NASAA

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Submitted by SEC Webform (http://www.sec.gov/rules/submitcomments.htm)

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

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

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA"),[1] I am writing in response to U.S. Securities and Exchange Commission ("SEC" or the "Commission") Release No. 34-95267, *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8* (the "Proposal").[2] NASAA supports the Proposal.

The D.C. Circuit Court of Appeals observed in 1970 that "[i]t is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy."[3] Corporate democracy is not simply about shareholders being allowed to vote on whatever questions and issues might appear on the ballot. True shareholder suffrage includes the right to engage with company management and other shareholders by submitting proposals for a vote of the shareholders.[4] As companies have become larger, ownership more diffuse, and in-person attendance at shareholder meetings less common, the proxy solicitation process has become the

[1] Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

[2] The Proposal is available at https://www.sec.gov/rules/proposed/2022/34-95267.pdf.

[3] *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970) (citing H.R. Rep. No. 1383, 73d Cong., 2d Sess. 5, 13 (1934) (stating, *inter alia*, that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange")).

[4] *See Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 421-22 (D.C. Cir. 1992) (stating that "section 14(a) [of the Exchange Act] shelters use of the proxy solicitation process as a means by which stockholders may become informed about management policies and may communicate with each other").

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primary forum for shareholder suffrage.[5] It is essential that shareholders have a fair and realistic means to access that process, as well as the opportunity to consider and vote on different approaches to address important concerns.

As a result, Rule 14a-8 generally requires a company to include a properly-submitted shareholder proposal on the company's proxy statement, unless the proposal is not a proper subject for action by shareholders under a limited set of prescribed circumstances.[6] The Proposal would effect moderate changes to three of the prescribed bases for exclusion – substantial implementation,[7] duplication,[8] and resubmission.[9] Overall, we believe that the proposed amendments reflect a balanced approach and would benefit both shareholders and the companies they own.

I. Substantial Implementation

The substantial implementation exclusion was adopted to avoid consideration of a shareholder proposal when the company has already acted favorably on the substance of that proposal.[10] The Proposal would clarify that a shareholder proposal is excludable as already "substantially implemented" only where the company has already "implemented the essential elements of the proposal."[11]

We concur with the proposed approach to maintain a "substantial implementation" standard, rather than returning to the pre-1983 standard requiring full implementation.[12] The full implementation standard would likely be too constricting, especially considering the complexity of many of the issues that can be the subject of shareholder proposals. We also agree that, while the substantial implementation inquiry will require case-by-case factual analyses, an approach that focuses on the elements of a given proposal would provide a more reliable and predictable assessment of the sufficiency of the actions that the company has already taken than the varied approaches under the existing rule.[13]

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[5] *See*, *e.g.*, Renee Jones, SEC, Director, Div. of Corp. Fin., *The Shareholder Proposal Rule: A Cornerstone of Corporate Democracy* (Mar. 8, 2022), *available at* https://www.sec.gov/news/speech/jones-cii-2022-03-08.

[6] *See generally* 17 CFR 240.14a-8(i).

[7] *See* 17 CFR 240.14a-8(i)(10).

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

[9] *See* 17 CFR 240.14a-8(i)(12).

[10] *See* Proposal at 10; *Proposals by Security Holders*, Release No. 34-12598, 41 FR 29982, 29985 (July 20, 1976).

[11] Proposal at 14.

[12] *See id.* at 63.

[13] *See id.* at 14. As described by other commenters, there are numerous instances in which proposals have been excluded as "substantially implemented" despite the company's previous actions failing to address the

We anticipate that some commenters will argue that the proposed amendment is tantamount to a full implementation standard because shareholder proponents could get around the exclusion by making insignificant tweaks to the proposal. Arguments in this vein would be misguided because an element must be *essential* to the proposal in order for its non-implementation to defeat the exclusion. Although the term "essential" is not defined in the Proposal, we do not believe that this concept would be too difficult to apply when construed in light of the objectives of the Proposal, Rule 14a-8, and Section 14 of the Exchange Act.[14]

II. <u>Duplication</u>

The duplication exclusion was intended "'to eliminate the possibility of shareholders having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other.'"[15] The Proposal would clarify that this provision permits exclusion of a shareholder proposal only where two or more proposals "address[] the same subject matter and seek[] the same objective by the same means."[16]

The proposed amendment reflects a commonsense approach that brings the exclusion closer to its original intent. Two shareholder proposals cannot be considered to be the same or duplicative if they address different subject matters, seek distinct objectives, or seek to achieve those objectives by different means. Shareholders should have the right to consider a variety of approaches to complex problems. We further agree that the new standard would increase the clarity and objectivity of the exclusion, thereby lowering certain costs for companies and shareholders alike.

