CENTER FOR POLITICAL ACCOUNTABILITY

January 31, 2020

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

Re: Comments on Proposed *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8* (File Number S7-23-19)

Dear Secretary Countryman,

The Center for Political Accountability ("the Center"), a non-profit, non-partisan organization working to bring transparency and accountability to corporate political spending, appreciates the opportunity to comment on changes to the shareholder resolution process proposed by the Commission in Exchange Act Release No. 87458, "Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8" (the "Release").

Since 2003, the Center has collaborated with close to 20 shareholder advocates, directly engaging companies to improve disclosure and oversight of their election-related spending. As a result of these efforts, 173 leading public companies have adopted political disclosure and accountability policies following agreements with shareholders and the Center. The Center strongly opposes the changes to Rule 14a-8 proposed in the Release.

SUMMARY

The SEC's shareholder proposal process has borne strong dividends for corporations – an accounting of which is conspicuously absent in the Release. The process provides an early warning system for management, alerting them to problems or issues that may have evaded their radar. It serves as a pressure release valve, allowing investors to push for incremental change without the burden and costs of newly imposed regulation. The proxy process also allows companies to engage with shareholders on specific issues, helping to avert unhealthy escalation of conflict.

The proposed rule changes would disproportionately hit small investors and their ability to wage multiyear campaigns for improved disclosure and policy changes. Specifically, the increased resubmission thresholds, as well as the new "momentum" requirement, would severely impair the capacity for investors to raise a new issue, spread awareness, and build sufficient support to force management to take action.

Indeed, an analysis hypothetically applying the currently proposed resubmission thresholds to all past proposals based on the Center's model political disclosure resolution reveals both that successful efforts to bring disclosure and transparency to company political spending would have been blocked before

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reaching a critical mass of support and that a number of efforts already receiving significant shareholder backing would have been excluded due to random year-to-year fluctuation in shareholder votes.[1]

Thanks in part to the proxy proposal process, voluntary corporate political disclosures are becoming a corporate governance norm and are a positive example of campaign finance reform achieved through private, not public, channels.[2] Moreover, these results were achieved without early support from institutional investors, who may be conflicted and whose interests are narrowly financial.[3]

Ironically, the SEC's move comes at a time when more shareholders are engaging with companies, and many board members have become more responsive to investor perspectives. It would be harmful to companies to undercut a long-held shareholder right when it has provided companies the benefit of lower risks and better investor relations. Further, the proposal would undermine Justice Anthony Kennedy and the Supreme Court's expressed faith in the "procedures of corporate democracy" to protect the First Amendment rights of shareholders.[4]

BACKGROUND

American corporations are generous contributors and significant players in the political process through their support of candidates, political action committees (PACs), ballot measures, and organizations that seek to influence legislators, policymakers and regulators via election outcomes. Companies may choose to offer financial support to further their long-term goals or support public policies that are aligned with their business strategy. However, political spending always involves an element of the unknown, and these expenditures and activities can represent risks to corporations, their boards, and their shareholders.

Corporate Participation in Election-Related Spending

The primary focus of the Center's efforts is on the use of corporate treasury funds to engage in election-related activity. Corporate PACs, which rely on voluntary contributions, tend to be highly regulated under federal and state law and are subject to broad disclosure requirements.[5] Much of corporate

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[1] Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals 13 (Jan. 16, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-advisors-shareholder-proposals.pdf ("Even if a proposal is obtaining an overall increasing level of vote support over time, year-to-year votes can reasonably be expected to fluctuate due to random factors beyond the control of the sponsor, and that have little to do with the merits or support for the proposal.").

[2] Robert Yablon, *Campaign Finance Reform Without Law*, 103 Iowa L. Rev. 185, 212 (2017).

