



BETTER MARKETS

By Email to chairmanoffice@sec.gov

December 9, 2019

Jay Clayton, Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: The SEC must investigate allegations that dozens of fraudulent or misleading comment letters were submitted to and relied upon by the SEC in connection with two recent rule proposals on the proxy process.

Dear Chairman Clayton:

We¹ are calling upon the SEC to immediately conduct a thorough and transparent investigation into reports that dozens of fraudulent or misleading comment letters were submitted to and relied upon by the SEC in connection with two important rule proposals released last month, one on shareholder proxy access and one on proxy advisers.²

If these allegations prove to be true, then the notice and comment process for these two Proposals has been corrupted, the administrative record on which they rest is defective, and any final rules predicated on that record would be subject to challenge under the Administrative Procedure Act. Accordingly, an investigation is necessary—

1. to assess the contaminating effect that those letters may have had on the administrative record underlying the Proposals;

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

² Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458; File No. S7-23-19 (Nov. 5, 2019) (“Proxy Access Proposal”), available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>; Securities and Exchange Commission, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-87457; File No. S7-22-19 (Nov. 5, 2019) (“Proxy Adviser Proposal”) (together, the “Proposals”), available at <https://www.sec.gov/rules/proposed/2019/34-87457.pdf>.

2. to mitigate or cure that damage to the extent possible;
3. to hold accountable those responsible for any fraudulent or deceptive letters;
4. to deter the use of such tactics; and
5. to identify long-term measures that could effectively detect and address such alleged abuses in the future.

The SEC has a duty to pursue this matter by virtue of its primary mandate to protect investors, facilitate capital formation, and ensure the integrity of the capital markets. Clearly, the SEC cannot advance these goals effectively through any rulemaking if its notice and comment process—a cornerstone of the rulemaking framework under the Administrative Procedure Act—has been corrupted. And beyond the fulfillment of its duty, the SEC has an opportunity to lead a new effort to prevent such abuses from occurring in the future, thus protecting and preserving the integrity of rulemakings not only at the SEC but at other regulatory agencies as well.

Factual Background.

On November 15, 2018, the SEC held a roundtable in Washington, D.C. focusing on “the current proxy voting mechanics and technology, the shareholder proposal process, and the role of proxy advisory firms.”³ The SEC solicited public comments on those topics and received over 18,000 submissions following announcement of the roundtable.⁴ In August of this year, the SEC issued two forms of guidance relating to the proxy process.⁵ And on November 5, 2019, the SEC released the two Proposals.

The Proxy Access Proposal would impose new burdens on shareholders seeking to submit proxy proposals, including higher ownership thresholds, more onerous resubmission standards, and additional procedural requirements. The Proxy Adviser Proposal would increase the burdens on proxy advisers by treating them as engaged in proxy solicitation and by conditioning certain exemptions currently available to those advisers upon compliance with additional disclosure and procedural requirements. These important and increasingly high-profile issues have generated

³ Securities and Exchange Commission, Spotlight on the Proxy Process (Nov. 15, 2018), *available at* <https://www.sec.gov/proxy-roundtable-2018>; *see also* Securities and Exchange Commission, Statement Announcing SEC Staff Roundtable on the Proxy Process (July 30, 2018), *available at* <https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process>

⁴ Securities and Exchange Commission, Comments on Statement Announcing SEC Staff Roundtable on the Proxy Process, *available at* <https://www.sec.gov/comments/4-725/4-725.htm>

⁵ Securities and Exchange Commission, Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Release No. 34-86721 (Aug. 21, 2019), *available at* <https://www.sec.gov/rules/interp/2019/34-86721.pdf>; Securities and Exchange Commission, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release Nos. IA-5325; IC-33605 (Aug. 21, 2019), *available at* <https://www.sec.gov/rules/interp/2019/ia-5325.pdf>.

intense debate, along with heavy lobbying by corporate interests who seek to limit the influence of minority shareholders in the governance of their public companies.

