September 9, 2022

Via rule-comments@sec.gov

Ms. Vanessa A. Countryman, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

File Number S7-20-22

Dear Ms. Countryman:

Oxfam is a global organization working to end the injustice of poverty. In addition to leading emergency humanitarian responses to conflicts and natural disasters, Oxfam tackles the entrenched systems, policies, and practices that keep people trapped in poverty. This includes advocating that governments and private sector actors respect human rights and promote a healthy environment.

In the United States, Oxfam America is an investor and active participant in the shareholder proposal process, regularly engaging with corporations and investors on matters related to its human rights and environmental justice mission. Like many other participants in the shareholder proposal process, Oxfam plays multiple roles. Our organization holds shares in numerous companies, acts as a human rights risk advisor to firms with impact and ESG investing strategies, and supports other stakeholders in the advancement of human rights and economic development objectives. We advocate for improvements in disclosure and oversight of various social and environmental issues that can help issuers improve their long-term financial prospects. Because Oxfam engages with communities in more than 70 countries, we bring information from the ground up regarding adverse human rights risks and on the global and national-level context in which companies are operating.

Oxfam supports the proposed amendments to Rule 14(a)-8. The changes provide important clarity on key elements of the rule related to substantial implementation, duplication, and resubmission, and protect investors by reducing ways that issuers can evade disclosure around critical topics that impact a company's long-term financial prospects. These changes will reduce costs and uncertainty for shareholders. By closing the door to certain no action requests that take advantage of ambiguities in Rule 14(a)-8's language, the SEC's amendments pave the way for investors to ensure that important resolutions appear on the proxy statement.

We applaud Chairman Gary Gensler, the Commissioners and SEC Staff in supporting the rights of investors to file proposals while making the process more efficient, objective, and predictable.

Substantial implementation

The proposed amendments render the "substantial implementation" exception more predictable and effective for investors by ensuring that companies have implemented not only the "essential purpose" of a

resolution, but that they have taken concrete steps towards implementing "essential elements"[1] of the proposal's request. Tangible actions are more clearly identifiable than more nebulous concepts like "purpose," making the new standard easier for SEC staff to implement. This, in turn, creates a more predictable and effective process for investors.

The current "essential purpose" standard is highly subjective and offers only vague direction, introducing a high degree of uncertainty into the no action process. As currently phrased, SEC staff are forced to interpret the overarching goal of a resolution and evaluate whether the company's practices "compare favorably with the guidelines of the proposal." The phrase "compare favorably" is enigmatic.This vague standard effectively forces SEC staff to become issue-area experts to perform their job well when making determinations about highly technical topics like scope 3 GHG emissions, forced labor in tech sector supply chains, or the nuanced impact of a more racially diverse board of directors. Without diving into the minutiae of what constitutes an effective human rights due diligence (HRDD) policy, for example, companies can – and often do – claim "substantial implementation" by publishing empty platitudes about respecting human rights, without taking actual action to ensure that HRDD policies are implemented. The existing standard allows companies to pay lip service to generic goals rather than take concrete action on issues that are important to investors.

We support the amendment's requirement that companies must have "already implemented the essential elements of the proposal." The distinction between "purpose" and "elements" is key: companies will now have to demonstrate not only that they share the overarching goals of a particular resolution, but that they have *actively taken steps* that are outlined in the resolution's text. This language makes the requirements clearer for proponents and companies alike, reducing uncertainty and ensuring that investors have the opportunity to vote on topics that a company has not yet taken steps to implement. It therefore supports the SEC's goal to "enhance the ability of shareholders to express diverse objectives and various ways to achieve those objectives through the shareholder proposal process."

In Oxfam's experience as a proponent, issuers have frequently mischaracterized the "essential purpose" of our resolutions in order to take advantage of the "substantial implementation" exception. Recent examples include:

- A pharmaceutical company claiming it had substantially implemented a proposal requesting it study the feasibility of transferring vaccine technology to manufacturers in low-income countries, arguing that vaccine donations to poor governments fulfilled the essential purpose of the resolution;
- An agribusiness company pointing to sporadic audits in suppliers' factories abroad as evidence that it had substantially implemented a request to conduct human rights impact assessments on the supply chains of high-risk food products;
- Another pharmaceutical company arguing that its commitment to introduce "non-profit pricing" for its medicine to an undisclosed number of countries meant that it had substantially implemented a request that it be transparent about how receiving U.S. government funding influenced its pricing strategy;
- A meat processor highlighting a 1-page statement on human rights and the publication of an annual sustainability report to illustrate it had substantially implemented a proposal calling for transparency around labor conditions in its poultry factories.