[3] Lucian A. Bebchuk and Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 199 Colum. L. Rev. 2029, 2035 ("Our analysis demonstrates that index fund managers have strong incentives to (i) underinvest in stewardship and (ii) defer excessively to the preferences and positions of corporate managers"); John C. Bogle, Op-Ed., *The Supreme Court Had Its Say. Now Let Shareholders Decide.*, N.Y. Times, (May 14, 2011), https://www.nytimes.com/2011/05/15/opinion/15bogle.html ("In fact, for decades, with a handful of exceptions, the participation of our institutional money managers in corporate governance has been limited, reluctant and unenthusiastic. Perhaps they feared angering clients whose pension and thrift funds they manage — that is, the very corporations whose shares fill their investment portfolios.") (Bogle was the founder and former chairman and chief executive of the Vanguard Group).

[4] *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) ("There is, furthermore, little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.") (internal citation omitted).

[5] Paul Denicola et al., *The Conference Board Handbook on Corporate Political Activity: Emerging Corporate Governance Issues* 5 (2010), www.conferenceboard.org/retrievefile.cfm?filename=1189_1309335497.pdf&type=subsite.

political activity is financed with corporate treasury funds, and much of this spending is difficult if not impossible to track absent voluntary disclosures from companies.

Contributions to candidate and party committees (direct)
Corporations are prohibited from tapping their treasuries for direct contributions to federal candidates and national political parties, but many states permit direct contributions to state and local candidates (including judicial candidates), parties, and committees. Such contributions must be disclosed to varying degrees depending upon state law, but these disclosures are spread across 50 state campaign finance web sites, making it difficult for investors to track.

Contributions to §527 political committees (direct)
Corporations may also contribute to tax-exempt political committees organized under §527 of the Internal Revenue Code. These groups include Super PACs and partisan associations of governors, attorneys general, or state legislature candidates. Such contributions must be disclosed to the IRS (by the recipient 527 organization), and, in some cases, contributions must be disclosed to the Federal Election Commission as well.

Contributions to ballot measure committees (direct)
State and local ballot initiatives often attract hundreds of millions of dollars in corporate money. A Center for Public Integrity analysis of ballot measures in 2014 found that over 75% of the $266 million contributed by the top 50 donors came from corporations and business trade groups.[6] Access to this data varies by state.

Independent expenditures (direct)
Citizens United opened the door for corporations and trade associations to make unlimited expenditures to support or oppose a candidate for public office. However, such expenditures cannot be coordinated with the candidate or official party committees.

Payments to politically-active trade associations (indirect)
Corporations pursue membership in industry trade associations for a variety of reasons, but many fail to exercise control over how their dues, special assessments, and other payments are used. Many trade associations are politically active, in some cases spending tens of millions of their members' dollars to support or oppose election campaigns. As trade associations are not required to disclose their members, voluntary disclosure by companies is the only way to find out who funds these activities. Some corporations prohibit their trade associations from using their payments for election related purposes. Absent such a restriction, companies should disclose their association memberships and the amount paid to each association, or at least the portion of such payments that are non-deductible under §162(e) of the Internal Revenue Code.

Payments to other politically active tax-exempt groups, such as 501(c)(4) organizations (indirect)
Corporations may also contribute to §501(c)(4) "social welfare" organizations, which are permitted to engage in limited election-related activity. These groups, like trade associations, are not required to disclose their donors, making corporate disclosure of this information especially important. Certain (c)(4)s are major political spenders and are closely associated with influential elected officials, raising

[6] Chris Zubak-Skees and Liz Essley Whyte, *Who tried to buy the 2014 ballot measures?* The Ctr. for Publ. Integrity, Feb. 15, 2015, https://publicintegrity.org/politics/state-politics/big-business-crushed-ballot-measures-in-2014/.

the risk level for companies when they are solicited for contributions.[7]

