September 9, 2022
Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Request for Public Comment on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals under Exchange Act Rule 14a-8 (Release No. 34-95267; IC-34647; File No. S7-20-22)

Dear Ms. Countryman:

The Energy Infrastructure Council ("***EIC***") is a non-profit trade association of companies that develop and operate energy infrastructure, including traditional and renewable energy infrastructure companies; investors in energy infrastructure; service providers; and other businesses and individuals that operate in and around the energy industry. The EIC writes today in response to the U.S. Securities and Exchange Commission's ("***Commission***" or "***SEC***") request for comment on any or all aspects of the rule amendments to Exchange Act Rule 14a-8 ("Rule 14a-8" or the "Rule") proposed by the Commission on July 13, 2022 (the "***Proposed Rules***"). We appreciate the opportunity to comment on the Proposed Rules. Due to our concerns with fundamental aspects of the proposed amendments, we are presenting our comments by topic, instead of answering the specifically enumerated questions articulated in the Commission's proposing release.

I. Summary

The EIC believes that the Proposed Rules would not benefit, and in fact would likely harm, the majority of investors by amplifying the voices of a small subset of activists over broader investor interests. Respectfully, the Commission has failed to establish the benefit of the Proposed Rules—particularly in light of other recent actions by the Commission—and apparently ignored evidence from the broader investor base that the increasing brazenness of activist proponents is not aligned with the desires and needs of the reasonable investor. We urge the Commission to reconsider the Proposed Rules and maintain the current interpretations for the exclusion bases under Rule 14a-8. However, if the Commission is determined to revise them, the Proposed Rules should respect the underlying principles of materiality, business judgment, and governance functions that shape engagement between companies and their shareholders.

II. The Proposed Rules, Paired with the Commission's Other Actions, Would Compound Confusion on Rule 14a-8 While Failing to Enhance the Engagement Between Companies and Their Stockholders

Rule 14a-8 is an adjudicative rule with its own precedent. As the Commission notes, it is important for the Rule 14a-8 process to be "consistent and predictable" so companies and stockholder proponents alike have a reliable guide for their engagement on any topics raised under the Rule.[1] However, this Commission's own actions have undermined such consistency and predictability with a host of changes pushed through over an incredibly short duration. In November 2021, in an unprecedented move, the Commission's Division of Corporate Finance issued Staff Legal Bulletin 14L ("SLB 14L"), rescinding the prior three Staff Legal Bulletins, which had provided guidance on several bases for exclusion established under Rule 14a-8.[2] Far from simply reverting to prior positions, SLB 14L had the very real effect of pushing more proposals into proxy statements, regardless of the degree to which such proposals related to highly nuanced operational and business matters or failed to relate to matters of economic relevance. This Commission has also decided not to recognize the full extent of prior amendments to Rule 14a-8, creating additional confusion and unnecessary complexity and expense for companies and their investors. In September 2020, Rule 14a-8 was amended to, among other things, provide that the one proposal limitation contained in Rule 14a-8(c) should apply to "each person" rather than "each shareholder" and clarify that the rule applies to proposals submitted "directly or indirectly" by such person. In a move that is as troubling as it is unjustifiable, this Commission chose to effectively ignore this rule amendment by interpreting the provision as not applicable when a single person acted as both a proponent and a representative of another shareholder who had transmitted a proposal to the company.[3]

By failing to respect prior guidance and rule amendments, this Commission has set the pendulum swinging. This Commission's dogged focus on unravelling prior guidance, up to and including ignoring the Commission's own prior final rule amendments establishes a dangerous precedent, and sets companies and investors up to experience years of uncertainty. The Proposed Rules would impose on companies and investors the unnecessary and costly tasks of figuring out this Commission's new precedent and new interpretive frameworks. Moreover, this Commission's new rules and precedent will inevitably be subject to debate and will be top candidates for a future Commission to amend, rescind, revise or, as this Commission has done, entirely ignore.

