SHAREHOLDER RIGHTS GROUP

July 25, 2022

Via rule-comments@sec.gov

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

File Number S7-20-22

Dear Ms. Countryman:

The Shareholder Rights Group (SRG) is an association of proponents of shareholder proposals, organized to defend investor rights to engage with public companies on governance and long-term value creation. We are writing in support of the proposed rulemaking on Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8.

The proposed amendments to Rule 14a-8, the shareholder proposal rule, would clarify when a proposal can be excluded as substantially implemented, and when a proposal seeking different objectives or means may block another proposal submitted for the current or subsequent year. We support these overdue changes which would reduce costs and uncertainties to proponents and issuers alike. We appreciate the leadership of Chairman Gensler, the Commissioners and SEC staff making the proposal process more efficient, objective and predictable.

The current rules have placed the staff in the awkward position of making highly subjective determinations on substantial implementation, duplication or resubmission, and have increased the number and length of no action requests. They have also led to exclusion of numerous proposals, the consideration of which would have been of clear benefit to companies and their investors.

Substantial implementation

The proposal to revise criteria for substantial implementation, Rule 14a-8(i)(12), states that a proposal will be considered substantially implemented if "the company has already implemented the essential elements of the proposal." This effectively streamlines substantial implementation analysis by eliminating claims that a company's actions

Shareholder Rights Group

Arjuna Capital

As You Sow

Boston Common Asset Management, LLC

Boston Trust Walden

Clean Yield Asset Management

First Affirmative Financial Network, LLC

Harrington Investments, Inc.

Ides Capital

James McRitchie

John Chevedden

Mercy Investments

Natural Investments, LLC

Newground Social Investment, SPC

NorthStar Asset Management, Inc.

Pax World Funds

Sustainability Group of Loring, Wolcott & Coolidge, LLC

The Shareholder Commons

Trillium Asset Management, LLC

Zevin Asset Management

implemented the "essential purpose" without implementing the guidelines of the proposal. The substantial implementation rule, which merely asks whether a Proposal has bee "substantially implemented" has not been amended since 1983. In interpreting this vague language of the rule, the SEC 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," but staff has also looked to whether the company has addressed a proposal's *underlying* concerns and whether the *essential objectives* of a proposal have been met. As a result of these staff interpretations, no-action requests asserting substantial implementation have typically devolved into a subjective and philosophical debate as to interpretation of the "essential purpose" of a proposal.

Under the existing rule, issuers and their lawyers have gone to great lengths to argue about the underlying purpose of the proposal, typically asserting that existing company activities meet a proposal's purpose even when the activities clearly do not meet the proposal's guidelines. Even where proposals asked for specific criteria or responses on a topic like climate change (e.g. answering specific questions), issuers have claimed that the company's existing reporting meets the essential purpose by informing investors on its general *approach to climate change*, despite failing to address the specific elements requested by the proposal. For instance, climate change proposals asking a company to report "if and how" it intends to align with the Paris agreement, or to describe "benefits and drawbacks" of alignment with the goals of the Paris agreement ultimately led to the exclusion of proposals as substantially implemented at E*xxon Mobil Corporati*on (April 3, 2019) and *Hess Corporation* (April 11, 2019). The issuers talked around the Paris Agreement in their published materials, even though proponents demonstrated that the company reports had never answered or analyzed the core elements raised by the proposals – e.g. whether it intends to align with the Paris agreement. Under the new proposed principle of examining whether the essential elements of a proposal are implemented, such prior proposals would likely be found not excludable, to the benefit of investors seeking clearer disclosure and analysis of the companies' responses to climate transition risks.

