September 9, 2022

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

Re: Release No. 34-95267; IC-34647; File No. S7-20-22

Via e-mail: rule-comments@sec.gov

Dear Ms. Countryman:

The SOC Investment Group submits the following comments in connection with the proposed amendments to SEC Rule 14a-8, which would revise the exclusions relating to a company's ability to exclude a shareholder proposal on the grounds that the proposal has been substantially implemented, is a duplicate of another proposal, or has failed to receive enough support in prior years to allow resubmission to shareholders.

The SOC Investment Group is a shareholder at a number of publicly traded companies and submits shareholder proposals to portfolio companies. In addition, the SOC Investment Group works with pension funds sponsored by unions affiliated with the Strategic Organizing Center, a coalition of unions representing more than four million members, to enhance long term shareholder value through active ownership. These funds have over $250 billion in assets under management.

The SOC Investment Group agrees with the Commission's assessment that shareholder proposals are and have long been an important tool for facilitating engagements between companies and their shareholders, as well as between shareholders themselves. Rule 14a-8 allows shareholders to raise issues with management and the board that might not otherwise be raised in a public forum. A shareholder proposal thus provides an opportunity for communication about a company's activities on a given topic and may result in a change in existing policy without the matter coming to a vote. If a proposal does come to a vote, the rule gives shareholders the opportunity to be heard on important issues; the rule also benefits companies by allowing them to learn the views of its entire shareholder base, not simply some shareholders.

The proposed rule would clarify the criteria in the "substantially implemented" exclusion, Rule 14a-8(i)(10), and the "duplicate proposal" exclusion, Rule 14a-8(i)(11), with conforming amendments to the "resubmission" exclusion, Rule 14a-8(i)(12).

We agree with the Commission that clarifications of these exclusions would be useful and could make the current system more efficient. As the Release points out (Chart, p. 8), the "substantial implementation" exclusion has generated a number of no-action requests over the past three years (2018-2019 through 2020-2021), even though relief was denied in 50% to 67% of those cases; the

"duplicate proposal" exclusion was invoked a number of times during this period, and relief was denied between 56% and 75% of the time.

Rule 14a-8(i)(10): The "substantially implemented" exclusion.

This exclusion allows a company to omit a proposal from its proxy materials if the proposal has been "substantially implemented by the issuer." Conceptually, this formulation makes sense and reflects an improvement over the prior criterion, which asked whether "the proposal has been rendered moot." (Release, p. 11 & n.25). As the Commission acknowledged when it adopted the current language in 1983, this change could require some subjective judgments about the degree of alignment between a company's existing policy and the proposed policy.

As the Release also points out, the Commission has employed several formulations to interpret this exclusion, notably by asking whether a company's existing policies "compare favorably" with the guidelines in the proposal, or whether the underlying concerns and essential objectives of a proposal have been met (*id*., p. 12). This inquiry can be fact-intensive, and, as the Release also notes, the analysis in the competing no-action letters can devolve into a bean counting contest, with the company citing X number of elements of a proposal that the company has adopted, while the proponent cites Y number of elements that the existing policies do not contain. In addition, and as to proposals seeking greater disclosures on a topic, companies may invoke this exclusion to cite disclosures that are "voluminous, but unresponsive" to the core elements of a proposal; there is also the challenge of drafting a proposal that can "thread the needle" between specifying items that should be disclosed without being accused of micromanagement, which can lead to exclusion under the "ordinary business" exclusion in Rule 14a-8(i)(7) (*id.,* pp. 13-14).

To provide greater clarity, the proposed rule would amend this exclusion to permit omission if "the company has already implemented the essential elements of the proposal." This is an important clarification of the "compares favorably" and "underlying concerns" benchmarks discussed in the preceding paragraph. The key is identifying the "essential elements" of a proposal.