In each of these cases, the old "purpose" standard introduced confusion, while the new "elements"

[1] All quotations citing the amended rule appear at: SEC, Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14-a, 87 FR 45052, July 27,2022, *available at* https://www federalregister.gov/documents/2022/07/27/2022-15348/substantial-implementation-duplication-and-resubmission-of-shareholder-proposals-under-exchange-act.

standard brings clarity: the companies clearly had not implemented the precise elements requested by shareholders but could make plausible – though inaccurate – arguments that the underlying purposes had been addressed.

Substantial Duplication

Along similar lines, the proposed rule makes the resolution process more predictable by introducing a new "duplication" test that is more specific, and hence more accurately reflects whether the issuer has actually received another proposal that substantively mimics another.

The existing rule – which has not been updated since its adoption in 1977[2] – allows issuers to exclude a proposal if it "substantially duplicates another proposal" submitted during the same cycle. Staff has traditionally looked to whether the two proposals share a "principal thrust or focus." Such broad language provides little meaningful guidance for SEC staff or investors, leaving the exclusion open to the vagaries of interpretation. If one proponent files a resolution calling for a report on a company's GHG emissions, for example, and a later proponent requests disclosure on steps taken to meet the goals of the Paris Climate Agreement, an issuer may be tempted to argue that these environmentally-focused resolutions substantially duplicate one another, as GHG emissions are a component part of the Paris Climate Agreement. The proponents would likely disagree, however, and different SEC staff members could draw different conclusions, depending on how broadly or narrowly they interpret the proposal's "focus."

This ambiguous standard undermines the shareholder proposal process. Vague standards can discourage proponents from filing resolutions on even marginally similar topics, even if the specific actions sought are distinct. This, in turn, pushes proponents to craft narrower resolution asks to avoid any hint of overlap, forcing them to tightrope walk between the micromanagement and duplication exceptions.

The current duplication standard also incentivizes early filings, which harms the investors and companies alike. Because cautious proponents file early to prevent preemption, there is a shorter window of opportunity for investors and companies to dialogue prior to filing. It also means that filings that contain more out-of-date information by the time the annual general meeting (AGM) arrives. This is bad for investors and bad for issuers: a company may take steps to adapt its environmental footprint between September and December, for example, but if a proponent that is concerned about being preempted, it may file in September rather than waiting for the December deadline. That means information about the company's comparatively weaker environmental performance as of September is circulated to its investors, rather than its comparatively stronger performance in December.

Over the past few years, Oxfam has filed shareholder resolutions earlier than we were comfortable with in order to avoid being preempted. This has proven particularly problematic with pharmaceutical sector proposals, because the rate of technological advances and the constant shift in private and public sector approaches to distribution meant that the "facts" in the supporting statement quickly became dated. This is to the detriment of investors, and to management. While we were able to verbally update information over the phone to several large investors prior to the AGMs, ad hoc corrections are no match for circulating more up to date data to all of a company's investors and proxy advisory firms at the outset.

Furthermore, the current standard has encouraged abuse of the resolution process by a small but increasingly active subset of investors. Over the past several years, a growing number of proposals have been filed by anti-ESG investors that purport to make ESG asks in the resolved clause, but in reality are intending to subvert the spirit of these ESG requests. These investors replicate the resolved clause of a genuine ESG proposal, while using the supporting statement to lobby for viewpoints that are antithetical to the stated aim. They then file the resolution early in the season with the express purpose of preempting

[2] *Id.* at 45057.

a "real" proposal on that topic from appearing on the proxy statement. These proponents take advantage of the duplication exception by waiting until the SEC rejects the resolution that genuinely seeks transparency around the issue at hand, and then withdrawing the proposal so that investors do not have the opportunity to consider the ask. Other times, these "false flag" proponents allow the proposal to go to a vote to use the AGM as a platform to espouse views that oppose the resolved clause's stated aim. For example, the National Center for Public Policy Research (NCPPR) filed a racial equity audit resolution in 2022 at Johnson & Johnson, only to make offensive statements about race during the AGM, argue that the company is "suppressing" white employees,[3] and discourage company efforts to promote diversity, equity, and inclusion. Along similar lines, the NCPPR's (anti) lobbying disclosure proposal at Pfizer this year preempted the (genuine) lobbying disclosure filed by proponent Tara Health Foundation.[4] This result undermines the spirit and legitimacy of 14(a)-8, transforming proxy statements and AGMs into a space where certain proponents confuse investors by offering disingenuous proposals (and ones that often promote what many would consider distasteful views on race and other topics, no less).

