SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-95267; IC-34647; File No. S7-20-22]

RIN 3235-AM91

Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing to update certain substantive bases for exclusion of shareholder proposals under the Commission's shareholder proposal rule. The proposed amendments would amend the substantial implementation exclusion to specify that a proposal may be excluded if the company has already implemented the essential elements of the proposal. We also propose to specify when a proposal substantially duplicates another proposal for purposes of the duplication exclusion. In addition, we propose to amend the resubmission exclusion to provide that a proposal constitutes a resubmission if it substantially duplicates another proposal. Under the proposed amendments, for purposes of both the duplication exclusion and the resubmission exclusion, a proposal would substantially duplicate another proposal if it addresses the same subject matter and seeks the same objective by the same means.

DATES: Comments should be received on or before September 12, 2022.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form (https://www.sec.gov/rules/submitcomments.htm); or

- Send an email to rule-comments@sec.gov. Please include File Number S7-20-22 on the subject line.

Paper comments:

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

All submissions should refer to File Number S7-20-22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (https://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Kasey Robinson, Special Counsel, Office of Chief Counsel, at (202) 551-3500, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment amendments to 17 CFR 240.14a-8 ("Rule 14a-8") under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] ("Exchange Act").

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I. INTRODUCTION

Exchange Act Rule 14a-8 requires companies that are subject to the federal proxy rules[1] to include shareholder proposals in their proxy statements to shareholders, subject to certain procedural and substantive requirements.[2] The rule is intended to facilitate shareholders' right under state law to present their own proposals at a company's meeting of shareholders and the ability of all shareholders to consider and vote on such proposals.[3]

Under Rule 14a-8, a company must include a shareholder's proposal in the company's proxy materials unless the proposal fails to satisfy any of several specified substantive requirements or the proposal or shareholder-proponent does not satisfy certain eligibility or procedural requirements. Companies and shareholder-proponents do not always agree on the application of these requirements. If a company intends to exclude a shareholder proposal from

[1] This generally includes issuers with a class of securities registered under Section 12 of the Exchange Act and issuers that are registered under the Investment Company Act of 1940 ("Investment Company Act"). Foreign private issuers are exempt from the federal proxy rules. See 17 CFR 240.3a12-3(b). In addition, debt securities registered under Section 12(b) are exempt from the federal proxy rules, with some exceptions. See 17 CFR 240.3a12-11(b).

[2] 17 CFR 240.14a-8. Unless otherwise noted, references to "shareholder proposal," "shareholder proposals," "proposal," or "proposals" refer to submissions made in reliance on Rule 14a-8.

[3] See, e.g., Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Release No. 34-87458 (Nov. 5, 2019) [84 FR 66458 (Dec. 4, 2019)] ("2019 Proposing Release") ("The rule . . . facilitates shareholders' traditional ability under state law to present their own proposals for consideration at a company's annual or special meeting, and it facilitates the ability of all shareholders to consider and vote on such proposals."); Alan Palmiter & Frank Partnoy, Corporations: A Contemporary Approach 482 (1st ed. 2010) ("The shareholder proposal rule is a federal mechanism to facilitate state-created shareholder voting rights").

its proxy materials, it is required under Rule 14a-8(j)(1) to "file its reasons" for doing so with the Commission.[4] These notifications are generally submitted in the form of no-action requests, with companies seeking the staff's concurrence that they may exclude a shareholder proposal under one or more of the procedural or substantive bases under Rule 14a-8. For many years the staffs of the Division of Corporation Finance and the Division of Investment Management, as applicable, have engaged through the no-action letter process in the informal practice of expressing whether they would recommend enforcement action to the Commission if a company excludes a proposal from its proxy materials.[5] The staff offers its views in this manner to assist companies and shareholder-proponents in complying with the federal proxy rules.[6]

The shareholder proposal process has become a cornerstone of engagement between shareholders and company management.[7] Shareholder proposals provide an important mechanism for investors to express their views, provide feedback to companies, exercise oversight of management, and raise important issues for the consideration of their fellow shareholders in the company's proxy statement. Moreover, investor support for shareholder proposal campaigns over the years has helped to shape many current corporate practices and policies, such as annual director elections, majority vote standards for director elections, and proxy access rights for shareholders.[8]

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[4] 17 CFR 240.14a-8(j)(1).

[5] See Statement of Informal Procedures for the Rendering of Staff Advice With Respect to Shareholder Proposals, Release No. 34-12599 (July 7, 1976) [41 FR 29989 (July 20, 1976)] ("Statement of Informal Procedures").

[6] See id. No-action letters issued under Rule 14a-8 by the Divisions of Corporation Finance and Investment Management are available at https://www.sec.gov/corpfin/shareholder-proposals-no-action and https://www.sec.gov/investment/investment-management-no-action-letters, respectively.

[7] See infra note 8.

[8] See, e.g., Emiliano M. Catan & Marcel Kahan, *The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent*, 99 B.U. L. REV. 743 (2019), available at https://www.bu.edu/bulawreview/files/2019/06/CATAN-KAHAN.pdf (discussing the impact of shareholder activists on the elimination of staggered boards and other governance matters); Yaron Nili & Kobi Kastiel, *The*

Since Rule 14a-8 was adopted in 1942,[9] the Commission has amended the rule on numerous occasions, as necessary to improve the operation of the shareholder proposal process and to provide its views on the application of the rule's procedural and substantive requirements.[10] The most recent amendments to Rule 14a-8, adopted on September 23, 2020, relate to certain procedural requirements as well as the resubmission exclusion under Rule 14a-8(i)(12), as discussed below in Section II.C.1.[11]

The proposed amendments are intended to improve the shareholder proposal process based on modern developments and the staff's observations. The amendments we propose to each of Rule 14a-8(i)(10), 14a-8(i)(11), and 14a-8(i)(12) would facilitate shareholder suffrage and communication between shareholders and the companies they own, as well as among a company's shareholders, on important issues. In this regard, the proposed amendments are intended to "insure that public investors receive full and accurate information about all security holder proposals that are to, or should, be submitted to them for their action . . . [and] have . . .

Giant Shadow of Corporate Gadflies, 94 S. CAL. L. REV. 569, 571–76 (2021), available at https://www.sec.gov/comments/s7-23-19/s72319-6733874-207512.pdf (discussing the influence of corporate "gadflies" over corporate governance practices); Kosmas Papadopoulos, ISS Analytics, *The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance (2000-2018)*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-long-view-the-role-of-shareholder-proposals-in-shaping-u-s-corporate-governance-2000-2018/ (discussing the impact of shareholder proposals on corporate governance).

[9] Release No. 34-3347 (Dec. 18, 1942) [7 FR 10655 (Dec. 22, 1942)]. At the time, the rule did not set forth substantive bases for exclusion. It provided as follows: "In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal . . . ."

[10] See Amendments To Rules On Shareholder Proposals, Release No. 34-40018 (May 21, 1998) [63 FR 29106 (May 28, 1998)] ("1998 Adopting Release") (noting that the Commission would "continue to explore ways to improve the [shareholder proposal] process as opportunities present themselves").

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

the opportunity to vote" on such proposals.[12] The proposed amendments also would enhance the ability of shareholders to express diverse objectives and various ways to achieve those objectives through the shareholder proposal process. In addition, the proposed amendments would set forth a clearer framework for the application of certain of the rule's substantive bases for the exclusion of proposals and should thereby provide greater certainty and transparency to shareholders and companies as they evaluate whether these bases would apply to particular proposals.

We are proposing modifications to, and seeking public comment on, three of the rule's substantive bases for exclusion: Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12). In addition, while we do not propose to amend Rule 14a-8(i)(7),[13] the ordinary business exclusion, at this time, we reaffirm the standards the Commission articulated in 1998 for determining whether a proposal relates to ordinary business for purposes of Rule 14a-8(i)(7).[14]

As shown in Table 1, the bases for exclusion in Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12) collectively represent a significant percentage of the no-action requests the staff has received under Rule 14a-8.[15]

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[12] See Statement of Informal Procedures, supra note 5.

[13] 17 CFR 240.14a-8(i)(7).

[14] In the 1998 Adopting Release, supra note 10, the Commission stated: "The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. . . . [P]roposals relating to [ordinary business] matters but focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote. . . . The second consideration relates to the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." The Commission also clarified that specific methods, time-frames, or detail do not necessarily amount to micromanagement and are not dispositive of excludability.

[15] Table 1 shows requests received by the Division of Corporation Finance and the Division of Investment Management from October 1 through June 30 of each time period shown. The percentages in parentheses in each column of the table represent percentages of the total number of no-action requests that assert Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12), respectively (as noted in each respective "Number of Requests" row).

Table 1

	2020-2021 (Total: 266)	2019-2020 (Total: 238)	2018-2019 (Total: 226)
Rule 14a-8(i)(10) – Substantial Implementation			
Number of Requests	110	90	83
Granted on (i)(10)	36 (33%)	45 (50%)	37 (45%)
Granted on Other Basis	10 (9%)	8 (9%)	6 (7%)
Denied	31 (28%)	24 (27%)	21 (25%)
Withdrawn	33 (30%)	13 (14%)	19 (23%)
Rule 14a-8(i)(11) – Duplication			
Number of Requests	12	9	16
Granted on (i)(11)	3 (25%)	4 (44%)	7 (44%)
Granted on Other Basis	1 (8%)	0	6 (38%)
Denied	5 (42%)	1 (11%)	2 (13%)
Withdrawn	3 (25%)	4 (44%)	1 (6%)
Rule 14a-8(i)(12) – Resubmissions			
Number of Requests	2	3	1
Granted on (i)(12)	1 (50%)	0	1 (100%)
Granted on Other Basis	1 (50%)	1 (33%)	0
Denied	0	1 (33%)	0
Withdrawn	0	1 (33%)	0

First, we propose to amend Rule 14a-8(i)(10), the substantial implementation exclusion, which allows companies to exclude a shareholder proposal that "the company has already substantially implemented."[16] This standard has remained substantively unchanged since 1983.[17] We propose to amend this rule to specify that a proposal may be excluded if "the company has already implemented the essential elements of the proposal." The proposed amendment would provide a clearer standard for exclusion and promote more consistent and predictable determinations regarding the exclusion of proposals under the rule.

[16] 17 CFR 240.14a-8(i)(10).

[17] See 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").

Second, we propose to amend Rule 14a-8(i)(11), the duplication exclusion, which allows companies to exclude a shareholder proposal that "substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting."[18] The duplication exclusion has not been substantively updated by the Commission since its adoption in 1976.[19] The proposed amendment would specify that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means."

Third, we propose to amend Rule 14a-8(i)(12), the resubmission exclusion, which allows companies to exclude a shareholder proposal that "addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years" if the matter was voted on at least once in the last three years and did not receive at least:

- 5 percent of the votes cast if previously voted on once;
- 15 percent of the votes cast if previously voted on twice; or
- 25 percent of the votes cast if previously voted on three or more times.[20]

Although the resubmission thresholds themselves were reviewed and amended by the Commission in 2020,[21] the "substantially the same subject matter" test has been in place since 1983.[22] We propose to amend the resubmission exclusion to provide that a resubmission is a shareholder proposal that "substantially duplicates" a proposal previously included in a

[18] 17 CFR 240.14a-8(i)(11).

[19] See 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").

[20] 17 CFR 240.14a-8(i)(12).

[21] See 2020 Adopting Release, supra note 11.

[22] See 1983 Adopting Release, supra note 17.

company's proxy materials, which would replace the current "substantially the same subject matter" test. This proposed amendment would align the "resubmission" standard with the "duplication" standard under Rule 14a-8(i)(11), in consideration of the similar objectives of these exclusions. As noted above with respect to the proposed amendment to Rule 14a-8(i)(11), we also propose to specify for purposes of Rule 14a-8(i)(12) that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means."

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

II. DISCUSSION OF THE PROPOSED AMENDMENTS

A. Rule 14a-8(i)(10) – Substantial Implementation

1. Background

Rule 14a-8(i)(10), the substantial implementation exclusion, allows a company to exclude a shareholder proposal that "the company has already substantially implemented."[23] The purpose of the exclusion is to "avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management."[24] During the 2021, 2020, and 2019 proxy seasons, the staff received 110, 90, and 83 no-action requests, respectively, asserting the substantial implementation exclusion. Of these, the staff concurred in the exclusion

[23] 17 CFR 240.14a-8(i)(10).

[24] Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982, at 29985 (July 20, 1976)] ("1976 Proposing Release").

of 36, 45, and 37 of the requests, respectively, on the basis of the substantial implementation exclusion.

Prior to 1983, Rule 14a-8(i)(10) did not include a concept of "substantial implementation," and exclusion under the rule was permitted only in those cases in which a proposal had been fully effected.[25] In 1983, however, the Commission announced an interpretive change to permit exclusion of proposals that had been "substantially implemented by the issuer."[26] The Commission acknowledged that the interpretive position would "add more subjectivity to the application of the provision" but believed the change was necessary as the "previous formalistic application of this provision defeated its purpose,"[27] given that the exclusion was available only when a proposal had been fully effected—that is, when a company had taken all of the actions requested by the proposal.[28] In 1998 the Commission adopted the current language of Rule 14a-8(i)(10) to reflect the interpretation it announced in 1983.[29] The Commission has not revised Rule 14a-8(i)(10) since that time, except to add a note to paragraph (i)(10) to clarify the status of shareholder proposals that seek an advisory shareholder vote on executive compensation or that relate to the frequency of shareholder votes approving executive compensation.[30]

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[25] At the time, the rule text provided for exclusion where "the proposal has been rendered moot."

[26] See 1983 Adopting Release, supra note 17.

[27] Id.

[28] See 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)], at 47429 ("1982 Proposing Release").

[29] See 1998 Adopting Release, supra note 10.

[30] See Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 34-63768 (Jan. 25, 2011) [76 FR 6010 (Feb. 2, 2011)].

Because of the fact-intensive nature of the rule, over the years the staff has applied various, but similar, interpretive frameworks to determine whether a shareholder proposal has been substantially implemented by a company. For instance, the staff has indicated that a "determination that the [c]ompany has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal."[31] The staff also has considered whether the company has addressed a proposal's underlying concerns and whether the essential objectives of a proposal have been met. When considering whether a proposal has been substantially implemented, companies, shareholder-proponents, and the staff sometimes divide a proposal into its elements and evaluate which of them have been implemented. However, a proposal may be viewed as substantially implemented even if a company has not implemented all of the proposal's elements.[32]

We continue to believe that it is appropriate under Rule 14a-8(i)(10) to apply a "substantial" implementation standard, rather than the "full" implementation standard that was in place prior to 1983. We recognize, however, that there are many potential interpretations of what a substantial implementation standard may require, on a spectrum from minimal

[31] See Texaco, Inc. (Mar. 28, 1991).

