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

February 3, 2020

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

Dear Secretary Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), I write to comment on the Securities and Exchange Commission's (SEC or Commission) proposed rule entitled Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Proposed Rule or Release).[1] Specifically, the Proposed Rule would add unnecessary complexity to an already intricate system, create legal uncertainty with state law requirements, and add substantial costs to the shareholder engagement process. Further, the Proposed Rule appears to be insufficiently supported by data, and so would be subject to legal challenge on the grounds that it does not appear to satisfy the requirements of the Administrative Procedures Act. We believe that shareholders' rights should be strengthened to produce a better company-shareholder engagement system. In concert with other shareholders, we need to be able to engage and act, as owners, with our portfolio companies.

The Proposed Rule would go in the opposite direction. It would undermine shareholder democracy and limit our ability to engage constructively and advocate for policies that positively influence long-term share value. More directly, it undervalues the importance of shareholder oversight. Rather than restrict company-shareholder engagement, as the Proposed Rule would, we urge the SEC to enhance communications with and rights of shareholders in the proxy process. However, if the Commission persists in its misguided course of limiting shareholder engagement, we ask that the Commission make less dramatic changes in the ownership and resubmission thresholds and avoid imposing any new or revised restrictions on relevant state laws.

[1] *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8*, 84 Fed. Reg. 66458 (Dec. 4, 2019), at https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24476.pdf.

I. BACKGROUND

As the largest public defined benefit pension fund in the United States (U.S.), we manage approximately $400 billion in global assets on behalf of more than 1.9 million public employees, retirees, and beneficiaries. Our duty to pay benefits decades into the future requires that we take a long-term view when assessing whether the companies that we hold in our portfolio are effectively managed.

As outlined in our Governance and Sustainability Principles (Principles), our proxy voting responsibilities cover a wide range of corporate governance issues, and we use our Principles to engage constructively with companies to improve their strategies and governance. Furthermore, we will file shareowner proposals as a means to voice concerns as a responsible shareholder with a long-term view, and therefore we find that Rule 14a-8 is a critical process in company-shareholder engagement. In fact, we find that the mere ability to file shareholder proposals pursuant to the 14a-8 process assists us in our private communications with corporate executives on key areas.

We are not new to using the shareholder engagement process. CalPERS has advocated for shareholder rights for decades. In 1989, we wrote a letter to the SEC focused on "the practical contours of the role of shareholders in the governance of public companies."[2] In that letter, we highlighted deficiencies in the then-existing system that made it difficult for shareholders to play effective roles as active owners. We made forty-eight specific recommendations "to enhance the opportunities for ongoing shareholders to be participants in the dialogue of corporate governance."[3] We acted on our belief that "responsible and engaged shareholders have significant contributions to make as advocates – sometimes unilaterally and sometimes in conjunction with other shareholders – of policies and practices aimed at maximizing long term share values."[4] Although the letter initiated much discussion and produced some rule amendments, many of our concerns were not addressed.[5]

As time has passed, evolution of corporate practices (such as the growth of corporate leverage, executive compensation, and other concerns) have necessitated even further shareholder engagement. Accordingly, CalPERS continues to support enhancing shareholder rights and improving processes to facilitate communications between companies and their shareholders.

II. USE OF PROXY PROPOSALS

Rule 14a-8 provides a mechanism for shareholders to have their proposals included in a company's annual proxy statements to other shareholders. This process "facilitates

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[2] Letter from Richard Koppes, CalPERS General Counsel, to Linda C. Quinn, Director, Division of Corporation Finance, SEC (Nov. 3, 1989).
[3] Id.
[4] Id.
[5] Fisch, Jill E., *"From Legitimacy to Logic: Reconstructing Proxy Regulation" (1993).* Faculty Scholarship. Paper 1287. http://scholarship.law.upenn.edu/faculty_scholarship/1287. Stating that "[t]he extent to which the federal proxy rules frustrate shareholder democracy has been chronicled extensively. Many of these issues were brought to the attention of the SEC by the CalPERS letter, but the SEC chose not to address them. (1198-1199)

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."[6] However, these shareholder proposals are subject to significant procedural and substantive requirements.

Companies may exclude shareholder proposals that they believe fail to meet procedural and substantive requirements.[7] In order to protect themselves from potential subsequent action by the SEC for failure to include shareholder proposals in their proxy materials, companies have come to frequently rely on the SEC staff offering "no action" relief.[8] For example, as of January 24, 2020, the staff has been asked by companies to offer relief on 49 shareholder proposals for the 2019-2020 proxy season.[9]

However, companies are not always opposed to including shareholder proposals in their proxy materials. For example, a company may agree to permit inclusion of any proposal that it sees fit, without taking any position on whether the proposal would itself comply with the requirements of Rule 14a-8 (or even other substantive law).[10]

Perhaps one of our most significant concerns with the Proposed Rule is that it essentially ignores the critical role that shareholder proposals play in fostering communications between shareholders and the companies they own. Instead, the Release focuses on simply the rates at which proposals are adopted (or not). That is far too narrow of a view.

Shareholder proposals are a key component of our efforts to continuously engage with companies on areas of concern. We engage in private discussions with management. We send letters. We support others' shareholder proposals. And we sometimes offer our own. Put simply, we seek to use the tools available to us as shareholders to ensure we are fulfilling our fiduciary obligations to our beneficiaries. The Rule 14a-8 process is effectively the key component. When other efforts are unlikely or incapable of adequately addressing our concerns, we must be able to voice our concerns publicly. In this regard, the Rule 14a-8, as it has evolved over time, does far more than just facilitate voting on issues of importance to shareholders. It fosters communications between engaged shareholders and corporate executives.

At the same time, because of the current procedural and substantive constraints imposed by the proxy process itself, the issues for which we seek engagement – and ultimate results we seek – are rarely exhaustively captured by the outcome of a particular shareholder vote. It is

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[6]Release, at 66459.
[7] Release, at 66459.
[8] Late last year, the SEC staff significantly revised its "informal procedures" for evaluating those requests. Informal Procedures Regarding Shareholder Proposals, Division of Corporation Finance, SEC, at https://www.sec.gov/corpfin/informal-procedures-regarding-shareholder-proposals.
[9] 2019-2020 Shareholder Proposal No-Action Responses, SEC, at https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf.
[10] See, e.g., Intuit recently included in its proxy materials a shareholder proposal to adopt bylaws that would compel investor arbitration of disputes. Shareholders of Intuit rejected that proposal by vote in January 2020. However, when faced with a similar proposal in 2018, Johnson & Johnson determined that the proposal was not compliant with the law, and therefore could be rightly excluded from the company's proxy materials. Letter from Mark Gerber, Skadden, Arps, Slate, Meagher, & Flom, LLP, to SEC, Dec. 11, 2018, at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/dorisbehr121118-14a8-incoming.pdf. Upon learning that the proposal would be violative of the laws of New Jersey, where Johnson and Johnson is domiciled, the Commission staff agreed via no-action relief. Letter from M. Hughes Bates, SEC, to Mark Gerber, Skadden, Arps, Slate, Meagher, & Flom, LLP, Feb. 11, 2019, at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf.

wholly inappropriate to measure "success" of a shareholder proposal by solely whether it was passed. In fact, some of the most-effective shareholder proposals may be withdrawn before the shareholder meeting ever takes place. That is how this process is intended to work. It is to tee-up for company management and shareholders to address areas of interest to shareholders which may otherwise be inadequately addressed.

