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Re: Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8
Release No. 34-95267; IC-34647
File No. S7-20-22

Via email: rule-comments@sec.gov

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

Dear Ms. Countryman:

We are submitting this letter in response to the Commission's request for comments on its Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8 rule proposal set forth in the above-captioned proposing release (the "Proposing Release"). We appreciate the opportunity to comment on the proposed rules.

The Commission's stated intent with the proposed rules is to improve the shareholder proposal process by ensuring that public investors receive full and accurate information about the shareholder proposals that are submitted and have an opportunity to vote on such proposals. Additionally, the Commission notes that the proposed amendments seek to provide a clearer framework for the application of Rule 14a-8's substantive bases for the exclusion of proposals, thereby providing greater certainty and transparency to shareholders and companies.

We appreciate the Commission's efforts to improve the process by which shareholder proposals are considered for inclusion in proxy statements. In recent years, companies have actively engaged in shareholder outreach as a means to inform their governance, and we recognize that shareholder proposals often serve an important role in these efforts. We are concerned, however, that the proposed rules extend beyond the framework necessary to ensure that investors have accurate information and full participation in shareholder proposals and would instead have the effect of introducing additional costs, burdens and ultimately confusion into the application of Rule 14a-8 by leading to a significant increase in the number of prescriptive and detailed proposal resolutions.

Background

Fewer proposals are being excluded already with negative consequences, even without the proposed amendments. The 2022 proxy season serves as a useful basis to evaluate the impact of investors facing a record number of shareholder proposals up for vote, both as a result of an increase in the number of proposal submissions but also due to the meaningful decrease, compared to

historical levels, of the SEC Staff permitting shareholder proposals to be excluded from proxy statements due to the adoption of Staff Legal Bulletin 14L ("SLB 14L"). It is not surprising then that certain institutional investors have publicly expressed dismay over the proposals on proxy ballots this season as being poorly designed. In our view, the proposals included in 2022 proxy statements were more likely to be overly prescriptive in their mandates, include multiple errors and contain more generic claims and allegations aimed largely to provoke investor sentiment rather than spotlight company issues.

As BlackRock publicly stated, in 2022 there was a marked increase in environmental and social shareholder proposal of "varying quality" coming to vote and many were "more prescriptive and constraining on management than in prior years.[1] T. Rowe Price also observed that the increased number of proposals this year has led to lower "quality" and "more inaccuracies…more poorly targeted resolutions, and more proposals addressing non-core issues," along with "a marked increase in the level of prescriptive requests."[2]

We share the concerns expressed by these investors that this season's experience has shown that the proliferation of proposals results in numerous negative consequences. We have seen a noticeable shift from proposals that request companies disclose information to instead demand that companies take explicit actions. Many companies attempt to speak to the proponents of all proposals to work toward a negotiated solution that leads to withdrawals. Those discussions over the years have led to corporate changes that have been mutually beneficial to not only the proponents and companies, but also other shareholders. We believe that the proposed changes to Rule 14a-8 would undermine these efforts. This season, proponents were less willing to negotiate with companies once it became clear that the impact of SLB 14L would mean that fewer proposals would be excluded. The proposed amendments to Rule 14a-8 will only heighten and accelerate the risk that these trends, which result in costs and burdens to both companies and investors, will dominate, overwhelm and eventually overtake proxy ballots.

The proposed amendments are unnecessary in light of recent rule changes and the adoption of SLB 14L, and the duplication and resubmission rules in particular currently have limited impact already. Given Rule 14a-8 was recently amended in 2020, we believe it would be more helpful for a meaningful period of time to lapse in order to assess the effect of those 2020 changes before further amending these rules.

Notably, the risks expressed by some commenters that the amendments adopted in 2020 would reduce the total number of proposals have not occurred, as there seems to be no negative effect on the number of shareholder proposals submitted and voted on in the years following adoption of those changes. Instead, we have seen increases in both total submissions and on ballots. In addition, as reflected by the influence of SLB 14L, there is no need for additional Commission rules to

[1] See https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf.

[2] See https://www.troweprice.com/content/dam/trowecorp/Pdfs/ID0005320_2022_Aggregate_Proxy_Voting_Summary_Corp_Site_P7_FINAL.pdf.

render an impact on the exclusion of shareholder proposals, as the SEC Staff has long issued guidance that informs this process.

Requests for exclusion under Rule 14a-8(i)(11) and Rule 14a-8(i)(12) have in particular been measured and do not seem ripe for amendment. In the 2022 and 2021 proxy seasons, there were only 22 and 14 no-action requests that sought exclusion of shareholder proposals under Rule 14a-8(i)(11), respectively. Of these requests, only four were excluded pursuant to Rule 14a-8(i)(11) during each proxy season. We also found that Rule 14a-8(i)(12) has been used as an exclusionary basis for only five proposals in 2022 and only two proposals in 2021. It is clear that the existing standards represent an appropriate balance between the competing interests of preventing abuse by shareholder-proponents and avoiding the exclusion of proposals that have only a vague relation to an earlier proposal. Accordingly, the ability to have a proposal excluded under the current standard is already significantly restricted given the application of the existing analysis.

