



# Americans for Financial Reform Education Fund

September 12, 2022

Vanessa A. Countryman  
Securities and Exchange Commission  
100 F St. NE  
Washington, DC 20549

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

Dear Secretary Countryman,

The Americans for Financial Reform Education Fund (AFREF) and the undersigned organizations appreciate the opportunity to comment on the proposal by the Securities and Exchange Commission (the Commission) to update certain substantive bases for exclusion of shareholder proposals. Shareholder proposals are an important part of our corporate governance system, and we welcome the Commission’s proposal to provide more predictability and consistency to the application of exclusions based on substantial implementation, duplication, and resubmission. Specifically, we support the proposed changes that would make a proposal excludable as substantially implemented “[i]f the company has already implemented the essential elements of the proposal,” and as substantially duplicative or a resubmission if it “addresses the same subject matter and seeks the same objective by the same means.” These changes would reduce costs and uncertainties to both proponents and issuers, and make the proposal process more efficient, objective, and predictable. The current rules, which invite overly subjective determinations, have led to an increase in the number and length of no-action requests and the exclusion of proposals that would have benefited issuers and investors.

For the remainder of our comment letter, we focus on the benefits of the shareholder proposal process more generally that we encourage the Commission to consider as it finalizes the proposed rule. In its economic analysis, the Commission states: “The value of including a shareholder proposal in a company’s proxy statement for shareholder consideration and vote at a meeting depends fundamentally on the tradeoff between the potential for improving a company’s future performance and the costs associated with the submission and consideration of a

shareholder proposal borne by the company and its non-proponent shareholders.”<sup>1</sup> We believe, however, that there are important, substantial benefits to the shareholder proposal process that are not captured in this view of potential benefits and costs. We want to call attention to the importance of: 1) shareholder proposals withdrawn by proponents; 2) changes implemented through shareholder proposals at and beyond target companies; 3) shareholder proposals’ role in identifying, raising awareness, and addressing both company-level and systemic risks; and 4) shareholder proposals as a gauge for when standardized, mandated disclosures are needed.

### Importance of Shareholder Proposals Withdrawn by Proponents

The Commission acknowledges that “if a submitted but withdrawn proposal did not appear in a proxy statement, a press release, or a company’s no-action request, it may not be included in the data we use for the [economic] analysis.”<sup>2</sup> However, we encourage the Commission to take into account the fact that “[w]ithdrawn resolutions signal successful engagements between investors and companies.”<sup>3</sup> Indeed, corporate governance scholars note that it is in the best interest of issuers to reach an agreement with proponents of a shareholder proposal that is expected to pass rather than risk losing the vote, and that because of this, proposals that do not come to a vote can result in issuers making positive changes.<sup>4</sup>

Notably, members of the Interfaith Center on Corporate Responsibility (ICCR), a coalition of over 300 global institutional investors that represents more than \$4 trillion in managed assets, “negotiate over one hundred successful agreements with companies directly related to their resolutions” that result in “meaningful change” every year.<sup>5</sup> Therefore, we recommend the Commission incorporate information we expect to be submitted by proponents regarding the positive impacts of withdrawn proposals into its analysis of the benefits of the proposed rule. The increased clarity, predictability, and consistency the proposed rule would bring to the shareholder proposal process will save resources proponents and issuers currently expend on the no-action request process, and facilitate further productive engagement that in many instances can be expected to result in positive changes triggered by withdrawn proposals.

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<sup>1</sup> Securities and Exchange Commission, “Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8,” 48-49, File No. S7-20-22, *available at* <https://www.sec.gov/rules/proposed/2022/34-95267.pdf>.

<sup>2</sup> *Id.* at 39 n. 97.

<sup>3</sup> Morningstar, “The Proxy Process: Raising the Investor Voice to Address New Risks,” 20, Feb. 8, 2019, *available at* <https://perma.cc/7VQN-27R5>.

<sup>4</sup> Lucian Bebchuk & Scott Hirst, “Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy,” 2105 n. 196, *Columbia Law Review*, Dec. 2019, *available at* [https://columbialawreview.org/wp-content/uploads/2019/12/Bebchuk-Hirst-Index\\_Funds\\_and\\_the\\_Future\\_of\\_Corporate\\_Governance.pdf](https://columbialawreview.org/wp-content/uploads/2019/12/Bebchuk-Hirst-Index_Funds_and_the_Future_of_Corporate_Governance.pdf); Kobi Kastiel & Yaron Nili, “The Giant Shadow of Corporate Gadflies,” 582, *Southern California Law Review*, 2021, *available at* [https://southerncalifornialawreview.com/wp-content/uploads/2021/09/KastielNili\\_Final.pdf](https://southerncalifornialawreview.com/wp-content/uploads/2021/09/KastielNili_Final.pdf).

<sup>5</sup> Interfaith Center on Corporate Responsibility (ICCR), “ICCR’s 2022 Proxy Resolutions and Voting Guide: The Executive Summary,” *available at* <https://www.iccr.org/iccrs-2022-proxy-resolutions-and-voting-guide-executive-summary>.

