SOCIETY *for* Corporate Governance

September 13, 2022

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

Submitted electronically via rule-comments@sec.gov

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

Dear Ms. Countryman:

The Society for Corporate Governance (the "Society") appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "Commission" or the "SEC") on the proposed amendments to Exchange Act Rule 14a-8 (the "Proposed Amendments," and the accompanying release, the "Proposing Release").[1]

Founded in 1946, the Society is a professional membership association of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,000 public companies of almost every size and industry. The Society seeks to be a positive force for responsible corporate governance through education, collaboration, and advocacy. Our organization has 75 years of experience empowering professionals to shape and advance corporate governance within their organizations, in part through providing the knowledge and tools they need to advise their boards and executive management on corporate governance, regulatory and legal developments, investor engagement, and environmental, social, and governance ("ESG")/sustainability issues.

In this context, we believe that we are well-positioned to provide constructive feedback to the Commission with respect to the likely impact of the Proposed Amendments on corporations and their investors, including on corporate governance practices at companies of all sizes and across all industries.

[1] Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Release No. 34-95267, File No. S7-20-22 (July 13, 2022) [87 FR 45052 (July 27, 2022)].

Introduction

As we stated in our comments on the Commission's 2020 proposed amendments to Rule 14a-8, the Society recognizes the significance of the shareholder proposal process as an important means for investors to engage with the companies in which they invest.[2] In the decades since the SEC initially adopted Rule 14a-8 and the exclusionary bases thereunder, it has interpreted and—only in limited cases—amended these exclusionary bases. Generally, the Commission's historical approach to updating Rule 14a-8 has been characterized by a careful and deliberative balancing of the goals of companies and shareholder proponents, taking into account the changing relationships between issuers and investors. In contrast, the Proposed Amendments reverse the Commission's current standards for three important exclusionary bases (including standards adopted as recently as 2020[3]) in ways that we believe are likely to negatively impact issuers and shareholders.

As further discussed in Section I.A, the SEC adopted the existing standards for each of Rule 14a-8(i)(10), (11) and (12) to prevent abuses that place unnecessary strains on corporate resources without a corresponding benefit to a company's broader shareholder base. The Commission also has explicitly designed the existing standards to avoid overly formalistic applications of Rule 14a-8 that force shareholders to consider matters that: (i) already have been favorably acted upon by the management; (ii) are substantially identical proposals submitted by proponents acting independently of each other; or (iii) basically recast prior proposals that did not appeal to the broader shareholder base.

The potential for abuse has not abated since the SEC's adoption of the existing standards. Today, companies are facing record-breaking numbers of Rule 14a-8 proposals each year,[4] with some companies beginning to receive multiple proposals that address the same underlying topic. By making it easier for proponents to make prescriptive refinements to proposals that have already been considered by shareholders or were effectively implemented by the company, the Proposed

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2 Society for Corporate Governance, Comment Letter dated February 3, 2020, on Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458, File No. S7-23-19.

3 Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Release No. 34-89964 (Sept. 23, 2020) [85 FR 70240 (Nov. 4, 2020)] (the "2020 Rules Adopting Release").

4 For example, Alphabet's shareholders voted on 17 and Amazon's shareholders voted on 15 proposals at their respective companies' 2022 annual meetings. None of these proposals received majority support.

Overall, the 2022 proxy season has seen a record-breaking number of shareholder proposals submitted, which significantly surpassed the record-breaking 2021 proxy season. Georgeson LLC, An Early Look at the 2022 Proxy Season, HARV. L. SCH. FORUM ON CORP. GOVERNANCE, *available at* https://corpgov.law.harvard.edu/2022/06/07/an-early-look-at-the-2022-proxy-season/ (June 7, 2022).

Of the 797 proposals submitted to U.S. S&P Composite 1500 companies for meetings in the first half of 2022, 60% went to a vote (as compared with 52% for the 2021 proxy season). *See* Sullivan & Cromwell LLP, 2022 Proxy Season Review: Part 1—Rule 14a-8 Shareholder Proposals (Aug. 8, 2022) ("S&C 2022 Proxy Season Review"), *available at* https://www.sullcrom.com/files/upload/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf.

Amendments would likely further increase the number and granularity of, as well as the repetitiveness and potential conflicts between, the Rule 14a-8 proposals companies receive and put to a shareholder vote. This could, in turn, result in undue interference with board authority and inefficient uses of company and shareholder resources, as well as confusion to—and potential disenfranchisement of—retail investors.

Therefore, we disagree that the Proposed Amendments would increase certainty for companies and their shareholders. Rather, we expect the proposed changes to simply shift the costs and burdens of proposals that traditionally would be excluded onto companies and non-proponent shareholders—in other words, the vast majority of investors.

We have recently seen how the shareholder proposal process is impacted when the SEC narrows the availability of no-action relief under Rule 14a-8. As further discussed in Section I.B, Staff Legal Bulletin No. 14L ("SLB 14L"), which abandoned the SEC's long-standing requirement of a nexus between a proposal and the company, has already exposed companies to increasingly prescriptive environmental, social, and political proposals that seek to interfere with ordinary business operations. These granular proposals not only tell companies *what* issues to address, but also *how* to do so. The proxy season trends following the adoption of SLB 14L foreshadow how the Proposed Amendments, which further limit the availability of no-action relief, would likely expose companies and their shareholders to a greater number of granular, prescriptive, and duplicative shareholder proposals.

As further discussed in Section I.C, SEC rulemaking that foreseeably increases the granularity and prescriptiveness of shareholder proposals could create governance risks by distorting board decision-making processes. Although they are generally precatory, Rule 14a-8 proposals—especially prescriptive proposals that demand a company take specific actions—will likely meaningfully distort board decisions in ways that may not be in the best interest of companies and their shareholders, particularly in light of the strong influence of proxy advisory firms. For example, if a board decides not to implement the specific actions outlined in a prescriptive proposal, including because those actions are inconsistent with commercially sensitive business strategies that have not been disclosed to shareholders, directors may face increased re-election risk for perceived lack of responsiveness. Because boards are generally better positioned than shareholders to understand the specific circumstances facing the company, it is crucial that boards consider how to address shareholder concerns in the context of company-specific circumstances, rather than indiscriminately adopting one-size-fits-all changes.

The Proposed Amendments would tip the scales in favor of a small number of special interest proponents whose objectives may not be aligned with the objectives of mainstream investors or the best interests of the company and its shareholders, as further discussed in Section II. Mainstream investors (and especially retail investors) are largely focused on financial returns. The bulk of Rule 14a-8 proposals today, however, are submitted by a small group of proponents, mainly individuals and entities that are focused on special interests. For many years, approximately two-thirds of Rule 14a-8 proposals each year have come from less than a dozen proponents. These proponents tend to submit the same proposals to a large number of companies year after year, using the Rule 14a-8 process to publicize and advance their selected issues. The Proposed Amendments would further encourage these proponents to submit prescriptive proposals that dictate specific company actions; many of these proposals have failed to garner approval from companies' broader shareholder bases in recent proxy seasons. As a result, the Proposed Amendments are unlikely to be beneficial to most shareholders and could instead divert investor attention and resources from more pressing issues facing the companies in which they invest.