To cite another example where exclusion was, we believe, wrongly allowed, in *eBay Inc.* (March 29, 2018) the proposal requested that the compensation committee prepare a report assessing the feasibility of integrating sustainability metrics, including metrics regarding diversity among senior executives, into the performance measures of the CEO under the Company's compensation incentive plans. The proponent, Zevin Asset Management, emphasized in its no-action response that based on the company's no-action request

> … it is only evident that the Compensation Committee takes account of eBay's cultural aspirations toward diversity. By its own admission, eBay's approach to CEO compensation does not utilize specific metrics related to sustainability, diversity or

> inclusion. Moreover, according to the Company, "specific individual goals or performance criteria" related to sustainability are not assigned particular weight in the process of setting CEO compensation.
>
> … Far from being an account of the integration of sustainability and diversity metrics, the current state of practice offers no metrics at all, and it gives no reliable sense of whether and to what extent such metrics have been considered.
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> ***
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> … [A]t eBay (where Black people and Latinos still account for only 3 percent of technical roles and there are only 5 underrepresented people of color among the top 70 executives), a substantial response to our request on metrics is necessary and warranted. [Emphasis added]

Because the essential element of the Zevin proposal involved establishing specific metrics, it is clear and appropriate that this proposal would not have been excludable if the proposed rule were used to decide on exclusion.

Another example that we believe would be correctly non-excludable under the proposed rule was in *Apple Inc.* (December 6, 2019), where the proposal requested that the Board of Directors establish a human rights committee. The proponent asserted that existing committees, "Apple's current Audit and Finance Committee, Compensation Committee and Nominating and Corporate Governance Committee are not adequate to deal with very complicated challenges and high risks of Apple's international business." In contrast, the Company claimed that those committees and procedures implemented by the company addressed the underlying concern and essential objective of the Proposal, which *the company characterized* as requiring the Board to oversee the Company's policies, including human rights, foreign governmental regulations and international relations. The Staff accepted this argument. Yet, the essential element of the proposal was clearly the establishment of a separate board committee. There is little reason to think that SEC staff are in a better position than the investors themselves to assess whether the existing committee structures and measures obviated the need for a new committee.

The new proposed approach of asking whether the company has addressed the essential elements of the proposal is a sound approach. It would eliminate most of the subjectivity of the substantial implementation rule and encourage proponents to clearly articulate essential elements in drafting their proposals.

Duplication

The rulemaking proposal states that proposals previously submitted will only block another proposal on the current year's proxy under Rule 14a-8(i)(11) if it "addresses the same subject matter and seeks the same objective by the same means." This is a meritorious change to the existing rule, which currently uses the subjective test of whether a

previously submitted proposal "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."

To cite one example of a recent excluded proposal that we believe would be appropriately permissible under the rule change, a proposal submitted at *Chevron Corporation* (March 28, 2019) requested disclosure of short-, medium-and long-term greenhouse gas targets aligned with the Paris Climate Agreement temperature increase goals. A previously submitted proposal had requested that the company issue a report on how it can reduce its carbon footprint in alignment with the Paris Agreement's temperature goals. The supporting statement focused on strategies for diversifying the Company's energy mix, seeking information at board and management discretion, on ". . . the relative benefits and drawbacks of transitioning its operations and investments through investing in low carbon energy resources, reducing capital investments in oil and/or gas resource development that is inconsistent with a below 2 degree pathway, and otherwise diversifying its operations to reduce the company's carbon footprint (from exploration, extraction, operations, and product sales)." The proposal on targets was allowed to be excluded. In retrospect the two proposals may have had similar objectives of addressing the issue of decarbonization, but they had very different means, with one focused on the establishment of targets and the other focused on strategies for decarbonizing. It would have been more informative to the company and its investors to seek a vote on both proposals.

A similar example of exclusion under the rule, with one proposal addressing *goals* and the other addressing *strategy* occurred in *General Motors Corporation (*March 13, 2008). The company was allowed to omit a shareholder proposal which recommended "a committee of independent directors of the Board assess the steps the company is taking to meet new fuel economy and greenhouse gas emission standards for its fleets of cars and trucks, and issue a report to shareholders. The company claimed exclusion based on a previously submitted proposal asking the "the Board of Directors publicly adopt quantitative goals, based on current and emerging technologies, for reducing total greenhouse gas emissions from the company's products and operations." Again, a different outcome would be likely and appropriate under the proposed new principle.