The proposed amendments would impose costs and burdens on all parties without resulting benefits by unduly incentivizing proponents to submit proposals that contain prescriptive and exacting mandates. We have found that in recent years shareholder proposals have already become more prescriptive, as multiple proponents with similar interests are vying to impose differing views on the same subject matters. While these differences may at times be relevant, our understanding is that having multiple proposals with respect to the same underlying subject matters have resulted in investor confusion, based on discussions between companies and investors during shareholder outreach. The limited amount of time any investor can devote to a particular company is increasingly consumed with discussions about proposals, and companies are finding themselves in the awkward position of having to explain the differences among the proposals on the same topics. The proposed Rule 14a-8 amendments would further encourage having multiple proposals on the same subject matters on the same ballot, even if such proposals are duplicative of proposals that have already been implemented, presented or submitted.

We recognize that not all companies currently receive shareholder proposals, but the cost and burden for those that do are fairly significant, especially for companies that make efforts to engage with the proponents to negotiate for common solutions. The economic analysis in the Proposing Release reviewed a historical period where each company in the S&P 500 index received an average of a single shareholder proposal each year, with five percent receiving more than four proposals.[3] First, the data on the total number of shareholder proposals submitted is unlikely to be accurate given such information is not publicly available, and in our experience is much higher than any available database reflects. In addition, the 2022 proxy season is not taken into account in the analysis. As various sources have recognized, this year record number of proposals were submitted and voted on. The proposed rules if adopted will lead to a higher increase than historical periods used in the economic analysis, both in the total number of companies receiving proposals, and more proposals

[3] See footnote 107 in the Proposing Release.

being submitted overall, as both trends occurred in 2022. Therefore, the economic analysis may not be as relevant in terms of understanding the potential costs.

The proposed changes would not result in consistent and predictable determinations for exclusion, as they encourage proponents to focus on minutiae and narrow points. The proposed amendment to Rule 14a-8(i)(10) is problematic due to the shift of the factual analysis to what constitutes "essential elements" of a proposal. Such determination heightens the potential for more prescriptive proposals being on ballots, as proposals with many precise, discrete and exacting requests would make it more unlikely that a company could implement all the "essential elements."

Similarly, the proposed amendments to Rule 14a-8(i)(11) and Rule 14a-8(i)(12) are also troublesome because of the degree of specificity that may be required for two shareholder proposals to be deemed substantially duplicative, as the second proposal must seek the same objective using the same means as the prior proposal. Given the myriad ways in which the means to accomplish an objective may differ, the proposed rules create the incentive for proponents to add multiple minor modifications to a proposal to avoid exclusion under these bases.

The proposed "essential elements" standard would not provide a clearer framework to determine whether a proposal may be excluded pursuant to Rule 14a-8(i)(10)

The Commission's proposed amendment to Rule 14a-8(i)(10) would allow a proposal to be excluded as substantially implemented "if the company has already implemented the essential elements of the proposal." While the Proposing Release indicates that the Commission's goal is to provide a less onerous and more reliable determination of whether the actions taken to implement a proposal are sufficient, the standard for the "determination of which elements of a proposal are essential under that framework would be guided by the degree of specificity of the proposal and of its stated primary objectives."

The focus on the specificity of the proposal is inappropriate, as it encourages and incentivizes proponents to add many distinct and detailed requirements to the request in a proposal in order to render it more likely that almost all of those elements would need to be implemented to meet Rule 14a-8(i)(10). More proposals may include multi-prong lists of factors, or multiple but slight deviations or modifications from actions that the company has already taken. This would cause the standard to become a quantitative, rather than qualitative, framework that obfuscates the core purpose of the proposal and ends up making that meaningless.

We recommend that the Commission make clear that "essential" means the most important component of the proposal, or at minimum adopt a limit of two or three elements that could be considered essential, and is not dependent on either meeting nearly all of the listed requests in the proposal, or being required to satisfy the exact means by which the key action requested in the proposal is sought to be implemented. A proposal to adopt simple majority voting standards in governing documents should be deemed substantially implemented if the company adopts such

standards, and not based on whether the standard is majority of votes cast or majority of votes outstanding[4]. Otherwise, the focus on "essential elements" fails to provide a standard that would improve the factual analysis and create consistent and predictable interpretations, which the Commission has stated is critical for its consideration of the proposed amendment.

The proposed amendment to Rule 14a-8(i)(11) and Rule 14a-8(i)(12) would encourage proposals that are substantially similar to be on the same ballots.

The proposed rules would permit exclusion on grounds of duplication and resubmission if the two proposals address the same subject matter and seeks the same objective by the same means. Requiring that the two proposals must have the same subject, the same objective and be accomplished by the same means would render both Rule 14a-8(i)(11) and Rule 14a-8(i)(12) essentially moot as the two proposals in question would need to be nearly identical.

