INTERFAITH CENTER ON CORPORATE RESPONSIBILITY
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September 9, 2022

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

Re: "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8," Exchange Act Release No. 95267 (File No. S7-20-22)

Dear Secretary Countryman,

The Interfaith Center on Corporate Responsibility ("ICCR") appreciates the opportunity to comment on the changes to Rule 14a-8 ("Rule 14a-8" or the "Rule") proposed by the Securities and Exchange Commission (the "SEC" or "Commission"), in Exchange Act Release No. 95267 (the "Release"), "Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8" (the "Proposed Changes"). We are strongly supportive of the Proposed Changes.

ICCR members are a cross section of religious investors, pension funds, asset managers, endowments, and other long-term institutional investors collectively representing over $4 trillion in invested capital. ICCR members have over 50 years of experience in the shareholder resolution process, and their investor engagement has catalyzed valuable improvements in corporate accountability, transparency, and good governance. ICCR members filed 504 shareholder proposals for the 2022 proxy season on urgent issues such as climate change, human rights, racial justice, and corporate lobbying and political spending, earning 37 majority votes and leading to 175 withdrawals for settlement. The average shareholder vote for an ICCR member resolution for 2022 was 31.7%.[1]

We urge the Commission to adopt the Proposed Changes, which affect three of the substantive bases for exclusion under the Rule, because they would:

- Give shareholders the opportunity to communicate with corporate boards and management and with each other on a wider range of proposal formulations;

[1] For a full discussion of our work in the 2022 proxy season, see www.iccr.org/sites/default/files/page_attachments/iccrs_catalyzingcorporatechange_2022_final_08.10.22.pdf.

- Allow shareholders to vote on different approaches to an issue;
- Enable proponents to refine and shift strategies over time to address risk mitigation;
- Facilitate private ordering by increasing the likelihood that shareholders will have an opportunity to vote on compelling proposal formulations; and
- Enhance the predictability of the no-action process and, in so doing, make the process more efficient.

<u>Background</u>

Rule 14a-8 fulfills a critical function in public company corporate governance. Shareholder monitoring, which serves as a counterweight to the centralized power of the board and management, is impeded by the dispersed nature of share ownership. The Rule ameliorates this difficulty by providing a cost-effective avenue for shareholders to communicate with boards and management as well as with each other about critical issues of risk and concern, particularly related to long-term value and sustainability.

Engagement by ICCR members and other shareholders has served as a crucial "early warning system" for companies to identify emerging risks. The history of ICCR demonstrates literally hundreds of examples of companies changing their policies and practices in light of productive engagement with shareowners. Proponents have raised the alarm through proposals about many issues before they became mainstream concerns, including climate change, corporate political contributions and lobbying, and board diversity. ICCR members have a long-term investment horizon, which lends itself to identifying threats to sustainable value creation. ICCR members also engage broadly with corporations to address systemic risks that can negatively impact the broader investment portfolios of mainstream investors that have diversified holdings.

Although some companies will enter into dialogue without a proposal being filed, the threat of a proposal often motivates companies to engage with investors in good faith. For example, as noted above, during the 2022 proxy season ICCR members negotiated 175 commitments with companies, on a range of critical issues related to environmental and social risk and good governance, which were the result of the filing of a shareholder resolution and subsequent agreement to withdraw the filing.

The Commission acknowledges the value of the Rule's communication function, stating for example in a 1998 release that it would not raise the ownership threshold beyond $2,000 "in light of Rule 14a-8's goal of providing an avenue of communication for small investors."[2] The aggregation of shareholder preferences accomplished via proxy voting on shareholder proposals provides a clear signal to

[2] Exchange Act Release No. 40018 (May 21, 1998)

management and the board which is, as one author noted, "harder to overlook or misinterpret than stock market performance."[3]

Most of the reforms that are considered environmental, social, and governance ("ESG") best practices, including some that made their way into legislation and regulation, originated in shareholder proposals[4]. Examples include:

- Proposals addressing takeover defenses such as classified boards and poison pills, among the earliest to garner majority support, led to a large reduction in the deployment of those arrangements;
- Disclosure of political contributions and lobbying policies and expenditures;
- Executive compensation innovations such as limitations on severance payments and perquisites, say on pay, and performance-based stock options got their start in shareholder proposals; and
- Reporting on risks and opportunities related to climate change.

