U.S. Chamber of Commerce

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September 12, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Proposed Rule, Securities and Exchange Commission; Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8; 87 Fed. Reg. 45052 (July 27, 2022)

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the proposed rules (the "Proposed Rules" or "Proposal") of the Securities and Exchange Commissions ("SEC" or "Commission") governing substantial implementation, duplication, and resubmission of shareholder proposals under Exchange Act Rule 14a-8. The Chamber encourages the Commission not to finalize the Proposed Rules.

The shareholder proposal system, as governed by Exchange Act Rule 14a-8, goes beyond the SEC's statutory mission to promote investor protection, competition, and capital formation. The Proposal's use of the concept of "shareholder suffrage" injects political and special interest considerations into the shareholder proposal process and was rejected by the SEC in the past.[1]

Since its origins in the 1940s, the shareholder proposal process has evolved from a modest effort to give shareholders an additional tool for influencing corporate governance to a complex and over-politicized process that is neither satisfactory to issuers nor investors. The Commission's Proposed Rules centered around advancing "shareholder suffrage," would foment a more hostile shareholder proposal environment and cement contentious policy issues at the core of the shareholder proposal process. Such an outcome would create a tyranny of the minority and

[1] Indeed, when asked in 1943 about the potential for the proposal process to be usurped by "either the nuisance man or the man with a particular idea or even an 'ism' or something he wants to advance," then-SEC Commission Ganson Purcell told Congress that such a case would require the SEC to "make such appropriate changes as might seem necessary" to prevent such an outcome from occurring. "Security and Exchange Commission Proxy Rules … Hearings … H.R. 1493, H.R. 1821, and H.R. 2019." P. 163. Available at: https://play.google.com/books/reader?id=7RaCMxk2dH8C&pg=GBS.PP8&hl=en

significantly consume more issuer resources harming investor protection, competition, and capital formation.

Moreover, the Proposed Rules undermines the Commission's promulgated 2020 Shareholder Proposal Rule ("2020 Rule"), which, after substantial public consideration and staff justification, sought to address the criteria for resubmission to "relieve companies and their shareholders of the obligation to consider, and spend resources on, matters that had previously been voted on and rejected by a substantial majority of shareholders without sufficient indication that a proposal could gain traction among the broader shareholder base in the near future."[2] As discussed elsewhere in this letter, the Proposed Rules provide a path to activist shareholders to circumvent the important and modest reforms installed by the 2020 Rule and would impose additional strain on issuer resources at the precise moment when investor support for shareholder proposals has noticeably dropped.[3]

Accordingly, CCMC offers the following views and recommendations on the Proposal:

I. **The Proposal will not advance certainty for issuers but will instead further root special interest agendas at the center of the 14a-8 process;**

II. **The Proposal risks over-burdening issuer resources while decreasing issuer latitude over decision-making;**

III. **When evaluated together with other recent actions from the Commission, the Proposal will further weaken the public company model.**

IV. **If the Commission does ultimately adopt one or more of the proposed changes, it should make compensating changes to Rule 14a-8 to reduce the increased and unnecessary costs that shareholders would bear as a result of the proposed rule changes.**

Discussion

I. The Proposal will not advance certainty for issuers but will instead further root special interest agendas at the center of the 14a-8 process.

The current Commission's departure from employing reasoned, methodical, and shareholder value-focused criteria in making determinations for excluding

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[2] https://www.sec.gov/news/press-release/2020-220

[3] Posner, Cydney; Cooley LLP. More Prescriptive Proposals, Less Support for 2022 Proxy Season (Aug. 22, 2022). Available at: https://corpgov.law.harvard.edu/2022/08/22/more-prescriptive-proposals-less-support-for-2022-proxy-season/

shareholder proposals and toward fostering desired political outcomes via the 14a-8 process is concerning. Accompanying that concern is the likelihood that the political preferences of the political party controlling the Commission – through staff determinations – will increasingly be determinative of issuer no-action requests. The aggregate result of such changes will be to plunge board rooms and annual general meetings into political debate societies, jeopardizing issuers' ability to prioritize long-term value, all while decreasing the regulatory certainty as leadership at the Commission changes depending on Presidential administrations.

In recent years, the SEC staff has increasingly found itself weighing in on social and political issues as they pertain to shareholder proposals. Given the tight timelines for printing proxy materials and the cost of litigation as an alternative to seeking SEC staff advice, the no-action letter process, though flawed, has provided a form of rough justice for process participants. For better or worse, the SEC staff has found itself at ground zero under Rule 14a-8 and often acts to mediate disagreements between issuers and investors during proxy season.

The SEC's longstanding view of 14a-8 has, until the Commission's recently issued Staff Legal Bulletin 14L ("SLB 14L"), generally embraced the view that a policy matter contained in a proposal must have some connection to an issuer. This system has stood the test of time.

