September 12, 2022

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

Re: Proposed Rule, Securities and Exchange Commission; Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8; 87 Fed. Reg. 45052 (July 27, 2022)

Dear Ms. Countryman:

The undersigned organizations write to express our opposition to the rule proposal issued by the Securities and Exchange Commission (SEC) entitled "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8" (Proposal). If adopted, the Proposal would weaken reforms to Rule 14a-8 that were finalized less than two years ago, empower outside parties that have little or no stake in public companies to pursue financially immaterial objectives, and render the "no-action" process under Rule 14a-8 useless in many cases.

Accordingly, we wish to provide the following views and recommendations regarding the Proposal:

I. **The Proposal runs counter to the historical purposes of Rule 14a-8 and favors a small number of activists over the vast majority of investors.**

II. **The Proposal establishes highly subjective criteria that will strongly discourage issuers from seeking no-action relief under Rule 14a-8;**

III. **The Proposal undermines changes to the resubmission rule adopted in 2020;**

IV. **The SEC has not provided sufficient evidence or economic analysis to show that the Proposal is necessary and in the best interest of investors; and**

V. **The Proposal represents the latest example of the SEC capriciously weakening recent reforms to the proxy system, which will have long-term ramifications for investors and the willingness of companies to go public.**

Background

Rule 14a-8 was established as a means to facilitate constructive communication between investors and issuers, and to ensure that shareholder priorities were given a fair hearing at companies' annual meetings. Issuers are generally required to include a shareholder proposal with their proxy materials unless they obtain no-action relief using one of several exceptions under Rule 14a-8. The existence of these exceptions underscores the fact that the SEC has never permitted unrestrained access to a company's proxy statement.

For years, the SEC has allowed for the exclusion of proposals that dealt with topics that were fundamentally unrelated to corporate performance, such as proposals dealing with personal grievances or matters of a social or political nature that have no nexus to the company's operations. These safeguards have always been intended to allow public companies to focus their time and resources on issues their boards believe to be most relevant to shareholders by preventing the exploitation of Rule 14a-8 and keeping annual meetings from turning into debating societies that examine any issue that a shareholder wishes to present.

Over time, however, Rule 14a-8 has become less of a tool for shareholder communication and more of a vehicle for a small minority of activists to pursue their agendas. For example, during the 2021 proxy season, one individual and his associates alone were responsible for nearly one-third of all shareholder proposals.[1] Most groups that submit shareholder proposals also have some kind of explicit social or political objective. The views of these particular individuals and groups may not be shared by a majority of investors, yet they have come to dominate the shareholder proposal process and the topics that companies must grapple with during proxy season.

In 2020, the SEC adopted changes to Rule 14a-8, including amendments to the rules governing resubmissions of failed proposals and disclosures regarding a proponent's identity and economic interest in the underlying company (2020 Reforms). The 2020 Reforms were informed by a decade-long examination of the proxy process by the SEC and Congress[2] and were carefully calibrated to maintain the ability of long-term investors to submit proposals. While a vocal group of activists opposed these reforms, the 2020 Reforms were long overdue changes to a system that had strayed far from its original purpose.

Unfortunately, in the last year the SEC has worked to undermine the 2020 Reforms and tilt the scales in favor of shareholder activists. Staff Legal Bulletin 14L (SLB 14L) was a significant departure from the SEC's longstanding view of the "ordinary business exception" under Rule 14a-8. SLB 14L asserts that it is no longer necessary for a policy issue implicated by a proposal to have a nexus to an issuer's business. SLB 14L has now been followed by the

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[1] "Shareholder Proposal Developments During the 2021 Proxy Season" Gibson, Dunn, and Crutcher LLP (August 19, 2021)

[2] E.g. 2010 SEC Concept Release on the U.S. Proxy System; December 2013 SEC Staff Roundtable on Proxy Advisory Services; November 2018 SEC Staff Roundtable on the Proxy Process; September 2016 House Financial Services Committee Hearing "Corporate Governance: Fostering a System that Promotes Capital Formation and Maximizes Shareholder Value"; December 2018 Senate Banking Hearing "Proxy Process and Rules: Examining Current Practices and Potential Changes"

Proposal, which together amount to a sea change in the guidelines used determine what is excludable under Rule 14a-8.

The end result will be that issuers are less likely to seek no-action relief, even for shareholder proposals that have absolutely no connection to their core business. Annual meetings will therefore be dominated by immaterial proposals year after year, creating costs for shareholders and distractions for boards and management. This will ultimately harm investors and work to make the public company model less attractive.

Our views and recommendations on the Proposal are discussed in further detail below.

I. The Proposal runs counter to the historical purposes of Rule 14a-8 and favors a small number of activists over the vast majority of investors.

