2017. The average number of proposals submitted by each institutional proponent was 5.7 during our sample period, and it ranged from a low of 3.7 in 2017 to a high of 7.6 in 2007. Untabulated analysis shows a statistically significant upward trend in the number of unique institutional proponents and a statistically significant downward trend in the average number of proposals submitted by each institutional proponent.[165]

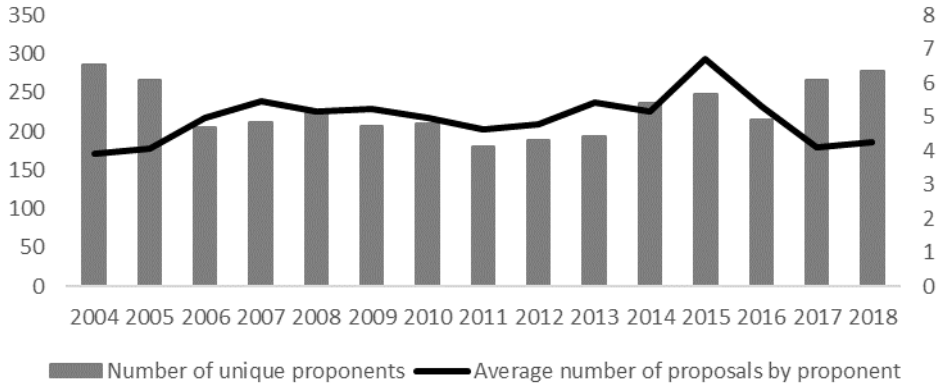
Overall, the results of our analysis suggest that there has been an increase (decrease) in the concentration of proposals submitted by individuals (institutions) during our sample period.

[164] The *p*-values are equal to zero.

[165] The *p*-values are equal to zero and 0.04, respectively.

Figure 6A

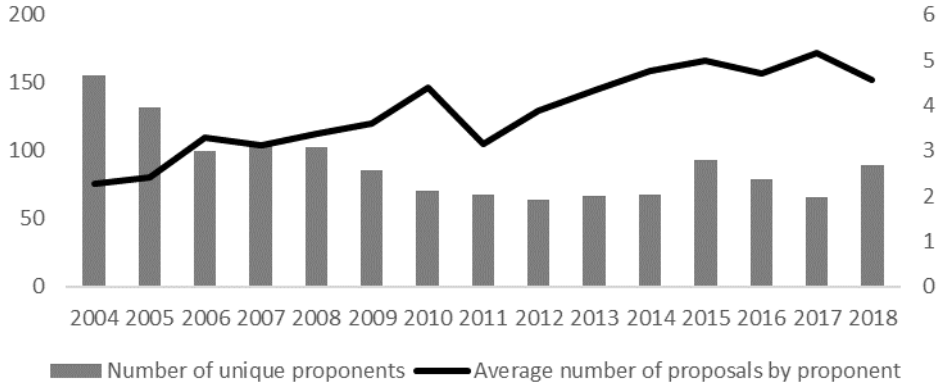
Number of unique proponents & average number of proposals - All proponents



Source: ISS Analytics.

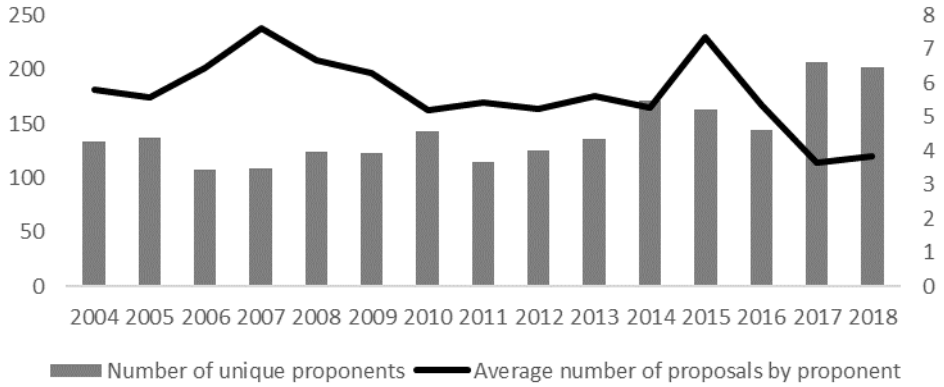
Figure 6B

Number of unique proponents & average number of proposals - Individuals



Source: ISS Analytics.

Figure 6C
Number of unique proponents & average number of proposals - Institutions



Source: ISS Analytics.

Relatedly, an academic study, using a sample of shareholder proposals submitted to S&P 1500 companies between 2003 and 2014, shows that five individual proponents submitted 78 percent of all proposals submitted by individuals and 27 percent of all proposals submitted by all proponents.[166]

Finally, we examine voting outcomes for all proposals, by proposal topic, and by proponent type to inform analysis of the effects of the proposed amendments on proposals that may garner high shareholder support. In addition, the level of voting support may determine

[166] Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy* 8–9, 37 (European Corporate Governance Institute, Working Paper No. 586/2018, 2018) ("Gantchev & Giannetti (2018)"). 27% = (290 + 222 + 157 + 133 + 125) / 3,384. These statistics are estimated using the identity of the proponents rather than the identity of the representatives, in cases where a representative submitted a proposal on behalf of a proponent.

For related statistics, see letters in response to the Proxy Process Roundtable from U.S. Chamber of Commerce Center for Capital Markets Competitiveness dated November 12, 2018, at 11 ("[D]uring 2017, just three individuals . . . sponsored 25% of proposals submitted at the Fortune 250."); Ceres dated November 13, 2018, at 6 ("From 2004–2017, the Chevedden, Steiner, and McRitchie families submitted 14.5% of the 11,706 proposals filed."); Mercy Investment Services, Inc. dated December 3, 2018, at 2 (same); Investment Company Institute dated November 14, 2018, at 1–3 of attachment.

which shareholder proposals would be affected by the proposed amendments to Rule 14a-8(i)(12). Figures 7A, 7B, and 7C show the average voting support for all proposals, by proposal topic, and by type of proponent, respectively. Voting support is defined as the ratio of "for" votes divided by the sum of "for" and "against" votes.[167] As Figure 7A shows, the average voting support was 33 percent in 2018, and it ranged from a low of 27.8 percent in 2004 to a high of 37.5 percent in 2009, with an average of 33.4 percent during our sample period.[168]

As Figure 7B shows, the average voting support for governance proposals (i.e., solid line in Figure 7B) has remained stable during our sample period at an average of 42.1 percent, while there has been an upward trend in the average voting support for environmental and social proposals (i.e., dotted and dashed lines in Figure 7B).[169] In particular, the average voting support for environmental proposals increased from a low of 11.8 percent in 2004 to a high of 28.9 percent in 2018, with an average of 21.9 percent during our sample period. The average voting support for social proposals increased from a low of 9.3 percent in 2005 to a high of 24.6 percent in 2018, with an average of 17.4 percent during our sample period. Untabulated analysis also shows that the average voting support for governance proposals is statistically significantly higher than the average voting support for environmental and social proposals, and the average

[167] We define voting support as the ratio of "for" divided by the sum of "for" and "against" votes because this is how voting support is defined for the purposes of Rule 14a-8(i)(12). See supra note 116. Abstentions and broker non-votes are excluded from the calculation of voting support for the purposes of Rule 14a-8(i)(12). See supra note 116.

[168] Untabulated analysis shows no statistically significant trend in the average voting support for all proposals during our sample period (the *p*-value is equal to 0.40).

[169] Untabulated analysis shows a statistically significant upward trend in the average voting support for environmental and social proposals (*p*-values are equal to zero) and no statistically significant trend in the average voting support for governance proposals during our sample period (the *p*-value is equal to 0.83).

voting support for environmental proposals is statistically significantly higher than the average voting support for social proposals.[170]

Finally, as Figure 7C shows, the average voting support for proposals submitted by institutions (i.e., solid line) has remained stable during our sample period at an average of 35.4 percent during our sample period, and the average voting support submitted by individuals (i.e., dashed line) has remained stable during our sample period at an average of 32.2 percent.[171] Untabulated analysis also shows that the average voting support for proposals submitted by institutions is statistically significantly higher than the average voting support for proposals submitted by individuals.[172]

In sum, our analysis shows that the average voting support of all proposals has remained stable during our sample period, but there is an increase in the average voting support for environmental and social proposals over the sample period.

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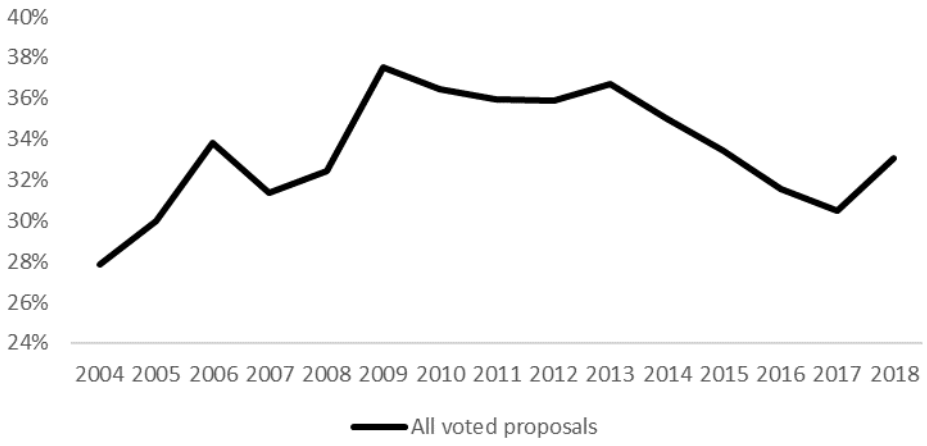
[170] The *p*-values are equal to zero.

[171] Untabulated analysis shows no statistically significant trend in the average voting support for proposals submitted by institutions and individuals during our sample period. The *p*-values are equal to zero 0.22 and 0.97 respectively.

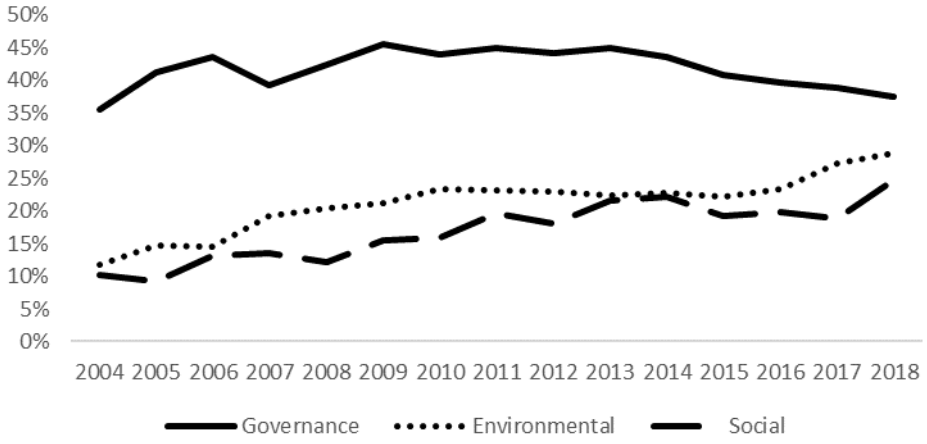
[172] The *p*-value is equal to 0.01.

Figure 7A
Average voting support

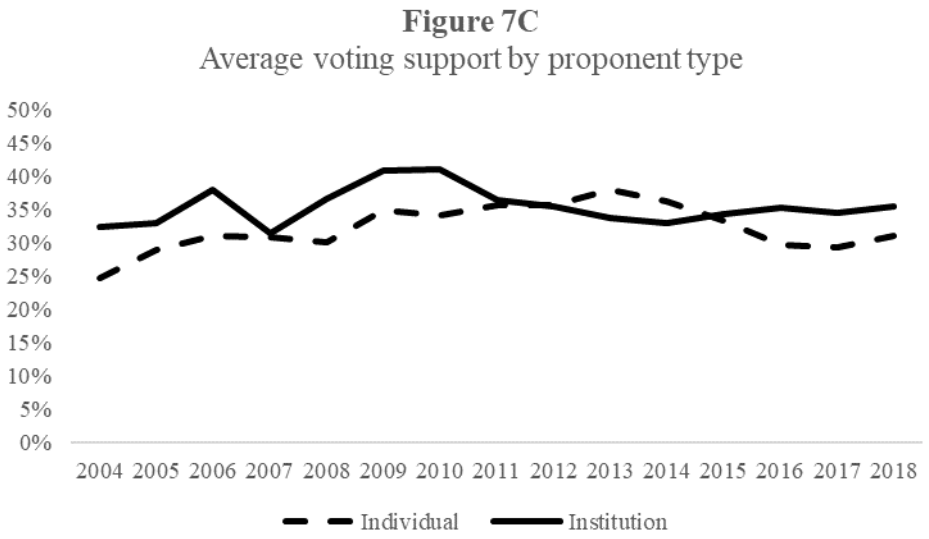


Source: ISS Analytics.

Figure 7B
Average voting support by topic



Source: ISS Analytics.



Source: ISS Analytics.

Figures 8A, 8B, and 8C show the percentage of proposals that received majority support for all proposals, by proposal topic, and by proponent type, respectively. Majority support is defined as more than 50 percent of the "for" votes divided by the sum of "for" and "against" votes.[173] We examine the percentage of proposals that received majority support as opposed to some other voting threshold because studies show that the probability of implementation of a shareholder proposal increases significantly once the proposal receives majority support.[174]

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[173] See supra note 167.

[174] For example, a 2010 study by Ertimur et al. shows that "proposals that won at least one majority vote in the past are more likely to be implemented (34.2% versus 22.9%)." See Yonca Ertimur, Fabrizio Ferri, & Stephen R. Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53 (2010) ("Ertimur et al. (2010)"). Similarly, a 2017 study by Bach and Metzger showed that "when the 50%-threshold is passed, there is a very sizeable jump of about 20% of the implementation likelihood." See Laurent Bach & Daniel Metzger, *How Do Shareholder Proposals Create Value?* (Working Paper, Mar. 2017) ("Bach & Metzger (2017)"). However, only crossing the management-defined majority threshold (as opposed to the simple majority threshold defined as the ratio of "for" votes divided by the sum of "for" and "against" votes) has an effect of the probability that the proposal is implemented. Id. The management-defined majority threshold may differ from a simple majority threshold. Id. In 43% of their sample, the management threshold is the same as the simple majority threshold. See id. In our analysis, we define majority support as the simple majority threshold because we lack data on the management-defined majority threshold.

As Figure 8A shows, there is a statistically significant downward trend in the percentage of proposals that received majority support during our sample period.[175] In particular, the percentage of proposals that received majority support ranged from a high of 27.7 percent in 2009 to a low of 11.9 percent in 2018, with an average of 20.6 percent during our sample period.

As Figure 8B shows, few environmental and social proposals received majority support during our sample period, while one out of three governance proposals received majority support.[176] More specifically, the percentage of governance proposals that received majority support (i.e., solid line in Figure 8B) ranged from a high of 37.7 percent in 2009 to a low of 14.9 percent in 2018, with an average of 30.6 percent during our sample period. The percentage of environmental proposals that received majority support (i.e., dotted line in Figure 8B) ranged from a low of 0 percent in 2004 to a high of 16.3 percent in 2018, with an average of 2.6 percent during our sample period. The percentage of social proposals that received majority support (i.e., dashed line in Figure 8B) ranged from a low of zero percent in 2010 to a high of 4.5 percent in 2016, with an average of 1.8 percent during our sample period. Untabulated analysis shows that there is a statistically significant downward trend in the percentage of governance proposals that received majority support, and a statistically significant upward trend in the percentage of environmental and social proposals that received majority support during our sample period.[177] Interpretation of these results should be undertaken with caution due to various factors, including

[175] The *p*-value is equal to zero.

[176] Untabulated analysis shows that the percentage of governance proposals that received majority support is statistically significantly higher than the percentage of environmental and social proposals that received majority support (the *p*-values are equal to zero), and the percentage of environmental proposals that received majority support is not statistically significantly different than the percentage of social proposals that received majority support (the *p*-value is equal to 0.23).

[177] The *p*-values are equal to 0.01, 0.02, and 0.05, respectively.

the uncertainties inherent in categorization and the evolution of voting support for proposals over time.

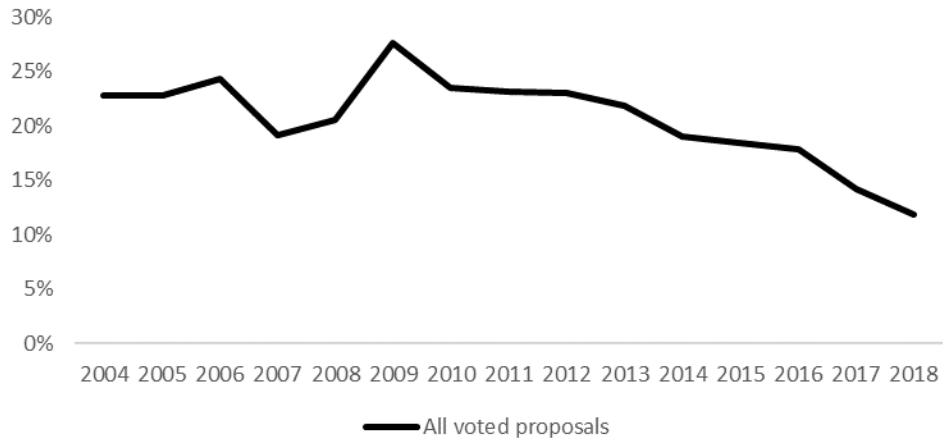
As Figure 8C shows, there is a statistically significant downward trend in the percentage of proposals submitted by individuals that received majority support, while the percentage of proposals submitted by institutions that received majority support has not changed significantly during our sample period.[178] In particular, the percentage of proposals submitted by individuals that received majority support (i.e., dashed line in Figure 8C) ranged from a high of 35 percent in 2009 to a low of 12.3 percent in 2014, with an average of 23.7 percent during our sample period. In addition, the percentage of proposals submitted by institutions that received majority support (i.e., solid line in Figure 8C) ranged from a high of 24.3 percent in 2013 to a low of 11.1 percent in 2018, with an average of 18.7 percent during our sample period. The percentage of proposals submitted by individuals that received majority support is statistically significantly higher than the percentage of proposals submitted by institutions that received majority support.[179]

In sum, our analysis shows that there is a decrease in the number of proposals that received majority support during our sample period and this decrease is primarily attributable to governance proposals and proposals submitted by individuals.

[178] The *p*-values are equal to zero and 0.48, respectively.

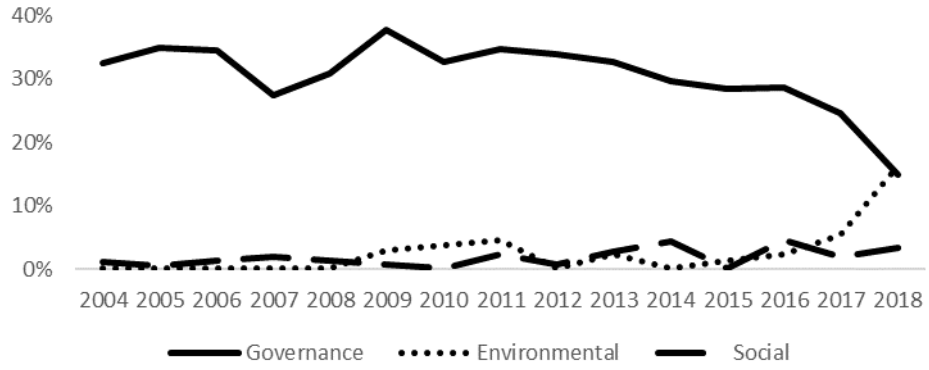
[179] The *p*-value is equal to 0.02.

Figure 8A
Percentage of proposals receiving majority support



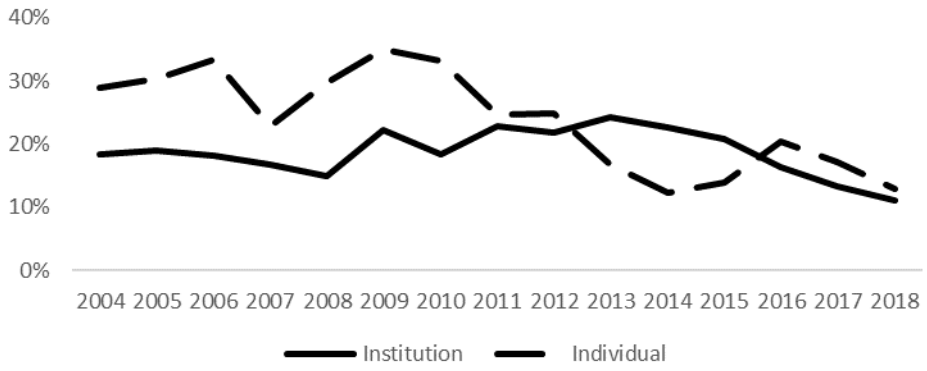
Source: ISS Analytics.