Abundant evidence supports the positive effect on firm value and corporate performance of superior ESG performance. Deutsche Asset & Wealth Management and researchers from the University of Hamburg surveyed the academic literature and found that 62.6% of meta-analyses showed a positive relationship between ESG and corporate financial performance.[5] A 2018 Bank of America study "found that firms with a better ESG record than their peers produced higher three-year returns, were more likely to become high-quality stocks, were less likely to have large price declines, and were less likely to go bankrupt.[6]

Benefits of engagement, which the Rule facilitates, have also been identified in studies. A 2018 study of global engagements primarily on environmental and social issues found that successful engagements led to higher sales growth and that successfully engaged firms with low ESG scores prior to engagement had statistically significant excess cumulative abnormal returns compared with similar non-engaged firms in the year following closure of the engagement. The study also found "no evidence that targets are negatively affected by the activism."[7] A study of corporate social responsibility engagements by a large institutional investor from 1999 to 2009 at U.S. public companies found that successful engagements were followed by positive abnormal returns.[8] A similar study by the same authors found increased profitability following successful engagements coordinated by the

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[3] Patrick J. Ryan, "Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy," 23 Ga. L. Rev. 97, 112 (1988) (https://heinonline.org/HOL/LandingPage?handle=hein.journals/geolr23&div=10&id=&page=)

[4] See https://corpgov.law.harvard.edu/2019/03/05/an-early-look-at-2019-us-shareholder-proposals/#more-116232

[5] Gunnar Friede et al., "ESG and Corporate Financial Performance: Mapping the Landscape," p.7 (Dec. 2015) (https://institutional.dws.com/content/_media/K15090_Academic_Insights_UK_EMEA_RZ_Online_151201_Final_(2).pdf)

[6] Robert G. Eccles & Svetlana Klimenko, "The Investor Revolution," *Harvard Business Review*, May-June 2019 (https://hbr.org/2019/05/the-investor-revolution)

[7] Tamas Barko et al., "Shareholder Engagement on Environmental, Social, and Governance Performance" (Sept. 2018) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977219)

[8] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154724

Principles for Responsible Investment between 2007 and 2017.[9] In another study, which used a private data set provided by a large fund manager, researchers concluded that the manager's outperformance of benchmarks was due primarily to engagements rather than security selection.[10]

The Release acknowledges all of these benefits of the shareholder proposal process. It states, "A shareholder proposal could improve a company's performance because it could motivate a value-enhancing corporate policy change, limit insiders' entrenchment, and provide management with information about the views of shareholders."[11] (footnotes omitted) The Release's cost-benefit analysis does not reflect the value of reforms achieved through the proposal process, citing "methodological and empirical challenges,"[12] but the academic research referenced above and ICCR members' long experience provide a sound basis for concluding that shareholder proposals often catalyze value-enhancing reforms.

The Proposed Changes Would Promote Communication, Encourage Innovation and Refinement of Strategies, Facilitate Private Ordering, and Increase the Predictability and Efficiency of the No-Action Process

Despite the value of the shareholder proposal process, Staff interpretations have at times unduly limited proponents' ability to place their proposals on company proxy statements. The Proposed Changes would reverse interpretations of three of the Rule's substantive bases for exclusion: substantial implementation (Rule 14a-8(i)(10)), substantial duplication (Rule 14a-8(i)(11)), and resubmission (Rule 14a-8(i)(12)) that have stymied proponents. The Proposed Changes would better support the purposes of the Rule by giving shareholders more opportunities to express their views on proposed ESG reforms, including competing approaches and refinements over time. Increasing the likelihood of proponents identifying approaches with wide appeal would facilitate private ordering. And shifting the Staff's focus to the proposals' specific requests, rather than more amorphous and subjective inquiries, would make the no-action process more predictable and efficient.

Substantial Implementation

Under Rule 14a-8(i)(10), a company may exclude a proposal that has been "substantially implemented." The exclusion aims to "avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management."[13] In analyzing substantial implementation, which the

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9 https://www.unpri.org/download?ac=5545, at 14-15.