Although it is possible that the proposed amendment could result in similar proposals appearing on a corporate ballot, we do not believe that this is a substantial concern. First, we find it implausible that this amendment would result in meaningful investor "confusion." The investors who are likely to spend time and resources on proxy votes will tend to be sufficiently sophisticated to grasp the concept of two independent proposals addressing similar issues. Second, if two proposals address similar issues but seek different objectives or different means, then both proposals should be considered on their own merits. Third, if two proposals are contradictory (*i.e.*, it is impossible to implement both proposals simultaneously), investors are unlikely to vote in favor of both.

Finally, we do not believe that the Commission should modify the Proposal to include standards for *which* duplicative shareholder proposal is excluded.[17] If two shareholder proposals

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elements of what the proponents had actually requested. *See*, *e.g.*, Letter from Shareholder Rights Group at 1-3 (July 25, 2022), https://www.sec.gov/comments/s7-20-22/s72022-20134698-305893.pdf.

[14] *See* authorities cited in notes 3 and 4, *supra*.

[15] Proposal at 17 (quoting *Adoption of Amendments Relating to Proposals by Security Holders*, Release No. 34-12999, 41 FR 52994, 52999 (Dec. 3, 1976)).

[16] *Id.* at 18.

[17] *See id.* at 21, item 8.

are truly duplicative under the proposed standard, it should make no meaningful difference which proposal is excluded from the company's proxy statement. We believe that the proposed standard appropriately reduces the first-in-time advantage and the related incentive to submit a proposal quickly. If the Commission is inclined to modify the Proposal to specify which of multiple shareholder proposals should be excluded, we would oppose a standard focused on the number of shares owned by the proponent(s).[18] Such a standard would unduly favor large institutional investors, and would do so when these shareholders already hold a significant advantage over individual shareholders in terms of the number of their proposals that are excluded and their access to company management.[19]

III. <u>Resubmission</u>

In September 2020, the Commission drastically raised the quantitative thresholds of support necessary for shareholders to resubmit a proposal.[20] Although the Commission did not propose changes at that time to the qualitative standard for what shareholder proposals are subject to the exclusion, the Commission requested comment on whether and how it should do so.[21] The current Proposal notes that commenters who addressed this issue were "largely supportive of narrowing the standard for exclusion if the Commission raised the resubmission thresholds."[22] The current Proposal would adjust the resubmission exclusion to provide that an excludable resubmission occurs when a proposal "substantially duplicates (*i.e.*, addresses the same subject matter and seeks the same objective by the same means as)" an earlier proposal.[23]

The Commission should adjust the resubmission exclusion as proposed. Coupled with the increased thresholds, which NASAA criticized for lack of support when they were proposed,[24] the current standard is an unnecessary barrier to shareholders' exercise of their rights. As NASAA argued in opposition to the increased support thresholds under the resubmission exclusion, shareholder proposals offer valuable insight and ultimately improve corporate governance practices, even when they do not initially capture the attention and appreciation of a majority of existing shareholders.[25] Shareholders have proven adept at shining a light on emerging issues and

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[18] *Id.*

[19] *See id.* at 43, Table 2 and n.110.

[20] *See Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, Release No. 34-89964 (Sept. 23, 2020), *available at* https://www.sec.gov/rules/final/2020/34-89964.pdf.

[21] *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, Release No. 34-87458, at 57-58, item 44 (Nov. 5, 2019), *available at* https://www.sec.gov/rules/proposed/2019/34-87458.pdf. *See also* Proposal at 25.

[22] Proposal at 25.

[23] *Id.* at 27, 81.

[24] *See* Letter from North American Securities Administrators Association at 5 (Feb. 3, 2020), https://www.nasaa.org/wp-content/uploads/2020/02/NASAA-Comment-Letter-SEC-Releases-No-34-87457-34-87458-02-03-20.pdf.

[25] *See id*. at 2-8.

the need for reforms that are often later adopted, despite not initially garnering high levels of shareholder support.

The proposed amendments to the resubmission exclusion strike an appropriate balance between limiting the consideration of proposals that have already been rejected or disregarded by the shareholders at large, and shareholders' ability to engage with the company and other shareholders and to learn from previous proposals that were unsuccessful. We also agree that the current standard is likely overbroad, especially in light of the drastically increased thresholds adopted in 2020. Just as shareholder proposals should not be considered duplicative if they address different subject matters, seek distinct objectives, or seek to achieve those objectives by different means, the resubmission of such proposals in succeeding years should not be considered an excludable resubmission because it should not be considered the same proposal.

In sum, the proposed amendments to the resubmission exclusion would more closely align Rule 14a-8 with its purpose and intent.

IV. Conclusion

Thank you for considering these views. NASAA looks forward to continuing to work with the Commission in the shared mission to protect investors. Should you have questions, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

Melanie Senter Lubin
NASAA President and
Maryland Securities Commissioner