Figure 8B
Percentage of proposals receiving majority support by topic



Source: ISS Analytics.

Figure 8C
Percentage of proposals receiving majority support by proponent type



Source: ISS Analytics.

Because many proposals are non-binding, not all proposals that garner majority support are implemented. Using a sample of governance-related proposals for S&P 1500 companies between 1997 and 2011, previous studies have shown that between 31 percent and 56 percent of the shareholder proposals that received majority support were implemented by management, and this percentage has increased over time.[180] These studies have also shown that the probability of a proposal being implemented depends on the influence of the proponent, the type of proposal,

[180] Bach and Metzger use a sample of governance-related proposals for S&P 1500 companies between 1997 and 2011 and find that 56% of the proposals that received majority support were implemented by management, and this percentage increased from 29% in 1997 to 70% in 2011. Bach & Metzger (2017), supra note 174. Ertimur et al. use a sample of governance-related proposals for S&P 1500 companies between 1997 and 2004 and find that 31% of the proposals that received majority support were implemented by management, and this percentage increased from 16% in 1997 to 40% in 2004. Ertimur et al. (2010), supra note 174. The differences in the statistics of the two cited papers is likely due to the different definition of implemented proposals. Bach and Metzger consider a proposal to be implemented "if management adopts the content of the proposal within two years after the shareholder meeting," while Ertimur et al. consider a proposal to be implemented if "the board takes a significant step toward a partial or full implementation within one year from the majority vote." See Bach & Metzger (2017), supra note 174; Ertimur et al. (2010), supra note 174. A 2007 study by Thomas and Cotter provide similar rates of implementation of shareholder proposals that received majority support as Ertimur et al. (2010). See Randall S. Thomas & James F. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FIN. 368 ("Thomas & Cotter (2007)").

the past performance of the company, and whether voting support exceeds majority support as defined by a company's governing documents.[181]

ii. Discussion specific to proposed amendments to Rule 14a-8(b) and Rule 14a-8(c)

To provide insight into the distribution of ownership across proponents, we perform two sets of analysis. First, we review proponents' ownership information as disclosed in companies' proxy statements for proposals to be considered at shareholder meetings held in 2018.[182] Companies have discretion in the type of information they must include in the proxy statements regarding proponents.[183] In particular, the company's proxy statement must either include the name and address of the proponents as well as the number of the voting securities that the proponent holds, or alternatively, a statement that this information will be provided to shareholders upon request. Whenever the company discloses the identity of the proponents, the company may disclose the identity of all or a subset of the proponents. Whenever the company discloses proponents' ownership information, the company may disclose the actual dollar value, the actual number of shares, a minimum dollar value, or a minimum number of shares held by the proponent. In addition, whenever the company discloses proponents' ownership information, the company may disclose ownership information for a subset of the proponents submitting a proposal, and the company may disclose actual holdings information for some of the proponents and minimum holdings information for the rest of the proponents submitting the same proposal. The type of ownership information the company discloses (i.e., actual holdings versus minimum

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[181] See Thomas & Cotter (2007), supra note 180; Ertimur et al. (2010), supra note 174; Bach & Metzger (2017), supra note 174.

[182] Proxy statements filed with the Commission are available at https://www.sec.gov/edgar/searchedgar/companysearch.html.

[183] See Rule 14a-8(l).

holdings and dollar value versus number of shares) frequently depends on the type of information provided in the proof-of-ownership letter furnished by the proponent. In particular, proponents also have discretion in the type of information they must provide in the proof-of-ownership letters.[184] Proponents may disclose the exact duration and level of their holdings or they may confirm that they meet the minimum ownership thresholds. For these reasons, data on proponent ownership from proxy statements may not be representative of the overall distribution of proponent ownership.

Table 1 summarizes the distribution of proponents' ownership in our sample of proposals.[185] There were 447 unique voted proposals for shareholder meetings held in 2018. Out of the 447 proposals, 287, or 64 percent, contained information on proponents' actual and/or minimum holdings, whereas the remaining 160, or 36 percent, did not contain information on proponents' ownership. In our sample of proxy statements, there were 198 proponents that submitted 150 unique proposals for which the proxy statements mentioned the proponents' actual holdings, and 159 proponents that submitted 139 unique proposals for which the proxy statements mentioned the proponents' minimum holdings.[186]

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[184] See Rule 14a-8(b).

[185] There is some information on proponents' duration of ownership in only 5 out of the 447 reviewed proposals. Because the sample is small, we do not provide descriptive statistics on proponents' duration of ownership using information from the proxy statements.

[186] Multiple proponents may submit a single proposal. Hence, the number of proponents in Table 1 can be higher than the number of proposals. Also, for the same reason, within each panel, the sum of proposals for the various ownership ranges can be higher than the total number of proposals. For example, in the Actual Holdings panel, the sum of proposals for the various ownership ranges (i.e., 158 = 2 + 75 + 16 + 65) is higher than the total number of proposals in the panel (i.e., 150).

Further, companies may disclose information on actual holdings for some proponents and information on minimum holdings for other proponents submitting the same proposal. Hence, in Table 1, the sum of the proposals with (i) information on proponents' actual holdings (i.e., 150 proposals); (ii) information on proponents' minimum holdings (i.e., 139 proposals); and (iii) no information on proponents' holdings (i.e., 160 proposals) is higher than the number of unique proposals in our sample (i.e., 447).

From the 198 proponents with actual holdings information, (i) 3 proponents, or 2 percent, held less than $2,000 worth of shares, and those proponents submitted 2 unique proposals; (ii) 85 proponents, or 43 percent, held more than or equal to $2,000 but less than $15,000 worth of shares, and those proponents submitted 75 unique proposals; (iii) 16 proponents, or 8 percent, held more than or equal to $15,000 but less than $25,000 worth of shares, and those proponents submitted 16 unique proposals; and (iv) 94 proponents, or 47 percent, held more than or equal to $25,000 worth of shares, and those proponents submitted 65 unique proposals.[187] The median ownership for proponents with actual holdings information was $16,758 and the average ownership was $17.4 million.[188]

From the 159 proponents with minimum holdings information, (i) all of the proponents held at least $2,000 worth of shares, and those proponents submitted 139 unique proposals; (ii) 23 proponents, or 14 percent, held at least $15,000 worth of shares, and those proponents submitted 23 unique proposals; and (iv) 16 proponents, or 10 percent, held at least $25,000 worth of shares, and those proponents submitted 16 unique proposals.

The proxy statements provide information on the identity of the proponents for a subset of the proposals with no holdings information.

[187] In cases where the company reports the number of shares rather than the dollar amount of the proponent's holdings, we convert the number of shares to dollars using the average of the bid and ask prices during a 60-day period before the filing date of the proxy statement. We use the filing date of the proxy statement rather than the date that the proponent submitted the proposal (see supra note 57) because proxy statements do not report the date of the shareholder proposal submission. Stock prices are retrieved from CRSP.

[188] In untabulated analysis, we examine whether the probability that a proposal would receive majority support depends on the proponents' ownership level. To measure voting support, we use the ISS Analytics data for the sample of proposals that were voted on in 2018 shareholder meetings. We only use data on proponents with information on their exact holdings. We compare the probability that the proposal would receive majority support for proposals submitted by proponents with above and below median dollar ownership levels and we find a negative and statistically significant relation between the probability that a proposal would receive majority support and the level of proponents' ownership (p-value equal to 0.06), but we find no relation between the level of the voting support and the level of proponents' ownership (p-value equal to 0.14). The results of this analysis should be interpreted with caution because of the small sample used for this analysis.

As mentioned above, in our sample, there were three proponents (i.e., one percent of all proponents with ownership information), whose individual holdings were below the current $2,000 ownership threshold, and those proponents submitted two unique proposals (i.e., one percent of all proposals submitted by proponents with ownership information in the proxy statements). For one of the two proposals, there were two co-proponents, whose both aggregate and individual holdings did not meet the $2,000 current ownership threshold.[189] For the other of the two proposals, there were four co-proponents, whose aggregate holdings met the $2,000 current threshold and the individual holdings of one of the co-proponents did not meet the $2,000 current ownership threshold.

Further, in our sample, two entities submitted more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. In particular, one entity submitted two proposals to one company and another entity submitted two proposals to each one of six different companies, resulting in a total of 14 submitted proposals.

[189] The dollar value of proponents' ownership may be measured with error in cases where we use the filing date of the proxy statement to estimate the dollar value of proponents' ownership (see supra note 187). Hence, the aggregate holdings of the proponents that submitted the abovementioned proposal may be higher than or equal to $2,000.

Table 1: Proponents' Ownership (from Proxy Statements)

	# of proponents	# of proposals
Actual Holdings	**198**	**150**
Holdings < $2,000	3	2
Holdings ≥ $2,000, but < $15,000	85	75
Holdings ≥ $15,000, but < $25,000	16	16
Holdings ≥ $25,000	94	65
Minimum Holdings	**159**	**139**
Holdings > $0	159	139
Holdings ≥ $2,000	159	139
Holdings ≥ $15,000	23	23
Holdings ≥ $25,000	16	16
No Holdings Information	**156**	**160**

Sources: *CRSP, ISS Analytics, Proxy Statements from EDGAR.*

Second, we review proponents' ownership information from the proof-of-ownership letters submitted in connection with the proposal that can be found as an attachment to the Commission staff's no-action letters issued under Rule 14a-8 during calendar year 2018.[190] Our sample comprises 254 unique shareholder proposals submitted by 242 unique proponents, yielding 485 proponent-proposal pairs. For 433, or 89 percent of all proponents that submitted a proposal for which the company submitted a no-action request, there is information on proponents' actual and/or minimum holdings. For the remaining 52 proponents, or 11 percent, there is no information on proponents' actual or minimum holdings. Further, there are 284 proponents that submitted 155 unique proposals, for whom there is information on their actual

[190] The no-action letters that include the proof-of-ownership letters are available at https://www.sec.gov/divisions/corpfin/cf-noaction/2019_14a-8.shtml and https://www.sec.gov/investment/investment-management-no-action-letters#P87_900. We analyze a sample (rather than the universe) of all proof-of-ownership letters attached to no-action letters available on the Commission's website because ownership data in proof-of-ownership letters are unstructured, and thus information must be manually collected.

holdings, and 149 proponents that submitted 99 unique proposals, for whom there is only information on proponents' minimum holdings.[191]

From the 284 proponents with actual holdings information, (i) eight proponents, or three percent, held less than $2,000 worth of shares, and those proponents submitted six unique proposals; (ii) 140 proponents, or 49 percent, held more than or equal to $2,000 but less than $15,000 worth of shares, and those proponents submitted 98 unique proposals; (iii) 19 proponents, or seven percent, held more than or equal to $15,000 but less than $25,000 worth of shares, and those proponents submitted 16 unique proposals; and (iv) 117 proponents, or 41 percent, held more than or equal to $25,000 worth of shares, and those proponents submitted 79 unique proposals.[192] The median ownership for proponents with actual holdings information is $13,076, and the average ownership is $11.8 million.

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[191] Multiple proponents may submit a single proposal. Hence, the number of proponents in Table 2 can be higher than the number of proposals. Also, for the same reason, within each panel, the sum of proposals for the various ownership ranges can be higher than the total number of proposals in the corresponding panel. For example, in the Actual Holdings panel, the sum of proposals for the various ownership ranges (i.e., 199 = 6 + 98 + 16 + 79) is higher than the total number of proposals in the panel (i.e., 155).

In Table 2, the sum of the proposals with (i) information on proponents' actual holdings (i.e., 155 proposals); (ii) information on proponents' minimum holdings (i.e., 99 proposals); and (iii) no information on proponents' holdings (i.e., 34 proposals) is higher than the number of unique proposals in our sample (i.e., 254) because for the same proposal, the proof-of-ownership letters submitted by the proponents can provide information on proponents' actual and/or minimum holdings.

[192] Data on proponent ownership from proof-of-ownership letters may not be representative of the overall distribution of proponent ownership because companies do not seek to omit every shareholder proposal. Companies sought to omit proposals by requesting a no-action letter from the Commission staff for 31% of shareholder proposals during the calendar year 2018. The percentage of proposals that companies sought to omit in 2018 is estimated as the number of unique proposals for which the Commission received a no-action request in 2018—see supra note 190—divided by the number of all unique proposals (i.e., voted, omitted, and withdrawn proposals) to be considered in 2018 shareholder meetings from ISS Analytics. Hence, this percentage is an approximation of the actual percentage of proposals that companies sought to omit in 2018 because some of the no-action requests received by the Commission in 2018 regarded 2019 shareholder meetings.

In addition, data on proponent ownership from proof-of-ownership letters is limited because proponents are not required to disclose in the proof-of-ownership letter their exact stock ownership but only to confirm that they meet the minimum ownership thresholds. See Rule 14a-8(b).

From the 149 proponents with minimum holdings information, (i) 148 proponents, or 99 percent, hold at least $2,000 worth of shares, and those proponents submitted 98 unique proposals; (ii) 18 proponents, or 12 percent, hold at least $15,000 worth of shares, and those proponents submitted 18 unique proposals; and (iii) 12 proponents, or eight percent, hold at least $25,000 worth of shares, and those proponents submitted 12 unique proposals.

As Table 2 shows, in our sample, there are nine proponents with individual holdings below the current $2,000 ownership threshold (i.e., eight proponents with exact holdings information and one proponent with minimum holdings information below the $2,000 threshold) and those proponents submitted seven unique proposals. For one of the seven proposals, there were two co-proponents, whose aggregate holdings met the $2,000 current ownership threshold. For another one of the seven proposals, there was only one proponent whose holdings did not meet the $2,000 threshold.[193] For the remaining five proposals, there was at least one other co-proponent whose share ownership met the current $2,000 threshold.

In cases where the proponent reports the number of shares rather than the dollar amount of his/her holdings, we convert the number of shares to dollars using the average of the bid and ask prices during the 60 calendar days before the date the shareholder submitted the proposal. See supra note 57. In cases where the no-action letter does not contain the date that the proposal was mailed or emailed, we use the date that the company received the proposal to estimate the highest of the average of the bid and ask prices during a 60-day period. In cases where the no-action letter does not contain the date that the proposal was mailed or emailed or the date that the company received the proposal, we use the date that the proposal was signed by the proponent. Stock prices are retrieved from CRSP.

[193] Commission staff issued a no-action letter for this proposal following the company's request because the proponent did not satisfy the minimum ownership requirement under Rule 14a-8(b).

Table 2: Proponents' Ownership (from Proof-of-Ownership Letters)

	# of proponents	# of proposals
Actual Holdings	**284**	**155**
Holdings < $2,000	8	6
Holdings ≥ $2,000, but < $15,000	140	98
Holdings ≥ $15,000, but < $25,000	19	16
Holdings ≥ $25,000	117	79
Minimum Holdings	**149**	**99**
Holdings < $2,000	149	99
Holdings ≥ $2,000	148	98
Holdings ≥ $15,000	18	18
Holdings ≥ $25,000	12	12
No Holdings Information	**52**	**34**

Sources: *CRSP, Proof-of-Ownership Letters attached to no-action letters found on Commission's website.*

Data on proponent ownership from proxy statements and proof-of-ownership letters cannot inform the analysis of shareholder-proponents' duration of holdings in excess of one year.[194] One commenter has provided an estimate of average holding period of four to eight months across all types of shareholders.[195] We solicit public comment on the duration of

[194] See supra note 185 and accompanying text. Because under current eligibility requirements, shareholder-proponents are required to have held shares for at least one year, we can reasonably assume a minimum of one year ownership duration for proponents' reported holdings unless the proposal was challenged on the basis of not satisfying the ownership eligibility requirements.

[195] See letter in response to the Proxy Process Roundtable from the Shareholder Rights Group dated December 4, 2018, at 9 (noting "[t]he average time an investor held a share holding a stock [sic] in the 1960s when the rule was passed was eight years, today it is between four and eight months").

There is limited academic research on share ownership duration, primarily due to data limitations. Some studies infer average duration of holdings for all shareholders (rather than just proponents) from data on aggregate share trading volumes. In particular, one white paper has looked at share turnover for NYSE listed securities to estimate an average duration of holdings of less than two years in 2014. See MICHAEL W. ROBERGE ET AL., LENGTHENING THE INVESTMENT TIME HORIZON (2016), available at https://www.pionline.com/article/20161101/WHITE_PAPERS/161109903. Any such analysis inferring average duration of holdings across all investors masks potential heterogeneity of holding periods across different types of investors. In particular, because some of the trading volume may come from high-frequency traders, these average statistics may underestimate the holding duration of institutional and individual investors likely to submit shareholder proposals.

Other academic research has relied on information on holdings for specific types of shareholders. In particular, one strand of literature has looked at daily trading records of 78,000 households from January 1991 to December 1996

ownership for all shareholders, and specifically for shareholders likely to submit shareholder proposals, in Section IV.E below.

iii. Discussion specific to proposals submitted on behalf of shareholders

As mentioned in Section IV.B.3.i above, from the 447 proposals submitted for a vote at a shareholder meeting in 2018, 363 provided information related to the identity of the proponents. Out of those 363 proposals, 67 (or 18 percent) were submitted by a representative. The documentation that would be mandated by the proposed amendments is generally non-public. We are able to verify if the proponent provided the documentation that would be mandated by the proposed amendments only in cases where the company submitted a no-action request for the proposal at issue, and thus submitted to the Commission the necessary supporting documentation, including the shareholder proposal and related disclosures. Companies

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from a U.S. discount brokerage house. A survey article notes that the estimated average holding period for individuals in this sample is 16 months. See Brad M. Barber & Terrance Odean, *The Behavior of Individual Investors*, 2 HANDBOOK OF THE ECONOMICS OF FINANCE, 1533, 1539 (2013). Another paper finds that the median holding period of individual investors in this dataset is 207 trading days. See Deniz Anginer, Snow Xue Han, & Celim Yildizhan, *Do Individual Investors Ignore Transaction Costs?* 6 (Working Paper, 2018), available at https://ssrn.com/abstract=2972845. Another strand of literature uses information from 13F filings with the Commission to estimate statistics of duration of holdings for a subset of institutional investors. For example, one paper documents that the value-weighted composition of long-term institutional investors with securities holdings in public U.S. companies has nearly doubled from approximately 35 percent since the early 2000s to 65 percent in 2017. Long-term institutional investors are defined as those with an implied average holding period of longer than three years. See Wei Jiang, *Who Are the Short-Termists?*, J. APPLIED CORP. FIN., Fall 2018, at 19 (2018). A second paper documents a median duration of holdings of approximately two years in 2015 among this set of investors. See K.J. Martijn Cremers & Simone M. Sepe, *Institutional Investors, Corporate Governance, and Firm Value*, 41 SEATTLE U. L. REV. 387, 403 (2018).

Lastly, we provide some evidence on holding periods using data on reported sales of corporate stocks retrieved from individual tax returns. See Janette Wilson & Pearson Liddell, *Sales of Capital Assets Data Reported on Individual Tax Returns, 2007–2012*, IRS STATISTICS OF INCOME BULL., Winter 20167, at 58, available at https://www.irs.gov/pub/irs-soi/soi-a-inca-id1604.pdf (Table 4B). In 2012 (the last year with available data), we estimate that among all transactions with reported holding duration, 46% were for corporate stocks held for a period longer than one year, 27% were for stocks held longer than 2 years, and 18% were for stocks held longer than 3 years. Estimates of holdings duration from reported sales may not be representative of the overall distribution of duration of stockholdings because the propensity to sell a stock may be dependent on the amount of time the stock has been held. See Zoran Ivković, James Poterba, & Scott Weisbenner, *Tax-Motivated Trading by Individual Investors*, 95 AMER. ECON. REV. 1605 (2005).

submitted a no-action request for 12 out of the 67 proposals submitted by a representative.[196] In eight out of the 12 requests, the proponent provided all documentation that would be mandated by the proposed amendments. In the remaining four cases, the shareholder proposal attached to the no-action letter posted on the Commission's website was signed by the representative rather than the proponent.

iv. Discussion specific to Rule 14a-8(i)(12)

To understand current practices for shareholder proposal resubmissions, we study a sample of shareholder proposal resubmissions for Russell 3000 companies from 2011 to 2018.[197] Out of the 3,620 proposals that went to a vote between 2011 and 2018, 2,168 (60 percent) were a first submission, 678 (19 percent) were a second submission, and the remaining 774 (21 percent)

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[196] See supra note 190 (providing links to no-action letters).

