Via rule-comments@sec.gov

October 25, 2023

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

File Number S7-20-22

In support of proposed rule changes on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8

Dear Ms. Countryman:

The undersigned investors, fiduciaries and organizations are writing in support of the pending rulemaking entitled *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8.* While the formal comment period has ended, we want to add to the public docket some important information that emerged after the comment period closed. Our experiences of the 2023 proxy season amplify the propriety of, and need for, the proposed rule changes.

1. The existing substantial implementation rule provides distorted incentives for proposals to be overly specific. The proposed rule change could rectify this to allow an option for more general proposals.

We support the proposed changes related to the substantially implemented exclusion, Rule 14a-8(i)(10). Currently, the "essential objectives" mode of Staff interpretation allows a company to exclude a proposal when it claims to have implemented the proposal's core objectives, even if the proposal's guidelines are clearly not met. Such an analysis requires Staff to make highly subjective conclusions about a proposal's core objectives, amplifying unpredictability and inconsistency in the no-action process. In contrast, the proposed rule change would analyze substantial implementation based on whether the company's activities met the "essential elements" of the proposal. We believe that such a rule change will render a more transparent, objective, and efficient shareholder proposal drafting and exclusion process.

Focusing review on whether the essential elements of a proposal have been met by company actions also allows proponents to file less prescriptive proposals, suggesting changes to

companies' existing practices with fewer details that might otherwise be left to the board and management's discretion. This approach may also win greater voting support. The current substantial implementation rule incentivizes specificity in drafting to preempt issuer no action requests asserting that the essential objectives are met. In our experience, proponents drafting proposals in recent years have had to navigate an increasingly hazardous and narrow window for proposal drafting, between micromanagement (proposals being overly specific) and substantial implementation (proposals being so broad that even minimal company actions touching upon the shareholder's concerns are deemed to have implemented the proposal).

Many shareholder proposals essentially ask a company to go beyond current efforts, step up the pace or scale of action, or redirect strategy. Yet proposals that simply ask for a company to do more are likely to be met with a substantial implementation exclusion if the company argues that it is in some way tackling the broader issue. To the extent that a shareholder proposal requests action at a level of simplicity and breadth, e.g., "disclose a plan to go beyond current actions to address climate transition risk," the current substantial implementation rule provides the issuer with the opportunity to claim, sometimes successfully, that the company has implemented the "essential purpose" of the proposal, because it is **more or less heading in the direction requested by the proposal**. To avoid vulnerability of a proposal to a substantial implementation challenge under this precept, proponents are incentivized to integrate crucial specifics that the company is not doing into the resolved clause. This prevents the "essential objective" exclusion by providing a core action that the company has not taken, but also means integration of specifics that are sometimes interpreted by the SEC Staff or market actors as "micromanagement."

Despite the possibility that a company may be undertaking an activity (e.g., quantifying Scope 3 greenhouse gas emissions, reducing carbon footprint, encouraging workforce diversity, etc.) at a certain level or pace, it is highly appropriate for shareholders to be able to vote on an advisory proposal that encourages the issuer to go beyond the current activities, while providing examples in the background or supporting statement of the proposal of peer activity and benchmarks that provide clarity on the perceived shortcomings of current efforts, such as appropriate information disclosures, performance metrics, or targets.

We believe the purpose of the shareholder proposal rule will be better served by providing investors with the option of writing a broadly phrased request asking the company to go beyond its current efforts and do more with respect to a specific issue. The proposed change to the substantial implementation exclusion can effectuate this option if the Commission clarifies that the request to "go beyond" can itself be an essential element. This would serve the purposes of the shareholder proposal process in allowing investors to signify where they believe the company needs to strengthen its strategy and implementation.

As an example of how this might apply to prior proposals, in 2023, the SEC Staff allowed

Amazon.com, Inc. to exclude a proposal requesting measurement and disclosure of Scope 3 emissions for the company's full supply chain, including a request to disclose specific and substantial categories of Scope 3 emissions that Amazon was not disclosing. The Staff concluded that the proposal micromanaged. Under the proposed substantial implementation rule change, the proponent could avoid exclusion by instead providing background information in the "whereas" clauses and supporting statement regarding the shortcomings of Amazon's Scope 3 approach, while the resolved clause could simply request that the issuer take action beyond current actions and plans to calculate and disclose Scope 3 emissions. As long as the proponents can have confidence that this request to "go beyond" will be treated as an essential element, the specifics could be reserved to background, allowing management discretion, rather than being part of the focused ask.

2. The proposed rule changes on duplication and resubmission would alleviate a legally imposed "race to the proxy" by proponents with divergent perspectives, and allow investor choice on meaningful options for response to significant issues facing the company.

In its existing form, the duplication rule has the unintended consequence of encouraging proponents to file proposals prematurely to secure a "first in time" filing status against other proposals that substantially duplicate their proposal but with divergent or opposing perspectives. Similarly, the current resubmission rule can allow a previously voted proposal that received minimal voting support to block a subsequent proposal on "substantially the same subject matter" that would take an opposite perspective and likely receive much greater voting support.

Accordingly, the proposed rule changes on resubmission and duplication can alleviate a legally imposed race to the proxy by proponents with divergent perspectives.

Instead, the proposed rule change would evaluate exclusion of a subsequently submitted proposal based on whether the later submitted proposal addresses *the same subject matter with the same objectives and the same means*. We believe this approach would represent an important refinement of the rules to prevent distorted incentives.

