ROBECO

Via Email

September 9, 2022

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

Re: File Number S7-20-22

Dear Secretary Countryman,

We welcome the opportunity to provide feedback on the Securities and Exchange Commission's (SEC) proposed rule "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8" (Proposed Rule).

By way of background, Robeco is a pure play international asset manager founded in 1929. It has offices in 13 countries worldwide and is headquartered in Rotterdam, the Netherlands. We have strived to be a global leader in sustainable investing since 1995. Robeco's focus has been on the integration of sustainable as well as fundamental and quantitative research in an effort to offer institutional and private investors an extensive selection of active investment strategies for a broad range of asset classes. As per June 2022, Robeco had EUR 178 billion in assets under management, of which EUR 171 billion committed to ESG integration. Robeco is a subsidiary of ORIX Corporation Europe N.V.

Please find below our comments in response to the three proposed amendments.

1. **Rule 14a-8(i)(10) – Substantial implementation**

We support the proposed amendment to Rule 14a-8(i)(10) that would revise the framework for the application of the "substantial" implementation standard by "[stating] that a proposal may be excluded as substantially implemented '[i]f the company has already implemented the essential elements of the proposal.'"

In particular, we agree with the below example included within the Proposed Rule:

*[T]he staff historically has concurred in the exclusion, under Rule 14a-8(i)(10), of proposals seeking the adoption of a proxy access provision that allows an unlimited number of shareholders who collectively have owned 3 percent of the company's outstanding common stock for 3 years to nominate up to 25 percent of the company's directors, where the company had adopted a proxy access bylaw allowing a shareholder or group of up to 20 shareholders owning 3 percent of its common stock continuously for 3 years to nominate up to 20 percent of the board. Under the proposed amendment, because the ability of an unlimited number of shareholders to aggregate their shareholdings to form a nominating group generally would be an essential element of the proposal, exclusion would not be appropriate.*

In our view, the amendments would provide a more objective framework for the substantial implementation exclusion, thereby ensuring more clarity and predictability with regards to proposal excludability.

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## 2. Rule 14a-8(i)(11) – Duplication

We support the proposed amendment to the standard for exclusion under Rule 14a-8(i)(11) to provide that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means." We consider that the amendment would lead to a clearer framework for evaluating whether proposals are substantially duplicative under 14a-8(i)(11) and would reduce the "first-in-time" advantage for the first shareholder putting forward a proposal on a certain topic.

In 2022, we noticed the increased prevalence of shareholder proposals that have widely become known as "anti-ESG" or "anti-social" on the AGM agendas of US companies. These often duplicate the "RESOLVED" clause of proposals filled by ESG-minded investors, with the supporting statement revealing that the objective sought by the proponent(s) is hindering rather than advancing the company's ESG efforts. A frequently cited example in this sense concerns the 2022 AGM of Johnson & Johnson. This meeting's agenda included two proposals with virtually identical "RESOLVED" clauses – items 6, submitted by NCCPR, and item 7, submitted by Mercy Investment Services. Both proposals requested that the company publicly disclose a racial equity audit report. However, the NCPPR supporting statement provided that:

*Some have pressured companies to adopt 'anti-racism' programs that seek to establish 'racial equity,' which appears to mean the distribution of pay and authority on the basis of race, sex, orientation and ethnic categories rather than by merit. Where adopted, however, such programs raise significant objection, including concern that the 'anti-racist' programs are themselves deeply racist and otherwise discriminatory.*

By contrast, the Mercy Investment Services statement provided that:

*Addressing systemic racism and its damaging economic costs demands more than a reliance on internal action and assessment. Audits engage companies in a process that internal actions alone may not replicate; unlocking hidden value and uncovering blind spots that companies may have to their own policies and practices. Company leaders are not diversity, equity, and inclusion experts and lack objectivity. Crucially, a racial justice audit examines the differentiated external impact a company has on minority communities.*

In this case, the SEC concluded that both proposals should be included in the company's proxy materials, a decision we welcomed and deemed appropriate. We believe that the revised standard would ensure a more objective framework for such determinations going forward, thereby benefitting shareholder suffrage.

## 3. Rule 14a-8(i)(12) – Resubmissions

We support the proposed amendment to Rule 14a-8(i)(12) 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." In particular, we agree that the amendment would mitigate the potential "umbrella" effect of the resubmission exclusion.

The new resubmission thresholds established by the 2020 amendments prompted significant criticism due to concerns that they restrict shareholder rights. Opponents often noted that a proposal may garner modest support at one meeting, prompting the proponent to refine the proposal in line with stakeholder feedback with the aim of resubmitting the resolution in the following year. Under existing rules, such proposals would be eligible for exclusion. The revised rules would however allow proponents to table the "refined" proposal and to gain greater support, which we believe would be in the best interest of shareholders.

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For all the above reasons, we support the Proposed Rule.

With kind regards on behalf of Robeco,

Carola van Lamoen,

Head of Sustainable Investing, Managing Director

For any questions, please contact:

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