At the open meeting on November 5, 2019, Chairman Clayton issued a statement in support of the Proposals.⁶ In that statement, he singled out as particularly influential seven specific comment letters, purportedly filed by everyday citizens after the roundtable. Those letters all expressed strong support for new measures that would limit the influence of proxy adviser firms. In Chairman Clayton's words,

“Some of the letters that struck me the most came from long-term Main Street investors, including an army veteran and a Marine veteran, a police officer, a retired teacher, a public servant, a single mom, a couple of retirees who saved for retirement, all of whom expressed concern about the current proxy process.”

The clear intent of those comment letters and of Chairman Clayton's public reference to them was to convey the impression that the Proposals were strongly supported by everyday investors, not only by large corporate interests, their boards, and their trade association allies.

However, on November 19, 2019, just two weeks following Chairman Clayton's statements and the Commission's vote to release the Proposals, a Bloomberg article appeared that cast grave doubts on the authenticity of dozens of comment letters submitted to the SEC, including the seven comment letters highlighted by Chairman Clayton.⁷ The article included the appalling revelation that those seven letters, along with at least 19 additional letters in the comment file, were either fraudulent or materially misleading with respect to the identities of the signers. According to the article, several people denied ever signing the letters that bore their names; several people were prevailed upon to sign their letters without any understanding of the issues they were supposedly addressing; and numerous signers were people with close connections to an advocacy group known as “60 Plus Association” (“60 Plus”), which is funded by corporate supporters of the Proposals. As further reported in the article, those signers included former employees of 60 Plus; a contractor for the group; and friends and relatives of the President of the organization—none of whom disclosed their connection to 60 Plus in their letters.

The matter is serious and urgent.

This series of events calls for an investigation for multiple reasons.

1. *The Proposals are important.* The Proposals deal with undeniably important regulatory issues, specifically relating to shareholder governance of, and engagement with, public companies. Moreover, the SEC has devoted an exceptional amount of attention and resources to these issues over the last year. For example, the SEC convened the roundtable on November 15,

⁶ Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System (Nov. 5, 2019), *available at* <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting>.

⁷ Zachary Mider and Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, BLOOMBERG, *available at* <https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change>.

2018; solicited public comments on the topics raised at that event; received and reviewed over 18,000 letters; issued two forms of related guidance in August; and then released the two rule Proposals last month.

2. The Proposals, if finalized, would have negative consequences, undermining the rights of shareholders and proxy advisers. As currently drafted, the Proposals threaten to have a seriously adverse impact on the interests of shareholders and proxy advisers who serve investors. The Proxy Access Proposal would impose substantial limitations on the rights of shareholders to participate in the governance of their companies through the proxy process, in some cases even disenfranchising shareholders. The Proxy Adviser Proposal would hamper the ability of proxy advisers to offer independent advice to investors about how shareholders may wish to cast their votes on proxy proposals involving important matters of corporate governance.

3. The alleged abuses appear to have been widespread and deliberate. The alleged submission of fraudulent or misleading comment letters in this case appears to have been a pattern, not an isolated instance. As detailed above, indications are that over two dozen comment letters were of suspicious origin. The universe of fraudulent or misleading letters may be much larger. And the deception through the use of allegedly false names, misleading names, or hidden affiliations was clearly intentional.

4. The suspect comment letters were highly influential. As explained above, the letters at issue clearly had a significant impact on the SEC, as evidenced by Chairman Clayton's unusual public statement that the seven suspect letters cited in the Bloomberg article were among those that "struck" him the most. Moreover, Chairman Clayton conspicuously chose to highlight that specific collection of letters over the thousands of other comment letters submitted on the issues presented, further evidencing their singularly powerful impact on the rulemaking process.

5. The alleged abuses may well involve illegal and even criminal conduct. The alleged conduct may have violated the criminal code, including 18 U.S.C. § 1001(a) (prohibiting materially false statements to the federal government) and 18 U.S.C. §§ 1341 and 1343 (prohibiting the use of the mails or wires in any "scheme or artifice to defraud"). For example, a person violates the mail and wire fraud provision if, with specific intent to defraud, he or she uses the mail or interstate wire communications in furtherance of a scheme to defraud.⁸ Forging the names of ostensibly sympathetic retail investors, such as a retired teacher and a single mom, to letters that in fact reflect the industry's desired policy goals, for the purpose of generating a false impression of popular support for corporate-friendly policies, betrays a clear intent to defraud. Moreover, it is obvious in light of Chairman Clayton's statements, discussed above, that if the letters were forged or misrepresented as alleged, this deception involved *material* false statements, i.e. false statements that are "capable of influencing the decision of the decision-making body to