The implementation of a standard that requires two proposals to have the same objective necessarily introduces vagueness and ambiguity into the determination rather than provide for balanced and predictable outcomes, and we are particularly concerned with respect to the potential interpretation of "same means." While a proposal to substantially reduce GHG emissions could be duplicative of a proposal to set GHG emissions reduction targets as having the same subject matter and same objective, there is an innumerable range of different processes to accomplish the goals of decreasing emissions. We do not believe it would be useful to induce proponents to describe overly prescriptive methods to accomplish the results requested by the second proposal.

We recommend that the Commission eliminate the requirement that the two proposals must have the "same means" with respect to assessing whether they are duplicative for 14a-8(i)(11) and was previously voted on under Rule 14a-8(i)(12), and at minimum clarify that "same" in this standard does not mean almost identical, to avoid restrictive interpretations. Even two proposals that are substantially similar in all respects, but where one describes a method of implementation while the other is simply silent, could be viewed as not having the "same means."

Such duplicative proposals would impose greater costs and burdens on companies by leading to situations where multiple proposals seeking the same outcome with minor differences end up on ballots, and on shareholders who need to parse through precise details in order to distinguish the two proposals. It would also effectively revert Rule 14a-8(i)(12) to the "substantially the same proposal" standard that was in place prior to 1983 that the Commission had rejected.

Below we respond to certain specific questions raised in the Proposing Release with respect to the proposed amendments to Rule 14a-8(i)(11) and Rule 14a-8(i)(12):

[4] Prior to 2022, such proposals were excluded on this basis as being substantially implemented.

- *Would the proposed amendment benefit shareholder-proponents and companies by promoting more consistent and predictable determinations regarding application of the duplication exclusion? What potential costs should we consider? Would the proposed amendment benefit shareholder-proponents and companies by promoting more consistent and predictable determinations regarding application of the resubmission exclusion? What potential costs should we consider?*

We do not believe that the proposed amendment would promote more consistent and predictable determinations regarding the duplication and resubmission bases for exclusion, given that proponents would be motivated to make slight changes to the second proposal that would then lead to specific fact-intensive analysis each time. Responding to two duplicative proposals by companies and shareholders, either through analysis, implementation or voting, would create substantial burdens.

- *Would the proposed amendment result in shareholder confusion or the inclusion and adoption of multiple contradictory proposals dealing with the same or similar issue? If so, what would be the implications for shareholders and companies? How would companies deal with any resulting implementation challenges? Are there potential measures we could consider to mitigate these impacts? For example, should we adopt a numerical limit on the number of shareholder proposals that address the same subject matter to be included in the proxy statement? If so, what numerical limit would be appropriate, how should such a limit be imposed, and what would be the anticipated costs of such an approach?*

Investors are already criticizing the surprising marked decrease in the number of shareholder proposals that were excluded and the subsequent increase in the number of proposals requiring their attention and votes. As noted above with reference to statements from BlackRock and T. Rowe Price, there have been an observable shift in what investors have characterized as the “quality” of the proposals. In our view, proposals increasingly contain errors, are more prescriptive and focus on narrower and discrete subject matters that are less likely to represent concerns broadly shared by most investors. We expect that the impact of SLB 14L means that proponents will be less willing to negotiate with companies in 2023 and future years, a trend that will be even more exacerbated if the rule amendments are adopted. For this reason and the reasons stated elsewhere in the letter as to the likely unintended consequences of adopting SLB 14L, we also urge that SLB 14L be rescinded or modified.

All of these issues impose costs and burdens on companies and investors. As simply one evidence of costs for both parties, it is our understanding that the experience of having multiple proposals covering the same subject matters in some companies’ proxy statement has led to investor frustration expressed during engagement meetings, as investors seem to expect that companies should bear the burden of explaining the differences among those proposals.

We agree that the Commission should consider a numerical limit on shareholder proposals that cover the same subject matter, and in fact, the Commission should evaluate whether there should be an overall limit on the number of proposals on the ballot. While it is not many companies currently

that receive a large amount of proposals, the consequences of SLB 14L, and the possible adoption of these amendments will almost certainly result in more companies receiving more proposals.

- *We anticipate that the proposed amendment would reduce the first-in-time advantage for the first shareholder to submit a proposal on a given topic. What is the impact of the first-in-time advantage on the ability of different shareholders to submit proposals addressing the same topic? Aside from a first-in-time standard, are there alternative objective standards that should be applied to determine which proposal(s) to exclude when a company has received proposals that are substantially duplicative under Rule 14a-8(i)(11), such as the number of shares owned or the number of co-proponents?*

Instead of a first-in-time advantage, we believe that the shareholder owning the most shares of the company at the time of submission should outweigh the race to meet the deadline.

* * *

The proposed amendments are inconsistent with the Commission's historical aim to avoid unnecessary demands on a company's resources when there is no benefit to the company's broader shareholder base. The amendments to Rule 14a-8 have been proposed at a time when companies are already receiving record numbers of shareholder proposals, and shareholders have expressed dissatisfaction with voting on a record number of proposals.

We appreciate the opportunity to participate in the Commission's rulemaking process, and would be pleased to discuss our comments or any questions that the Commission or its staff may have, which may be directed to Ning Chiu and Michael Schuster of this firm.

Very truly yours,

Davis Polk & Wardwell LLP