10 https://www.researchgate.net/publication/227351566_Returns_to_Shareholder_Activism_Evidence_from_A_Clinical_Study_of_the_Hermes_UK_Focus_Fund

11 Release, at 49.

12 Release, at 50

13 "Proposals by Security Holders," Exchange Act Release No. 12598 (July 7, 1976).

Rule does not define, the Staff has determined whether a company's policies or disclosures "compare favorably" with the guidelines of the proposal and whether the company has "addressed a proposal's underlying concerns" or satisfied the proposal's "essential objectives."

These standards are quite subjective, inviting companies to frame concerns and objectives in ways that ensure that companies' existing policies or disclosures suffice. This focus on concerns and objectives allows companies and the Staff to ignore or de-emphasize the actual request(s) set forth in proposals' resolved clauses and magnify material from the supporting statement, which can distort the substance of the proposal.

This overbroad approach can result in exclusion even when the company has failed to implement one or more key parts of a proposal and the proponent has explained the value of the missing elements. The determination in Wendy's[14] provides an example of this phenomenon. The proposal asked the company to disclose information regarding its processes for identifying potential and actual human rights risks of its operations and supply chain. Wendy's argued that its Supplier Code of Conduct, Code of Business Ethics and proxy statement substantially implemented the proposal. The proponent urged that Wendy's disclosures did not describe a process for identifying potential human rights violations and included only about half the information relating to actual violations. The proponent also explained that identification of potential violations was crucial to identifying risks and preventing actual violations.

Similarly, in Coca-Cola,[15] the proposal requested that the board prepare a report on how the company is responding to public policy challenges associated with BPA [bisphenol A], including summarizing what the company is doing to maintain its position of leadership and public trust on this issue, its role in adopting or encouraging development of alternatives to BPA in can linings and any material risks to the company's market share or reputation in continuing to use BPA. The company successfully argued that it had substantially implemented the proposal, despite the proponents' protestations that the company's report did not mention any legislative or regulatory initiative involving BPA, cite a single concern, or cite a "single scientific study indicating that [BPA] presents any health risks, despite the fact that the President's Cancer Panel, the U.S. Department of Health and Human Services, the AMA, the Endocrine Society, the WHO/FAO study cited by the Company, and other, have all stated they have concerns."

The Proposed Changes would permit omission on substantial implementation grounds only if the company has "already implemented the essential elements of the proposal." This standard would benefit shareholders and the shareholder proposal

[14] The Wendy's Company (Apr. 10, 2019).
[15] The Coca-Cola Company (Jan. 25, 2012, recon. denied, Feb. 29, 2012).

process by focusing not on vague concerns, which are vulnerable to manipulation, but instead on the specific actions a proposal requests. Analyzing implementation of concrete elements would increase the predictability of the no-action process, to the benefit of companies and proponents. Greater predictability may reduce the number of no-action requests companies file because companies would be less apt to take their shot at recharacterizing the proposal. The standard in the Proposed Changes would boost communication by allowing shareholders to express their view on the adequacy of any steps the company has already taken in relation to a proposal's subject.

Substantial Duplication

Rule 14a-8(i)(11) allows exclusion of a proposal that "substantially duplicates" an earlier-received proposal that will be included in the company's proxy statement. The Rule does not define substantial duplication; the Commission explained when it formally adopted the duplication exclusion in 1976 that "[t]he purpose of the provision is to eliminate the possibility of shareholders having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other." Considering such "redundant" proposals, the Commission stated, would serve "no useful purpose."[16]

Currently, the Staff decides whether a proposal substantially duplicates a proposal that was submitted first by determining whether the proposals have the same "principal thrust or focus." This subjective approach encourages companies to describe proposals' objectives in vague terms, which can involve ignoring or glossing over specific requests in the resolved clause and according too much importance to language in the supporting statement. According to the Release, "delineating the principal thrust or focus too broadly or too narrowly can lead to under- or over-inclusion of shareholder proposals, respectively."[17]

Political contributions and lobbying disclosure proposals illustrate the pitfalls of this approach. For many years, proponents have filed proposals seeking disclosure of companies' political contributions, including those made indirectly through trade associations. Political contributions involve candidates, parties, and committees—basically, election-related spending--and are not used for lobbying or other kinds of public policy advocacy. Later, proponents began filing proposals asking companies to disclose their spending on direct and indirect lobbying activities. Companies claimed these proposals substantially duplicated one another. In Exxon Mobil,[18] the company successfully argued that a political contributions disclosure proposal

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[16] Exchange Act Release No. 12999 (Nov. 22, 1976).