The Society urges the SEC not to adopt the Proposed Amendments. While the Society believes that shareholder proposals play an important role in the corporate democratic process, we also believe that Rule 14a-8 should incentivize the submission of high-quality proposals that both highlight shareholder concerns to a company's board and allow the board to resolve these concerns in a manner that serves the best interests of shareholders in light of the specific circumstances facing the company. We believe that the current framework for the Rule 14a-8 exclusionary bases already strikes the right balance and achieves effective and efficient outcomes. By contrast, we think the Proposed Amendments are not only unnecessary, but also potentially harmful to issuers and investors. As further discussed in Section III, we believe the SEC's regulatory process in connection with SLB 14L and the Proposed Amendments—including the effective reversal of the recently adopted resubmission rules—would detract from the Commission's stated goals of transparency, consistency, and predictability.

I. The Proposed Amendments to Rule 14a-8 Would Unduly Interfere with Board Authority and Unnecessarily Consume Corporate Resources

Currently, under Rules 14a-8(i)(10), (11), and (12), the SEC staff (the "Staff") undertakes a principles-based, holistic facts-and-circumstances analysis to assess whether a particular basis for exclusion asserted by a company has been established. The SEC's existing standards are a result of decades of careful consideration and refinement. Although these standards require the Staff to make subjective judgements and interpretations, we believe that they provide a reasonable level of predictability and strike the right balance between deterring potential abuse by proponents and incentivizing robust participation in the Rule 14a-8 process.

Under the stated goal of providing greater certainty and transparency,[5] the Commission is proposing to replace the existing standards with inflexible and formalistic tests that have been expressly rejected by the SEC in the past, as discussed below in Section I.A. Further, abandoning existing standards that are well understood by all stakeholders would not increase certainty or transparency for the Staff, proponents, or companies. Companies would face greater uncertainty because the Proposed Amendments would encourage proponents to submit a higher number of proposals that are also more granular and prescriptive. An increase in the volume of Rule 14a-8 proposals will tax company resources, while an increase in the granularity and prescriptiveness of proposals would increase companies' implementation challenges (*e.g.*, if shareholders approve two proposals that outline conflicting means for addressing the same objective).

As further discussed in Section I.B, granular and prescriptive proposals have already surged following the release of SLB 14L. These proposals have been criticized by some institutional shareholders for being low-quality because they fail to take company-specific circumstances into

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5 *See, e.g.*, Proposing Release at 7.

consideration.[6] By significantly narrowing the availability of no-action relief on the basis of "ordinary business" and "economic relevance," SLB 14L has also decreased the incentives for proponents to engage with issuers and consider the company's reasoning. Consequently, proponents were less likely to privately settle low-quality proposals with companies, and significantly more of these proposals went to a vote after the release of SLB 14L than in prior proxy seasons.[7] When voted, these proposals generally received low shareholder support. By further narrowing the availability of no-action relief, the Proposed Amendments would further encourage the submission of granular, prescriptive proposals that may be not well-tailored to their target companies.

Moreover, as further discussed in Section I.C, the adoption of the Proposed Amendments, along with a foreseeable resulting increase in granular proposals, would increase potential governance risks. The Proposed Amendments encourage proponents to usurp board authority by making it easier for overly prescriptive proposals to be included in a company's proxy materials. This has the potential to distort board decision-making processes in ways that are not conducive to good governance, including by limiting the board's ability to discharge its fiduciary duties in response to shareholder feedback in the best manner under the circumstances facing the particular company. These outcomes would force boards and management to divert time and attention away from engaging with investors on matters that are more relevant to the company.

For these reasons, we strongly urge the SEC not to adopt the Proposed Amendments. Because SLB 14L creates—and has already led to—many of the same problems, we also urge the SEC to rescind that guidance.

A. The SEC should not reverse its carefully considered existing standards, which allow the Staff to appropriately balance the interests of companies, proponents, and other shareholders.

1. The SEC should not amend Rule 14a-8(i)(10).

The Society believes that the Commission should not amend Rule 14a-8(i)(10) as proposed. Under the existing standard, a company can exclude a shareholder proposal under Rule 14a-8(i)(10) if "the company has already substantially implemented" the proposal. The Proposed Amendments would provide that a proposal may be excluded as substantially implemented "only if the company has already implemented *all* of its *essential elements*."[8] As the Proposing Release

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6 *See, e.g.*, BlackRock Investment Stewardship, 2022 voting spotlight summary (July 26, 2022), *available at* https://www.blackrock.com/corporate/literature/publication/2022-investment-stewardship-voting-spotlight-summary.pdf, at 14 ("[W]e observed a marked increase in E&S shareholder proposals that went to a vote (e.g., in the U.S. we saw a 133% increase) and many more proposals were unduly constraining on management or were overly prescriptive as to information sought or timeframes. Others failed to recognize the progress made such that companies had largely met the ask of the proposal.").

7 *See, e.g.*, T. Rowe Price, 2022 Aggregate Proxy Voting Summary (August 2022), available at https://www.troweprice.com/content/dam/trowecorp/Pdfs/ID0005320_2022_Aggregate_Proxy_Voting_Summary_Corp_Site_P7_FINAL.pdf, at 3.

8 Proposing Release at 15 (emphasis added).

further explains, "[w]here a proposal contains more than one element, every element of the proposal need not be implemented, although each essential element would need to be implemented."[9]

Under the existing Rule 14a-8(i)(10), the Staff applies a holistic analysis of a proposal's underlying concern and essential objective. In adopting this existing standard, the SEC explicitly rejected a standard that was similar to the one that the Commission is now proposing, which would require a rigid and formalistic tallying of whether all of the proposal's essential elements have been satisfied. The precursor to the existing Rule 14a-8(i)(10)—Rule 14a-8(c)(10)—initially permitted exclusion of a proposal that "has been rendered moot."[10] Until 1983, exclusion under Rule 14a-8(c)(10) was permitted only where a proposal had been "fully effected." In 1983, the Commission adopted an interpretive change to permit the exclusion of proposals that have been "substantially implemented by the issuer" in order to prevent abuses by proponents and undue burdens on companies and their other shareholders.[11] In 1998, the Commission adopted the current language of Rule 14a-8(i)(10) to reflect the interpretation it adopted in 1983.[12]

Shifting the examination under Rule 14a-8(i)(10) to whether a company has favorably acted on the "essential elements"—rather than the essential objectives—of a proposal does not eliminate subjectivity. This approach does not offer greater certainty or "provide a clearer framework"[13] for the Staff, proponents, or companies. Although the Proposing Release states that a proposal need not be implemented in "exactly the way a proponent desires" in order to be excluded, the guidance that the new "essential elements" test is satisfied "if the differences between the proposal and the company's actions are not essential to the proposal"[14] is circular and not instructive.

From the perspective of the Staff, the guidance still requires the exercise of subjective judgment in weighing different elements of each proposal. As the SEC admits in the Proposing Release, "[d]etermining whether a proposal could be excluded under the proposed amendment would still require a degree of substantive analysis—a determination of which elements of the proposal are the 'essential elements' and an analysis of whether those elements have been addressed."[15] From the perspective of the proponent, even though the SEC appears to indicate that it would consider

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9 *Id.*

10 Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994 (Dec. 3, 1976)] ("1976 Adopting Release"), at 53000.