Moreover, this Commission is looking to institute additional changes to Rule 14a-8 while the Commission's most recent amendments to Rule 14a-8 are still being implemented. The September 2020 rule amendments revised the procedural requirements for shareholder proposals as well as provisions for resubmitted proposals,[4] and the full impact of these rules has not been reflected in the shareholder engagement process, not least because of the new three-year holding requirement for certain proposals. As such, the Proposed Rules would muddy the waters by introducing a cross-current to current Rule 14a-8 practices before engagement trends from prior rulemakings are settled. This Commission's seemingly casual disregard for established precedent

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[1] https://www.sec.gov/rules/proposed/2022/34-95267.pdf at 13.
[2] https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals
[3] *E.g.*, *Baxter International Inc*. (avail. Jan. 12, 2021).
[4] https://www.federalregister.gov/documents/2020/11/04/2020-21580/procedural-requirements-and-resubmission-thresholds-under-exchange-act-rule-14a-8

and equal disregard for its own need to evaluate the advisability of further amendments under calmer conditions lay bare this Commission's ultimate goal, which is to advance a particular political agenda.

Whereas prior Commissions have seemed to be more focused on the degree to which rule changes will encourage agreement between the company and the shareholder-proponent,[5] this Commission's sole focus appears to be more proposals in more proxy statements. Based on the language of the Proposed Rules, and the examples given in the Commission's rationale for them, the clear thrust of the Proposed Rules is to allow more shareholder proposals to make their way into proxy statements. However, it is far from clear that this would provide any corresponding benefit to investors. In contrast, though the number of proposals—particularly on environmental, social, and governance ("ESG") topics—spiked in 2022, likely in part because of SLB 14L and this Commission's disregard of prior precedent, the average percentage of support these proposals received, as well as the percentage of proposals passing, fell by nearly in half.[6] This direct evidence from shareholders indicates that simply having more proposals in a proxy is not necessarily better for investors. However, it is necessarily more costly for them. More proposals, including proposals that investors will never support, results in increased costs to companies and diverts the focus of the management and boards of companies, as they have to navigate responses to each proposal and evaluate in advance the increased administrative burden and costs, and longer-term financial impact, of implementing any proposals that could achieve majority support, and shoulder additional engagement and printing costs. More proposals also make the entire proxy season more expensive for investors as service providers bake the additional cost of assessing more proposals into the costs that are inevitability passed on to investors in need of their services, directly or indirectly.

III. The Commission Has Acknowledged Issues with the Rule 14a-8 Process that Contraindicate the Narrowing of Exclusions Contemplated by the Proposed Rules

While the Commission notes "shareholder suffrage" as a major animating force behind the Proposed Rules, the Commission has previously acknowledged that the "overwhelming majority of shareholder proposals are submitted by a very small number of proponents."[7] This suggests that it is not shareholders' ability to vote, or even to raise proposals to a vote, that is at issue. Instead, the Proposed Rules would appear to clear a path for activists to hound companies on pet issues to such activists' satisfaction, even if the majority of shareholders have indicated no qualms with, and indeed have indicated support for, a company's performance on the topic in question.

Importantly, shareholder proponents do not always have interests that align with the majority of a company's investors or the "reasonable investor" for purposes of assessing the type or magnitude of policy decision that is appropriate for shareholder proposals. The Commission has previously noted concerns of activists using "the company and the proxy process to promote a personal interest or publicize a general cause."[8] As discussed above, although the number of

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[5] https://www.sec.gov/rules/final/2020/34-89964.pdf at 68.
[6] https://www.ey.com/en_us/board-matters/four-key-takeaways-from-the-2022-proxy-season
[7] https://www.sec.gov/rules/final/2020/34-89964.pdf at 89.
[8] https://www.sec.gov/rules/final/2020/34-89964.pdf at 20.

shareholder proposals—particularly on ESG topics—increased following the issuance of SLB 14L and the Commission's disregard for prior guidance and precedent, the average support for such proposals decreased significantly.[9] This inverse relationship indicates a substantial disconnect between shareholder proponents and companies' investor bases at large.