The defect of the existing duplicative proposal rule is exemplified by *Chevron Corporation* (February 21, 2012) in which the excluded proposal asked the company to provide a report on metrics related to offshore oil drilling including the number of offshore wells, current and projected expenditures for remedial maintenance and inspection of those wells, and cost of research to find effective containment and reclamation following marine oil spills. The staff treated this as duplicative based on a prior submitted proposal which asked for a report "on the steps the company has taken to reduce the risk of accidents, describing the board's oversight of process safety management, staffing levels inspection and maintenance of refineries, oil drilling rigs and other equipment." With the later proposal seeking metrics and the prior proposal seeking a narrative report on steps

the company is taking to reduce the related risks, these proposals may have addressed "substantially the same subject matter" but it was of no real benefit to investors to exclude the metrics proposal. It is clear to us that under the new proposed standard the two proposals would have both been permissible on the proxy.

Similarly, in *Comcast Corporation* (March 27, 2006) a proposal regarding executive benefits was allowed to be excluded. The proposal asked the Board of Directors to seek shareholder approval of future severance agreements with senior executives that provide benefits in an amount exceeding 2.99 times the sum of the executive's base salary plus bonus. In contrast, the previously submitted proposal requested that directors eliminate all remuneration for any one of management and an amount above $500,000 per year, eliminating possible severance pay and funds placed yearly in a retirement account. Clearly these proposals addressed pay inequity with very different means, yet under the vagaries of the "substantially same subject matter" rule, a subjective determination by staff allowed the later submitted proposal to be excluded.

Staff has sometime, under the existing rule, allowed similar proposals to proceed based on their different objectives or means, but the new proposed principles are a clearer and more objective vehicle for making these determinations. For example, a recent staff ruling *consistent* with the new proposed rule is the decision at *Johnson & Johnson* (February 11, 2022). Mercy Investment Services had submitted a proposal requesting the "board of directors to oversee a third-party audit (within a reasonable time and at a reasonable cost) which assesses and produces recommendations for improving the racial impacts of its policies, practices and products, above and beyond legal and regulatory matters." In its background section, the proposal pointed to the economic impacts of systemic racism on companies and society, including the racial gaps in the US economy which the proposal estimated to cost the economy $16 trillion over the past 20 years. At issue in the Company's duplication claim was a proposal previously submitted by the National Center for Public Policy Research which included a very similar resolved clause but had an opposite objective expressed in the background sections. It took the position that "anti-racism" programs raise significant objection, including concern that the "anti-racist" programs are themselves deeply racist and otherwise discriminatory." The principal objective of the prior proposal appeared to be to attack antiracism programs as undercutting meritocracy and discriminating against white employees. Although the Staff found that the two proposals did not conflict under the rule as addressing "substantially the same subject matter," the new proposed principle that examines whether the proposals are pursuing the same objectives would be a clearer foundation for the distinction. There should be room under the shareholder proposal rule to weigh and accommodate a range of investor perspectives, especially given our society's sometimes deeply divided views on particular issues.

The subjective nature of the duplicative proposals rule is long-standing. The Commission's no-action files are riddled with decisions that seem, to today's investors, to

be of obvious error, denying shareholder suffrage to address pressing issues for their companies by different means. We support the proposed change.

Resubmission

To the extent that a proposal did not receive sufficient votes for resubmission under the thresholds of Rule 14a-8(i)(12), the proposed rule would only lead to the exclusion of a proposal if the subsequently submitted proposal "addresses the same subject matter and seeks the same objective by the same means."