11 Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983) [48 FR 38218 (Aug. 23, 1983)] ("1983 Adopting Release"), at 38221; Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-19135 (Oct. 14, 1982) [47 FR 47420 (Oct. 26, 1982)] ("1982 Proposing Release"), at 47429.

12 Amendments To Rules On Shareholder Proposals, Release No. 34-40018 (May 21, 1998) [63 FR 29106 (May 28, 1998)] ("1998 Adopting Release"), at 29107, 29120.

13 Proposing Release at 14.

14 *Id.* at 15.

15 *Id.* at 14.

designations of "primary" objectives, elements, or features made by the proponent,[16] absent the manipulation described below, there would be uncertainty that the elements that the proponent considers to be essential will align with those that the Staff considers to be essential.

Moreover, the more objectives, elements, or features a proponent identifies, the less essential the Staff would view each of them.[17] From the Staff's perspective, this guidance would seem to decrease consistency of application, since the same element may become more or less "essential" depending on how proponents package their proposals. Alarmingly, the Proposing Release seems to encourage a "death by a thousand cuts" approach for proponents who want certainty that every single difference between their proposal and the company's action reaches a shareholder vote. Specifically, the Commission notes that "[i]n instances where a proposal contains only one essential element, that essential element would need to be implemented" and that the "specificity" of the proposal will guide the SEC's analysis.[18] This guidance could encourage proponents to submit one or more proposals, each of which demands a different highly specific change to the actions already taken by the company to address the same underlying issue.[19] This would mean that, contrary to the SEC's statements in the Proposing Release, these proponents' proposed course of action must be implemented exactly as proposed, or else shareholders will have to reconsider matters—including minute differences between the proposed course and the company's actions—which already have been favorably acted upon by management. The Proposed Amendments would effectively revert the substantial implementation analysis to the pre-1983 standard, when exclusion was available only if a company had "fully effected" a proposal.

Accordingly, a company would not be able to exclude a proposal if the company's action did not meet any one of a number of possibly "essential" elements of the proposal, even if the company had already satisfied the core request of the proposal. Because the proposed standard creates an incentive for proponents to frame a number of less important aspects of a proposal as "essential," the Proposed Amendments would make it more difficult for companies to demonstrate that they have already substantially implemented a proposal due to the increased focus on specific details rather than a consideration of whether the company has addressed the proponent's overall concern. In overemphasizing the "specific actions requested by a proposal,"[20] the proposed changes to Rule 14a-8(i)(10) would encourage proponents to inappropriately dictate the operations of a company, usurping authority that belongs to, and should be reserved for, the board and management. As further described in Section I.C and Section II, this outcome would benefit neither companies nor investors and would, in fact, be detrimental to both.

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16 *Id.*

17 *Id.* at 14, n.39.

18 *Id.* at 14–15.

19 Although the SEC amended Rule 14a-8(c) in 2020 to provide that a proponent may not submit multiple proposals for the same shareholder meeting, in reality, proponents have been circumventing this rule by working together, or submitting multiple proposals through individuals affiliated with the same entity or coalition.

20 Proposing Release at 13.

The foreseeable increase in granular and prescriptive proposals that demand subtle adjustments to the company's existing bylaws or policies would also likely lead to greater uncertainty for companies. Many companies may respond with management counterproposals that ask shareholders to ratify the company's existing policies, increasing investor confusion, particularly among retail shareholders. Especially where the proponent's suggested changes are minute, shareholders may have a hard time identifying the practical difference between the Rule 14a-8 proposal and the management counterproposal. In those cases, the shareholders may approve both the Rule 14a-8 proposal and the management counterproposal, even though it may be impossible or impracticable to reconcile the proposed changes with the company's existing policy, leading to significant uncertainty for the company's board. Even where reconciliation is possible, the company and its management may face a dilemma because they will be unable to divine the true preference of shareholders without conducting extensive additional shareholder engagement.

An example of a company facing such a dilemma is ConocoPhillips, where shareholders approved at the 2022 annual meeting both a management proposal setting the special meeting ownership threshold at 20% (with 80% of votes cast), as well as a shareholder proposal with a 10% threshold (with 53% of votes cast). While the ConocoPhillips board might reasonably adopt a 20% threshold, as the proposal with that threshold garnered a higher majority of votes cast on the matter, directors cannot be sure whether the proxy advisory firms and/or a significant subset of the shareholder base would view this decision as non-responsive to the vote on the other proposal.[21]

We believe, as the Commission itself has previously stated, that an overly formalistic application only serves to defeat the purpose of Rule 14a-8(i)(10). We are doubtful that the proposed changes would increase certainty for proponents or consistency for the Staff. Moreover, the proposed changes would disadvantage companies, which would likely need to devote significantly more time and resources[22] to addressing additional proposals, especially ones that unduly interfere with management's operation and the board's oversight of the company. The only "certainty" that companies would gain from the Proposed Amendments is that proponents will be more likely to demand constant and granular refinements to the company's practices and operations. The SEC's proposed approach would shift the costs and burdens of proposals that would be excluded under the existing standard onto companies and non-proponent shareholders, who comprise the vast majority of investors. For these reasons, it is crucial that the SEC maintain its current "substantial implementation" standard and not adopt the proposed changes to Rule 14a-8(i)(10).

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[21] ConocoPhillips, Proxy Statement 2022 (Form DEF 14A) (Mar. 28, 2022), *available at* https://www.sec.gov/Archives/edgar/data/0001163165/000120677422000879/cop3949151def14a.htm.

[22] In a recent survey of the Society's public company members, almost 40 percent of respondents said they currently devote more than 20 hours of staff time each proxy season to address shareholder proposals. In addition, 41% said they spend more than $20,000 on shareholder resolutions; more than half of that group typically spends more than $50,000 each season. These burdens are most likely to increase if the Proposed Amendments are adopted. Society for Corporate Governance, Public Company Survey for Shareholder Proposal Letter (August–September 2022), on file with author.

2. The SEC should not amend Rule 14a-8(i)(11).

The Society believes that the Commission should not amend Rule 14a-8(i)(11) as proposed. The Proposed Amendments would replace the existing "duplication" standard, which requires a holistic analysis of whether two proposals share the *same principal thrust or focus*, with a comparison of whether the proposals address the *same subject matter* and seek the *same objective* by the *same means*. Under the proposed approach, a company would likely be unable to exclude a proposal with the same focus as an earlier-submitted proposal due to minor variations between the two proposals. This will likely distract shareholders from other important matters on the ballot, as further discussed in Section II. In addition, the proposed changes to the "duplication" standard also increase the likelihood of potentially conflicting proposals that would create implementation challenges for companies and result in a waste of corporate resources.[23]

As a preliminary matter, the Commission's own statistics indicate that there is no clear need for the proposed changes to Rule 14a-8(i)(11), as this exclusionary basis is used infrequently. The Proposing Release notes that during the 2021, 2020, and 2019 proxy seasons, the Staff only received 12, nine, and 16 no-action requests, respectively, seeking relief on the basis of duplication.

