John D. Neumann
Vice President, General Counsel
and Secretary

September 12, 2022

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

Re: File No. S7-20-22; Release Nos. 34-95267, IC-34647: *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule* **Comments of NACCO Industries, Inc.**

Dear Ms. Countryman:

NACCO Industries, Inc. ("NACCO" or the "Company") appreciates the opportunity to furnish comments in response to the Securities and Exchange Commission's ("SEC" or the "Commission") request for public input regarding the Commission's proposed rule on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8[1]. NACCO Industries, Inc., brings natural resources to life by delivering aggregates, minerals, reliable fuels and environmental solutions through its robust portfolio of NACCO Natural Resources businesses. The Company operates under three business segments: Coal Mining, North American Mining and Minerals Management. The Coal Mining segment operates surface coal mines for power generation companies. The NAMining segment is a mining partner for producers of aggregates, coal, lithium and other industrial minerals. The Minerals Management segment acquires and promotes the development of mineral interests. Mitigation Resources of North America is a subsidiary of NACCO that provides stream and wetland mitigation solutions.

Publicly traded companies depend on a proxy process that enables smart business growth and strong investor returns. NACCO supports a proxy process that allows company management to engage in a productive dialogue with shareholders about key aspects of the business. NACCO supports the Commission's 2020 rule amending the procedural requirements and resubmission thresholds for shareholder proposals under Rule 14a-8.[2] The 2020 rule required shareholders to own more stock for longer in order to submit a shareholder proposal and required failed proposals to achieve a higher degree of shareholder support before being resubmitted in subsequent years.

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[1] *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, 87 Fed. Reg. 45052 (27 July 2022). Release Nos. 34-95267, IC-34647; *available at* https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf.

[2] *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 214 (4 November 2020). Release No. 34-89964; *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-04/pdf/2020-21580.pdf.

These changes were designed to center the proxy conversation on the needs of long-term shareholders and ensure that issuers and investors would be able to focus their attention on vital issues that drive long-term value creation.

The 2020 amendments became effective for shareholder meetings taking place after January 1, 2022. Yet even before the 2020 rule took effect, the SEC had already begun taking steps to undermine its critical reforms. In October 2021, the Division of Corporation Finance issued Staff Legal Bulletin ("SLB") 14L, which effectively prohibited companies from excluding from the proxy ballot any shareholder proposals related to environmental, social, and governance ("ESG") topics of "broad societal impact."[3] We were unaware that the SEC's scope of responsibility includes promoting public forum ESG discussion. The 2020 rule was designed to prioritize the needs of long-term shareholders over the agendas of activist investors—but SLB 14L granted those same activists special access to the proxy ballot to pursue ESG causes of their choosing.

The SEC has now—just seven months after the 2020 rule took effect—proposed to further empower activists at the expense of public companies and their long-term shareholders. The proposed rule would significantly undermine companies' ability to exclude unproductive shareholder proposals from the proxy ballot. The longstanding and straightforward exclusion criteria under Rule 14a-8(i) allow companies to exclude proposals that would divert time and resources by forcing shareholders to consider irrelevant, inappropriate, moot, duplicative, or unlawful proposals. The three exclusion criteria that would be amended by the proposed rule—Rule 14a-8(i)(10), (i)(11), and (i)(12)—are designed to limit proposals that have already been substantially implemented by the company, are duplicative of other proposals on a given year's proxy ballot, or have been rejected by a large percentage of the shareholder base in previous years. The proposed rule would make it more difficult for issuers to utilize Rule 14a-8(i)(10), (i)(11), and (i)(12)—and thus make it easier for activists to flood the proxy ballot with substantially implemented, duplicative, and resubmitted proposals. In a manner akin to the Commission's climate proposal, which requires a level of disclosure that will only confuse and overwhelm investors, this disclosure of irrelevant proposals will harm investors by impeding their ability to focus on material information.

The proposed changes largely concern the consistency between a given shareholder proposal and a company's existing policies (substantial implementation), another proposal's text and effect (duplication), or a previously rejected proposal's text and effect (resubmission). At present, companies, investors, and SEC staff are permitted to conduct fact-based analyses to determine whether the proposal in question is sufficiently similar to trigger the relevant exclusion. The proposed rule, on the other hand, would narrow each criterion to such a degree that only virtually identical proposals could be excluded. The proposed rule's amendments thus would dramatically shift the balance of power away from issuers and long-term shareholders and toward single-issue activists. Activists would be empowered to regularly adjust their preferred proposals, continually making changes or adding new conditions to ensure that their idea is always *just* different enough to evade exclusion. This new dynamic will ultimately force companies and shareholders to

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[3] Staff Legal Bulletin No. 14L (3 November 2021). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

consider proposals any time an activist demands, irrespective of whether the company has already taken steps to address the underlying issue or whether shareholders have already considered and rejected (or are currently considering) a similar proposal.

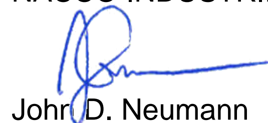
In addition to the proposed changes to the substantial implementation, duplication, and resubmission exclusions, the proposing release also includes a single sentence about Rule 14a-8(i)(7)—the ordinary business exclusion. According to the release, the SEC intends to "reaffirm the standards the Commission articulated in 1998" with respect to how the ordinary business exclusion should be applied.[4] This seemingly innocuous statement is suspect when viewed through the lens of SLB 14L, which instituted a new interpretation of those 1998 standards less than a year ago. SLB 14L broadens the application of the significant social policy exception to the ordinary business exclusion, effectively prohibiting public companies from excluding any ESG-related shareholder proposals from the proxy ballot. The proposing release's reaffirmation of the Commission's interpretation of Rule 14a-8(i)(7) thus could be read as an attempt to codify SLB 14L.

NACCO respectfully encourages the SEC not to adopt the proposed rule. By narrowing the criteria by which companies can exclude shareholder proposals from the annual proxy ballot, the rule would incentivize an increase in both the volume and the prescriptiveness of activist shareholder proposals. It would also force shareholders to repeatedly consider duplicative, moot, and previously rejected submissions and distract them from digesting the material information the Commission obligates issues to disclose. Most importantly, it would empower and prioritize the agendas of single-issue activists, particularly ESG activists, —at the expense of long-term shareholders across the country.

NACCO does not support the SEC's attempt to increase the volume and prescriptiveness of activist proposals, discourage companies from seeking no-action relief, and undermine the 2020 amendments to Rule 14a-8—and we respectfully encourage the SEC not to adopt the proposed rule.

Very truly yours,

NACCO INDUSTRIES, INC.



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[4] *Ibid.*