The new rule significantly reduces the opportunity for such gamesmanship. The new rule clarifies that a proposal can be blocked only if a previously submitted proposal "addresses the same subject matter and seeks the same objective *by the same means*."[5] Ensuring that the *means* are duplicative, and not simply the focus of the proposal, ensures a more accurate assessment of whether a resolution's ask has already been addressed by a prior submission. *How* companies achieve certain environmental, social or governance aims matter, which this new language takes into account. The proposed amendment thus better captures the underlying spirit of Rule 14(a)-8 – which is to allow investors to vote on important topics that issuers may not currently be addressing.

Resubmission

Finally, Oxfam supports the new resubmission standard. Currently, a proposal may be excluded if another resolution on "substantially the same subject matter" did not garner enough votes from investors to meet the resubmission thresholds at any time over the past three years. While the resubmission thresholds in the new rule remain the same (recently raised in 2020),[6] the proposed amendment clarifies that a similar resolution would only be excluded the following year if it "addresses the same subject matter and *seeks the same objective by the same means*" (emphasis added).

As with the amendments discussed above, this recognizes the important distinction between goals and concrete steps taken to achieve those goals. Analyzing both objectives and means, and not simply objectives, allow SEC Staff to reach a more accurate conclusion as to whether investors have already passed judgment on the issue at hand. This reduces uncertainty, as it is challenging for an investor to predict how narrowly or broadly the SEC staff would interpret the previous standard of "subject matter."

The shift will also make it safer for proponents to file on important topics that could superficially appear similar to those that did not reach the threshold. If a 2018 proposal called on a company to prepare a report on labor conditions throughout the company's operations, for example, and a 2019 resolution

[3] Statement by National Center for Public Policy Research, https://nationalcenter.org/wp-content/uploads/2022/04/JJ-2022-Shareholder-Meeting-Statement-1.pdf.
[4] SEC, No Action Decision Regarding Pfizer (Feb. 26, 2022), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/tarapfizer022222-14a8.pdf
[5] *Id.* at 45057 (emphasis added).
[6] Prior to 2020, Rule 14a-8(i)(12) stated that proposals must receive a minimum of 3% if voted on once, 6% if voted on for two consecutive years, and 10% if voted on for three or more years. The 2020 Amendments raised these thresholds to 5%, 15%, and 25% respectively.

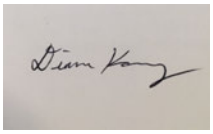
requested disclosure around warehouse injury rates, that could arguably trigger the "same objective" resubmission flag. While some staff could view these as sharing overlapping labor rights objective, others would view these as meaningfully distinct. This confusion has led Oxfam, and no doubt other investors, to avoid important topics that envision distinct actions for fear that their shared overarching aims could be misconstrued as a resubmission. The new standard renders such unclear decisions far more straightforward.

Given the 2020 amendments to Rule 14(a)-8 that raised the resubmission threshold, Oxfam appreciates these changes as particularly timely. Emergent issues may take several years of socialization before investors understand how the request could contribute to a company's financial strength, meaning that resolutions may receive fairly low vote totals during the first few years being filed. Topics that once received single digit votes, such disclosure around climate change policies, now routinely achieve majority support. While this new standard does not return the resubmission totals to the previous floor, by ensuring that the actual *means* of implementation mirrors a previous resolution with a low vote total, the resubmission exemption will not have the same constraining grip on investors as it otherwise would.

Conclusion

The proposed amendments to the substantial implementation, substantial duplication, and resubmission exemptions bring a much needed measure of precision to three convoluted areas of the no action process. They increase the accuracy of no action decisions by making it more difficult for issuers to take advantage of technicalities and vague guidelines and ensure that investors have the opportunity to vote on important issues that have yet to be addressed. We strongly support the proposed changes. If additional information would be helpful, please contact me a [redacted] or [redacted].

Sincerely,



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