Even though companies rarely rely on the existing "duplication" standard to exclude shareholder proposals today, perhaps the SEC is seeking to narrow the application of Rule 14a-8(i)(11) because it is concerned that the current standard has chilled proponents from submitting more similar proposals. However, it is unclear why the Commission concluded that proponents needed to be further incentivized, especially in light of the fact that: (i) technically, each proponent may submit only one proposal for each shareholder meeting; (ii) absent coordination, proponents do not have insight into other proposals submitted for the same shareholder meeting (unless made public in filings with the SEC or via other channels); and (iii) many companies already receive multiple proposals for the same shareholder meeting that address the same topic. For example, in the 2022 proxy season, at least one company received multiple racial equity/civil rights audit proposals that were essentially identical, except that one proponent demanded consultation with civil rights groups generally, and another proponent demanded that the civil rights groups include bipartisan viewpoints.[24]

On the other hand, the company and shareholder burdens that the SEC considered when adopting the existing "duplication" standard remain relevant today. The Proposed Amendments could significantly expand companies' and shareholders' exposure to the unnecessary burdens the SEC tried to eliminate when it adopted the existing "duplication" standard in 1976. As the Commission explained in 1976, the purpose of the existing provision is to "eliminate the

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23 Among 146 of the Society's public company members that responded to a survey question about how they would address conflicting shareholder proposals that receive a majority of votes cast, the vast majority indicated that in the event of such a conflict, they would not have a clear path forward and/or would need to further engage with their largest investors. Society for Corporate Governance, Public Company Survey for Shareholder Proposal Letter, *supra* note 22.

24 *See* S&C 2022 Proxy Season Review at 11–12; Johnson & Johnson, 2022 Proxy Statement (Form DEF 14A) (Mar. 16, 2022), *available at* https://www.sec.gov/Archives/edgar/data/200406/000020040622000026/a2022jnjproxy.htm.

possibility of shareholders having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other."[25] The Proposed Amendments would lead to the revival of this possibility, which the Proposing Release attempts to portray as a positive development for proponents, other shareholders, and companies. Based on our experience, however, the Society believes that having multiple similar proposals appear on the same proxy statement would lead to confusion for companies and their investors and may even thwart proponents' objectives by splitting the vote.

It is not hard to fathom two different proponents focused on the same underlying issue but proposing two different ways to address that issue. Take, for example, two net-zero target proposals that prescribe slightly different paths, each aligned with a distinct science-based standard.[26] If shareholders approve both proposals, but it would be impracticable for the company to implement both paths, what message would that outcome send to a company that is trying to be responsive to its shareholders? Allowing votes on two almost identical proposals could make it difficult or even impossible for the company to be responsive to both proposals.

For these reasons, we believe that the proposed changes to Rule 14a-8(i)(11) would lead to undesirable outcomes for companies, proponents, and other shareholders, outweighing the purported benefits stated in the Proposing Release. Therefore, it is crucial that the SEC not adopt its proposed changes to Rule 14a-8(i)(11) and maintain the current "duplication" standard.

3. The SEC should not amend Rule 14a-8(i)(12).

The Society believes that the Commission should not amend Rule 14a-8(i)(12) as proposed. The Proposed Amendments would replace the existing "resubmission" standard, which requires a holistic analysis of whether a current proposal shares the *same substantive concerns* with a previous proposal that failed to garner meaningful shareholder support, with a comparison of whether the two proposals address the *same subject matter* and seek the *same objective* by the *same means*. Under the proposed approach, a company would likely be unable to exclude a proposal with the same focus as a low-vote proposal submitted for a prior shareholder meeting because of minor variations between the two proposals. As discussed earlier in Section I.A.2, this outcome would benefit neither companies nor non-proponent shareholders.

In fact, the proposed changes have the potential to harm companies and investors by re-incentivizing the abuses that SEC has previously tried to curb with the existing standard. Historically, the "resubmission" exclusion was only available with respect to proposals that were "virtually identical" in form and in substance to a proposal previously included in an issuer's proxy materials.[27] In 1976, the Commission proposed to amend the "resubmission" standard to

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25 1976 Adopting Release, at 52999.

26 There are many other plausible examples based on the proposals submitted in 2022. For example, a company may receive multiple civil rights audit proposals, one which permits an in-house investigation, one which demands an independent third-party investigation, one which demands the adoption of policies to address issues identified in an investigation, and one which requires the disclosure of those issues (with specific policy demands likely following in the year after the company makes such disclosure).

27 1982 Proposing Release at 47429.

permit exclusion where a proposal "deals with substantially the same subject matter as a proposal previously submitted to security holders." The Commission explained the need for this change, flagging abusive practices by proponents who evaded the rule by "recasting the form of the proposal, expanding its coverage, or otherwise changing its language" so that the resubmitted proposal would not be considered "substantially the same" as the prior proposal.[28] While the Commission did not amend the resubmission provision in 1976 after considering comments, it did adopt interpretive guidance to permit the exclusion of proposals "composed essentially of the elements" of two or more low-vote proposals in prior years.[29] In 1982, the Commission again proposed the same amendment as it did in 1976, observing that "[d]espite the fact that the alternative test has proved effective in controlling some of the more flagrant abuses of Rule 14a-8(c)(12), the incidence of abuse of the existing provision and the existing interpretations thereunder continues to grow."[30] The proposed change was adopted in 1983, with the SEC noting its belief that the change was "necessary to signal a clean break from the strict interpretive position applied to the existing provision." To avoid an improperly broad interpretation of the existing standard, the SEC noted that the determination of whether a proposal was "substantially similar" under the existing standard is "based upon a consideration of the substantive concerns raised by a proposal rather than the specific language or actions proposed to deal with those concerns."[31]

As with Rule 14a-8(i)(10) and (11), the Society believes that the SEC has already struck the appropriate balance between the rights of shareholders to engage with companies through the Rule 14a-8 process, on the one hand, and the need to deter abuses by proponents, on the other hand. The proposed narrower "resubmission" standard will ultimately harm companies, which will need to spend additional time and money each year managing more fringe-issue proposals that received minimal support. These proposed changes will also harm shareholders, who will be forced to consider matters again and again, with only minor variations, despite having recently demonstrated their lack of interest. For example, a special interest proponent could repeatedly submit a proposal that receives less than 5% of votes cast. If the proponent is allowed to tweak the means of implementation slightly every year, its proposals could elude exclusion on the basis of resubmission, making the recently adopted 15% and 25% voting thresholds irrelevant. This is exactly the kind of tactics that the SEC has previously characterized as a "flagrant abuse" of the Rule 14a-8 process.

For these reasons, we ask the SEC to maintain its current "resubmission" standard and not adopt the proposed changes to Rule 14a-8(i)(12).

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28 Proposals by Security Holders: Notice of Proposed Amendments to Rule, Release No. 34-12598 (July 7, 1976) [41 FR 29982 (July 20, 1976)], at 29985.

29 1976 Adopting Release at 52999.

30 1982 Proposing Release at 47430.

31 1983 Adopting Release at 38221.