In addition to the current incentive for proponents to secure their slot on the proxy against proposals with divergent perspectives, the current rules may even allow or encourage some investors or investor representatives to "game the system" by filing proposals that they know will not receive voting support with the primary intent of obstructing proposals with an opposing view on the same topic. In a March 2023 article in the publication Responsible Investor,[1] Scott Shepard, a fellow at the National Center on Public Policy Research ("NCPPR"),

[1] Paul Verney, 'Anti-ESG proposals' up 60 percent this year, despite low support in 2022", Responsible Investor, (March 27, 2023) accessible at:
https://www.responsible-investor.com/anti-esg-proposals-up-60-percent-this-year-despite-low-support-in-2022/#:~:text=News%20%26%20Analysis-,'Anti%2DESG%20proposals'%20up%2060%20percent%20this%20year%2C,NCPPR%20about%20the%20group's%20strategy

referred to this strategy as "blocking proposals."

The incentive for a race to the proxy implied by the current rules has the distorting impact of potentially encouraging proponents to file proposals prematurely, where ongoing engagement with the issuer may resolve the investor concerns without filing a proposal. These idiosyncrasies of the current Rule 14a-8(i)(11) and Rule 14a-8(i)(12) incentivize early filing before engagements are given needed time.

As the Commission noted in promulgating recent amendments to 13-D and 13-G, the Commission's rules should not "complicate shareholders' ability to independently and freely express their views and ideas to one another." As such, the shareholder proposal process should be robust and fair in accommodating divergent perspectives, short term and long-term investors, as well as supporters and opponents of action on topics like climate change or diversity.

Along the same lines, the focus on whether proposals subsequently submitted utilize "different means" is a compelling analytical framework as well, because proposals addressing the same subject matter through different means will enhance shareholder voting options. For example, on a given issue, different proposals might request different courses of action such as an independent audit, a report of the board, or establishment of targets benchmarked to an external voluntary standard. It enriches shareholder voice and choice to allow a vote on which approaches may better mitigate related investment risks. Based on such voting outcomes, board and management will also gain richer insights into shareholder perspectives.

3. The proposed rule changes regarding duplicative proposals should allow proponents to evaluate duplication claims prior to no-action requests.

In contrast to settings in which proponents with *divergent* perspectives may compete for a single proposal slot on a subject matter, in other instances multiple proponents with *aligned* perspectives may unwittingly file similar proposals. This possibility can best be addressed through a simple revision to the proposed rule under which the company receiving purportedly duplicative proposals should be required to represent in any no-action request raising a Rule 14a–8(i)(11) challenge that it gave notice to the proponents of the allegedly duplicative proposals (including filer contact information) reasonably far in advance, before filing a no-action request. For example, this requirement could be part of the Rule 14a-8(c) deficiency notice process. After receiving such a notice, the proponents would have the opportunity to confer and determine whether one or more of the proposals should be withdrawn to allow a more focused shareholder vote. Such a requirement would make the process more efficient by potentially reducing the cost and number of instances in which issuers need to pursue a no-action challenge.

Conclusion

We appreciate the Commission's and Staff's continued efforts to create a fairer and more

efficiently functioning shareholder proposal process. The shareholder proposal rule is a keystone of corporate governance, allowing investors to identify and vote on which issues they see as pivotal to the company's future and to their interest as investors, as well as guiding America's public corporations to fitness in a future that is ever changing.

Recent guidance from the SEC staff in Staff Legal Bulletin 14L (SLB 14L) provided much needed clarity on ordinary business and micromanagement rules, so that both issuers and proponents know whether a proposal is likely to survive an exclusion challenge. This has eased the drafting process and discouraged companies from filing no-action challenges on subjective and philosophical arguments regarding ordinary business that have no grounding in the Commission's rules.

The impact of SLB 14L on no-action requests has been commendable and efficient, with a 30% drop in no-action requests in 2023, but a significant increase in the proportion of no-action requests granted, from 29% in 2022 to 46% in 2023. To us, these metrics are indicative of a more cost-efficient process, saving both issuers and proponents costs related to the no-action process.

The current proposed rule changes can provide further cost efficiencies, eliminate subjectivity of staff decision-making, and avoid SEC interference with a proxy process that is robust and functional in facilitating shareholder communications and engagement.

Sincerely,

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Aquinas Associates
Arjuna Capital
As You Sow
Boston Common Asset Management
Ceres
Communications Workers of America
Dana Investment Advisors
The Episcopal Church
Everence Financial and the Praxis Mutual Funds
Figure 8 Investment Strategies
For the Long Term
Friends Fiduciary Corporation
Goosewing Partners
Green America Endowment
Green Century Capital Management
Harrington Investments, Inc.

Impax Asset Management
Interfaith Center on Corporate Responsibility
Investor Advocates for Social Justice
James McRitchie, Shareholder Advocate Corporate Governance | CorpGov.net
John Chevedden
Maryknoll Sisters
Mercy Investment Services
Miller/Howard Investments
Natural Investments
NEI Investments | Aviso Wealth
Newground Social Investment
NorthStar Asset Management, Inc.
Northwest Coalition for Responsible Investment (NWCRI)
Open Mic
Province of Saint Joseph of the Capuchin Order, Corporate Responsibility Office
Region VI Coalition for Responsible Investment
Segal Marco
The Shareholder Commons
Shareholder Rights Group
SHARE — the Shareholder Association for Research and Education
Sisters of Charity of Saint Elizabeth
Sisters of the Humility of Mary
Socially Responsible Investment Coalition, San Antonio, TX
SOC Investment Group
Trillium Asset Management
Trinity Health
Tulipshare, Sustainable Investment Fund
Zevin Asset Management