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Ms. Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

September 12, 2022

Subject: File No. S7-20-22, Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8

Dear Secretary Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), I write to express our support for the U.S. Securities and Exchange Commission's (SEC or Commission) proposed rule to update three substantive bases for companies to exclude shareholder proposals in their proxy statements (Proposed Rule). The Proposed Rule will clarify shareholder rights and, therefore, produce a better company-shareholder engagement system. The Proposed Rule will aid us, the owners of the companies in our portfolio, in our engagement with company management, including when we act in concert with other shareholders.

As the largest public defined benefit pension fund in the United States, we manage approximately $430 billion in global assets on behalf of more than 2 million members. Additionally, we have an ongoing duty to pay member benefits, for decades into the future. As such, we seek long-term sustainable, risk-adjusted returns through efficient capital allocation and stewardship in line with our fiduciary duty. Accordingly, we take a long-term view when assessing whether the companies that we hold in our portfolio are effectively managed.

As embodied in CalPERS' Governance & Sustainability Principles[1], we firmly embrace accountable corporate governance. In our experience, it is critical for capital providers, particularly institutional investors, such as CalPERS, to have the ability to actively engage with company management. The shareholder proposal process promotes such engagement. We file shareowner proposals as a means to voice concerns as a responsible shareholder with a long-term view and, therefore, find SEC Rule 14a-8 to be a critical component of company-shareholder engagement. In 2020, we opposed a proposed change to the resubmission thresholds in SEC Rule 14a-8 because "it would undermine shareholder democracy and limit

[1] CalPERS' Governance & Sustainability Principles (Sept. 2019), available at https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf.

our ability to engage constructively and advocate for policies that positively influence long-term share value."[2]

Between 2018-19 and 2020-21, the SEC reported an annual average of 108 no-action requests where at least one of the three substantive areas covered by the Proposed Rule was to be used as a basis to exclude a shareholder proposal from a proxy statement.[3] An annual average of 53 no-action requests (approximately half of the requests) were either denied by the SEC or withdrawn by the company. While no-action relief has been relatively rare, any relief may not only disenfranchise shareholders but also make the shareholder process unpredictable through the seemingly inconsistent application of existing rules, which, significantly, may discourage shareholders from participating in the shareholder process. The consequent inactivity would rob companies and other shareholders from being exposed to the potential benefits and diverse insights of those discouraged shareholders. We would like to see fewer no-action requests to be accepted by the SEC, and believe that the Proposed Rule strikes an appropriate balance of narrowing the rationales for certain no-action requests without opening the floodgates to "shareholder activists."

The Proposed Rule narrows and clarifies the (I) substantial implementation, (II) duplication, and (III) resubmission bases for exclusion. Through this guidance, the Proposed Rule provides much-needed clarity that will likely lead to companies submitting fewer no-action requests. This would not only free up critical company and SEC resources but, more significantly, increase consistency and predictability in the shareholder process and, in turn, promote shareholder engagement. Shareholder engagement is critical to the exercise of our fiduciary responsibilities and to the pursuit of our investment objectives, and the Proposed Rule will improve our engagement with the companies that we hold in our portfolio.

We anticipate that, as a result of the Proposed Rule, companies will be more responsive to our requests to engage on critical governance and sustainability issues, including on an informal basis. Improved, more productive informal engagement may even lead to fewer formal shareholder proposals being submitted, thereby reducing the costs associated with considering proposals.

I. Substantial Implementation

We support the Proposed Rule's clarification that a company may only exclude a shareholder proposal using the "substantially implemented" standard described in Rule 14a-8(i)(10) when "the company has already implemented the essential elements of the proposal."[4]

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[2] CalPERS Comment Letter on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8; Release No. 34-87458 (File No. S7-23-19) (Feb. 3, 2020), available at https://www.calpers.ca.gov/docs/legislative-regulatory-letters/02-20-comment-sec-shareholder-proposals.pdf.

[3] Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Proposed Rule, 87 Fed. Reg. 45,042, 45,054 (July 27, 2022).

[4] *Id.* at 45,056.