B. SLB 14L has increased the prevalence of non-company-specific and overly prescriptive proposals while discouraging engagement; these trends would be exacerbated if the SEC adopts the Proposed Amendments.

As discussed previously in Section I.A, the Proposed Amendments will likely increase the number, granularity, and prescriptiveness of the proposals submitted each year by proponents. This outcome is more than a mere theoretical possibility, as demonstrated by the proxy season results following the SEC's release of SLB 14L (*see* Section I.B.1).

SLB 14L has significantly narrowed the availability of no-action relief under the "ordinary business" and "economic relevance" bases. Since its release, Society members have observed a meaningful increase in the submission of overly prescriptive proposals that go far beyond identifying areas of concern for management. Likely encouraged by the new "ordinary business" standard under SLB 14L, which requires the Staff to assess "whether the proposal raises issues with a broad societal impact" rather than focus on the particular proposal's significance to a specific company and its operations, proponents made granular demands on companies to take specific actions during the 2022 proxy season (in many cases, without considering the company's unique circumstances). These prescriptive proposals also reached a shareholder vote at a much higher rate compared to pre-SLB 14L periods. However, when voted, these proposals received generally low shareholder support.[32]

These 2022 proxy season statistics suggest that, at least in part due to the SEC's abandonment of its long-standing and well-reasoned requirement of a nexus between a proposal and the company, companies and their shareholders are facing increased exposure to proposals that some shareholders consider to be low quality and/or inappropriate. For example, BlackRock announced in May 2022 that it expected to support proportionally fewer climate-related proposals in 2022 than it did in 2021 because the overly prescriptive proposals are not "consistent with [its] clients' long-term financial interests."[33] In July, BlackRock announced that it supported 24% of environmental and social proposals in the 2022 proxy season, as compared with 43% in 2021, due to the more prescriptive nature of the 2022 proposals and because "many climate-related shareholder proposals sought to dictate the pace of companies' energy transition plans despite continued consumer demand, with little regard to company financial performance" and "[o]ther proposals failed to recognize that companies had largely already met their ask."[34] Similarly, T. Rowe Price observed that "the increase in the volume of proposals resulted in a decrease in their overall quality," including greater numbers of inaccuracies, poorly targeted proposals, and prescriptive, action-based requests.[35] The investment manager reported that its

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32 *See* S&C 2022 Proxy Season Review.

33 *See* BlackRock Investment Stewardship, 2022 climate-related shareholder proposals more prescriptive than 2021 (May 2022), *available at* https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf.

34 *See* BlackRock, 2022 voting spotlight summary, *supra* note 6.

35 T. Rowe Price, 2022 Aggregate Proxy Voting Summary, *supra* note 7, at 3.

support for shareholder proposals on environmental topics declined from 28% in 2021 to 16% this year, and its support for shareholder proposals on social topics declined from 19% to 13%.[36]

Based on the proxy season results following the adoption of SLB 14L, it is foreseeable that the Proposed Amendments, which further limit the availability of no-action relief, would expose companies to even a greater number of inappropriately granular and prescriptive shareholder proposals. Similar to the "ordinary business" standard under SLB 14L, the proposed "substantial implementation" standard would limit the Staff's flexibility to consider company-specific circumstances for purposes of the exclusion. Therefore, the SEC's proposed change to the "substantial implementation" standard would likely further exacerbate the concerns that investors have noted with respect to this year's environmental and social proposals, in particular, that many are not well-tailored or even relevant to particular companies.

The Proposed Amendments could also impede productive engagement between companies and proponents, which have, in the past, resulted in the withdrawal of many proposals. Following the adoption of SLB 14L, Society members have reported a reduced willingness by proponents to engage or to find common ground.[37] We have also seen that the proposals most likely to be withdrawn after private settlement in prior years (*e.g.*, proposals on social issues) went to a vote much more often in 2022.[38] Anecdotally, we have observed shifts in certain proponents' negotiating postures. Whereas, in prior years, these proponents were willing to work with companies on compromises that were mutually acceptable, some now only agree to withdraw a proposal if the company has agreed to full implementation.

The SEC has in the past (including in its 2020 amendments to Rule 14a-8) sought to create incentives for thoughtful proponent-issuer engagement. However, both SLB 14L and the Proposed Rules meaningfully shift the calculus for proponents. In particular, a proponent who knows that a proposal is unlikely to attract broad shareholder support had very different incentives to negotiate under the standards that were in place prior to the adoption of SLB 14L than the proponent would have under SLB 14L and the Proposed Amendments. Under the old standards, that proponent faces a meaningful chance of having its proposal excluded from the proxy statement; therefore, a compromise may be the more effective way to accomplish at least part of its agenda (even if just to raise awareness among management) and withdrawing the proposal before a vote allows the proponent to submit its proposal again the following year. However, under the new standards, which both makes exclusion harder for companies and resubmission easier for proponents, a proponent faces much lower risks from refusing to settle and may instead wish to use the proxy statement to broadcast its agenda, at the expense of the company, even if the proponent expects the proposal will receive limited support.

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[36] *Id.* at 4.

[37] T. Rowe Price also noted that "proponents exhibited a lower propensity to negotiate settlements with issuers before taking a proposal to a vote." *See* T. Rowe Price, 2022 Aggregate Proxy Voting Summary, *supra* note 7.

[38] Voted social proposals increased by over 70% year-over-year. *See* S&C 2022 Proxy Season Review.

C. The Proposed Amendments are not conducive to responsible corporate governance.

As discussed previously, SLB 14L and the Proposed Amendments invite proponents to unduly interfere in decisions (particularly operational matters) that should be reserved for the board, as the board is better positioned to evaluate whether a particular course of action serves the best interests of the company and its shareholders. At the same time, SLB 14L and the Proposed Amendments would shift the burden and responsibility of screening out low-quality or inappropriate proposals to a company's broader shareholder base, which would force non-proponent shareholders to devote more time to analyze these proposals.

In fact, boards and management may need to devote their already limited engagement time with shareholders—a precious commodity during proxy season—to explaining why these shareholder proposals may not serve the best interests of the company and its shareholders. Discussing matters that are either irrelevant to a company, or that have already been considered and addressed by the company, detracts from companies' opportunity to get feedback on more salient and novel issues. Without sufficient engagement on low-quality or inappropriate proposal topics, however, shareholders may approve the proposed action on the basis that taking the action is "generally a good idea," without realizing that there are reasons why the proposed action is not right for a specific target company.

If a proposal has been approved by shareholders, the board must still independently exercise its business judgment. If shareholders approve a proposal that outlines broader objectives rather than specific means, the board has flexibility to determine a path that is appropriate for the company. However, if shareholders approve a proposal that outlines a very specific course of action, a board may face shareholder backlash if the company does not adopt the exact course of action proposed by the proposal, even if it has good reasons for doing so.

