

# CONSULTATION RESPONSE

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## **SECURITIES AND EXCHANGE COMMISSION: SUBSTANTIAL IMPLEMENTATION, DUPLICATION, AND RESUBMISSION OF SHAREHOLDER PROPOSALS UNDER EXCHANGE ACT RULE 14A-8 (S7-20-22)**

12 September 2022

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To inform this response, the following investor groups have been consulted: PRI Global Policy Reference Group. This consultation is not an endorsement or acknowledgement of the views expressed in this response.

# INTRODUCTION

The Principles for Responsible Investment (PRI) works with its international network of signatories to put the six Principles for Responsible Investment into practice. Its goals are to understand the investment implications of environmental, social and governance (ESG) issues and to support signatories in integrating these issues into investment and ownership decisions. The PRI acts in the long-term interests of its signatories, of the financial markets and economies in which they operate and ultimately of the environment and society as a whole.

The six Principles for Responsible Investment are a voluntary and aspirational set of investment principles that offer a range of possible actions for incorporating ESG issues into investment practice. The Principles were developed by investors, for investors. In implementing them, signatories contribute to developing a more sustainable global financial system.

The PRI develops policy analysis and recommendations based on signatory views and evidence-based policy research. The PRI welcomes the opportunity to respond to the Securities and Exchange Commission's call for public comments on proposed amendments under Exchange Act Rule 14a-8.

## ABOUT THIS CONSULTATION

The Securities and Exchange Commission (SEC or the Commission) is consulting on proposed updates to certain substantive bases for exclusion of shareholder proposals under Exchange Act Rule 14a-8. When a company wishes to exclude a shareholder proposal from its proxy materials, it is required to file a no-action request with the Commission. The proposed changes would clarify grounds under which companies may exclude shareholder proposals from their proxy statements by amending the substantial implementation exclusion, the duplication exclusion and the resubmission exclusion.

The PRI supports its signatories to fulfil their obligations as stewards of capital and their commitment to Principle 2 of the Principles for Responsible Investment: We will be active owners and incorporate ESG issues into our ownership policies and practices. The PRI therefore welcomes the opportunity to respond to the SEC's consultation.

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# KEY RECOMMENDATIONS

The PRI commends the Commission's efforts to enhance clarity and transparency for shareholders around the reasons why issuers may exclude shareholder proposals in proxy materials.<sup>1</sup> The proposed changes would improve the efficiency with which diverse shareholder objectives can be debated and reconciled by the markets, enhances shareholders' abilities to utilize the proxy process to address issues of concern and strengthens the utility of the proxy process to address a variety of issues that affect shareholder's fiduciary duty. Therefore, we support the revisions to the following:

- The substantial implementation exclusion;
- The duplication exclusion; and
- The resubmission exclusion.

The PRI additionally recommends the Commission:

- Apply the logic of the proposed amendments of Rule 14a-8(i)(11) on Duplication to Rule 14a-8(i)(9) on Conflicts with company's proposals.
- Take additional action to reverse the resubmission thresholds established in 2020 from 5%, 15% and 25%<sup>2</sup>, for matters voted on once, twice or three times in the last five years, respectively, to the previous thresholds of 3%, 6% and 10%.
- Codify the Significant Social Policy Exception interpretation as introduced by Staff Legal Bulletin Nos. 14L<sup>3</sup> and 14H<sup>4</sup>.

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<sup>1</sup> Proposal at p. 73.

<sup>2</sup> As finalized under [Release No. 34-89964; File No. S7-23-19 "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8.](#)

<sup>3</sup> Securities and Exchange Commission, [Shareholder Proposals: Staff Legal Bulletin No. 14L \(CF\)](#), November 3, 2021.

<sup>4</sup> Securities and Exchange Commission, [Shareholder Proposals: Staff Legal Bulletin No. 14H \(CF\)](#), October 22, 2015.

# DETAILED RESPONSE

## THE PRI'S POSITION ON STEWARDSHIP AND SHAREHOLDER PROPOSALS

PRI signatories have committed to being active owners and to incorporate ESG issues into ownership policies and practices. Principle 2 of the Principles for Responsible Investment states that signatories “will be active owners and incorporate ESG issues into our ownership policies and practices.”<sup>5</sup> The PRI regards stewardship as one of the most effective mechanisms to reduce risks, maximise returns and have a positive impact on society, the environment and the financial system as a whole. Stewardship is a vital part of investors’ fiduciary duty to prudently care for clients’ and beneficiaries’ assets and to create long term, risk-adjusted value.