## Changes Implemented Through Shareholder Proposals At and Beyond Target Companies

Corporate governance scholars note that “shareholder proposals have proven to be an effective stewardship tool for bringing about governance changes at large numbers of public companies.”<sup>6</sup> Indeed, between 2003 and 2018, shareholder proposals were behind the increased adoption of corporate governance changes including declassifying the board, establishing an independent board chair, and adopting a majority vote standard, proxy access, say-on-pay, and a shareholder right to call a special meeting.<sup>7</sup> These changes reverberated beyond the companies where shareholder proposals were filed.<sup>8</sup>

The Boardroom Accountability Project, launched in 2014 by the New York City Comptroller, is another example of a successful shareholder proposal campaign. By 2019, almost 500 issuers had implemented the reform advocated by the Project — proxy access. One study estimates that these efforts led to a total increase of \$10.6 billion in shareholder value at targeted companies.<sup>9</sup> We encourage the Commission to consider the benefits of such substantial, widespread changes precipitated by shareholder proposal campaigns, and how the proposed changes could help ensure subjective exclusions do not jeopardize these benefits.

## Shareholder Proposals’ Role in Identifying, Raising Awareness, and Addressing Both Company-Level and Systemic Risks

Many credit multiyear shareholder proposal campaigns with “flag[ging] potentially material risks at both the company and and financial market level,” “shap[ing] the governance landscape,” and “rais[ing] market awareness of material environmental, social, and governance (ESG) risks.”<sup>10</sup> Additionally, others suggest the economies of scale achieved by organizations that file shareholder proposals mean “these tools could be very effective in reducing climate risk, financial stability risk, or social stability risk.”<sup>11</sup> Indeed, shareholder proposals are a powerful

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<sup>6</sup> Lucian Bebchuk & Scott Hirst, “Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy,” 2040, *Columbia Law Review*, Dec. 2019, *available at* [https://columbialawreview.org/wp-content/uploads/2019/12/Bebchuk-Hirst-Index\\_Funds\\_and\\_the\\_Future\\_of\\_Corporate\\_Governance.pdf](https://columbialawreview.org/wp-content/uploads/2019/12/Bebchuk-Hirst-Index_Funds_and_the_Future_of_Corporate_Governance.pdf).

<sup>7</sup> Kosmas Papadopoulos, “The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance (2000-2018),” *Harvard Law School Forum on Corporate Governance*, Feb. 6, 2019, *available at* <https://corpgov.law.harvard.edu/2019/02/06/the-long-view-the-role-of-shareholder-proposals-in-shaping-u-s-corporate-governance-2000-2018/>.

<sup>8</sup> Kobi Kastiel & Yaron Nili, “The Giant Shadow of Corporate Gadflies,” 584, *Southern California Law Review*, 2021, *available at* [https://southerncalifornialawreview.com/wp-content/uploads/2021/09/KastielNili\\_Final.pdf](https://southerncalifornialawreview.com/wp-content/uploads/2021/09/KastielNili_Final.pdf).  
<sup>9</sup> *Id.* at 587.

<sup>10</sup> See Morningstar, “The Proxy Process: Raising the Investor Voice to Address New Risks,” 10, Feb. 8, 2019, *available at* <https://perma.cc/7VQN-27R5>.

<sup>11</sup> Lucian Bebchuk & Scott Hirst, “The Power of the Big Three, and Why It Matters,” 45, Working Draft, Feb. 21, 2021, *available at* [http://www.law.harvard.edu/faculty/bebchuk/The\\_Power\\_of\\_the\\_Big\\_Three\\_and\\_Why\\_It\\_Matters.pdf](http://www.law.harvard.edu/faculty/bebchuk/The_Power_of_the_Big_Three_and_Why_It_Matters.pdf).

tool for investors to productively engage with issuers on matters of importance to them beyond short-term financial return, including issues that could affect company-specific long-term performance as well as the health of the equity market as a whole – a matter of increasing importance due to the highly diversified nature of most investors’ equity holdings and the inability to diversify away systemic risks. The Commission should consider how the proposed changes could help ensure subjective exclusions of shareholder proposals do not jeopardize these important engagements.

### Shareholder Proposals as a Gauge for When Standardized, Mandated Disclosures Are Needed

Shareholder proposals are also an important part of the regulation of equity markets, and help the Commission fulfill its mission of protecting investors and maintaining efficient markets. This is so because “historically the SEC has viewed large minority support for shareholder proposals calling for more transparency as an indication that a sufficient interest exists to justify mandatory disclosure rules.”<sup>12</sup> For example, shareholder proposals were a motivating factor behind the Commission’s 1992 executive pay disclosure rules.<sup>13</sup> Additionally, increases in issuer disclosures spurred by shareholder proposals help demonstrate that companies recognize investor demand for the disclosures and that the disclosures are feasible.<sup>14</sup> Having clear rules for the exclusion of shareholder proposals will prevent unpredictable and inconsistent decisions on exclusions that could get in the way of an important gauge that helps the Commission achieve its mission.

We thank the Commission for engaging in this important rule-making process to bring predictability and consistency to the interpretation of the relevant sections of Rule 14a-8. We appreciate the Commission’s consideration of our recommendations to ensure the full range of benefits of shareholder proposals are taken into consideration when finalizing the rule. For further discussion, please contact Natalia Renta at [REDACTED].

Sincerely,

Americans for Financial Reform Education Fund  
American Federation of State, County and Municipal Employees (AFSCME)  
Communications Workers of America (CWA)  
Public Citizen  
U.S. Impact Investing Alliance

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<sup>12</sup> Lucian Bebchuk, Robert J. Jackson Jr., James D. Nelson, & Roberto Tallarita, “The Untenable Case for Keeping Investors in the Dark,” 15, *Harvard Business Law Review*, 2020, *available at* [https://www.hblr.org/wp-content/uploads/sites/18/2020/03/HLB103\\_crop.pdf](https://www.hblr.org/wp-content/uploads/sites/18/2020/03/HLB103_crop.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 34.