A recent study of 3,903 proposals, between 2007-2019, examined the impact on stock price where no action was requested. This study found that the stock price appreciated in value by 0.11% and 0.58% immediately upon the issuance of a no action decision. The study found that the no action process was an important mechanism in weeding out non-relevant proposals and ensuring that the shareholder proposal process was focused on building corporate and investor value. The authors of the study also found no difference in the decisions reached by the SEC when it was controlled by a Democratic or Republican majority.[4]

SLB 14L altered that premise by making detrimental changes related to the "ordinary business" exception. In issuing SLB 14L, the Division of Corporation Finance created a new interpretation for the "ordinary business" exception, stating:

> "[S]taff will no longer focus on determining the nexus between a policy issue and the company but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this

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[4] Matsusaka, John G. and Ozbas, Oguzhan and Yi, Irene, Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions (April 1, 2019). USC CLASS Research Paper No. CLASS17-4, Marshall School of Business Working Paper No. 17-7, Available at SSRN: https://ssrn.com/abstract=2881408 or http://dx.doi.org/10.2139/ssrn.2881408

determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.

Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7)

Because the staff is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7), it will no longer expect a board analysis as described in the rescinded SLBs as part of demonstrating that the proposal is excludable under the ordinary business exclusion."

Accordingly, under SLB 14L, the SEC no longer evaluates proposals on a company-by-company basis. Instead of determining how a proposal can impact investors and a board of the impacted company, the SEC now examines issues through the lens of 'broad societal impact.' Consequently, investor protection, competition, and capital formation are no longer the core guiding principles in evaluating no-action requests and the SEC staff now opines on societal issues well outside of its legal remit and expertise. With SLB 14L, the SEC has positioned itself as a subjective governmental arbiter of how the capital markets should assess social issues, pushing the Commission out of its depth legally, operationally, and conceptually. The Chamber expressed these concerns in a letter to the SEC, which is attached as an appendix, regarding SLB 14L on November 16, 2021.

It is clear the Proposed Rules intend to build on this sentiment to further root politics at the center of the 14a-8 process. The Commission's Proposed Rules seek to "provide a clearer standard for exclusion and promote more consistent and predictable determinations regarding the exclusion of proposals under the rule."[5] Adoption of the Proposed Rules would result in company boards and their investors having to increasingly opine on the political posturing of a minority of activist shareholders. In creating new criteria for exclusion under the "substantial implementation," "substantial duplication," and "substantially the same" exclusions,

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[5] Proposed Rules, p. 8. This goal, while laudable, raises a few questions that the SEC should address in any final rule. First, how does the Commission define a "social policy of significance"? No-action letters this year led to greater confusion on this topic, not clarity. For instance, how did the Commission determine that the "metaverse" was a social policy issue in its April 2, 2022, decision? The proposal's proponent appears to argue that since the targeted company is big, this must be a public policy issue. Is this sufficient? It certainly does not seem consistent with past court decisions, e.g., *Trinity Wall Street v. Wall-Mart Stores, Inc.*, 792, F.3d 323 (3d Cir. 2015) at 345. More generally, if the "metaverse" is "social policy of significance," what is not? The Commission's Proposed Rules fail to provide a limiting principle. Is the SEC looking for companies to be the forum to adjudicate contemporary and prominent social issues? The economic analysis in the Proposed Rule does not address the likely scope of these potential changes and their costs.

the Proposed Rules would weaken current guardrails that prevent companies from having to consider proposals of an overtly political nature at investor meetings.[6]

For example, Rule 14a-8(i)(11), the "duplication" exclusion, helps to prevent companies from having to consider proposals with opposing political perspectives on the same politically prominent subject. Under the Proposed Rules, however, a company would only qualify for an exception under 14a-8(i)(11) in the circumstance that a proposal "addresses the same subject matter and *seeks the same objective by the same means*."[7] Thus, in practice, the Proposed Rules could preclude companies that receive such dueling proposals from an exception under 14a-8(i)(11) on either proposal because they differ in political outcomes. Moreover, assuming both proposals would be interpreted as having a 'broad societal impact' under SLB 14L, the company would not likely succeed in excepting either proposal under 14a-8(i)(7). The likely option, then, would be for the issuer to evaluate and exercise votes on both proposals, a potentially problematic and polarizing outcome without any direct benefit to the issuer or the majority of investors.

Potentially even more problematic, the Commission's Proposed Rules "seeks the same objective by the same means" clause of the proposed amendments to 14a-8(i)(11) would mean that a handful of activists[8] could coordinate among themselves to offer proposals that have the same political objective but differ slightly in their means of achieving those objectives. Activist shareholders have recognized that investor meetings are one way to have their voices heard in the press and the C-suite.[9] While shareholder proposals can serve a valid purpose, the 14a-8 process has increasingly become a way for a small minority of investors to amplify idiosyncratic agendas at the expense of companies and the majority of their investors. Frivolous proposals obscure or lessen consideration of proposals that focus on how to improve a firm's performance that other shareholders have put forth, and such proposals can serve as a serious distraction for boards, whose responsibility it is to focus on the long-term best interests of the company and all its shareholders. In diminishing the guardrails preventing this minority from coopting the shareholder proposal process, the