[197] See CII Report, supra note 92. Because the CII Report does not use data on shareholder proposal submissions prior to 2011, the analysis in the report is conducted under the assumption that all proposals submitted in the earlier years are first-time submissions. Nevertheless, some proposals in the earlier years are actually resubmissions from previous years. As a result, the CII Report underestimates the number of resubmitted proposals in the sample and overestimates the number of proposals eligible for resubmission in the following year. To correct for these biases, we supplement data in the CII Report with data on voted shareholder proposals from ISS Analytics during the years 2006 to 2010. We apply the CII Report's methodology to identify resubmitted proposals for years 2011 to 2013 using the description of the shareholder proposal in the ISS data. As a result, we identify 1,442 shareholder proposals as resubmissions compared to 1,314 in the CII Report. Therefore, some of the statistics on resubmitted proposals in our analysis differ from those presented in the CII Report.

When considering eligibility for resubmission, we only consider whether the proposal is eligible for resubmission in the following year, and not whether the proposal is eligible for resubmission at some other point in the future. This distinction is important because, under the current resubmission thresholds, all proposals are eligible for resubmission following a three-year cooling-off period. Of all the proposals resubmitted during 2011 to 2018, 84% were voted on in the previous year and 12% (5%) were not voted in the previous year, but were voted on two (three) years prior.

Statistics on resubmitted shareholder proposals are subject to measurement error because ISS Analytics' classification of resubmitted shareholder proposals is not always the same as what the Commission's staff or courts might deem to be a proposal on "substantially the same subject matter."

Lastly, the total number of voted shareholder proposals in the CII Report is slightly lower than the counts in the ISS Analytics data. For example, there are 423 shareholder proposals that appear as first-time submissions or resubmissions in the CII Report during 2018, while we estimate that 447 shareholder proposals were voted on during the same period using the ISS Analytics data. See supra Section IV.B.3.i.

were a third or higher submission (see Table 3 below).[198] During the same time period, the average support for first time proposals was 34 percent and the median support was 30 percent. The average support for second and third or higher submissions was slightly lower than first-time proposals, each receiving approximately 30 percent and 32 percent, on average.[199]

Table 3: Shareholder proposals by number of submissions, 2011-2018

	# of proposals	% of proposals	Average % support	Median % support	% of proposals eligible for resubmission next year
First	2,168	60%	34%	30%	94%
Second	678	19%	30%	29%	90%
Third or subsequent	774	21%	32%	31%	94%
Total	**3,620**	**100%**	**32%**	**30%**	**93%**

Sources: *CII Report*, *ISS Analytics*.

Some types of proposals are more likely to be resubmitted than others and thus, the effect of proposed amendments to the resubmission thresholds may vary with proposal type. Therefore, what follows is a discussion of how the likelihood of shareholder proposal

[198] A proposal is categorized as first submission if it has not been voted on in the preceding three calendar years. A proposal is categorized as second (third or greater) submission if it has been voted on within the preceding three calendar years and it has been voted on once (two or more times) in the past five calendar years.

[199] Throughout the analysis in this section, when comparing estimates across subsamples of the data (e.g., average support for first time and second time proposals, or the propensity to resubmit proposals across proposal types, etc.), we verify that the estimates are statistically different from one another. In particular, we test whether the difference in a particular pair of estimates is statistically significant using hypothesis tests for continuous and discrete random variables and a *p*-value of 10%. See, e.g., Greene (2007), supra note 144.

The median support for second-time submissions, 29 percent, was slightly lower than first-time submissions, while the median support for third-time or subsequent submissions, 31 percent, was slightly higher. While the difference in median voting support between first-time and second-time submissions is statistically significant, the difference in the median voting support between first-time and third or subsequent submissions is not.

resubmission is related to: (i) prior voting support; (ii) proposal topic; (iii) firm size; (iv) dual-class structure of shares; and (v) proponent type.

Shareholders' propensity to resubmit previously voted proposals depends on the voting support a proposal has previously received. Using a sample of voted shareholder proposals from 2011 to 2018, we find that a shareholder proposal was more likely to be resubmitted in the following year if it has garnered greater than 10 percent, but less than majority, support (see Table 4 below).[200] In particular, among proposals that were eligible to be resubmitted in the following year under the current resubmission thresholds, 32 percent of proposals that received less than 10 percent of votes in favor were actually resubmitted in the following year, as compared to 44 percent of proposals that received between 10 percent and 50 percent of votes in favor. We assume that because shareholder proposals garnering majority support are more likely to be implemented than those receiving lower levels of support, these proposals are less likely to be resubmitted.[201]

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[200] For this analysis, we look at proposals submitted during the calendar years 2011 to 2017 and whether they were resubmitted in the following year using data from 2012 to 2018. Because we do not have data on whether these proposals were resubmitted in 2019, we exclude proposals submitted in 2018.

The analysis shows that, in our sample, 10 shareholder proposals submitted to nine companies were resubmitted and voted on despite being eligible for exclusion under the current resubmission thresholds. Five of these proposals were resubmitted in the year following a previous vote during 2011 to 2017. Thus, these five proposals are included in the results presented in Table 4.

[201] See supra note 180 and accompanying text.

Table 4: Shareholder proposals support and resubmissions by proposal topic, 2011-2017

% Vote For	<10%	10%-50%	>=50%	**Total**
All Proposals				
Number of proposals	648	1,997	552	**3,197**
Eligible for resubmission	418	1,997	552	**2,967**
(% of proposals)	(65%)	(100%)	(100%)	**(93%)**
Resubmitted	133	878	65	**1,076**
(% of eligible proposals)	(32%)	(44%)	(12%)	**(36%)**
Governance Proposals				
Number of proposals	176	1,196	522	**1,894**
Eligible for resubmission	117	1,196	522	**1,835**
(% of proposals)	(66%)	(100%)	(100%)	**(97%)**
Resubmitted	28	453	62	**543**
(% of eligible proposals)	(24%)	(38%)	(12%)	**(30%)**
Environmental Proposals				
Number of proposals	152	301	9	**462**
Eligible for resubmission	105	301	9	**415**
(% of proposals)	(69%)	(100%)	(100%)	**(90%)**
Resubmitted	36	132	2	**170**
(% of eligible proposals)	(34%)	(44%)	(22%)	**(41%)**
Social Proposals				
Number of proposals	320	500	21	**841**
Eligible for resubmission	196	500	21	**717**
(% of proposals)	(61%)	(100%)	(100%)	**(85%)**
Resubmitted	69	293	1	**363**
(% of eligible proposals)	(35%)	(59%)	(5%)	**(51%)**

Sources*: CII Report, ISS Analytics*.

The tendency to resubmit shareholder proposals differs by proposal topic (see Table 4 above). Because governance-related shareholder proposals received greater voting support than environmental and social shareholder proposals, on average, governance-related proposals were

more likely to be eligible for resubmission in the following year.[202] Despite more proposals being eligible for resubmission, governance-related proposals were less likely to be resubmitted than environmental and social proposals. In particular, among proposals that received less than 10 percent support, 24 percent of governance-related shareholder proposals eligible for resubmission in the following year were actually resubmitted, as compared to 34 percent of environmental and 35 percent of social shareholder proposals eligible for resubmission. Among proposals that received between 10 percent and 50 percent support, 38 percent of governance-related shareholder proposals eligible for resubmission in the following year were actually resubmitted, as compared to 44 percent of environmental and 59 percent of social shareholder proposals eligible for resubmission.

The tendency to resubmit shareholder proposals also differs by the type of company. In particular shareholder proposals received by S&P 500 companies were more likely to be resubmitted in the following year than shareholder proposals received by those companies not in the S&P 500 (see Table 5 below). For example, among shareholder proposals receiving less than 10 percent support, 33 percent of eligible shareholder proposals were resubmitted at S&P 500 companies, as compared to 22 percent at non-S&P 500 companies. Among shareholder proposals receiving between 10 percent and 50 percent support, 47 percent of eligible shareholder proposals were resubmitted at S&P 500 companies, as compared to 31 percent at non-S&P 500 companies.

[202] See Section IV.B.3.i for an analysis of voting support by shareholder proposal topic. We rely on the proposal categorization from the CII Report, supra note 92, to group proposals into governance, environmental, and social categories.

Table 5: Shareholder proposals support and resubmissions by company size, 2011-2017

% Vote For	< 10%	10%-50%	≥ 50%	**Total**
S&P 500				
Number of proposals	556	1,663	337	**2,556**
Eligible for resubmission	359	1,663	337	**2,359**
(% of proposals)	(65%)	(100%)	(100%)	**(92%)**
Resubmitted	120	774	47	**941**
(% of eligible proposals)	(33%)	(47%)	(14%)	**(40%)**
Non S&P 500				
Number of proposals	92	334	215	**641**
Eligible for resubmission	59	334	215	**608**
(% of proposals)	(64%)	(100%)	(100 %)	**(95%)**
Resubmitted	13	104	18	**135**
(% of eligible proposals)	(22%)	(31%)	(8%)	**(22%)**

Sources: *CII Report, ISS Analytics*.

Fewer shareholder proposals were eligible for resubmission in the following year in companies with dual-class shares as compared to those without such shares (see Table 6 below).[203] Among shareholder proposals that received less than 10 percent in voting support, only 50 percent were eligible for resubmission the following year for companies with dual-class shares, as compared to 66 percent for companies without dual-class shares. However, eligible shareholder proposals at dual-class companies were more likely to be resubmitted in the following year. Among proposals eligible for resubmission in the following year, 71 percent were resubmitted at dual-class companies, while only 29 percent were resubmitted at non-dual class companies.

[203] To identify firms with two or more classes of common shares, we use the classification of dual-class firms in the ISS Governance dataset.

Table 6: Shareholder proposals support and resubmissions by type of company shares, 2011-2017

% Vote For	< 10%	10%-50%	≥ 50%	**Total**
Companies with dual-class shares				
Number of proposals	48	116	4	**168**
Eligible for resubmission	24	116	4	**144**
(% of proposals)	(50%)	(100%)	(100%)	**(86%)**
Resubmitted	17	69	0	**86**
(% of eligible proposals)	(71%)	(59%)	(0%)	**(60%)**
Companies without dual-class shares				
Number of proposals	600	1,881	548	**3,029**
Eligible for resubmission	394	1,881	548	**2,823**
(% of proposals)	(66%)	(100%)	(100%)	**(93%)**
Resubmitted	116	809	65	**990**
(% of eligible proposals)	(29%)	(43%)	(12%)	**(35%)**

Sources: *CII Report, ISS Analytics*.

The tendency to resubmit shareholder proposals also differs by the type of proponent (see Table 7 below). In particular shareholder proposals submitted by individual proponents receiving between 10 percent and 50 percent of the votes in support were less likely to be resubmitted than proposals submitted by other proponent types.[204]

[204] Shareholder proposals with individual proponents were less likely to be resubmitted than proposals with non-individual proponents for all three proposal types: governance-related, environmental, and social. However, the difference is most pronounced for social proposals, for which individuals were five times less likely to resubmit eligible proposals.

Table 7: Shareholder proposals support and resubmissions by type of proponent, 2011-2017

% Vote For	< 10%	10%-50%	≥ 50%	**Total**
Individual proponents				
Number of proposals	171	725	182	**1,078**
Eligible for resubmission	97	725	182	**1,004**
(% of proposals)	(57%)	(100%)	(100%)	**(93%)**
Resubmitted	29	266	11	**306**
(% of eligible proposals)	(30%)	(37%)	(6%)	**(30%)**
Non-individual proponents				
Number of proposals	477	1,272	370	**2,119**
Eligible for resubmission	321	1,272	370	**1,963**
(% of proposals)	(67%)	(100%)	(100%)	**(93%)**
Resubmitted	104	612	54	**770**
(% of eligible proposals)	(32%)	(48%)	(15%)	**(39%)**

Sources: *CII Report*, *ISS Analytics*.

We also analyze how voting support changes with the number of times a particular proposal is submitted. Fifty-two percent of resubmitted shareholder proposals saw an increase in voting support relative to the last time they were voted on (see Table 8 below). Shareholder proposals that got less than 10 percent voting support in the past were more likely to see increases in voting support as compared to proposals receiving between 10 percent and 50 percent of votes in favor. For those proposals for which voting support increased, the average increase in voting support is approximately six percent for all proposals, six percent for governance-related proposals, and five percent for environmental and social proposals.

Table 8: Change in voting support for resubmitted proposals, 2011-2018

% Vote For	< 10%	10%-50%	≥ 50%	**Total**
All Proposals				
Number of proposals	178	1,165	109	**1,452**[205]
% Proposals with increase in voting	55%	52%	47%	**52%**
Average increase in voting support	7%	5%	6%	**6%**
Governance Proposals				
Number of proposals	42	657	106	**805**
% Proposals with increase in voting	52%	50%	48%	**50%**
Average increase in voting support	17%	6%	6%	**6%**
Environmental Proposals				
Number of proposals	47	157	2	**206**
% Proposals with increase in voting	62%	55%	0%	**56%**
Average increase in voting support	4%	5%	N/A	**5%**
Social Proposals				
Number of proposals	89	351	1	**441**
% Proposals with increase in voting	53%	54%	0%	**53%**
Average increase in voting support	5%	5%	N/A	**5%**

Sources: CII Report, ISS Analytics.

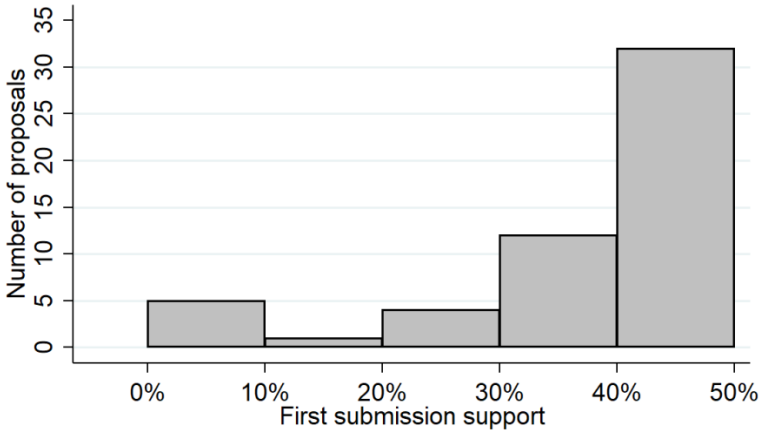
Lastly, we analyze the extent to which initial support for shareholder proposals is related to the likelihood of the shareholder proposal ultimately obtaining majority support.[206] During 2011 to 2018, 533 unique shareholder proposals have garnered majority support, of which 479

[205] The total number of proposals in Table 8 represents the total number of proposals that were resubmitted (not first time submissions) in the years 2011 to 2018, which differs from the total number of proposals in Tables 4, 5, 6, and 7 (i.e., 3,197 proposals). This is because the analysis on the propensity to resubmit shareholder proposals excludes proposals resubmitted in 2011 and those that were resubmitted after a period longer than one year. See supra note 200.

[206] Note that in this analysis, we may be underestimating the likelihood of proposals ultimately obtaining majority support, especially for proposals toward the end of our sample that could get majority support following a future resubmission. For example, if a new proposal fails to garner majority support in 2018, but is resubmitted in 2019, our data does not allow us to see whether such a proposal would garner majority support following a resubmission in a year after 2018. See supra note 200.

(90 percent) obtained majority support on their initial submission.[207] Of the remaining 54 shareholder proposals that received majority support following a resubmission, 32 (60 percent) obtained majority support on their second submission and 22 (40 percent) obtained majority support on their third or subsequent submissions. Figure 9 below shows the distribution of first submission voting support for the 54 shareholder proposals that garnered majority support following a resubmission. Of these, approximately 60 percent started with support of over 40 percent in their first submission, and 98 percent started with support of over 5 percent in their first submission. Of the 22 proposals that obtained majority support on their third or subsequent submissions, approximately 95 percent received support of over 15 percent on their second submission, and 100 percent received support of over 25 percent on their third or subsequent submission.

Figure 9: Voting Support Received on Initial Submission by Proposals Garnering Majority Support on a Subsequent Resubmission, 2011-2018



Sources: CII Report, ISS Analytics

[207] Note that this number is lower than 552 proposals receiving majority support in Table 4. This is because the former measure counts unique proposals while the latter counts each time a proposal is submitted and receives over 50% support. Therefore, in some instances, the latter measure will count twice a proposal that receives majority support, is resubmitted, and receives majority support again.

The results of the analyses in Tables 3–8, Figure 9, and accompanying text should be interpreted with caution—our analysis of shareholder proposal resubmissions is subject to selection bias because the data only includes resubmissions that appeared in proxy materials. The data does not capture resubmissions that were withdrawn because proponents reached an agreement with management or because proponents decided to withdraw the resubmission for other reasons, and it does not capture resubmissions that were excluded pursuant to one of the substantive bases under Rule 14a-8.[208]

C. Benefits and Costs and Effects on Efficiency, Competition, and Capital Formation of Proposed Rule Amendments

Below we discuss the anticipated economic effects of the proposed rule amendments. Section IV.C.1 discusses economic considerations relevant to shareholder proposals generally, Section IV.C.2 discusses the general economic effects of the proposed rule amendments, Section IV.C.3 discusses the specific benefits and costs of each proposed amendment, and Section IV.C.4 discusses the effects of the proposed amendments on efficiency, competition, and capital formation.

1. General Economic Considerations Relevant to Shareholder Proposals

As mentioned in Section IV.B above, Rule 14a-8 was designed to facilitate shareholders' ability under state law to appear in person at an annual or special meeting and, subject to certain requirements governed by state law and the company's governing documents, present their own proposals for a vote by shareholders at that meeting. By giving proponents the ability to have their proposals included alongside management's in the company's proxy statement, Rule 14a-8

[208] For a similar discussion, see the letter in response to the Proxy Process Roundtable from the Shareholder Rights Group dated December 4, 2018, at 13.

allows shareholders to consider and vote on matters raised by other shareholders for consideration at an annual or special meeting of shareholders.

A shareholder proposal could be value enhancing not only because it could motivate a value-enhancing change,[209] but also because it could limit insiders' entrenchment[210] and provide management with information about the views of shareholders.[211] On the other hand, a shareholder proposal may not be value enhancing, and companies may bear direct costs associated with the consideration of a proposal and/or its inclusion in the proxy statement and these costs may be passed down to shareholders. A shareholder proposal may not be value enhancing if it serves the interests of a minority rather than the majority of shareholders.[212] Shareholders may also bear costs associated with their own consideration of a proposal. Our economic analysis does not speak to whether any particular shareholder proposal or type of proposals are value enhancing, whether the proposed amendments would exclude value-enhancing proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value enhancing.

In addition, companies and their shareholders may bear opportunity costs associated with considering proposals that are ultimately not supported by a majority of shareholders or

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[209] See, e.g., Vicente Cuñat, Mireia Gine, & Maria Guadalupe, *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value*, 67 J. FIN. 1943 (2012) ("Cuñat et al. (2012)").

[210] See, e.g., Bach & Metzger (2017), supra note 174.

[211] See, e.g., J. Robert Brown, Jr., *Corporate Governance, Shareholder Proposals, and Engagement Between Managers and Owners* (University of Denver Sturm College of Law, Legal Research Paper Series, Working Paper No. 17-15, 2017) ("Brown (2017)").

[212] For a related argument, see the letter in response to the Proxy Process Roundtable from Business Roundtable dated November 9, 2018.

implemented by a company instead of engaging in other value-enhancing activities.[213] Therefore, the value of a shareholder proposal depends fundamentally on the tradeoff between the potential for value-creation and the cost borne by companies and their shareholders. Furthermore, the value of shareholder proposals is limited by the extent to which shareholders participate in the voting process and the extent to which management implements those proposals.

Some empirical literature has examined whether proposals are value enhancing by studying the stock price reaction around announcements associated with shareholder proposals, and finds that shareholder proposals are, on average, associated with small or negligible changes in target companies' market value.[214] More specifically, a literature review of prior studies in this area shows that shareholder proposals are associated, with an average 0.06 percent short-window stock price reaction.[215] These results, however, mask significant cross-sectional variation in the valuation effects of shareholder proposals. In particular, literature finds significant stock market reaction to shareholder proposals that pass by a small margin relative to

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[213] See, e.g., CCMC Report, supra note 84; Rulemaking Petition, supra note 82, at 8–9; Roundtable Transcript, supra note 13, comments of Ning Chiu, Counsel, Capital Markets Group, Davis Polk & Wardwell LLP, at 127; Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness, at 136; Dannette Smith, Secretary to the Board of Directors and Senior Deputy General Counsel, UnitedHealth Group, at 148–49; letters in response to the Proxy Process Roundtable from Blackrock, Inc. dated November 16, 2018; Business Roundtable dated November 9, 2018; Society for Corporate Governance dated November 9, 2018 (discussing costs associated with shareholder proposals).