In the current shareholder landscape, if a board gives due consideration to an approved shareholder proposal but determines that it is not in the company's and its shareholders' best interests to implement the proposed action, it is not irrational for directors to be concerned about facing increased opposition.[39] In ISS's 2021 proxy voting guidelines, the proxy advisor states that it may recommend against "individual directors, committee members, or the entire board of directors as appropriate if [t]he board failed to act on a shareholder proposal that received the support of a majority of the shares cast in the previous year."[40] We have observed that a proxy advisor's negative recommendation has a meaningful and negative impact on shareholder support of a nominee, especially in contested elections. It is incredibly challenging to avoid a negative vote recommendation against one or more directors where a company is perceived not

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39 Glass Lewis & Co.'s U.S. proxy voting guidelines state that "we will consider recommending that shareholders vote against . . . [a]ll members of the governance committee during whose tenure a shareholder proposal relating to important shareholder rights received support from a majority of the votes cast (excluding abstentions and broker non-votes) and the board has not begun to implement or enact the proposal's subject matter." Glass Lewis, 2022 Policy Guidelines, *available at* https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf, at 25-26.

40 ISS, United States Proxy Voting Guidelines, *available at* https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf, at 12.

to have implemented a proposal that garnered majority support. Additionally, to even attempt to avoid a negative recommendation, a company would need to explain the current level and methodology of implementation, among other factors, which may not be appropriate for disclosure due to commercial sensitivity.

For these reasons, the Society does not believe that the Proposed Amendments would be conducive to responsible corporate governance practices. A framework that would unduly increase the pressure on boards to implement prescriptive proposals—including those that attempt to usurp decisions that are reserved for the board—creates meaningful corporate governance risks that could ultimately harm shareholders and the broader market.

II. The Proposed Amendments Would Burden Both Retail and Institutional Shareholders to Advance the Special Interest Goals of a Small Number of Proponents

As the Proposing Release concedes, the Proposed Amendments could result in "increased costs to non-proponent shareholders associated with their own consideration of shareholder proposals."[41] These cost increases would likely be considerable because the adoption of the Proposed Amendments can be expected to increase both the number of proposals shareholders have to consider, the granularity of such resolutions, and the complexity of the evaluation process. For example, under the proposed "duplication" standard, multiple shareholder proposals seeking the same or similar objectives can make their way onto the same ballot. As a result, shareholders, both retail and institutional, would have to consider how to vote for proposals with overlapping, or even conflicting, methods of achieving the same objective. In addition, under the proposed "substantial implementation" and "resubmission" standards, shareholders would also be forced to expend time and resources on re-examining shareholder proposals that are merely tweaking measures companies have already adopted, or that vary only marginally from other proposals that have failed to gain traction in the past. Furthermore, we expect that the significant increase in the number of Rule 14a-8 proposals would lead to a corresponding increase in the number of management counterproposals, which would increase the burden on shareholders even more.

For institutional investors, increased costs would arise from paying third-party advisors or devoting additional resources to assess and engage with companies on these proposals. For retail investors, especially those who do not have the resources to conduct the necessary research and evaluation, the increase in proposals (particularly highly technical proposals) would increase confusion and could lead some investors to stop voting their shares.

In addition, as the volume and granularity of proposals are expected to increase, there are monetary and non-monetary costs to companies and their boards and management associated with managing, responding to, and engaging with shareholders, as well as likely hiring additional

41 Proposing Release at 60–61. In addition, although the economic analysis in the Proposing Release considers the cost of the no-action process, it does not sufficiently account for the economic impact, for both companies and investors, resulting from the foreseeable increase in proposals, especially granular proposals that address highly specific and/or highly technical issues.

employees and advisors to assist with these efforts. These costs would also be borne by shareholders, including retail and institutional investors who have different investing priorities from the small group of proponents who drive the vast majority of Rule 14a-8 submissions.

A. The majority of Rule 14a-8 proposals are submitted by proponents who have interests that are not directly aligned with those of most investors.

For many years, Rule 14a-8 proposals have been driven by a handful of special interest groups, with approximately two-thirds of proposals each year coming from basically the same 10 proponents. The top 10 proponents—consisting of special interest groups, unions, and individuals with small to non-existent economic stakes in the companies they target—submitted more than 60% of Rule 14a-8 proposals for annual meetings during the first half of 2022 at U.S. S&P Composite 1500 companies. Four individuals in particular submitted nearly one third of all proposals this season.[42]

Compared to the majority of investors—particularly retail investors, who generally prioritize their return on investment and other financial considerations more than any other factor, including ESG-related factors—the frequent proponents have vastly different priorities.[43] For example, the Interfaith Center on Corporate Responsibility (ICCR), which submitted at least 73 proposals in the 2022 proxy season, is a faith-based investor coalition whose stated mission is to build "a more just and sustainable world" through "the lens of faith." Another prolific proponent, the "anti-ESG" group National Center for Public Policy Research, which submitted at least 22 proposals in the 2022 proxy season, is "a communications and research foundation supportive of a strong national defense and dedicated to providing free market solutions to today's public policy problems."

The Proposed Amendments, if adopted, would further encourage proponents to act on their special interests, ignoring both the circumstances of the company and the interests of other shareholders. By doing so, the Commission takes a step backwards from its long established policy goal of preventing the misuse and abuse of the Rule 14a-8 process, eroding protections in a framework that had been established to "discourage the use of this rule by persons who are motivated by a desire for publicity rather than the interests of the company and its security holders" and "relieve the management of harassment in cases where [shareholder] proposals are submitted for the purpose of achieving personal ends rather than for the common good of the issuer and its security holders."[44]

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42 S&C 2022 Proxy Season Review at 4–6.

43 *See* Gallup, Gallup Investor and Retirement Optimism Index (Dec. 3, 2021), *available at* https://news.gallup.com/file/poll/389804/20220222Investors%20and%20ESG.pdf; Gallup, "Where U.S. Investors Stand on ESG Investing" (Feb. 23, 2022), *available at* https://news.gallup.com/poll/389780/investors-stand-esg-investing.aspx; FINRA Investor Education Foundation & NORC at the University of Chicago, Investors say they can change the world, if they only knew how: Six things to know about ESG and retail investors (Mar. 2022), *available at* https://www.finrafoundation.org/sites/finrafoundation/files/Consumer-Insights-Money-and-Investing.pdf.

44 2020 Rules Adopting Release at 5–6, n.2 (citing decades of SEC policy rationale).

B. Institutional investors are unlikely to benefit from the Proposed Amendments.

For an institutional investor, the Proposed Amendments, if adopted, would result in the need to devote more resources to engagement and proxy voting. The expected increase in proposals may require an institutional investor to rely more on third-party advisors (who don't owe a fiduciary duty to the institution's beneficiaries) and/or expand the number of employees dedicated to evaluating these proposals. In addition, we expect these proposals to be more granular, with minor differences between proposals on the same subject matter (including between the Rule 14a-8 proposal and the management counterproposal). Furthermore, as the 2022 proxy season demonstrated, proposals are also becoming more technical, which may also require institutional investors to hire subject matter experts who are in short supply. For example, proponents are focusing on climate-related proposals that implicate methodological and scientific issues that may require investors to seek out additional expertise.

The increased costs would not generate a corresponding benefit for institutional investors. Many of these institutional investors are already closely monitoring the companies in which they invest with respect to the ESG issues that are the principal thrust of the majority of Rule 14a-8 proposals. These institutional investors are, in some cases, more sophisticated on these topics than the proponents, given the amount of staff time they have already dedicated to these topics. Moreover, even without the Rule 14a-8 process, these investors have ample opportunity to provide their thoughts on these and other topics to their investees. They can more efficiently and effectively express their will—including whether a particular action should be taken or whether an existing action should be adjusted—through direct engagement, including at the regular engagement meetings that many institutional investors have with management teams at their portfolio companies.

