Sanford Lewis, Attorney

Via rule-comments@sec.gov

October 30, 2023

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

File Number S7-20-22

Dear Ms. Countryman:

I am writing to comment on the pending rulemaking entitled Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8. Although I understand that the comment period has ended, I wish to add additional evidence to the record for consideration by the Commission based on the 2023 proxy season. I am writing in my professional capacity as an attorney who advises proponents in the no action process. While I am also the general counsel and Director of the Shareholder Rights Group, the opinions submitted herein are my own and do not necessarily reflect the perspective of every member of the Shareholder Rights Group.

The 2022-2023 Staff movement from subjective to objective interpretive criteria for the shareholder proposal rule has increased program efficiency. The pending rule changes build on that efficiency, while correcting distorted incentives in the current rule.

Staff Legal Bulletin 14 L (issued in November 2021) provided more explicit guidance to issuers and proponents regarding the interpretation and application of the ordinary business and micromanagement rules. The bulletin revoked several prior Staff-created exclusion principles inconsistent with the Commission's rule. In 2023, issuers submitted 30% fewer no action requests than in the preceding year. But the portion of no action requests granted rose significantly from 29% in 2022 to 46% in 2023.

It stands to reason that the bulletin would lead to fewer requests. For the first time in decades, the new Staff guidance provides objective indicators to allow both proponents and issuers to assess whether a given proposal will withstand a challenge based on the ordinary business rule. With its predictable framework for proponents to draft compliant proposals, the bulletin has made the drafting process more predictable, making it less likely that proponents will file proposals subject to contest at the SEC. In my opinion, the reduction in unnecessary legal challenges is a good government initiative – it reduces unnecessary costs of the process for issuers, proponents, and SEC staff.

The proposed change to the substantial implementation rule would be another critical improvement for providing objective tests for Staff to apply, rather than the subjectivity that has gradually been integrated into Staff interpretations of the exclusion. Briefly reviewing the history of the exclusion, a 1983 rulemaking release by the Commission provided interpretive guidance that the mootness of a proposal should be judged by whether it is "substantially implemented,"

departing from the longstanding prior interpretation that would render a proposal moot only if it had been fully effectuated. Notably, the 1983 release acknowledged that such a new interpretation would “add more subjectivity to the application of the provision.”[1] Notwithstanding this interpretative change, Staff no-action decisions continued referencing “mootness” of the proposal when referring to the exclusion. In 1998, the Commission formally changed the language of the exclusion from “moot” to "substantially implemented" without providing any further guidance. This left it up to the Staff to evaluate whether or not a particular proposal was substantially implemented and to develop interpretive approaches. In the 2000s, the interpretive activities of Staff under the no action process led to two somewhat contradictory lines of decisions and precedents.

In some instances, the Staff looked to the proposal's guidelines, noting that a “determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal.” *Walgreen Co.* (Sept. 26, 2013); *Texaco, Inc*. (Mar. 6, 1991, recon. granted Mar. 28, 1991).

In other instances, however, the Staff began to articulate a separate and more problematic subjective criterion -- whether the issuer has satisfied the “essential objective” of a proposal, even if the company did not implement the proposal's elements. See, e.g., Salesforce.com, Inc. (Apr. 20, 2021); Apple Inc. (Dec. 17, 2020); Wal-Mart Stores, Inc. (Mar. 25, 2015); Entergy Corp. (Feb. 14, 2014); Duke Energy Corp. (Feb. 21, 2012); Exelon Corp. (Feb. 26, 2010).

This “essential objective” analysis became increasingly problematic, as the Staff analysis strayed way beyond the guidelines of a proposal sometimes to appear to merely inquire whether a company has published information on the general subject matter of the proposal, with seemingly little regard to the request made by the proposal.