Over the last two proxy seasons, the proportion of shareholder proposals dealing with social, political, or environmental matters has increased significantly. According to one analysis, social and political proposals increased by 17% year-over-year in 2022, following a 39% increase in 2021.[3] Environmental proposals increased by 38% in 2022, following a 40% increase in 2021.[4] As has been the trend, a small group of activists and activist funds are responsible for a majority of proposals: In 2022, just *ten* proponents were responsible for 60% of all proposals submitted.[5]

Notably, support for social, political, and environmental proposals is extremely low among retail investors. According to a 2021 report, retail investors only provided 18% support for environmental and social proposals during the 2021 proxy season, and only 19% supported proposals calling for greater disclosure about political spending.[6] The data is clear: retail investors, who invest in the public markets for long-term financial growth and retirement security, continue to have little interest in advancing such proposals at public companies.

It is confounding that the SEC – through SLB 14L and the Proposal – has seemingly chosen the side of a micro-minority of activist proponents over the overwhelming majority of individual investors. SLB 14L very likely contributed to the increase in social, political, and environmental proposals during the 2022 proxy season, and it will encourage similar proposals in the years to come. The Proposal will have a similar effect by making it even more difficult for companies to obtain no-action relief under Rule 14a-8.

Analyzing and responding to shareholder proposals requires the use of substantial corporate resources and in some cases can create distractions for boards and management. The shareholder proposal system is not free: shareholders ultimately bear the costs of dealing with activist proposals, which are often submitted year after year. The SEC must take these costs into account and consider the level of investor interest in shareholder proposals, particularly those that deal with social or political matters. Unfortunately, the Proposal empowers activist investors

[3] "2022 Proxy Season Review: Part 1"; "2021 Proxy Season Review: Part 1" Sullivan & Cromwell LLP
[4] *Id.*
[5] *Id.*
[6] "2022 Proxy Season Preview" Broadridge (February 2022)

and incentivizes social and political proposals – ultimately at the expense of public companies and their long-term shareholders.

II. The Proposal establishes highly subjective criteria that will strongly discourage issuers from seeking no-action relief under Rule 14a-8.

While at first glance the Proposal appears to include only technical changes to Rule 14a-8, in reality, it represents a sea change in the way that the SEC administers the shareholder proposal process. Even more concerning, the Proposal would effectively give activists the ability to decide whether issuers have met the proposed standards for exclusion. This potential shift of balance in favor of activist proponents is a major concern for both issuers and investors.

For example, the proposed changes to Rule 14a-8(i)(10) will lead to utterly subjective determinations as to whether an issuer has already substantially implemented *all* of the "essential elements" of a proposal for it to be excluded. The Proposal acknowledges this will require a "degree of substantive analysis" and that a proposal's "stated primary objective" would guide such analysis.

Similarly, the proposed changes to the definition of "substantially duplicates" under Rule 14a-8(i)(11) and Rule 14a-8(i)(12) will fail to provide issuers with any kind of clear, objective guidelines to determine whether a proposal is excludable. This could result in multiple proposals containing similar, sometimes nearly identical, requests of issuers to be voted on and approved at the same annual meeting or year after year.

Concerningly, the Proposal even contains hypothetical scenarios that provide a roadmap to activists for how to navigate the potential new rules and ensure that a proposal is always included with a company's proxy materials. For example, the Proposal explains that under the proposed changes to Rule 14a-8(i)(11), an issuer would have to include with its proxy materials two proposals regarding political spending disclosure, even if the only difference between them is that one requests the information to be published in a newspaper, the other for the information to be included in a company report. (Perhaps a third proponent might request that the company disclose the information through a microsite, while another might want it disclosed in the annual report, and so on.) The possibilities for proponents appear endless, but it remains unclear how the Proposal will be beneficial in any way to a company's broader shareholder base.

III. The Proposal undermines changes to the resubmission rule adopted in 2020.

While the SEC has studiously avoided directly amending the 2020 Reforms, proposed changes will weaken the positive changes made to Rule 14a-8(i)(12) in 2020.

The 2020 Reforms raised the thresholds that determine whether a proposal that previously garnered very low support could be resubmitted in a subsequent proxy year. The purpose of these changes was to "relieve companies and their shareholders of the obligation to consider, and spend resources on, matters that had previously been voted on and rejected by a substantial majority of shareholders without sufficient indication that a proposal could gain traction among the broader shareholder base in the near future."[7]

The 2020 Reforms raised the resubmission thresholds so that companies could exclude a proposal if it received less than 5% of the votes cast if previously voted on once; less than 15% of the votes cast if previously voted on twice; or less than 25% of the votes cast if previously voted on three or more times.

Raising the resubmission thresholds was a long-considered reform that was first proposed by the SEC in 1997[8] and was later discussed at the SEC's proxy process roundtable in 2018. By effectively leaving it to proponents to determine whether a proposal "substantially duplicates" a previously submitted proposal that received low support will undermine the intent and effect of the 2020 Reforms.