Even under the existing Rule 14a-8 framework, because institutional investors need to engage with management teams at a large number of portfolio companies, their proxy season calendars are already packed. If the Proposed Amendments are adopted and proxy ballots become even more crowded as we expect they would, institutional investors would need to cram even more issues into their engagement sessions with investees. Under the Proposed Amendments, a ballot may have multiple similar proposals or resolutions that are only subtly different from those on which the investor voted last year. Institutional investors may need to spend additional time with the company to understand these differences and what they mean for the company, which may note be possible. Additionally, even if these issues are not actually the investors' priority items, attempting to understand and assess similar proposals may divert their attention away from the issues that matter more to them and may limit their ability to engage on truly significant topics and vote with the benefit of much-needed context from management.

C. The Proposed Amendments would result in a disproportionate burden on, and potential disenfranchisement of, retail investors.

The Society believes that the Proposed Amendments will have a particularly detrimental impact on retail investors, who directly own approximately 35% of the U.S. equity market.[45] Retail investors typically make their own voting decisions without advisory support or having their shares automatically voted in accordance with a voting policy established in advance of proxy season. In addition, unlike institutional investors, it is rare for retail investors to engage with the companies they own throughout the year. Often, the only time a retail investor considers its investment in a company is when deciding how to vote on matters presented at a shareholders' meeting. The Proposed Amendments will disadvantage smaller, less sophisticated retail investors who may not appreciate the extreme nuances in proposals that would result from the Proposed Amendments if adopted. Retail investors will be left to wonder why they are being asked to vote on multiple proposals that appear to be asking them to vote in favor of the same thing, or why the proponent and management seem to be fighting over semantic differences in their proposal, counterproposal, statements of support, and statements of opposition.

This could lead to uninformed voting decisions, where retail investors cast votes at random because they are not sure how to evaluate each proposal. Perhaps even worse, the unnecessary confusion that would be created by the Proposed Amendments may further dampen retail proxy voting, which already is well below the participation rate for institutional investors.[46]

Because retail shareholders do not tend to directly engage with companies the way that institutional investors do, it may be tempting to conclude that they would benefit from the increased opportunity to provide feedback to companies if the Proposed Amendments are adopted and the number of Rule 14a-8 proposal grows further. However, the vast majority of retail shareholders rarely submit proposals themselves, and based on their voting patterns, it is fairly clear that the proposals being submitted do not align with most of these shareholders' priorities. Retail shareholders historically have voted less favorably on Rule 14a-8 proposals relative to the broader investor base.[47] Retail shareholders also have not supported ESG proposals to the same degree as other investors. Studies have shown that, when deciding whether or not to make an informed vote on a matter, retail voters will carefully consider whether the costs of active participation can be justified by the likely economic benefit associated with implementing a proposal.[48] As a result, retail investors are far less likely to utilize their corporate voting rights on shareholder proposals that are not aligned with a core investment priority to them. Therefore, any increase in shareholder proposals by special interest proponents—many of

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45 *See, e.g.*, Phil Mackintosh, "Who Counts as a Retail Investor," Nasdaq (Dec. 17, 2020), *available at* https://www.nasdaq.com/articles/who-counts-as-a-retail-investor-2020-12-17.

46 Retail investors voted 30% of their shares in 2021 (down from 33% in 2017), while institutions voted their shares at an 83% rate. *See* Broadridge-Pwc ProxyPulse, 2022 Proxy Season Preview, *available at* https://www.broadridge.com/proxypulse/_assets/docs/broadridge-proxypulse_2022-season-preview-and-2021-review.pdf

47 Alon Brav, Matthew Cain and Jonathon Zytnick, *Retail shareholder participation in the proxy process: Monitoring, engagement, and voting*, 144 J. FIN. ECON. 492 (2022).

48 *Id.*

whom have stated non-financial priorities—are likely to increase the disenfranchisement of retail investors.

III. The SEC's Recent Approach to Rule 14a-8 Has Introduced Uncertainty and Additional Costs to the Shareholder Proposal Framework

The Society's experience with SEC rulemaking has been that the Commission typically slowly and deliberately adjusts the standards for the substantive exclusions under Rule 14a-8 over time based on its observation and experience. Society members have sought to engage with the Division of Corporation Finance on 14a-8 annually for the last two decades. We note that the last three substantive amendments to Rule 14a-8 had been made in intervals of at least seven years (*i.e.*, in 1976, 1983, 1998, and 2020), as further described in Section I.A.

In the past year, however, the SEC has made two significant updates to the Rule 14a-8 shareholder proposal process. After the SEC adopted the previous amendments in November 2020, the Staff released SLB 14L in November 2021 without going through a rulemaking process and giving market participants an opportunity to comment.[49] Then, not even a year after the release of SLB 14L, the SEC released the Proposed Amendments in July 2022, which would, if adopted, effectively reverse the Commission's 2020 amendments to the "resubmission" exclusion mere months after they became effective.

This departure from the SEC's historically deliberate approach would reduce certainty, predictability, and transparency, which are the SEC's stated goals for the Proposed Amendments. Society members also are concerned that the SEC's recent approach to updating Rule 14a-8 has unnecessarily increased costs and complexity for companies and shareholders.

Therefore, while the Society believes that the Proposed Amendments should not be adopted at all, we believe even more strongly that the SEC should refrain from finalizing the Proposed Amendments so soon after it has adopted the 2020 changes to Rule 14a-8's resubmission standards. If the Commission intends to adopt the Proposed Amendments, we urge that it wait at least three proxy seasons after the effectiveness of the 2020 amendments so it can collect sufficient data and feedback to properly evaluate the costs, benefits, and need of further amendments to Rule 14a-8. Waiting at least three proxy seasons would also allow the Commission to receive feedback and data with respect to the impact of SLB 14L.

A. Reversal of recently adopted rules detracts from the SEC's stated goals of consistency and predictability.

In his comments at the Commission's open meeting in July 2022, Commissioner Mark Uyeda stated that the Proposed Amendments would "effectively nullify the 2020 amendments to the

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[49] The Staff did not hold its annual 14a-8 stakeholder meeting in 2021 to gather input feedback from companies before pursuing these significant policy changes. While the Covid-19 pandemic has made in-person meetings more challenging, the Commission could have held an online meeting.

resubmission exclusion and render this basis almost meaningless" because they would impose an overly strict standard for evaluating whether proposals are excludable as resubmissions.

The purpose of the 2020 amendments was to better align the interests of proponents with the majority of shareholders. For example, the SEC noted that it raised the resubmission thresholds to "distinguish between proposals that have a realistic prospect of obtaining broader or majority support in the near term and those that do not."[50] When proposing the 2020 amendments, the Commission sought comment on whether to amend the definition of "substantially the same subject matter," but ultimately decided not to change the standard.