The current rulemaking proposal also flagged a significant concern for investors related directly to the proposed rule changes – the relationship between the Commission’s 1998 guidance limiting the circumstances in which micromanagement would be found as against Staff interpretive guidance and precedents on substantial implementation. The relationship between micromanagement and substantial implementation has been a long-standing concern of investors and in recent years became a complicated “needle to thread.” As stated in the rulemaking proposal, page 13:

> Some shareholders also have expressed concerns about the difficulty of “threading the needle” when seeking to draft a proposal that does not “micro-manage” the company under Rule 14a-8(i)(7) but still provides sufficient specificity and direction to avoid exclusion as “substantially implemented” under Rule 14a-8(i)(10) when a company had not implemented its essential elements. [Footnotes deleted]

For instance, exclusions were allowed where the companies published some information that touched superficially on the topics of interest in the proposal without answering the core request.

[1] https://archives.federalregister.gov/issue_slice/1983/8/23/38214-38223.pdf#page=5

See e.g., *Exxon Mobil Corporation* (April 3, 2019, March 29, 2019), *Hess Corporation* (April 11, 2019).

Those precedents demonstrated a growing problem for investors. A broad interpretation of micromanagement required careful non-prescriptive wording, but then the non-prescriptive wording allowed the proposal to be found to be substantially implemented and the proponent's guidelines were not enforced by the Staff. The breadth of the wording supported the company's argument for exclusion based on "essential objectives".

We can see the tension between micromanagement and substantial implementation at play in the 2023 ruling in *Chubb Limited* (March 27, 2023), where the company challenged a proposal requesting target-setting and measurement of greenhouse gasses on both micromanagement and substantial implementation grounds.

In effect, the company Chubb applied two different exclusions to support their essential argument that the company viewed its existing activities as sufficient and not subject to investor engagement through the shareholder proposal process.

The substantial implementation argument asserted that the company's existing activities were sufficient and the micromanagement argument amounted to the idea that shareholders could not ask for further specific steps beyond what the company already did. We believe that the Staff correctly applied its granularity test to the proposal and found that the proposal did not micromanage:

> The Proposal requests the Company issue a report disclosing 1.5°C aligned medium and long-term greenhouse gas targets for its underwriting, insuring, and investment activities.
>
> We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal does not seek to micromanage the Company.

Failing to persuade the Staff that the requested action constituted micromanagement, Chubb's substantial implementation argument amounted to an assertion that regardless of what the proposal requested, <u>all that shareholders were entitled to seek was a level of action fulfilled by the company's existing reporting.</u>

Chubb essentially asked the Staff to look past the guidelines of the proposal, and to instead to conclude that the company's existing activities substantially implemented the proposal:

> Rule 14a-8(i)(10) requires a holistic analysis of a proposal's underlying concern and essential objective to determine if a company has substantially implemented a shareholder proposal submitted for inclusion in the company's proxy statement. While the Proposal's "Resolved" statement is overly prescriptive and micromanaging, the underlying concern and essential objective of the Proposal - from the first "whereas" clause through the last sentence - is for the Company to be aligned with "the Paris Agreement's 1.5 degrees Celsius (1.5°C) goal, which will require net zero greenhouse gas (GHG) emissions by 2050." Chubb has substantially implemented the underlying concern and essential

> objective of the Proposal, and also has two reports, one of which is updated annually, providing ample disclosure to the shareholders about the Company's commitment to, and methods for achieving, the net zero by 2050 goal. As Chubb explained in its Climate Change Policy:
>
> > Chubb recognizes its responsibility to encourage the transition to a net-zero carbon economy and we support the global goal of net-zero carbon emissions by 2050. Chubb has already taken significant actions to address climate change through a holistic effort across our business, including limitations on underwriting and investing in certain fossil fuel activities. (Climate Change Policy at page 2)
> >
> > There is no single path towards achieving the essential objective of the net zero by 2050 goal. The Proposal articulates one approach - setting medium and long-term GHG targets for underwriting, insuring, and investment activities. However, the Company already applies a holistic, fact-based strategy towards reaching the essential objective articulated by the Proposal. Details are provided below on five of the facets of the Company's climate strategy that address the Proposal's underlying concern and essential objective, and compare favorably with the guidelines of the Proposal: (1) public disclosure; (2) underwriting criteria; (3) expanded product and service offerings; (4) investments; and (5) methodology assessment.