[32] See, e.g., WD-40 Co. (Sept. 27, 2016) (concurring under Rule 14a-8(i)(10) in the company's exclusion of a proposal requesting that the company adopt a proxy access bylaw provision and identifying certain "essential elements for substantial implementation" because the company represented that "the board has adopted a proxy access bylaw that addresses the proposal's essential objective," even though a number of the company's provisions differed from the proposal's terms); NVR, Inc. (Feb. 12, 2016, recons. granted Mar. 25, 2016) (concurring, on reconsideration, under Rule 14a-8(i)(10) in the exclusion of a proposal seeking four specific revisions to the company's existing proxy access bylaw provision where the company amended the provision to reduce the minimum ownership threshold from 5 percent to 3 percent and increased the permissible recall period for loaned shares from three to five business days, but did not eliminate the 20-person limit on the number of shareholders that may aggregate their shareholdings to form a nominating group or eliminate the requirement for nominating shareholders to represent that they will continue to own the shares required to meet the minimum ownership threshold for at least one year following the meeting).

implementation to all but full implementation. In view of the staff's experience with the substantial implementation exclusion, we are concerned that the current rule may be difficult to apply in a consistent and predictable manner.[33] Moreover, we believe that the language of the current rule is insufficiently focused on the specific actions requested by a proposal—*i.e.*, its elements—and, thus, it may not serve the original purpose of the exclusion to avoid the consideration of proposals on which a company already has "favorably acted."[34]

Additionally, some observers have expressed concerns about variation and potential unpredictability in the operative principles guiding the staff's interpretation of the substantial implementation exclusion.[35] For example, with respect to shareholder proposals requesting a report, some have observed that the staff may find a proposal substantially implemented based on "voluminous but unresponsive reporting" that does not answer the core questions raised by the proposal.[36] 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

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[33] Compare Apple Inc. (Nov. 19, 2018) (concurring under Rule 14a-8(i)(10) in the exclusion of a proposal requesting that the company establish a board committee on international policy to oversee policies regarding matters specified in the proposal, where the company argued that its existing board committees include responsibility for the specified matters) and Verizon Communications Inc. (Feb. 19, 2019) (concurring under Rule 14a-8(i)(10) in the exclusion of a proposal requesting that the company establish a board committee on public policy and social responsibility to oversee policies regarding matters specified in the proposal, where the company argued that its existing board committees include responsibility for the specified matters) with Exxon Mobil Corp. (Apr. 2, 2019) (not concurring in the exclusion of a proposal requesting that the company establish a board committee on climate change, where the company argued that the board's public issues and contributions committee substantially implemented the proposal under Rule 14a-8(i)(10) because its responsibilities included oversight of climate change issues).

[34] 1976 Proposing Release, supra note 24, at 29985.

[35] See, e.g., Letter to John Coates, Acting Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, from Sanford Lewis, Director, Shareholder Rights Group, dated February 4, 2021, available at https://www.corpgov.net/2021/02/reform-no-action-process/ ("February 4, 2021 Letter"); Letter to Allison Lee, Acting Chair, U.S. Securities and Exchange Commission, from Sanford Lewis, Director, Shareholder Rights Group, Mindy Lubber, Ceres, Lisa Woll, The Forum for Sustainable and Responsible Investment, and Josh Zinner, Interfaith Center on Corporate Responsibility, dated January 26, 2021, available at https://www.iccr.org/sites/default/files/resources_attachments/chair_lee_letter_0.pdf ("January 26, 2021 Letter").

[36] See, e.g., February 4, 2021 Letter, supra note 35.

company under Rule 14a-8(i)(7)[37] 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.[38]

2. Proposed Amendment

In view of these considerations, we are proposing an amendment to Rule 14a-8(i)(10) that would maintain a "substantial" implementation standard and provide a clearer framework for its application. The proposed rule would state that a proposal may be excluded as substantially implemented "[i]f the company has already implemented the essential elements of the proposal." Whether a proposal has been substantially implemented necessarily involves a factual determination to be made on a case-by-case basis. We believe that an analysis that focuses on the specific elements of a proposal would provide a reliable indication of whether the actions taken to implement a proposal are sufficiently responsive to the proposal such that it has been substantially implemented.

Determining 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. In determining the essential elements of a proposal, we anticipate that the degree of specificity of the proposal and of its stated primary objectives[39] would guide the analysis. The

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[37] See 1998 Adopting Release, supra note 10.

[38] See Sanford Lewis, Shareholder Rights Group, *SEC Resets the Shareholder Proposal Process*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Dec. 23, 2021), https://corpgov.law.harvard.edu/2021/12/23/sec-resets-the-shareholder-proposal-process/; January 26, 2021 Letter, supra note 35. See also Staff Legal Bulletin No. 14L, Section B.3 (Nov. 3, 2021).

[39] Proponents sometimes attempt to identify the primary objectives, elements, or features of a proposal. We expect that the more objectives, elements, or features a proponent identifies, the less essential the staff would view each of them.

proposed amendment would permit a shareholder proposal to be excluded as substantially implemented only if the company has implemented all of its essential elements.

Under the proposed amendment, a proposal need not be rendered entirely moot, or be fully implemented in exactly the way a proponent desires, in order to be excluded. A company may be permitted to exclude a proposal it has not implemented precisely as requested if the differences between the proposal and the company's actions are not essential to the proposal. Where 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. In instances where a proposal contains only one essential element, that essential element would need to be implemented in order to exclude the shareholder proposal under the proposed amendment.

For example, the staff historically has concurred in the exclusion, under Rule 14a-8(i)(10), of proposals seeking the adoption of a proxy access provision that allows an unlimited number of shareholders who collectively have owned 3 percent of the company's outstanding common stock for 3 years to nominate up to 25 percent of the company's directors, where the company had adopted a proxy access bylaw allowing a shareholder or group of up to 20 shareholders owning 3 percent of its common stock continuously for 3 years to nominate up to 20 percent of the board.[40] Under the proposed amendment, because the ability of an unlimited number of shareholders to aggregate their shareholdings to form a nominating group generally would be an essential element of the proposal, exclusion would not be appropriate.

As another example, where a proposal calls for a company to issue a report about a particular topic, a company's existing reports or disclosures about that topic may not implement the essential elements of the proposal, especially if the plain language of the proposal explains

[40] See, e.g., Oracle Corp. (Aug. 11, 2016).

how the company's existing reports or disclosures are insufficient. Additionally, where a proposal requests a report from the company's board of directors (such as disclosure regarding the board's assessment of a topic, or the board's process in approaching a topic), the staff may determine that the company has not implemented an essential element of the proposal if the report comes from management rather than the board, if the proposal demonstrates a clear emphasis on reporting directly from the board.

We believe that the proposed amendment would facilitate shareholder suffrage, provide a more objective and specific framework for the substantial implementation exclusion, assist the staff in more efficiently reviewing and responding to no-action requests, and benefit shareholders and companies by promoting more consistent and predictable determinations. By providing greater certainty and transparency with respect to the standard to be applied under the rule, the proposed amendment would aid shareholder-proponents, in drafting their proposals, and companies, in determining whether a proposal may be excludable under the rule.

Request for Comment

1. Should we amend the standard for exclusion under Rule 14a-8(i)(10), as proposed, to provide that a proposal may be excluded if "the company has already implemented the essential elements of the proposal"?
2. Would the proposed amendment benefit shareholder-proponents and companies by promoting more consistent and predictable determinations regarding application of the substantial implementation exclusion? What potential costs should we consider?
3. Under the proposed amendment, the analytical framework would focus on a proposal's essential elements. 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. Is this an appropriate standard to identify a proposal's essential elements? Are there other potential approaches we should consider?

B. Rule 14a-8(i)(11) – Duplication

1. Background

Rule 14a-8(i)(11), the duplication exclusion, provides that a shareholder proposal may be excluded if it "substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting."[41] During the 2021, 2020, and 2019 proxy seasons, the staff received 12, 9, and 16 no-action requests, respectively, asserting the duplication exclusion. Of these, the staff concurred in the exclusion of 3, 4, and 7 of the requests, respectively, on the basis of the duplication exclusion.

As the Commission explained when it formally adopted the duplication exclusion in 1976, "[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."[42] Aside from minor stylistic revisions to the provision in 1998,[43] the Commission has not updated the provision since its adoption.

Historically, in evaluating whether proposals are substantially duplicative under Rule 14a-8(i)(11), the staff has considered whether the proposals share the same "principal thrust" or "principal focus."[44] Proposals that differ as to terms and/or scope may nevertheless be deemed

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[41] 17 CFR 240.14a-8(i)(11).

[42] See 1976 Adopting Release, supra note 19. Prior to the Commission's formal adoption of the duplication exclusion in 1976, the exclusion "existed . . . on an informal basis." Id.

[43] See 1998 Adopting Release, supra note 10.

[44] See, e.g., Pacific Gas & Electric Co. (Feb. 1, 1993) (staff response letter noting that exclusion under Rule 14a-8(i)(11) was not appropriate because the second proposal's "principal thrust" differed from the first proposal's "principal focus").

substantially duplicative if the principal thrust or focus is the same. The staff's experience with Rule 14a-8(i)(11) through the no-action letter process has demonstrated that this analytical framework can be difficult to apply in a consistent and predictable manner because, as with the "substantial implementation" standard under current Rule 14a-8(i)(10), there are numerous potential approaches to evaluating whether a proposal is "substantially" duplicative as well as to discerning a proposal's principal thrust or focus. The current Rule 14a-8(i)(11) framework can necessitate fact-intensive, case-by-case judgments in determining a proposal's principal thrust or focus, and delineating the principal thrust or focus too broadly or too narrowly can lead to under- or over-inclusion of shareholder proposals, respectively.

We also note that, because Rule 14a-8(i)(11) permits exclusion only of the later-received proposal, it operates to the advantage of the first shareholder to submit a proposal that is substantially duplicative of another proposal submitted for the same meeting. Thus, the rule may create an incentive to submit a proposal quickly. As a result, the rule enables a shareholder who is first to submit a proposal for a company's meeting to preempt the consideration of later-received proposals, even though a later proposal (if it had been voted on) may have received more shareholder support. Accordingly, we are concerned that the current duplication standard may unduly constrain shareholder suffrage by limiting shareholder-proponents' ability to engage with the companies whose securities they own and with other shareholders by presenting for consideration competing approaches to addressing important issues.

2. Proposed Amendment

We are proposing an amendment to Rule 14a-8(i)(11) providing that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means."

For example, consider the following two proposals: (1) a proposal requesting that the company publish in newspapers a detailed statement of each of its direct or indirect political contributions or attempts to influence legislation; and (2) a proposal requesting a report to shareholders on the company's process for identifying and prioritizing legislative and regulatory public policy advocacy activities. In considering the application of the duplication exclusion to these proposals, the staff previously had concurred that the proposals were substantially duplicative when analyzing the principal thrust or focus of the proposals.[45] Under the proposed amendment, however, these proposals would not be deemed substantially duplicative because, although they both address the subject matter of the company's political and lobbying expenditures, they seek different objectives by different means.

We believe the proposed amendment would provide a clearer standard for exclusion that would assist the staff in more efficiently reviewing and responding to no-action requests and would benefit shareholder-proponents and companies by promoting more predictable and consistent determinations regarding the exclusion of proposals. By providing greater certainty and transparency with respect to the standards to be applied under the rule, the proposed amendment would aid shareholder-proponents, in drafting their proposals, and companies, in determining whether a proposal may be excludable under the rule. Moreover, the proposed amendment would promote more consistent outcomes when comparing a given proposal against proposals submitted for the same shareholder meeting for purposes of Rule 14a-8(i)(11).[46]

As discussed above, we recognize that Rule 14a-8(i)(11) operates to the advantage of the first shareholder to submit a proposal. By providing for exclusion only where a proposal

[45] See Pfizer Inc. (Feb. 17, 2012).

[46] As discussed in Section II.C below, we are proposing a similar amendment to Rule 14a-8(i)(12) in consideration of the similar objectives of these exclusions.

"addresses the same subject matter and seeks the same objective by the same means," the proposed amendment would reduce incentives for proponents to submit a proposal quickly, reduce incentives for proponents to attempt to preempt other proposals those proponents do not agree with, and facilitate the consideration at the same shareholder meeting of multiple shareholder proposals that present different means to address a particular issue. In other words, the proposed amendment would enable the consideration by a company's shareholders of later-received proposals that may be similar to and/or address the same subject matter as an earlier-received proposal but which seek different objectives or offer different means of addressing the same matter.

At the same time, we are aware of the possibility that the proposed amendment could result in the inclusion in a company's proxy materials of multiple shareholder proposals dealing with the same or similar issue. This outcome could cause shareholder confusion and may lead to conflicting or inconsistent results and implementation challenges for companies if shareholders approve multiple similar, although not duplicative, proposals. Although we believe that the benefits of the proposed amendment would justify these potential impacts, we seek comment on the possible implications for companies and shareholders.

Request for Comment

4. Should we amend the standard for exclusion under Rule 14a-8(i)(11), as proposed, to specify that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means"?
5. 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?

6. 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?

7. 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?

8. 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?

C. Rule 14a-8(i)(12) – Resubmissions

1. Background

Rule 14a-8(i)(12), the resubmission exclusion, provides that a shareholder proposal may be excluded from a company's proxy materials if it "addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years" if the matter was voted on at least once in the last three years

and received support below specified vote thresholds on the most recent vote.[47] During the 2021, 2020, and 2019 proxy seasons, the staff received 2, 3, and 1 no-action requests, respectively, asserting the resubmission exclusion.[48] Of these, the staff concurred in the exclusion of 1, 0, and 1 of the requests, respectively, on the basis of the resubmission exclusion.

Since 1948, the Commission has not required a company to include a shareholder proposal in its proxy statement if "substantially the same proposal" previously had been submitted for a shareholder vote and did not receive a specified minimum percentage of votes upon its most recent submission.[49] The Commission explained that the purpose of the provision was "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."[50] For many years following adoption of the provision, the staff interpreted the phrase "substantially the same proposal" to mean one that is virtually identical (in form as well as substance) to a proposal previously included in the issuer's proxy materials.[51]

Some commentators had asserted that the provision failed to accomplish its stated purpose because proponents were able to evade exclusion of their proposals by simply recasting the form of the proposal, expanding its coverage, or by otherwise changing its language in a manner that precluded one from saying that the proposal is virtually identical to a prior

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[47] 17 CFR 240.14a-8(i)(12).

[48] From October 15, 2021 through May 10, 2022, the staff received 11 no-action requests asserting the resubmission exclusion, which represents an increase in requests compared to the 2020 and 2021 proxy seasons. This increase is likely due to the higher resubmission thresholds under Rule 14a-8(i)(12) adopted in the 2020 Adopting Release, supra note 11, as discussed below.

[49] See Adoption of Amendments to Proxy Rules, Release No. 34-4185 (Nov. 5, 1948) [13 FR 6678 (Nov. 13, 1948)].

[50] See Notice of Proposal to Amend Proxy Rules, Release No. 34-4114 (July 6, 1948) [13 FR 3973 (July 14, 1948)].