[6] These proposals are not just overtly political, they are also do not warrant expenditures of corporate resources and management time under the original spirit of the 14a-8 exclusions. 14a-8 exclusions were not meant to be a tool by which proposals proliferate; they were intended to guide exclusions of proposals.
[7] *Supra* note 5. p. 18 (emphasis added)
[8] In one analysis of the 2022 Proxy Season, Sullivan & Cromwell found that just ten proponents were responsible for 60% of all proposals submitted. "2022 Proxy Season Review: Part 1"; Sullivan & Cromwell LLP. Available at: https://www.sullcrom.com/files/upload/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf
[9] https://www.politico.com/newsletters/the-long-game/2022/06/10/conservative-shareholders-strike-back-00038806

Proposed Rules would only serve to further encumber a focus on long-term value to the detriment of investors that the SEC is tasked with protecting.[10]

Additionally, the Commission should be careful not to further expose determinations related to proposal exclusions to relatively subjective interpretations by Commission staff that seemingly align with the political persuasion of the Commission's leadership. According to an analysis of the 2022 Proxy Season by law firm Sullivan & Cromwell, companies had a higher success rate in excluding shareholder proposals from "anti-ESG" (Environmental, Social, and Governance) proponents compared to all social/political proposals considered by the SEC.[11] If this trend continues and ultimately applies to the Proposed Rules, the result would be decreased certainty for companies between regimes at the SEC. Indeed, according to another evaluation of the 2022 Proxy Season, the success rates of no-action requests on each exclusion contemplated in the Proposed Rules dropped in year-over-year comparisons between 2022, 2021, and 2020.[12] The change can be attributed to directives to staff in excluding proposals, which sows uncertainty for companies in what to expect from the Commission based on the results of a Presidential election.[13]

The SEC's reputation as an independent, sober regulator has been a hallmark of the U.S. capital markets' success. However, should Commission staff's no-action determinations align with the political persuasion of the Commission's leadership, it is companies who will be caught in the middle; determinations about which proposals should receive consideration are likely to swing from one political preference to the

[10] It is remarkable, given the scope and consequences of the Proposed Rules, the scarcity of the record to support the proposed changes. The Commission appears to base the need to act on Proposed Rule footnotes 35, 37, and 107, all of which tie back to letters sent by Sanford Lewis, an attorney who is hired to write no-action letters to the SEC for professional shareholder proponents on behalf of his group, The Shareholder Rights Group. A quick review of the members of the group sending the letters to the Commission shows that they are the **top 5 most prolific shareholder activists** from Sullivan & Cromwell's study and represent **6 of the top 10** most prolific. These members of the Shareholder Rights Group alone submitted **over 270 proposals in 2022, or 1/3 of all proposals submitted.** See note 5 above, page 5. While it is unsurprising these activists believe that the current rules are too restrictive, it is surprising that the Commission would feel it is the appropriate basis upon which to act. These are not large shareholders representing a market consensus or shareholders even necessarily focused on long-term value creation. We encourage the Commission not to give undue weight to these voices, who have professionalized the shareholder proposal process and have a direct financial interest in the propagation of shareholder proposals, which, as such, may well conflict with the best interests of *all* shareholders.

[11] *Supra* note 8, p. 6

[12] According to an analysis done by Gibson Dunn, the success rates for no-action requests plummeted dramatically, moving from 70% in 2020, 71% in 2021, and just 38% in 2022. Notably, the success rate of exclusions based on "substantial implementation" fell 42% in the 2022 Proxy Season.
https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season/

[13] Gerber, Marc S. and Ryan J. Adams; Skadden, Arps, Slate, Meagher & Flom LLP. SEC Increases the Unpredictability of the Shareholder Proposal No-Action Process. Available at:
https://corpgov.law.harvard.edu/2022/07/20/sec-increases-the-unpredictability-of-the-shareholder-proposal-no-action-process/

other, sacrificing predictability for companies, their ability to prioritize long-term value, and, ultimately, shareholder protection.

II. The Proposal risks over-burdening issuer resources while decreasing issuer latitude over decision-making.

II.A. Issuers will need to evaluate an increased number of proposals, straining resources on proposals that lack the likelihood of receiving majority or significant investor support.

As discussed above, the Proposed Rules would lead to a proliferation of shareholder proposals that are unrelated to a company's operations and/or its ability to create long-term shareholder value and that do not garner significant investor support.[14] In addition to having a detrimental effect on the investor meeting itself, a proliferation of politically- or policy-motivated proposals would impose significant additional strain on issuer resources prior to and during proxy season. Proxy season is already intensive and expensive. The Proposed Rules risk adding additional strain without any direct tie to companies or the majority of their investors.

Companies are receiving more proposals, and more prescriptive proposals, than in previous proxy seasons.[15] Companies are required to understand the proposals they receive, evaluate them in the context of their business and current regulation, and engage with proponents, investors, and proxy advisors. In the 2022 Proxy Season, the percentage of proposals that gained majority support dropped to just 10.6%, compared with 16.2% in 2021.[16] Moreover, as proposals get more prescriptive, it can be expected that investor support for individual proposals will continue to decrease.[17] As envisioned by the Proposed Rules,[18] activist proponents will have a new playbook that is likely to increase the number of proposals companies and their investors will have to consider.