The bases for exclusion under Rule 14a-8 exist to help mediate such disconnects. However, the increasing laxness by the Commission on shareholder proponents (in contrast to the tightening expectations on companies) has allowed such proponents to use a company's proxy statement as a platform for their own activist agenda. For example, two shareholder proposals for diversity and inclusion-related audits were included in Johnson & Johnson's most recent DEF 14A; however, these proposals approached the topic from radically different perspectives, with one proponent focused on potential claims of illegal discrimination against employees deemed "non-diverse" and the other focused on combating systemic racism.[10] So effectively, under this Commission's disregard of prior guidance and precedent, activist proponents can now not only duke it out with the company, they can use the company's platform and regulatory filings, and the funds of all investors, to duke it out with each other. This inherently subjects shareholders to activism from at least one, and possibly more than one, proponent whose views are widely at odds with the majority of shareholders; here, with the proposal identifying anti-racism training as "implicitly discriminatory" receiving less than 3% support from shareholders.[11] And yet the Proposed Rules would adopt this Commission's current approach and expand upon it, making it far more difficult for companies to avoid diversion of their limited resources towards this type of bickering between activist proponents.

Moreover, companies' efforts—and the broader company-investor engagement mechanism—are frustrated when activist proponents use the Rule 14a-8 process to continually broadcast their ideologies in the form of proposals that hound the company on the same fundamental qualms year after year. The Commission has acknowledged that companies are often exposed to resubmissions that have been rejected by a significant majority of investors in prior years.[12] "Shareholder suffrage" is not advanced by allowing activists to pelt companies with requests that align with their own ideologies to the exclusion of company-specific contexts and investors' prior and existing engagement on such topics. Substantial implementation, duplication, and resubmission—i.e., the bases for exclusion that are being reexamined under the Proposed Rules—exist precisely to require consideration of such contexts and investor engagement efforts.

As such, the Proposed Rules would not serve to improve the shareholder proposal process. They would, instead, primarily serve to greenlight continued campaigning by a small number of

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[9] https://www.ey.com/en_us/board-matters/four-key-takeaways-from-the-2022-proxy-season

[10] https://www.sec.gov/Archives/edgar/data/0000200406/000020040622000026/a2022jnjproxy htm#i83f3697d6bbd4caca49658fb304e273a_268

[11] *Compare* https://www.sec.gov/Archives/edgar/data/0000200406/000020040622000026/a2022jnjproxy htm#i83f3697d6bbd4caca49658fb304e273a_268 *with* https://www.sec.gov/Archives/edgar/data/0000200406/000020040622000047/jnj-20220428.htm

[12] https://www.sec.gov/rules/final/2020/34-89964.pdf at 2, footnote 2, 66.

activists, with little regard for how (or whether) such proponents' interests align to the company's investor base or fit into the broader context of a company's actions and operations.

IV. The Proposed Rules Are Addressing Specters Conjured by the Commission to Undermine Companies' Ability to Engage, and Negotiate in Good Faith, with Shareholder Proponents On Behalf of All Their Investors

As discussed above, the Proposed Rules do not address—and in some ways would exacerbate—real problems that the Commission has acknowledged plague the Rule 14a-8 process. Effectively, the Commission is placing its heavy thumb on one side of the scale of negotiations to hamstring companies' ability to efficiently respond to the will of the majority of their investors, forcing companies to devote substantial energy to respond to activist proponents' pet projects.

A. The "Essential Elements" Test Proposed for Rule 14a-8(i)(10) solves a non-existent problem while inserting activist shareholders directly into the complex decision-making companies must make on many topics, particularly with regards to ES.

The "essential elements" test introduced under the Proposed Rules for the purposes of the substantial implementation test under Rule 14a-8(i)(10) would only compound existing issues resulting from this Commission's prior actions. The Commission notes that some parties have expressed concerns about "threading the needle" between micromanagement and substantial implementation in crafting their proposals; we believe this to be a straw man given that historically there has been a significantly open field between what a company is required to do to establish that it has substantially implemented a proposal and what a company must prove to establish that a proposal met the micromanagement standard. However, even assuming that this concern has any validity, the Commission recently made changes in proponents' favor to address this precise point in SLB 14L.[13] The number of ESG proposals (the primary impetus for this rulemaking) going to investor votes surged in 2022, reaching record highs. Therefore, "threading the needle" would no longer appear to be a legitimate concern. Therefore, we question the legitimacy of additional changes designed to further loosen the now minimal mechanisms designed to appropriately balance moderation and engagement between companies and investors.

