

Submitted Electronically

September 12, 2022

Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

**RE: Release No. 34-95267; IC-34647; File No. S7-20-22; RIN 3235-AM91
Proposed Rule: Substantial Implementation, Duplication, and Resubmission of Shareholder
Proposals Under Exchange Act Rule 14a-8**

Ladies and Gentlemen:

Morningstar welcomes the opportunity to comment on the Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, or Proposed Rule, recently published by the U.S. Securities and Exchange Commission, SEC, or Commission.¹

Morningstar is a leading provider of independent investment research and has a long history of advocating for the rights of shareholders in global markets.

Morningstar brings a unique perspective to the questions in the Proposed Rule. As the world's largest provider of mutual fund data and ratings, Morningstar has a long history of advocating for transparency and shareholder rights in global financial markets. Relevant to the Proposed Rule and its impact on shareholders' rights to file shareholder proposals, we collect data from Form DEF 14a, Form N-PX, and Form 8-K to provide our investor clients with insight into the voting impact of their investments and to support ongoing research covering investment fiduciaries' execution of their stewardship responsibilities. Through our Sustainalytics business, we provide institutional investor clients with ESG research, ratings and data as well as ESG-focused engagement and an ESG Voting Policy Overlay service that combines research with engagement insights to generate vote recommendations for our clients. Because we offer an extensive line of products for individual investors, professional financial advisors, and institutional clients, we have a broad view on the Proposed Rule and its possible effects on shareholders and companies.

Morningstar Supports the Proposed Amendments

Morningstar appreciates the Commission's intention to clarify certain substantive bases for the exclusion of shareholder proposals under the Commission's shareholder proposal rule. To further facilitate the Commission's goal, we submit the following comments and suggestions:

- Morningstar maintains the position we put forward in [our earlier comments on Proposed Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8](#), that shareholder proposals play an important role in shaping corporate governance practices and promoting market-wide resilience.
- Morningstar therefore supports the Commission's proposed amendments, which offer much-needed clarity on three of the substantive bases for exclusion of shareholder proposals from

¹ SEC. 2022. Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, <https://www.federalregister.gov/documents/2022/07/27/2022-15348/substantial-implementation-duplication-and-resubmission-of-shareholder-proposals-under-exchange-act> (Proposed Rule).

company proxy statements, thereby encouraging shareholder participation in the proxy process, extending investor choice among alternative approaches to achieving good governance, and avoiding wasteful strategic blocking of shareholder proposals.

- Morningstar encourages the Commission to reconsider the existing resubmission thresholds which came into effect in 2022.

Shareholder Proposals Underpin Constructive Dialogue at a Critical Time for Markets

We believe that these amendments will be welcomed by all shareholders who take a long-term view of their investments. Clarity on the application of exclusion criteria supports shareholders to constructively use the shareholder resolution filing process in the way it is intended — to facilitate constructive dialogue between shareholders and companies and among shareholders.

Not only do shareholder proposals provide investors with a means to contribute to an essential conversation around long-term risks, but they also incubate and help to evolve good governance practices in some companies that often become emulated by other companies. For instance, it is largely through resolution filing and advocacy on measures such as majority voting in director elections and board declassification that shareholders have gained more leverage in board elections.

In short, the exercise of investor voice through shareholder resolutions upholds shareholder democracy, which is central to the resilience of the U.S. equity market.

The Proposed Rule Would Improve the Shareholder Resolution Process by Limiting Uncertainty, Extending Shareholder Choice, and Avoiding Strategic Blocking of Competing Proposals

Morningstar believes that the proposed amendments offer much-needed clarity on the Commission’s Substantial Implementation, Duplication, and Resubmission exclusions, and will serve to address concerns that many shareholders have previously highlighted during consultation on the SEC’s 2020 rule changes regarding resubmission thresholds.

Substantial Implementation. Rule 14a-8(i)(10)

Narrowing the exclusion basis of Rule 14a-8(i)(10) from whether a company has “substantially implemented” the shareholder’s proposal to whether the “essential elements” of the proposal have been implemented not only creates more certainty for shareholders, but it also limits the subjective nature of the SEC staff’s decisions on individual no-action appeals brought by companies.

Without this clarity, we believe that shareholders may have been dissuaded from proposing resolutions owing to the time commitment and resources required to execute such a process. Furthermore, companies have, in the past, used the broad definition of “substantial implementation” to block shareholder resolutions pressing for stronger rights with respect to existing company policies (such as corporate bylaw provisions providing investors with proxy access rights), and improved transparency (such as sustainability reporting on ESG metrics and targets).

While we recognize that it remains necessary for SEC staff to exercise some degree of judgement over what constitutes the “essential elements” of a shareholder proposal, we believe that this proposed amendment puts greater onus on shareholders to clearly articulate the most important elements of the proposal, with clear reference to existing company practice. In so doing, it likely removes some of the burden on SEC staff, while also supporting investor efforts to drive incremental improvements over time in response to evolving risks and market conditions, building on existing corporate governance practices.

