**American Federation of Labor and Congress of Industrial Organizations**

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AFL-CIO

AMERICA'S UNIONS

September 9, 2022

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

**Re: Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8 [File No. S7-20-22]**

Dear Ms. Countryman:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to provide comments on the U.S. Securities and Exchange Commission's proposed amendments to Exchange Act Rule 14a-8 on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals [File No. S7-20-22]. The AFL-CIO is a federation of 58 national and international labor unions that represent 12.5 million working people. Union members participate in the capital markets as individual investors as well as participants in pension and employee benefit plans. The AFL-CIO, its affiliate unions, and union members' pension plans have submitted Rule 14a-8 shareholder proposals for many decades. We are pleased to support the Commission's proposed clarifying amendments to Rule 14a-8 that will improve the shareholder proposal process for both companies and investors.

Shareholder proposals are an integral part of shareholder democracy in the United States. Since adoption in 1942, the shareholder proposal rule has been a remarkably cost-effective mechanism to elevate shareholder concerns to boards of directors and corporate management. Over the years, shareholder proposals have facilitated the private ordering of companies on a wide variety of environmental, social and governance ("ESG") issues such as climate change sustainability reporting, equal employment opportunity, and annual director elections to name just a few examples. However, the Rule 14a-8(i) exclusions that permit companies to exclude shareholder proposals from their proxy statements have long been a source of ambiguity. The subjective nature many of these exclusions has increased costs for investors, companies, and the Division of Corporation Finance staff (the "Division Staff") to determine which shareholder proposals should go to vote. More generally, shareholders have been deprived of the opportunity to vote on many proposals that would have created value by increasing corporate accountability on a variety of ESG issues.

In 1998, the Commission revised Rule 14a-8 into a plain English question and answer format to make it easier for shareholders and companies to understand and follow.[1] However, the subjective nature of many of the Rule 14a-8(i) exclusions has prevented consistent and predictable determinations in the Rule's interpretation. Over the years, the Division Staff has attempted to address these ambiguities by issuing a dozen staff legal bulletins on Rule 14a-8. While helpful, this staff guidance has not been sufficient to provide transparency and certainty regarding Rule 14a-8(i)'s various exclusions. As a result, companies frequently seek permission to exclude shareholder proposals through the Division of Corporation Finance's no-action letter process. These Rule 14a-8 no-action letter requests consume corporate resources, increase the Division Staff's workload, and create regulatory uncertainty for investors as the proponents of shareholder proposals. These regulatory costs include both the direct cost of the Rule 14a-8 no-action request process as well as the need to monitor the changing contours of the Rule 14a-8 exclusions as interpreted by staff legal bulletins and no-action letter determinations.

We therefore support the Commission's proposed clarification to Rule 14a-8(i)(10) that permits companies to exclude shareholder proposals that the company has already substantially implemented. In most cases, shareholder proponents and companies are able to come to agreement regarding the withdrawal of proposals if the company has already (or is willing to) substantially implement the proposal.[2] However, in some cases, companies take a "kitchen sink" approach to try and exclude proposals by citing tangentially relevant information in an effort to persuade the Division Staff that the company has substantially implemented the proposal.[3] In such cases, we believe that the voting shareholders rather than the Division Staff are best able to decide whether a shareholder proposal has merit. For this reason, we strongly support reducing the subjectivity of Rule 14a-8(i)(10) by clarifying that a proposal may only be excluded if the company has already implemented the essential elements of the proposal. This clarification will help avoid needless no-action letter disagreements between companies and proponents. The proposed change will also ensure that all shareholders have the opportunity to vote on shareholder proposals whose essential elements have not been substantially implemented.

We also support the Commission's proposal to clarify Rule 14a-8(i)(11) that permits the exclusion of a proposal that substantially duplicates a previously submitted proposal. On occasion, companies will make overbroad claims that shareholder proposals are substantially duplicative when they are only peripherally related to each other.[4] The lack of transparency regarding what constitutes a duplicative proposal also discourages shareholders from submitting different proposed solutions to pressing matters of concern. In our view, voting shareholders should have the opportunity to consider shareholder proposals that take different approaches

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[1] Amendments to Rules on Shareholder Proposals, Release No. 34-40018 (May 21, 1998) [63 FR 29106].
[2] Interfaith Center on Corporate Responsibility, *ICCR's 2022 Proxy Resolutions & Voting Guide*, February 16, 2022, https://www.iccr.org/sites/default/files/iccrs_2022_proxy_resolutions_and_voting_guide_v2.pdf ("Every year ICCR members negotiate over one hundred of these successful agreements with companies directly related to their resolutions.").
[3] *See e.g.,* PayPal Holdings, Inc. (Northstar Asset Management, Inc., April 4, 2021) and NIKE, Inc. (Wynnette Labosse Tr., August 2, 2021) (claiming that proposals asking for a report on diversity, equity and inclusion were substantially implemented by existing company disclosures).
[4] *See e.g.,* Amazon.com Inc. (Sisters of St. Joseph of Brentwood, The Nathan Cummings Foundation, and Hana Their, April 7, 2021) (claiming that proposals asking for a report on surveillance technology, hate speech, and employee promotions were duplicated by a previously submitted racial equity audit shareholder proposal).