The Proposed Rules encourage the use of diverse objectives to achieve the same ends while simultaneously increasing the amount of coordination permitted

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[14] *See* U.S. Chamber of Commerce Center for Capital Markets Competitiveness Report: *Raising the Resubmission Thresholds: "Zombie" Proposals and the Need to Modernize an Outdated System*. This report provides an analysis of resubmitted proposals, which have low and declining support and the burdens placed on management and the majority of shareholders. Available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/10/CCMC_ZombieProposal_Digital.pdf

[15] https://www.wsj.com/articles/investors-put-forward-more-proposals-dialing-up-pressure-on-companies-11659432601

[16] *Supra* note 12

[17] *Supra* note 3

[18] *Supra* note 5, p. 7. "The proposed amendments also would enhance the ability of shareholders to express diverse objectives and various ways to achieve those objectives through the shareholder proposal process."

between investors. The result will be for proponents to be incentivized to offer micromanagement-oriented proposals that vary slightly in method or outcome, increasing the number of proposals companies and investors are made to consider via intentional, coordinated campaigns by activists. Proposals such as these are not about the long-term value of a company, nor are they about the majority of investors; rather, they are a means to platform the idiosyncratic views of a minority of shareholders. As the number of these proposals increases, it will impose significant new burdens on companies and investors to keep up, and will further strain resources in evaluating, negotiating, and recommending on individual proposals. The economic analysis does not sufficiently evaluate costs for this expected increase in proposal submissions by companies or proposal votes by investors, all to the detriment of the beneficial owners of the company.[19] Adoption of the Proposed Rules would not lead to improved outcomes for firms and would risk confusing investors in making voting decisions.[20]

II.B. The proliferation of micromanagement-oriented proposals will lead to confusion and decrease firms' abilities to negotiate with proponents.

Further, companies will also have new challenges in successfully managing proposals and negotiating with proponents to reach mutually agreeable outcomes. The Commission's proposed changes to Rule 14a-8(i)(10), the "substantial implementation" exclusion, would lead to a proliferation of proposals that seek to micromanage company policies. For example, some companies have been successful in negotiating with shareholder proponents to implement certain audits of a company's policies and practices, reaching agreement with the proponent to realize the desired outcome from the proposal in a pragmatic, company-specific, and mutually agreed upon way. Negotiation is a useful tool in the practical implementation of policy, both for companies and for proponents. However, the new "essential

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[19] Indeed, the Commission considered the additional costs to companies per proposal in its 2020 Final Rule. The Commission cited several sources with integrity that estimated costs to companies per proposal that ranged from $20,000 to $150,000 (p. 116, fn. 332). The current Commission should consider the costs that would be imposed on an issuer for each additional proposal received as a result of the Proposed Rules. For example, the Commission could use an average of $80,000/proposal multiplied by an average number of additional proposals expected to be allowed for consideration under the Proposed Rules (for simplicity of this example: 2), then multiplied again by the number of companies in a widely-cited index (e.g. the Russell 3000).

[20] The Commission could seek to address these costs by proposing a limit on the total number of proposals each year. The Proposed Rules do not consider that Substantial Implementation and Duplication do not act simply as thresholds for individual proposals, they also act as safety valves for the total number of proposals. For example, without Duplication, there is no limit to the number of proposals that could potentially be received. Despite the low average numbers used in the Proposed Rules, many Chamber members regularly average 15 proposals already. Is there an upper limit that the Commission believes is reasonable? If so, this should be addressed; if not, the economic analysis would appear to be insufficient and should consider the burden of a potentially unlimited number of proposals each year.

elements" test contemplated by the Proposed Rules for 14a-8(i)(10)[21] would mean that, even if a company is actively working to implement a negotiated policy, proposals that address the same outcome but through a slightly differentiated method would not receive an exception. In this scenario, company resources would be particularly strained, as the company has already engaged a proponent, is working toward implementing a policy, and would *still* be required to consider a new proposal at its investor meeting. The "essential elements" of a proposal could be as minute as a difference of opinion about which outside firm is preferable to conduct the audit. In such a situation, the proposal could risk interfering with an ongoing audit that investors may understand is occurring, leaving investors confused on the merits of a new proposal on the subject and creating additional engagement burdens for companies.[22]

Moreover, because the Proposal contemplates letting proponents determine which elements of a proposal are the "essential elements," the small group of individuals and institutions that submit a majority of proposals assume new power in determining whether a proposal will receive consideration. As a result, firm latitude to negotiate and find mutually agreeable methodologies to achieving desired proponent outcomes may wane. The Commission should not seek to foster a more hostile environment between shareholders and companies, as it is neither good for the companies nor their investors. What is more, evidence from the 2022 Proxy Season shows that the percentage of proposals that shareholders were willing to withdraw as a result of negotiations dropped.[23] Even in circumstances where companies are able to successfully negotiate with a proponent, proponents may feel emboldened to still require the proposal to be considered at company meetings, which may ultimately disincentivize negotiations altogether.[24] It is hard to see, especially as investor support for micromanagement-oriented proposals has dropped, how this outcome serves to the benefit of investors and company long-term value. Complicating how companies and investors communicate with one another will lead to issues in trying to respond to and meaningfully implement proposals. The Commission should reconsider whether

[21] *Supra* note 8, p. 14

[22] The Proposed Rules also do not address how the analysis of an "essential element" would be impacted by other exemptions. For example, if an essential element would be impossible to achieve, a violation of law, or overly vague, can it truly be an essential element for consideration by shareholders? We believe significant guidance on these topics would be required to proceed with the Proposed Rules.