The "essential element" standard would refine and clarify the "compares favorably" standard that the Division has used for many years, and our experience illustrates the wisdom of this approach. We submitted "racial equity audit proposals" for the 2021 annual meetings at both Citigroup and JPMorgan Chase. Both companies sought no-action relief on the ground that the company had implementing the "key goals" of the proposal by adopting and announcing plans to address racial equity. In letters filed with the staff, our counsel pointed out that the "key goal" of the proposal was not that management should do something on the topic, but that there be an "independent audit" of the company's plans and operations, with the role of an independent party being the key element. The staff agreed.[1]

The Release states that in order to determine the "essential elements" of a proposal, "we anticipate that the degree of specificity of the proposal and of its stated primary objectives would guide the analysis" (*id.,* p. 14). The Release also provides helpful examples, but we believe that there is a related issue

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[1] The staff did not issue letters denying relief in both *Citigroup, Inc*. (Feb. 26, 2021) or *JPMorgan Chase & Co.* (Feb. 23, 2021), but noted the results in the chart for the 2020-2021 proxy season. See https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/shareholder-proposal-no-action-responses-2020-2021.htm. The correspondence from both the proponent and the company appear at https://www.sec.gov/corpfin/2020-2021-shareholder-proposals-no-action.

where additional guidance would be helpful, and that involves proposals to change a company's stated policy from one numerical goal to another*, e.g.,* a proposal to reduce a company's greenhouse gas emissions by 40% by a specific date, when the existing policy goal for that date is 35%, or a proxy access proposal to increase the cap on the number of nominating shareholders not from 20 to unlimited, but from 20 to 50. The Release indicates that the decision-making process will be guided by the specificity of a given proposal and its "stated objectives," but it is not clear how this benchmark would apply to proposals of this sort.

The Commission has requested responses to several questions, which we answer as follows:

Question 1: Should we amend the standard for exclusion under Rule 14a-8(i)(10), as proposed, to provide that a proposal may be excluded if "the company has already implemented the essential elements of the proposal"?

Response to Question 1: Yes, for the reasons stated above.

Question 2: Would the proposed amendment benefit shareholder-proponents and companies by promoting more consistent and predictable determinations regarding application of the substantial implementation exclusion? What potential costs should we consider?

Response to Question 2: We believe that the answer is "yes," although as noted above, we believe that any final rule should provide additional illustrations as to how the exclusion would apply to situations of the sort described above.

Question 3: Under the proposed amendment, the analytical framework would focus on a proposal's essential elements. The determination of which elements of a proposal are essential under that framework would be guided by the degree of specificity of the proposal and of its stated primary objectives. Is this an appropriate standard to identify a proposal's essential elements? Are there other potential approaches we should consider?

Response to Question 3: As noted above, we submit that the suggested framework could be fleshed out in connection with any final rule to provide additional illustrations as to how that framework would work in practice.

Rule 14a-8(i)(11): The "substantially duplicates" exclusion.

This exclusion allows a company to omit a proposal that "substantially duplicates another proposal" that the company had received earlier in the same proxy season. In discussing the reasons for revising this language, the Release notes that the staff currently focuses on has traditionally focused on whether the two proposals share the same "principal thrust" or "principal focus," an inquiry that may involve the same sort of fact-intensive analysis used in "substantially implemented" situations. In addition, the first-in requirement can create incentives to file early and can pre-empt proposals that were voted the prior year that may have garnered more support (pp. 17-18).

As the Release points out, the number of no-action requests decided on (i)(11) grounds is substantially smaller than the number of requests that are decided on (i)(10) ground. Even so, companies are willing to raise a "duplication" objection to a proposal, even though relief was denied between 43% and 75% of the time in the 2019, 2020 and 2021 proxy seasons (p. 17).

In lieu of the current language, the Commission proposes a standard that would permit exclusion if a proposal "addresses the same subject matter and seeks the same objectives by the same means." We support this language, which would build on the present "principal thrust" and "principal focus" standard by clarifying that the proper focus is on whether the two proposals have the "same objectives."

This "same objectives" language is key. SOC Investment Group (formerly known as the CTW Investment Group) has witnessed abuses of Rule 14a-8 when a proponent files a proposal that takes the "resolved" clause of an SOC Investment Group proposal (such as those calling for a racial equity audit or disclosure of corporate political spending) and then adds a "supporting statement" that urges a vote *against* the very same resolution or espouses policy goals that are distinct from (or the opposite of) the goals in our proposal. When this happens, the "objectives" of the two proposals are antagonistic, even though the language of the "resolved" clauses may be identical.

For example, in connection with Bank of America's 2021 shareholder meeting, the CTW Investment Group filed a proposal at Bank of America recommending an independent "racial equity audit of the company's practices. This first-time proposal received a 26.5% "yes" vote.

We re-submitted this proposal for the 2022 annual meeting, only to learn that another shareholder had beaten us to the punch with a proposal containing the same "resolved" clause, but a supporting statement seeking the opposite of what our proposal recommended, *i.e.,* a focus on discrimination against "non-diverse" employees. When advised by the corporate secretary of this duplication, which occurred before the staff letter in *Johnson & Johnson Co.* (Feb. 11, 2022), we withdrew our proposal.