regarding the same subject matter. For this reason, we welcome the Commission's proposed clarification that proposals may only be excluded under Rule 14a-8(i)(11) if the subsequently submitted proposal addresses the same subject matter and seeks the same objective by the same means. This clarification of Rule 14a-8(i)(11) likely will also result in better drafted and more thoughtful shareholder proposals as proponents will not feel pressured to submit their proposals prematurely in a "race to the proxy" to avoid duplication by an earlier submitted proposal.

For similar reasons, we also support the Commission's proposed clarification of Rule 14a-8(i)(12) that governs when a shareholder proposal may be resubmitted for reconsideration by shareholders based on the most recent vote results. While requests to exclude shareholder proposals under Rule 14a-8(i)(12) are rare, companies have occasionally sought to exclude proposals by asserting that a new proposal is substantially the same as an earlier proposal that failed to receive the necessary shareholder support. Such assertions can be overbroad when the two proposals address the same subject matter but by different means.[5] Shareholder proponents often experiment with different approaches when resubmitting proposals on subject matters, and this innovative process should not be curbed by subjective interpretations of Rule 14a-8(i)(12). To provide needed predictability, we favor clarifying that that a proposal has been resubmitted only if it concerns the same subject matter and seeks the same objective by the same means. We also note that adopting the same definition for Rule 14a-8(i)(11) as Rule 14a-8(i)(12) will simplify the Rule 14a-8 exclusions for the benefit of investors and companies alike.

We believe that the benefits of the proposed amendments to Rule 14a-8 will dramatically outweigh any potential costs. Removing subjectivity from the Rule 14a-8(i) exclusions will reduce uncertainty for companies, investors, and the Division Staff. In addition to reducing the costs of uncertainty from Rule 14a-8's no-action request process, the Commission's economic analysis should also take into consideration the benefits of facilitating the submission of shareholder proposals. Shareholder proposals reduce agency costs by holding companies accountable to their owners.[6] A survey of academic studies concluded that shareholder proposals are associated with a small but positive increase in the value of companies.[7] These positive externalities are enjoyed by all investors and not just the proponents of shareholder proposals. For this reason, shareholder proposals are public goods that are underprovided by the private market. Too few shareholder proposals are being submitted, not too many. Notably, shareholder proposals only make up a tiny fraction (between 1 to 2 percent) of all proxy votes that are cast.[8]

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[5] *See e.g.,* Alphabet, Inc. (SOC Investment Group, April 11, 2022) (claiming that a proposal urging the board to consider nominating a non-management employee for election to the board was substantially same subject matter as a proposal to require the nomination of an employee representative).

[6] Luc Renneboog and Peter Szilagyi, "The Role of Shareholder Proposals in Corporate Governance," Journal of Corporate Finance, Vol. 17, Issue 1, February 2011, pp. 167-188.

[7] Matthew Denes, et. al., "Thirty Years of Shareholder Activism: A Survey of Empirical Research," Journal of Corporate Finance, Vol. 44, June 2017, pp. 405-424.

[8] CalPERS, the largest U.S. pension plan, voted on 28,750 management proposals compared to 518 shareholder proposals at U.S. companies between July 1, 2020 and June 30, 2021. CalPERS, "Proxy Voting – United States Proxy Votes," May 2, 2022, https://www.calpers.ca.gov/page/investments/corporate-governance/proxy-voting. For Blackrock, the largest U.S. asset manager, shareholder proposals made up just 1 percent of the total votes cast between July 1, 2021 and June 30, 2022. Blackrock, "2022 Voting Spotlight Summary," 2022, https://www.blackrock.com/corporate/literature/publication/2022-investment-stewardship-voting-spotlight-summary.pdf.

For these reasons, we commend the Commission for proposing to amend Rule 14a-8 to clarify the permitted reasons for excluding shareholder proposals on the grounds of substantial implementation, duplication, and resubmission. These needed clarifications will increase certainty for both companies and investors by providing more consistent and predictable determinations regarding the Rule 14a-8 exclusions, and thereby reduce costs of the shareholder proposal process for all parties. By reducing subjectivity, the proposed rule clarifications will also make the Rule 14a-8 less confusing for investors, and thereby will enfranchise a wider array of investors to be able to use the shareholder proposal process. A more inclusive and accessible shareholder proposal rule will benefit all investors by strengthening shareholder democracy and expanding the marketplace of ideas that the shareholder proposal process facilitates. If the AFL-CIO can be of further assistance, please contact me at [redacted] or [redacted].

Sincerely,

Brandon J. Rees
Deputy Director, Corporations and Capital Markets