[214] The majority of prior studies find no long-term effects of shareholder proposals on companies' returns, earnings, operations, and corporate governance. See, e.g., Matthew R. Denes, Jonathan M. Karpoff, & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405 (2017) ("Denes et al. (2017)"). We focus our discussion on short-term market reactions to shareholder proposals because findings on the long-term effects are less reliable than the findings on the short-term effects as it can be hard to attribute the long-term effects to the shareholder proposals.

[215] See Denes et al. (2017), supra note 214. The results of these studies should be interpreted with caution because they do not identify a clean announcement date for proposals by which to gauge the market reaction. For example, companies frequently include multiple proposals in the same proxy statement and they announce other news, such as dividends, at shareholder meetings. For related arguments, see Thomas & Cotter (2007), supra note 180.

proposals that fail by a small margin on the day of the vote. For example, one study found a 1.3 percent higher increase in stock price on the day of the vote for proposals that pass by a small margin compared to proposals that fail by a small margin.[216]

The market reaction can differ with the topic of the shareholder proposal. For example, one study finds more positive market reaction for shareholder proposals related to eliminating poison pills and proposals seeking the adoption of cumulative voting relative to other types of governance proposals.[217] Another study finds larger market reaction for shareholder proposals that reduce antitakeover protection than other types of governance-related proposals.[218] Some literature provides evidence that environmental and social proposals that pass by a small margin elicit a positive stock market reaction on the day of the shareholder meeting.[219]

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[216] See Cuñat et al. (2012), supra note 209. One reason why the market reaction is concentrated in proposals that pass by a small margin is that for proposals that pass or fail by a large margin, the stock price may already reflect the voting outcome because it is largely anticipated. For proposals that fail by a small margin, there is typically negligible or no stock price reaction because proposals that fail even by a small margin are significantly less likely to be implemented than proposals that pass by a small or large margin. See also Bach & Metzger (2017), supra note 174.

Nevertheless, Bach & Metzger also argue that the estimates of stock price reaction around majority support thresholds likely are biased because of the ability of management to sway the outcome of the vote, although the direction of this bias is difficult to estimate. Laurent Bach & Daniel Metzger, *How Close Are Close Shareholder Votes?*, 32 REV. FIN. STUD. 3183 (2019) ("Bach & Metzger (2019)").

[217] Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275 (2000) ("Gillan & Starks (2000)"). This study examines a sample of proposals submitted between 1987 and 1994. Hence, the generalizability of some of the findings of this study could be limited.

[218] See Cuñat et al. (2012), supra note 209.

[219] Caroline Flammer, *Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach*, 61 MGMT. SCI. 2549 (2015). Nevertheless, the study also notes that "although [the] results imply that adopting close call [environmental and social] proposals is beneficial to companies, they do not necessarily imply that [environmental and social] proposals are beneficial in general." Id. In particular, the study finds that shareholder proposals on social and environmental issues receive low shareholder support, on average, and only a small and unrepresentative sample of shareholder proposals on social and environmental issues is associated with positive stock market reactions. Id.

Market reaction to shareholder proposals also can depend on the type of the proponent. For example, Gillan and Starks (2000) find that market reaction is higher for proposals sponsored by individuals than institutions, whereas Cuñat et al. (2012) show that market reaction is higher for proposals submitted by institutions than individuals.[220] Gantchev and Giannetti (2018) show that market reaction is higher for proposals submitted by individuals that submit proposals infrequently.[221] Matsusaka et al. (2019) find a negative market reaction to shareholder proposals submitted by labor unions in years that a new labor contract must be negotiated.[222]

Finally, the market reaction to shareholder proposals typically is higher for firms that would benefit the most from the changes sought by the shareholder proposal. For example, Renneboog and Szilagyi (2011) find that the market reaction around the dates the proposals were first announced is higher for firms with poor governance quality,[223] and Cuñat et al. (2012) show that market reaction to governance-related proposals on the day of the shareholder meeting is higher for firms with a large number of antitakeover provisions in place.[224]

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[220] The different findings of the cited papers likely are attributable to different samples and methodologies used.

[221] Gantchev & Giannetti (2018), supra note 166.

[222] John G. Matsusaka, Oguzhan Ozbas, & Irene Yi, *Opportunistic Proposals by Union Shareholders*, 32 REV. FIN. STUD. 3215 (2019). For similar evidence of stock market reaction to union-sponsored proposals, see Jie Cai & Ralph A. Walkling, *Shareholders' Say on Pay: Does it Create Value?*, 46 J. FIN. & QUANTITATIVE ANALYSIS 299 (2011) and Andrew K. Prevost, Ramesh P. Rao, & Melissa A. Williams, *Labor Unions as Shareholder Activists: Champions or Detractors?*, 47 FIN. REV. 327 (2012).

[223] Luc Renneboog & Peter G. Szilagyi, *The Role of Shareholder Proposals in Corporate Governance*, 17 J. CORP. FIN. 167 (2011). The dates the proposals were first announced were (i) the mailing dates of the definitive proxy statements; (ii) the dates of a preliminary statement released by the target firm; or (iii) the dates that the proxy materials were filed by the proponent in the event of a proxy contest. Governance quality is measured using two separate indices: (i) an index that tracks 24 antitakeover provisions and (ii) an index that tracks the following six provisions: staggered boards, limits to shareholder bylaw amendments, poison pills, golden parachutes, and supermajority requirements for mergers and charter amendments.

[224] Cuñat et al. (2012), supra note 209, use a sample of shareholder proposals that Riskmetrics classifies as governance-related. These proposals are broadly classified into the following six categories: (i) antitakeover proposals, (ii) compensation, (iii) voting, (iv) auditors, (v) board structure, and (vi) other.

As mentioned above, companies may bear both direct and opportunity costs associated with the consideration of a proposal, and these costs may be passed down to shareholders.[225] In particular, to the extent applicable, companies incur costs to: (i) review the proposal and address issues raised in the proposal; (ii) engage in discussions with the proponent(s); (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 a notice with the Commission; and (vi) prepare a rebuttal to the submission.

There is disagreement among commenters regarding the costs associated with processing shareholder proposals.[226] Based on data from a 1996 SEC questionnaire, the average cost for a company to determine whether to place a proposal on a ballot was $58,309 and the average cost to print and distribute proxy materials, and tabulate votes on the proposal was $78,795.[227] Commenters, however, have expressed concerns that these cost estimates likely are unreliable because: (i) they likely cover the cost of all proposals received by a company in a year, not the cost of a single proposal; (ii) they are averages, based on a wide range of responses from companies; (iii) printing and mailing costs have decreased in recent years due to the increased

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[225] Costs would not be passed down to shareholders if managers absorbed some of these costs by decreasing their compensation or by offsetting the cost increases by decreasing other types of costs.

[226] See supra notes 21– 25 and accompanying text.

[227] The cumulative rate of inflation between May 1998 and August 2019 is 157.6%. See *Consumer Price Index (CPI) Inflation Calculator*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (last visited Oct. 31, 2019), https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=11%2C600.00&year1=201011&year2=201906. The average costs to companies were $37,000 and $50,000, respectively. See 1998 Adopting Release, supra note 8.

$58,309 = $37,000 x 1.576

$78,795 = $50,000 x 1.576

use of electronic dissemination of proxy materials;[228] and (iv) they capture the overall cost of printing and distributing proxy materials, not the cost of an additional shareholder proposal.[229] More recently, a representative from an industry group estimated a cost of $50,000 per proposal.[230] In response to the Proxy Process Roundtable, one commenter also stated that the company's cost per shareholder proposal, including resubmitted proposals, is more than $100,000,[231] while another commenter cited to a House Report that estimated the cost associated with shareholder proposals to be $150,000.[232] In addition, the Commission has previously estimated that companies spend, on average, $11,600 to file with the Commission a notice that

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[228] The processing fee for the electronic dissemination of proxy materials cannot exceed 50 cents per set of proxy materials. See NYSE Rule 451.90. Automatic Data Processing Inc. estimated that "the average cost of printing and mailing a paper copy of a set of proxy materials during the 2006 proxy season was $5.64." See Shareholder Choice Regarding Proxy Materials, Release No. 34-56135, (Jul. 26, 2007) [72 FR 42221 (Aug. 1, 2007)]. There is also a processing fee for the dissemination of proxy materials via mail. The processing fee for the dissemination of proxy materials via mail can be lower than the processing fee for the dissemination of proxy materials via email. See letter from the Investment Company Institute (Jan. 17, 2019), at 3, available at https://www.ici.org/pdf/18_ici_nysefees_ltr.pdf (noting that "[e]very beneficial account pays the NYSE schedule maximum fee of 15 cents in processing fees to receive a paper shareholder report in the mail. . . . Every beneficial account pays the NYSE schedule maximum fee of 25 cents (15 cents plus 10 cents) to receive a shareholder report by email."). The letter from the Investment Company Institute refers to processing fees to disseminate a shareholder report, but we expect that the processing fees to disseminate proxy materials would be comparable. Nevertheless, the cost of printing and mailing the proxy materials would offset any cost savings arising from lower processing fees for proxy materials disseminated via mail compared to proxy materials disseminated via email. See, e.g., BROADRIDGE, 2019 PROXY SEASON KEY STATISTICS AND PERFORMANCE RATING (2019), available at https://www.thecorporatecounsel.net/member/Memos/Broadridge/09_19_2019.pdf (estimate of cost savings as a result of the increased electronic dissemination of proxy materials).

[229] See, e.g., letter in response to the Proxy Process Roundtable from the Shareholder Rights Group dated December 4, 2018; Kanzer (2017), supra note 104, at 2–3; Brown (2017), supra note 211.

[230] See Statement of Darla C. Stuckey, President and CEO, Society for Corporate Governance, Before the H. Comm. on Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises, Sept. 21, 2016, at 8 (noting "a lower legal cost estimate based on anecdotal discussions with [the Society for Corporate Governance] members of $50,000 per proposal").

[231] See letter in response to the Proxy Process Roundtable from Exxon Mobil Corporation dated July 26, 2019.

[232] See letter in response to the Proxy Process Roundtable from the American Securities Association dated June 7, 2019, at 4.

they intend to exclude a shareholder proposal, which is equivalent to $13,602 today.[233] We lack data to estimate the dollar cost of the remaining activities associated with shareholder proposal submissions, but we request comment and data on these costs in Section IV.E below.

We note that the cost of processing a resubmission may be lower than the cost of processing a first-time proposal.[234] Further, some of the above mentioned costs, such as the expenses to draft a no-action request or campaigning to increase retail voters' participation, involve a degree of management discretion as to the level of expenses incurred, and there is disagreement about the level of such expenses that is value-enhancing.[235]

Shareholder proposals also impose opportunity costs on companies and their shareholders because management, the board, and the voting shareholders could spend the time spent on processing a shareholder proposal and voting on the proposal to engage in other value-enhancing activities. We are unable to estimate the dollar amount of some of the direct administrative costs and opportunity costs associated with shareholder proposals because we lack the necessary data.

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[233] See Facilitating Shareholder Director Nominations, Release No. 34-62764 (Aug. 25, 2010) [75 FR 56668 (Sept. 16, 2010)], at 56742 n. 797. $11,600 = 116 hours/notice x 0.25 time of outside professionals x $400 hourly wage of outside professionals; $13,602 = $11,600 x 1.173 cumulative rate of inflation between November 2010 and August 2019. See *Consumer Price Index (CPI) Inflation Calculator*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (last visited Oct. 31, 2019), https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=11%2C600.00&year1=201011&year2=201906.

[234] See, e.g., letter in response to the Proxy Process Roundtable from the Shareholder Rights Group dated December 4, 2018, at 14 (noting "[o]ur experience as proponents of proposals leads us to believe that companies expend less resources on proposals that are resubmitted. If resources are expended in opposition to proposals, the lion's share of those resources and board attention to a proposal are most likely expended in the first effort to oppose the proposal"). In certain instances, however, resubmissions could be costlier than initial submissions. For example, companies might decide to challenge a resubmission and incur the associated costs following low support for the initial submission.

[235] See, e.g., Brown (2017), supra note 211, at 21; Kanzer (2017), supra note 104, at 2; James McRitchie, *SRI Funds & Advisors Send Open Letters on Lawsuits Against Shareholders*, CORPGOV.NET (Mar. 24, 2014), https://www.corpgov.net/2014/03/sri-funds-advisors-send-open-letters-on-lawsuits-against-shareholders/; see also letter in response to the Proxy Process Roundtable from Investor Voice, SPC dated November 14, 2018, at 3.

Thus, we seek comment on these costs, and any corresponding cost savings of the proposed amendments, in Section IV.E below.

As mentioned above, in addition to the costs to companies that may be passed down to shareholders, individual shareholders may bear costs associated with their own consideration and voting on a proposal. Although these costs may be difficult to quantify, many investment advisers (among others) retain proxy advisory firms to perform a variety of services to reduce the burdens associated with proxy voting determinations, including determinations on shareholder proposals.

2. General Economic Effects of the Proposed Amendments

i. Discussion specific to proposed amendments to Rule 14a-8(b) and Rule 14a-8(c)

The proposed amendments to the ownership thresholds in Rule 14a-8(b) would allow companies to exclude the following additional proposals relative to the proposals that can be excluded under the current ownership thresholds:[236] (i) proposals submitted by shareholders that hold at least $2,000 and less than $15,000 worth of shares for a period between one and three years and (ii) proposals submitted by shareholders that hold at least $15,000 and less than $25,000 worth of shares for a period between one and two years.[237] The proposed amendments to Rule 14a-8(b) would not allow shareholders to aggregate their holdings, and, therefore, companies would be able to exclude proposals submitted by shareholders that do not individually meet the minimum ownership thresholds under Rule 14a-8. In addition, the proposed

[236] As of August 2019, the $2,000 threshold as adopted in May 1998 would be equal to $3,152 after adjusting for inflation, see supra note 55, and it would be equal to $8,379 after adjusting for the growth in Russell 3000 index, see supra note 56.

[237] Proposals submitted by shareholders that hold less than $2,000 worth of shares or hold the shares for less than one year are excludable under the current rule, and thus are not listed as additional excludable proposals under the proposed amendments to the ownership thresholds.

amendments to Rule 14a-8(b) would require a shareholder-proponent to provide contact information as well as availability to discuss the proposal with the company, and, where a representative is used, documentation authorizing the representative to submit the proposal on the shareholder-proponent's behalf. Lastly, the proposed amendments to 14a-8(c) would allow companies to exclude proposals where the proponent, either individually or serving as a representative, has submitted more than one proposal for the same meeting. As a result, the proposed amendments could increase the number of excludable shareholder proposals because they could discourage proponents from submitting proposals that would not satisfy the requirements of the proposed amendments to Rule 14a-8(b) and Rule 14a-8(c) and they could allow issuers to exclude proposals that do not satisfy the requirements of the proposed amendments to Rule 14a-8(b) and Rule 14a-8(c).[238]

To estimate the number of proponents and proposals that could be excludable as a result of the proposed amendments to Rule 14a-8(b) and Rule 14a-8(c), we analyze proponents' ownership information using data from proxy statements (see Table 1 above). With respect to any dollar ownership category, the data does not indicate whether the proponents in that category held their shares for more than one year. Assuming all proponents held the shares for at least three years, the proposed amendments to the ownership thresholds would not result in the exclusion of any additional proponents or proposals to be considered in shareholder meetings

[238] The effect of the proposed rule amendments on proponents' willingness to submit proposals is distinct from the effect of the proposed rule amendments on company's ability to exclude certain proposals because companies occasionally allow proposals that do not meet the current eligibility thresholds to be voted on. At the same time, companies may expend additional time and resources to exclude proposals that are submitted despite not being eligible for submission. Hence, to the extent that the proposed rule amendments would discourage proponents from submitting certain proposals, the proposed rule amendments would have an effect that may be different than and incremental to the effect of companies' ability to exclude certain proposals.

held in 2018 relative to the current threshold.[239] On the other hand, if one were to assume (again, without any data to support the assumption) that all proponents bought the shares one year in advance of the shareholder submission and plan to hold those shares only through the date of the meeting, we find that the increase in the ownership threshold from $2,000 with a one-year holding period to $25,000 with a one-year holding period could result in the exclusion of 51 percent of the proponents and 56 percent of the proposals that were submitted to be considered at shareholder meetings held in 2018, assuming also that none of those proponents would increase their holdings to meet the new thresholds in order to be able to file a proposal.[240]

The proposed rule amendments also would prohibit shareholders from aggregating their holdings to meet the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal. As shown in Table 1 above, there are three proponents that submitted two unique proposals, whose individual holdings were below the $2,000 threshold. One of the two proposals was

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[239] We have data that shows which shareholder-proponents held varying minimum holdings, based on information the companies provided in the proxy statements. However, we have not prepared estimates of excludable proposals under the proposed amendments based on that data since it is not clear how much each shareholder-proponent actually holds and why the company selected the specific minimum that they decided to report.

[240] 51% = 43% + 8%. We estimate that the total number of excludable proponents is 101. Eighty-five proponents, or 43 percent, held between $2,000 and $15,000, while 16 proponents, or 8 percent, held between $15,000 and $25,000 worth of shares.

56% = (84 excludable proposals) / (150 proposals with exact information on proponents' ownership). Note that the number of proposals that would be excludable is different from the summation of the proposals from the "# of proposals" column in Table 1 above because the latter double-counts proposals that were submitted by multiple proponents.

In estimating the number of excludable proposals, we make the following assumptions about proposals that are submitted by multiple proponents. First, we assume that a proposal would still be submitted if at least one of the co-proponents met the proposed dollar ownership threshold. Assuming that a proposal with multiple proponents would be excludable if at least one proponent does not meet the proposed eligibility requirements, the number of excludable proposals would be 90 or 60 percent.

Second, in cases where we have data on exact ownership for some proponents and minimum ownership for the remaining proponents submitting a joint proposal (there are two such proposals), we assume proponents reporting minimum holdings would continue to be eligible to submit the proposal under proposed amendments. Assuming that a proposal would be submitted only in cases where the proponents reporting minimum holdings have reported minimum holdings in excess of $25,000, the number of excludable proposals would be 84 or 56 percent.

submitted by two co-proponents, whose both aggregate and individual holdings did not meet the $2,000 current ownership threshold, and this proposal is excludable under the current rules. For the other of the two proposals, there were four co-proponents, whose aggregate holdings met the $2,000 threshold, but the individual holdings of one of the co-proponents did not meet the $2,000 threshold. Assuming that a proposal would be submitted if at least one of the co-proponents met the ownership threshold and assuming no change in the ownership threshold, the proposed amendments to proponents' ability to aggregate their holdings would not result in the exclusion of any proposals relative to the current requirements.

Finally, our analysis of proxy statements suggests that 7, or 2 percent of, additional proposals would be excludable under the proposed amendments to Rule 14a-8(c) (i.e., one-proposal limit).[241]

We also analyze proponents' ownership information using data from proof-of-ownership letters that have been made available as part of no-action requests submitted to the staff during calendar year 2018 (see Table 2 above). With respect to any dollar ownership category, the data does not indicate whether the proponents in that category held their shares for more than one year. Assuming proponents held the shares for three years, the proposed amendments to the ownership thresholds would not result in the exclusion of any additional proponents or proposals to be considered in shareholder meetings held in 2018 relative to the current threshold.[242] On the other hand, if one were to assume (again, without any data to support that assumption) that all

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[241] 2% = (7 excludable proposals) / (363 proposals with proponents' identity information in the proxy statements submitted to be considered in 2018 shareholder meetings).

Our analysis assumes that persons that submitted multiple proposals to the same company and for the same shareholder meeting, either directly or indirectly, would withdraw all but one proposal.

[242] See supra note 239.

proponents bought the shares one year in advance of the shareholder submission and plan to hold those shares only through the date of the meeting, we find that the increase in the ownership threshold from $2,000 with a one-year holding period to $25,000 with a one-year holding period could result in the exclusion of 56 percent of the proponents and 40 percent of the proposals, for which the company submitted a no-action request to Commission staff, assuming also that none of those proponents would increase their holdings to meet the new thresholds in order to be able to file a proposal.[243]

The proposed rule amendments also would prohibit shareholders from aggregating their holdings to meet the applicable minimum ownership thresholds to submit a Rule 14a-8 proposal. As shown in Table 2, there are nine proponents that submitted seven unique proposals, whose individual holdings were below the $2,000 threshold. For one of the seven proposals, there were two co-proponents, whose aggregate holdings met the $2,000 current ownership threshold. For another one of the seven proposals, there was only one proponent whose holdings did not meet the $2,000 threshold, and this proposal is excludable under the current threshold. For the

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[243] 56% = 49% + 7%. We estimate that the total number of excludable proponents is 159. One hundred and forty proponents, or 49 percent, held between $2,000 and $15,000, while 19 proponents, or 7 percent, held between $15,000 and $25,000.