To use the SEC's own example, if a proponent submits a proposal that called on an issuer to publish its political spending and lobbying expenditures in a newspaper, and that proposal receives 1% support, the proponent could come back the next year and request the same information be disclosed, but this time through a company report. Because this would appear to not meet the proposed "same means" test, it would appear to not be excludable – even if 99% of investors have already indicated they have no interest in the information.

This would be a wholly undesirable outcome for issuers, investors, and the SEC as the arbiter of the no-action process. The SEC should drop consideration of any further amendments that undermine changes to the resubmission thresholds adopted as part of the 2020 Reforms.

IV. The SEC has not provided sufficient evidence or economic analysis to show the Proposal is necessary and in the best interest of investors.

In his dissenting statement, Commissioner Uyeda noted that the Proposal lacked any kind of analysis as to the benefit of the shareholder proposal system:

> …the proposal does not even attempt to ascertain whether it would add value to investors. It states that "[o]ur economic analysis does not speak to whether any particular shareholder proposal is value-enhancing, whether the proposed amendment would result in inclusion of value-enhancing proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value-enhancing." It also acknowledges the failure to gather data "to assess the likelihood of proponent behavior changes or quantify the potential increase in the number of proposals."
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> Not only is it uncertain if this proposal is value-enhancing, but the economic analysis acknowledges that it will burden other shareholders with the "costs associated with their own consideration of a shareholder proposal" and these costs can be significant. Increasing the number of shareholder proposals may cause asset managers to

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[7] 2020 Reforms at 66

[8] Amendments to Rules on Shareholder Proposals (September 19, 1997)

rely even more on proxy voting advice, despite the action being taken today that may weaken the integrity of that advice.[9]

Recent evidence indicates there is a positive correlation between share performance and shareholder proposals being excluded from company proxies. A study of 3,903 proposals, between 2007-2019, examined the impact on stock price where no action was requested. This study found that the stock price appreciated in value between 0.11% and 0.58% immediately upon the issuance of a no-action decision.[10] The study found that the no-action process was an important mechanism in weeding out irrelevant proposals and ensuring that the shareholder proposal process is focused on building corporate and investor value.

The Proposal's economic analysis does not adequately consider the costs of the current system or estimate the effect that no-action relief has on stock performance. Given that the Proposal will likely result in fewer no-action requests granted by SEC staff (and thus more shareholder proposals included on the proxy ballot), the SEC must – in accordance with the Administrative Procedure Act – conduct a more thorough analysis about the overall economic impact of the Proposal prior to promulgation of any final rule.

V. The Proposal represents the latest example of the SEC capriciously weakening recent reforms to the proxy system, which will have long-term ramifications for investors and the willingness of companies to go public.

The Proposal is just the latest iteration of the SEC reversing course on reforms adopted in recent years that were design to protect long-term shareholders and improve the proxy system. The SEC's reputation as an independent regulator is at risk when the agency embarks on a rulemaking agenda focused on overturning recently adopted rules, especially absent any clear rationale or evidence to support such a dramatic about-face.

The SEC's recent actions to gut the 2020 proxy advisory firm rule – without allowing the rule to take effect and be fairly evaluated – is just one example of how the SEC has jeopardized its independence over the last 18 months. Similar to the Proposal, the proxy firm rule was the result of a decade-long bipartisan rulemaking process and was widely supported, despite vocal opposition by a small minority of activists.

The public markets need a steady hand at the regulatory wheel, and the SEC's recent agenda risks the agency's reputation and jeopardizes the public company model. Activists should not be further emboldened to use shareholder proposals to pursue political or social objectives, nor should the SEC be the arbiter of political or social outcomes. If the Proposal is finalized, it will make the public market a less attractive tool for capital formation and discourage listings on U.S. exchanges.

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[9] Statement on Proposed Amendments for Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals under Exchange Act Rule 14a-8. Commissioner Mark Uyeda (July 13, 2022)

[10] Matsusaka, John G. and Ozbas, Oguzhan and Yi, Irene, Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions (April 1, 2019). USC CLASS Research Paper No. CLASS17-4, Marshall School of Business Working Paper No. 17-7, Available at SSRN: https://ssrn.com/abstract=2881408 or http://dx.doi.org/10.2139/ssrn.288140

Conclusion

For the reasons stated above, we urge the SEC to seriously reconsider this ill-advised initiative and instead focus on enforcing and evaluating the 2020 Reforms. We look forward to serving as a resource to the SEC on this critical issue.

Sincerely,

American Securities Association

Nareit

National Association of Manufacturers

NIRI: The Association for Investor Relations

U.S. Chamber of Commerce