The new thresholds established by the 2020 amendments for resubmission drastically altered opportunities to resubmit proposals. Proponents had written to the Commission warning that the proposed increase in thresholds would curtail the ability of proponents to address emerging issues which may receive low votes when initially introduced. The amended rule did not alter the "substantially the same subject matter" principle for exclusion. As such it did nothing to accommodate the progression of emerging issues, including lessons learned by proponents and other voting investors. A proponent might get a relatively low vote on a proposal and receive feedback from the market, either from asset managers or proxy advisors, that the proposal was too prescriptive or contained other objectionable "means" or "objectives". The proposed rule, in contrast, provides an appropriate opportunity for proponents to fine tune their approach to a topic to win greater voting support.

The failure of the resubmission rule to accommodate proponent and investor learning is a long-standing problem. For example, in *Texaco Inc.* (January 21, 1994), the staff allowed exclusion as substantially the same subject matter as prior proposals for a proposal asking a company to endorse the Code of Conduct for Business Operating in South Africa and to report to shareholders on its implementation. The code in question was adopted by the South African Council of Churches on July 8, 1993, seeking to encourage businesses to play a constructive and creative role in partnership with workers, communities and other members of civil society to lay the economic foundations for a stable and prosperous South Africa. Its planks called for equal opportunity, training and education to increase productive capacities, protection of workers' rights, a safe and healthy workplace, job creation, social responsibility programs developed in consultation with communities affected, disclosure of product hazards to consumers, environmentally sound products and practices, support for black-owned businesses, and disclosure of information needed to monitor Code implementation. In contrast, proposals that had previously been submitted in 1990, 1991 and 1992 proposals which received inadequate votes for resubmission would have required the Company to sever all economic ties with South Africa and relocate its operations to the "front line states" bordering South Africa and would have required the company to terminate sales to the South African military, police and any of their agencies until the black majority there achieves political equality and apartheid ends. The issuer took the position that the later proposal was merely an "attempt to modify the prior proposals to avoid the effect of Rule 14a–8(c)(12)." The

company asserted that what the proposals had in common was that they both encouraged stockholders to address "whether and under what conditions the company should continue its operations in South Africa." The exclusion operated to the detriment of investors. It is evident that the means and objectives of the excluded proposal were sufficiently different from the prior proposals that they would not be excludable under the new proposed framework. This would be an appropriate outcome.

Economic Analysis Recommendations

Each of the proposed technical fixes to the rule are supportive of the interests of investors and issuers in having clarity and predictability about the rules, and would ease proponent concerns about whether limited company actions on the subject matter of a proposal, or the filing of a prior proposal with very different means or objectives, may block a proposal. The minimal added cost associated with including a few additional proposals on proxy statements is substantially outweighed by the benefit of bolstering investors' voices and choices in addressing critical issues facing their companies. We urge the Commission to consider the following economic benefits associated with the proposed rule changes:

• Supporting the rights and responsibilities of investment fiduciaries, including pension funds, to assess and manage risk in their portfolios, including long-term risks associated with issues raised in shareholder proposals;

• Providing greater choice and flexibility to voting investors in possible approaches to addressing critical issues facing their companies;

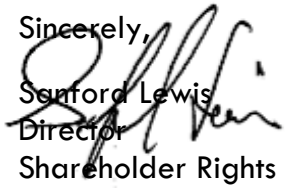
•Allowing investors to address the portfolio-wide risks posed by issuer activities associated with systemic issues and externalities;

• Providing recourse for investors concerned with potentially misleading statements or commitments by corporations. Shareholder proposals often provide the least costly and most efficient means of confirming whether a company's net zero by 2050 or diversity commitments are backed by actions and metrics, and therefore provide critical information to the market;

• Reducing costs of the no action process and increasing efficiency for proponents and issuers alike, including the amount of SEC staff deliberative time on the three exclusions.

We strongly support the proposed changes.

Sincerely,



Sanford Lewis
Director
Shareholder Rights Group