[17] Release, at 18.

[18] Exxon Mobil Corp. (Mar. 9, 2017); see also WellPoint, Inc. (Feb. 20, 2013); AT&T Inc. (Mar. 1, 2012), JPMorgan Chase & Co. (Feb. 24, 2012); Johnson & Johnson (Feb. 23, 2012); Occidental Petroleum Corp. (Feb. 25, 2011); Union Pacific (Feb. 1, 2012, recon. denied Mar. 30, 2012).

substantially duplicated one on lobbying because they had a shared thrust or focus of "spending in the political arena." The proponent had presented evidence that regulators, institutional investors, proxy advisors, and others treated political spending and lobbying as distinct activities. To avoid exclusion, some proponents began inserting disclaimers along the lines of "This proposal does not encompass lobbying spending" in a political contributions proposal.[19]

The Rule's current approach gives rise to a race to file first and can elevate a proposal about which shareholders are less supportive than the excluded proposal. The Release provides an excellent example of this problem. Pfizer received two proposals addressing disclosure of the company's political spending and lobbying: The one received first asked Pfizer to publish its political contributions and lobbying expenditures in two national newspapers and nine newspapers in selected U.S. cities; the later-received proposal asked for an annual report on the company's process for identifying and prioritizing public policy advocacy activities. The Staff allowed exclusion of the later-received proposal as substantially duplicative, although the specific actions requested differed significantly.

Holders of only 3.8% of shares voted at the AGM supported the newspaper disclosure proposal,[20] far below the 23.5% average for other kinds of political contributions disclosure proposals[21] and the 21.4% average for more standard lobbying disclosure proposals on which shareholders voted that year.[22] Shareholders may have viewed disclosure in newspapers as less useful than disclosure in a report that would likely be made available on the company's website. As well, shareholders could have viewed the expense of placing ads in major newspapers as excessive, compared with the cost of producing a website report. Not only were Pfizer shareholders deprived of the opportunity to express their views on these competing approaches; the low vote on the newspaper disclosure proposal might have led Pfizer's board and management to conclude that the company's shareholders did not support increased political and lobbying disclosure by Pfizer. Subsequent events showed that was not the case: Holders of 47.2% of the shares supported a 2021 proposal requesting disclosure of Pfizer's political contributions.[23]

The Proposed Changes would provide that proposals are substantially duplicative if they address the same subject matter and seek the same objective by the same

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[19] See, e.g., ExxonMobil Corp. (Apr. 2, 2019) (Unitarian Universalist Association).
[20] https://www.sec.gov/Archives/edgar/data/0000078003/000007800312000004/pf8k426v.htm. The newspaper disclosure proposal had achieved a nearly identical vote at Pfizer the year before. (https://www.sec.gov/Archives/edgar/data/0000078003/000007800311000004/pf8k428v.htm)
[21] This figure was arrived at by averaging the votes reported in the 2012 Georgeson Annual Corporate Governance review in the "Report on Political Contributions" category, after removing the nine votes that were erroneously included in this category because the proposals requested either a shareholder vote or prohibition on political contributions. (The ACGR maintains separate categories for proposals requesting such a vote or prohibition.)
[22] This figure was arrived at by averaging the votes reported in the 2012 Georgeson Annual Corporate Governance review in the "Report on Lobbying" category.
[23] https://www.sec.gov/ix?doc=/Archives/edgar/data/0000078003/000007800321000059/pfe-20210422.htm

means. The lobbying and political contributions disclosure proposals discussed above would not likely be deemed substantially duplicative using this standard, given the differing subject matters. Including both proposals on the proxy would allow shareholders to vote on competing approaches, which would enrich the communication between shareholders and the board and management. Where proposals differ as to subject matter, objective, or means, it is not the case that "no useful purpose" would be served by permitting shareholders to vote on both of them. Allowing shareholders to express their views on competing approaches would expedite the process of identifying a formulation with broad shareholder support and increase the likelihood of achieving a value-enhancing solution.

