Corporate Governance

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Ms. Vanessa A. Countryman, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Via rule-comments@sec.gov

September 11, 2022

File Number S7-20-22

Dear Ms. Countryman:

Since its founding in 1995, Corporate Governance (CorpGov.net) has been a leading voice in news, commentary, and a network for those interested in transforming corporate governance to be more accountable to shareholders. Essentially a small family office, we filed about 80 proposals for the 2022 season and have filed hundreds of shareholder proposals over the years. I write in support of the proposed rulemaking on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8.

Existing rules place SEC staff in the untenable position of making highly subjective determinations that leave shareholder advocates wondering which submissions will be excluded, including those of clear benefit to companies and their investors.

Proposed technical changes will reduce subjective decisions by Staff and come closer to recognizing that since "materiality" relates to what facts a "reasonable investor" would consider, investors should be the ones making decisions on proxy proposals, not Staff. Too often, the SEC has taken on the role of protecting corporate managers from shareholders.

Historical Context

After its founding, the SEC was largely a champion of shareholder rights, requiring companies to include proposals on any 'proper subject' in the proxy. The idea was to "approximate the conditions of the old-fashioned meeting." The SEC even took Transamerica to court in 1947 for refusing to place proposals by the famous Gilbert brothers on their proxy. That was the *only* time the SEC has ever gone to court to protect the rights of shareholders to place a measure on a corporate proxy.

From that high point, the SEC began chipping away at shareholder rights with regard to the proxy. The rules were amended so those shareholder proposals could only target issues *directly related* to the corporation. When grey areas arose, such as a 1951 proposal to consider the advisability of abolishing Greyhound's segregated seating system in the South, the SEC insulated management from proposals *motivated* by a 'general' cause, even if the proposal concerned issues directly related to the corporation.

Then came the ‘ordinary business rule,’ allowing exclusion of proposals concerned with day-to-day business decisions, followed by other exclusions.

President Reagan’s SEC excluded shareholder proposals that concerned “operations which account for less than five percent of the issuer’s gross assets.” It disqualified proposals from shareholders unless they owned at least $1,000 of common stock for at least a year. Proposals must stem from economic motives; that was the clear philosophy. (Required ownership for filing has been subsequently raised substantially.)

After Cracker Barrel, the SEC accepted the untenability of enforcing a bright line between the market and society. The bright line was removed in 1998 when the SEC announced it would return to a case-by-case approach regarding when social policy issues fall within the scope of the ‘ordinary business’ exclusion. However, the SEC still appears to be more inclined to protect companies from shareholders than shareholders from entrenched managers.

Substantial Implementation

The proposal to revise criteria for substantial implementation, Rule 14a-8(i)(12), states that a proposal will be considered substantially implemented if “the company has already implemented the essential elements of the proposal.” Under the existing rule, companies engage in a subjective exercise of characterizing (and often mischaracterizing) the essential purpose of the proposal and then assert that existing company actions fulfill such purposes.

Even when we assert the proposal's essential purpose, Staff often takes the company’s interpretation over the proponents. For example, this year, we submitted a proposal to Charles River Laboratories on proxy access with the following essential provisions:

> Nominating shareholders and *unlimited groups of shareholders* must have owned at least 3% of the outstanding shares of common stock of the Company continuously for a period of at least 3-years. Such shareholders shall be entitled to nominate a total of 25% of the number of authorized directors rounded down to the nearest whole number.

Although there were substantial differences in what the company adopted and what the proposal sought, we felt compelled to withdraw our proposal after the company filed a no-action request. The company was correct in its interpretation of prior Staff decisions.

> The “essential objective” of the Proposal seeks meaningful proxy access for stockholders. The Staff has specifically concurred in the exclusion of a proxy access proposal where the company adopted a by-law that did not implement the proposal exactly as proposed by the stockholder, but that was substantially similar to the proposal and addressed the proposal’s “essential objective.”

Even though we defined the “essential provisions” of our proposal, we anticipated from previous experience that Staff would side with the company’s interpretation. See https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/youngcrli012422-14a8.pdf.

The proposed approach would eliminate most of the substantial implementation rule's subjectivity and encourages proponents to articulate essential elements in drafting their

proposals. Just as shareholders should have the ability to define materiality, we should be able to determine what elements of our proposals are essential.

Duplication

The rulemaking proposal states that a proposal previously submitted will only block another proposal on the current year's proxy under Rule 14a-8(i)(11) if it "addresses the same subject matter and seeks the same objective by the same means." This is a meritorious change to the existing rule, which currently uses the subjective test of whether a previously submitted proposal "substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting."

The proposed rule would rectify a long-standing defect in the shareholder proposal rule by enabling investors to vote on a diversity of approaches to an issue, providing meaningful options for shareholder consideration.

We strongly recommend against establishing a maximum number of proposals on a particular topic. This would have an unintended consequence of maintaining the race to be first in line, which does not support the careful crafting of proposals and allows success or failure in engagement to determine whether or not a proposal is necessary.

Proponents have little interest in multiplying the number of duplicative proposals appearing on the proxy statement. Rather than imposing a subjective duplication rule on investors, a better procedural approach would be to encourage companies to immediately notify proponents if there are multiple proposals that the issuer views as duplicative and to provide parties of multiple proposals with each other's contact information. That would allow the proponents to discuss the overlap and coordinate the withdrawal of unnecessary proposals that do not add to meaningful proxy deliberations.

As with the substantial implementation rule change, the duplication rule change will also benefit investors who vote their proxies by allowing proposals that address a subject matter with different means. This will enable investors to consider what they view as the optimal approach to the topic, possibly supporting some proposals and not others.

For example, we submitted a proposal to Apple asking that they convert to a Social Purpose Corporation (SPC)**.** The National Center for Public Policy Research (NCPPR) submitted a similar proposal asking that Apple convert to a Public Benefit Company (PBC). We agree with Apple's contention and Staff concurrence that the NCPPR was vague (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/youngmcritchieapple122221-14a8.pdf). However, had it not been vague, we imagine our proposal would have been excluded as duplicative.

Under the proposed duplication standard, we hope shareholders would at least face the possibility of choosing between conversion to an SPC or a PBC or rejecting both. These are substantially different legal forms. Equating the two is like equating cooperative and nonprofit forms of incorporation and governance.

Resubmission

The 2020 amendments to the shareholder proposal sharply elevated the voting thresholds for resubmission of a proposal that previously was voted on. With the new thresholds of 5% vote the first year, 15% vote the second year, and 25% vote the third year in order to resubmit proposals, there is a substantial prospect of thwarting productive engagement and deliberation by proponents, issuers, and voting investors on topics that are of clear relevance to a given company.

The proposed approach allows investors to revisit a topic by a different means because the proposed rule would only lead to the exclusion of a proposal if the subsequently submitted proposal "addresses the same subject matter and seeks the same objective by the same means." The proposed rule allows proponents to fine-tune their approach to a topic to win greater support.

For example, our proposal to Microsoft was excluded under rule 14a-8(i)(12)(ii) because the proposal "deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials."

Our proposal asked the Nominating, Governance, and Corporate Responsibility Committee to include (but not limit) its 'Initial List' of director candidates to current or past non-management employees. In contrast, the subject matter of both prior proposals cited by Microsoft's no-action request asked the Board of Directors to prepare a report to shareholders. The subject of the proposals is quite different, even if the objective is similar. https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/mcritchiemicrosoft092821-14a8.pdf

I urge the Commission to adopt the rule changes as proposed.

Sincerely,

James McRitchie
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