[23] *Supra* note 8, p. 2

[24] *Supra* note 11. "The change of administration at the SEC and the issuance of SLB 14L appear to have served as an open season call for shareholder proponents: the number of proposals submitted surged, the percentage of proposals that shareholders were willing to withdraw as a result of negotiations dropped, and the number of proposals excluded through the no-action process plummeted." Should the Commission finalize its Proposed Rules, the ability and incentive for companies to negotiate with proponents, and proponents with companies, will further decrease.

empowering a minority of shareholder proponents in this manner is truly beneficial to U.S. capital markets.

II.C. An increased number of shareholder proposals at investor meetings will lead to greater reliance on unreliable proxy voting advice businesses.

As the number of shareholder proposals increases, so too does the need for investors to understand and make decisions about how to vote their shares related to proposals increase. Proxy voting advice businesses ("PVABs") provide investors with analysis and recommendations on how to vote their proxies on proposals and therefore play an important role in determining the outcome of key corporate governance decisions.[25] The Proposed Rules would create additional reliance on PVABs and further empower PVABs by increasing the number of proposals required to be considered at annual meetings. Problematically, PVABs do not owe fiduciary duties to the beneficial holders of the securities, are largely free from regulatory oversight, and have generally revised their policies to align with ESG-related and activist-aligned initiatives regardless of whether the proposals at hand are in the best economic interest of shareholders.[26,27]

PVAB voting recommendations are routinely predicated on inaccurate information or incomplete and misleading analysis, which companies have little opportunity to correct.[28] PVAB voting recommendations also typically do not incorporate any economic analysis demonstrating that the recommendation is in the

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[25] An analysis of investor decisions from the 2020 Proxy Season found that institutional investors controlling over $5 trillion in assets voted in lockstep with PVAB voting recommendations. See Paul Rose, Manhattan Institute, Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting (Apr. 22, 2021), available at http://www.manhattan-institute.org/proxyadvisors-market-power-review-investor-robovoting

[26] In fact, activist organizations, like Majority Action, use the ISS survey to build a record that their agenda needs to be the baseline for ISS recommendations to investment funds each year. Below is an email sent to members of the Council of Institutional Investors, by Majority Action, where they had prepopulated answers to the ISS survey and encouraged members to vote even if they were not ISS clients to build a record justifying changes to ISS' base policies:
"Dear fellow CII members,
ISS has released its annual Global Benchmark policy survey (https://majorityact.us14.list-manage.com/track/click?u=29949090dd7e5473bbb4f2e3a&id=e0682ca80e&e=e7f712bb42) , which will close on August 31. We encourage responsible investors to submit responses to the survey even if you are not a client of ISS.
Majority Action has prepared suggested responses to the climate change questions (https://majorityact.us14.list-manage.com/track/click?u=29949090dd7e5473bbb4f2e3a&id=4a825f1744&e=e7f712bb42) on page two of the survey, as well as a suggested response to the racial equity audit question (https://majorityact.us14.list-manage.com/track/click?u=29949090dd7e5473bbb4f2e3a&id=5fc9551ae2&e=e7f712bb42) on page three of the survey. The survey does not require responses to all questions.
Kind regards,
[redacted]
Majority Action Investor Engagement Team"

[27] https://www.fenwick.com/insights/publications/proxy-advisors-update-voting-guidelines-for-2022-focusing-on-board-diversity-climate-and-esg-oversight

[28] https://www.centerforcapitalmarkets.com/wp-content/uploads/2020/10/CCMC_RoseWalker_v5.pdf

best economic interest of the company's shareholders. If the Proposed Rules were to take effect, more votes would be exercised on shareholder proposals and therefore the issues with PVABs will amplify. In 2020, the Commission promulgated a rule imposing modest reforms designed to increase PVAB transparency and the accuracy of information contained in proxy voting recommendations.[29] However, just before the 2020 PVAB rule went into effect implementing these changes, a new Commission abruptly and improperly reversed course on those changes. From a practical perspective, the Commission's reverse course will have a significant impact related to the Proposed Rules, reducing issuers' ability to inform proxy voting decisions pertaining to proposals and further allowing PVABs to apply general voting recommendations to issuers with differing business and investor circumstances. Taken together, the consequences of the Commission's actions related to PVABs, and the Proposed Rules would be to reduce company latitude over corporate governance decision-making and ultimately undermining competition, capital formation, and investor protection in the U.S. capital markets.