To the extent the Commission is genuinely concerned about shareholders' ability to engage with companies on issues shareholders view as important, data following the Commission's previous about-faces suggests that the Proposed Rules would only serve to further empower the small subgroup of activist investors, disproportionately and at the direct expense of companies' investor bases at large. Activist proponents leapt to take advantage of SLB 14L, producing a swathe of more prescriptive proposals in the 2022 proxy season.[14] However, this did not produce an outpouring of widespread investor support for proposals. As noted above, average support

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[13] *Compare* https://www.sec.gov/rules/proposed/2022/34-95267.pdf at 13 *with* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals ("we believe our current approach…will help to avoid the dilemma many proponents faced when seeking to craft proposals with sufficient specificity and direction to avoid being excluded under Rule 14a-8(i)(10), substantial implementation, while being general enough to avoid exclusion for "micromanagement.").

[14] https://www.ey.com/en_us/board-matters/four-key-takeaways-from-the-2022-proxy-season. *See also* https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf (attributing the "marked increase" in "proposals of varying quality coming to a vote" to SLB 14L).

precipitously declined. Thus, narrowing the already selective handful of ways to exclude shareholder proposals primarily served to clog annual meetings with proposals that the majority of investors did not find appropriate or sufficiently important on which to direct companies. It is reasonable to expect that the Proposed Rules will further exacerbate this issue.

We further note that there is a glaring lack of any consideration of materiality or the business judgment of the board in assessing the "essential elements" of a proposal. Here, we will use climate-related proposals as an example. Climate change is a complex topic and how companies address it needs to be as specific and unique as each company's business, operations, risk profile and strategy. The depth of company-specific understanding required to implement a climate change-related strategy is more detailed than any shareholder proposal can, and we would argue, should, be. Climate change proposals, by definition, are going to fail to fully reflect all of the relevant business information that the board and key members of management are likely to have, even though such proposals may demand specific business actions or use of specific methodologies to drive a company's climate-related risk assessment and/or management.[15]

The Commission explicitly indicates in the Proposed Rules that, to the extent a proposal explains why existing reports or disclosures are insufficient then such reports/disclosures would not serve as a basis for exclusion under Rule 14a-8(i)(10).[16] However, with no safeguards on these explanations, there is a significant risk that an activist proponent could sidestep addressing a company's existing actions on the topic by nitpicking the company's existing efforts, notwithstanding the board and management's more detailed and nuanced understanding of the company's business, operations, risk profile and strategy. Moreover, with no restraints on materiality, a company can be reduced to having to explain every decision regardless of how minute, nuanced or immaterial. Therefore, the Proposed Rules would insert shareholders into the minutiae of decisions that rely, and we would argue, should rely, in many respects on the business judgment of company directors or managers.

Contrary to the Commission's language, the shareholder proposal process does not exist for investors to "exercise oversight over management."[17] This fundamentally misunderstands the purpose of the corporation as established by state law. Exercising oversight over management is the role of the board. Nor does the shareholder proposal process exist for investors to express their views, irrespective of the company's contextual situation. By requiring a company to have implemented each element essential to the proposal in question, instead of looking at the proposal as a whole and whether the essential *substance* of it has been implemented, the Commission is stacking the deck in favor of a small subgroup of activist proponents, an approach that was clearly rejected by investors in the 2022 proxy season.

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[15] https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf (observing climate themes in shareholder proposals aimed at, among other things: decommissioning traditional energy assets, requiring alignment of business models with particular climate scenarios, and setting emissions reduction targets in accordance with particular methodologies).

[16] https://www.sec.gov/rules/proposed/2022/34-95267.pdf at 15-16.

[17] https://www.sec.gov/rules/proposed/2022/34-95267.pdf at 5.