Disclosure Becomes the Norm through Private Ordering

Companies today are paying closer attention to their political spending and its impact.[8] In 2004, only one public company had adopted political disclosure policies; by October 2010, 76 major companies had adopted CPA's corporate governance model for political disclosure and accountability.[9] Today, that number has more than doubled to 173, as more and more companies recognize the risks of spending and benefits of disclosure and corporate board oversight. These companies recognize their duty as responsible stewards of other people's money to refrain from hiding in the dark corners of politics. In addition, three-fifths of the S&P 500 companies, the dominant source of corporate political money, have some form of disclosure, as measured by a CPA-Wharton School Zicklin Center for Business Ethics Research annual benchmarking of those companies' political disclosure and accountability policies.[10] As academics and journalists have noted, through a process known as private ordering, corporate political disclosure has become the norm.[11]

The Center's Model Shareholder Proposal on Political Disclosure

Because it takes time to marshal persuasion and understanding from companies, the multiyear proxy process is central to the Center's effort. Shareholders are calling on companies to disclose their direct and indirect political spending with corporate funds and to adopt policies for decision-making and oversight of this spending.

Today there is strong support for shareholder resolutions calling for political disclosure and accountability. In the 2019 proxy season, proposals based on the Center's model resolution were filed at 56 companies. Of those 56, 13 companies reached agreements to adopt political disclosure policies. Thirty-three resolutions were listed on company proxy statements and went to a vote. Of those 33, two received majorities, 11 were in the 40-50% range and 12 were in the 30-40% range. The average vote was 36.4%.

The 2019 average vote was indeed a record high for the model proposal, but since the average vote on the resolution first cracked 30% in 2009, average support has fluctuated between 28 and 34%. The

[7] Bruce F. Freed & Karl J. Sandstrom, *Dangerous Terrain: How to Manage Corporate Political Spending in a Risky New Environment*, Conf. Board Rev., Winter 2012, at 20, 22.
[8] Ctr. for Political Accountability et al., *The 2019 CPA-Zicklin Index of Corporate Political Disclosure and Accountability* 12 (2019) (enclosed as Appendix), https://politicalaccountability.net/hifi/files/2019-CPA-Zicklin-Index-Report.pdf ("Data from the 2019 Index reflect large U.S. public companies increasing overall their acceptance and practice of disclosure and accountability with regard to their election-related spending. . . . The new Index data suggest many companies are becoming sensitive to the risks of spending to influence politics and are taking steps to manage these risks or are strengthening existing practices.").
[9] Denicola et al., *supra* note 5, at 6.
[10] Ctr. for Political Accountability et al., *supra* note 8. The CPI-Zicklin Index has been published every year since 2011, though the benchmark only includes the full S&P 500 dating back to 2015.
[11] Yablon, *supra* note 2; Sarah Krouse and Theo Francis, *Companies Make Room for Investors Pushing Climate, Social Issues*, Wall St. J., (May 1, 2019), https://www.wsj.com/articles/companies-make-room-for-investors-pushing-climate-social-issues-11556715600.

resolution debuted in 2004 with average support of 9.1%, held steady in 2005, and more than doubled in 2006 to 22% in year three.[12]

That average support for the Center's model resolution has regularly fluctuated while maintaining a positive slope demonstrates that varying levels of support from year to year are not as important as the overall trend line. This calls into question the value of the proposed momentum requirement. Indeed, based on the fluctuation in *average support* for the Center's resolution, it is expected that individual resolutions refiled at the same company will experience even greater variability in support while continuing an overall upward climb.

PROPOSED RESUBMISSION REQUIREMENTS – A SOLUTION IN SEARCH OF A PROBLEM

The proposed changes would disproportionately impact engaged investors who have successfully used shareholder proposals to get a vote on specific questions during the annual proxy process. Such proposals have given shareholders leverage to persuade companies to recognize and act on the social, environmental and governance risks that their actions may pose.

An examination of the performance of some of the Center's model resolutions had the currently-proposed resubmission thresholds already been in place illustrates the arbitrary nature of the revised 5/15/25 and momentum resubmission requirements. Numerous engagements leading to companies adopting political disclosure would have been cut short, impairing the ability of shareholders to hold management and directors accountable.