40% = (62 excludable proposals) / (155 proposals for which the proof-of-ownership letters provided exact information on proponents' ownership). Note that the number of proposals that would be excludable is different from the summation of the proposals from the "# of proposals" column in Table 2 above because the latter double-counts proposals that were submitted by multiple proponents.

In estimating the number of excludable proposals, we make the following assumptions about proposals that are submitted by more than one proponent. First, we assume that a proposal would still be submitted if at least one of the co-proponents met the proposed dollar ownership threshold. Assuming that a proposal with multiple proponents would be excludable if at least one proponent does not meet the proposed eligibility requirements, the number of excludable proposals would be 102 or 66 percent.

Second, in cases where we have data on exact ownership for some proponents and minimum ownership for the remaining proponents submitting a joint proposal (there are 27 such proposals), we assume proponents reporting minimum holdings would continue to be eligible to submit the proposal under proposed amendments. Assuming that a proposal would be submitted only in cases where the proponents reporting minimum holdings have reported minimum holdings in excess of $25,000, the number of excludable proposals would be 72 or 46 percent.

remaining five proposals, there was at least one other co-proponent, whose share ownership met the current $2,000 threshold. Hence, assuming that a proposal would be submitted if at least one of the co-proponents met the ownership threshold and assuming no change in the ownership thresholds, the proposed amendments could result in the exclusion of one unique proposal, or 0.4 percent of the proposals with ownership information for which the company submitted a no-action request to the Commission staff.[244]

The results of the analysis of the proponents' ownership information using data from proxy statements and proof-of-ownership letters should be interpreted with caution for several reasons. First, we are unable to estimate the number of excludable proponents taking into account the proposed amendments to both the dollar and the duration thresholds because we lack data on proponents' duration of ownership, but, as noted above, there would be no impact to long-term shareholders who have held their shares for three years or more.[245] While we have limited data on duration of ownership from proxy statements or proof-of-ownership letters, we recognize that there may be a relation between duration of ownership and the propensity of a shareholder to submit a proposal. In particular, longer ownership duration could be an indicator that a shareholder has sufficient interest in engaging with the company and is therefore more likely to submit a shareholder proposal. On the other hand, we may observe shareholders buying

[244] 0.4% = (1 excludable proposal under the proposed prohibition to aggregation of holdings) / (227 proposals with proponents' ownership information attached to the no-action letters).

[245] Staff received some non-public retail share ownership data from a market participant who requested confidential treatment for the data. Those data provide some information about level and duration of ownership but do not allow us to identify those shareholders that have submitted or are likely to submit shareholder proposals. Additional challenges posed by the data include that the sample spans a limited time period and information about holdings cannot be aggregated to the shareholder level. We would welcome empirical data to assist in estimating the number of excludable proponents under the proposed thresholds, and we encourage commenters to submit data to the public comment file that allow us to aggregate holdings to the shareholder level, identify shareholders likely to submit shareholder proposals, and that span a sufficiently long time period.

and holding on to their shares for long periods of time because they are following a passive investment strategy and are therefore less likely to engage with management or other shareholders. We hypothesize that these types of shareholders would be less likely to submit shareholder proposals. Depending on whether the former or the latter effect is more prevalent, the effect of the proposed amendments to the ownership thresholds could be closer to the lower or higher end of the range of excludable proposals discussed above, respectively.

Second, our analysis is subject to sample selection bias because the ownership data in the proof-of-ownership letters only concerns proponents whose proposals were the subject of a no-action request, and the ownership data in the proxy statements only concerns proposals that ultimately were included in the proxy statement and went to a vote.[246]

Third, our analysis is subject to self-reporting bias because the proof-of-ownership letters are not required to disclose the proponents' exact holdings but only need to affirm that proponents meet the minimum ownership requirements.[247] Relatedly, companies are not required to disclose the holdings of the proponents in their proxy statements. In fact, 34 percent of the proof-of-ownership letters only state that the proponents meet the minimum ownership

[246] In particular, it is difficult to draw inferences about the total effect of proposed amendments to the eligibility requirements on precluding shareholders from submitting proposals or on the number of excludable submitted proposals using ownership data from proxy statements or proof-of-ownership letters included with no-action requests. For example to the extent that companies may be more likely to choose to request no-action relief for proposals of certain types of proponents or topics, our results may not be generalizable for the full set of submitted proposals. We estimate that of the proposals for which companies have requested no-action relief, 51% were submitted by individual proponents. Therefore, compared to the number of total submissions by individual proponents in 2018 (39% estimated in Section IV.B.3.i above), our analysis may be over-representative of the proposals submitted by individuals.

[247] In particular, of the 433 proposal-proponent pairs for which we collected information on ownership from proof-of-ownership letters, these letters disclosed exact, as opposed to minimum, holdings information for 53 percent of individual proponents and 72 percent of non-individual proponents, and this difference is statistically significant at the 1 percent level. Hence, our results using only information on exact holdings may under-represent individual proponents relative to non-individual ones.

requirements rather than report the proponents' exact holdings.[248] In addition, there is information on ownership for only 70 percent of the proponents found in proxy statements and there is information on minimum ownership for 45 percent of the proponents with ownership information in the proxy statements.[249] Hence, the generalizability of the results of our analysis to all proponents that potentially could be affected by the proposed rule amendments is limited.

We expect that more proposals would be excludable with increases in share turnover. Literature documents a general upward trend in share turnover over time.[250] As share turnover increases and thus investors hold shares for a shorter period of time, it becomes less likely that investors would meet the ownership duration thresholds of the proposed rule amendments.[251] Further, the proposed increase in the ownership requirements would become more difficult to satisfy with decreases in the issuers' stock prices to the extent investors' holdings are at or near

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[248] 34% = 149 / (149 + 284) from Table 2 above.

[249] 70% = (198 + 159) / (198 + 159 + 156) from Table 1 above.

45% = 159 / (198 + 159) from Table 1 above.

In particular, of the 348 proposal-proponent pairs for which companies reported proponent identity and ownership information, the proxy statements disclosed exact, as opposed to minimum, holdings information for 41 percent of individual proponents and 69 percent of non-individual proponents, and this difference is statistically significant at the 1 percent level. Hence, our results using only information on exact holdings may under-represent individual proponents relative to non-individual ones.

The number of proposal-proponent pairs (i.e., 348) for which companies reported proponent identity and ownership information is lower than the sum of proponents with ownership information in Table 1 above (i.e., 357 = 198 + 159) because companies occasionally provide the count and ownership of the proponents but do not provide information on the identity of the proponents.

[250] See, e.g., Tarun Chordia, Richard Roll, & Avanidhar Subrahmanyam, *Recent Trends in Trading Activity and Market Quality*, 101 J. FIN. ECON. 243 (2011).

[251] Proponents have discretion in how frequently they trade shares, and thus they may decide to hold shares for a longer period of time to satisfy the proposed ownership duration thresholds.

See supra note 198 for a discussion of changes in investors' holding period over time.

the ownership thresholds. The reason is that proponents' holdings are more likely to fall below the ownership dollar thresholds as the market value of the company decreases.

We do not expect the proposed amendments to the ownership thresholds to affect all types of shareholders and companies in the same way. First, the proposed amendments could have a greater effect on retail investors compared to institutional investors because the average holdings of retail investors are typically lower than the average holdings of institutional investors. Second, to the extent that investors with smaller holdings are more likely to submit proposals on certain topics, by reducing the number of such investors who are eligible to submit proposals, the proposed rule amendments could decrease the number of proposals on those topics more than other types of proposals. For example, individual investors are more likely to submit governance proposals than institutional investors. Untabulated analysis shows that 86 percent of the proposals submitted by individual investors are governance proposals, whereas 47 percent of the proposals submitted by institutional investors are governance proposals.[252] Hence, the proposed rule amendments could decrease the number of governance proposals more than environmental and social proposals, but this effect may be mitigated to the extent that institutional proponents submit a larger fraction of shareholder proposals.[253] Third, the proposed rule amendments could affect companies with smaller market capitalization more than those with larger market capitalization. The reason is that, for firms with smaller market capitalization, proponents' holdings are more likely to be below the proposed ownership thresholds, assuming that investors hold stocks proportionately to the companies' market capitalization (i.e., investors

[252] Data is retrieved from ISS Analytics for Russell 3000 companies between 2004 and 2018. See CII Report, supra note 92 (showing that retail investors largely focus on governance proposals).

[253] See supra Section IV.B.3.i.

hold the market portfolio).[254] Fourth, the proposed amendments could decrease the number of proposals received by companies that have been public for fewer than three years more than the number of proposals received by seasoned companies because the average duration of investors' holdings would be, by their nature, shorter for those firms.[255]

The proposed rule amendment would also eliminate the alternative one-percent ownership threshold. The one-percent ownership threshold currently is rarely utilized in light of the $2,000/one-year threshold. In particular, none of the proxy statements and proof-of-ownership letters we reviewed refer to the one-percent ownership threshold as evidence that the proponents met the current ownership thresholds (see Section IV.B.3.ii above). Further, as of December 2018, there were no companies for which the one-percent ownership threshold would be relevant (i.e., the one-percent threshold would result in an ownership requirement of less than $2,000).[256] Hence, we believe that the proposed elimination of the one-percent ownership threshold would not have a significant economic effect.

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[254] See, e.g., John Y. Campbell, *Household Finance*, 61 J. FIN. 1553 (2006) (discussing households' stock holdings).

We note that smaller companies currently receive proposals less frequently than larger companies, and thus, while there may be a greater reduction in eligible proponents under the proposed amendments at smaller companies, the overall impact of the proposed increase in the ownership thresholds might be less pronounced for smaller companies.

[255] We note that newly-listed companies currently receive proposals less frequently than seasoned companies, and thus the overall impact of the proposed increase in the ownership thresholds might be less pronounced for newly-listed companies. See Kron & Rees, supra note 96, at 1; see also Roundtable Transcript, supra note 13, comments of Jonas Kron, Senior Vice President and Director of Shareholder Advocacy, Trillium Asset Management, at 142 ("Less than 9 percent of Russell 3000 companies that have had an IPO since 2004 have received a shareholder proposal."); Ning Chiu, Counsel, Capital Markets Group, Davis Polk & Wardwell LLP, at 147 (acknowledging that "IPO companies don't always get a lot of proposals").

[256] We estimate the number of companies with market capitalization below $200,000 as of December 2018. Data is retrieved from CRSP.

ii. Discussion specific to proposed amendments for proposals submitted on behalf of shareholders

The majority of shareholders that submit a proposal through a representative already provide the documentation that would be mandated by the proposed amendments, consistent with existing staff guidance.[257] In particular, as discussed in Section IV.B.3.iii above, 67 percent of the proposals that were submitted through a representative (67% = 8 / 12) included the documentation that would be mandated by the proposed amendments. For the remaining 33 percent of the proposals that were submitted through a representative and provide only some of the documentation mandated by the proposed amendments, we expect that the cost of providing the proposed additional documentation would be small because the information that would be required is readily available to the proponents and the proposed disclosure is not lengthy. Hence, we expect that the economic effects of this aspect of the proposed amendments likely would be minimal.

iii. Discussion specific to proposed amendments to Rule 14a-8(i)(12)

The proposed amendments to Rule 14a-8(i)(12) comprise (i) the proposed amendments to the resubmission thresholds and (ii) the proposed Momentum Requirement. Relative to the current thresholds, the proposed amendments to the resubmission thresholds would allow companies to exclude the following additional resubmitted proposals: (i) those that received shareholder support between 3 and 5 percent on a first submission; (ii) those that received shareholder support between 6 and 15 percent on a second submission; and (iii) those that received shareholder support between 10 and 25 percent on a third or subsequent submission. In addition to the proposed amendments to the resubmission thresholds, the proposed Momentum

[257] See SLB 14I, supra note 65.

Requirement would allow companies to exclude proposals previously voted on by shareholders three or more times in the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and, at the time of the most recent shareholder vote, the proposal did not receive a majority of the votes cast and support declined by 10 percent or more compared to the immediately preceding shareholder vote on the same subject matter. As a result, the proposed amendments to Rule 14a-8(i)(12) could increase the number of excludable shareholder proposals because they could (i) decrease proponents' willingness to submit proposals on matters for which it may be difficult to garner sufficient support in the future or matters that did not receive sufficient support to qualify for resubmission when previously voted on and (ii) allow companies to exclude such proposals.

Using the 2011 to 2018 data on shareholder proposals for Russell 3000 companies, we estimate that the proposed amendments to the resubmission thresholds would result in an additional 212 resubmitted proposals being excludable (15 percent of the total resubmitted proposals in this timeframe) (see Table 9 below).[258] The largest increase in the number of excludable proposals would result from the increase in the third submission threshold. In particular, raising that threshold from 10 percent to 25 percent would result in the excludability of 27 percent of proposals that have been submitted three or more times. Approximately 48 percent (i.e., 101 out of the 212) of the newly excludable proposals saw no increase in support from the previous time they were voted on. The other 52 percent (i.e., 111 out of 212) saw increases in support, averaging 5 percent more votes in favor of the proposal compared with the

[258] This analysis assumes that shareholders' voting behavior and proponents' proposal submission behavior would not change as a result of the proposed amendments to the resubmission thresholds. Also, we exclude from this analysis 10 shareholder proposals that were resubmitted but were eligible for exclusion under the old resubmission thresholds. See supra note 200.

proposal's prior submission. However, almost all of these newly excludable proposals (i.e., 211 of 212 proposals) ultimately failed to generate majority support.

Table 9: Resubmitted shareholder proposals ineligible for resubmission under proposed thresholds, 2011-2018

Resubmitted After:	First Submission	Second Submission	Third or subsequent Submission	**Total**
All Proposals				
Resubmitted proposals	677	322	443	**1,442**
Excludable proposals under proposed amendments				
Number (%)	47 (7%)	45 (14%)	120 (27%)	**212 (15%)**
Number (%) with support increase	20 (3%)	29 (9%)	62 (14%)	**111 (8%)**
Average increase in support	7%	4%	5%	**5%**
Number (%) with majority support	1 (0%)	0 (0%)	0 (0%)	**1 (0%)**
Governance Proposals				
Resubmitted proposals	355	191	255	**801**
Excludable proposals under proposed amendments				
Number (%)	14 (4%)	12 (6%)	60 (24%)	**86 (11%)**
Number (%) with support increase	5 (1%)	10 (5%)	37 (15%)	**52 (6%)**
Average increase in support	21%	7%	5%	**7%**
Number (%) with majority support	1 (0%)	0 (0%)	0 (0%)	**1 (0%)**
Environmental Proposals				
Resubmitted proposals	118	43	42	**203**
Excludable proposals under proposed amendments				
Number (%)	10 (8%)	15 (35%)	12 (29%)	**37 (18%)**
Number (%) with support increase	8 (7%)	9 (21%)	5 (12%)	**22 (11%)**
Average increase in support	3%	1%	3%	**2%**
Number (%) with majority support	0 (0%)	0 (0%)	0 (0%)	**0 (0%)**
Social Proposals				
Resubmitted proposals	204	88	146	**438**
Excludable proposals under proposed amendments				
Number (%)	23 (11%)	18 (20%)	48 (33%)	**89 (20%)**
Number (%) with support increase	7 (3%)	10 (11%)	20 (14%)	**37 (8%)**
Average increase in support	1%	4%	5%	**4%**
Number (%) with majority support	0 (0%)	0 (0%)	0 (0%)	**0 (0%)**

Sources: *CII Report*, *ISS Analytics*.

Further, we estimate that the proposed Momentum Requirement would result in an additional 57 (4 percent) resubmitted proposals being excludable. Of these 57, 42 are governance proposals, 12 are social proposals and 3 are environmental and all would be excludable following a third or subsequent submission. Overall, the proposed amendments to rule 14a-8(i)(12) could result in 269 (19 percent) additional excludable proposals relative to the current resubmission thresholds.[259]

We do not expect the proposed amendments to Rule 14a-8(i)(12) to affect all types of shareholder proposals in the same way. First, the proposed amendments to Rule 14a-8(i)(12) could have a greater impact on shareholder proposals relating to environmental and social issues compared to shareholder proposals on governance issues for the following reasons. Shareholder proposals on environmental and social issues tend to receive lower support than those on governance issues, on average. In particular, as Figure 7B above shows, the average voting support for governance proposals was 42.1 percent, the average voting support for environmental proposals was 21.9 percent, and the average voting support for social proposals was 17.4 percent during our sample period, and the difference in the voting support between governance and environmental and social proposals is statistically significant.[260] Further, proposals on environmental and social issues are more likely to be resubmitted compared to proposals on governance issues, and thus would be more likely to be affected by the changes in the resubmission thresholds. In particular, as Table 4 above shows, 30 percent of the governance

[259] The proposed amendments to rule 14a-8(i)(12) could result in 30 additional excludable proposals in 2018.

[260] See supra note 154 for details on the classification of shareholder proposals into environmental, social, and governance proposals. Also see letters in response to the Proxy Process Roundtable from AEquo, et al. dated May 14, 2019; Canadian Coalition for Good Governance dated May 15, 2019; Shareholder Rights Group dated December 4, 2018.

proposals that were eligible for resubmission were actually resubmitted, while 41 percent of the environmental and 51 percent of social proposals that were eligible for resubmission were actually resubmitted.

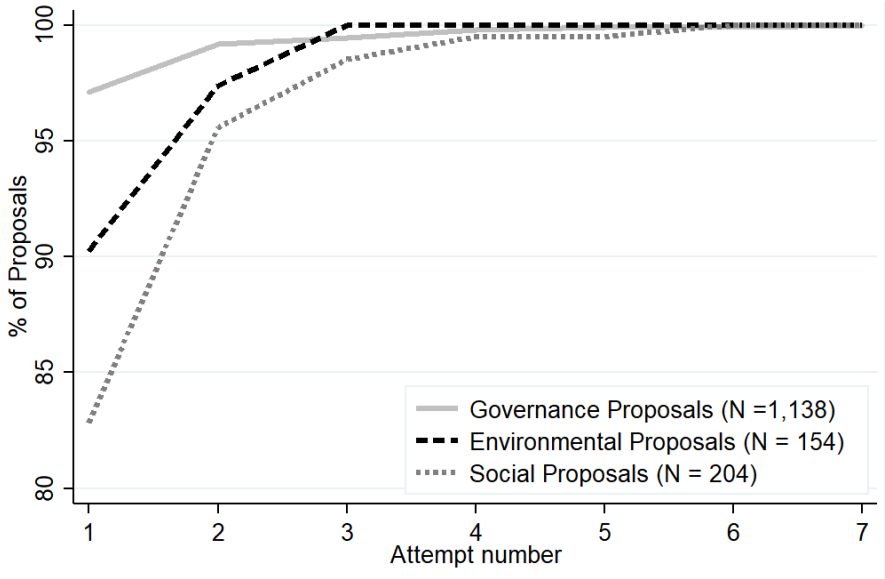
In addition, as shown by our analysis in Figure 10 (below), shareholder proposals on social and environmental issues generally take longer to gain support than proposals on governance issues.[261] More specifically, we analyze all of the shareholder proposals submitted to Russell 3000 companies during 2011 to 2018 that received more than 25 percent of voting support at some point. Our analysis shows that while more than 97 percent of the governance-related proposals received more than 25 percent of the voting support in the first submission, only 83 percent of the social proposals and 90 percent of the environmental proposals received more than 25 percent of the voting support in the first submission. Almost all of the governance and environmental proposals had received more than 25 percent of the voting support by the third submission, whereas it took more than five submissions for the social proposals to receive more than 25 percent of the voting support.[262] The results of the analysis in Figure 10 (below) suggest that environmental and social proposals take longer to gain support than proposals on governance issues. However, it is not clear how much of the increased support for certain resubmitted environmental and social proposals is attributable to proposals gaining traction through the resubmission process as opposed to other factors, such as changing opinions on environmental and social issues. In particular, various proposals in each proposal category

[261] See, e.g., letter in response to the Proxy Process Roundtable from CtW Investment Group dated January 16, 2019.

[262] The conclusions are qualitatively similar if we analyze shareholder proposals that receive majority support at some point. Out of all governance-related shareholder proposals that garnered majority support, 91% did so in the first submission, while only 61% of the environmental proposals and 60% of the social proposals did so in the first submission.

evolve over time as a result of various factors, including shareholder engagement. For example, we would expect that proponents would be incentivized to adjust their proposals over time based on interactions with companies and other shareholders with an eye toward garnering more support.