B. The "Same Objective by the Same Means" Test Proposed for Rules 14a-8(i)(11) and (12) Flouts the Purpose of the Duplication and Resubmission Exclusions by Providing Activist Proponents a Wide Berth to Subject Companies to an Onslaught of Proposals with Only Marginal Differences

Similar to the proposed amendments to Rule 14a-8(i)(10), the "same objective by the same means" test serves primarily to support activist proponents by removing important guidance that has helped create a more effective shareholder proposal submission process and more effective investor engagement. By precluding exclusion of similar proposals that pursue the same topics with mildly different means or ends, the Proposed Rules would, again, allow activist proponents to make superficial changes in proposal language to submit a litany of stand-alone requests or to circumnavigate bars on resubmission. This is an uncanny counterpoint to the Commission's prior revisions to "counter the abuse of the security holder proposal process by certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue."[18]

Similar to the Rule 14a-8(i)(10) proposed amendments, this new test for the purposes of Rules 14a-8(i)(11) and (12) would ignore any concept of materiality or deference to the board's business judgment in the review of proposals against each other. We have discussed several issues with this in section IV.A above; however, here, the problem is literally multiplied as investors are asked to weigh in on the same issue multiple times where they would previously have had to respond only once.

For example, returning to the example of climate change, the "principal thrust" of a proposal may be to provide more disclosure on climate-related risks. However, there are many methodological approaches to assessing a situation as complex as climate change. The Proposed Rules do not presently provide any requirements on how dissimilar an objective or means must be to be treated as not the "same." For examples, for objectives, proposals may be presented that request reporting on greenhouse gas reduction strategies that, among other things, (1) achieve net zero emissions by 2050; (2) are aligned with the Paris Agreement; or (3) are aligned with a trajectory for global warming of not greater than 1.5 ℃. Facially, these may appear to be different objectives, focused on: (1) a particular emissions outcome; (2) a particular emissions pathway outcome; and (3) a particular temperature outcome. If so, then these objectives alone could support at least three proposals. However, functionally, these proposals are all asking for the same thing, they are asking for the company to address a reduction in its greenhouse gas emissions and report against that plan. However, without greater clarity from the Commission, the Proposed Rules may thus allow activist proponents to repeatedly present the same functional request in disregard of the purpose of the duplication and resubmission exclusion bases. The Commission should not allow activists to simply shuffle the deck and claim that it has different cards. Some notion of material dissimilarity must be included in any changes to Rule 14a-8 to address this issue.

[18] Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34, 20091 (Aug. 16, 1983) [48 FR 38218 (Aug. 23, 1983], at 38221 ("1983 Adopting Release").

V. Recommendations and Conclusion

We believe that the Commission's desire to amend the bases for exclusion under Rule 14a-8 is misguided and rooted in ideological considerations outside of the Commission's statutory mandate and authority. Where it previously recognized the need to maintain a balance between companies and investors to allow for productive and appropriate engagement, the Commission is now using its regulatory authority to throw its significant weight behind a specific sliver of investors at the expense of the broader investor community and the integrity of the capital markets. We thus urge the Commission to reconsider its approach and to steady the pendulum rather than setting it swinging into what would likely be decades of uncertainty and instability as subsequent iterations of the Commission try to realign the Rule 14a-8 exclusion bases, either towards their preferred political outcomes or in an attempt to mitigate this Commission's political agenda.

However, to the extent the Commission does undertake to amend Rule 14a-8, we believe the Commission should ensure such changes remain rooted in the Commission's mandate by supporting a balanced approach in the engagement between companies and shareholders while retaining a focus on materiality and the proper role of the various governance bodies of public companies.

We ask that the Commission carefully consider our recommendations when determining how to proceed with respect to climate change-related disclosures and the potential adoption of regulation. We would be happy to discuss our comments or any other matters that you believe would be helpful. Please contact me at [redacted] or [redacted] if you have questions or wish to discuss our comments.

Sincerely,

Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council

cc: Gary Gensler, Chair of the SEC

Caroline A. Crenshaw, Commissioner
Jaime Lizárraga, Commissioner
Hester M. Peirce, Commissioner
Mark Uyeda, Commissioner