The upshot was that Bank of America shareholders were denied the opportunity to vote on a proposal that more than 25% of them had supported the first time out. By contrast, the competing proposal received a "yes" vote of only 2.1%, thus making the proposal ineligible for submission in the near future.[2]

Such gamesmanship has no place in this area, and the proposed rule would provide a useful clarification by specifying that the focus of the (i)(11) exclusion must be on the objectives of any two competing proposals. We are skeptical that there would be a significant problem with shareholder confusion; even if the "resolved" clause of two proposals may be the same or similar, a comparison of the two "supporting statements" should make clear the difference in terms of objectives.[3]

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[2] The experience at Johnson & Johnson was similar. A first-time racial equity audit proposal scored a 33.9% "yes" vote in 2021 and rose to 62.6% in 2022, while the "non-diverse" counter-proposal in 2022 received only a 2.7% "yes" vote.

In 2022 a similar proposal was adopted by Apple shareholders with a "yes" vote of 53.6%, and proponents of that proposals have outlined publicly what they view as the essential elements of a "racial equity audit," which should be conducted by a third party with a core competency in civil rights work. That letter is available at https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/62716f2cf9da773d70d2488c/1651601196509/Apple_CRA+Engagement+Letter_2022.pdf.

[3] If a proposal in Year 2 has the same "resolved" clause as a proposal in Year 1, yet the supporting statement urges a vote *against* that proposal, it would appear that that such a "vote against my proposal" proposal could be

A final point about the "duplication" exclusion is warranted. Our experience indicates that some corporate secretaries are willing to telephone a proponent in situations where duplication concerns arise. When this happens, it may be possible to resolve the issue without resort to a request for no-action relief.

However, not all companies provide such a heads-up. Instead, some proceed immediately to the no-action process, thus creating needless effort for all concerned. We thus recommend that the final Release should encourage companies, before seeking no-action relief, to reach out to the second-in-time proponent, to identify the first-in proponent and provide the text of the first-in proposal. When this happens, the matter may resolve itself without the company seeking no-action relief. The second-in proponent may see that opposing a no-action request would be futile; alternatively, the second-in proponent may contact the first-in proponent, who would be willing to withdraw the first-in proposal. Either way, the process would work more efficiently than is currently the case.

The Commission has requested responses to several questions, which we answer as follows:

Question 4: Should we amend the standard for exclusion under Rule 14a-8(i)(11), as proposed, to specify that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means"?

Response to Question 4: Yes, for the reasons stated above.

Question 5: Would the proposed amendment benefit shareholder-proponents and companies by promoting more consistent and predictable determinations regarding application of the duplication exclusion? What potential costs should we consider?

Response to Question 5: Yes, for the reasons stated above.

Question 6: Would the proposed amendment result in shareholder confusion or the inclusion and adoption of multiple contradictory proposals dealing with the same or similar issue? If so, what would be the implications for shareholders and companies? How would companies deal with any resulting implementation challenges? Are there potential measures we could consider to mitigate these impacts? For example, should we adopt a numerical limit on the number of shareholder proposals that address the same subject matter to be included in the proxy statement? If so, what numerical limit would be appropriate, how should such a limit be imposed, and what would be the anticipated costs of such an approach?

Response to Question 6: We are skeptical that a "same objectives" standard would create that much confusion; if anything, the presence of multiple proposals may provide a company with a more precise gauge of investor interest on a topic.

To illustrate the point, this issue has arisen in a similar context companies argued that a shareholder proposal on a specific facet of executive compensation (say, a limit on accelerated vesting of unearned equity) conflicted with the management proposal seeking approval of a new equity plan that

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omitted under Rule 14a-8(i)(3), which proscribes materially false or misleading statements in a company's proxy materials. The Commission may wish to address that point.

contemplates such vesting; thus, the argument went, the proposal could be excluded under the (i)(9) exclusion for “direct conflicts” with management proposals. The staff did not concur in those instances for understandable reasons: Even if shareholders are willing to endorse the equity plan on balance and as a whole, a separate vote on accelerated vesting lets the board know if there are specific concerns about that specific element of the plan. Such knowledge can be helpful for future board deliberations.

As for the concept of putting a cap on the number of proposals, it would seem that unless the proposals are identical or virtually identical, there could be difficult definitional questions as to how close the two (or more) proposals are to each other.