While our signatories employ a variety of stewardship strategies, most share the view that the shareholder resolution process is a critical tool for effective active ownership.

**Shareholder proposals are a vital corporate engagement mechanism.** They allow investors to use their formal rights as owners to publicly escalate important matters and directly interact with a company’s board. Filing and voting on shareholder proposals—when used effectively—can also:

- Focus shareholder efforts on a single, concrete call to action;
- Aggregate a wider set of shareholder views on that call to action, including views of those who lack the resources or access to conduct other types of stewardship;
- Elevate an issue to the corporate board (e.g., if a dialogue has not progressed beyond the investor relations team);
- Inform other investors and stakeholders about an urgent or underrepresented issue; and
- Set clear, transparent expectations to the board and management that prevents claims of a lack of awareness of investor expectations.

**The shareholder proposal process has important implications for corporate governance in the US.** As outlined in more detail in our comment letter to the SEC on “S7-23-19: Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8<sup>6</sup>,” the SEC’s corporate disclosure regime has been shaped by investor interest, for example expressed through shareholder resolutions. In the proposing release for “the Enhancement and Standardization of Climate-Related Disclosures for Investors,” for instance, the SEC argued that one of the reasons for proposing issuer climate disclosures was a clear demonstrated interest by investors in climate related issues through shareholder proposals.<sup>7</sup> The PRI supports the SEC’s efforts to strengthen shareholder rights and increase transparency around the substantive bases for exclusion of shareholder proposals, as this will allow investors to better utilize the proxy process to exercise their shareholder rights. This change may aid the Commission in future rulemakings, as it will allow

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<sup>5</sup> Principles for Responsible Investment, [What are the Principles for Responsible Investment?](#)

<sup>6</sup> Principles for Responsible Investment, [Consultation Response File Number: S7-23-19: Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8](#)

<sup>7</sup> Securities and Exchange Commission, [Release Nos. 33-11042; 34-94478; File No. S7-10-22 The Enhancement and Standardization of Climate-Related Disclosures for Investors](#), p. 322.

investors to better utilize the shareholder proposal process to signal needs for additional corporate disclosure on new and emerging issue areas.

**Furthermore, the shareholder resolution process provides a clear, rules-based pathway for investors to hold managers accountable to their shareholders** and formulate important agreements with management.<sup>8</sup> Recent highlights include:

- The Coca Cola Company agreeing to reduce its cumulative use of virgin plastic by 3 million metric tons by 2025, in their withdrawal agreement following a shareholder proposal by Green Century Capital Management.<sup>9</sup>
- Church & Dwight agreeing to ensure competitive reproductive health rights benefits and to address employees' concerns regarding reproductive health issues, following a shareholder proposal by As You Sow.<sup>10</sup>
- 98% of Chevron investors voted in favour of a shareholder proposal by Mercy Investment Services that called on Chevron to issue an analysis on the reliability of its methane disclosure. Chevron had recommended that shareholders vote in favour of the proposal and will presumably be improving disclosures accordingly.<sup>11</sup>

## THE PRI'S COMMENTS ON SPECIFIC ASPECTS OF THE PROPOSED RULE

**The PRI supports the proposed updates to the Substantial Implementation exclusion, the Duplication exclusion, and the Resubmission exclusion.** We commend the Commission's effort to facilitate shareholders' rights to present their proposals at shareholder meetings.<sup>12</sup> The proposed changes will allow shareholders to better elevate issues to corporate boards, set clearer expectations to issuer boards and management teams and better inform market participants such as the Commission and other shareholders and stakeholders about new, emerging issues.

### Substantial Implementation under Rule 14a-8(i)(10)

**The PRI supports the proposed change** that proposals may be excluded as substantially implemented, "if the company has already implemented the essential elements of the proposal."<sup>13</sup> We support the focus on specific actions, or elements, requested by the shareholder proposal and believe that the proposed change will increase transparency around the application of the substantial implementation exclusion.

### Duplication under Rule 14a-8(i)(11)

**The PRI supports the proposed change** that proposals may be excluded as duplicative, "if the proposal substantially duplicates (i.e., addresses the same subject matter and seeks the same objective by the same means as) another proposal previously submitted to the company by another

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<sup>8</sup> Additional details and examples are available here: Principles for Responsible Investment, [Consultation Response File Number: S7-23-19: Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8](#), p. 12.

<sup>9</sup> Green Century Funds, [Coca-Cola\\* Agrees to Reduce Virgin Plastic Use](#), February 10, 2021.