[51] See 1982 Proposing Release, supra note 28.

proposal.[52] In view of these concerns, in 1976 the Commission proposed to revise the standard for exclusion of a proposal under the provision from "substantially the same proposal" to "substantially the same subject matter."[53] Some commenters had urged the Commission not to adopt the proposed amendment, arguing that: (1) abuses of the existing provision had been rare and did not justify the type of radical revision proposed; (2) the new standard would be almost impossible to administer because of the subjective determinations that it would require; and (3) it would unduly constrain shareholder suffrage because of its possible "umbrella" effect (*i.e.*, it could be used to omit proposals that had only a vague relation to the subject matter of a prior proposal that received little shareholder support).[54] After considering public comment, the Commission determined not to adopt the proposed revision, noting that "the potential drawbacks of the new provision appear to outweigh the prospective benefits."[55]

In 1982, the Commission again proposed the same revision considered in 1976[56] and, in 1983, adopted the proposed revision, noting that "this change is necessary to signal a clean break from the strict interpretive position applied to the existing provision."[57] As amended, the provision permitted the exclusion of proposals dealing with "substantially the same subject matter" as proposals submitted in prior years that received support below specified vote thresholds.

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[52] Id.; see also 1976 Proposing Release, supra note 24.

[53] See 1976 Proposing Release, supra note 24.

[54] See id.; 1976 Adopting Release, supra note 19.

[55] See 1976 Adopting Release, supra note 19.

[56] See 1982 Proposing Release, supra note 28.

[57] See 1983 Adopting Release, supra note 17, at 38221.

Commenters supporting the 1983 amendment viewed it as an appropriate response to counter the abuse of the shareholder proposal process by "certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue."[58] Commenters who opposed the change argued that the revision was too broad and that it could be used to exclude proposals that had only a vague relation to an earlier proposal. Noting these concerns, the Commission explained that, while "interpretation of the new provision will continue to involve difficult subjective judgments, . . . those judgments will be 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" such that "an improperly broad interpretation of the . . . rule will be avoided."[59]

The "substantially the same subject matter" test has been in place since 1983. However, the Commission has revisited the minimum vote thresholds necessary for resubmission under the provision from time to time[60] and increased the resubmission thresholds in 2020 (the "2020 amendments").[61] Prior to the 2020 amendments, Rule 14a-8(i)(12) required a proposal to receive at least: (i) 3 percent of the vote if previously voted on once; (ii) 6 percent of the vote if previously voted on twice; or (iii) 10 percent of the vote if previously voted on three or more times. The 2020 amendments increased the levels of support a shareholder proposal must receive to be eligible for resubmission at the same company's future shareholders' meetings

[58] See id.

[59] See id.

[60] See Adoption of Amendments to Proxy Rules, Release No. 34-4979 (Jan. 6, 1954) [19 FR 246 (Jan. 14, 1954)]; 1983 Adopting Release, supra note 17; Proposals of Security Holders, Release No. 34-22625 (Nov. 14, 1985) [50 FR 48180 (Nov. 22, 1985)]; 1998 Adopting Release, supra note 10.

[61] See 2020 Adopting Release, supra note 11 (the "2020 amendments").

from 3, 6, and 10 percent to 5, 15, and 25 percent, respectively. We continue to assess the impact of these amendments.

While the Commission did not otherwise propose changes to the wording of the rule in connection with the 2020 amendments, it did request comment on whether it should change the Rule 14a-8(i)(12) standard or its application, such as reverting to the pre-1983 "substantially the same proposal" standard. The six commenters who responded to the request for comment were largely supportive of narrowing the standard for exclusion if the Commission raised the resubmission thresholds.[62] For example, one commenter suggested that, if the 2020 amendments raised the resubmission thresholds, the Commission should consider whether to "narrow the definition of 'Resubmissions'" because "the higher resubmission thresholds could expand the ability of a shareholder to preempt future proposals by submitting (intentionally or not) an unpopular idea that 'addresses substantially the same subject matter' as an idea that many shareholders support."[63] Similarly, another commenter noted that a revised standard focusing not on the "'substantive concerns'" of similar proposals but rather on the "'specific language or actions proposed to deal with those concerns'" would be helpful in order to "allow different approaches to the same or a similar issue to be voiced and provided as options for shareholders to support."[64] The Commission did not adopt any changes to the applicable standard in response to these comments on the proposing release for the 2020 amendments.

When considering whether proposals deal with "substantially the same subject matter," the staff has followed the standard the Commission articulated in 1983: whether the proposals

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[62] See letters from Council of Institutional Investors dated January 30, 2020; James McRitchie dated February 2, 2020; Local Authority Pension Fund Forum dated February 3, 2020; New York City Comptroller dated February 3, 2020; New York State Comptroller dated February 3, 2020; Stewart Investors dated January 30, 2020.

[63] See letter from Council of Institutional Investors dated January 30, 2020.

[64] See letter from Local Authority Pension Fund Forum dated February 3, 2020.

share the same "substantive concerns" rather than the "specific language or actions proposed to deal with those concerns." This determination of a proposal's "substantive concerns" can necessitate fact-intensive, case-by-case judgments in applying Rule 14a-8(i)(12) through the no-action letter process. In this regard, as with the "substantial duplication" test under Rule 14a-8(i)(11), delineating the "substantive concerns" of a proposal either too broadly or too narrowly may result in the under- or over-inclusion of proposals, respectively. Additionally, the staff has observed that proposals that address the same subject matter but call for different actions may receive significantly different shareholder votes, which could suggest that shareholders view such proposals as raising different issues.

We are concerned that the "substantially the same subject matter" test under Rule 14a-8(i)(12) may not accomplish its stated purpose because focusing on whether proposals share the same "substantive concerns" rather than "the specific language or actions proposed to deal with those concerns" may not, as the Commission initially had believed, avoid an "improperly broad interpretation" of the provision. In this regard, we share the concerns previously expressed by commentators that the "substantially the same subject matter" standard unduly constrains shareholder suffrage because of its potential "umbrella" effect—*i.e.*, that it could be used to exclude proposals that have only a vague relation, or are not sufficiently similar, to earlier proposals that failed to receive the necessary shareholder support. As a result, the current standard could discourage experimentation with new ideas, as it limits proponents' ability to modify their proposals to address a similar subject matter in subsequent years to build broader shareholder support, and also restricts other shareholders from presenting different or newer approaches to addressing the same issue.

2. Proposed Amendment

To address these concerns, we are proposing to revise the standard of what constitutes a resubmission under Rule 14a-8(i)(12) from a proposal that "addresses substantially the same subject matter" as a prior proposal to a proposal that "substantially duplicates" a prior proposal—the same standard that applies under current Rule 14a-8(i)(11), the duplication exclusion. The proposed amendments also would provide that, for purposes of Rule 14a-8(i)(12), a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means."

Under the proposed approach, in order to be excludable under the resubmission exclusion, a proposal must not only address the same subject matter as a prior proposal but also must seek the same objective by the same means. In other words, the standard for exclusion would focus on the specific objectives and means sought by a proposal with respect to a given subject matter (*i.e.*, the specific actions proposed to deal with a proposal's "substantive concerns"). We anticipate that this approach may provide a more accurate indication of whether shareholders have already provided their views on a particular issue and the proposed means to address it.

To take an example, the staff previously had viewed the following proposals as addressing the same subject matter for purposes of the resubmission exclusion: (1) a proposal requesting that the board adopt a policy prohibiting the vesting of equity-based awards for senior executives due to a voluntary resignation to enter government service (a "government service golden parachute"); and (2) a proposal requesting that the board prepare a report to shareholders regarding the vesting of such government service golden parachutes that identifies eligible senior executives and the estimated dollar value of each senior executive's government service golden

parachute.[65] Under the proposed amendment to Rule 14a-8(i)(12), although these proposals concern the same subject matter (namely, government service golden parachutes for senior executives), exclusion would not be warranted because they do not seek the same objectives by the same means.

We note that, under the proposed revision to Rule 14a-8(i)(12), the previous proposal(s) and the current proposal need not be identical to warrant exclusion. In this regard, we do not propose to revert to the pre-1983 standard of "substantially the same proposal" for the same reason that prompted the Commission to abandon this standard in 1983—namely, the concern that proponents could alter a few words from a previously submitted proposal to evade exclusion of their proposals.[66] However, we seek public comment on whether it would be appropriate to return to the "substantially the same proposal" pre-1983 standard.

We believe that the proposed amendments would alleviate the potential "umbrella" effect of the resubmission exclusion by enabling proponents to make adjustments to their proposals to build broader support and also allow other proponents to put forth their own proposals offering different ways to address the same issue. Consequently, the proposed amendments would align more closely with the purpose of the exclusion, which is to avoid the continued consideration of "proposals that have generated little interest when previously presented to the security holders,"[67] by recognizing that proposals that address the same subject matter, or share the same substantive concerns, do not necessarily garner equivalent levels of shareholder interest and support. In this way, we anticipate that the proposed revisions would strike a more appropriate

[65] See The Goldman Sachs Group, Inc. (Jan. 10, 2017).

[66] See 1983 Adopting Release, supra note 17.

[67] See 1982 Proposing Release, supra note 28, at 47429.

balance between effecting the purpose of the exclusion and preserving the ability of shareholders to engage with a company and other shareholders through the shareholder proposal process.

Although we recognize that the resubmission exclusion, as proposed to be amended, would continue to require a degree of fact-intensive judgment, we believe it would provide a clearer standard for exclusion, assist the staff in more efficiently reviewing and responding to no-action requests, and benefit shareholders and companies by promoting more consistent and predictable determinations regarding the exclusion of proposals. By providing greater certainty and transparency with respect to the standards to be applied under the rule, the proposed amendment would aid shareholder-proponents, in drafting their proposals, and companies, in determining whether a proposal may be excludable under the rule. Moreover, the proposed amendments would promote more consistent outcomes when comparing a given proposal against proposals submitted for the same shareholder meeting, for purposes of Rule 14a-8(i)(11), and against proposals considered at prior meetings, for purposes of Rule 14a-8(i)(12), in consideration of the similar objectives of these exclusions.

Request for Comment

9. Should we amend the resubmission exclusion, as proposed, to provide that a resubmission is a proposal that "substantially duplicates" a prior proposal, the same standard as under the duplication exclusion in Rule 14a-8(i)(11)? Should we amend the rule, as proposed, to specify that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means"? Should we instead maintain the current standard? Should we consider a different standard, such as the Commission's pre-1983 "substantially the same proposal" standard? Are there other approaches we should consider?

10. 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?

11. The proposed amendment seeks to strike a balance between the purpose of the resubmission exclusion to limit the consideration of proposals that do not garner significant shareholder support and the ability of shareholder-proponents to engage with a company and other shareholders through the shareholder proposal process, including by mitigating the potential "umbrella" effect of the resubmission exclusion. Are there other considerations we should take into account?

12. The proposed amendment would apply the same standard for exclusion when comparing a given proposal against proposals submitted for the same shareholder meeting, for purposes of the duplication exclusion in Rule 14a-8(i)(11), and against proposals considered at prior meetings, for purposes of the resubmission exclusion in Rule 14a-8(i)(12). Is this approach appropriate?

III. ECONOMIC ANALYSIS

As discussed above, we are proposing modifications to three of the substantive bases for the exclusion of shareholder proposals under Rule 14a-8. We are mindful of the costs and benefits of these proposed amendments. The discussion below addresses the potential economic effects of the proposed amendments, including the likely benefits and costs, as well as the effects on efficiency, competition, and capital formation.[68] We analyze the expected economic effects

[68] Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] and Section 2(c) of the Investment Company Act [15 U.S.C. 80a-2(c)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires

of the proposed amendments relative to the current baseline, which consists of both the current regulatory framework and the current practices relating to shareholder proposal submissions. Overall, we expect the proposed amendments to benefit companies and shareholder-proponents by providing standards that are easier to apply and result in determinations that are more predictable and consistent. To the extent that companies and shareholder-proponents modify their behavior in response to the proposed amendments, additional economic effects could include changes in the volume and characteristics of shareholder proposals submitted and included in companies' proxy statements.

Where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the proposed amendments. In many cases, however, we are unable to quantify the economic effects because we lack information necessary to provide reasonable estimates. For example, we do not have data that would allow us to assess the extent to which companies and shareholder-proponents may change their behavior in response to the proposed amendments. We further note that even in cases where we have some data regarding certain economic effects, the quantification of these effects is particularly challenging due to the number of assumptions that we would need to make to estimate the benefits and costs of the proposed amendments. Where we are unable to quantify the economic effects of the proposed amendments, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs, and potential impacts of the proposed amendments on efficiency, competition, and capital formation.

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the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

A. Affected Parties

The proposed amendments would affect all companies subject to the federal proxy rules that receive shareholder proposals, the proponents of these proposals, and non-proponent shareholders of these companies.[69] Companies that have a class of equity securities registered under Section 12 of the Exchange Act are subject to the federal proxy rules, including Rule 14a-8.[70] In addition, all management companies are subject to the federal proxy rules.[71] Finally, there are certain companies that voluntarily file proxy materials that could be affected to the extent that they receive shareholder proposals.

As of December 31, 2021, we estimate that there were 5,862 companies that had a class of securities registered under Section 12 of the Exchange Act (including 97 Business Development Companies ("BDCs")).[72] This estimate represents an upper bound of the number of potentially affected companies because some of these companies may not file proxy materials or receive a shareholder proposal in a given year. Out of the 5,862 potentially affected companies mentioned above, 4,588 (78 percent) filed proxy materials with the Commission

[69] The proposed amendments could also have indirect effects on providers of administrative and advisory services related to proxy solicitation and shareholder voting.

[70] Foreign private issuers are exempt from the federal proxy rules under Exchange Act Rule 3a12-3(b). See supra note 1.

[71] 17 CFR 270.20a-1 ("Rule 20a-1") under the Investment Company Act [15 U.S.C. 80a-20(a)] requires management companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act. "Management company" means any investment company other than a face-amount certificate company or a unit investment trust. See 15 U.S.C. 80a-4.

[72] We estimate the number of companies with a class of securities registered under Section 12 of the Exchange Act by reviewing all filers, by unique Central Index Key (CIK), of Forms 10-K and amendments filed during calendar year 2021.

during calendar year 2021.[73] In addition, as of December 31, 2021, there were 33 companies that voluntarily filed proxy materials.[74]

As of December 31, 2021, there were 2,034 management companies[75] that were subject to the federal proxy rules, of which 625 (31 percent) reported to have submitted matters for their security holders' vote during the reporting period.[76] However, we estimate that 944 unique entities associated with management companies[77] filed proxy materials with the Commission during calendar year 2021 on 569 unique forms.[78]

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[73] The proxy materials we consider in our analysis are materials filed via EDGAR under submission types DEF 14A, DEF 14C, DEFA14A, DEFC14A, DEFM14A, DEFM14C, DEFR14A, DEFR14C, DFAN14A, PRE 14A, PRE 14C, PREC14A, PREM14A, PREM14C, PRER14A, and PRER14C.

[74] We identify companies that voluntarily file proxy materials as companies reporting pursuant to Section 15(d) of the Exchange Act but not registered under Section 12(b) or Section 12(g) of the Exchange Act and foreign private issuers that filed any proxy materials during calendar year 2021 with the Commission. See supra note 73 for details on the proxy materials we consider for this analysis.