⁸ *United States v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003); see also *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996) ("To prove mail and wire fraud, the government must prove, beyond a reasonable doubt: (1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme.").

which [they] are addressed.”⁹ In fact, the Department of Justice has opened criminal investigations in similar situations where groups have engaged in fraud by submitting forged comment letters urging regulators to take particular actions.¹⁰

6. These alleged abuses are increasingly common at federal agencies. Finally, this type of deceptive and potentially illegal conduct has become an increasingly widespread problem, at the SEC and other agencies as well. Over the last two years, numerous articles have revealed major instances of abuse in the comment letter process relating to a variety of rule proposals issued by a variety of other federal regulatory agencies.¹¹ So worrisome is this trend that the United

⁹ *Neder v. United States*, 527 U.S. 1, 16 (1999).

¹⁰ Kevin Collier & Jeremy Singer-Vine, *Millions Of Comments About The FCC's Net Neutrality Rules Were Fake. Now The Feds Are Investigating*, BUZZFEED NEWS (Dec. 8, 2018), available at <https://www.buzzfeednews.com/article/kevincollier/feds-investigation-net-neutrality-comments>.

¹¹ Jeremy Singer-Vine, *Political Operatives Are Faking Voter Outrage With Millions of Made-Up Comments To Benefit The Rich And Powerful*, BUZZFEED NEWS (Oct. 3, 2019, 9:32 AM), available at <http://www.buzzfeednews.com/article/jsvine/net-neutrality-fcc-fake-comments-impersonation> (reporting on the huge number of fraudulent comments submitted to the FCC by anti-net neutrality groups using the appropriated identities of everyday citizens, in the broader context of public relations campaigns spearheaded by industry groups to control the political process); James Grimaldi, *The NFL's Other Problem: Fake Fans Lobbying for the Blackout*, WALL ST. J. (Sept. 7, 2018, 1:13 PM), available at http://www.wsj.com/articles/the-nfls-other-problem-fake-fans-lobbying-for-the-blackout-1536340410?mod=article_inline (emphasizing the lengths corporate interests will go to thwart a dissenting, pro-consumer advocacy group's efforts to repeal an agency rule that artificially inflates costs for consumers); James Grimaldi, *Complaints About Falsified Pipeline Endorsements Draw No Response*, WALL ST. J. (Mar. 20, 2018, 9:00 AM), available at http://www.wsj.com/complaints-about-falsified-pipeline-endorsements-draw-no-response-152155080?mod=article_inline (implicating an energy-lobbying group in appropriating dozens of individuals' identities and submitting comment letters to the Federal Energy Regulatory Commission in support of a gas pipeline project that has since been approved); James Grimaldi, *Lawmaker Seeks Probe into Fake Comments on Payday-Lending Rule*, WALL ST. J. (Feb. 5, 2018, 3:57 PM), available at http://www.wsj.com/articles/lawmaker-seeks-probe-into-fake-comments-on-payday-lending-rule-1517862004?mod=article_inline (discussing industry groups' efforts to submit bogus comment letters using stolen identities to the CFPB and create false impression that consumers oppose a rule that would restrict high-interest payday lending and predatory lending practices); James Grimaldi, *Many Comments Critical of 'Fiduciary' Rule Are Fake*, WALL ST. J. (Dec. 27, 2017, 5:30 AM), available at <http://www.wsj.com/articles/many-comments-critical-of-fiduciary-rule-are-fake-1514370601> (discussing felonious nature of the thousands of fraudulently submitted comments criticizing the Department of Labor's proposed fiduciary rule, which would have required investment advisors handling retirement accounts to act in the best interests of their clients); James Grimaldi, *Millions of People Post Comments on Federal Regulations. Many Are Fake.*, WALL ST. J. (Last Updated, Dec. 12, 2017, 2:13 PM), available at http://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188?mod=article_inline (emphasizing how investigations of regulatory dockets have unearthed countless occurrences of fake comment letters submitted on behalf of individuals without their knowledge, letters that frequently favor antiregulation stances and mirror industry talking points); see also Rachel Potter, *More Than Spam? Lobbying the EPA Through Public Comment Campaigns*, BROOKINGS (Nov. 29, 2017), available at <http://www.brookings.edu/research/more-than-spam-lobbying-the-epa-through-public-comment-campaigns/> (emphasizing abuses by groups