Figure 10: Timing of receiving support >25% by proposal topic, 2011-2018



Our analysis above suggests that the increase in the resubmission thresholds could have a greater effect on shareholder proposals relating to environmental and social issues compared to shareholder proposals on governance issues. Out of the 269 additional excludable proposals under the proposed rule amendments, 128 were related to governance issues and 40 were related to environmental issues and 101 were related to social issues. Therefore, although environmental and social proposals made up 44 percent (=641/1,442) of all resubmitted proposals in Russell 3000 firms during 2011 to 2018, these types of proposals made up 52 percent (= 141/ 269) of newly excludable proposals under the proposed amendments to the resubmission thresholds and the Momentum Requirement.

Second and relatedly, the proposed amendments to Rule 14a-8(i)(12) could have a greater effect on shareholder proposals submitted by non-individual proponents because these proponents tend to submit environmental and social proposals at a higher frequency than do individual investors.[263] In particular, the proposed increase in the resubmission thresholds could increase the number of excludable proposals resubmitted by non-individual proponents by 186 (19 percent).[264] In contrast, the proposed increase in the thresholds could increase the number of excludable proposals resubmitted by individual proponents by 92 (17 percent).

Third, the proposed amendments to Rule 14a-8(i)(12) could have a greater effect on larger companies because larger companies are more likely to receive shareholder proposals.[265] In particular, we find that 20 percent of resubmitted shareholder proposals at S&P 500 companies would be excludable under the proposed resubmission thresholds, as compared to 12 percent of proposals resubmitted to non-S&P 500 firms.[266]

Fourth, the proposed amendments to Rule 14a-8(i)(12) could have a greater effect on companies with dual-class voting shares for which insiders hold the majority of the voting shares.[267] In particular, we find that 32 percent of resubmitted shareholder proposals at

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[263] See supra note 252 and accompanying text.

[264] Data is retrieved from the CII Report for shareholder proposals submitted to Russel 3000 companies between 2011 and 2018. See supra note 197.

Numbers of newly excludable proposals under proposed resubmission thresholds are computed relative to the total resubmitted proposals during the sample period by each type of proponent.

[265] See supra Figure 3.

[266] Data is retrieved from ISS Analytics and the CII Report for shareholder proposals submitted to Russel 3000 companies between 2011 and 2018. See supra note 197.

[267] Shareholder proposals are less likely to exceed the resubmission thresholds whenever insiders hold a large percentage of the voting stock. Nevertheless, commenters have expressed concerns particularly in cases in which insiders hold a large percentage of the voting stock through dual-class shares. See letters in response to the Proxy Process Roundtable from the City of New York Office of the Comptroller dated January 2, 2019; CtW Investment

companies with dual-class shares would be newly excludable under the proposed resubmission thresholds, as compared to 18 percent in companies without dual-class shares.[268] For these companies, shareholder proposals generally receive lower levels of support than in other companies, because insiders usually oppose shareholder proposals.[269]

3. Benefits and Costs of the Proposed Amendments

i. Benefits

a. General discussion of benefits

As a result of the proposed amendments, companies could exclude more proposals and shareholders could be discouraged from submitting proposals that likely would be excluded based on the proposed amendments. Consequently, companies could experience cost savings because they would be required to process fewer proposals (see Section IV.B.3.i above for a detailed discussion of the costs associated with shareholder proposals).[270] Shareholders of these

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Group dated January 16, 2019; see also letter in response to the Rulemaking Petition from the Shareholder Rights Group dated October 5, 2017. This is because dual-class shares result in the separation of voting and cash flow rights, giving insiders disproportionate voting power relative to their cash flow rights.

[268] Data is retrieved from ISS Analytics and the CII Report for shareholder proposals submitted to Russell 3000 companies between 2011 and 2018. See supra note 197. Our analysis of proposals submitted to companies with dual-class shares should be interpreted with caution because our data does not allow us to identify companies for which insiders hold the majority of dual-class shares. Our data also does not allows us to distinguish companies for which the dual-class shares provide differential voting rights as opposed to other types of rights, such as dividend payments, to shareholders.

[269] Literature provides some evidence that insider holdings of voting rights are larger in firms with dual-class voting shares, and that in companies for which insiders hold the majority of the voting shares, insiders are more likely to vote against shareholder proposals. See Rob Bauer, Robin Braun, & Michael Viehs, *Industry Competition, Ownership Structure and Shareholder Activism* (Working Paper, Sept. 2010), available at https://ssrn.com/abstract=1633536.

[270] To the extent that proponents would continue submitting proposals that would be excludable under the proposed rule amendments, companies would incur costs to exclude those proposals (e.g., issuers would need to file a notice with the Commission that they intend to exclude the proposal). These costs would partially offset any cost savings arising from the proposed rule amendments.

Any potential cost savings arising from the proposed rule amendments could be limited by the extent to which proponents change their behavior. For example, proponents could (i) alter their portfolio allocation to meet the

companies also could benefit from the potential decrease in proposals to the extent that any potential costs savings would be passed down to them in the form of higher returns on their investment.

Shareholders also could benefit from the decrease in the number of proposals because they could spend fewer resources reviewing and voting on shareholder proposals. Relatedly, the decrease in the number of proposals could result in more efficient use of shareholder resources.[271] More specifically, the decrease in the number of proposals could allow shareholders to focus on the processing of proposals that are more likely to garner majority support and be implemented by management, which ultimately could benefit shareholders because it would result in more efficient use of their resources.

b. Discussion specific to proposed amendments to Rule 14a-8(b) and Rule 14a-8(c)

As discussed in Section IV.C.3.i.a above, the proposed amendments to Rule 14a-8(b) and Rule 14a-8(c) could decrease the number of proposals that companies must process, and thus could decrease the costs associated with processing shareholder proposals. We estimate that, as a result of the proposed amendments to Rule 14a-8(b) and Rule 14a-8(c), all Russell 3000 companies together could experience annual cost savings associated with a decrease in the

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ownership thresholds; (ii) rotate proposals on similar topics among different companies; or (iii) submit proposals to the same company but on a different topic.

[271] See letter in response to the Proxy Process Roundtable from Business Roundtable dated June 3, 2019, at 5 (noting "shareholders can lose sight of matters of true economic significance to the company if they are spending time considering one, or even numerous, immaterial proposals. The resources and attention expended in addressing shareholder proposals cost the company and its shareholders in absolute dollars and management time and, perhaps worse, divert capital resources to removal of an immediate distraction and away from investment in value-adding allocations, such as research and development and corporate strategy.").

number of voted proposals of up to $70.6 million per year.[272] In addition, the decrease in the number of proposals could free up resources so that companies and their shareholders could pursue other value-enhancing activities.

As a result of the proposed increase in the ownership thresholds, proponents could bear a larger percentage of the total cost that companies and their shareholders incur to process a shareholder proposal. For example, a shareholder that owns $25,000 worth of stock in a company would bear a larger percentage of the costs associated with processing a shareholder proposal relative to a proponent that owns $2,000 worth of stock in a company. As a result of bearing a larger percentage of the total costs, proponents could be less willing to submit proposals that are less likely to garner majority support and be implemented by management.

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[272] $70.6 million = $150,000 (i.e., cost estimate provided by the American Securities Association in their letter in response to the Proxy Process Roundtable dated June 7, 2019 (see supra note 232)) x 471 (i.e., maximum number of excludable proposals as a result of the proposed amendments to Rule 14a-8(b) and Rule 14a-8(c)). 471 = [84 (i.e., maximum number of excludable proposals as a result of the proposed amendments in Rule 14a-8(b) using only data for proposals with exact information on proponents' ownership in proxy statements, see supra note 240) + 1 (i.e., incremental number of excludable proposals as a result of the proposed amendments to 14a-8(c) using only data for proposals with exact information on proponents' ownership)] x 831 (i.e., all proposals submitted to be considered in 2018 shareholders' meetings) / 150 (i.e., proposals with exact information on proponents' ownership in proxy statements).

The following caveats apply to our cost savings estimates. Our analysis assumes that the distribution of ownership for proponents with exact ownership information in the proxy statements is the same as the distribution of ownership for proponents with minimum or no ownership information in the proxy statements and the distribution of ownership for proponents that submitted proposals that were ultimately withdrawn or omitted. Our analysis also applies the same per-proposal cost estimate (i.e., $150,000) to voted, omitted, and withdrawn proposals and it applies the same per-proposal cost estimate to operating companies and management companies. Lastly, our analysis assumes that companies will not reallocate the time and resources that would free up as a result of the reduction in proposals to process the remaining proposals.

On the other hand, the lower bound of cost savings would be $1.4 million. $1.4 million = $50,000 (i.e., cost estimate provided by Darla Stuckey in her 2016 testimony before the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, see supra note 230) x 28 (i.e., minimum number of excludable proposals as a result of the proposed amendments to 14a-8(b) and 14a-8(c)). 28 = [0 (i.e., minimum number of excludable proposals as a result of the proposed amendments to 14a-8(b) using only proposals with exact information on proponents' ownership in proxy statements, see supra Section IV.C.2.i) + 5 (i.e., incremental number of excludable proposals as a result of the proposed amendments to 14a-8(c) using only proposals with exact information on proponents' ownership in proxy statements)] x 831 (i.e., all proposals submitted to be considered in 2018 shareholders' meetings) / 150 (i.e., proposals with exact information on proponents' ownership).

In addition, by eliminating shareholders' ability to aggregate their holdings with those of other shareholders, the proposed amendments would require each proponent to have a sufficient economic stake or investment interest in the company to justify the costs associated with a shareholder proposal.

Further, by providing that a person, directly or indirectly, may submit only one proposal for a shareholder's meeting, the proposed amendments would prohibit shareholders from imposing disproportionate costs on the company and other shareholders by submitting multiple proposals for the same meeting.

Finally, by requiring a statement from the proponent that he or she is willing to meet with the company after submission of the shareholder proposal, the proposed amendments could encourage direct communication between the proponent and the company, which could promote more frequent resolution of the proposals outside the voting process. Such resolutions could decrease the costs that companies and their shareholders incur to process shareholder proposals.

c. Discussion specific to proposed amendments for proposals submitted on behalf of shareholders

To the extent that the practices of certain proponents are not consistent with the proposed amendments related to proposals submitted through a representative, the proposed amendments could benefit companies and other shareholders because they could demonstrate the existence of a principal-agent relationship and could provide assurance that the shareholder supports the proposals. Further, the proposed amendments could result in cost savings to companies that would no longer be required to expend resources to obtain some of the information that is not provided by the proponents but would be required under the proposed amendments.

d. Discussion specific to proposed amendments to Rule 14a-8(i)(12)

As discussed in Section IV.C.3.i.a above, the proposed increase in the resubmission thresholds and the proposed Momentum Requirement could benefit companies and their shareholders because it could decrease the number of proposals for companies and shareholders to consider. As a result of the proposed amendments, we estimate that all Russell 3000 companies together could experience annual cost savings associated with a decrease in the number of voted proposals of up to $8.9 million per year.[273]

In addition, the decrease in the number of proposals could free up resources so that companies and their shareholders could pursue other value-enhancing activities. Relatedly, the proposed amendments to the resubmission thresholds and the Momentum Requirement could exclude proposals that have historically garnered low levels of support and thus would allow shareholders to focus on the processing of proposals that may garner higher levels of voting support and may be more likely to be implemented by management.

The proposed amendments to the resubmission thresholds could also benefit companies and their shareholders to the extent that they change proponents' behavior. In particular, due to

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[273] $8.9 million = $150,000 (i.e., cost estimate provided by the American Securities Association in their letter in response to the Proxy Process Roundtable, see supra note 232) x 59 (i.e., number of excludable proposals as a result of the proposed amendments to 14a-8(i)(12)). 59 = 30 (i.e., number of excludable proposals as a result of the proposed amendments to 14a-8(i)(12) that were included in proxy statements to be considered in 2018 shareholder meetings) x 831 (i.e., proposals submitted to be considered in 2018 shareholders' meetings) / 423 (i.e., voted proposals in the CII Report in 2018). The following caveats apply to our cost savings estimates. Our analysis applies the same per-proposal cost estimate (i.e., $150,000) to voted, omitted, and withdrawn proposals and to operating companies and management companies. In addition, our analysis assumes that the proposed amendments to 14a-8(i)(12) will have the same effect on proposal eligibility of voted, withdrawn, and omitted proposals. Lastly, our analysis assumes that companies will not reallocate the time and resources that would free up as a result of the reduction in proposals to process the remaining proposals.

On the other hand, the lower bound of cost savings would be $3.1 million. $3.1 million = $50,000 (i.e., cost estimate provided by Darla Stuckey in her 2016 testimony before the House Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, see supra note 230) x 63 (i.e., number of excludable proposals as a result of the proposed amendments to 14a-8(i)(12)).

the higher thresholds, proponents may spend more resources to more carefully prepare proposals that are more likely to garner sufficient levels of shareholder support. In addition, proponents may spend more resources to market their proposal to other shareholders to increase support for their proposal. As a result, companies and their shareholders could benefit from the submission of shareholder proposals that are more likely to receive higher levels of support and thus are more likely to be implemented by management.

Similarly, the proposed resubmission thresholds may discourage the submission of proposals that are less likely to garner majority voting support.[274] Similarly, the Momentum Requirement may discourage the submission of proposals that garner significant but not majority support and recently have experienced a decrease in shareholder support, which may indicate waning shareholder interest in the proposal.

ii. Costs

a. General discussion of costs

The proposed amendments could result in the exclusion of certain proposals that would have otherwise been included in the proxy statement and voted on. To the extent that such shareholder proposals would be value enhancing, the potential exclusion of value-enhancing proposals could be detrimental to companies and their shareholders.[275] One way the exclusion of

[274] Proponents incur costs to submit proposals, which may already deter some proponents from resubmitting proposals that have a low likelihood of receiving sufficient levels of shareholder support.

[275] See supra Section IV.C.I for a detailed discussion of literature that examines the value of shareholder proposals.

The potential decrease in the number of shareholder proposals also could be costly to the various providers of administrative and advisory services related to shareholder voting because the demand for the services of these providers could decrease. Examples of these service providers include proxy advisory firms, tabulators of voting, and proxy solicitors.

certain proposals could be detrimental is by limiting or slowing the adoption of potential improvements.

Shareholder proposals are one way for shareholders to communicate with management and other shareholders. The proposed amendments would alter the eligibility requirements in a manner that could increase companies' ability to exclude certain proposals, which could restrict shareholders' ability to use this avenue of communication with other shareholders. In addition to increasing companies' ability to exclude certain proposals, the proposed amendments could decrease shareholders' willingness to submit certain proposals, which could further inhibit communication between shareholders and also inhibit shareholders' engagement with management.[276]

By limiting the shareholder proposals channel of communication, the proposed amendments could lead to proponents seeking alternative avenues of influence, such as public campaigns, litigation over the accuracy of proxy materials, or demands to inspect company documents. As a result, companies could confront greater uncertainty in their interaction with shareholders.[277]

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[276] See supra note 48; see also letter in response to the Proxy Process Roundtable from American Federation of Labor & Congress of Industrial Organizations dated November 9, 2018.

[277] See Brown (2017), supra note 211, at 24–25; see also letter to Jeb Hensarling, Chairman, and Maxine Waters, Ranking Member, House Financial Services Committee, from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated April 24, 2017, available at https://democrats-financialservices.house.gov/uploadedfiles/letter_-_cii_04.27.2017.pdf (stating that the proposed rule amendments are "likely to have unintended consequences, including shareowners more often availing themselves of the blunt instrument of votes against directors, and increased reliance on hedge fund activists to push for needed corporate changes."); Ceres Business Case, supra note 25, at 11 (noting that "[a]lternatives to shareholder proposals include voting against directors, lawsuits, books and records requests, and requests for additional regulations. Each of these is more onerous and adversarial than including a 500-word proposal in the proxy statement for the consideration of shareholders"); letters in response to the Proxy Process Roundtable from Council of Institutional Investors dated January 31, 2019; Los Angeles County Employees Retirement Association dated October 30, 2018; MFS Investment Management dated November 14, 2018; US SIF dated November 9, 2018.

Any negative effects of the proposed amendments would be more pronounced for shareholders that follow passive index strategies because those shareholders are more limited in their ability to sell shares of an underperforming stock and thus might be more likely to rely on the proxy proposal process to encourage value-enhancing changes.[278]

b. Discussion specific to proposed amendments to Rule 14a-8(b) and Rule 14a-8(c)

In addition to the costs discussed in Section IV.C.3.ii.a above, the proposed amendments to 14a-8(b) and 14a-8(c) could impose certain costs on shareholder-proponents. These costs could arise from: (i) shareholder-proponents' efforts to reallocate shareholdings in their portfolio to satisfy the proposed dollar ownership thresholds; (ii) decreased diversification of shareholder-proponents' portfolio because a larger portion of their wealth may be invested in a particular company; (iii) shareholder-proponents holding the shares for longer periods of time to satisfy the proposed duration thresholds; and (iv) shareholder-proponents making themselves available to communicate with management after submitting a proposal. The latter costs to shareholder-proponents consist of the direct costs of meeting with management, and the opportunity costs associated with spending time to meet with management instead of engaging in other activities. There are also costs associated with disclosing the times the proponents would be available to communicate with management but we believe that any such costs likely are minimal.

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[278] See letter in response to the Proxy Process Roundtable from the City of New York Office of the Comptroller dated January 2, 2019, at 1 (noting that "[b]ecause of our long-term investment horizon, and the fact that we allocate more than 80% of the funds' investments in U.S. public equity through passive index strategies, we cannot readily sell shares in a company when we have concerns about the company's performance, board composition and quality, management, executive compensation, workplace practices or management of risks, including those related to climate change"); Ceres Business Case, supra note 25, at 10 (noting that "[w]hile active investors have the option of selling shares of companies whose management they do not trust to add value, passive investors' options are more limited").

At the same time, passive investors are more likely to hold shares for a long period of time than active investors, and thus are less likely to be affected by the proposed amendments to Rule 14a-8(b).

Further the proposed change from a single-tier to three-tiered ownership thresholds could increase compliance complexity because companies and proponents would be required to consider multiple thresholds to establish whether a proposal is eligible for exclusion.

The proposed increase in the ownership thresholds and the prohibition of aggregation of shareholdings could disproportionately affect certain types of shareholder-proponents. In particular, the proposed amendments could disproportionately affect individuals.[279] This disproportionate effect would be more costly if individuals submit more value-enhancing proposals than institutions. Two academic papers suggest that proposals submitted by individual investors elicit a stronger market reaction than proposals submitted by institutional investors,[280] while one suggests otherwise.[281] The potentially negative consequences of this disproportionate effect on individuals could be amplified by the fact that (i) institutional investors generally may have more direct channels of communication with companies than individual investors who rely more on the shareholder-proposal process to communicate with management and other shareholders[282] and (ii) larger shareholders have, on average, greater success in seeing their contested proposals ultimately included in the proxy.[283]

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[279] See supra Section IV.C.2.i.

[280] See, e.g., Gillan & Starks (2000), supra note 217; Gantchev & Giannetti (2018), supra note 166. Gillan and Starks (2000) interpret the more positive stock market reaction to proposals submitted by individuals compared to institutions as consistent with the idea that the market views shareholder proposals submitted by an institution as evidence of management's unwillingness to negotiate with such investors. See Gillan & Starks (2000).

[281] See Cuñat et al. (2012), supra note 209.

[282] See, e.g., letters in response to the Proxy Process Roundtable from MFS Investment Management dated November 14, 2018, at 2 (noting "[a]s a large institutional investor, we generally have access to management teams and directors that smaller shareholders may not have"); Pax World Funds dated November 9, 2018, at 2 (noting "[w]hile some asset managers or owners with hundreds of billions in assets can often engage with management and boards as often as they wish, smaller investors' inquiries to companies often die in investor relations departments."); and the Shareholders Right Group dated December 4, 2018, at 8–9 (noting "larger investors often do not need the shareholder proposal process in order to persuade companies to engage with them on their concerns. In contrast, the shareholder proposal process provides an appropriate avenue through which all shareholders, including Main

As explained above, the proposed amendments could disproportionately affect smaller companies that receive proposals.[284] This is because investors' holdings in smaller companies are more likely to be below the proposed ownership thresholds than investors' holdings in larger companies, assuming investors hold the market portfolio.[285] As a result, to the extent that the proposals excluded as a result of the proposed amendments would be value enhancing, any negative effects of the proposed amendments on smaller companies could be larger than the effects on larger companies. At the same time, however, smaller companies would enjoy larger cost savings as a result of the potentially larger increase in the number of excludable proposals. Hence, the net effect of the proposed rule amendments on smaller relative to larger companies is unclear.