<sup>10</sup> As You Sow, [2021 Shareholder Impact Review](#)

<sup>11</sup> Ceres, [Chevron's Investors Call for Improved Methane Disclosures in a Near-Unanimous Vote](#), May 25, 2022.

<sup>12</sup> Proposal at p. 4.

<sup>13</sup> Proposed Rule at p. 80.

proponent that will be included in the company’s proxy materials for the same meeting”<sup>14</sup> The PRI is supportive of this change to consider the objectives and means of implementation of shareholder proposals when evaluating whether they are duplicative. Shareholders that may wish to introduce different means to address issues that have already been raised by another proponent would now be able to do so. As a result, shareholders will be able to vote their proxies in a way that adds more nuance and clarity around their specific expectations on corporate action than previously possible.

The PRI is not concerned about the possibility that “the proposed amendment could result in the inclusion in a company’s proxy materials of multiple shareholder proposals dealing with the same or similar issue.”<sup>15</sup> When it comes to sustainability related issues, there are often multiple means for companies to address shareholder concerns. The proposed change by the Commission will allow shareholders to put these different means to a vote and help build consensus on the best way forward.

### Resubmission under Rule 14a-8(i)(12)

**The PRI supports the proposed change** that a proposal constitutes a resubmission if it substantially duplicates, meaning that it “addresses the same subject matter and seeks the same objective by the same means”<sup>16</sup>, as a prior proposal. As indicated above, conditioning the substantial duplication exclusion on the objective and means of implementation allows for more nuanced shareholder proposals to be put forward. This change will allow shareholders to innovate the approaches they bring to company boards and management through the shareholder proposal process and will allow shareholders to vote on a variety of objectives and means related to the same issue of concern.

Currently, if a proposal received less than 5% support within its first year, the issuer may be able to effectively dismiss all related proposals for the next 5 years. The low vote result may reflect that shareholders disagreed with the means that a proposal seeks, and not necessarily a disagreement with the proposal’s objective itself. The existing rules do not allow for shareholders to iterate their proposals in a timely manner based on differing views. The proposed change allows shareholders to better represent their views to management in a timely manner and will support a proxy voting process that more closely reflects the desires of shareholders. This is especially poignant in instances where the objective sought by the proposal is a material issue to the company. Banning shareholders’ ability to engage on the material issue via the shareholder proposal process for 5 years could be damaging to shareholder value. This underscores the importance of full adoption of the Commissions proposed changes to Rule 14a-8(i)(12).

## ADDITIONAL RECOMMENDATIONS

**The PRI recommends the SEC apply the logic of the proposed amendments to Rule 14a-8(i)(11) on Duplication to Rule 14a-8(i)(9) on Conflicts with company proposals and to include these amendments in its final rulemaking.**

We encourage the Commission to apply the logic of proposed amendments to Rule 14a-8(i)(11)—that a proposal “substantially duplicates” another proposal if it “addresses the same subject matter and seeks the same objective by the same means”—in situations where the duplication is between a

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<sup>14</sup> Proposed Rule at p. 80.

<sup>15</sup> Proposal at p. 20.

<sup>16</sup> Proposal at p. 81.

management and shareholder proposals, under Rule 14a-8(i)(9). We believe that the benefits of shareholders being able to provide boards with more nuance and clarity of their preference through voting on duplicate proposals applies regardless of if the proposal was submitted by another proponent or by company management.

## RESUBMISSION THRESHOLDS

**The PRI continues to view the resubmission thresholds introduced in 2020<sup>17</sup> as harmful to the exercise of shareholder rights and encourages the Commission to reverse these changes as soon as practicable.**

In our comment letter to the SEC regarding Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (S7-23-19), we argued that the basis for the SEC's Proposed Rule was substantially at odds with empirical evidence and that the rule would significantly impede the accountability of management to their shareholders.<sup>18</sup>

In our original economic analysis, we reviewed all proposals that appeared on proxy filings from 2006 to 2018 and found that a significant number (399 submitted resolutions) would have been excluded under the new rule. We further expressed concern that many proposals that do not gain strong early support nevertheless gain support when resubmitted in later years. In other words, support for a proposal in year one is not determinative of support in years two or three. Furthermore, the PRI expressed concern that the cost-benefit analysis conducted by the SEC was insufficient and one-sided. For example, it did not consider the costs of reduced shareholder monitoring of management resulting from the rule changes. For these reasons, we continue to find the changes made under "Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (S7-23-19)" to be detrimental to investors and the maintenance of fair, orderly and efficient markets.