Duplication. Rule 14a-8(i)(11)

Narrowing Rule 14a-8(i)(11) to apply as an exclusion basis, not only where a resolution addresses the same subject matter as a previously filed resolution, but also where it “seeks the same objectives by the same means,” as proposed, would afford shareholders greater choice among competing solutions for addressing the same governance concern. For the proponents of resolutions, it would reduce the first-in-time advantage to the first filer to submit a resolution on a given topic for an upcoming shareholder meeting — thereby limiting opportunities for strategically blocking competing resolutions.

This narrower basis for exclusion appears to have been applied by SEC staff in 2022 by rejecting a no-action petition by Johnson & Johnson. Whereas the first resolution to reach the company within the filing window requested a Civil Rights Audit on the grounds that “anti-racist programs are themselves deeply racist and otherwise discriminatory,” the second sought a third-party racial justice audit on the grounds that corporations have a responsibility to “...recognize and remedy industry- and company-specific barriers [to racial equity].” The company appealed to the SEC for no-action relief to omit the latter, which SEC staff rejected. As it turned out, the first resolution garnered only 3% support, whereas the latter garnered 63% support. We believe that the company’s no-action appeal would have been upheld in previous years had SEC staff applied the broader interpretation of the Duplication Rule.

In the past, the application of the Duplication Rule has favored proposals that garner only minimal support over proposals that have previously or elsewhere garnered substantial shareholder support, based only on the timing of their respective filings. This limits shareholder choice among alternative objectives, such as pursuing greater workplace racial and gender diversity versus pursuing “ideological diversity.” It also limits shareholder choice among the means for achieving the same objectives — for instance, is greater corporate accountability for spending and activities to influence political campaigns and movements achieved through better disclosure, stronger board oversight, limitations on certain activities, or a combination of measures?

While the Duplication Rule is less often invoked by companies as a basis for exclusion in no-action appeals than Rule 14a-8(i)(10), we believe that the noticeable increase in the number of so-called “anti-ESG” resolutions in 2022 makes this exclusion basis potentially more relevant in future proxy seasons.

In 2022, at least 35 resolutions were filed by groups that oppose progressive corporate actions on climate change and racial and gender diversity. In most cases, the resolution text provides evidence of the proponent’s objectives and these resolutions consequently garnered very low support. However, in some cases the resolution text offered no warning of the resolution filers’ intent to make controversial statements at companies’ shareholder meetings — statements that were at odds with the ostensibly pro-ESG language of the resolution. We believe that these cases demonstrate that filer affiliation helps investors discern the objective of a resolution. We therefore encourage the SEC to consider requiring companies to consistently disclose the identity of resolution filers in their proxy statements in order to avoid confusion about resolution objectives.

Resubmission. Rule 14a-8(i)(12)

The [SEC’s 2020 amendments to the shareholder proposal rule](#) to raise proposal resubmission thresholds were deeply unpopular with investors. In Morningstar’s submission to the consultation process we argued that the new thresholds fail to account for the how new ideas gain support among investors over successive proxy seasons. They also effectively place certain companies with strong insider control over proxy votes out of the reach of shareholder proposals on key ESG issues. Finally, the elevated thresholds afford another opportunity for strategic blocking of proposals with competing objectives and means.

We continue to hold these concerns, and therefore welcome the proposed amendment to the Resubmission Rule which, by substituting the existing condition that the proposal “addresses substantially the same subject matter” with the condition that it “substantially duplicates” a previously voted resolution as a basis for exclusion, effectively narrows the circumstances under which a proposal may be considered a resubmission.

We believe the proposed amendment strikes the right balance between discouraging wasteful filing while also allowing an issue to gain traction with investors. To avoid exclusion of a resolution aiming to achieve the same objective as that of a previously poorly supported resolution, the onus is on the proponent to offer alternative means for achieving the objective.

This also means that low levels of support for resolutions addressing a subject of long-standing importance to company shareholders, yet aiming to achieve an unsupportable objective, would be unlikely to disqualify subsequent resolutions addressing the same subject matter, yet advancing more widely supportable objectives.

Conclusion

In summary, we support the Commission’s goals of clarifying certain substantive bases for the exclusion of shareholder proposals under the Commission’s shareholder proposal rule. We have summarized our views and provided suggestions above. In addition to this, we urge the Commission to reverse the changes to the shareholder proposal resubmission thresholds that were made in 2020.

Morningstar thanks the Commission for the opportunity to comment. We would be pleased to engage with the Commission on an ongoing basis, leveraging our global organization of experts operating in multiple jurisdictions. Should you wish to discuss these and other comments, please do not hesitate to contact us as indicated below:

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Sincerely,

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