III. When evaluated together with other recent actions from the Commission, the Proposal will further weaken the public company model.

III.A. The Proposed Rules will undermine the 2020 Shareholder Proposal Rule.

The promulgated 2020 Shareholder Proposal Rule modestly increased shareholder resubmission thresholds for the first time since 1954. The Chamber agreed with this approach,[30] citing to "zombie" proposals that are offered repeatedly but never gain majority support. Continuous resubmissions are a drain on shareholders and companies alike, requiring significant time and monetary resources to defend against proposals that have repeatedly been rejected. Such "zombie" proposals impose adverse consequences on shareholders in the form of: (a) wasted shareholder resources; (b) diminished comprehension and attention of shareholders on matters of economic significance; (c) diffused management attention better spent on economically significant matters.[31] Companies and their investors should be protected from the costs and hassle of having to repeatedly register their opposition to such proposals.

While the Commission's Proposed Rules do not directly adjust these updated resubmission thresholds, they instead offer a way around them. The proposed

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[29] See generally Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55,082 (Sept. 3, 2020) (2020 Rule)

[30] https://www.sec.gov/comments/s7-23-19/s72319-6730870-207447.pdf, p. 12

[31] *See* letter from Corporate Governance Coalition for Investor Value, July 17, 2017, available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2017/07/20170717-CGCIV-Final-Resubmission-Thresholds-letter.pdf

amendments to Rule 14a-8(i)(12), the "resubmission" exclusion, would apply the same test as the "substantially duplicates" exclusion, specifying that in order to be eligible for exclusion under the "resubmission" exclusion, a proposal "must not only address the same subject matter as a prior proposal but also must *seek the same objective by the same means*."[32] Following this new criteria, proponents of "zombie" proposals that would otherwise be excluded under the resubmission thresholds would be able to make simple tweaks to the methodology of their proposals to circumvent those thresholds. In effect, the proposed amendments would continue to allow such proponents to serially offer proposals with one objective but slightly varied paths to achieving that objective, thereby subverting the spirit of the 2020 Rule, which sought to limit such proposals on behalf of companies and investors alike.

III.B. The Commission must evaluate the aggregate effect of regulatory changes on companies and investors.

The Commission continues to employ a piecemeal, rule-by-rule approach to its economic analysis. Concerningly, the aggregate effect of the Commission's proposed and finalized changes related to corporate governance has not been contemplated by these Proposed Rules or others.

The Commission must evaluate the effect of its reversal on the 2020 Proxy Advisor Rule, its finalization of the Universal Proxy Rule and Pay vs. Performance Rule, SLB 14L, as well as the new Proposed Rules – including the proposed amendments' subversion of the 2020 Shareholder Proposal Rule – holistically. Taken together, these changes impose serious new compliance challenges for public companies, ultimately placing the ability of companies to focus on long-term value at serious risk. Moreover, such changes to corporate governance continue to put the public company model at risk; indeed, the number of public companies in the U.S. has steadily decreased since 1996.[33] The Commission should take care not to further weaken the public company model, as it has a direct bearing on capital formation, investor protection, and fairly, orderly, and efficient markets.

IV. If the Commission does ultimately adopt one or more of the proposed changes, it should make compensating changes to Rule 14a-8 to reduce the increased and unnecessary costs that shareholders would bear as a result of the proposed rule changes.

If one or more of the proposed amendments is adopted, the Commission should amend paragraph (i)(7) to expressly provide that issuers may exclude a proposal on a

[32] *Supra* note 3, p. 27
[33] https://accf.org/2022/06/24/report-the-declining-number-of-public-companies-and-mandatory-reporting-requirements/

significant social policy issue that is not significant to the company's operations, regardless of whether the issue has broader societal impacts. Shareholder proposals on social policy issues account for a significant number of proposals submitted every year. Therefore, they are an appreciable source of Rule 14a-8 costs that ultimately are borne by shareholders.

Further, shareholder proposals on social policy issues raise serious First Amendment concerns, both by forcing companies to carry and distribute the speech of other parties on controversial topics such as abortion and climate policy, and by forcing companies to speak to such topics themselves in responding to the shareholder proposal.[34] While the better view of the First Amendment is that issuers should never be obligated to carry other entities' speech on controversial social policy matters,[35] it is particularly inappropriate to compel such speech under Rule 14a-8 when there is not a meaningful nexus between a social policy matter and the company's operations. If a matter is not significant to a company's operations, then there is no "governmental interest" under the securities laws that could "justif[y]" "compell[ing]" the company to speak on it. Since the government's legitimate interest is nil, the company's speech rights always outweigh it, no matter what First Amendment level of scrutiny is applied.[36]

This adjustment to the rule for social policy issues not significant to the company's operations will reduce the costs to issuers that otherwise result from the Commission's proposed rule. We propose that this exclusion apply to all proposals, regardless of whether they are duplications, resubmissions, or were substantially implemented. This is most consistent with the First Amendment and would yield the greatest cost savings for shareholders. Alternatively, this exclusion could operate as an exception to subsections 10, 11, and 12 of the proposed rule text specifically, *e.g.*, a proposal that was similar, but not the same in subject, objective, and means, *could* be excluded if on a social policy issue not significant to the company's operations.