## SIGNIFICANT SOCIAL POLICY EXCEPTION

**The PRI supports the SEC's position regarding the Significant Social Policy Exception of rule 14a-8(i)(7), as articulated in Staff Legal Bulletin (SLB) Nos. 14L<sup>19</sup> and 14H<sup>20</sup>, and encourages the Commission to codify this guidance in rulemaking.**

We note that the Commission has not addressed this issue through an official rule since the 1998 Release and believe the recent back and forth on this issue between SLB Nos. 14I and 14L signifies the need for codifying the Commission's interpretation. The increased uncertainty for investors and issuers on how to interpret this substantive base for excluding a shareholder proposal in recent years points to a clear need to codify the current interpretation.

**The PRI is supportive of the Commission's reinterpretation of the Significant Social Policy Exception in SLB No. 14L** and would urge the commission clarify in future rulemaking that the judgement to whether something constitutes a significant social policy is not determinative based on whether or not the issue is a significant policy issue to a particular company. We also agree with the

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<sup>17</sup> Proposal at p. 24.

<sup>18</sup> Principles for Responsible Investment, [Consultation Response File Number: S7-23-19: Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8](#)

<sup>19</sup> Securities and Exchange Commission, [Shareholder Proposals: Staff Legal Bulletin No. 14L \(CF\)](#), November 3, 2021.

<sup>20</sup> Securities and Exchange Commission, [Shareholder Proposals: Staff Legal Bulletin No. 14H \(CF\)](#), October 22, 2015.

staff's clarification in SLB No. 14H that a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the "nitty-gritty of its core business."<sup>21</sup>

We believe codifying this clarification to the Significant Social Policy Exception will benefit issuers and investors alike. With greater frequency, issues that have been considered off-limits by the ordinary business clause are becoming significant social policy issues. For example, in the past forced employee arbitration clauses would have traditionally been seen as an item of "ordinary business." Yet, the "#MeToo" movement enabled these contractual obligations to transcend the "day-to-day business matters and raise[d it to the status of a] policy issue[s] so significant that it would be appropriate for a shareholder vote."<sup>22</sup>

The staff's interpretation of the "ordinary business" standard (14a-8(i)(7)) related to social policy issues in SLB Nos. 14L and 14H **is aligned with the PRI's view on social issues and impacts**. Investors are also increasingly viewing social issues, such as inequality, as systemic risks to their entire portfolios. Rather than focusing on individual companies and their human capital management practices, investors who are broadly invested in the market have started to consider the implications of systemic inequality on their portfolios. Income inequality can not only negatively impact long-term investment performance and change the risks and opportunities that affect investment opportunities, it can also destabilize the financial and social systems in which investors operate.<sup>23</sup> If the lens of what constitutes a significant social policy issue as defined in SLB No. 14I were to be readopted by a future administration, it would likely endanger investors' ability to utilize the proxy process to engage companies on this issue with significant impact to total portfolio value.

**We believe the trend of day-to-day business matters becoming significant social policies will endure.** Institutional Investors are increasingly recognizing the impact of broader societal issues on financial returns across their investment portfolios. The PRI's foundational report *A Legal Framework for Impact*, commissioned in partnership with the UNEP FI and the Generation Foundation, and authored by Freshfields Bruckhaus Deringer outlines the concept of investing for sustainability impact, which describes an investment approach where "investors intentionally seek [...] to influence what investee enterprises and third parties do in assessable ways that address sustainability challenges."<sup>24</sup> Furthermore, the report outlines that all businesses and therefore investment decisions have sustainability impacts, positive or negative. The market will benefit from clear, more permanent guidance on how considerations are assessed to be a significant social policy issue. Therefore, the PRI welcomes the interpretations articulated in Staff Legal Bulleting Nos. 14L and 14H and encourages the Commission to codify this change in future rulemaking.

*The PRI has experience of contributing to public policy on sustainable finance and responsible investment across multiple markets and stands ready to support the work of the Securities and Exchange Commission further to support shareholder rights in the US.*

Please send any questions or comments to [policy@unpri.org](mailto:policy@unpri.org).

More information on [www.unpri.org](http://www.unpri.org)

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<sup>21</sup> Securities and Exchange Commission, [Shareholder Proposals: Staff Legal Bulleting No. 14H \(CF\)](#), October 22, 2015.

<sup>22</sup> Securities and Exchange Commission, [Shareholder Proposals: Staff Legal Bulleting No. 14L \(CF\)](#), November 3, 2021.

<sup>23</sup> Principles for Responsible Investment, [Why and how investors can respond to income inequality](#), October 24, 2018.

<sup>24</sup> Freshfields Bruckhaus Deringer, [A Legal Framework for Impact](#).