Notably, while the 2020 amendments were data-driven,[51] the Commission fails to offer any plausible evidence of recent market developments that would justify its attempt to limit the "resubmission" exclusion now. Because the 2020 amendments only became effective for shareholder meetings from January 1, 2022, it is too early to tell what effect the 2020 amendments have had, or will have, on market participants' use of the "resubmission" exclusion. Further, as the Commission acknowledges in the Proposing Release, the "resubmission" exclusion is very rarely used by companies, making an amendment of the "resubmission" exclusion at this time even more unjustifiable.

B. Significantly changing the "ordinary business" and "economic relevance" standards without undertaking a rulemaking process is inconsistent with the SEC's stated goal of transparency.

SLB 14L rescinded prior guidance issued in 2017, 2018, and 2019 on the "ordinary business" and "economic relevance" exclusions under Rules 14a-8(i)(7) and (i)(5), respectively. While purporting to return to a historical approach, SLB 14L actually represents a significant shift in the Staff's previous approach with respect to these exclusionary bases. SLB 14L has been correlated with a meaningful decrease in the rate at which no-action requests—especially in connection with proposals on social/political topics—have been granted by the Staff on the basis of Rule 14a-8(i)(7).

SLB 14L was adopted as Staff guidance and not through the SEC's formal rulemaking process. Therefore, market participants did not have the opportunity to comment on the policy changes before they were adopted. While stating that the SEC is not proposing for the Proposed Amendments to cover the "ordinary business" exclusion, the Proposing Release instead states

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50 2020 Rules Adopting Release at 67.

51 *See, e.g.*, the 2020 Rules Adopting Release at 71 ("Based on our review of shareholder proposals that received a majority of the votes cast on a second or subsequent submission between 2011 and 2018, 95 percent received support greater than 15 percent on the second submission, and 100 percent received support greater than 25 percent on the third or subsequent submission.").

that the Commission reaffirms the "ordinary business" standard it articulated in 1998, citing a portion of the 1998 Adopting Release that most closely aligns with SLB 14L.[52]

We share concerns raised by Commissioner Hester Peirce during the Commission's open meeting in July 2022, that the reaffirmation, which is effective as of the issuance of the Proposed Amendments, might be intended to codify or otherwise give precedential weight to the Staff guidance in SLB 14L or related Staff guidance or no-action determinations. If so, the lack of a solicitation of public comments is troubling in light of the significant impact SLB 14L appears to have had on the Rule 14a-8 ecosystem.

1. The significantly lower likelihood of obtaining no-action relief, especially with respect to social and political proposals, has already had a notable impact on the engagement patterns between companies and their shareholders.

Since the release of SLB 14L, there has been a notable decrease in the rate at which the SEC Staff granted no-action relief, as shown in the table below: [53]

	Requests for H1/2021 that the Staff responded to (Nov. 3, 2020 and on)			Requests for H1/2022 that the Staff responded to (Nov. 3, 2021 and on)			YoY Change in % Granted
Proposal Category	Considered	Granted	% Granted	Considered	Granted	% Granted	
Environmental	15	7	47%	17	4	24%	(23%)
Social/Political	77	57	74%	85	26	31%	(43%)
Governance	68	48	71%	57	31	54%	(16%)
Compensation	14	9	64%	9	3	33%	(31%)
Total	**175**	**122**	**70%**	**168**	**64**	**38%**	**(32%)**

For no-action requests that the Staff responded to from November 3, 2021, onward, the Staff granted relief with respect to 38% of the requests, as compared to 70% for the comparable sample of requests one year prior. Although the decline was reflected across all types of Rule 14a-8 proposals, there was a particularly precipitous decline in the success rate of no-action requests relating to proposals on social/political topics.

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52 Proposing Release at 7. The SEC clarifies in a footnote the specific portions of the 1998 Adopting Release that are being reaffirmed, including that proposals relating to ordinary business matters but focusing on "sufficiently significant social policy issues" are generally not excludable under Rule 14a-8(i)(7).

53 The data discussed in this section is limited to no-action requests by companies in the S&P Composite 1500 with respect to proposals submitted for shareholder meetings in the first half of 2022 and 2021.

From November 3, 2021, onward, the Staff concurred with only 25% of requests based on the "ordinary business" exclusion under Rule 14a-8(i)(7) that it considered, compared to 64% during the same period in 2021 prior to the release of SLB 14L. The decrease in the Staff's concurrence on "ordinary business" exclusions was particularly notable for social/political proposals. The Staff granted only 14 of 49 such requests (29%), as compared with 30 of 42 such requests (71%) during the same period last year.

As discussed previously in Section I.B, the decrease in no-action relief correlated to a decreased willingness on the part of proponents to resolve their issues with companies through private engagement. As a result, more social/political proposals went to a vote than ever in H1 2022, increasing 72% over the same period in the prior year.

2. Proposals from "anti-ESG" proponents have been excluded at a higher rate than other social and political proposals since SLB 14L.

Although Society members observed a dramatic decrease in the likelihood of obtaining no-action relief since SLB 14L, our review of SEC no-action letters indicates that companies were more successful in excluding the proposals (including on "ordinary business" grounds) submitted by proponents who self-identify as politically conservative or "anti-ESG" during the 2022 proxy season. Companies obtained no-action relief in 50% of the instances where relief was requested on "anti-ESG" proponents' proposals (compared with a 38% success rate across all proposals). The delta further widened when considering only social/political proposals, where companies had a 50% success rate for excluding proposals from "anti-ESG" proponents as compared with 31% across all social/political proposals considered by the Staff.

While the Society doesn't endorse proposals from "anti-ESG" proponents, we are concerned about the Staff's higher rate of concurrence on these proposals. Among other things, this difference indicates that narrowing an exclusionary basis does not remove the possibility of subjective or inconsistent judgements on the part of the Staff. Because Rule 14a-8 proposals on corporations' ballots have a messaging impact—whether or not accurately—of signaling the priorities of investors to a company and the broader public, we are concerned that uneven grants of no-action relief, especially along ideological lines, could give companies, policymakers, and other stakeholders a skewed perception of those shareholder priorities.

Conclusion

For all of the reasons above, the Society believes the Proposed Amendments would be detrimental to U.S. companies and non-proponent shareholders. Specifically, we urge the Commission not to increase burdens on issuers; it should instead promote engagement between companies and proponents by allowing the "substantial implementation" exclusion to apply to situations where companies have met the essential objectives, rather than all of the essential elements, of the proposal. To avoid confusing shareholders and distracting management with similar (but in some cases, potentially conflicting) proposals on the same ballot, we urge the SEC not to adopt the proposed changes to the "duplication" exclusion. To increase predictability for companies and shareholders that have just started to comply with the 2020 amendments to Rule 14a-8, we ask the SEC not to adopt the proposed changes to the "resubmission" exclusion.

Finally, we urge the Commission to consider the low-quality and prescriptive proposals that proliferated during the 2022 proxy season and rescind SLB 14L as well.

Respectfully submitted,

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Vice President, Policy & Advocacy
Society for Corporate Governance

cc: Chair Gary Gensler
Commissioner Hester Peirce
Commissioner Caroline Crenshaw
Commissioner Mark Uyeda
Commissioner Jaime Lizárraga