The analysis also belies significant shortcomings of the proposed revisions: the assumption, without evidence, that a proposal must receive majority support to be meaningful; the assumption that proposals failing to meet the 5/15/25 or momentum resubmission requirement are unlikely to ever receive meaningful support; and, the failure to account for or undertake any cost benefit analysis that includes settlement agreements leading to withdrawal of proposals.

Proposed Resubmission Rules Would Have Blocked Settlement Agreement with Alphabet Inc.

For example, in 2016, Clean Yield Asset Management filed a proposal based on the Center's model resolution at Alphabet Inc., parent company of Google, which had scored a 32.9% score out of 100 on the 2015 CPA-Zicklin Index. 9.8% of shareholders supported the proposal the first year, and upon resubmission in 2017, 10.2% of shareholders voted in support. After refiling again in 2018, Clean Yield Asset Management and Alphabet reached a settlement where Alphabet adopted political disclosure and transparency in exchange for Clean Yield's withdrawing the proposal. Alphabet's score on the 2018 CPA-Zicklin Index jumped to 95.7% earning the designation of a "Trendsetter" company in corporate political disclosure and accountability.

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[12] Had the SEC's proposed revisions applied to *average support* for the Center's model resolution, it would have failed to reach the 6% second vote resubmission threshold and been excluded until 2009, the first year average support exceeded 30%. Despite support doubling from 2005 to 2006, the third year vote of 22% still would have failed the year 3 25% resubmission requirement under the new regime.

Had the SEC's proposed resubmission thresholds already been in place, the 2017 vote would not have met the 15% resubmission threshold, and any proposal on political disclosure would have been excluded for the next three years, including the proposal that was resubmitted in 2018 leading to a settlement agreement.

Alphabet Inc. Political Disclosure Resolution

Year	Vote Level	Existing Threshold	Proposed Threshold
2016	9.8	3	5
2017	10.2	6	15
2018	**Proposal fulfilled by Alphabet; withdrawn**	10	Excluded

The performance of the proposal at Alphabet reveals three severe shortcomings of the SEC proposal: 1) the increased resubmission thresholds will prematurely exclude shareholder proposals that lead to meaningful policy changes at companies; 2) that a vote need not be anywhere near a majority to convince management of a proposal's value[13]; and 3) failure to take settlement agreements into account when evaluating the costs and benefits of the current and proposed regimes would make many engagements appear to be failures when in reality shareholders and the company reached an optimal outcome at minimal cost.[14]

Proposed Resubmission Rules Would Have Blocked Settlement Agreement with Goldman Sachs

In the 2009 Proxy Season, 27.3% of shareholders supported Domini Impact Investments' political disclosure resolution, filed for the first time at Goldman Sachs. Support increased to 37.2% on the refiled resolution in 2010. Yet in 2011, support on the third vote dropped by 63% to 13.8%. Under the SEC's proposed resubmission requirements, the 13.8% vote would fail to meet the 25% resubmission threshold. Moreover, even if that vote had been as high as 33.4%, it still would have dropped by over 10% and would have failed to meet the momentum requirement. In any case, the proposed regime would have excluded resubmission of the proposal for the next three years, thus blocking the settlement agreement that was reached the very next year in 2012.

Following the agreement, Goldman placed in the First Tier of companies in the 2013 CPI-Zicklin Index and has since earned a 100% score in each of the last four CPI-Zicklin Index reports.

[13] Alphabet Inc. reached a settlement agreement that fulfilled everything urged in the proposal the year after the proposal received 10.2% shareholder support. Moreover, the company met all of the shareholder's requests following a vote that would have failed under the new resubmission requirements.

[14] An analysis considering only the vote outcomes in 2016 and 2017 might conclude that the proponent saw little prospect of increased support and opted against refiling in 2018, a mistaken conclusion which, if believed, would lend support to the proposed 5/15/25 requirements.