[75] We estimate the number of unique management companies by reviewing all Forms N-CEN of companies active through December 2021 received by the Commission as of March 15, 2022. These 2,034 management companies were associated with the following funds: (i) 11,780 open-end funds, out of which 2,398 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share class; (ii) 651 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies. Open-end funds are series of trusts registered on Form N-1A. Closed-end funds are trusts registered on Form N-2. Variable annuity separate accounts registered as management companies are trusts registered on Form N-3.

[76] We estimate the number of unique management companies that submitted matters for their security holders' vote by reviewing Item B.10 in all Forms N-CEN of management companies active through December 2021 received by the Commission as of March 15, 2022. These 625 management companies were associated with the following funds: (i) 2,481 open-end funds, out of which 278 were ETFs registered as open-end funds or open-end funds that had an ETF share class; (ii) 436 closed-end funds; and (iii) no variable annuity separate accounts.

[77] We estimate the number of unique entities associated with management companies by reviewing unique CIKs associated with materials filed via EDGAR under submission types DEF 14A, DEF 14C, DEFA14A, DEFC14A, DEFM14A, DEFM14C, DEFR14A, DEFR14C, DFAN14A, N-14, PRE 14A, PRE 14C, PREC14A, PREM14A, PREM14C, PRER14A, and PRER14C. Form N-14 can be a registration statement and/or proxy statement. We manually review all Forms N-14 filed during calendar year 2021 with the Commission and we exclude from our estimates Forms N-14 that are exclusively registration statements. Because management companies could comprise funds and proxy materials could be filed with the Commission at the management company, fund family, a combination of funds or fund families, or individual fund level, the number of entities associated with management companies that filed proxy materials during calendar year 2021 exceeds that number of management companies that submitted matters for their security holders' vote. See supra note 76.

[78] We estimate the number of unique proxy filings by reviewing the unique accession numbers of proxy materials filed by entities associated with management companies. Because multiple entities of management companies, as identified by unique CIK, could appear on the same proxy form, the number of proxy forms is lower than the number of unique entities estimated above. See supra note 77.

Proponents of shareholder proposals also could be affected by the proposed rule amendments. We estimate that there were approximately 176 proponents—66 individual proponents and 110 institutional proponents—that submitted a shareholder proposal to be included in a company's proxy statement as a lead proponent during calendar year 2021.[79] Because many proponents may not submit a shareholder proposal every year, our estimate based solely on 2021 submissions could be undercounting the number of proponents that could be affected by the proposed amendments. For example, there were approximately 586 unique lead proponents—272 individual proponents and 314 institutional proponents—that submitted a shareholder proposal to be included in a company's proxy statement for annual and special meetings from 2017 through 2021.[80] Non-proponent shareholders of companies also could be indirectly affected by the proposed rule amendments. According to a recent study based on the 2019 Survey of Consumer Finances, approximately 68 million households owned publicly traded stock directly or indirectly (through other investment instruments).[81] Moreover, based on an academic study using U.S. retail shareholder voting data from Broadridge covering nearly all regular and special meetings during the three years 2015 to 2017, there were approximately 46

[79] Data is retrieved from the FactSet SharkRepellent Proxy Proposal dataset, infra note 96. This data allows for the unique identification of a sole lead proponent of each proposal, but not the unique identification of all co-proponents across proposals. We estimate based on information provided in FactSet's "proposal notes," that approximately 11 percent of proposals in 2021 were submitted by multiple proponents and among the proposals that were submitted by multiple proponents, the average (median) number of proponents was 2.7 (3). As a result, our estimated number of proponents should be interpreted as a lower bound on the total number of unique shareholder-proponents.

[80] See id.

[81] See Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 FED. RES. BULL. 1, 18-19 (2020), available at https://www.federalreserve.gov/publications/files/scf20.pdf (reporting that 52.6 percent of the 128.6 million families represented owned stock in publicly-traded companies). Indirect holdings of publicly-traded stock are those in pooled investment funds, retirement accounts, and other managed assets. The same study estimates that approximately 19 million households (15 percent) held publicly traded stock directly in 2019. This is a triennial survey, and the latest data available as of this time is from the 2019 survey.

million retail accounts that directly held shares of U.S. public companies.[82] Our analysis of institutional investor data also shows that there were 6,968 unique institutional investors during 2021.[83]

B. Baseline

The baseline against which the costs, benefits, and the impact on efficiency, competition, and capital formation of the proposed amendments are measured consists of the current regulatory framework, including the current staff no-action positions with respect to Rule 14a-8 and the current practices of companies and shareholders related to shareholder proposals.

1. Regulatory Framework

State laws, company bylaws and other governing documents, and the federal securities laws jointly govern the shareholder proposal process. Rule 14a-8 sets forth procedural and substantive bases upon which a company may exclude a shareholder proposal from its proxy statement.[84] Under Rule 14a-8(i)(10), the substantial implementation exclusion, companies may exclude a shareholder proposal that "the company has already substantially implemented."[85] Under Rule 14a-8(i)(11), the duplication exclusion, companies may exclude a shareholder proposal that "substantially duplicates another proposal previously submitted to the company by

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[82] See Alon Brav et al., *Retail shareholder participation in the proxy process: Monitoring, engagement, and voting*, 144 J. OF FIN. ECON. 492, 497 (2022). The number of retail accounts is an approximation of the number of retail investors because each retail investor can hold multiple accounts and multiple retail investors can hold a single account. Further, this data only covers a subset of all retail accounts.

[83] Data is retrieved from the Thomson/Refinitiv Institutional (13F) Holdings dataset. Unique institutional investors are composed of filers with a unique Manager Number that filed a Form 13F at least for one quarter during calendar year 2021 with the Commission. The estimated number of institutional investors is a lower bound of the actual number of institutional investors because only institutional investment managers that exercise discretion over $100 million or more in Section 13(f) securities on the last trading day of any month of any calendar year must file Form 13F with the Commission. See 17 CFR 240.13f-1.

[84] See supra note 2.

[85] See supra note 16.

another proponent that will be included in the company's proxy materials for the same meeting."[86] Under Rule 14a-8(i)(12), the resubmission exclusion, companies may exclude a shareholder proposal that "addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years" if the matter was voted on at least once in the last three years and did not receive: (i) 5 percent of the vote if previously voted on once; (ii) 15 percent of the vote if previously voted on twice; or (iii) 25 percent of the vote if previously voted on three or more times.[87]

When a company intends to exclude a shareholder proposal from its proxy materials, it must advise the Commission staff of its intention to do so and will generally submit a no-action request seeking the staff's concurrence that it would not recommend enforcement action to the Commission if the company excludes the proposal under one or more of the bases for exclusion in Rule 14a-8.[88] Generally, if the staff grants a no-action request, a company will not include the shareholder proposal in its proxy statement.[89] In some instances, a company may negotiate with a proposal's proponent for the withdrawal of the proposal during or after the no-action process.

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[86] See supra note 18.

[87] See supra note 20. Rule 14a-8(i)(12) was amended in 2020 and these resubmission thresholds only apply to proposals submitted for meetings beginning in 2022. See 2020 Adopting Release, supra note 11. Prior to the 2020 amendments, Rule 14a-8(i)(12) required a proposal to receive at least: (i) 3 percent of the vote if previously voted on once; (ii) 6 percent of the vote if previously voted on twice; or (iii) 10 percent of the vote if previously voted on three or more times. See id.

[88] See 17 CFR 240.14a-8(j)(1). A shareholder proposal may be omitted without submitting a no-action request. In particular, a company may give notice to the Commission that it will exclude the proposal without submitting a no-action request, perhaps if it intends to seek a determination by a court. However, this practice is rare and virtually all proposal exclusion notifications come in the form of no-action requests.

[89] Rarely, a shareholder proposal may be included in a company's proxy and voted on despite Commission staff having granted a company's no-action request regarding exclusion of the proposal. This was the case for four proposals (approximately 0.1 percent) submitted for annual meetings held from 2017 through 2021. See infra note 97.

In any event, the staff's no-action position is not legally binding and the matter ultimately may be resolved by a federal district court.[90]

As new and developing issues arise with respect to companies and shareholders, shareholder proposals may demonstrate different trends, and the staff's review under the substantive bases for exclusion of Rule 14a-8 may adjust in response to such trends. As a result, companies and shareholders may find it difficult to apply past staff no-action positions to predict whether a proposal should be included in a company's proxy statement. For example, several commenters have expressed concerns around the variation and potential unpredictability of staff positions regarding the substantial implementation exclusion.[91] More broadly, stock price movements following the issuance of staff no-action letter responses suggest that staff responses resolve some uncertainty about whether a proposal will be included in a company's proxy statement.[92] Yet, even after the staff's position is disclosed, uncertainty could remain as to whether a court would agree with the staff's interpretation of an exclusion under Rule 14a-8.[93] Uncertainty regarding the applicability of any individual basis for exclusion to any particular

[90] See generally Thomas Lee Hazen, Treatise on the Law of Securities Regulation, § 10:27 (7th ed. 2016). See also supra note 88.

[91] See supra note 35.

[92] See, e.g., John G. Matsusaka et al., *Can Shareholder Proposals Hurt Shareholders? Evidence from Securities and Exchange Commission No-Action-Letter Decisions*. 64 J. OF L. AND ECON. 107 (2021) (finding a statistically significant mean cumulative abnormal return, the difference between the actual return and the expected return, ranging between 0.11 percent and 0.58 percent following an issuance of a staff no-action letter concurring in a company's exclusion of a shareholder proposal under Rule 14a-8). Because proposal details and a company's request to exclude it are publicly available on the Commission's website in advance of the staff no-action response, we would not expect to see any price reactions if staff no-action responses were fully predictable.

[93] In some past instances, courts have disagreed with the staff's interpretation of bases for exclusion under Rule 14a-8. See, e.g., Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323 (3d Cir. 2015).

proposal may contribute to companies' common practice of asserting multiple bases for exclusion in their no-action requests under Rule 14a-8.[94]

2. Practices Related to Proposal Submissions

In this section, we describe practices around shareholder proposal submissions to understand the baseline against which we compare the effects of the proposed amendments, informing the analysis of the potential effects of the proposed amendments to Rule 14a-8 in later sections. We note that the current practices around shareholder proposals are likely to differ from prior years because the 2020 amendments to Rule 14a-8, which relate to certain procedural requirements and the resubmission exclusion under Rule 14a-8(i)(12), became effective for proposals submitted for annual or special meetings to be held on or after January 1, 2022.[95] We expect the 2020 amendments to affect the number of proposals submitted and included in companies' proxy statements in 2022 and the subsequent seasons relative to prior years. In addition, as the characteristics of shareholder proposals vary across years, so do the outcomes of the staff's no-action positions based on the limited subset of proposals that the staff reviews through the no-action letter process. Further, Commission and staff interpretations of the procedural and substantive bases for exclusion under Rule 14a-8 have varied over time, as discussed above in Sections II.A.1, II.B.1, and II.C.1. As a result, the percentage of proposals submitted but not included in companies' proxy statements can vary considerably from one

[94] Using data from the 2021, 2020 and 2019 proxy seasons, we estimate that in approximately half (one third) of no-action requests asserting the substantial implementation or duplication (resubmission) basis for exclusion, companies asserted at least one other basis under Rule 14a-8.

[95] The 2020 amendments to Rule 14a-8, which apply to shareholder proposals submitted for annual and special meetings held on or after January 1, 2022, included changes to the ownership requirements to be eligible to submit a proposal, increases in the resubmission voting thresholds, and certain other procedural requirement changes. See 2020 Adopting Release, supra note 11. These amendments also included a transition period that allows shareholders meeting specified conditions to rely on prior ownership thresholds to demonstrate eligibility to submit a proposal for an annual or special meeting to be held prior to January 1, 2023. See id. at 70263.

proxy season to the next, limiting our ability to draw conclusions regarding the current practices related to shareholder proposal exclusions based on data from an individual proxy season.

Our data[96] on shareholder proposals contains proposals that were either (i) included in companies' proxy statements and voted on by shareholders; (ii) omitted from companies' proxy statements through the staff no-action process; or (iii) submitted by the proponents but withdrawn prior to a vote, where the information about the proposal is publicly available.[97] Throughout the analysis, we disaggregate statistics by company size, proponent types, and proposal topics to understand how the practices related to shareholder proposals have varied across these categories.

We find that 392 shareholder proposals were submitted to be included in companies' proxy statements for meetings held from January 1, 2022 through May 20, 2022, a decrease of approximately 10 percent relative to proposals submitted for meetings held in the same period in 2021.[98] Of these 392 submissions, the majority of proposals (80 percent) were included in

[96] Unless stated otherwise, all data in this section is retrieved from the FactSet SharkRepellent Proxy Proposal dataset (accessed on June 4, 2022). Dataset coverage includes over 4,000 U.S.-incorporated public companies and some foreign-incorporated companies. FactSet extracts and processes proxy data from regulatory filings and press releases, as well as through web-monitoring and in rare instances, direct engagement with companies and shareholder-proponents. We exclude from our analysis shareholder proposals that are not subject to Rule 14a-8, such as proposals related to proxy contests and other proposals appearing in dissident shareholders' proxy material, proposals that were raised from the floor of the annual or special meetings and were not submitted to appear in the companies' proxy statements, and proposals submitted for a vote at meetings of foreign companies that are not subject to federal proxy rules.

[97] Our data is comprehensive with respect to shareholder proposals that appear in companies' proxy statements and those for which the company submitted a no-action request to Commission staff. However, proposal submissions counts in our analysis represent a lower bound on all shareholder proposal submissions because this data may not include all shareholder proposals that were withdrawn by proponents. In particular, if a submitted but withdrawn proposal did not appear in a proxy statement, a press release, or a company's no-action request, it may not be included in the data we use for the analysis in this section.

[98] Using data from previous proxy seasons, we estimate that proposals submitted for meetings held from January 1, 2022 through May 20, 2022 will account for approximately 60 percent of all proposals that will be submitted during the 2022 proxy season. We also note that some effects of the 2020 amendments on the number of proposals submitted and included in companies' proxy statements may not yet be realized. See supra note 95.

companies' proxy statements and voted on, while 11 percent were omitted following a no-action letter issued by the Commission staff and 9 percent were withdrawn by the proponent prior to the applicable meeting.[99] The majority (85 percent) of proposals were submitted for annual and special meetings of S&P 500 companies. Further, the majority of proposals submitted were related to governance issues (53 percent), followed by those on social (33 percent) and environmental (13 percent) issues.[100] We also estimate that 42 percent of proposals were submitted by individual proponents while 49 percent were submitted by institutional proponents.[101] Lastly, the average shareholder support for voted proposals during this period was 30 percent of the total number of votes cast and the median shareholder support was 32 percent, with approximately 10 percent of proposals receiving majority support.

