



The Forum for Sustainable and Responsible Investment

Via email to rule-comments@sec.gov

September 16, 2022

Vanessa A. Countryman
Secretary
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 US SIF: The Forum for Sustainable and Responsible Investment, I welcome the opportunity to provide this comment letter in response to the Notice of Proposed Rulemaking (the "Release") "Substantial Implementation, Duplication and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8" (File No. S7-20-22) (the "Proposal").

US SIF is the leading voice advancing sustainable investing across all asset classes. Our mission is to rapidly shift investment practices toward sustainability, focusing on long-term investment and the generation of positive social and environmental impacts. Our members include investment management and advisory firms, mutual fund companies, asset owners, research firms, financial planners, advisors, and broker-dealers, representing more than \$5 trillion in assets under management or advisement. US SIF members incorporate environmental, social and governance ("ESG") criteria into their investment decisions and take their shareowner responsibilities seriously, including in voting proxies and engaging with companies.

US SIF supports the SEC's Proposal and the ability of shareholders to file resolutions at the annual meetings of publicly traded companies. The proposed rule amendments will help reduce the number of shareholder proposals improperly excluded from proxy statements and increase clarity for shareholders and companies alike about which proposals are entitled to be included in a company's proxy statement.

Background

The shareholder proposal rule (Rule 14a-8 under the Securities Exchange Act of 1934) is a vitally important, market-based mechanism for shareholders to communicate with boards, management, and other shareholders on important environmental, social and corporate governance issues that a company is either not sufficiently addressing, or about which a shareholder believes additional information is necessary.

Since 1942, the proxy statement has been the principal way for shareholders to disseminate their proposals. It provides shareholders with the ability to file resolutions at companies' annual

meetings as well as stimulate dialogue with management. This process has been one of the most visible and effective ways investors can practice responsible ownership.

Though shareholders have a right to file proposals, that right is not absolute. In addition to certain qualifying prerequisites for filing a proposal, Rule 14a-8 lays out 13 different types of exclusions that companies may use as a basis for challenging a shareholder's right to have their proposal included in the company's proxy statement.

A company, however, does not have a unilateral right to exclude a proposal from its proxy statement because it believes the proposal falls within one of the enumerated exclusions. Rather, the company must notify the SEC and typically does so by way of a request for "no action." The "no action" process is an informal way for the SEC staff to provide the staff's opinion as to whether it concurs or declines to concur with the company's analysis.

There are scenarios where the staff's decisions about the exclusions have been inconsistent.¹ To provide some uniformity and clarify expectations about the exclusions, the SEC proposes to amend the rules relating to 3 of the 13 types of exclusions: substantial implementation, duplication and resubmission.

The *Substantial Implementation* exclusion has not been amended since 1983, when the Commission sought to decrease the number of irrelevant proposals on proxy statements. In doing so, they inadvertently added a significant level of subjectivity to deciding which proposals would fall under this exclusion and which would not.

The *Duplication* exclusion was added to Rule 14a-8 in 1976. Since its introduction, the SEC staff has used a "principal thrust" or "principal focus" test when determining whether a proposal falls under this exclusion. The current duplication exclusion language has created an incentive for a proposal to be submitted quickly since a proposal with a similar theme or subject may be found duplicative of another proposal that uses the same means/methods but has an opposing objective.

The *Resubmission* exclusion was most recently amended in 2020. In part, the 2020 amendment increased the ownership thresholds a shareholder must meet to be eligible to file a shareholder proposal at an annual meeting. That amendment was opposed by US SIF and the majority of the sustainable investing industry.

Support for the Proposal

The proposed amendments to Rule 14a-8 will give more clarity to shareholders submitting proposals and companies weighing whether to challenge a proposal by submitting a no-action request to the SEC staff.

Substantial Implementation

The Proposal clarifies what shareholder proposals may fall into the Substantial Implementation exclusion. A proposal will count as having already been substantially implemented if the company has already "implemented the essential elements" of the proposal. This is meant to ensure that a company must implement the important parts of the proposal and cannot argue

¹ Shareholder Rights Group comment letter, <https://www.sec.gov/comments/s7-20-22/s72022-20134698-305893.pdf>

that it has implemented most of its requirements while leaving out essential components. This would eliminate most of the subjectivity of the substantial implementation rule and encourage proponents to articulate essential elements in drafting their proposals.

Duplication

The proposed rule adds definition to what it means for a shareholder proposal to be a duplication of another proposal during the same proxy season. A proposal will fall into the Duplication exclusion only if another proposal already "addresses the same subject matter and seeks the same objective by the same means." This replaces the "principal focus" or "principal thrust" test.

We recommend against the Commission imposing a numerical limit on the number of shareholder proposals that address the same subject matter on a proxy statement.² Such a limit would incentivize a "race to file" among proponents that may produce fewer well-thought-through proposals or encourage outright gamesmanship by competing proponents to "win" a limited spot on the proxy. These potential outcomes from adding numerical limits would not be in the interest of investors or companies.

Resubmission

The proposed rule also adds the definition of duplication (if another proposal "addresses the same subject matter and seeks the same objective by the same means") to the Resubmission exclusion. This ensures that both the Resubmission and Duplication exclusions have the same requirements. The result is that a resolution on the same topic which did not receive adequate votes to be resubmitted would not prevent a resolution on a similar topic from being submitted.

We strongly support the Proposal and urge the SEC to finalize the rule. The minimal added cost associated with including a few additional proposals on proxy statements is substantially outweighed by the benefit of bolstering investors' voices and choices in addressing critical issues facing companies in which they invest.

Sincerely,



Lisa Woll
CEO

² Release, section B, question 6.