III. DECLINE IN SHAREOWNERS' RIGHTS IN THE UNITED STATES

On average, a U.S. company receives a shareholder proposal once every 7.7 years.[11] The number of shareholder proposals is generally quite low and has already been in decline over the past 15 years. As the Release notes:

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. Results are qualitatively similar when we compare voted rather than all submitted shareholder proposals for S&P 500 and Russell 3000 companies.[12]

Despite a substantial decline in the number of shareholder proposals since 2004, the SEC has chosen to propose several amendments that will each further reduce the number of proposals and weaken shareholders' ability to monitor companies. To us, the data shows a need to improve the balance of power in favor of shareholders, but the Proposed Rule makes a giant step in the opposite direction.

While much has changed in the usage of shareholder proposals since 1989, the political debate between company managers and shareholders has not. Decades of aggressive lobbying and lawsuits[13] have dramatically weakened shareholder democracy in the U.S., particularly when compared to other major jurisdictions. Buttressed by decades of ever-expanding no-action letters from the SEC staff, companies have come to exclude wide swaths of unwelcome shareholder proposals on issues of keen shareholder interest and consideration.[14]

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[11] Transcript Shareholder Proposals Panel Proxy Roundtable Securities and Exchange Commission, November 15, 2018, comments by Brandon Rees on pages 11 and 12. Rees offers, "The facts are that the average publicly listed company in the United States can expect to receive a shareholder proposal once every 7.7 years. Determined by dividing the number of publicly traded companies by the average number of proposals in a given year.

[12] Release, at 74.

[13] See, e.g., Al-Alami, Leen, "*Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Litigation"* (2013) Discusses eight cases in which the company side of the company-shareholder debate successfully sued the SEC to strike SEC rules based on the following: going beyond limits of authority (Business Roundtable I), improper interpretation of a statute(Teicher), failure to consider efficiency, competition, and capital formation Chamber of Commerce I), relying on information not in the record (Chamber of Commerce II), conflicts with statutory purpose (Goldstein), exceeding authority (Financial Planning Assn), failed to consider efficiency, competition, and capital formation (American Equity), and acting arbitrarily and capriciously for not assessing economic effects (Business Roundtable II)

[14] While not the subject of the Release, we urge the SEC to, pursuant to its announced review of staff-views including no-action letters, consider repealing or significantly revising many of these past no-action letters. Statement Regarding Staff Views, Chairman Clayton, SEC, Sept. 13, 2018, at https://www.sec.gov/news/public-statement/statement-clayton-091318. Each of those letters has the effect of restricting shareholders' ability to engage with companies they own, and so we urge that these letters be narrowly tailored.

In the U.S., CalPERS votes in more than 3,000 annual meetings, yet we see fewer than 500 shareholder proposals in a given year. Fewer than 220 out of 65,000,000 U.S. shareholders file shareholder proposals each year, but the Proposed Rule would eliminate some of that.[15] The majority of U.S. public companies have never held a vote on a shareholder proposal because proposals are actually rare, and proponents primarily target large companies.

It is interesting that so much critical attention is being given to proposals and proponents without a similar critical examination of companies. Since most shareholder proposals are non-binding, companies routinely ignore them, including those that win majority support.[16] In light of these facts, we believe the SEC should modify its rules to protect investors by enhancing shareholder rights instead of further shifting power in favor of company management to reduce shareholder rights.

IV. CALPERS' CONCERNS WITH THE PROPOSED RULE

Unfortunately, the Proposed Rule embraces amendments promoted solely by certain Corporate Lobbyists[17] without giving much weight to company or investor voices. This is a critical problem because the Proposed Rule disenfranchises[18] shareholders of all sizes, including CalPERS. It effectively removes a key tool in the shareholder engagement toolkit. It is also important to note that under the Proposed Rule, no additional exclusions are added to keep unwanted proposals from the proxy, so the only proposals targeted for elimination come from a pool that meets all existing complex requirements, including those that produce substantial value to shareholders.[19]

Put simply, the Proposed Rule ***exclusively*** authorizes companies to exclude shareholder proposals that are currently appropriate for shareholder consideration, in proper form, and timely filed. With regard to so called "valueless proposals," the Proposed Rule does nothing because most of those are quickly dealt a death blow in our already well-established (and remarkably intricate) system.

Below, we address each section of the amendments included in the Proposed Rule and provide our views.

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[15] We suspect that the paucity of shareholder proposals in the U.S. may have many contributors, not the least of which is the daunting, complex requirements and legal process already established in the Rule 14a-8 process. In our experience, having a shareholder proposal included in a company's proxy materials requires significant legal and policy expertise, which may come at significant cost to shareholders. This would be an appropriate burden for the SEC to consider relieving.

[16] Release, at 91 (stating that "previous studies have shown that between 31% and 56% of the shareholder proposals that received majority support were implemented by management, and this percentage has increased over time.").

[17] Corporate Lobbyists have changed over time but now include, but are not limited to; The Business Roundtable, The U.S. Chamber of Commerce, The Center of Executive Compensation, The Main Street Investors Coalition and the Society of Corporate Governance.

[18] Merriam- Webster- Disenfranchise: to deprive of a franchise, of a legal right, or of some privilege or immunity. This definition is used to highlight that it is properly used in this context given that it extends beyond voting.

[19] 1934 Act Rule 14a-8 provides thirteen bases pursuant to which public companies may exclude proposals from their proxy materials and there are numerous procedural requirements regarding timing and process.

A. Ownership Thresholds

The shareowner proposal process was intended to replicate the rights of shareowners at annual meetings under state law.[20] In 1943, SEC Chairman Ganson Purcell stated:

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.[21]

When Rule 14a-8 was adopted, there were no ownership or timing requirements for the submission of shareholder proposals.[22] The principle articulated by SEC Chair Purcell allowed an owner of one share to file a shareholder proposal regardless how long that share had been held. Companies benefit in the proxy system by being able to use proxy voting to meet quorum requirements for annual meetings.[23] This early company-shareholder trade seems reasonable. Shareholders maintain the expected basket of shareholder rights, and companies reach quorum requirements. Unfortunately, with the Proposed Rule, the SEC, without adequate explanation, stretches its ostensible authority in a direction that is very different from the original intent.