Changes to the resubmission voting thresholds decreased the fraction of proposals voted on in 2021 that were eligible to be resubmitted for meetings held in 2022. We find that overall, 76 percent of voted proposals that did not receive majority support were eligible for a resubmission in 2022, a decrease from 89 percent of proposals that were eligible in the prior year. Governance and social proposals were more likely to be eligible for resubmission (77

[99] See supra note 97, which discusses the potential underestimation of the volume of withdrawn proposals in our analysis. In this analysis, we classify a shareholder proposal that was included in a company's proxy statement but was not voted on in the annual or special meeting as a withdrawn proposal.

[100] We grouped proposals into governance, social, and environmental categories based on FactSet's proposal subcategory definitions. The governance group is mostly comprised of shareholder proposals related to shareholder rights and takeover defenses, board structure and independence, and executive compensation. Social proposals include, among others, proposals related to political contributions and lobbying disclosure, labor and health issues, human rights, and board diversity. Environmental proposals include, among others, proposals related to sustainability, greenhouse gas emissions, climate change, community/environmental impact, and renewable energy.

[101] Throughout our analysis, "individual" proponents are comprised of retail investors. "Institutional" proponents are comprised of asset managers, unions, pension funds, religious organizations, nonprofit organizations, and other organizations. The data is missing lead proponents' identity for 36 (9 percent) of shareholder proposals over this period which is presumably because companies are not required to disclose the identity of the proponent in proxy statements. See 17 CFR 240.14a-8(l).

percent of voted proposals that did not receive majority support) than environmental proposals (61 percent of voted proposals that did not receive majority support). We also find that proposals submitted by individual investors were more likely to be eligible for resubmission (81 percent) than those submitted by institutions (74 percent). Of the 392 shareholder proposals submitted to be included in companies' proxy statements for meetings held from January 1, 2022 through May 20, 2022, 258 (66 percent) were a first submission, 55 (14 percent) were a second submission, and the remaining 79 (20 percent) were a third or subsequent submission.[102]

We also note that from October 15, 2021 through May 10, 2022,[103] the staff received 87 no-action requests asserting the substantial implementation exclusion (37 percent of all no-action requests over this period) and concurred in the exclusion of 11 percent of these requests on the basis of the substantial implementation exclusion. In the same period, the staff received 22 no-action requests asserting the duplication exclusion (9 percent of all no-action requests over this period) and concurred in the exclusion of 18 percent of these requests on the basis of the

[102] We categorize a proposal as a first submission if it has not been voted on in the preceding three calendar years. A proposal is categorized as a second (third or subsequent) submission if it has been voted on within the preceding three calendar years and it has been voted on once (two or more times) in the past five calendar years. Conducting any systematic analysis on proposal resubmissions across multiple years requires employing a methodology for determining whether multiple proposals deal with "substantially the same subject matter." For this analysis, we relied on FactSet's standardized proposal descriptions and the text of the proposal. In particular, we classified a proposal as a resubmission if the prior proposal had the same FactSet-assigned description and the text of the prior proposal was not substantially dissimilar or if the prior proposal had a different FactSet-assigned description but the text of the prior proposal was almost identical. Textual similarity was computed via a probabilistic string-matching algorithm. Prior research on shareholder proposals similarly has used shareholder proposal descriptions to identify proposals as resubmissions. See Brandon Whitehill, *Clearing the Bar, Shareholder Proposals and Resubmission Thresholds*, Council of Institutional Investors (Nov. 2018), available at https://docs.wixstatic.com/ugd/72d47f_092014c240614a1b9454629039d1c649.pdf. It is important to note that our methodology for classifying a proposal as a resubmission of a previously submitted proposal may not always align with what the staff or the courts might view as a proposal on "substantially the same subject matter." While using a different textual comparison methodology may result in a change in the number and characteristics of proposals classified as resubmissions in our analysis, we have no reason to believe that it would yield materially different qualitative conclusions regarding proposal resubmissions over the five-year period we consider.

[103] Using data from previous proxy seasons, we estimate that no-action requests received up to May 10, 2022 will account for approximately 90 percent of all no-action requests the staff will receive for the 2022 proxy season.

duplication exclusion. Lastly, the staff received 11 no-action requests asserting the resubmission exclusion (5 percent of all no-action requests over this period) and concurred in the exclusion of 45 percent of these requests on the basis of the resubmission exclusion.

Because the 2022 proxy season is ongoing and, as a result, the information on current practices related to shareholder proposals is incomplete, we supplement the analysis above with information about shareholder proposals submitted for annual and special meetings held from 2017 through 2021.[104] We combine statistics on shareholder proposals submitted over a period of five years because the number and characteristics of shareholder proposal submissions can vary from one year to the next. A total of 3,560 proposals were submitted for inclusion in companies' proxy materials for annual and special meetings held from 2017 through 2021, an average of approximately 712 proposals submitted each year (see Table 2[105]). Of the submissions, the majority of proposals (66 percent) were included in companies' proxy statements and voted on, while 20 percent were omitted following a no-action letter issued by the Commission staff, and 14 percent were withdrawn by the proponent prior to the applicable meeting.[106] Shareholder proposal activity in this five-year period was concentrated among the S&P 500 companies, with each company in the S&P 500 index receiving on average a single shareholder proposal each year.[107] The majority of proposals submitted were related to

[104] FactSet data includes seven shareholder proposals submitted for six annual meetings during the 2017-2021 period that were cancelled. We exclude from our analysis two proposals from two cancelled meetings because identical proposals were included in proxy statements for rescheduled annual meetings to avoid double-counting the same proposal. We classify the remaining five proposals as withdrawn because they were not resubmitted for the companies' subsequent annual meetings.

[105] The percentages in parentheses in each column of the table represent percentages of the total number of proposals in the first row of each column.

[106] See supra note 97.

[107] We note that the volume of shareholder proposal submission is not uniform across companies. Approximately half of S&P 500 companies received no shareholder proposals over the five-year period, while five percent received

governance issues (54 percent), followed by those on social (31 percent) and environmental (11 percent) issues.[108] Lastly, slightly less than half of proposals (46 percent) were submitted by individual proponents,[109] but these proposals were more likely to be omitted and less likely to be withdrawn than those submitted by institutional proponents.[110]

Table 2: Shareholder proposal submissions by status, 2017-2021

Proposal Status	Voted On	Omitted	Withdrawn	**Total**
Number	2,362	696	502	**3,560**
Company Size				
S&P 500	1,762 (75%)	543 (78%)	378 (75%)	**2,683 (75%)**
All Other	600 (25%)	153 (22%)	124 (25%)	**877 (25%)**
Proposal Topic				
Governance	1,440 (61%)	362 (52%)	133 (26%)	**1,935 (54%)**
Social	669 (28%)	200 (29%)	240 (48%)	**1,109 (31%)**
Environmental	208 (9%)	73 (10%)	105 (21%)	**386 (11%)**
Proponent Type				
Institution	1,058 (45%)	251 (36%)	373 (75%)	**1,682 (47%)**
Individual	1,090 (46%)	435 (63%)	115 (23%)	**1,640 (46%)**

Source: *FactSet SharkRepellent Proxy Proposals*.

more than four proposals on average per year. We also estimate that approximately two percent of shareholder proposals were submitted to management companies.

[108] See supra note 100 for a description of how we grouped proposals into governance, social, and environmental categories. There are 130 (four percent) shareholder proposals submitted over the 2017-2021 period that we classify as neither governance, social, or environmental. These proposals include proposals related to returning capital to shareholder (in the form of dividends or share repurchases), asset divestitures, fund-specific issues, and other miscellaneous issues. Because our data includes shareholder proposals that are categorized as neither governance, social, nor environmental, the percentages in the Proposal Topic rows of Table 2 do not sum up to 100 percent.

[109] See supra note 101 for a description of how we categorized proponent types. The data is missing lead proponents' identity for 238 (7 percent) of shareholder proposals over the 2017-2021 period. Because proponent identity is missing for some proposals in our data, the percentages in the Proponent Type rows of Table 2 do not sum up to 100 percent.

[110] We note that the higher withdrawal likelihood for proposals submitted by institutional shareholder-proponents could be due to these shareholders having more direct channels of communication and engagement and influence with companies than individual investors. See, e.g., Eugene Soltes et al., *What Else do Shareholders Want? Shareholder Proposals Contested by Firm Management* (Harv. Bus. Sch., Working Paper, July 14, 2017), https://ssrn.com/abstract=2771114 (finding that the amount of shareholder ownership of shares is positively associated with the probability that a proposal is withdrawn, which is consistent with the idea that large shareholders "are more influential and are more likely to have dialogue with managers that would facilitate implementation of their proposal prior to a shareholder vote") ("Soltes et al. (2017)").

The counts of omitted proposals in Table 2 above represent proposals excluded from companies' proxy statements following a no-action letter issued by the Commission staff under any of the procedural or substantive bases in Rule 14a-8. Only a subset of these omitted proposals were excluded due to the substantial implementation, duplication, or resubmission exclusions. Based on data in Table 1 above, companies asserted the substantial implementation, duplication, and resubmission exclusion in approximately 39 percent, five percent, and one percent, respectively, of the no-action requests during the 2021, 2020, and 2019 proxy seasons. The staff concurred in the exclusion in 42 percent, 38 percent, and 33 percent of these no-action requests on the basis of the substantial implementation, duplication, and resubmission exclusion, respectively. We also note that there was variation across the 2021, 2020, and 2019 proxy seasons with respect to companies' likelihood of asserting the substantial implementation, duplication, and resubmission exclusions and the staff's likelihood of concurring in those exclusions. For example, relative to the prior two seasons, during the 2021 proxy season, companies were more likely to assert the substantial implementation exclusion, but the staff concurred in a lower number of these requests.[111]

Table 3 summarizes data on voting support across proposal topics and proponent types. The average (median) shareholder support for voted proposals over the five-year sample period was 33 (32) percent of the total number of votes cast, with approximately 15 percent of proposals receiving majority support. Voting support varied across proposal topics and proponent types. In particular, governance proposals received higher shareholder support on average and were

[111] During the 2021 proxy season, approximately 41 percent of no-action requests asserted the substantial implementation exclusion, as compared to 38 percent and 37 percent in the 2020 and the 2019 seasons, respectively. The staff concurred in approximately 33 percent of no-action requests that asserted the substantial implementation exclusion on the basis of the substantial implementation during the 2021 proxy season, as compared to 50 percent and 45 percent during the 2020 and the 2019 seasons, respectively.

more likely to be supported by the majority of voting shareholders than social and environmental proposals. In addition, proposals submitted by individual proponents received higher shareholder support on average and were more likely to be supported by the majority of voting shareholders than proposals submitted by institutional proponents.[112]

Table 3: Shareholder proposal voting support, 2017-2021

	Votes cast in favor		Proposals with
	Average	Median	majority support
All Proposals	33%	32%	15%
Proposal Topic			
Governance	36%	34%	18%
Social	27%	27%	8%
Environmental	31%	29%	14%
Proponent Type			
Institution	31%	29%	14%
Individual	35%	35%	16%

Source: *FactSet SharkRepellent Proxy Proposals.*

Out of the 3,560 shareholder proposals in our data, 2,091 (59 percent) were a first submission, 578 (16 percent) were a second submission, and the remaining 891 (25 percent) were a third or subsequent submission (see Table 4[113] below).[114] While companies in the S&P 500 index received 75 percent of all shareholder proposals, they received a higher than proportional percentage of proposals that were resubmitted, receiving 78 and 91 percent of all second and third or subsequent submissions, respectively. Proposals related to governance issues

[112] Differences in the types of proposals submitted by individual and institutional shareholder-proponents could be driving the differences in the voting support across these two groups. For example, we find that individual shareholder-proponents submitted the majority (70 percent) of voted governance proposals over the five-year period, while institutional shareholder-proponents submitted the majority (80 percent) of voted social and environmental proposals.

[113] The percentages in parentheses in each column of the table represent percentages of the total number of proposals in the first row of each column.

[114] See supra note 102 for a description of our methodology regarding resubmitted proposals.

accounted for 56 percent of initial and second submissions, but a lower percentage (49 percent) of third or subsequent submissions. Proposals related to environmental and social issues accounted for a higher than proportional percentage of third or subsequent submissions. First and second submissions were close to evenly split across individual and institutional proponents, but third or subsequent submissions were more likely to have been submitted by institutional proponents.

Table 4: Shareholder proposals by number of submissions, 2017-2021

Submission No.	First	Second	Third or subsequent	**Total**
Number	2,091	578	891	**3,560**
Company Size				
S&P 500	1,423 (68%)	453 (78%)	807 (91%)	**2,683 (75%)**
All Other	668 (32%)	125 (22%)	84 (9%)	**877 (25%)**
Proposal Topic				
Governance	1,180 (56%)	322 (56%)	433 (49%)	**1,935 (54%)**
Social	606 (29%)	187 (32%)	316 (35%)	**1,109 (31%)**
Environmental	187 (9%)	59 (10%)	14 (16%)	**386 (11%)**
Proponent Type				
Institution	987 (47%)	267 (46%)	428 (48%)	**1,682 (47%)**
Individual	989 (47%)	270 (47%)	381 (43%)	**1,640 (46%)**

Source: *FactSet SharkRepellent Proxy Proposals.*

We next analyze whether shareholder-proponents choose to resubmit proposals that are eligible to be resubmitted for subsequent meetings (see Table 5 below).[115] For this analysis, we

[115] Under Rule 14a-8(i)(12), a future proposal addressing "substantially the same subject matter" as a voted proposal is considered a resubmission if it is submitted for a meeting during the three years following the most recent vote. However, when estimating the likelihood that a proposal is resubmitted, we restrict the analysis above to proposals resubmitted in the subsequent year to avoid introducing a truncation bias in our analysis because we do not observe whether more recent proposals are resubmitted in each of the subsequent three years. As a result, estimates in Table 5 may underestimate the percentage of eligible proposals that may eventually be resubmitted.

consider all proposals that were voted on during 2017-2020,[116] but received less than majority support because passing proposals are more likely to be implemented[117] by companies, resulting in reduced incentives for shareholder-proponents to resubmit the proposal.[118] There were 1,641 of these shareholder proposals.[119] While the vast majority (90 percent) of voted shareholder proposals during 2017-2020 were eligible to be resubmitted in the following year, less than half (48 percent) of eligible proposals were actually resubmitted. We find that shareholder proposals submitted to companies in the S&P 500 index were more likely to be resubmitted than those submitted to companies outside of the S&P 500 index. Despite being the most likely to be eligible for resubmission among the three proposal topics groups, governance proposals were least likely to be resubmitted. We also find that shareholders' propensity to resubmit previously voted proposals was correlated with the voting support the proposal has previously received. In particular, comparing between shareholder proposals that received above and below 20 percent voting support and were eligible to be resubmitted in the following year, proposals with prior support above 20 percent were 25 percent more likely to be resubmitted than proposals with prior support below 20 percent. Lastly, because shareholder-proponents were relatively unlikely to resubmit proposals that received voting support below the specified vote thresholds in Rule

[116] We restrict our sample to proposals submitted for 2017-2020 meetings and analyze whether they were resubmitted in the following year using data from 2018-2021 meetings for two reasons. First, because resubmission thresholds were amended in 2020, we have to apply different thresholds to determine proposal eligibility for proposals submitted to meetings before and after 2022. See supra note 87. Second, because the 2022 proxy season is ongoing, we have limited data on proposals voted on during 2021 and resubmitted for 2022 meetings. We include a separate analysis of eligibility and resubmission likelihood for 2021 shareholder proposals in Section III.B.2.b below.