Any effects of the proposed amendments would be, at least partially, mitigated by the fact that companies can elect to include in their proxy materials proposals of proponents that do not meet the proposed eligibility requirements, if the companies believe that those proposals would benefit shareholders.[286]

Street's shareholders, as well as their chosen representatives, can raise issues and elicit consideration and support from their fellow shareholders"); see also Ceres Business Case, supra note 25, at 9 (noting that "[a] system that allows shareholders to file proposals is needed in part because individual investors and smaller shareholders nearly always lack large enough holdings to get the board and management's attention in any other way"); Eugene Soltes, Suraj Srinivasan, & Rajesh Vijayaraghavan, *What Else do Shareholders Want? Shareholder Proposals Contested by Firm Management* (Working Paper, July 2017) ("Soltes et al. (2017)") (finding that the level of shareholder ownership is positively associated with the probability that a contested proposal is withdrawn, which is consistent with the idea that large shareholders "are more influential and are more likely to have dialogue with managers that would facilitate implementation of their proposal prior to a shareholder vote").

[283] See Soltes et al. (2017), supra note 282.

[284] See supra Section IV.C.2.i.

[285] See supra note 254.

[286] Our analysis of proponents' ownership information from proxy statements shows that there was one proposal submitted by two co-proponents whose aggregate holdings did not meet the $2,000 current ownership threshold. This proposal is excludable under the current ownership threshold, but nevertheless appeared in the company's proxy statement. See supra note 189 for caveats related to this analysis.

c. Discussion specific to proposed amendments for proposals submitted on behalf of shareholders

Shareholders that submit a proposal through a representative could incur minimal costs to ensure that their practices are consistent with the proposed amendments. In addition, to the extent that the practices of certain proponents are not consistent with the proposed amendments, the proposed amendments could impose minimal costs on proponents to provide this additional documentation. We lack data to quantify these costs but we request comment on these costs in Section IV.E below.

d. Discussion specific to proposed amendments to Rule 14a-8(i)(12)

The proposed amendment to the resubmission thresholds and the proposed Momentum Requirement could impose costs on proponents because they could spend more resources in preparing a proposal to seek to garner sufficient levels of support to satisfy the proposed requirements.

The proposed amendments also could increase the complexity of the shareholder proposal eligibility requirements because the Momentum Requirement would be a new requirement.

Literature also shows that management may spend resources to influence the success rate of shareholder proposals.[287] The Momentum Requirement would allow companies to exclude proposals that do not meet but are close to the majority threshold. Hence, the Momentum Requirement could provide further incentives to management to expend resources to influence

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[287] Management may influence the voting outcome either by encouraging shareholders that would favor them to vote or by encouraging shareholders to vote in line with management. See Bach & Metzger (2019), supra note 216.

the voting outcome of a shareholder proposal because the benefit of influencing the voting outcome (i.e., three year exclusion of the proposal) could be greater than under current rules.

As discussed in Section IV.C.2 above, the proposed amendments to the resubmission thresholds and the proposed Momentum Requirement could have a larger effect on certain types of proposals and companies. In particular, the proposed amendments could have a larger effect on larger companies because larger companies are more likely to receive shareholder proposals.[288] To the extent that the proposals excluded as a result of the proposed amendments would be value enhancing, larger companies could be more negatively affected by the proposed amendments than smaller firms. The disproportionate effect on larger companies could be amplified by the fact that larger companies are less likely to be the target of hedge fund activism and thus experience improvements through alternative forms of activism,[289] and larger companies are more likely to contest shareholder proposals.[290] At the same time, any negative effects could be at least partially mitigated by the fact that larger companies would enjoy larger cost savings as a result of the decrease in the number of proposal resubmissions.

The proposed amendments to the resubmission thresholds and the proposed Momentum Requirement also could have a larger effect on companies with dual-class voting shares for which insiders hold the majority of the voting shares.[291] At such controlled companies, it may be difficult to get support for a shareholder proposal above the proposed thresholds. While shareholder proposals may be less likely to gain majority support and be implemented at these

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[288] See supra Section IV.B.3.i.

[289] Alon Brav, Wei Jiang, Frank Partnoy, & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729 (2008).

[290] Soltes et al. 2017, supra note 282.

[291] See supra Section IV.B.3.iv.

companies,[292] they may still provide a valuable communication mechanism between shareholders. We note that the non-voting stock of companies for which the majority of voting stock is held by insiders could trade at a discount to compensate the owners of the non-voting stock for the reduced ability of shareholder proposals to garner sufficient support for those companies. In addition, literature suggests that the probability of a proposal being implemented is negatively related to insider ownership. Hence, the decrease in the number of resubmitted proposals as a result of the proposed rule amendments for firms with dual-class voting stock for which insiders hold the majority of the voting shares likely would be limited because the probability of a proposal being implemented in those firms would be already low.[293]

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[292] See Roundtable Transcript, supra note 13, comments of Brandon Rees, Deputy Director of Corporations and Capital Markets, American Federation of Labor and Congress of Industrial Organizations, at 167; CII Report, supra note 197, at 21; Ceres Business Case, supra note 25, at 14; letter in response to the Proxy Process Roundtable from the City of New York Office of the Comptroller dated January 2, 2019, at 11.

[293] See, e.g., Ertimur et al. (2010), supra note 174.

A commenter also suggested that an increase in the resubmission thresholds could provide stronger incentives to some proponents to submit proposals on certain topics with the intent of obtaining low levels of support for certain subject matters, and thus rendering proposals on the same subject matter excludable for three years. Nevertheless, we believe that any such activity is unlikely to be widespread. See letter in response to the Proxy Process Roundtable from the City of New York Office of the Comptroller dated January 2, 2019, at 11 (noting "we have seen efforts to pre-empt proposals in a given year urging stronger policies on climate change by a group submitting a proposal to go in the opposite direction. With high resubmission thresholds, that kind of mischief-making would be encouraged on a broader scale as long as the SEC policy refers to 'the same subject matter' rather than 'the same proposal'"). For related discussion, see also the letter in response to the Proxy Process Roundtable from Sustainable Investments Institute dated November 12, 2018, at 13 (noting "[n]ew this year were proposals from the free market activist group the National Center for Public Policy Research (NCPPR) that used precisely the same resolved clause as the one used in the main campaign on lobbying. In two instances, because they were filed first, these resolutions pre-empted proposals filed later from the disclosure advocates, on lobbying at Duke Energy and about election spending at General Electric, where the question turned on third-party spending groups. The NCPPR proposals went to votes in each case and while the presenters argued against disclosure in their support statement, investors appeared to vote on the basis of what was in the resolved clause and support levels were comparable to those filed by disclosure proponents—34.6 percent at Duke (33.3 percent last year) and 21.2 percent at GE (no previous election proposals but 28.6 percent on a traditional lobbying resolution in 2017).").

The potential costs of the proposed rule amendments would be more pronounced in instances where material developments could change shareholder support for the proposal but the proposal is otherwise ineligible for resubmission under the proposed rule for a period of time.[294]

Any negative effects of the proposed amendments would be, at least partially, mitigated by the fact that companies would be able to exclude only proposals for which there is an observable measure of low shareholder interest (i.e., low voting support among shareholders and lack of momentum toward achieving a more substantial level of shareholder support). In addition, any negative effects of the proposed rule amendments would be mitigated by the fact that companies could elect to include in their proxy materials resubmissions that would otherwise be excludable if they believed that those resubmissions would benefit shareholders.[295] Also, companies' ability to exclude certain resubmissions would be limited to a three-year cooling-off period regardless of the level of support the proposal last received.

Finally, any potential effects of the proposed amendments would be moderated by changes in proponent behavior, such as submitting a proposal on a different topic when the initial proposal is ineligible for resubmission or submitting a proposal on the same topic but at a different company to continue investor conversations on that topic.

4. Effects of Proposed Amendments on Efficiency, Competition, and Capital Formation

To the extent that the proposed amendments could reduce the costs of processing shareholder proposals and could free up management resources for more valuable activities, the

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[294] See letter in response to the Proxy Process Roundtable from the City of New York Office of the Comptroller dated January 2, 2019.

[295] Among shareholder proposals resubmitted to Russell 3000 companies during 2011 to 2018, 10 proposals appeared in company proxies and were voted on despite receiving low voting support in prior submissions and being eligible for exclusion under the current resubmission thresholds. See supra note 200.

proposed amendments could result in efficiency improvements. Any improvements in efficiency could be offset by the costs associated with the exclusion of shareholder proposals that could have resulted in changes that would have enhanced efficiency.

Further, to the extent that the proposed amendments would permit shareholders to focus on the processing of proposals that are more likely to receive majority support and be implemented, the proposed amendments could result in more efficient use of shareholder resources.

In addition, to the extent that the proposed amendments could reduce costs to companies associated with the shareholder-proposal process, the proposed amendments could be a positive factor in the decision of firms to go public, which could positively affect capital formation on the margin.[296] Nevertheless, we believe that any such effects likely would be minimal because most firms receive only few proposals each year and the costs of responding to proposals likely are a small percentage of the costs associated with being a public company.[297] In addition, companies that have recently had an initial public offering infrequently receive shareholder proposals.[298]

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[296] See, e.g., letter in response to the Proxy Process Roundtable from Center for Capital Markets Competitiveness dated December 20, 2018, at 7 (noting "[t]he decline in public companies is a multifaceted issue with no single solution. . . . Those issues include proxy advisory firm reforms as discussed earlier as well as shareholder resubmission thresholds.").

[297] Between 1997 and 2018 for Russell 3000 companies that received a proposal, the median number of proposals was one per year. See Roundtable Transcript, supra note 13, comments of Brandon Rees, Deputy Director of Corporations and Capital Markets, American Federation of Labor and Congress of Industrial Organizations, at 140, 142 (noting "the average publicly listed company in the United States can expect to receive a shareholder proposal once every 7.7 years, and the median number of proposals received is one. . . . [S]hareholder proposals make up less than 2 percent of the total number of ballot items. Less than 4 percent of shareholder proposals were filed at companies with under $1 billion in market capitalization. Less than 9 percent of Russell 3000 companies that have had an IPO since 2004."); see also letters in response to the Proxy Process Roundtable from Ceres dated November 13, 2019; Mercy Investment Services, Inc. dated December 3, 2018, at 3; Presbyterian Church U.S.A. dated November 13, 2018, at 3–4.

[298] See supra note 297.

To the extent that the proposed amendments would have disproportionate effects on U.S. relative to foreign firms because foreign firms are not subject to federal proxy rules,[299] the proposed amendments could improve competition. Further, to the extent that the proposed amendments to the ownership (resubmission) thresholds would have disproportionate effects on smaller (larger) companies, the proposed amendments could harm competition. Nevertheless, we expect that any such effects likely would be minimal because the cost of processing shareholder proposals likely is a small percentage of companies' total cost of operations.

Finally we do not expect that the proposed amendments for proposals submitted by a representative would have a meaningful effect on efficiency, competition, and capital formation.

D. Reasonable Alternatives

1. Shareholder Ownership Thresholds

i. Alternative ownership thresholds

We considered a number of alternative approaches to the ownership thresholds. First, we considered whether to simply increase the $2,000 / one-year threshold in the current requirement to a $50,000 / one-year threshold without providing additional eligibility options. Using proponents' exact ownership information from the proxy statements and assuming no change in proponents' ability to aggregate their holdings to submit a joint proposal, such an increase would have resulted in the excludability of 96 proposals, or 65 percent of the proposals with exact proponents' ownership information to be considered at 2018 shareholder meetings.[300] The

[299] See supra note 130.

[300] 65% = 97 (excludable proposals under a $50,000/one-year threshold) / 150 (proposals with exact proponents' ownership information in proxy statements). For proposals that are submitted by more than one proponent, these estimates assume that the proposals would still be submitted if the aggregate ownership of the co-proponents met the alternative dollar ownership threshold. For proposals that are submitted by multiple proponents, some of which provide exact and others provide minimum holdings information, we assume that the ownership of the proponents with minimum holdings information is equal to the lowest end of the ownership range.

advantage of increasing only the dollar amount in the current threshold is that the rule would be easier to implement and monitor. The disadvantage of such an approach would be that shareholders would not have the flexibility to become eligible to submit shareholder proposals by either increasing their holdings or holding the shares of a company for a longer period of time as under the proposed approach.

Alternatively, we considered using a tiered approach, as proposed, but with different combinations of minimum dollar amounts and holding periods. For example, we considered $2,000 for five years, $15,000 for three years and $25,000 for one year or $2,000 for three years, $10,000 for two years, and $50,000 for one year. We are unable to estimate the incremental effects of the former alternative (i.e., $2,000 for five years, $15,000 for three years, and $25,000 for one year) relative to the effects of the proposed amendments discussed in Section IV.C.2.i above because we lack data on proponents' ownership duration. Assuming all proponents held the shares for only one year, the increase in the dollar ownership thresholds from $2,000 to $50,000 (i.e., third tier of the alternative ownership threshold) could result in the exclusion of 97 proposals, or 65 percent of the proposals with exact proponents' ownership information related to 2018 shareholder meetings.[301] On the other hand, assuming all proponents held the shares for at least three years, the proposed ownership thresholds would not result in a change in the number of excludable proposals relative to the current thresholds.

Different thresholds could result in the exclusion of more or fewer proposals, depending on the threshold. While we believe that the proposed tiers would appropriately balance the interests of shareholders who seek to use the company's proxy statement to advance their own

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[301] See supra note 300.

proposals, on the one hand, with the interests of companies and other shareholders who bear the burdens associated with the inclusion of such proposals, on the other hand, we solicit comment as to whether any refinements of those thresholds would strike a better balance.

We also considered whether to index the proposed ownership thresholds for inflation. The benefit of such an approach would be that thresholds would adjust over time without the need for additional rulemaking. The disadvantage of such an approach would be that compliance with the rule could be more cumbersome as companies and proponents would have to monitor periodically evolving ownership thresholds.

ii. Percent-of-ownership threshold

We considered whether to propose an ownership requirement based solely on the percentage of shares owned. For example, we considered eliminating the dollar ownership threshold and retaining the one-percent ownership threshold. Using proponents' exact ownership information from the proxy statements and assuming no change in proponents' ability to aggregate their holdings to submit a joint proposal, we estimate that using a one-percent ownership threshold and removing the $2,000/one-year threshold would have resulted in 149 proposals, or 99 percent of the proposals to be considered in 2018 shareholder meetings that provide exact proponents' ownership information, being excludable under the proposed amendments.[302]

The advantage of a percentage-of-ownership threshold is that it would permit shareholders owning the same proportion of a larger company as of a smaller company to submit

[302] 99% = 149 (number of excludable proposals under a 1% threshold) / 150 (proposals with exact proponents' ownership information in proxy statements). For proposals that are submitted by more than one proponent, these estimates assume that the proposals would still be submitted if the aggregate ownership of the co-proponents met the alternative percent-of-ownership threshold. For proposals that are submitted by multiple proponents, some of which provide exact and others provide minimum holdings information, we assume that the ownership of the proponents with minimum holdings information is equal to the lowest end of the ownership range.

a proposal. The percentage-of-ownership threshold, however, would be marginally harder to implement because of changes in the stock price of the company over time. We also believe that a percentage-of-ownership threshold of one percent would prevent the vast majority of shareholders from submitting proposals,[303] which, in turn, could have a chilling effect on shareholder engagement. In addition, the types of investors that hold more than one percent of a company's shares are more likely to be able to communicate directly with management, and thus do not typically use shareholder proposals.[304]

2. Shareholder Resubmission Thresholds

i. Alternative resubmission thresholds

We considered proposing different resubmission thresholds, including raising the thresholds to 5/10/15 percent, 6/15/30 percent, or 10/25/50 percent. All three alternatives threshold levels would increase the number of proposals eligible for exclusion relative to the baseline, with the first expected to have smaller effects relative to the proposed amendments and second and third expected to have larger effects relative to the proposed amendments. We estimate that 92 (6 percent), 328 (23 percent), and 668 (46 percent) additional proposals that were resubmitted between calendar years 2011 and 2018 would have fallen below the 5/10/15 percent, 6/15/30 percent, and 10/25/50 percent thresholds, respectively. In addition, we are requesting comment on whether the rule should 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. Under this alternative, no proposal would be eligible for exclusion on its first two submissions, allowing shareholder proposals at least two years to gain traction. We estimate

[303] See supra note 302.

[304] See supra note 282.

that 418 (29 percent) additional proposals that were resubmitted between calendar years 2011 and 2018 would have failed to garner majority support by third submission.[305] We also are requesting comment on the appropriate cooling-off periods under this approach, such as three and five years.

ii. Different vote-counting methodologies

We considered whether to propose changes to how votes are counted for purposes of applying the resubmission thresholds. For example, we considered whether votes by insiders should be excluded from the calculation of the fraction of votes that a proposal received. We also considered whether to apply a different vote-counting methodology for companies with dual-class voting structures. One commenter has highlighted how the presence of a subset of shareholders with special voting rights could make the voting threshold requirement difficult to satisfy.[306] The advantage of applying different kind of vote-counting methodologies for votes by insiders and for companies with dual-class shares is that it would make it easier for shareholder proposals to meet the resubmission thresholds and thus potentially could mitigate management entrenchment for those firms.[307] The disadvantage of such an approach is that companies and their shareholders would continue to incur costs associated with processing proposals that are less likely to garner majority support and be implemented by management.

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[305] This estimate is an upper bound of the number of excludable proposals under this alternative because it would allow all proposals following first and second submissions to be resubmitted. We cannot identify all proposals that would have been resubmitted but were not because they were eligible for exclusion under the current resubmission thresholds for first and second submissions.

[306] See letter in response to the Proxy Process Roundtable from City of New York Office of the Comptroller dated January 2, 2019.

[307] See supra note 267.

iii. Exception to the rule if circumstances change

We considered whether to propose an exception to the proposed rule amendments that would allow an otherwise excludable proposal to be resubmitted if there were material developments that suggest a resubmitted proposal may garner significantly more votes than when it was previously voted on. Several commenters pointed out the possibility of an unpopular proposal gaining popularity in subsequent years following changes in company circumstances or other market developments.[308] We expect that such an exception would lower the number of proposals eligible for exclusion under the proposed amendments, but the magnitude of the decrease would depend on what types of developments qualify for the exception and how many companies experience these particular types of developments. We expect the additional costs of such an exception would include those associated with determining whether changes in circumstances qualify for the exception. On the other hand, shareholders may benefit from being able to submit proposals on matters that would otherwise be excludable under Rule 14a-8(i)(12) and may have gained popularity among shareholders following a material development at the company.

E. Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the amendments, if adopted, would promote efficiency, competition, and capital formation. In addition, we request comments on our selection of data sources, empirical methodology, and the assumptions we have made throughout the analysis. Commenters are requested to provide

[308] See letters in response to the Proxy Process Roundtable from the Shareholder Rights Group dated December 4, 2018; Teachers Insurance and Annuity Association of America (TIAA) dated June 10, 2019; City of New York Office of the Comptroller dated January 2, 2019.

empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. In addition, we request comment on the following:

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.

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.

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?

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?

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?
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?
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?
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?

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?

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?

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?

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.

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.

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?

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?

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?

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?

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?

V. PAPERWORK REDUCTION ACT

A. Summary of the Collections of Information

Certain provisions of our rules and schedules that would be affected by the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[309] We are submitting the proposed amendments to

[309] 44 U.S.C. 3501 et seq.

the Office of Management and Budget ("OMB") for review in accordance with the PRA.[310] The hours and costs associated with preparing, filing, and sending the schedules, including preparing documentation required by the shareholder-proposal process, constitute paperwork burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collection is mandatory. Responses to the information collection are not kept confidential and there is no mandatory retention period for the information disclosed. The title for the affected collection of information is:

"Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A)" (OMB Control No. 3235-0059).

We adopted the existing regulations and schedule pursuant to the Exchange Act. The regulations and schedule set forth the disclosure and other requirements for proxy statements filed by issuers and other soliciting parties. A detailed description of the proposed amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the proposed amendments can be found in Section IV above.

B. Summary of the Proposed Amendments' Effects on the Collections of Information

The following table summarizes the estimated effects of the proposed amendments on the paperwork burdens associated with Regulation 14A.

PRA Table 1. Estimated Paperwork Burden Effects of the Proposed Amendments

Proposed Amendments	Estimated Effect
Rule 14a-8(b)(1)(i)	

[310] 44 U.S.C. 3507(d); 5 CFR 1320.11.