Goldman Sachs Political Disclosure Resolution

Year	Vote Level	Existing Threshold	Proposed Threshold
2009	27.3	3	5
2010	37.2	6	15
2011	13.8	10	25 (and loss of momentum)
2012	**Proposal fulfilled by company; withdrawn**	10	excluded

The performance of the proposal at Goldman again reveals glaring shortcomings of the SEC proposal: 1) the increased resubmission thresholds will prematurely exclude shareholder proposals that lead to meaningful policy changes at companies; 2) year to year fluctuations in support are not a reliable indicator of the viability or value of a proposal[15]; 3) a vote need not be anywhere near a majority to convince management of a proposal's value; and 4) failure to take settlement agreements into account when evaluating the costs and benefits of the current and proposed regimes would make many engagements appear to be failures when in reality shareholders and the company reached an optimal outcome at minimal cost.[16]

Proposed Resubmission Rules Would Have Excluded JPMorgan Shareholder Proposal Twice and Blocked Settlement Agreement

JPMorgan Chase was one of the inaugural companies to list the Center's political disclosure resolution on its proxy in 2004. 9.5% supported the resolution that first year, and after a one year hiatus, the proposal was back on the proxy in 2006 and received 28.9%. In 2007, however, support dropped to 12%, insufficient to meet the proposed 25% third vote resubmission threshold. Resubmitted again in 2008, support jumped back to 28.5% in the first year of what would have been a three year cooling off period under the proposed rules.

Shareholders did not resubmit the resolution at JPMorgan again until 2011, which also would have been the first year the resolution was eligible for resubmission under the proposed rules had it been excluded based on the 2011 vote – receiving 37.4% support. But in 2012 support dropped to 10.6%, less than a third the support from shareholders the previous year. Under the proposed rules the 2012 vote would have failed the 15% second-year resubmission threshold, thus there could have been no 2013 resubmission, which ultimately resulted in a settlement agreement.

After implementing the policies agreed to in the settlement, JPMorgan earned "Trendsetter" status on the CPA-Zicklin Index in 2013 and has since continued to strengthen its political disclosure and accountability policies, reaching a score of 97.1% in 2019.

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15 This of course implicates the proposed momentum requirements and complete lack of evidence, data, or analysis beyond supposition from the Commission to support creating such a requirement.

16 Much like the Alphabet engagement, an examination of the Goldman engagement that ignored the settlement agreement would lend support to the proposed 5/15/25 requirements.

JPMorgan Chase Political Disclosure Resolution

Year	Vote Level	Existing Threshold	Proposed Threshold
2004	9.5	3	5
2006	28.9	6	15
2007	12	10	25
2008	28.5	10	Excluded
2011	37.4	10	5 (eligible for resubmission after cooling)
2012	10.6	10	15
2013	**Proposal fulfilled by JPMorgan; withdrawn**	10	Excluded

Once again, examination of this engagement reveals the same shortcomings of the SEC proposal: 1) the increased resubmission thresholds will prematurely exclude shareholder proposals that lead to meaningful policy changes at companies;[17] 2) year to year fluctuations in support are not a reliable indicator of the viability or value of a proposal; 3) a vote need not be anywhere near a majority to convince management of a proposal's value; and 4) failure to take settlement agreements into account when evaluating the costs and benefits of the current and proposed regimes would make many engagements appear to be failures when in reality shareholders and the company reached an optimal outcome at minimal cost.

Proposed Resubmission Rules Would Have Blocked Settlement Agreement with Boeing

Much like the shareholder engagement at JPMorgan, shareholders submitted political disclosure resolutions that went to a vote at Boeing seven times before reaching a settlement with the company. In 2010, the resolution's fourth vote, support fell from 28.4% to 23.85%. As any resolution under the proposed rules must reach at least 25% in its third and any subsequent votes, proposals on the same topic would have been excluded in 2011, 2012, and 2013 under the SEC's proposal. Under the current regime, the resolution was resubmitted in 2011 for a vote of 22% and 2012 for 29.4%. After resubmitting again in 2013 – what would have been the third of the three year cooling off period – Boeing agreed to adopt political disclosure and transparency polices and shareholders withdrew the proposal.