We can see, therefore, that the two arguments regarding micromanagement and substantial implementation are part and parcel of the same argument by the company. In essence, their argument was that they had done as much as they felt that they needed to do to satisfy investor concerns and sought to bar further requests from shareholders on this topic.

Evaluating the essential purpose of a proposal in such an instance puts the Staff in an untenable position. Having determined that the ask is not micromanagement, I believe it is awkward and inappropriate for the Staff to turn around and say that while the proposal does not micromanage, its request can be fulfilled by activities that only satisfy the company's looser definition of the proposal's essential purpose and intent, though clearly failing to meet the explicit request of the proposal.

In my opinion, the proposed amendment on substantial implementation could bring interpretation of micromanagement and substantial implementation into integrity and alignment by allowing proposals to be filed that are not too prescriptive (micromanagement), and to align with that permissible request in determining whether the proposal is substantially implemented.

Proposed Amendments Revising Duplication and Resubmission Rules

The proposed rulemaking amendment would also revise the rules on duplication and resubmission to prevent a previously submitted proposal from being treated as preemptive of subsequent proposals when the prior submitted proposals had significantly different objectives. This rule change has become significantly more important this year.

The current exclusions under the duplication rule are based on whether the subsequently submitted proposal substantially duplicates the previously submitted proposal, and resubmissions are based on whether the subsequently submitted proposal addresses substantially the same subject matter as a proposal that received insufficient votes for resubmission in the applicable time period. In contrast, the new proposed rule would examine whether the proposal subsequently submitted addressed the same "subject matter, objectives, and means" as the previously submitted proposal. This enhances investor choice and prevents the rule from posing distorted incentives.

Proposals that address genuine issues of risk management for a company may nevertheless reflect divergent views of proponents. The proposed rule change speaking to different "objectives" of previously submitted proposals provides an important assurance against becoming a point of pressure for proponents with divergent perspectives to feel a need to be "first in line" to file on a particular subject matter.

The opportunity for proponents to file with divergent perspectives has been demonstrated in recent years and has demonstrated that such divergent proposals can be edifying rather than confusing for fellow shareholders and for Board and management.

To cite some recent examples:

- In 2022, Johnson & Johnson received two proposals related to racial equity, though the proposal background statements were diametrically opposed. One proposal requested a third-party racial equity audit and received 62.64% of shareholder support. The other proposal also requested a racial equity audit, but asserted that “anti-racist programs are themselves deeply racist.” This proposal received only 2.74% of shareholder support. This large variance in voting results is a good example of how the process works - investors were able to discern and choose between the two opposing perspectives.

- In 2023, a proposal filed at Home Depot asked the company to rescind the racial equity audit that resulted from a previous shareholder proposal supported by a majority (62.77%) of the company’s investors the year before. This year’s proposal received a mere 0.9% of support from shareholders. Shareholders reinforced their support for the company’s racial equity audit by soundly rejecting this "anti" proposal. Again, this is an example of the process functioning and reinforcing the guidance of investors.

As these examples demonstrate, divergent perspectives on proposals do not imply "general political or social debate" on the proxy. When broad public issues, like diversity or climate change, are directly relevant to a company's business, it is appropriate for proposals and divergent perspectives to be considered.[2]

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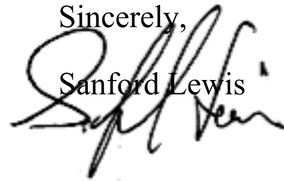
[2] The relevance rule ensures that only proposals that are "significantly related to the company's business" will be treated as nonexcludable, which means that a general request, for instance, for a company to make a public statement on an unrelated issue, is unlikely to survive the challenge.

To conclude, in my opinion, the proposed rule changes would ease current distortions concerning pressure to include too many specifics in a proposal and for proponents to race to file proposals ahead of others with divergent perspectives. The rule changes appear to be prudent and necessary to further refine the workings of the SEC shareholder proposal rule.

Sincerely,



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