[117] See 2020 Adopting Release, supra note 11, at 70286 n. 451.

[118] Using shareholder proposals voted on during 2017-2020 annual and special meetings, we find that only 13 percent of proposals garnering majority support were resubmitted in the following year.

[119] We estimate that 2,869 shareholder proposals were submitted for annual and special meetings held from 2017 through 2020, 1,897 (66 percent of submitted proposals) were voted on, and 256 (13 percent of voted proposals) received majority support.

14a-8(i)(12), companies attempted to exclude proposals asserting the resubmission exclusion in only a few instances over this period (see Table 1 above).[120]

Table 5: Proposals eligible for resubmission and resubmitted, 2017-2020

	Number	% Eligible	% Resubmitted if eligible
Total	1,641	90%	48%
Company Size			
S&P 500	1,286	90%	52%
All Other	355	92%	31%
Proposal Topic			
Governance	936	94%	43%
Social	518	86%	58%
Environmental	155	88%	47%
Proponent Type			
Institution	790	89%	48%
Individual	732	92%	46%

Source: *FactSet SharkRepellent Proxy Proposals.*

C. Potential Costs and Benefits

Below we discuss the potential economic effects of the proposed amendments. Section III.C.1 discusses economic considerations relevant to shareholder proposals generally, while the remaining three sections discuss the economic effects related to the proposed amendments to Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12), respectively.

1. General Economic Considerations Relevant to Shareholder Proposals

In this section, we describe the general economic considerations related to the shareholder proposal process. The value of including a shareholder proposal in a company's

[120] We estimate that of all of the proposals that were voted on during the 2017-2020 period and resubmitted in the following year, only 4 percent were excludable because their prior voting support was below the voting thresholds specified in Rule 14a-8(i)(12).

proxy statement for shareholder consideration and vote at a meeting depends fundamentally on the tradeoff between the potential for improving a company's future performance and the costs associated with the submission and consideration of a shareholder proposal borne by the company and its non-proponent shareholders.[121] A shareholder proposal could improve a company's performance because it could motivate a value-enhancing corporate policy change,[122] limit insiders' entrenchment,[123] and provide management with information about the views of shareholders.[124] The value of shareholder proposals is limited by the extent to which shareholders participate in the voting process and the extent to which management implements proposals with broad shareholder support. In this regard, we note that shareholder proposals typically are non-binding on the company, even if they are approved by a shareholder vote. Our economic analysis does not speak to whether any particular shareholder proposal is value-enhancing, whether the proposed amendments would result in the inclusion of value-enhancing

[121] There is an extensive academic literature on the value of shareholder activism, including activism through shareholder proposals. See, e.g., Matthew R. Denes et al., *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405 (2017); for a review. See also 2019 Proposing Release, supra note 3, and 2020 Adopting Release, supra note 11, for an extensive discussion of the general economic considerations related to shareholder proposals and a description of academic literature related to the value of shareholder proposals.

[122] See, e.g., Vicente Cuñat et al., *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value*, 67 J. FIN. 1943 (2012); Caroline Flammer, *Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach*, 61 MGMT. SCI. 2549 (2015). Yet, we note that there might be cross-sectional variation in the valuation effects of shareholder proposals and several recent academic papers have identified settings in which shareholder proposals have the potential to reduce value. For example, one paper found that passing shareholder proposals submitted by the most active individual sponsors result in negative abnormal returns and trigger sales by mutual funds that voted against these proposals. See Nickolay Gantchev & Mariassunta Giannetti, *The costs and benefits of shareholder democracy: Gadflies and low-cost activism*, 34 REV. FIN. STUD. 5629 (2021). Another paper found a negative market reaction to shareholder proposals submitted by labor unions in years that a new labor contract must be negotiated. See John G. Matsusaka et al., *Opportunistic Proposals by Union Shareholders*, 32 REV. FIN. STUD. 3215 (2019).

[123] See, e.g., Chen Lin et al., *Managerial entrenchment and information production*, 55 J. FIN. & QUANTITATIVE ANALYSIS 2500 (2020); Laurent Bach & Daniel Metzger, *How Do Shareholder Proposals Create Value?* (Working Paper, Mar. 1, 2017), available at https://ssrn.com/abstract=2247084.

[124] See, e.g., J. Robert Brown, Jr., *Corporate Governance, Shareholder Proposals, and Engagement Between Managers and Owners* (Univ. of Denv. Sturm Coll. of L., Working Paper No. 17-15, 2017), available at https://ssrn.com/abstract=2957998.

proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value-enhancing.

There are significant methodological and empirical challenges to measuring the value of including a shareholder proposal in a company's proxy statement and thus any potential benefits that may result from the inclusion of additional shareholder proposals in the proxy statement. For example, it is often difficult to isolate the effect of a singular shareholder proposal on a company's stock price from the effects of other items that are contemporaneously considered and voted on at a shareholder meeting or from the effects of direct engagement between shareholders and management. In addition, stock price changes following a proposal submission or vote may capture various effects such as signaling effects (*e.g.*, the submission of a proposal may signal that the targeted company is underperforming or that the initial negotiations between the proponent and company failed), market expectations regarding the voting outcome, and market expectations regarding the probability of implementation of a proposal. Nevertheless, academic literature has attempted to measure the value of shareholder proposals and how this value varies with proposal topic and proponent type by studying the stock price reaction around announcements associated with shareholder proposals.[125]

At the same time, companies may bear both direct costs and opportunity costs associated with the submission of a shareholder proposal, and these costs may be passed on to

[125] In the 2019 Proposing Release, the Commission summarized the findings of empirical literature that examines whether proposals are economically beneficial by studying short-run abnormal stock returns around key events related to shareholder proposals. See 2019 Proposing Release, supra note 3, at 66495. The main events related to shareholder proposals studies in academic literature comprise the initial press announcement of submission of a shareholder proposal, the proxy mailing date, and the date of the shareholder meeting. See 2020 Adopting Release, supra note 11, at 70285, for a description of limitations associated with using short-term market reactions to measure the benefits of shareholder proposals.

shareholders.[126] Several commenters to the 2020 amendments noted that no-action correspondence represents the most substantial cost companies incur related to shareholder proposals.[127] Shareholders other than the shareholder-proponent may also bear costs associated with their own consideration of a shareholder proposal.[128] Finally, shareholder-proponents bear costs associated with preparing a shareholder proposal, submitting a proposal to be included in a company's proxy statement and, as applicable, engaging with management following proposal submission.[129]

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[126] In particular, to the extent applicable, companies incur costs to: (i) review the proposal and address issues raised in the proposal; (ii) engage in discussions with the shareholder-proponent(s); (iii) print and distribute proxy materials, and tabulate votes on the proposal; (iv) communicate with proxy advisory firms and shareholders (*e.g.*, proxy solicitation costs); (v) if they intend to exclude the proposal, file a notice with the Commission; and (vi) prepare a rebuttal to the submission to the Commission. See 2020 Adopting Release, supra note 11, at 70272-70275, for a detailed discussion of the costs to companies. We recognize that there is variation in the costs associated with responding to shareholder proposals and that some costs that companies incur are mandatory, while others are discretionary. As a result, the 2020 Adopting Release used a range of estimates, $20,000-$150,000, as a measure of the direct costs to companies associated with addressing a singular shareholder proposal. See 2020 Adopting Release, supra note 11, at 70274. We also note that the cost of addressing a resubmission may be lower than the cost of addressing a first-time proposal. See 2019 Proposing Release, supra note 3, at 66496. Lastly, the costs associated with the submission of a shareholder proposal may include opportunity costs and thus may be larger than the estimates used in the 2020 Adopting Release. See 2020 Adopting Release, supra note 11, at 70266 n.295.

[127] See 2020 Adopting Release, supra note 11, at 70272-70273 n. 332, 339.

[128] See 2020 Adopting Release, supra note 11, at 70276-70277, for a detailed discussion of the costs to non-proponent shareholders. Although these costs may be difficult to quantify, many institutional investors retain proxy advisory firms to perform a variety of services to reduce the burdens associated with proxy voting decisions, including voting decisions on shareholder proposals. We have limited data on fees charged by proxy voting advisory firms but note that one such proxy advisory firm, ISS, reports a fee ranging from $5,000 to above $1,000,000 per client on Form ADV. However, we note that this fee covers a broad range of services provided by ISS (*e.g.*, voting services, governance research, ratings provision, etc.) and includes proxy voting advice services related to board elections and management proposals. See 2020 Adopting Release, supra note 11, at 70277 n.369, for a detailed discussion of the costs to non-proponent shareholders. In addition to costs associated with obtaining proxy voting advice for institutional investors, retail shareholders may incur direct costs and both retail and institutional non-proponent shareholders may incur opportunity costs related to shareholder proposals. However, we do not have data that would allow us to reliably estimate these costs.

[129] Under Rule 14a-8(b)(iii), shareholder-proponents are required to submit a written statement stating their availability to discuss their proposal with the company. As a result, in addition to the costs associated with proposal preparation, shareholder-proponents may incur some costs associated with: (i) disclosing the times the proponents will be available to communicate with management as well as preparing to communicate and communicating with management and (ii) the opportunity costs associated with setting aside and spending time to communicate with management instead of engaging in other activities. We do not have data that would allow us to reliably estimate these costs.

2. Rule 14a-8(i)(10) – Substantial Implementation

As discussed in Section II.A.2, we are proposing to amend Rule 14a-8(i)(10) to state that a proposal may be excluded as substantially implemented "[i]f the company has already implemented the essential elements of the proposal." The proposed amendment's modification to the definition of "substantial implementation" to focus on the "essential elements" of a proposal would set forth a more objective and more specific standard for excluding proposals than the existing rule language. By providing the staff with a more objective and specific framework for analyzing the exclusion when reviewing and responding to no-action requests, we believe that the amended standard should result in no-action positions that are more predictable and consistent than under the current rule. Increased transparency and reduced uncertainty around the application of Rule 14a-8(i)(10) would benefit companies by facilitating more informed decision-making when considering whether to exclude a proposal.[130] In particular, companies may be better able to weigh the costs and benefits of seeking a no-action letter, especially in instances in which the staff is unlikely to agree with the application of the exclusion because a company has implemented some but not all of the essential elements of an earlier proposal. As we noted above, costs to companies associated with no-action requests can be significant.[131] In turn, to the extent that companies seek no-action letters less frequently as a result of the proposed amendment, because they conclude that seeking such letters would not be successful, they may incur lower costs related to shareholder proposal submissions. The proposed amendment could have a greater effect on larger companies because a larger company

[130] We recognize that some uncertainty regarding the application of the substantial implementation exclusion may remain because the determination of whether elements of a proposal are essential may vary across proposals.

[131] Table 2 above shows that during the five-year period, 2017-2021, companies in the S&P 500 index received 75 percent of submitted shareholder proposals. See also Soltes et al. (2017), supra note 110 (finding that companies that submit no-action requests proposals tend to be larger and receive more proposals on average).

is more likely to receive a shareholder proposal and is also more likely on average to submit a no-action request than a smaller company. On the other hand, costs related to shareholder proposals may be a relatively smaller percentage of the total cost of operations for larger companies than for smaller companies.

The reduced uncertainty around proposal excludability could also benefit shareholder-proponents by facilitating more informed decision-making when considering whether to submit a proposal. In particular, the ability to better predict the staff's no-action positions may allow shareholder-proponents to avoid submitting proposals when the essential elements have already been implemented by a company and that would be unlikely to be permitted to go to a shareholder vote. In addition, the increased transparency and reduced uncertainty of the application of the proposed amendment coupled with companies potentially seeking no-action letters less frequently may lead shareholder-proponents to benefit from having to spend less time and fewer resources to reply to companies' no-action requests.

We expect that the proposed amendment will result in more consistent determinations under Rule 14a-8(i)(10) across proposals and over time. Current exclusion determinations can vary, which may contribute to the variability in the number of shareholder proposals included in companies' proxy statements.[132] Consequently, we expect the increased consistency of exclusion determinations resulting from the proposed amendment to reduce the variability in the number of shareholder proposals included in companies' proxy statements.

Whether the proposed amendment has an effect on the number of proposals submitted and included in companies' proxy statements in any given proxy season going forward depends on a number of factors, including whether and how companies and shareholder-proponents

[132] See supra Section III.B.2.

change their behavior as a result of the proposed amendment. While we do not have data that would allow us to assess the extent to which companies and shareholder-proponents may change their behavior in response to the proposed amendment to Rule 14a-8(i)(10), we qualitatively describe below how potential changes in behavior may impact the number of proposals submitted and included in companies' proxy statements. In particular, companies could modify their behavior around proposal implementation or shareholder-proponents could modify their behavior around proposal submission in response to this proposed amendment. For example, companies might take into account that implementing the essential elements of a prior proposal could preclude a subsequent proposal with the same essential elements from being considered in a future meeting, while implementation of some of the elements of a proposal but not all of the essential elements could result in recurring future votes on a proposal that contains essential elements that were not implemented. However, we recognize that companies (and shareholder-proponents) may continue to encounter some uncertainty when seeking to determine whether the essential elements of a prior proposal have been implemented. To the extent that companies become more likely to implement all of the essential elements of a proposal, the number of proposals included in companies' proxy materials could decrease.

Conversely, knowing that a proposal containing essential elements that the company had not already implemented is unlikely to be excludable under the amended standard, shareholder-proponents could draft a proposal to focus on these essential elements and in turn, increase the likelihood of this proposal appearing in a company's proxy statement. Such changes in shareholder-proponent behavior could result in an increase shareholder proposals submitted and included in companies' proxy statements.

Because we cannot reliably predict whether and the extent to which companies and shareholder-proponents may change their behavior in response to the proposed amendment to Rule 14a-8(i)(10), the effect of the proposed amendment on the number of shareholder proposals and the distribution of shareholder proposal types is unclear. Lastly, for reasons explained above in Section III.C.1, we cannot reliably predict whether any potential change in the number of shareholder proposals submitted or included in companies proxy statements will result in net benefits or costs to companies and shareholders.

