

United States Senate

WASHINGTON, DC 20510

February 11, 2020

The Honorable Jay Clayton
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Chairman Clayton,

I write to you today with concerns about the SEC's recent proposal to raise resubmission thresholds for shareholder resolutions and its impact on the ability of LGBTQ Americans to work free from discrimination.¹ Today, 92 percent of Fortune 500 companies have non-discrimination policies that include sexual orientation, and 82 percent also include gender identity.² In many cases, efforts to ensure that LGBTQ employees were protected by these policies were driven by the shareholder resolution process. However, had the newly proposed rule been in effect in the recent past, fewer companies would have these policies and fewer LGBTQ Americans would be free from fear of discrimination at their workplace.³ That outcome would be devastating, not just for these individuals, but for the companies and their shareholders who would have been deprived of their valuable contributions. As such, I do not believe the proposed rule serves the public interest and ask that you withdraw it.

The SEC asserts that the proposed rule is in response to increased public interest in reform, but cites only a rulemaking petition from nine business trade associations.⁴ Their petition calls for restrictions on resubmissions because "... year-after-year, a small minority of shareholders seeks to promote causes that do not advance the financial (as opposed to political or social) interests of any shareholders. . . ."⁵ The petitioners' attempt to portray shareholder interests as an island separate from public policy or society is wrong at best. Over the years, these petitioners and their allies have criticized as politically motivated several shareholder proposals that have proven to create significant value once adopted. For example, in 2016 a Credit Suisse report found that companies with LGBTQ friendly policies outperformed a global index by 3 percent and a custom basket of peer companies by 1.4 percent over a six year period.⁶ Compounded over the life of a long-term investment this outperformance becomes vast.

In addition to my concern about the new proposed thresholds themselves, I am disturbed by the Commission's analysis of previous shareholder proposals in its justification. First, the analysis only goes back to 2011, an

¹ U.S. Securities and Exchange Commission Proposed Rule. "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8". 5 November 2019.

² New York City Comptroller, Scott M. Stringer. Comment on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8. 3 February 2020.

³ An analysis by Morningstar provided to Senator Baldwin's office found that 10 percent of pro-LGBTQ resolutions would have failed on the first ballot over the last 15 years.

⁴ 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. "Petition for rulemaking regarding resubmission of shareholder proposals failing to elicit meaningful shareholder support". Accessible at: <https://www.sec.gov/rules/petitions/2014/petn4-675.pdf>

⁵ Ibid.

⁶ Credit Suisse ESG Research. 15 April 2016. Accessible at <https://plus.credit-suisse.com/rpc4/ravDocView?docid=QYuHK2>.

insufficiently short period and long after the early days of the LGBTQ rights movement. Second, by analyzing only proposals that would go on to receive majority support, the analysis overlooks the fact that many proposals are not adopted through majority votes, but rather by negotiation between shareholders and management. Were these new thresholds in place, management would have less reason to negotiate with shareholders.

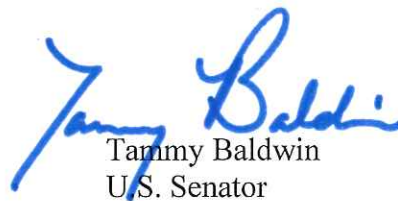
However, the most concerning element of the analysis is that it uses probability (based on insufficient data as mentioned above) to justify the likelihood that a shareholder proposal would be excluded based on the new thresholds.⁷ As the Commission well knows, Congressional intent in Section 14 of the Securities and Exchange Act has been interpreted to “give true vitality to the concept of corporate democracy.”⁸ I am disappointed that the Commission seems to believe the values of democracy can be done away with in lieu of probabilities.

If there is one lesson we can take away from the fight for LGBTQ equality and other social movements in American history, it is that perseverance in the face of long odds is essential to changing attitudes and transforming society. Research has shown that exposure to LGBTQ individuals greatly increases support for their equal rights and that this exposure often happens in the workplace.⁹ If employers were more likely to discriminate against LGBTQ individuals, these attitudes would have changed more slowly—or not at all—and our companies, shareholders, and society as a whole would be poorer for it.

Finally, I am concerned by the Commission’s refusal to extend the comment period beyond 60 days, despite overwhelming support for an extension in the comment file. As Commission staff would no doubt agree, analysis of the potential impact of these proposals is complex and time consuming. As such, I would urge you to reconsider extending the comment period.

In closing, drawing upon the lessons of the fight for LGBTQ equality, I again urge you to withdraw your proposal to raise resubmission thresholds because of both its impact on that still on-going fight, and its potential to deter as-yet unknown social movements that could transform our workplaces and our society for the better.

Sincerely,



Tammy Baldwin
U.S. Senator

⁷ U.S. Securities and Exchange Commission Proposed Rule. “Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8”. 5 November 2019. Pg. 69: “we provide descriptive statistics on the voting support and the probability of obtaining majority support for all proposals” in order to “provide some evidence on the effects of the proposed amendments.”

⁸ *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970) (“It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of Section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy.”).

⁹ Pew Research Center. “In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable’” 6 June 2013. Accessible at: <https://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/>; Human Rights Campaign Foundation. “A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide.” March 2018. Accessible at: <https://www.hrc.org/resources/a-workplace-divided-understanding-the-climate-for-lgbtq-workers-nationwide>