For four decades, the SEC insisted that any shareholder could submit proposals, and while it considered imposing ownership requirements on submitters, it ultimately rejected them.[24] Then, in 1983, the SEC took its first significant steps to strip rights from shareholders by granting Corporate Lobbyists' wishes to exclude valid shareholder proposals. At that time, the SEC created an arbitrary requirement that shareholders must own at least $1,000 of the company for at least one-year.[25] Then in 1998, the SEC, again agreeing with Corporate Lobbyists, raised the threshold to $2,000.[26] Although the SEC has reviewed the $2,000 threshold often since 1998, it had consistently decided to maintain the $2,000 requirement. Now, after a long campaign, Corporate Lobbyists have convinced the SEC that a dramatic increase in the threshold is warranted, without showing any signs of system abuse.[27] To the contrary, the data provided by the SEC itself in its own Release suggests that the number of shareholder proposals is generally significantly less than it was decades ago.

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[20] Fisch, at (1142), "In adopting early proxy rules, the SEC described its mission as an attempt to replicate the old-style annual meeting that was personally attended by shareholders;" Comments of SEC Chairman Cox during Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law, May 7, 2007. Stating, "The system that Congress authorized the SEC to devise was meant to replicate as nearly as possible the opportunity that shareholders would have to exercise their voting rights at a meeting of shareholders if they were personally present."

[21] Security and Exchange Commission Proxy Rules, Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess. 172 (1943) (statement of SEC Chairman Ganson Purcell).

[22] Release, at 13 (noting that "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. … 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."),

[23] Fisch, at 1135.

[24] See, e.g., Adoption of Amendments Relating to Proposals by Security Holders, SEC, Exch. Act Rel. No. 34–12999, 41 Fed. Reg. 52994 (Dec. 3, 1976).

[25] See Proposed amendments to Rule 14a-8, Release No. 34-19135 (Oct. 14, 1982) at 47420-21.

[26] See Amendments to Rules On Shareholder Proposals, Release No. 34-40018 (May 21, 1998)

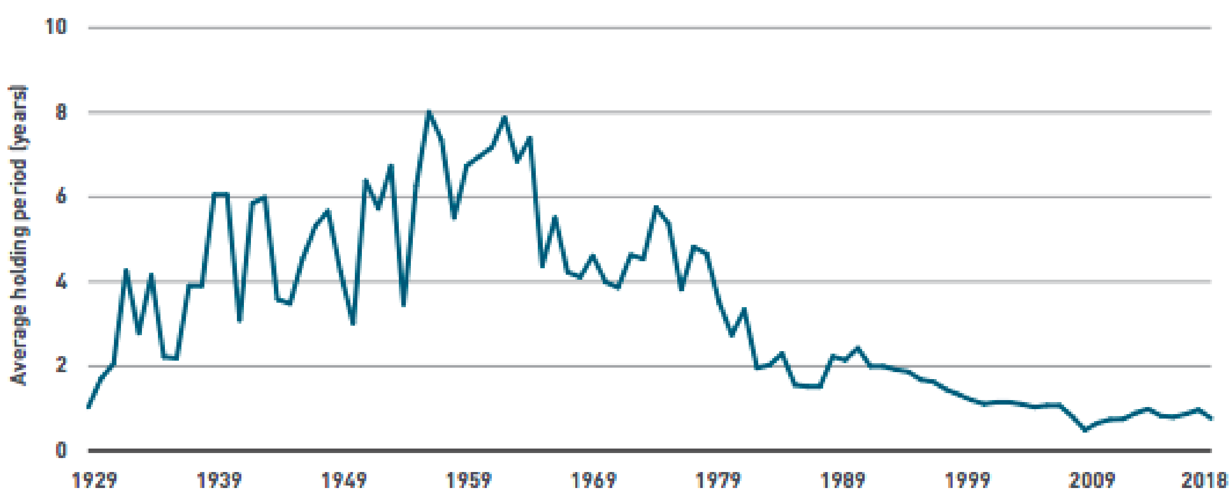
[27] See; The Business Roundtable, *Responsible Shareholder Engagement and Long-Term Value Creation* (Oct.2016), at 5 and Rulemaking Petition from the U.S. Chamber of Commerce, National Association of Corporate Directors, National Black Chamber of Commerce, American Petroleum Institute, American Insurance Association, The Latino Coalition, Financial Services Roundtable, Center on Executive Compensation, and Financial Services Forum, April 9, 2014.

Under the Proposed Rule, a shareholder would have to hold an 11.5 times greater value in a company to have the same rights to file as today. This is a significant change that will disenfranchise most shareholders, including CalPERS[28] and end the tradition of small shareholders fully participating in shareholder democracy.[29] Put simply, it will deny all shareholders of the opportunity for engagement on issues of interest to them. CalPERS benefits directly and indirectly by learning of issues of interest voiced by smaller investors. This fact is wholly ignored in the Proposed Rule. Only a very tiny fraction of investors will have enough assets invested in a company to qualify for the proposed new ownership thresholds. Put simply, the Proposed Rule would explicitly establish a U.S. market wherein only the extraordinarily wealthy may have their materials included in a company's proxy materials in a timely manner. Those without the ability to own such significant holdings for extended periods would thus, if they want to engage a company and submit an issue to shareholders for consideration, then be forced to incur legal and cost burdens that would far exceed those of their larger counterparts. The SEC seems completely unaware of the fact that it is seeking to further silence those with the weakest voices.

Aside from the dollar threshold, the SEC has seemingly ignored the impact of the holding period requirement. When the one-year duration requirement was first adopted, the average stock holding period spanned several years. Today, the average stock holding period in the U.S. is under nine months.[30]

Exhibit 1: Short holding periods: Lack of conviction?

NYSE average holding periods, 1929 – 2018



Sources: Barron's, IDC, as of 12/31/18.

[28] CalPERS is an index investor. The Proposed Rule may reduce our rights in more than 60 investments where we have invested less than $25,000. These smaller investments are more likely to roll in and out of the index making them more likely to be impacted by the timing requirement as well. In any event, the Proposed Rule reduces the rights of most U.S. shareholders without offering any benefits to investors.

[29] Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law (May 20027) Transcript. Professor Neuhauser, "But the idea that the smaller shareholder should be able to participate is important. That's certainly our tradition."

[30] Ted Maloney and Robert Almeida, Jr., *Lengthening the Investment Time Horizon*, MFS, Nov. 2019, at https://www.mfs.com/content/dam/mfs-enterprise/mfscom/insights/2019/November/mfse_time_wp/mfse_time_wp.pdf.

This fundamental market-wide change in investing behavior is not addressed in the Proposed Rule, despite the fact that this duration requirement now eliminates a far greater percentage of investors when the holding period was first adopted.

Further, the Proposed Rule creates additional concern because the ownership values derived for the new tiered approach appear to have no basis. In the Release, the SEC suggests that the single year threshold might be $3,152 if it were simply adjusted for inflation[31] or $8,379, if it were adjusted in line with the increase in the Russell 3000.[32] Using those two numbers creates a range of $3,152 to $8,379. Interestingly, this range is then ignored in the rest of the Release. Rather than use the $3,152 to $8,379 range that is presented in the Release, the SEC arbitrarily settles on tiered amounts of $25,000, $15,000, and $2,000 for again arbitrarily-selected one, two, and three-year holding periods. For comparison purposes, the average of the three amounts is $14,000, which is seven times the existing one-year share ownership number and outside the boundaries of the presented range. Rather than developing an economic or market-based approach that is consistent with the history of the threshold, the SEC has developed the tiers out of whole cloth and for the first time requiring "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 system."[33] At first glance, this does not appear to be a bad principle, except that it was not included in the initial legislation. By adopting this approach, the SEC makes a significant shift from the original one-share no holding period requirement and instead creates a targeted outcome that harms investor rights, especially those with less money invested. Such approach could not have been taken by SEC Chair Purcell in 1943 in light of the originating legislation, yet the SEC fails to explain where it gets the authority to diverge so far from the original intent.