3. Rule 14a-8(i)(11) – Duplication

As discussed in Section II.B.2, we are proposing to amend Rule 14a-8(i)(11) to indicate that a proposal "substantially duplicates" another proposal that will be included in the company's proxy materials for the same meeting if it "addresses the same subject matter and seeks the same objective by the same means." We expect that the proposed amendment would provide the staff a more objective and specific framework for applying the duplication exclusion when reviewing and responding to no-action requests than the existing rule language, thereby reducing uncertainties with respect to the application of the exclusion and promoting more predictable and consistent determinations.[133]

We expect the benefits to companies and their non-proponent shareholders would be qualitatively similar to those described in Section III.C.2 above with respect to Rule 14a-8(i)(10) because greater predictability and certainty about the application of Rule 14a-8(i)(11) could facilitate more informed decision-making around the submission of a no-action request. For example, companies may be better able to weigh the costs and benefits of seeking a no-action

[133] We recognize that some uncertainty regarding the application of the duplication exclusion may remain because the determination of whether the objectives or means of two or more proposals are the same may vary across proposal characteristics.

letter, especially in instances where the staff is unlikely to agree with the application of the exclusion because a proposal that the company is seeking to exclude has a different subject matter or different objectives or means as those in another proposal that is to be included in the proxy statement, and is thus, not "substantially duplicative." We note, however, that quantitatively these benefits could be less pronounced than those described in Section III.B.2 with respect to Rule 14a-8(i)(10) since companies have been less likely to assert Rule 14a-8(i)(11) as the basis for exclusion than Rule 14a-8(i)(10).[134] Also, for the same reasons as those described in Section III.B.2, this proposed amendment may have a differential effect on larger and smaller companies. The extent to which greater predictability and certainty around determinations under the proposed amendment to Rule 14a-8(i)(11) could benefit shareholder-proponents in drafting proposals would be limited because proponents are unlikely to observe the content of other proposals that are concurrently submitted for inclusion in the same proxy statement during their own proposal preparation.[135]

Similarly to the discussion of the proposed Rule 14a-8(i)(10) amendments above, we expect the proposed amendment to Rule 14a-8(i)(11) to reduce the variability in the number of shareholder proposals included in companies' proxy statements from one proxy season to the next, but we cannot reliably predict how the number of shareholder proposals submitted or included in companies' proxy statements might change. In particular the number of shareholder

[134] During the 2021, 2020, and 2019 proxy seasons, the staff received 12, 9, and 16 no-action requests, respectively, asserting the duplication exclusion. Companies asserted the duplication exclusion in approximately five percent of no-action requests submitted over these three proxy seasons. As of May 10, 2022, the staff has received 22 no-action requests asserting the duplication exclusion, accounting for approximately nine percent of no-action requests submitted up until that point during the 2022 proxy season.

[135] We expect that the likelihood that proponents observe concurrently submitted proposals has been further reduced with the 2020 amendments to Rule 14a-8(c), which limited the ability of a single representative to submit multiple shareholder proposals on behalf of multiple shareholders to the same meeting. See 2020 Adopting Release, supra note 11.

proposals could change to the extent that shareholder-proponents could modify their behavior in response to this proposed amendment. For example, a shareholder-proponent potentially could draft a proposal to be more particular regarding its objectives or means so as to minimize the likelihood of those objectives or means being deemed the same objectives or means as those in another proposal that potentially could be submitted on the same subject matter for the same shareholder meeting. However, the possibility of such changes in proponent behavior likely would be mitigated by proponents' consideration of the micromanagement exclusion under Rule 14a-8(i)(7), among other considerations.[136] While this potential change in proponent behavior could result in more shareholder proposals included in companies' proxy statements, we do not have data that would allow us to assess the likelihood of proponent behavior changes or quantify the potential increase in the number of proposals.

If the number of shareholder proposals included in companies' proxy statements increases, the likelihood of multiple shareholder proposals dealing with the same or similar subject matter but having different objectives and/or means appearing in the same proxy statement could increase. This change could lead to shareholder confusion or the need for shareholders to spend additional time and resources to review and compare the similar, but not duplicative, proposals.[137] In addition, companies may face implementation challenges and costs if shareholders approve multiple similar, but not duplicative, proposals. However, if shareholder consideration of similar, but not duplicative, proposals leads to greater support for and improved likelihood of implementation of a proposal that aligns more closely with the objectives of shareholders, then shareholders could benefit.

[136] See supra note 14.

[137] Institutional investors may choose to rely on proxy advisory firms to analyze similar, but not duplicative, proposals and determine whether they should vote on these proposals in a similar way. See supra note 128.

4. Rule 14a-8(i)(12) – Resubmissions

As discussed in Section II.C.2, we are proposing to amend Rule 14a-8(i)(12) to revise the standard for what constitutes a resubmission from a proposal that "addresses substantially the same subject matter" as a prior proposal to a proposal that "substantially duplicates" a prior proposal, defined the same way that phrase is defined in the proposed amendment to Rule 14a-8(i)(11).[138] As with the proposed amendments to Rule 14a-8(i)(10) and Rule 14a-8(i)(11) described above, we expect that the proposed amendment would provide the staff with a more objective and specific framework for applying the resubmission exclusion when reviewing and responding to no-action requests than the existing rule language, thereby reducing uncertainties with respect to the application of the exclusion and promoting more predictable and consistent determinations.

We expect the benefits to companies and their non-proponent shareholders to be qualitatively similar to those described in Section III.C.2 and Section III.C.3 above because greater predictability and certainty about the application of Rule 14a-8(i)(12) could facilitate more informed decision-making around the submission of a no-action request. The proposed amendments could also benefit shareholder-proponents by facilitating more informed decision-making when preparing a shareholder proposal for submission. In particular, the ability to better predict the staff's no-action positions may allow shareholder-proponents to avoid spending time and resources on submitting a proposal that substantially duplicates a prior proposal that has failed to meet the rule's specified vote thresholds and that likely would be excluded from a company's proxy statement. However, we do not expect these benefits to companies and their

[138] See supra Section III.C.3.

shareholder-proponents to be large because very few proposals are currently excluded from companies' proxy statements on the basis of Rule 14a-8(i)(12).[139]

Similarly to the discussion above of the proposed amendments to Rule 14a-8(i)(10) and Rule 14a-8(i)(11), we cannot reliably predict the extent to which shareholder-proponents might modify their behavior in response to this proposed amendment, and we cannot quantify how the number of proposals submitted and included in companies' proxy statements could change as a result. However, we note that potential changes in shareholder-proponents' behavior could increase the number of proposals submitted and included in companies' proxy statements. Currently, shareholder-proponents may refrain from submitting a shareholder proposal dealing with substantially the same subject matter as an earlier proposal if the earlier proposal failed to garner sufficient levels of support to satisfy the resubmission thresholds because they may recognize that such a proposal is likely to be excluded from the company's proxy statement under Rule 14a-8(i)(12).[140] This appears to have led to a relatively low number of no-action requests seeking to rely on the resubmission exclusion.[141] Under the proposed amendment, a proponent could change the objective or the means of a previously submitted proposal about the same subject matter so as to allow for it to be considered an initial submission instead of a resubmission. Shareholder-proponents might be more likely to do this in instances where circumstances at the company have changed from one year to the next and, due to those

[139] During the 2021, 2020, and 2019 proxy seasons, the staff received 2, 3, and 1 no-action requests, respectively, asserting the resubmission exclusion. Companies asserted the resubmission exclusion in less than one percent of no-action requests submitted over these three proxy seasons. As of May 10, 2022, the staff has received 11 no-action requests asserting the resubmission exclusion, accounting for approximately five percent of no-action requests submitted up until that point during the 2022 proxy season.

[140] See supra note 120.

[141] See supra note 139.

circumstances, where a similar but not duplicative proposal may garner significantly more votes than a prior proposal. At the same time, by reducing the potential for the "umbrella" effect of the resubmission exclusion, the proposed amendment could result in the inclusion of multiple proposals submitted by differing proponents offering different objectives or means to address the same issue.[142]

The proposed amendment to the resubmission exclusion could result in benefits to shareholder-proponents to the extent that that there is an increase in the number of proposals included in companies' proxy statements and shareholder-proponents submit only those proposals that are net beneficial to them. The increase in the number of submitted proposals could also result in benefits to companies and their non-proponent shareholders if these additional proposals lead to value-enhancing changes. To the extent that the proposed amendment would facilitate proponents experimenting and making adjustments to previously submitted proposals to build broader support, the amendment could also lead to proposals that align more closely with the objectives of shareholders to be put to a shareholder vote. Voting outcome data for these additional proposals could further inform management about shareholder views, allowing it to consider actions that are of greater importance across larger swaths of the shareholder base and potentially leading to improved efficiency in the management-shareholder engagement process. On the other hand, the potential increase in the number of submitted shareholder proposals could translate to increased costs to companies associated with the consideration of proposals, engagement with shareholder-proponents, or proposal inclusion in the proxy statement and increased costs to non-proponent shareholders associated with their own

[142] See supra note 54 and the accompanying text.

consideration of shareholder proposals.[143] Further, the potential increase in the number of submitted proposals could result in additional costs to companies and their non-proponent shareholders if these additional proposals lead to changes that reduce companies' future performance.

Lastly, because voting outcomes and shareholder-proponents' propensity to resubmit previously voted-on proposals varies across proposal topics and proponent types, this amendment may impact certain proposal categories and certain proponent types more than others. In particular, subject to specific facts and circumstances, the proposed amendment may have a greater effect on environmental proposals and proposals submitted by institutional proponents because these types of proposals are less likely to be eligible for resubmission following the 2020 amendments to the voting thresholds in Rule 14a-8(i)(12) than governance and social proposals and proposals submitted by individual proponents, respectively.[144]

D. Anticipated Effects on Efficiency, Competition, and Capital Formation

By making exclusion determinations more certain and predictable and enabling companies and shareholder-proponents to make more informed decisions around the submission of a no-action request and submission of a proposal, respectively, we expect the proposed amendments to improve efficiency. Specifically, the proposed amendments could allow companies to avoid inefficiently using time and resources to attempt to exclude a shareholder proposal from proxy statements in instances in which the proposed amendments would not permit exclusion. Similarly, the proposed amendments could allow shareholder-proponents to

[143] See supra note 126.

[144] See supra notes 100 and 101 for a description of how we grouped proposals into governance, social, and environmental categories, and proponent types.

avoid inefficiently using time and resources to prepare a proposal submission that likely will be excluded from a company's proxy statement.

The proposed amendments could lead to additional effects on efficiency and capital formation as a result of the potential changes in companies' and shareholder-proponents' behavior leading to a change in the number and characteristics of proposals included in companies' proxy statements. For example, the proposed amendments could further improve efficiency and increase capital formation if additional included shareholder proposals result in value-enhancing policy changes or provide additional information to management about shareholder views.[145] On the other hand, companies may bear costs associated with considering and addressing additional proposals, leading to a potential reduction in efficiency and capital formation.[146]

Because the potential costs and benefits of the proposed amendments may be greater for certain companies, the proposed amendments could result in competitive effects. For example, the proposed amendment could have a greater effect on U.S. public companies relative to those that are not subject to the federal proxy rules, namely foreign companies and U.S. private companies. Further, the proposed amendments could have a greater effect on larger public companies relative to smaller public companies because larger public companies are more likely to receive shareholder proposals. These competition effects could, for instance, arise through the capital formation channel described above. However, because the proposed amendments could result in greater benefits but also greater costs to certain companies, we cannot reliably predict

[145] See supra notes 122-124 and the accompanying text.

[146] See supra note 126.

whether and how the competitive position of these companies may change as a result of the proposed amendments.

E. Reasonable Alternatives

1. Rule 14a-8(i)(10) – Substantial Implementation

We considered a number of alternative approaches to amending Rule 14a-8(i)(10). First, we considered proposing a change to the rule that would require a proposal to be fully implemented in exactly the way a proponent describes it in the proposal for it to be excludable from a company's proxy statement. The benefit of this approach is that it would be a standard that is more predictable in application because it would not require a determination of which elements of the proposal are essential. We expect that this alternative could lead to greater consistency and predictability of determinations under Rule 14a-8(i)(10). Further, because a full implementation standard would be more straightforward for companies and proponents to understand and apply, it may be more likely to result in a lower number of no-action requests than under the proposed amendments. However, this alternative could result in more shareholder proposals appearing in a company's proxy statement relative to the proposed amendment even if the differences between a shareholder-proponent's preferred policies and the policies that the company has already implemented are only minimal. The full implementation alternative would be likely to result in relatively greater costs associated with companies' addressing and non-proponent shareholders' consideration of these additional proposals.

We also considered various other formulations of what would be considered "substantially implemented," such as if the company has already:

1) Effected substantially all of what the proposal requests;
2) Addressed substantially all of the underlying concerns of the proposal; or

3) Implemented the essential objectives of the proposal.

All three of these alternatives may require a more fact-intensive analysis (*e.g.*, delineating "what the proposal requests" or its "underlying concerns" or "essential objectives" and determining whether the company has "substantially" addressed them) compared to the proposed amendment. Further, in the second and third alternatives, the analysis may not be sufficiently focused on the specific elements of the proposal, which may not serve the purpose of the exclusion to avoid the consideration of proposals on which a company has already "favorably acted." We expect that all three alternative standards would be difficult to apply in a consistent and predictable manner. As a result, companies and shareholders would potentially experience greater uncertainty with respect to the application of the substantial implementation exclusion under such alternatives relative to the proposed amendment.

2. Rule 14a-8(i)(11) – Duplication

As an additional change to the proposed amendment to Rule 14a-8(i)(11), we considered changing the existing first-in-time standard to instead provide for the exclusion of the duplicative proposal that has fewer co-proponents. As with the first-in-time standard, this alternative would provide an objective criterion for exclusion of a proposal. By focusing on the number of co-proponents, this alternative would place an emphasis on the potential breadth of shareholder support a proposal might receive. However, we find little evidence in the data that the number of co-proponents is positively associated with the level of support for a proposal.[147] Further, this alternative approach would not provide a methodology for determining which proposal should be excluded in cases in which duplicative proposals have the same number of co-filers. We also

[147] Using shareholder proposals that were voted on in meetings held in 2017-2021 and controlling for proposal topic, we find a positive but not statistically significant correlation between the numbers of co-proponents and the voting support a proposal received.

considered changing the existing first-in-time standard to instead provide for the exclusion of the duplicative proposal that has fewer number of shares held by a proponent or co-proponents. However, a proponent's ownership or the aggregate ownership of co-proponents may not be correlated with the eventual level of shareholder support a proposal may receive.[148] Lastly, we expect that the potential benefits associated with changing the first-in-time standard to one of the alternatives described above, beyond those of the proposed amendment, would be minimal because the proposed amendment alone may reduce the incentives for proponents to submit a proposal quickly or reduce the incentives for proponents to attempt to preempt other proposals those proponents do not agree with and in turn, address the concerns associated with the first-in-time standard of the duplication exclusion.

3. Rule 14a-8(i)(12) – Resubmissions

As an alternative to the proposed amendment to Rule 14a-8(i)(12), we considered returning to the pre-1983 standard defining a resubmission as "substantially the same proposal" and interpreting that to mean a proposal that is virtually identical (in form as well as substance) to a proposal previously included in the company's proxy materials. This alternative may be easier to apply relative to the proposed amendments because it would not involve a determination about the objectives and means of a proposal. We would expect that such an alternative could to lead to a greater consistency and predictability of determinations under Rule 14a-8(i)(12) and potentially result in fewer no-action requests. However, as discussed in Section II.C, reverting to the pre-1983 standard would re-introduce the concern previously acknowledged by the Commission that a shareholder-proponent could make some minor changes to a previously submitted proposal so as to not have the proposal excluded. In turn, this alternative

[148] See 2019 Proposing Release, supra note 3, at 66488 n. 188.

could result in the inclusion of proposals in companies' proxy statements that have little potential for obtaining broader or majority support in the near term, which could result in greater costs for companies and their shareholders.

F. Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the amendments, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. In addition, we request comments on our selection of data sources, empirical methodology, and the assumptions we have made throughout the analysis. In addition, we request comment on the following:

1. Are there any entities that would be affected by the proposed amendments that are not discussed in the economic analysis? In which ways are those entities affected by the proposed amendments? Please provide an estimate of the number of any additional affected entities.
2. Are there any costs or benefits of the proposed amendments that are not discussed in the economic analysis? If so, please describe the types of costs and benefits and provide a dollar estimate of these costs and benefits.
3. We have provided a qualitative analysis of the costs and benefits of the proposed amendments. What would be the quantitative impact of the proposed amendments? Please provide data about or dollar estimates of the costs and benefits as they relate to proponents, companies, and non-proponent shareholders.

4. What would be the effects of the proposed amendments, including any effects on efficiency, competition, and capital formation? Would the proposed amendments be beneficial or detrimental to proponents, companies, and the companies' non-proponent shareholders, and why in each case?

5. Could the proposed amendments to Rule 14a-8(i)(10), Rule 14a-8(i)(11), or Rule 14a-8(i)(12) allow companies to make more informed decisions around inclusion or exclusion of proposals and the submission of no-action requests? Would companies submit fewer no-action requests to the Commission's staff as a result of the proposed amendments? Could there be a cost savings to companies associated with companies no longer attempting to exclude proposals that are unlikely to be excludable under Rule 14a-8(i)(10), Rule 14a-8(i)(11), or Rule 14a-8(i)(12)?

6. Could the proposed amendments to Rule 14a-8(i)(10), Rule 14a-8(i)(11), or Rule 14a-8(i)(12) allow shareholder-proponents to make more informed decisions around submitting proposals? Would shareholder-proponents submit different proposals in terms of subject matter and/or quantity as a result? Could the proposed amendments benefit shareholder-proponents by allowing them to avoid submitting proposals that are likely to be excludable under Rule 14a-8(i)(10), Rule 14a-8(i)(11), or Rule 14a-8(i)(12)?

7. How might companies and shareholder-proponents change their behavior in response to the proposed amendments to Rule 14a-8(i)(10), Rule 14a-8(i)(11), or Rule 14a-8(i)(12)? How might these changes in behavior affect the number and characteristics of proposals submitted and included in companies' proxy statements? How might these changes in behavior impact the distribution of proposal topics submitted and included in companies'

proxy statements? Would these changes result in benefits or costs to companies, proponents, and non-proponent shareholders?

8. We described in Section III.E above a number of alternative approaches or additional changes to the proposed amendments that we considered. Are there any costs or benefits to these alternatives that are not discussed in the economic analysis? If so, please describe the types of costs and benefits and provide a dollar estimate of these costs and benefits.

9. Are there additional alternatives to the proposed amendments that we should consider? If so, please describe the types of costs and benefits of these additional alternatives and provide a dollar estimate of these costs and benefits.

IV. PAPERWORK REDUCTION ACT

A. Summary of the Collection of Information

Certain provisions of our rules and schedules that would be affected by the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[149] We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[150] The hours and costs associated with preparing, filing, and sending the schedules, including preparing documentation required by the shareholder-proposal process, constitute paperwork burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collection is mandatory.

[149] 44 U.S.C. 3501 et seq.

[150] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Responses to the information collection are not kept confidential, and there is no mandatory retention period for the information disclosed. The title for the affected collection of information is:

"Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A)" (OMB Control No. 3235-0059).

We adopted the existing regulations and schedule pursuant to the Exchange Act. The regulations and schedule set forth the disclosure and other requirements for proxy statements filed by issuers and other soliciting parties. A detailed description of the proposed amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the proposed amendments can be found in Section III above.

B. Summary of the Proposed Amendments' Effects on the Collection of Information

As discussed in Section II above, the proposed amendments are intended to provide a clearer framework for the application of three of the substantive bases for the exclusion of shareholder proposals under Rule 14a-8. The proposed amendments to Rule 14a-8(i)(10), 14a-8(i)(11), and 14a-8(i)(12) would provide greater certainty and transparency to shareholders and companies as they evaluate whether these bases would apply to particular proposals.

C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

The paperwork burden estimate for Regulation 14A includes the burdens imposed by our rules that may be incurred by all parties involved in the proxy process leading up to and associated with the filing of a Schedule 14A. The current number of estimated responses for the

collection of information for Regulation 14A is 6,369 annual responses, reflecting 777,590 internal burden hours and a professional cost burden of $103,678,712.[151] The total burden estimate for Regulation 14A reflects, among other things, the collection-of-information burden associated with Rule 14a-8, which includes both the time that a shareholder-proponent spends to prepare its proposals for inclusion in a company's proxy statement, as well as the time that the company spends to prepare its proxy statement to include and respond to such proposals. We recognize that the burdens on a particular proponent or company would likely vary based on a number of factors, including the propensity of a particular shareholder-proponent to submit proposals, or the number of shareholder proposals received by a particular company, which may be related to its line of business or industry or other factors.

The proposed amendments to Rule 14a-8 would revise the text of Rule 14a-8 to provide clearer standards for exclusion, and promote more consistent and predictable determinations regarding the exclusion of proposals under the rule. The proposed amendments are not expected to affect the number of annual responses under the Regulation 14A information collection, as the obligation to prepare and file proxy statements would remain irrespective of the proposed amendments. The proposed amendments could either increase the burden associated with particular filings (for example, by leading to the inclusion of more shareholder proposals in companies' proxy statements) or reduce the burden (for example, by providing a clearer basis for exclusion of a shareholder proposal). While the effects of the proposed amendments on the burden hours and professional costs are difficult to predict, as they would depend on a number of interrelated and potentially offsetting factors, we expect that the overall burdens associated with

[151] These numbers reflect the Commission's current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average. Averages may not align with the actual number of filings in any given year.

Regulation 14A would not change significantly. Thus we are estimating no change in paperwork burden in connection with the proposed amendments, although we solicit comment on this and other aspects of our PRA analysis below.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F

Street NE, Washington, DC 20549-1090, with reference to File No. S7-20-22. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-20-22 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[152] the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[152] 5 U.S.C. 801 et seq.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

The Regulatory Flexibility Act ("RFA")[153] requires an agency, when issuing a rulemaking proposal, to prepare and make available for public comment an Initial Regulatory Flexibility Analysis ("IRFA") that describes the impact of the proposed rule on small entities.[154] This IRFA has been prepared in accordance with the RFA and relates to the proposed amendments to Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12) under the Exchange Act described in Section II above.

A. Reasons for, and Objectives of, the Proposed Action

Rule 14a-8 provides an important mechanism for shareholders to express their views, provide feedback to companies, and raise important issues for the consideration of their fellow shareholders by the inclusion of shareholder proposals in the company's proxy statement. The proposed amendments are intended to facilitate shareholder suffrage and communication between shareholders and the companies in which they invest, as well as among a company's shareholders, through the shareholder proposal process. In particular, they are intended to enhance the ability of shareholders to express diverse objectives, consider various ways to address issues, and provide greater certainty and transparency to shareholders and companies as to the application of certain of the substantive standards for the exclusion of proposals under Rule 14a-8. The reasons for, and objectives of, the proposed amendments are discussed in more detail in Section II above. We discuss the economic impact and potential alternatives to the proposed amendments in Section III, and the estimated compliance costs and burdens of the amendments under the PRA in Section IV above.

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[153] 5 U.S.C. 601 et seq.

[154] 5 U.S.C. 603(a).

B. Legal Basis

We are proposing amendments to the rules under the authority set forth in Sections 3(b), 14, and 23(a) of the Exchange Act, as amended, and Sections 20(a), 30, and 38 of the Investment Company Act, as amended.

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect some small entities that are either: (i) shareholder-proponents that submit Rule 14a-8 proposals, or (ii) issuers subject to the federal proxy rules that receive Rule 14a-8 proposals. The RFA defines "small entity" to mean "small business," "small organization" or "small governmental jurisdiction."[155] The definition of "small entity" does not include individuals. For purposes of the RFA, under our rules, an issuer of securities or a person, other than an investment company, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year.[156] We estimate that there are approximately 772 issuers that are subject to the federal proxy rules, other than investment companies, that may be considered small entities.[157] An investment company, including a business development company, is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[158] We estimate that, as of December 2021, there were approximately 80 investment companies that

[155] 5 U.S.C. 601(6).

[156] 17 CFR 240.0-10(a).

[157] This estimate is based on staff analysis of issuers potentially subject to the final amendments, excluding co-registrants, BDCs, and issuers of asset-backed securities, with EDGAR filings on Form 10-K, or amendments thereto, or any proxy filing as described in note 73, supra, filed during the calendar year of Jan. 1, 2021 to Dec. 31, 2021. This analysis is based on data from XBRL filings, S&P Compustat, Ives Group Audit Analytics, and manual review of filings submitted to the Commission.

[158] 17 CFR 270.0-10.

are subject to the federal proxy rules that may be considered small entities.[159] We are unable to estimate the number of potential shareholder-proponents that may be considered small entities;[160] therefore, we request comment on the number of these small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

If adopted, the proposed amendments would apply to small entities to the same extent as other entities, irrespective of size. Therefore, we generally expect the nature of any benefits and costs associated with the proposed amendments to be similar for large and small entities. However, as noted in Section III.C above, the proposed amendments could have a greater effect on larger entities because larger entities are more likely to receive shareholder proposals and submit no-action requests than smaller entities. Accordingly, we refer to the discussion of the proposed amendments' economic impact, including the estimated costs and benefits, on all affected parties, including small entities, in Section III.C above. Consistent with that discussion, we anticipate that the economic benefits and costs likely could vary among small entities based on a number of factors, such as the propensity of a particular shareholder-proponent to submit proposals, or the number of shareholder proposals received by a particular issuer, which may be related to its line of business or industry or other factors, which makes it difficult to project the economic impact on small entities with precision. While the proposals themselves do not impose any new reporting, recordkeeping or compliance requirements, they could affect the costs

[159] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data filed with the Commission (Forms N-Q and N-CSR) for or during the last quarter of 2021.

[160] For the purposes of our Economic Analysis, we have estimated that there were approximately 176 proponents that submitted a proposal to be included in a company's proxy statement as a lead proponent during calendar year 2021. See supra Section III.A. Out of these 176 proponents, 66 were individuals, and 110 were non-individuals. Thus, no more than 110 of these unique proponents would be considered small entities. However, this data allows for the identification of a sole lead proponent of each proposal, but not all of a proposal's proponents, and, as a result, it should be interpreted as a lower bound on the total number of unique proponents.

associated with preparing a proxy statement or a shareholder proposal depending on the particular facts and circumstances. As explained in Section III, in many cases we are unable to quantify these costs because we lack information necessary to make reasonable estimates. As a general matter, however, we recognize that the costs of the proposed amendments borne by the affected entities could have a proportionally greater effect on small entities, as these costs may be a relatively greater percentage of the total cost of operations for smaller entities than larger entities, and thus small entities may be less able to bear such costs relative to larger entities. The proposed amendments could create varying competitive effects for companies based on company size. As noted in Section III.D above, the proposed amendments could have a greater competitive effect on larger public companies relative to smaller public companies because larger public companies are more likely to receive shareholder proposals. However, because the proposed amendments could result in both greater benefits and greater costs to certain companies, we cannot reliably predict whether and how the competitive position of smaller public companies may change as a result of the proposed amendments.

Compliance with the proposed amendments may require the use of professional skills, including legal skills. We request comment on how the proposed disclosure amendments would affect small entities, including the type of professional skills necessary for compliance with the proposed amendments.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The RFA directs us to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The Rule 14a-8 shareholder proposal process is used regularly by issuers and shareholder-proponents of all sizes, and the rule generally does not impose different standards or requirements based on the size of the issuer or shareholder-proponent. We do not believe that establishing different compliance or reporting obligations in conjunction with the proposed amendments or exempting small entities from all or part of the requirements is necessary. We believe the proposed amendments are equally appropriate for issuers and shareholder-proponents of all sizes seeking to engage with one another through the Rule 14a-8 process, and we see no reason why a shareholder-proponent of a company that is a small entity should be required to comply with differing standards regarding submission of a shareholder proposal to the company than a shareholder-proponent of a company that is a larger entity. In this regard, we anticipate that the proposed amendments would result in more predictable and consistent determinations regarding the application of Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12) across proposals and over time, which would benefit both issuers and shareholder-proponents of all

sizes. We do not believe that imposing different standards or requirements based on the size of the issuer or shareholder-proponent is necessary, and may result in additional costs associated with ascertaining whether a particular issuer or shareholder-proponent may avail itself of such different standards. For these reasons, we are not proposing differing compliance or reporting requirements or timetables, or an exception, for small entities. However, we seek comment on whether and how the proposed amendments could be modified to provide differing compliance or reporting requirements or timetables for small entities and whether such separate requirements would be appropriate.

The proposed amendments are intended to provide a clearer framework for the application of certain of the rule's substantive bases for the exclusion of proposals that is applicable to, and equally appropriate for, issuers and shareholder-proponents of all sizes. We believe that the proposed amendments are clear and that further clarification, consolidation, or simplification of the compliance requirements for small entities is not necessary, although we solicit comment on how the proposed amendments could be revised to reduce the burden on small entities.

Rule 14a-8 historically, and the proposed amendments generally, use design standards rather than performance standards in order to promote uniform requirements for all issuers and shareholder-proponents in connection with the submission of shareholder proposals. We solicit comment as to whether there are aspects of the proposed amendments for which performance standards would be appropriate.

G. Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entities, including shareholder-proponents, that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities and whether the proposed amendments would have any effects that have not been discussed in the analysis;
- How to quantify the impact of the proposed amendments; and
- Whether there are any federal rules that duplicate, overlap, or conflict with the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AMENDMENTS

We are proposing the rule amendments contained in this document under the authority set forth in Sections 3(b), 14, and 23(a) of the Exchange Act, as amended, and Sections 20(a), 30, and 38 of the Investment Company Act, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements; Securities.

In accordance with the foregoing, we are proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Amend § 240.14a-8 by revising the text of paragraphs (i)(10) through (12) to read as follows:

§ 240.14a-8 Shareholder proposals.

* * * * *

(i) * * *

(10) *Substantially implemented:* If the company has already implemented the essential elements of the proposal;

* * * * *

(11) *Duplication:* If the proposal substantially duplicates (*i.e.*, addresses the same subject matter and seeks the same objective by the same means as) another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) *Resubmissions:* If the proposal substantially duplicates (*i.e.*, addresses the same subject matter and seeks the same objective by the same means as) a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

(i) Less than 5 percent of the votes cast if previously voted on once;

(ii) Less than 15 percent of the votes cast if previously voted on twice; or

(iii) Less than 25 percent of the votes cast if previously voted on three or more times.

* * * * *

By the Commission.

Dated: July 13, 2022.

Vanessa A. Countryman,
Secretary.