• Revise the ownership requirements that shareholders must satisfy to be eligible to submit proposals to be included in an issuer's Schedule 14A proxy statement to the following levels: ○ ≥$2K to <$15K for at least 3 years;	28% decrease in the number of shareholder proposal submissions,[311] resulting in a reduction in the average burden per response of 5.08 hours.[312]

[311] See supra Section IV.C.2.i. We estimate that the decrease in the number of shareholder proposals could range from 0 to 56%, depending on shareholders' holding periods. For purposes of the PRA, we assume an estimated decrease of 28%.

[312] In response to the Proxy Process Roundtable, commenters provided several cost estimates associated with a company's receipt of a shareholder proposal. These estimates are $87,000 (see letters in response to the Proxy Process Roundtable from Blackrock, Inc. dated November 16, 2018; Society for Corporate Governance dated November 9, 2018); more than $100,000 (see letter in response to the Proxy Process Roundtable from Exxon Mobil Corporation dated July 26, 2019); and approximately $150,000 (see letter in response to the Proxy Process Roundtable from the American Securities Association dated June 7, 2019). In addition, one observer estimated a cost of approximately $50,000 "based on anecdotal discussions with [members of the Society for Corporate Governance]." See Statement of Darla C. Stuckey, President and CEO, Society for Corporate Governance, Before the H. Comm. on Financial Services Subcomm. on Capital Markets and Government Sponsored Enterprises, Sep. 21, 2016. At an estimated hourly cost of $400 per hour, these estimated costs would correspond to the following estimated burden hours: 125 hours ($50,000 / $400 = 125), 218 hours ($87,000 / $400 = 218), 250 hours ($100,000 / $400 = 250), and 375 hours ($150,000 / $400 = 375).

A July 2009 survey of Business Roundtable companies, in which 67 companies responded, indicated that the average burden associated with preparing a no-action request related to a shareholder proposal is approximately 47 hours with associated costs of $47,784. The survey also indicated that the average burden for a company associated with printing and mailing a single shareholder proposal is 20 hours with associated costs of $18,982. See letter in response to Facilitating Shareholder Director Nominations, Release No. 34-60089 (Jun. 10, 2009) [74 FR 29024 (Jun. 18, 2009)] from Business Roundtable dated August 17, 2009, available at https://www.sec.gov/comments/s7-10-09/s71009-267.pdf. Thus, based on the Business Roundtable's survey, the combined effect of these two aspects of processing a shareholder proposal was estimated at 67 hours with associated costs of $66,766.

Informed by the range of estimates provided, we estimate that the burden hours for a company associated with considering and printing and mailing a shareholder proposal (not including burdens associated with the no-action process) would be 100 hours (80 hours associated with activities unrelated to printing and mailing, and 20 hours associated with printing and mailing). In addition, we estimate that the burden hours associated with seeking no-action relief would be 50 hours.

We further estimate that 40% of proposals are included in the proxy statement without seeking no-action relief, 16% are included after seeking no-action relief, 15% are excluded after seeking no-action relief, and 29% are withdrawn. Thus, we estimate 107 burden hours associated with a company's receipt of a shareholder proposal, calculated as follows:

- 100 hours for 40% of proposals (i.e., proposals that are included in the proxy statement without seeking no-action relief);
- 150 hours for 16% of proposals (i.e., proposals that are included in the proxy statement after seeking no-action relief);
- 130 hours for 15% of proposals (i.e., proposals that are excluded from the proxy statement after seeking no-action relief); and
- 80 hours for 29% of proposals (i.e., proposals that are withdrawn).

The reduction in the average burden per response of 5.08 hours is calculated by multiplying the expected reduction in proposals (28%) by the average number of proposals received between 1997 and 2018 (946) for a reduction in the total number of proposals of 265. This reduction in the number of proposals (265) is then multiplied by the

○ ≥$15K to <$25K for at least 2 years; or ○ ≥$25K for at least 1 year.	
Rule 14a-8(b)(1)(iii) • Require shareholders to provide the company with a written statement that they 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, and to provide contact information as well as business days and specific times that they are available to discuss the proposal with the company.	Increase in the average burden per response of 0.04 hours.[313]
Rule 14a-8(b)(1)(iv) • Require shareholders to provide certain written documentation to companies if the shareholder appoints a representative to act on its behalf in submitting a proposal under the rule.	Increase in the average burden per response of 0.01 hours.[314]
Rule 14a-8(b)(1)(v) • Disallow aggregation of holdings for purposes of satisfying the ownership requirements.	0.2% decrease in the number of shareholder proposal submissions,[315] resulting in a reduction in the average burden per response of 0.04 hours.[316]

estimated burden hours per proposal (107) for a total of 28,355 burden hours. This total number of burden hours (28,355) is then divided by the total number of responses (5,586) for a reduction in the average burden per response of 5.08 hours.

[313] The increase in the average burden per response of 0.04 hours is calculated by multiplying the expected amount of time to provide this information (20 minutes) by the expected average number of expected proposals after taking account of the total reduction in proposals submitted as a result of the proposed amendments (615) for a total increase of 205 hours. This increase in burden hours (205 hours) is then divided by the total number of responses (5,586) for an increase in the average burden per response of 0.04 hours.

[314] The increase in the average burden per response of 0.01 hours is calculated by multiplying the expected amount of time to provide this information (20 minutes) by the expected number of proposals submitted by a representative. We estimate that approximately 18% of proposals are submitted by a representative; thus, we multiply the average number of expected proposals after taking into account the reduction in proposals as a result of the proposed amendments (615) by 18% for a total of 111 proposals submitted by a representative. The number of proposals (111) is multiplied by the estimated amount of time to provide this information (20 minutes) for a total of 37 hours. This increase in burden hours (37 hours) is then divided by the total number of responses (5,586) for an increase in the average burden per response of 0.01 hours.

[315] See supra Section IV.C.2.i. We estimate that the decrease in the number of proposals could range from 0 to 0.4%. For purposes of the PRA, we assume an estimated decrease of 0.2%.

[316] The reduction in the average burden per response of 0.04 hours is calculated by multiplying the expected reduction in proposals (0.2%) by the average number of proposals received between 1997 and 2018 (946) for a reduction in the total number of proposals of 2. This reduction in the number of proposals (2) is then multiplied by the estimated burden hours per proposal (107) for a total of 214 burden hours. This total number of burden hours (214) is then divided by the total number of responses (5,586) for a reduction in the average burden per response of 0.04 hours.

Rule 14a-8(c) • Provide that shareholders and other persons cannot submit, directly or indirectly, more than one proposal for the same shareholders' meeting.	2% decrease in the number of shareholder proposal submissions,[317] resulting in a reduction in the average burden per response of 0.36 hours.[318]
Rule 14a-8(i)(12) • Increase the prior vote thresholds for resubmission of a proposal that addresses substantially the same subject matter as a proposal previously included in company's proxy materials within the preceding 5 calendar years if the most recent vote occurred within the preceding 3 calendar years to: o less than 5% of the votes cast if previously voted on once; o less than 15% of the votes cast if previously voted on twice; or o less than 25% of the votes cast if previously voted on three or more times. Permit exclusion of proposals that addresses substantially the same subject matter as proposals that have been previously voted on three or more times in the last five years, notwithstanding having received at least 25% of the votes cast on the most recent submission, if the most recently voted on proposal (i) received less than 50% of the votes cast and (ii) experienced a decline in shareholder support of 10% or more of the votes cast compared to the immediately preceding vote.	7% reduction in the number of shareholder proposals by reducing the number of resubmissions,[319] resulting in a reduction in the average burden per response of 1.26 hours.[320]

[317] See supra Section IV.C.2.i.

[318] The reduction in the average burden per response of 0.36 hours is calculated by multiplying the expected reduction in proposals (2%) by the average number of proposals received between 1997 and 2018 (946) for a reduction in the total number of proposals of 19. This reduction in the number of proposals (19) is then multiplied by the estimated burden hours per proposal (107) for a total of 2,033 burden hours. This total number of burden hours (2,033) is then divided by the total number of responses (5,586) for a reduction in the average burden per response of 0.36 hours.

[319] See supra Section IV.C.2.iii, Table 9 for a discussion regarding the estimated decrease in resubmitted proposals. That discussion estimates that there would have been 269 additional excludable resubmitted proposals (212 attributable to the revised resubmission thresholds of 5%, 15%, and 25% and 57 attributable to the Momentum Requirement) between 2011 and 2018 out of a total of 1,442 resubmitted proposals under the proposed amendments. A total of 3,620 proposals were included in proxy statements during that period. Thus, the estimated reduction in the number of shareholder proposals is estimated by dividing 269 by 3,620, which yields 7%.

[320] The reduction in the average burden per response of 1.26 hours is calculated by multiplying the expected reduction in proposals (7%) by the average number of proposals received between 1997 and 2018 (946) for a reduction in the total number of proposals of 66. This reduction in the number of proposals (66) is then multiplied by the estimated burden hours per proposal (107) for a total of 7,062 burden hours. This total number of burden hours (7,062) is then divided by the total number of responses (5,586) for a reduction in the average burden per response of 1.26 hours.

Total:	Net decrease in the average burden per response of 6.69 hours.[321]

C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

The paperwork burden estimate for Regulation 14A includes the burdens imposed by our rules that may be incurred by all parties involved in the proxy process leading up to and associated with the filing of a Schedule 14A. This would include both the time that a shareholder-proponent spends to prepare its proposals for inclusion in a company's proxy statement, as well as the time that the company spends to respond to such proposals. Our incremental and aggregate reductions in paperwork burden as a result of the proposed amendments represent the average burden for all respondents, including shareholder-proponents and large and small registrants. In deriving our estimates, we recognize that the burdens would likely vary among individual proponents and registrants based on a number of factors, including the propensity of a particular shareholder-proponent to submit proposals, or the number of shareholder proposals received by a particular company, which may be related to its line of business or industry or other factors.

As shown in PRA Table 1, the burden estimates were calculated by estimating the number of parties expected to expend time, effort, and/or financial resources to generate, maintain, retain, disclose or provide information required by the proposed amendments and then multiplying by the estimated amount of time, on average, each of these parties would devote in response to the proposed amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. For Regulation 14A we estimate

[321] (5.08 + 0.04 + 0.36 + 1.26) – (0.04 + 0.01) = 6.69 hours decrease in average burden per response.

that 75% of the burden is carried by the company or the shareholder-proponent internally and that 25% of the burden of preparation is carried by outside professionals retained by the company or the shareholder-proponent at an average cost of $400 per hour.[322]

PRA Table 2. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Proposed Amendments

Number of Estimated Responses (A)[323]	Burden Hour Reduction per Response (B)	Reduction in Burden Hours for Responses (C) = (A) x (B)[324]	Reduction in Internal Hours for Responses (D) = (C) x 0.75	Reduction in Professional Hours for Responses (E) = (C) x 0.25	Reduction in Professional Costs for Responses (F) = (E) x $400
5,586	6.69	37,370	28,027	9,343	$3,737,200

The following table summarizes the requested paperwork burden, including the estimated total reporting burdens and costs, under the proposed amendments.

PRA Table 3. Requested Paperwork Burden under the Proposed Amendments

Current Burden			Program Change			Requested Change in Burden		
Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Number of Affected Responses (D)	Reduction in Internal Hours (E)[325]	Reduction in Professional Costs (F)[326]	Annual Responses (G) = (A)	Burden Hours (H) = (B) - (E)	Cost Burden (I) = (C) - (F)
5,586	551,101	$73,480,012	5,586	28,027	$3,737,200	5,586	523,074	$69,742,812

[322] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several issuers, law firms, and other persons who regularly assist issuers in preparing and filing reports with the Commission.

[323] The number of estimated affected responses is based on the number of responses in the Commission's current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average. We do not expect that the proposed amendments will materially change the number of responses in the current OMB PRA filing inventory.

[324] The estimated reductions in Columns (C), (D) and (E) are rounded to the nearest whole number.

[325] From Column (D) in PRA Table 2.

[326] From Column (F) in PRA Table 2.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File No. S7-23-19. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-23-19 and be submitted to the U.S. Securities and

Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

The Regulatory Flexibility Act ("RFA")[327] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act, to consider the impact of those rules on small entities. The Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") in accordance with Section 603 of the RFA.[328] This IRFA relates to proposed amendments to Rule 14a-8 of the Exchange Act.

A. Reasons for, and Objectives of, the Proposed Action

Rule 14a-8 facilitates the proxy process for shareholders seeking to have proposals considered at a company's annual or special meeting; however, the burdens associated with this process are primarily borne by issuers. The proposed amendments are intended to balance shareholders' ability to submit proposals with the attendant burdens for companies and other shareholders associated with the inclusion of such proposals in a company's proxy statement. The reasons for, and objectives of, the proposed amendments are discussed in more detail in Sections I and II, above.

B. Legal Basis

We are proposing amendments to the rules under the authority set forth in Sections 3(b), 14 and 23(a) of the Securities Exchange Act of 1934, as amended.

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[327] 5 U.S.C. 601 et seq.

[328] 5 U.S.C. 603.

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect some small entities that are either: (i) shareholder-proponents that submit Rule 14a-8 proposals, or (ii) issuers subject to the federal proxy rules that receive Rule 14a-8 proposals. The RFA defines "small entity" to mean "small business," "small organization" or "small governmental jurisdiction."[329] The definition of "small entity" does not include individuals. For purposes of the RFA, under our rules, an issuer of securities or a person, other than an investment company, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year.[330] We estimate that there are approximately 881 issuers that are subject to the federal proxy rules, other than investment companies, that may be considered small entities. We are unable to estimate the number of potential shareholder-proponents that may be considered small entities;[331] therefore, we request comment on the number of these small entities.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

As noted above, the primary purpose of the proposed amendments is to balance shareholders' ability to submit proposals with the attendant burdens for companies and other shareholders associated with the inclusion of such proposals. If adopted, the proposed amendments would likely reduce the number of proposals required to be included in the proxy statements of issuers subject to the federal proxy rules, including small entities. In turn, the

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[329] 5 U.S.C. 601(6).

[330] 17 CFR 240.0-10(a).

[331] For the purposes of our Economic Analysis, we have estimated that there were 22,162,828 retail accounts that held shares of U.S. public companies during calendar year 2017. There were 170 unique proponents that submitted proposals that were included in a company's proxy statement as lead proponent or co-proponent during calendar year 2018. See supra Section IV.B.2. Out of these 170 unique proponents, 38 were individuals and 132 were non-individuals. Thus, no more than 132 of these unique proponents would be considered small entities.

proposed amendments would likely reduce the costs to these issuers of complying with Rule 14a-8. If adopted, the proposed amendments may reduce the number of proposals that shareholder-proponents that are small entities would be permitted to submit to issuers for inclusion in their proxy statements. In turn, these small entities may experience an increase in shareholder-engagement costs to the extent these small entities elect to increase their investment to meet the eligibility criteria or pursue alternatives methods of engagement, such as conducting their own proxy solicitation. The proposed amendments that would require shareholder-proponents to provide written documentation regarding their ability to meet with the issuer and relating to the appointment of a representative would slightly increase the compliance burden for shareholder-proponents, including those that are small entities.[332] Compliance with the proposed amendments may require the use of professional skills, including legal skills. The proposed amendments are discussed in detail in Section II, above. We discuss the economic impact, including the estimated costs and benefits, of the proposed rule to all affected entities, including small entities, in Section IV and Section V, above.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap or conflict with other federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

[332] See supra Section V.B.

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Rule 14a-8 generally does not impose different standards or requirements based on the size of the issuer or shareholder-proponent. We do not believe that establishing different compliance or reporting obligations in conjunction with the proposed amendments or exempting small entities from all or part of the requirements is necessary. We believe the proposed amendments are equally appropriate for shareholder-proponents of all sizes seeking to engage with issuers through the Rule 14a-8 process. While we do anticipate a moderate increase in burden for shareholder-proponents, we do not believe that imposing different standards or requirements based on the size of the shareholder-proponent will accomplish the purposes of the proposed amendments, and may result in additional costs associated with ascertaining whether a particular shareholder-proponent may avail itself of such different standards. For issuers, the proposed amendments would not impose any significant new compliance obligations. To the contrary, the proposed amendments would reduce the compliance costs of affected issuers, including small entities, by decreasing the number of shareholder proposals that may be submitted. For these reasons, we are not proposing differing compliance or reporting requirements or timetables for issuers that are small entities, or an exception for small entities. However, we seek comment on whether and how the proposed amendments could be modified to

provide differing compliance or reporting requirements or timetables for small entities and whether such separate requirements would be appropriate.

We believe that the proposed amendments do not need further clarification, consolidation or simplification for small entities, although we solicit comment on how the proposed amendments could be revised to reduce the burden on small entities.

The proposed amendments generally use design standards rather than performance standards in order to promote uniform submission requirements for all shareholder-proponents. We solicit comment as to whether there are aspects of the proposed amendments for which performance standards would be appropriate.

G. Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments 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; and
- How to quantify the impact of the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[333] the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VIII. STATUTORY AUTHORITY

The amendments contained in this release are being proposed under the authority set forth in Sections 3(b), 14 and 23(a) of the Exchange Act, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

[333] 5 U.S.C. 801 et seq.

TEXT OF THE PROPOSED AMENDMENTS

In accordance with the foregoing, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. No. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Amend § 240.14a-8 as follows:

    a. Revise paragraphs (b)(1) and (2);

    b. Revise paragraph (c); and

    c. Revise paragraph (i)(12).

The revisions read as follows:

§ 240.14a-8. Shareholder proposals.

* * * * *

(b) * * *

(1) To be eligible to submit a proposal, you must satisfy the following requirements:

(i) You must have continuously held:

(A) At least $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years; or

(B) At least $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or

(C) At least $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year; and

(ii) You must provide the company with a written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with § 240.14a-8(b)(1)(i)(A) through (C), through the date of the shareholders' meeting for which the proposal is submitted; and

(iii) You 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; and

(iv) If you use a representative to submit a shareholder proposal and/or otherwise act on your behalf in connection with the shareholder proposal, you must provide the company with written documentation that:

(A) Identifies the company to which the proposal is directed;

(B) Identifies the annual or special meeting for which the proposal is submitted;

(C) Identifies you as the proponent and identifies the person acting on your behalf as your representative;

(D) Includes your statement authorizing the designated representative to submit the proposal and/or otherwise act on your behalf;

(E) Identifies the specific proposal to be submitted;

(F) Includes your statement supporting the proposal; and

(G) Is signed and dated by you.

(v) For purposes of paragraph (b)(1)(i)(A) through (C), you may not aggregate your holdings with those of another shareholder to meet the requisite amount of securities.

(2) The following methods may be used to demonstrate eligibility to submit a proposal:

(i) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with § 240.14a-8(b)(1)(i)(A) through (C), through the date of the meeting of shareholders.

(ii) If, like many shareholders, you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(A) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held at least $2,000, $15,000, or $25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively. You must also include your own written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with § 240.14a-8(b)(1)(i)(A) through (C), through the date of the meeting of shareholders; or

(B) The second way to prove ownership applies only if you were required to file, and filed, a Schedule 13D (§ 240.13d-101), Schedule 13G (§ 240.13d-102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter), and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents or updated forms, demonstrating that you meet at least one of the share ownership requirements under § 240.14a-8(b)(1)(i)(A) through (C). If you have filed one or more of these documents with the SEC, you may demonstrate your eligibility to submit a proposal by submitting to the company:

(*1*) A copy of the schedule(s) and/or form(s), and any subsequent amendments reporting a change in your ownership level;

(*2*) Your written statement that you continuously held at least $2,000, $15,000, or $25,000 in market value of the company's securities entitled to vote for at least three years, two years, or one year, respectively; and

(*3*) Your written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with § 240.14a-8(b)(1)(i)(A) through (C), through the date of the company's annual or special meeting.

(c) *Question 3:* How many proposals may I submit? 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.

* * * * *

(i) * * *

(12)(i) *Resubmissions*. If the proposal addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the

preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

(A) Less than 5 percent of the votes cast if previously voted on once;

(B) Less than 15 percent of the votes cast if previously voted on twice; or

(C) Less than 25 percent of the votes cast if previously voted on three or more times.

(ii) A proposal that is not excludable under § 240.14a-8(i)(12)(i)(C) may nevertheless be omitted if it deals with substantially the same subject matter as proposals previously voted on by shareholders three or more times in the preceding five calendar years if, at the time of the most recent shareholder vote, the proposal:

(A) Received less than 50 percent of the votes cast; and

(B) The percentage of votes cast declined by 10 percent or more compared to the immediately preceding shareholder vote on substantially the same subject matter.

* * * * *

By the Commission.

Dated: November 5, 2019.

Vanessa A. Countryman,

Secretary.

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