In the Release, the SEC only provides a summary of the tiered approach, which barely scratches the surface in what would be required for a workable rule with the described tiers. Court cases show that shareholders currently have difficulty defending the existing, lower one-year ownership requirement when companies decide to force shareholders to prove ownership.[34] There is no doubt that providing the level of proof required in the existing rules for a three-year period will be more difficult. Problems arise when shareholders move accounts or brokers or advisors merge or restructure. A shareholder can maintain the proper level of ownership in a company and not be able to file a proposal because it cannot prove consistent ownership of the same shares because of transitions in the normal course. Proving any ownership requirement is made more difficult given the structural issues with the rule already noted by courts.[35]

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[31] Release at 19, see footnote 55.

[32] Id. (but noting it is unusual to make a Russell 3000 comparison for such adjustments especially since the basket of stocks changes significantly over the time period.)

[33] Release at 22.

[34] Apache Corp. v. John Chevedden, 696 F. Supp. 2d 723 (S.D. Tex. 2010) Apache successfully argued that Chevedden did not meet the technical ownership requirements as specifically prescribed in the rule. Chevedden had provided a certification from his introducing broker. A statement from the record holder evidencing documentary support of continuous beneficial ownership is required. The most sophisticated proponents have trouble documenting the one-year requirement. They even have trouble figuring out who meets the definition of record holder. With the Proposed Rule, the SEC creates a substantially more difficult problem because record keeping is more difficult after three years.

[35] Id. The court went by the strict language in the rule given that an actual owner of shares may not be the registered owner or record owner by definition so a broker letter recording holdings did not suffice and only a letter from DTC or CEDE & Co. would meet the express language in the rule. Chevedden had records he owned the required shares, but those records did not match what the rule required.

Granted, if any registrant would like to treat shareholders differently based on how long shares are held, such registrant could adopt such process by amending its bylaws with the approval of its own shareholders. Here, without a single test case that would signal desire or effectiveness, the SEC proposes a requirement that gives preferred treatment to certain shareholders based on value owned without a company going through the normal formalities to effectuate such change, including a shareholder vote. If the Proposed Rule is implemented as written, the SEC would override state laws and rewrite company articles of incorporation and bylaws. Once initiated, it is unclear what future Commissions might do with such power. Of course, the SEC assumes that if it has the power to set a reasonably low ownership threshold which was never envisioned in the legislation that it must have the power to substantially raise the threshold or even create complex tiers.

Most importantly, it appears that the SEC has proposed a rule that may actually discourage investment in smaller companies, solely to prevent larger companies from getting shareholder proposals. This effect is evident in the implications for CalPERS' ability to submit shareholder proposals. CalPERS is an index investor. In many indexes, company size is one factor in determining investment allocations. As of January 5, 2020, CalPERS had investments below $25,000 in more than 60 U.S. public companies and would, if the proposal were adopted, lose rights to offer proposals for some of those companies. It is reasonable to assume that many other index investors will be similarly affected given that the largest U.S. registrant is about 200,000 times the size of the smallest.[36] The Release made no attempt to quantify the number of investors whose rights would be lost.

The mix of factors relied upon by investors when making investment decisions may be materially altered if they are unable to offer their proposals for consideration by other shareholders. For some investors, the Proposed Rule may cause them to alter their existing investment strategies by divesting the smaller stakes, usually in smaller companies, from their portfolios completely. In other words, in adopting the Corporate Lobbyists agenda by disenfranchising shareholders, especially small ones, the SEC will also likely harm small companies. Notably, this outcome conflicts with the SEC's mission to facilitate capital formation and Chairman Jay Clayton's agenda, which seeks to encourage private companies to go public earlier in their development cycle. Investors already struggle with allocation decisions. The SEC should not provide an additional push away from continued ownership in small companies. All broad index investors will be similarly impacted, and it is highly likely that some, especially when coupled with the impact of Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice and associated increased cots, will choose to change allocations to a smaller number of stocks. In any event, the SEC should have included substantial analysis on how changes and expenses in the two rules, when taken together, might impact investments in smaller companies.

Lastly, we note that CalPERS has consistently supported maintaining a single, low dollar ownership requirement.[37] If the SEC were to raise that threshold, we would urge it to not

[36] Our internal analysis shows that it would require an investment of $160 Billion in U.S. public equities in order to obtain a $25,000 investment in the smallest company in a particular index.
[37] Letters in response to the Proxy Process Roundtable from CalPERS dated December 11, 2018, supporting maintaining $2,000 threshold.

exceed indexing it for inflation, which would make the new threshold $3,000.[38] Further, we would additionally urge the Commission to consider changing the duration of the ownership requirement so as to better reflect the significant changes to holding periods during the years since the one-year requirement was established.

B. Proposals Submitted on behalf of Shareholders

CalPERS believes that the Proposed Rule should support shareholders working together. Collective engagement is an integral part of shareholder democracy; this includes the ability of agents to act on behalf of other shareholders. In an effort to address some companies' concerns with valid shareholder proposals offered by one prolific proponent, the Proposed Rule would dramatically reduce the ability of all shareholders to effectuate change at the companies they own. It also brings the SEC into rewriting state agency law and potentially violating the First Amendment, because the rule reduces the rights of shareholders to associate freely.[39] We believe state laws already appropriately address agency issues, including the requirements necessary to act on behalf of another in filing a proposal. If the requirements of state law are not met, companies already have recourse, as shown by court cases on the topic.[40]

By adopting its own agency requirements, the SEC creates a minefield for shareholders seeking to exercise our rights. The directions provided by the SEC in the Proposed Rule do not include the detail and history already embedded in state law requirements. Based on the current draft, practitioners are not certain what the SEC would require of shareholders, or what a critical company might be willing to accept when a shareholder uses a representative to file a proposal. The SEC appears to assume the power to adopt this provision and also assumes that no state government will resist the modification of internal state laws that have the impact of reducing constituent rights. This may ultimately be the case, as the SEC has certain broad powers that have only been limited by the Corporate Lobbyists advocating for the Proposed Rule in order to reduce shareholder rights.[41] In any event, the Release should have included a discussion on the SEC's authority to regulate agency requirements when such has always been the domain of the states.[42] Interestingly, if courts decide the SEC has the power to change state agency law, future Commissions may modify additional state laws for other purposes. We believe it is best not to open the door. But the reality is that this bears a close resemblance to the issue in Business Roundtable I,[43] where the court instructed the SEC to leave what is normally within the purview of state law to the states. The Release admits as much stating that "this practice has [always] been governed by state agency law.[44] If the SEC has the authority under its broad power to regulate proxies, we still have a problem because the Release never discusses what would be

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[38] $3,000 is rounded down from $3152 provided in the Release, as the inflation adjusted number.