The existing rule only speaks to a company "substantially implementing" a proposal in order to exclude it and that standard has proven difficult to apply in a uniform and foreseeable manner. While we agree that the Proposed Rule will still require a "factual determination to be made on a case-by-case basis," which necessarily involves some degree of subjective analysis, we also agree that "an analysis that focuses on the specific elements of a proposal" will improve the consistency of the rule's application.[5]

We are encouraged by the example the SEC provided, which illustrates how the Proposed Rule would be applied. Specifically, we agree that a proposal where one allows 20 shareholders to amass their shareholdings to reach an ownership threshold that permits them to take some action should not be used to exclude a proposal that allows an unlimited number of shareholders to amass their shareholdings for the same ends because "the ability of an unlimited number of shareholders to aggregate their shareholdings…generally would be an essential element of the proposal."[6]

Furthermore, we agree with the Council of Institutional Investors that the Proposed Rule should appropriately "prevent a company from excluding—as "substantially implemented"—governance proposals "to eliminate supermajority vote provisions when the company had previously adopted a 'majority-votes-outstanding standard' if the proposal called for a 'majority-of-votes-cast' standard.""[7] While majority-votes-outstanding and majority-of-votes-cast are both voting threshold standards, a company should not be able to exclude one just because it has already implemented the other. The outcomes of those two approaches are distinct enough that the different voting thresholds should be viewed as essential elements of each proposal, and should therefore not result in the exclusion from shareholders' consideration.

II. Duplication (Rule 14a-8(i)(11))

We support the Proposed Rule's clarification that a company may only exclude a shareholder proposal using the "duplication" standard described in Rule 14a-8(i)(11) when the proposal "addresses the same subject matter and seeks the same objective by the same means" as another previously submitted proposal.[8]

The existing rule provides that a company may exclude a proposal "if the proposal substantially duplicates another proposal."[9] The Proposed Rule provides a useful clarification of what "substantially duplicates" means in the context of the duplication standard. Proposals that address the same subject matter could have very different objectives. Further, proposals with the same objective often vary widely in their methods of achieving that objective. Shareholders

[5] *Id.*

[6] *Id.*

[7] *See* Council of Institutional Investors Comment Letter on File Number S7-20-22 (Aug. 25, 2022), available at https://www.sec.gov/comments/s7-20-22/s72022-20137475-307959.pdf.

[8] Proposed Rule, *supra* note 3, at 45,057.

[9] 17 CFR 240.14a-8(i)(11) (Shareholder Proposals).

deserve the opportunity to assess the merits of various approaches and advise company management on the best course of action.

We are again encouraged by the SEC's example of the Proposed Rule in action. Specifically, we agree that a proposal requesting a company publish its political contributions in a newspaper and a proposal requesting a company report its lobbying activities in a report to shareholders are not duplicative, even though both proposals address political activities.

We are satisfied with the "first-in-time" standard for determining which duplicative proposal should be excluded, especially given that the Proposed Rule will reduce the first-in-time advantage with the implementation of the "substantially duplicates" clarification, and we offer no alternative standards at this time.

III. Resubmissions (Rule 14a-8(i)(12))

We support the Proposed Rule's clarification that a company may only exclude a shareholder proposal using the "resubmissions" standard described in Rule 14a-8(i)(12) when the proposal "substantially duplicates" another previously submitted proposal.[10]

The existing rule provides that a company may exclude a proposal "if the proposal deals with substantially the same subject matter" as a previous proposal included in the company's proxy materials.[11] This standard was far too broad and could be used by companies to exclude proposals similar to others in general terms, but in fact could be quite different.

The Proposed Rule narrows the scope of the resubmissions standard with the "substantially duplicates" clarification used by the duplication standard, discussed above. By narrowing the scope of what can be considered a resubmitted shareholder proposal by aligning the substantive test with one that provides an exclusion for duplicative proposals, shareholders will be empowered to experiment and adjust previously submitted proposals to build broader support among company management and other shareholders. This type of innovation-fostering process is well-suited to developing consensus solutions to a growing number of complex sustainability challenges affecting companies and their long-term investors. Additionally, the consistency in language between the duplication and resubmissions standards will effectively increase the predictability of the shareholder proposal process, which will allow shareholders to be more comfortable with participating in the process.

IV. Conclusion

CalPERS supports the adoption and implementation of the Proposed Rule to update three substantive bases for companies to exclude shareholder proposals in their proxy statements. The Proposed Rule will lead to greater certainty and predictability in the shareholder proposal process and, consequently, enhance company-shareholder relations.

[10] Proposed Rule, *supra* note 3, at 45,058.

[11] 17 CFR 240.14a-8(i)(12).

Thank you for the opportunity to share our comments. If you have any questions or wish to discuss in more detail, please do not hesitate to contact James Andrus, Interim Managing Investment Director, at [redacted]

Sincerely,

Marcie Frost
Chief Executive Officer

cc: James Andrus