For reasons similar, if the Commission adopts one or more of the proposed amendments, it should amend paragraph (i)(5) to state expressly that proposals related to social issues may be excluded if they do not relate to operations which account for 5 percent or more of the company's total assets. This will reduce the costs

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[34] *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (the freedom of speech includes the right to choose "what not to say").
[35] As the D.C. Circuit recognized in *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), a company's right against compelled speech is heightened when the speech is not "purely factual and uncontroversial." *Id.* at 527.
[36] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

the rule imposes on companies and ultimately on shareholders and will further the First Amendment rights of issuers.

Again, such an exclusion should apply to all proposals, regardless of whether they are duplications, resubmissions, or were substantially implemented. Alternatively, this exclusion could operate as an exception to subsections 10, 11, and 12 of the proposed rule text specifically, *e.g.*, a proposal that was similar, but not the same in subject, objective, and means, *could* be excluded if it related to a social issue and did not relate to operations which account for 5 percent or more of the company's total assets.

Conclusion

The Proposed Rules inappropriately further cement proposals to advance special interest agendas at the center of the 14a-8 process. This will place a significant strain on companies, undermine important protections for investors, and facilitate the circumvention of time tests processes by further inviting Rule 14a-8 to be used to advance special interest agendas unrelated to the purpose of the corporation. The Commission should not finalize the amendments as contemplated in the Proposed Rules. The Chamber stands ready to engage with the Commission to offer additional perspectives on these Proposed Rules.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

U.S. Chamber of Commerce
Center for Capital Markets
Competitiveness

November 16, 2021

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
Washington, DC 20549

Re: Staff Legal Bulletin 14L (CF)

Dear Chair Gensler:

We are writing to express our significant concerns regarding the announcement on November 3, 2021, that the Securities and Exchange Commission ("SEC") Division of Corporation Finance ("Division") rescinded three recent Staff Legal Bulletins ("rescinded SLBs") and replaced them with Staff Legal Bulletin No. 14L ("SLB 14L"). It is our considered opinion, as outlined below, that SLB 14L injects uncertainty into the shareholder proposal process, degrades investor protection, and harms competition and capital formation. We believe the Division should immediately reverse this decision. If the SEC or its staff believes that changes to the shareholder proposal process are necessary and in the best interest of investors, then the SEC should solicit input from the public and consider changes in an open and transparent manner.

Instead, however, in releasing SLB 14L, the Division has acted in an opaque and seemingly capricious manner under your direction. The issuance of SLB 14L jettisons decades of SEC policy for the sake of political expediency. Coupled with other recent announcements not to enforce recent duly-enacted rules, we fear that the SEC is putting its hard-earned reputation for even-handedness and rationality at risk. The SEC cannot expect the many thousands of businesses it regulates to respect the rule of law when the agency itself does not. Nor will the SEC be able to lead global public policy discussions if it is perceived as following a politically motivated regulatory philosophy that changes each time there is a presidential election.

Since its origins in the 1940s, the shareholder proposal process under Rule 14a-8 has evolved from a modest effort to give shareholders an additional tool for influencing corporate governance to a complex and over-politicized process that is neither satisfactory to issuers nor their investors. On the one hand, the issuer community often finds itself devoting significant time and attention to proposals that are not germane to the business and are, in the majority of cases, destined to fail when put to a vote. The small minority of investors who avail themselves of the Rule 14a-8 process also often find the process to be an unsatisfactory one, both from a resource and outcome perspective.

For better or worse, the SEC staff has found itself at ground zero under Rule 14a-8 and often acts to mediate disagreements between issuers and investors during the no-action letter process. In recent years, the SEC staff has increasingly found itself weighing in on social and political issues. Given the tight timelines for printing proxy materials and the cost of litigation as an alternative to seeking SEC staff advice, the no-action letter process, though flawed, provides a form of rough justice for the participants.

Over the past several decades, boards have increased their communication with investors to understand their priorities. Some shareholders have increasingly used proposals at annual meetings as a means to raise the profile of an issue. Recently, the SEC promulgated reforms to further improve these communications channels.[1] Additionally, the rescinded SLBs provided businesses and their investors with the certainty of those items that would be appropriately considered with shareholder proposals. Undergirding this entire process was the prioritization of economic return for investors in the companies that they have invested in.

A recent study of 3,903 proposals, between 2007-2019, examined the impact on stock price where no action was requested.[2] This study found that the stock price appreciated in value by 0.11% and 0.58% immediately upon the issuance of a no action decision. The study found that the no action process was an important mechanism in weeding out non-relevant proposals and ensuring that the shareholder proposal process was focused on building corporate and investor value. The authors of the study also found no difference in the decisions reached by the SEC when it was controlled by a Democratic or Republican majority.

The no action process that existed under the rescinded SLBs was an important mechanism to refocus return as a priority and promote investor protection and competition.