Boeing made the top tier of companies in the 2013 CPA-Zicklin Index, continued to strengthen its policies, and has now been a Trendsetter in each of the last four Index reports.

[17] The proposed rules would have blocked this ultimately successful shareholder resolution on two separate occasions.

Boeing Political Disclosure Resolution

Year	Vote Level	Existing Threshold	Proposed Threshold
2005	10.7	3	5
2007	28.1	6	15
2009	28.4	10	25
2010	23.85	10	25 (and loss of momentum)
2011	22.07	10	Excluded
2012	29.44	10	Excluded
2013	**Proposal fulfilled by Boeing; withdrawn**	10	Excluded

Again, this engagement follows a pattern where arbitrary assumptions and omissions on the part of the Commission in formulating the proposal would likely hamper precisely the type of low-cost, low-conflict engagements the Commission purports to encourage in the Release: 1) the increased resubmission thresholds will prematurely exclude shareholder proposals that lead to meaningful policy changes at companies; 2) year to year fluctuations in support are not a reliable indicator of the viability or value of a proposal; 3) a vote need not be anywhere near a majority to convince management of a proposal's value; and 4) failure to take settlement agreements into account when evaluating the costs and benefits of the current and proposed regimes would make many engagements appear to be failures when in fact shareholders and the company reached an optimal outcome at minimal cost.

Proposed Resubmission Rules Would Have Excluded AT&T Shareholder Proposal Twice and Imperiled Eventual Adoption of Political Disclosure

Shareholders have filed and brought to a vote at AT&T the Center's political disclosure resolution twelve times, dating back to 2005 when the company was still operating as SBC Communications. Under the proposed rules, the resolution would have failed on its third vote after receiving 13.3%. During what would have been a cooling off period under the SEC's rulemaking proposal, shareholders resubmitted twice, earning 31.9% shareholder support at both annual meetings.

Shareholders resubmitted again in 2011 – the first year the resolution would have been eligible for resubmission under the proposed revisions – getting 31% support. Support increased to 38.6% in 2012 but dropped in 2013 to 25.4%. Though not an insignificant level of support, the 2013 resolution would have failed the proposed momentum requirement, leading to another three years of exclusions. During the would-be cooling off period of 2014-2016, the proposal received 24.6%, 25.6%, and 29% shareholder support respectively. In 2017, the first year the proposal would have been eligible for resubmission under the proposed revisions, 30% of shareholders voted in support.

Though no further resolutions were filed on election related spending, by 2019 AT&T management came to appreciate the value of the proposal shareholders persisted in bringing to a vote twelve times and adopted political disclosure, accountability, and transparency policies. Indeed, AT&T earned the Trendsetter designation for the first time in the 2019 CPA-Zicklin Index with a score of 97.1%.

AT&T Political Disclosure Resolution

Year	Vote Level	Existing Threshold	Proposed Threshold
2005[18]	12.5	3	5
2006	15.2	6	15
2007	13.3	10	25
2008	31.9	10	excluded
2009	31.9	10	excluded
2011	31.0	10	5 (eligible for resubmission after cooling)
2012	38.6	10	15
2013	25.4	10	Loss of Momentum
2014	24.6	10	excluded
2015	25.6	10	excluded
2016	29.0	10	excluded
2017	30.0	10	5 (eligible for resubmission after cooling)
2019		**AT&T updates policies, designated "Trendsetter" in 2019 CPA-Zicklin Index**	

Unlike the shareholder engagements discussed previously, AT&T did not adopt political disclosure as part of a settlement agreement predicated on withdrawal of a pending shareholder resolution. In this instance, there was no shareholder pressure or leverage in the form a pending proxy vote on election-related spending. In this instance, the company undertook its own cost benefit analysis and decided that adopting political disclosure was a net benefit. Further, this engagement illustrates the benefits of shareholders persisting and building support and educating a company over 15 years of engagement before breaking through.