States Senate's Permanent Subcommittee on Investigations recently issued a report on the problem, concluding that "[f]or online commenting to be beneficial to both the agencies and the public, online dockets must contain substantive, relevant information that is easy to identify. They should not contain abusive material or comments submitted under false identities, and agencies should take appropriate action against commenters who abuse the process."¹²

In short, any effort to advance the Proposals through such allegedly underhanded, dishonest, and influential tactics must be thoroughly investigated and remedied to restore the integrity of the rulemaking process, which is the central policy-making mechanism used by federal regulatory agencies. These steps must be taken to ensure that any final rules arising from these Proposals reflect the optimal regulatory approach in the public interest, not the views and preferences of the regulated industry or its allies falsely portrayed as those of retail investors or others. Moreover, an investigation is necessary to explore new measures that can detect, remediate, punish, and deter such abuses in the future.

The investigation must be thorough, expeditious, and transparent.

The investigation must be thorough. The investigation must, at a minimum, answer the following questions:

1. Whether and to what extent any comment letters addressing issues related to the Proposals were submitted to the SEC by people using false names; people who did not intend to file comment letters or did not understand the letters they signed; or people who had undisclosed personal connections to lobbying groups supporting the substance of the Proposals;
2. Who conceived of, orchestrated, participated in, or had knowledge of the submission of any fraudulent or misleading comment letters related to the Proposals;
3. Whether such conduct violated any federal laws or rules, including, without limitation:
 - a. any criminal statutes, including those prohibiting mail and wire fraud or false statements to the federal government;
 - b. the securities laws and any rules and regulations thereunder;

that launch tactical campaigns to manipulate agency considerations during the notice and comment period for rule proposals).

¹² Abuses of the Federal Notice-and-Comment Rulemaking Process, Staff Report, Permanent Subcommittee on Investigations, United States Senate, at 33 (Oct. 24, 2019), *available at* https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf?mod=article_inline.

- c. the Commission's Rules of Practice, including 17 C.F.R. § 201.201(e)(ii)(providing that sanctions may be imposed on any representative who is found "to be lacking in character or integrity," to have "engaged in unethical or improper professional conduct," or to have "willfully violated" any provision of the federal securities laws or the rules thereunder; or
 - d. any state laws and regulations.
4. What remedial steps are necessary to repair the rulemaking record underlying the Proposals;
 5. What punitive measures are necessary to hold the responsible parties accountable;
 6. What prior SEC rulemakings, if any, have involved similar instances of comment letter submissions that are fraudulent or misleading;
 7. What new measures should be adopted by the SEC, including the adoption of new rules, to detect, prevent, remediate, or punish such abuses in the future, including comment letter authentication protocols; corrective submissions to the comment file; the imposition of sanctions; or referrals to other regulatory or law enforcement authorities, either state or federal.

The investigation must be expeditious. In addition, the investigation must be expeditious. The formal comment period on the two Proposals will remain open for only 60 days following publication in the Federal Register. Once that period closes, the Commission will presumably be inclined to bring them both to a vote for final adoption without undue delay. But no final action on the Proposals would be appropriate unless and until the investigation is concluded and any necessary and appropriate remedial steps are taken. Only then will the SEC be equipped to attempt to finalize the Proposals.

The investigation must be transparent. Finally, the investigation must be transparent. Accordingly, the findings of the report must be immediately made public (accounting for any appropriate redactions genuinely necessary to protect any bona fide and compelling privacy interests). At stake here is not only the integrity of the rulemaking process but also the public's faith in that process. Given the now widely reported allegations surrounding the comment letters submitted in support of the Proposals, as well as the series of exposés regarding other abuses in the comment letter process cited above, it is especially important that the matter be forthrightly addressed in a fully transparent manner, so the public's confidence in the government's rulemaking process can be restored.

Conclusion.

Thank you for your attention to these matters. We look forward to your response.

Sincerely,



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