The evolution of 14a-8 over the years has, until t SLB 14L was issued, been premised on due process and public input. Notice-and-comment rulemaking has been the basis for substantive amendments to the rule. The staff legal bulletin process, though imperfect, has also been premised on gradual, incremental evolution based on public feedback. New staff

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[1] Exemptions from the Proxy Rules for Proxy Voting Advice (July 22, 2020); Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (September 23, 2020)

[2] Matsusaka, John G. and Ozbas, Oguzhan and Yi, Irene, Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions (April 1, 2019). USC CLASS Research Paper No. CLASS17-4, Marshall School of Business Working Paper No. 17-7, Available at SSRN: https://ssrn.com/abstract=2881408 or http://dx.doi.org/10.2139/ssrn.2881408

legal bulletins have typically been informed by an annual stakeholders meeting sponsored by the staff with input from investors, asset managers, issuers and service providers. Here, the Division did not seek public comment, the Commission did not engage in notice-and-comment rulemaking, and the annual stakeholder meeting was not held. With SLB 14L, the SEC is moving away from this carefully constructed balance and moving toward rule by regulatory fiat.

Under rule 14a-8(i)(7), a company may exclude a shareholder proposal if it deals with a subject involving a company's ordinary business operation. This exception allows the day-to-day operational issues of a business to remain with its management and board. Nonetheless, shareholders may bring forth proposals on issues such as governance or on items that impact the strategy and direction of a business. In issuing SLB 14L, the Division stated:

> [S]taff will no longer focus on determining the nexus between a policy issue and the company but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.
>
> Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7)....
>
> Because the staff is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7), it will no longer expect a board analysis as described in the rescinded SLBs as part of demonstrating that the proposal is excludable under the ordinary business exclusion.

Accordingly, under SLB 14L, the SEC will no longer look at proposals on a company by company basis. Instead of determining how a proposal can impact investors and a board of the impacted company, the SEC will now examine issues through the lens of 'broad societal impact'. Consequently, investor protection, competition, and capital formation will be ignored, and the SEC will now have to opine on societal issues well outside of its legal remit. Where the SEC has waded into social issues before, such as with the conflict minerals disclosure rule, it has failed to use the securities laws to solve the problem at hand. The courts have raised First Amendment concerns.

At best, SLB 14L fails to provide companies, boards and investors with any certainty. At worst, the SEC has now positioned itself as a subjective governmental arbiter of how the capital markets should assess social issues. By moving forward with SLB 14L, the SEC will be out of its depth both operationally and conceptually.

In numerous SEC reform reports issued over the past 12 years, the Chamber has illustrated how the SEC has lacked the expertise to perform its statutory mandates and suggested reforms to the no action process.[3] Fortunately, past SEC Chairs, both Democrat and Republican, have attempted to address those staffing issues, albeit with varying degrees of success. It is unclear what process the SEC will use to determine its decisions of what is a broad societal issue, nor is it clear whether the SEC has the staff it will need to undertake such an effort. Many issues of broad societal impact lead to differing and reasonably held opinions. How will the SEC staff decide on a viewpoint when there's an active and ongoing societal debate on a hot topic? Wading into controversial issues will impact the SEC's prestige, affecting its ability to perform its legally mandated missions. It is also unclear how the SEC will empower personnel to determine agency positions on societal issues or how it will factor in opposing points of view.

With SLB 14L, the SEC has sought to redefine its mission to define broad societal impacts and how the capital markets should react to them. The SEC has neither the statutory authority, capacity, nor capability to perform such a function. In a representative democracy, opinions on broad societal impacts are generally the purview of the citizen. Has the SEC taken procedural steps to address important process issues such as:

- Does the Division have a comprehensive list of issues it considers implicating "broad societal impact" beyond the few teased in SLB 14L? If so, due process demands that such a list be made publicly available.

- If the Division has not already formulated a list of issues implicating "broad societal impact," what criteria will it consider in doing so going forward? What guiderails are in place to ensure that the staff does not act arbitrarily and capriciously in formulating other categories? How will the Division ensure it does not engage in constitutionally impermissible viewpoint discrimination to favor certain political issues over other ones?

- What policies and procedures does the SEC have in place to ensure that the staff does not violate the Hatch Act and other federal laws governing political corruption as the Division engages in inherently political activity under the guise of Rule 14a-8? Has the SEC sought the advice of the Office of Personnel Management or the Office of the U.S. Special Counsel on these matters? If so, what is the substance of that advice?

- What policies and procedures does the SEC have in place to protect whistleblowers on the staff who wish to report misconduct under the Hatch Act or otherwise as the staff veers into territory in which it has no institutional expertise?

[3] Cite SEC reform reports

To some degree, in requiring staff to make a determination about broad societal impact, the SEC will be taking a position on the worthiness of an issue and therefore could be seen as weighing in on one side or another, even if it is not the Agency's intention to do so.

SLB 14L creates an unworkable system that is beyond the mission of the SEC. We urge the SEC to withdraw SLB 14L and reinstate SLBs 14I, 14J and 14K forthwith.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce