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Submitted electronically via SEC.gov

Sept. 12, 2022

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

Re: File Number S7-20-22, Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8

Dear Ms. Countryman:

Nareit appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC or Commission) proposal entitled "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8" (Proposal). [1]

Nareit serves as the worldwide representative voice for real estate investment trusts (REITs) and non-REIT public companies that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.[2]

Nareit and its members have had a long-standing interest in ensuring that the shareholder submission process functions to promote constructive communication between REITs and their shareholders. For these reasons, Nareit has actively participated in the SEC's efforts related to this process in past years, submitting several comments on this topic, including our February 2020 comment to the SEC strongly supporting the Commission's 2020 amendments to the requirements for submission of shareholder proposals in Rule 14a-8 (2020 Amendments).[3]

[1] Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals under Exchange Act Rule 14a-8, Securities Act Release No. 95,267, Investment Company Act Release No. 34,647, 87 Fed. Reg. 45,052 (proposed rule July 13, 2022), https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf.

[2] Through the properties they own, finance and operate, REITs help provide the essential real estate we need to live, work, and play. U.S. REITs own approximately $3.5 trillion in gross assets across the U.S., with public U.S. REITs accounting for nearly $2.5 trillion in gross assets. Stock-exchange listed REITs had an equity market capitalization of over $1.5 trillion as of May 31, 2022. In addition, approximately 145 million Americans live in households that benefit from ownership of REIT stocks through their individual shareholdings, their 401(k) retirement plans and other investment funds (https://www.reit.com/data-research/data/reits-numbers).

[3] Nareit, Comment on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Feb. 3., 2020) available at https://www.sec.gov/comments/s7-23-19/s72319-6742778-207790.pdf.
Nareit also submitted a comment to the SEC in advance of its 2018 Roundtable on the U.S. Proxy Process, See, Nareit Comment in Advance of the SEC's 2018 Proxy Roundtable (Nov. 12, 2018) available at https://www.sec.gov/comments/4-725/4725-4635941-176322.pdf. Nareit additionally highlighted the shareholder resubmission rule as an important example of an existing SEC rule that is not "functioning as intended" in its comments on the SEC Strategic Plan 2018-2022, See, Nareit Comment on Draft 2018-2022 Strategic Plan for Securities and Exchange Commission (July 25, 2018) available at https://www.sec.gov/comments/34-83463/cll7-4127822-171766.pdf.

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Nareit and its members oppose the SEC's current Proposal, which we believe would upset the careful balance achieved by Commission's 2020 Amendments. In a significant departure from current practice, the Proposal would significantly narrow the ability of REITs and other issuers to exclude proposals that have been substantially implemented, would be duplicative of other proposals, or would be resubmissions of prior failed proposals. We are concerned that under the Proposal virtually all shareholder proposals—including those proposed by *de minimis* shareholders potentially serving the interests of very few—would be presented to all of a company's shareholders, who would be required to bear the costs. We also note that because the Proposal would exempt foreign private issuers, who are not subject to U.S. proxy rules, U.S. issuers would be placed at a competitive disadvantage relative to foreign companies.

In our comments that follow we elaborate on our concerns about the Proposal, which are summarized below:

- The Proposal Would Upset the Careful Balance Achieved by the SEC's 2020 Amendments;
- The Proposal Would Effectively Nullify the Existing Exclusion Categories for Shareholder Proposals that have been Substantially Implemented and/or are Duplicative; and,
- The Proposal Would Undermine Improvements to the Shareholder Resubmission Rule adopted in 2020.

The Proposal Would Upset the Careful Balance Achieved by the SEC's 2020 Amendments

Nareit and its members have long supported policies intended to ensure that the shareholder submission process, as regulated under Rule 14a-8, functions to promote constructive engagement between REITs and their shareholders and that it is not abused. For this reason, as noted above, Nareit continues to strongly support the 2020 Amendments. As we wrote in our comment supporting the proposal that preceded the adoption of the 2020 Amendments, "[w]e…believe that the Proposal accomplishes the Commission's goal, as set forth in the Proposing Release, of ……strik[ing] a balance between maintaining an avenue of communication for shareholders, including long-term shareholders, while also recognizing the costs incurred by companies and their shareholders in addressing a shareholder's proposal."[4]

Our support for the 2020 Amendments was strongly influenced by the experiences of Nareit's member REITs, which suggested a variety of misuses of the shareholder proposal process. Nareit members also reported that their incidence of resubmitted shareholder proposals roughly paralleled other U.S. public companies, as reported in published surveys at that time.[5] They report that these "repeat" proposals are time consuming for their boards and management. They also worry that these proposals are confusing for shareholders.

[4] Nareit comment, Supra Note 3 at 1.
[5] Id at 6.

In addition to experiencing many kinds of troubling proposals reported by other companies at the time, REITs reported many instances in which a shareholder holding the minimum shares under Rule 14-a-8, or close to the minimum, submitted shareholder proposals that were clearly intended to advance narrow, self-interested objectives, distinct from goals that would benefit stakeholders broadly. Some REITs have repeatedly received oppositional proposals over a period of years, submitted by organizations holding *de minimis* shares, which were intended to gain leverage over management in an unrelated negotiation, or to achieve a self-serving goal unrelated to the subject of the proposal.

Notwithstanding these concerns, Nareit and its members continue to believe that it is important to preserve the ability of stakeholders to present legitimate proposals when they have a meaningful long-term interest in the outcome. We believe this kind of engagement strengthens REITs and other public companies and is highly beneficial. We believe that the 2020 Amendments represented a constructive step towards refocusing the shareholder proposal process on this kind of meaningful dialogue between companies and shareholders with a real stake in the outcome of companies. Accordingly, we oppose the current Proposal, because we believe it would greatly circumvent the balance achieved in the 2020 amendments.

Our members also raised concerns that because the Proposal, if adopted, would operate in tandem with the Commission's recently issued Staff Legal Bulletin 14L ("SLB 14L")[6], the upset in this balance will be significant. SLB 14L, which eliminated the requirement that a proposal must have some connection to an issuer, greatly curtailed the ability of issuers to exclude proposals under the "ordinary business exception." Our members are concerned that if the Proposal is adopted, these changes in aggregate would lead to a consequential and costly increase in duplicative, irrelevant and redundant shareholder proposals being put to votes each year.

Our members also question why the Commission is rushing to amend this rule, which has not even been in effect for a full proxy season. We note that the Commission's release acknowledges that "some effects of the 2020 amendments on the number of proposals submitted and included in companies' proxy statements may not yet be realized." Moreover, the release, which cites to no additional relevant facts, experience or data that have emerged since the adoption of the 2020 Amendments, offers no persuasive rationale for moving forward to modify this rule at this juncture.

The Proposal Would Effectively Nullify the Existing Exclusion Categories for Shareholder Proposals that have been Substantially Implemented and/or are Duplicative

Nareit opposes the provisions of the Proposal that would amend rules 14a-8(i)(10) and 14a-8(i)(11) because we believe these changes would, if adopted, effectively undermine the ability of

[6] Staff Legal Bulletin No. 14L, Section B.3 (Nov. 3, 2021). The Bulletin states that "staff 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.

issuers to exclude proposals that a company has already "substantially implemented" and those that are duplicative. The examples provided in the release to illustrate how these proposed changes would operate in practice make clear that, if adopted, they would permit proponents to simply tweak some aspect of their proposal to evade the ability of issuers to exclude proposals under the current rules.

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal that the company has already "substantially implemented." Currently, in evaluating an issuer request to exclude a proposal on this basis, SEC staff considers whether the company's policies, practices and procedures compare favorably with the request set forth in the proposal and whether it addresses the proposal's underlying concerns. The Proposal would instead require SEC staff to focus on the specific elements of a shareholder proposal to assess whether the company's prior actions taken to implement the substance of the proposal are sufficiently responsive. This would require SEC staff to undertake an analysis that is simultaneously highly specific and, by the Proposal's admission, highly subjective. Our members fear that this subjective process would be vulnerable to being co-opted by activist and/or *de minimis* shareholders pursuing self-interested goals distinct from the long-term interests of the issuer.

Under current Rule 14a-8(i)(11), the duplication exclusion provides that a company may exclude a shareholder proposal that "substantially duplicates" another shareholder proposal that the company has already received and will be including on its proxy card for the same meeting. The Proposal would amend this standard so that proposals would be deemed duplicative only when they address the same subject matter and seek the same objective by the same means. The release includes, by way of example, a scenario in which a company receives a proposal requesting that it publish a detailed statement of its direct or indirect political contributions in newspapers and states that this proposal would not be duplicative with respect to a proposal that requests that the company publish this information in its company report.[7] Because proponents could easily tweak proposals to evade exclusion, we believe that this change, if adopted, would tip the scale in favor of proponents and result in proxies featuring duplicative proposals.

Because we do not believe that the interests of the great majority of shareholders would be well served by a rule requiring them to bear the costs of duplicative proposals that are likely to be expensive and confusing for voting shareholders, Nareit strongly opposes these proposed changes.

The Proposal Would Undermine Improvements to the Shareholder Resubmission Rule Adopted in 2020

Nareit strongly supported the provisions of the 2020 Amendments that replaces the thresholds for resubmitting a failed shareholder proposal (resubmission thresholds) then set at 3, 6, and 10% with new thresholds of 5, 15, and 25%, respectively, and also permits companies to exclude proposals that have been submitted three or more times in the preceding five years if

[7] Proposal at 55.

less than 50% of the vote and support declined by more than 10% since the prior vote. [8] Nareit continues to believe that, if permitted to take effect unimpeded, these revised resubmission thresholds will over time achieve more meaningful shareholder participation in the proxy process by enabling shareholders to focus on proposals likely achieve support and foster constructive changes.

Our support for these changes in the resubmission thresholds is grounded in the experience of our member REITs. As we reported in our 2020 comment, Nareit members believe that roughly 20-30% of the proposals that they receive are resubmitted, or are substantially similar, to previously submitted proposals.[9] They report that these repeat proposals are time consuming for their boards and management and confusing for shareholders. Additionally, as noted above, many REITs reported repeated instances in which shareholders holding the minimum shares under Rule 14-a-8, or close to the minimum, submitted shareholder proposals that were clearly intended to advance narrow, self-interested objectives, distinct from goals that would benefit stakeholders broadly.[10]

Currently, Rule 14a-8(i)(12) provides that a shareholder proposal may be excluded if it "addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years" if the matter was voted on at least once in the last three years and did not achieve specified levels of support on the most recent vote. The Proposal would change this standard for assessing if a proposal qualifies for this resubmission exclusion from "substantially the same subject matter" to "substantially duplicates," aligning the test for resubmission of failed proposals with the test for "substantial duplication" in Rule 14a-8(i)(11), described above. Accordingly, if adopted, the Proposal would only permit a proposal to be excluded if it addresses precisely the same subject matter and seeks the same objective by precisely the same means as a prior failed proposal.

Nareit and its members believe that this change, if adopted, would permit proponents to adjust their proposals to circumvent the resubmission rules and undermine the beneficial changes adopted in the 2020 Amendments. The example provided in the release, suggesting that a proponent that modifies a failed proposal by requesting a few pieces of additional information would be able to submit the proposal in another year, is troubling.[11]

Accordingly, Nareit and its members strongly oppose this proposed change, which effectively circumvents the intent and effect of the revised resubmission thresholds adopted in the 2020 Amendments by enabling proponents who fail to meet the resubmission thresholds in one year to merely tweak failed proposals and submit similar proposals.

[8] See, Nareit comments, Supra note 5.
[9] Id.
[10] Id at 4, noting that in the years prior to the adoption of the 2020 Amendments, one proponent submitted at least 52 shareholder proposals to 20 U.S. lodging REITs and hotel operators related to contract negotiations with another party, over which lodging REITs have no control and distinct from the subject of the proposals.
[11] Proposal at 27-28.

Conclusion

Because we believe that the Proposal, if adopted, would upset the careful balance achieved in the 2020 Amendments, Nareit and its members oppose the Proposal. We believe that if the reforms set forth in the 2020 Amendments are permitted to take effect unimpeded, they will over time promote constructive engagement between REITs, other public companies and their shareholders, to the benefit all shareholders. Accordingly, we urge the SEC to reconsider this Proposal.

We are happy to discuss these comments and any related issues with the Commission and/or its staff as it moves forward. Please feel free to contact us (vrostow@nareit.com, (202) 739-9431), with any further questions that you may have.

Respectfully submitted for Nareit,

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