[39] See e.g., Apple No-Action Letter dated (December 17, 2013). Chevedden argued freedom of association rights and pointed out that companies often use agents in the form of law firms to communicate regarding Rule 14a-8 to highlight the unfairness of keeping shareholders form working with people possessing the necessary skills to navigate the rule.

[40] Waste Connections, Incorporated v. John Chevedden; James McRitchie; Myra K. Young, 2014 WL 554566 (5th Cir. Feb. 13, 2014). This is one of the cases attempting to prevent shareholders from working together to file a valid governance proposal. The SEC allows submission by proxy, but companies have successfully used courts to disallow proposals based on technicalities that requires compliance with specific provisions in the rule. The bottom line is that there is an active and settled system for this process.

[41] See. Al-Alami in footnote 5.

[42] Release at 29.

[43] Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).

[44] Release at 29.

required for the transition, the costs of such change, or the confusion it will create with the many states to eliminate a handful of proposals each year.

The amendment clearly would limit shareholders' ability to work with the agents they choose. The Proposed Rule focuses on a narrow section of the market (individuals acting on behalf of individual shareholders to file a proposal) and confuses many who commonly and appropriately act as representatives, such as an employee of a shareholder.[45] Although Corporate Lobbyists provide anecdotes of shareholders not knowing or understanding the details of a proposal on their behalf, it is important to note that no principal has made such complaint against an agent acting in such capacity. We see no reason for additional rules when the current ones are broken rarely, and companies have made use of the existing state laws to exclude otherwise valid proposals.[46] Moreover, companies always have the final say on non-binding proposals because it may choose not to implement a majority winning proposal. Any final rule addressing representatives must include substantially more detail to provide guidance to the myriad of different types of representatives active in the process and to coordinate with the various existing state laws. If adopted, state agency laws will have to be modified, and company by-laws will have to be reviewed to determine whether they too must be amended to reflect the new processes and establish the context in which shareholders will look to the SEC for the agency law requirements. Without the state law backdrop, the SEC will have to create substantially more robust rules than are proposed in the Release or develop creative ways to attach its vision to the agency law requirements of the many states. Finally, because these necessary steps are not included in the Proposed Rule their costs are not taken into consideration and compared to the benefits of excluding a handful of shareholder proposals each year.

C. Role of Shareholder Proposal Process in Shareholder Engagement

As discussed above, effective company-shareholder engagement, when necessary, is critically important, and we believe is essential to fulfilling our fiduciary duties. After spending the last several decades revising shareholder requirements and expanding no-action letters so as to thwart shareholder engagement, the Release seems to imply that the current lack of engagement is the fault of shareholders. In our experience, U.S. companies generally avoid engagement and shareholders generally embrace it. When shareholders have the right to file a proposal, companies are more motivated to engage. Given the Proposed Rule would reduce the number of shareholders who could offer proposals as well as the number of proposals offered, the company-shareholder engagement dynamic in the U.S. will be weakened.

During the Commission's 2007 Roundtable on company-shareholder engagement, one panel firmly established that U.S. companies are behind other jurisdictions, like the U.K., in company-shareholder engagement.[47] We have seen marked improvement in company-shareholder

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[45] Several practitioners have noted that the guidance is confusing. Correcting the deficiencies will require that the SEC obtain input from the very practitioners that are being disenfranchised. The business groups promoting the Proposed Rule amendments have not participated in the shareholder proposal process directly and may be unfamiliar with the existing requirements.

[46] Waste Connections at 27., Apache Corp. v. John Chevedden, 696 F. Supp. 2d 723 (S.D. Tex. 2010).

[47] See 10. Roundtable 2007. Comment by Grundfest, "To summarize that wonderful summary of British law (by Mr. William Underhill), as I understand it, there are fewer formal rules and much more shareholder access and interaction. So, in other words, you're getting the result that many people in the United States want with a far simpler legal and regulatory mechanism." Ex. Under UK law, rejecting a shareholder resolution is a criminal offense. As such, directors in the UK spend the company's money and put the resolution rather than take personal risks.

engagement since 2007, with some companies creating departments specifically to engage, but there is still significant room for improvement. Many companies still prefer to pay Corporate Lobbyists, rather than talk to shareholders or address the concerns their shareholders raise. The SEC's approach in this section conflicts with the reality on the ground. For example, CalPERS wrote to 685 companies from the Russell 3000 with no female directors on their boards to discuss board diversity. After two attempts, 44 percent of those companies still had not responded to us. Other shareholders have had similar experiences on certain issues. Following the lead of Corporate Lobbyists, the Proposed Rule fully adopts the company perspective that shareholders avoid engagement, but our experience with non-responsive companies trying to avoid adding women to their boards tells a different story. CalPERS actively works to enhance communication with companies by using available tools, including filing shareholder proposals, if necessary. We did exactly that to get some of the 300 non-responsive companies to engage. Under the Proposed Rule, CalPERS might file a proposal to get a non-responsive company to engage on a topic and then have to provide a schedule of availability for engagement to a non-responsive company; however, the company, the party that has avoided engagement, would have no such requirement. This makes no sense, yet it is the response to anecdotes contributed by Corporate Lobbyists.

We would like the SEC to promote company-shareowner engagement through a more balanced approach. To do so, the SEC would have to impose corresponding requirements on companies. It would be great if the SEC encouraged engagement outside of the proposal process as well. This would effectively reduce the number of shareholder proposals. It is important to note that creating a more formal system for engagement within the shareholder proposal process may strengthen such engagements while weakening engagements outside of that process. We fear that the stated requirement might have the additional unintended consequence of forcing shareholders to file proposals just to get a company to communicate. Therefore, we believe that micromanaging one side of the company-shareholder engagement process is more likely to reduce engagements, frustrate the process, and weaken the system.

Certain assumptions in the Release that large shareholders have certain privileges with companies that are not available to other shareholders are largely distorted. As noted above, companies have failed to engage initially with CalPERS on adding women to boards. Certain companies routinely avoid engaging and therefore receive proposals. The Proposed Rule is actually created to support such companies rather than supporting companies that actively engage with shareholders in the normal course. The Proposed Rule does nothing to address company engagement practices in the normal course or after a proposal has been filed. It attacks shareholders as being deficient and rewards companies by making them do nothing different. From our perspective, this is a troubling outcome given certain companies are the real problem. It is more troubling that the SEC develops an entire amendment having given weight to anecdotes provided by Corporate Lobbyists that sue the SEC. There should be real data to determine how often shareholders decline to communicate compared to the number of times companies fail. Our one example above provides more than 300 instances where companies have failed.

In sum, amending the rules to micromanage shareholders only makes the real problem in company-shareholder engagements worse. A better approach would be to adopt an overarching policy promoting company-shareholder engagement outside of the shareholder proposal process. Interestingly, encouraging engagement in the normal course would reduce the number of proposals without reducing shareholder rights. We think that a company that fails to engage when given the opportunity should lose its right to exclude the shareholder proposal of a proponent that requested the engagement. In any event, if the SEC desires to micromanage shareholders then it should include a corresponding requirement for companies.[48]

D. One-Proposal Limit

The Proposed Rule's one-proposal limit is unnecessary because the existing one-proposal limit works and does not violate a shareholder's right to choose a representative of their choice as under state agency law. Currently, by the time a person submits a shareholder proposal, almost all shareholders have voted by proxy, and in many cases, those votes have already been counted and the press release drafted. Adding an additional requirement that would override existing agency law[49] and discard votes that have been counted is harsh and creates a weaker proxy system. The ability to file a shareholder proposal is a component of a larger system of company-shareholder engagement. The new one-proposal limit damages the larger process creating a more adversarial system than the one contemplated under state laws. Assuming the SEC has the power to mandate this change, making it effective may take substantially more work than is contemplated in the Release.

Given the proxy system, very few regular shareholders attend the annual meeting. Thus, submitting the shareholder proposal is purely an administrative formality. In fact, in some cases, for convenience, companies agree with proponents to submit their shareholder proposals, so the shareholder does not have to travel to the meeting to read a two-minute script to board members. The Proposed Rule appears to end a good thing and that is the practice of certain companies working with their shareholders. Granted, if the proposal is not submitted, the company may choose to ignore the proposal and the proxy votes for it. By disallowing a representative to read the short script purely because she has submitted or filed another proposal at the same meeting is unreasonable and not supported by state laws that actually regulate corporate annual meetings. In fact, we are not aware of any state law that prevents shareholders from using their chosen agent even if that agent has already spoken once at the meeting. Therefore, it concerns us that the SEC prefers its own approach that would override state law (assuming the SEC has the power to do so) and company bylaws in order to disregard proxy votes that have already been counted. The Release highlights that this is an issue with only 2 percent of the proposals or roughly 7 per year,[50]and it occurs late in the process after the shareholder proposal is in the proxy and has been voted on. In other words, all of the costs have been made on the proposal and the only thing that is left to do is record

[48] See, Comment by Kerrie Waring, Chief Executive Officer of International Corporate Governance Network (ICGN), "a similar requirement for shareholder engagement should be introduced for companies," in its response to the Release.
[49] Restatement (Third) of Agency; A review of agency law raises concerns regarding what will have to happen in order to effectively effectuate prohibiting a principal from working with a chosen agent. Assuming the SEC has the power to do this, additional steps would be necessary, such as reviewing the constitutive documents of each registrant to determine whether amendments are necessary to reflect this change in shareholder rights.
[50] Release at 122.

counted votes. The change may force companies to keep legal representatives under state law from exercising their right in that state after all other work has already been completed.

Normal state agency laws should continue to apply to shareholder proposals. There is no reason why companies and shareholders cannot work together to make the administrative submission a non-issue, as is the case at some companies. Jurisdictions with better company-shareholder engagement require board members to facilitate bringing shareholder matters up for discussion. For example, in the U.K. directors are held personally accountable when a company fails to bring a proper item before other shareholders.[51] While some companies actively work to assist proponents in the process, others work as obstructionists. In this environment, given the votes have already been counted, the SEC should not give obstructionist companies more ammunition.

Given that the board and company staff are the primary audience for the submission, there is no danger of undue influence of shareholders. In the worst case, one person will make two short speeches to the board and company staff. Since the outcome of the vote has already been determined by the time the proposal is submitted, there is no practical reason to change the state approved process for proponents whether they are institutions or individuals. The proposed process would increase the costs of filing a proposal and likely reduce the number of proposals filed slightly, but in order to achieve this outcome, the SEC would discard votes and disregard the laws of each state. Implementing this change may require that each registrant review its constitutive documents to determine whether an amendment to those documents is necessary. In some cases, given that limiting a shareholder's choice of representative may be contrary to applicable state law and company bylaws, a company may not be able to comply without amending its bylaws. Since the amendment would reduce shareholder rights, it may require a vote of shareholders[52] or a change in state law.[53] In other words, the change may force more shareholder votes than it would prevent. Similarly, a survey of state laws should be conducted regarding what needs to happen at the state level to facilitate the proposed change. Finally, this proposed amendment fails the efficiency test. Too many people would be required to do too much work to impact too few proposals, roughly 7 per year.[54]

E. Resubmission Thresholds

We oppose the proposed changes to the resubmission thresholds. Resubmissions are the least costly proposals and the easiest for companies to manage. A company simply has to place the proposal in its proxy. No letters to the SEC are necessary. The company does minimal work,

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[51] See 18. Roundtable 2007. Comments of Underhill speaking of directors in the UK, "That also focuses the directors' minds. So, when It comes to taking a fine judgment on a legal point as to whether the resolution is valid and can be put, directors would usually decide to spend the company's money and put the resolution, convene the meeting or circulate the statement rather than take risks themselves."

[52] See, e.g. Microsoft Bylaws Section 1.13 (b)(iv) which states, "A representation that the Noticing Shareholder intends to vote or cause to be voted such stock at the meeting and intends to appear in person or by representative at the meeting **to** nominate the person or propose the business specified in the notice." The term representative has no limits. It appears that a bylaw amendment may be required at Microsoft to effectuate the proposal, and shareholders would have to vote on the change. The Release simply assumes that the SEC has the power to implement the new one proposal amendment, which may in fact be the case, but it may be substantially more difficult than initially contemplated and require more work by states and companies.

[53] See, e.g. Apple Bylaws Section 5.14 references the shareholder proposal rules stating that nothing in Section 5.14 reduces such rights but is silent regarding agency. Apple is a California Corporation and California Civil Code 2296 states, "Any person having capacity to contract may appoint an agent, and any person may be an agent.."

[54] Release at 122.

and there are no marginal expenditures because the company can handle it with existing staff working normal hours. It must be noted that the proposal has already met the complicated requirements imposed on shareholder proposals and is proper for shareholder discussion and votes. We must repeat that the number of proposals filed is substantially declining, and, therefore, there is no sign that the system is being abused by shareholders. Companies are currently winning in the shareholder proposal marketplace. Most proponents self-select out of the process after getting low vote totals. Only 32 percent of proponents garnering less than 10 percent of the vote choose to resubmit.[55] This rule targets the final one-third left standing, and historically, some of the important emerging issues.

The original legislation produced SEC rules that had no resubmission requirements. Proponents had an automatic right to resubmit proposals. The mere existence of any resubmission threshold was a significant win for companies because, as professor Fisch notes, "[n]o state law bars a shareholder from making the same motion or proposal in successive years, yet Rule 14a-8(c)(12) limits a shareholder's ability to do so."[56] Shareholders have already been stripped of important rights with the existing thresholds, and increasing those thresholds substantially harms rather than protects investors.

The SEC's analysis only focused on proposals that eventually win approval arguing that it is rare for proposals that get low initial votes to ever win majority approval. Unfortunately, that narrow view does not tell the entire story because some companies adopt proposals without getting majority shareholder support.[57] Another fact is that interest in an issue often grows over time. Certain items such as majority voting had low vote counts in the beginning. Now, majority voting often obtains majority approval on the initial vote. In other words, a part of the data shows the same issue grow over time and somehow, the SEC has interpreted low vote counts as a proposal with less shareholder interest and less value when all that is being observed is the early development of an issue.

It is important to note that some proposals with very low initial votes eventually do achieve a majority vote. In 2013 an individual proponent filed a proxy access proposal at Netflix. The proposal received 4.8 percent of the vote and would not be eligible for another vote for three years under the Proposed Rule.[58] Given the existing resubmission standard of 3 percent, an institutional investor was able to submit a proxy access proposal at Netflix in 2015. This proposal won a majority of shareholder votes.[59] The proposed resubmission thresholds would have frustrated this result. The Netflix example also shows how an individual investor initiates an issue that takes hold with the larger market and is adapted by institutional investors. The Proposed Rule would not only kill a certain number of proposals it would kill much of the "seed corn."

Furthermore, companies sometimes adopt proposals prior to getting majority support. In the main body of the Release, the SEC neglected to consider such proposals in its analysis as being

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[55] Release at 103. Stating, "32 percent of proposals that received less than 10 percent of votes in favor were actually resubmitted in the following year."
[56] Fisch at 1149.
[57] Release at 87.
[58] Sullivan and Cromwell LLP 2013 Proxy Season Review, page 11. Describing proxy access proposal for (either (a) holders with at least 1% but less than 5% for 2 years or (b) 50 holders of $2,000 each with at least 0.5% but less than 5% for 1 year).
[59] Weil Alert SEC Disclosure and Corporate Governance. (October 21, 2015) page II. 5. Describing proxy access proposal for 3% for 3 years.

implemented, and even worse, the SEC improperly assumed such proposals were never implemented. This approach distorts the market and disregards company-shareholder negotiated wins. In fact, the economic analysis provides information in footnote 174 of the Release which states that a proposal winning majority support is only 20 percent more likely to be implemented given that 23 percent of proposals that never get majority approval are implemented.[60] By focusing solely on proposals that eventually won majority support, the SEC failed to give proper weight to all implemented proposals. Drastically changing the thresholds as proposed will shift power to companies and reduce the number of negotiated wins. The proposed dramatic adjustment in thresholds should not be undertaken without reexamining the data focusing on implemented proposals rather than those obtaining majority support. From our view, the negotiated wins amount to positive outcomes for all parties and should be a continuing part of the ecosystem.

The computations in the Proposed Rule do not provide a clear picture of the magnitude of the changes to the resubmission thresholds. The Release includes presentation errors when justifying the SEC's increases from 3/6/10 percent to 5/15/25 percent. The first sentence of the final paragraph of page 51 of the Release reads as follows, "[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." Few would protest increases of 2, 9, and 15 percent. However, a move from 3 to 5 percent is not a 2 percent increase; it is a 67 percent increase. The other periods would see 150 percent increases. A casual reader would get a very different impression of the proposal had the percentage change been correctly presented in the Release, noting that in most cases the requirement more than doubles.

If the SEC must change the thresholds, we hope the Commission actually makes only a small change. It is common for legislators and regulators to move in smaller increments, determine the impact of the change on the market, and then make additional adjustments, if necessary.[61] If for political purposes some change must be made, we recommend that the SEC adopt an incremental approach to resubmission thresholds by making only modest moves. We would not oppose the thresholds changing to 5/10/15 percent. With this change, each of the initial and the second thresholds would see a 67 percent increase, and the final threshold would see a 50 percent increase. Such increases are still substantial and will result in companies having to include fewer shareholder proposals. This less dramatic change would be less disruptive to the system while still eliminating proposals with weak shareholder support.

F. Momentum Requirements

The resubmission thresholds are adequate to eliminate successive voting on proposals with little shareholder interest making a momentum requirement superfluous. The momentum requirements provide a novel approach to further limit the number of shareholder proposals, but it is too complex to be implemented efficiently with the current voting infrastructure. The discussion provided in the Release does not touch on numerous additional requirements necessary to make the momentum requirement effective. The SEC will have to draft a

[60] Release at 87.
[61] See Roundtable 2007 in 8. "What the Delaware Courts did is they took a little step in this direction, they looked to see what is the effect on the market….they tried to do it through this stepwise approach."

substantially more robust final rule, including additional detail regarding vote calculations, recounts, contesting the votes or calculations, and resolving conflicts. Such final rule would be so complex that companies will not like it. Companies may not like it anyway because a company that uses it would upset an incredibly large percentage of its shareholder base. If times are good, such companies may not care, but when the company will need those shareholders, the base will remember the company frustrating them through use of this requirement.

Most interesting to companies would be the way the SEC has chosen to count votes which may be different from the way companies actually count votes pursuant to state law and their own governance documents. From a shareholder perspective, it is wonderful that the Release adopts simple majority voting, as partially described in Footnote 116, in order to count all threshold related votes including momentum requirements, however, this choice may not sit well with some companies given that it is a frequent topic for shareholder proposals. In any event, the SEC fails to properly describe how to count votes because it does not define key terms and uses them inconsistently. For example, when describing the new thresholds, the term "votes cast" is used in determining how votes will be counted. Footnote 116 is placed after the last bullet and states "only votes for and against a proposal would be included in the calculation." Disregarding it is unclear what Footnote 116 enhances, the terminology in the footnote is different from the terminology used in the body of the Release. "Votes cast" is never defined and is used inconsistently. When this is applied to the momentum requirements, a mess is made because precision is required given that a small number of votes may make a difference.

The complex momentum requirement is articulated in just a few paragraphs, unsupported by adequate data or analysis. Substantially more detail is needed to effectuate such a complex requirement. A final rule would likely require more than a dozen pages of explanations and examples. If the momentum requirement becomes effective, each registrant will have to review its governance documents and determine what modifications must be made to those documents, including vote calculations, record maintenance, additional requirements for inspectors of elections, and numerous additional add-ons. Also, with the SEC's change to simple majority voting for certain purposes, it is likely that proponents will request additional companies adopt simple majority voting for all elections at a substantially quicker pace using the SEC's guidance as additional evidence that simple majority voting is best governance.

The momentum requirement makes the vote calculations more important given the precision that may be required to analyze small differences in vote counts. It makes it far more likely that there will be questions regarding vote calculations. Recounts and contested elections will be more common given the nature of the momentum requirement, and small differences in the number of votes will be important. CalPERS is prepared to review a full momentum requirement that includes the elements suggested above, but companies may prefer to exclude this requirement given its complexity and minimal value. All registrants will have to bear the cost of implementing new procedures while only a very few will ever use them.

In the U.S., there are issues counting, tracking, and calculating votes. This rarely becomes a real-life problem because shareholders vote with management most of the time. Because votes are mostly one-sided, there is little reason to cure every deficiency in voting infrastructure, however, the precision required by the momentum requirement provides a reason to address the deficiencies in voting. This is necessary because the momentum requirement presents the most likely case where there will be arguments over vote calculations. Anticipating such disputes makes clear that the presentation in the Release is not adequate for the purpose of adopting a momentum requirement. Detailed guidance is needed for steps that are not mentioned in the Release.

The momentum requirement does not accord with actual practice. Using the proxy access proposal at Netflix as an example, we show one problem with momentum requirements. As mentioned earlier, the proxy access proposal won approval in 2015, but Netflix did not adopt proxy access until 2019. In the interim periods, the proponent continued to submit proxy access proposals. Interestingly, under the Proposed Rule, a proponent would avoid submitting the proposal again out of fear that if it falls below 50 percent and has a greater than 10 percent decrease in vote total (or an actual decrease of about 5 percent), the winning majority vote would be void. The Release did not consider how proponents deal with votes that obtain a majority and are not implemented by the company. The Release assumes that there would be no additional votes after a majority is achieved, but the fight continues to implementation, and unfortunately, the Release fails to consider that possibility. Addressing the lack of implementation of majority winning proposals is more important than eliminating a proposal that has shareholder interest but suffered a "modest" drop in votes.[62]

The proposal system is meant to replicate the rights a shareholder would have at an annual meeting. No state limits a shareholder's right to resubmit a motion or proposal at successive meetings regardless of the outcome.[63] So, it is clear that the SEC is drifting very far from the original intent, the SEC does not provide a defensible reason for this complicated additional requirement, nor does it bother to include all of the reasonable elements that would be required to provide the market implement the new concept. We do not see a reason for taking away a shareholder's ability to resubmit a proposal that surpasses the resubmission threshold requirement, especially if the requirements are enhanced in a final rule. There is no abuse of the system and no scandal that warrants this additional out-of-the-box requirement. Changing the resubmission thresholds to 5/10/15 would represent more than enough change at this time; there is no need for this incredibly disruptive momentum requirement, especially for companies that do not currently have simple majority voting (though we would appreciate the SEC establishing a rule for simple majority voting). Besides, substantially more work is required to make this effective, and even if it is effective, it may do far more harm than good to the company that frustrates a large percentage of its shareholders.

G. Economic Analysis

The Release suffers from a lack of proper economic analysis because it does not consider the economic value of the benefits of shareholder proposals, so the economic impact of the Proposed Rule is grossly understated. If properly stated, the SEC would have to conduct a more detailed cost-benefit analysis. The economic analysis also fails to consider the following: the

[62] Using "modest" as used on page 51 of the release when describing changes of 2, 9, and 15 percent as modest.
[63] Fisch at 1149.

costs associated with companies modifying their governance documents to reflect the amendments, the costs of coordinating with necessary state governments on certain changes impacting state laws, and the costs of more detailed vote counts required by the momentum requirements. On the other hand, the economic analysis includes an exaggerated cost for shareholder proposals. Fortunately, the most substantial shareholder proposal work product is included in the no-action correspondence on the SEC's website and does not reflect a value anywhere near $150,000 per submission. During no-action fights, many proposals are disposed of fairly quickly and easily by referencing the appropriate exclusion. Companies actually pay less than $20,000 in marginal costs for the work product displayed on the SEC website.[64]

The most significant gap in economic analysis is the SEC's failure to analyze the practical impact on smaller companies when investors reallocate shareholdings to satisfy ownership thresholds.[65] The SEC identified this as an issue and mistakenly assumed that only potential proponents would conduct such analysis when the Proposed Rule pushes all shareholders to review smaller investments, so it appears that the Corporate Lobbyists' attack on shareholders will produce collateral damage by possibly reducing investments in small registrants.

V. CONCLUSION

For nearly eighty years, the SEC has overseen a shareholder proposal system that has been used to elevate company-shareholder engagement. The Proposed Rule would undermine shareholder rights and substantially weaken that engagement. The number of shareholders who are even permitted to have a voice would be decreased significantly. The already extremely low number of shareholder proposals would also likely decline.

We fundamentally disagree with the premise that only the largest investors should have a voice in U.S. companies, which is what the Proposed Rule would do. But worse, the Proposed Rule doesn't just disenfranchise small investors. The Proposed Rule would disenfranchise everyone, including CalPERS. In fact, CalPERS may be precluded from offering proposals in perhaps as many as sixty companies we own.

This anti-shareholder-democracy Proposed Rule bears little resemblance to the initial rule discussed by SEC Chair Purcell in 1943, in which a shareholder owning one share for one day could file a proposal and have it placed in the proxy. Here, the SEC expands its power substantially without an intervening act of Congress by overriding state laws, rewriting company articles of incorporation and bylaws, and micro-managing investor activities. The very Corporate Lobbyists that would be against an activist SEC favoring shareholder rights have encouraged SEC activism to reduce those same rights. Interestingly, those same Corporate Lobbyists successfully sued the SEC a number of times[66] arguing that the SEC lacked the power

[64] CalPERS' staffer has experience representing registrants filing no-action requests. The most significant cost is getting familiar with Rule 14a-8. Once a

[65] Release at 143.

[66] 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. Page

to make certain rules or failed to complete proper economic analysis. The most substantial advocates for the Proposed Rule primarily represent the largest registrants and may adversely impact the market for investments in the smallest companies.

We understand some changes may have to be made. However, those changes should be to promote—not inhibit—shareholder engagement. If the SEC were to continue its efforts to restrict shareholders, however, we think that those restrictions must be supported by the facts, including their impacts on investor engagement and potential investments (such as in smaller companies). Due to the importance of shareholder proposals, we believe firmly that any dollar submission and re-submission rates must remain very low. We are deeply concerned with all other concepts in the Release to restrict the number of investors who can offer shareholder proposals. In addition to being arbitrary and unsupported by the record, the tiered concept is too complex to be effectively implemented within our current voting infrastructure.

As described in the Release, the use of representatives has been governed by state agency laws since 1943.[67] We recommend that the SEC verify that there are no state law issues with the SEC reducing long-standing state law rights, including whether state laws have to be modified, or certain companies have to change their governance documents, or both.

At root, without offering any detailed justification or analysis, the SEC is proposing to disenfranchise an unknown number of shareholders and discouraging investment in U.S. companies in order to address concerns raised by a small handful of corporate executives and their representatives. The SEC should abandon the Proposed Rule and instead focus on efforts to promote – not inhibit – shareholder engagement.

11, explaining that the, "U.S. Court of Appeals for the District of Columbia Circuit since 1996 [has] rejected all challenged Commission rules to come before that Court," and highlighting those decisions in footnote 29 which is copied in total below.

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

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

[67] Release at 29.

We welcome the opportunity to discuss our comments to the Release in more detail. Please contact Anne Simpson, Investment Director, at (916) 795-9672 if you have any questions or wish to discuss in more detail.

Sincerely,

Marcie Frost
Chief Executive Officer