If multiple proposals on a given topic are filed, the most effective procedure would be the procedure outlined above for notifying the second-in proponent, a measure that could reduce or eliminate the need to seek no-action relief.

Finally, we note our recommendation that “vote against my proposal” proposals could be weeded out by viewing such proposals as misleading and thus a violation of Rule 14a-8(i)(3).

Question 7: We anticipate that the proposed amendment would reduce the first-in-time advantage for the first shareholder to submit a proposal on a given topic. What is the impact of the first-in-time advantage on the ability of different shareholders to submit proposals addressing the same topic?

Response to Question 7: The first-in-time requirement can encourage gamesmanship, but it is not clear whether it favors one class of shareholders over another.

Question 8: Aside from a first-in-time standard, are there alternative objective standards that should be applied to determine which proposal(s) to exclude when a company has received proposals that are substantially duplicative under Rule 14a-8(i)(11), such as the number of shares owned or the number of co-proponents?

Response to Question 8: We are not sure there is a superior alternative. For example, a rule that gives an advantage to a proponent or group of proponents with more shares may encourage some proponents to load up on co-filers, which could increase the transactional costs for all concerned.

There is a practical point to be noted here. Duplicate proposals are most likely to occur only after a particular proposal has cleared the no-action hurdle in a prior year, thus reducing the risk that the proposal can be challenged as “ordinary business” or on other grounds. As a result, it should hardly be surprising that different shareholders will use the same basic text and that a given company will receive the same (or essentially the same) proposal from different proponents. When that happens, the extent of duplication is usually clear. If the company were to advise the second filer of that situation, identify the first filer and provide the text of the proposal, it may be possible for the two proponents to reach a resolution as to which proposal should be withdrawn without resort to the no-action process.

Rule 14a-8(i)(12): The “resubmission thresholds” exclusion.

This exclusion allows the omission of proposals that address “substantially the same subject matter” as a proposal or proposals included in a company’s proxy materials if the prior proposals failed to achieve a specified level of “yes” votes. The staff has considered application of this exclusion by asking if a new

proposal raises the same "substantive concerns" as prior proposals, but the concern has been expressed that this can involve detailed, fact-intensive inquiries.

The Release proposes revising the current "same subject matter" standard to permit exclusion if the new proposal "addresses the same subject matter and seeks the
same objective by the same means." This change would harmonize this exclusion with the (i)(11) duplication proposal, and we believe that the change is warranted and will provide greater clarity.

The Commission has requested responses to several questions, which we answer as follows:

<u>Question 9:</u> Should we amend the resubmission exclusion, as proposed, to provide that a resubmission is a proposal that "substantially duplicates" a prior proposal, the same standard as under the duplication exclusion in Rule 14a-8(i)(11)? Should we amend the rule, as proposed, to specify that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means"? Should we instead maintain the current standard? Should we consider a different standard, such as the Commission's pre-1983 "substantially the same proposal" standard? Are there other approaches we should consider?

<u>Response to Question 9:</u> We favor the proposed change for the reasons stated above.

<u>Question 10</u>: Would the proposed amendment benefit shareholder-proponents and companies by promoting more consistent and predictable determinations regarding application of the resubmission exclusion? What potential costs should we consider?

<u>Response to Question 10:</u> We believe that the change would be beneficial to all concerned.

<u>Question 11:</u> The proposed amendment seeks to strike a balance between the purpose of the resubmission exclusion to limit the consideration of proposals that do not garner significant shareholder support and the ability of shareholder-proponents to engage with a company and other shareholders through the shareholder proposal process, including by mitigating the potential "umbrella" effect of the resubmission exclusion. Are there other considerations we should take into account?

<u>Response to Question 11:</u> We favor the proposal for the reasons stated above.

<u>Question 12:</u> The proposed amendment would apply the same standard for exclusion when comparing a given proposal against proposals submitted for the same shareholder meeting, for purposes of the duplication exclusion in Rule 14a-8(i)(11), and against proposals considered at prior meetings, for purposes of the resubmission exclusion in Rule 14a- 8(i)(12). Is this approach appropriate?

<u>Response to Question 12:</u> Yes, for the reasons stated above.

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Thank you for the opportunity to submit these comments. The SOC Investment Group would be pleased to provide any further information that may be helpful to the Commission's deliberations.

Respectfully submitted,

Dieter Waizenegger
Executive Director