The shareholder proposal process would be improved if proponents did not race to file their proposal first. Proposals filed far in advance of the submission deadline—which is itself already far in advance of the annual meeting—may include outdated information. In addition, the first-to-file approach penalizes proponents who seek to engage with the company prior to filing in the hopes of reaching agreement.

Resubmission

Rule 14a-8(i)(12) provides that a proposal addressing "substantially the same subject matter" as a proposal that has been voted on in the last five years and failed to reach the applicable resubmission threshold can be omitted. The Rule does not define "substantially the same" or "subject matter." The higher resubmission thresholds imposed by the Commission's 2020 rulemaking, which are the subject of litigation by ICCR and others, raise the stakes in applying those terms.

The resubmission exclusion was adopted "to relieve the management of the necessity of including proposals which have been previously submitted to security holders without evoking any substantial security holder interest therein."[24] Proponents making "subtle changes" to a proposal from one year to the next led the Commission to change its "same proposal" standard in 1983 to substantially the same subject matter.

The current standard has been interpreted in an overbroad way and frustrates the communication the Rule is intended to promote. It also does not reflect the way proponents engage in the shareholder proposal process. Typically, a proponent identifies a problem and suggests a solution in proposal form. The proponent then receives feedback from other shareholders through the proxy voting process. Weak support would spur the proponent to try to understand whether shareholders did not perceive a problem at the company or whether they disagreed with the suggested solution. Upon learning that other shareholders concurred in its identification of a problem, the proponent could suggest a different formulation in a follow-up proposal.

[24] Notice of Proposal to Amend Proxy Rules, Exchange Act Release No. 4114 (July 6, 1948)

As with the substantial implementation and substantial duplication inquiries, the Staff's analytical approach to the substantially the same subject matter standard has sometimes been overbroad, conflating proposals that request different actions. For example, in Wal-Mart Stores,[25] the Staff concurred with the company that it could exclude a proposal asking Wal-Mart's board to report to shareholders on the company's process for identifying and analyzing potential and actual human rights risks of Wal-Mart's operations and supply chain ("human rights due diligence"). Wal-Mart argued that the proposal addressed substantially the same subject matter as a proposal asking it to require its suppliers to publish an annual sustainability report, which had failed to reach the resubmission threshold. Wal-Mart argued that the proposals addressed substantially the same subject matter of "the measurement, prevention and reporting of human rights issues in the Company's supply chain" because they "express similar "substantive concerns" regarding the measurement, prevention and reporting of human rights issues." The proponents pointed out that the human rights due diligence proposal requested that Wal-Mart issue a report, while the previous proposal asked Wal-Mart to press its suppliers into issuing their own reports. Further, Wal-Mart's suppliers could be expected to do business with companies other than Wal-Mart; as a result, their reports would contain information not relevant to Wal-Mart.

The Proposed Changes would allow exclusion when a proposal substantially duplicates a proposal that did not reach the resubmission threshold. This standard would facilitate refinement of an approach over time and identification of an approach that could garner significant shareholder support. It would also better foster communication between and among shareholders and with boards and management. Meaningful differences in voting results for different approaches—like those seen in the Pfizer proposals discussed above—support the contention that new approaches should generally be viewed as addressing different subject matter. The new standard would enable ICCR members and other investors to persist in trying to engage companies on a critical issue using a new approach, even after an initial effort has obtained low shareholder support.

<u>Conclusion</u>

The Commission should adopt the Proposed Changes, which ICCR strongly supports. They remedy overbroad interpretations of three substantive bases for exclusion and focus on the specific actions requested from a company, which is more straightforward and therefore easier for the Staff to apply. The Proposed Changes would strengthen communication between shareholders and boards/managements and among shareholders, increase predictability, and facilitate private ordering.

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[25] Wal-Mart Stores, Inc. (Mar. 27, 2013).

The Proposed Changes are consistent with the Commission's objectives in rulemaking to protect investors and promote efficiency.[26]

We appreciate this opportunity to provide our views to the Commission on this important matter. Please feel free to contact me at jzinner@iccr.org with any questions.

Sincerely,

Josh Zinner
CEO

[26] Release, at 30 & n.68.