And the proposed rules would make such a long-term engagement near impossible, as shareholders would have had to wait resubmit for three years on two separate occasions under the proposal. The shortcomings of the SEC's proposal that apply to this engagement merit repetition: 1) the increased resubmission thresholds will prematurely exclude shareholder proposals that lead to meaningful policy changes at companies; 2) year to year fluctuations in support are not a reliable indicator of the viability or value of a proposal; and, 3) a vote need not be anywhere near a majority to convince management of a proposal's value.

Curious Fixation on Majority Support, Conspicuous Indifference to Settlements

The Center is particularly concerned by the proposal's assertion and insistence without evidence that a majority vote is necessary to be meaningful and to move management. In the Center's experience this is

[18] At the time of filing the company was operating as SBC Communications.

simply not the case, and such an assumption woefully misconstrues the goals and motivations of shareholders.

Shareholders the Center has partnered with over the years take the initiative to engage because they care about the long term value of the company in which they are invested and they care about addressing the issues raised in the proposal. Accordingly, the ultimate goal of shareholders filing the political disclosure resolution is not a majority vote or a high vote – the goal is to avoid a vote entirely. By reaching a settlement in which the company agrees to adopt the proposal, shareholders avoid the unpredictable nature and fluctuations inherent to shareholder votes. Even with a high or majority vote, there is no certainty a company will comply with the advisory proposal. A settlement agreement brings certainty to the outcome and has the benefit of happening sooner.[19]

Of the 455 proposals based on the Center's model resolution that went to a vote, only 12 have ever received majority support. Yet the Center's shareholder partners have reached settlement agreements – predicated on the company's adoption of disclosure and accountability in its corporate election-related spending – with 173 companies.

It appears that the Commission's focus on majority support is related to its indifference to settlement agreements. Had the commission grappled with the fact that management regularly settles with shareholders after votes that would not survive the proposed second year resubmission threshold, the rationale for the increased resubmission thresholds and worship of the majority vote would have been discarded, or at the very least adjusted.

CONCLUSION

The SEC's existing shareholder proposal process has benefited corporations. It serves as an early warning system for management and as a pressure relief valve. It provides companies an opportunity to meaningfully respond to public concerns on issues that transcend the daily operating demands on companies but are finding expression in our national political debate. It also acts to spur companies to address serious issues affecting their bottom line. Climate change is a prime example as is political spending that today poses a heightened risk with the rise of social media and Millennial activism.

As engagements with Alphabet, Goldman Sachs, JPMorgan Chase, Boeing, and AT&T show, the proposed rules would have severely impaired the ability of shareholders to spread awareness and build support for critical issues impacting shareholder value and long-term growth. Indeed, these engagements that would have been blocked, sometimes multiple times under the proposed rules, are in fact fine examples of corporate democracy working as intended.

When the Supreme Court eased limits on corporate election-related spending a decade ago, it nonetheless underscored important principles of corporate democracy and political disclosure. Justice Anthony Kennedy's majority opinion in *Citizens United* underlined protections afforded shareholders "through the procedures of corporate democracy."[20] At the same time, he wrote that disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency

[19] Settlement agreements are typically reached prior to the printing of a Company's annual proxy statement so that the company need not include the proposal in its statement.
[20] *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

enables the electorate to make informed decisions and give proper weight to different speakers and messages."[21]

Those "procedures of corporate democracy" were sufficient in the Court's view to "protect[] dissenting shareholders from being compelled to fund corporate political speech."[22] But the extent to which the SEC's proposed rules undermine the protections of all shareholders – particularly individuals and small shareholders – calls into question whether dissenting shareholders will be sufficiently protected from being compelled to fund corporate political speech in contravention to their First Amendment rights.

To preserve the protections corporate democracy affords to shareholders espoused by Justice Kennedy, and to preserve shareholders' ability to press companies to adopt policies that safeguard shareholder value while safeguarding our democracy, the Center urges the SEC to reject the pending proposal.

Sincerely,

Bruce F. Freed
President

Dan Carroll
Vice President for Programs

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[21] *Id.* at 916.
[22] *Id.* at 911.