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VIA ELECTRONIC DELIVERY TO: Rule-Comments@sec.gov

September 12, 2022

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

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

Dear Secretary Countryman:

I write in support of the proposed rulemaking on *Substantial Implementation*, *Duplication*, and *Resubmission of Shareholder Proposals under Exchange Act Rule 14a-8*. We comment from the perspective **(a)** of an Registered Investment Advisor who manages assets on behalf of individual and institutional clients, and also **(b)** from having served for many years as a Governing Board member of the Interfaith Center on Corporate Responsibility (ICCR).

For clients, *Newground Social Investment* reviews the financial, social, and governance implications of the policies and practices of publicly-traded companies. We do this because the data supports a view that sound governance, social, and environmental policies are hallmarks of the most profitable companies.

Accordingly, we vote all proxies on behalf of clients and have a history – **dating back to 1994** – of engaging in direct dialogue with corporate management teams around ESG[1] topics. During this time, 'engagement' has included dialogue, discussion, negotiation, and the filing of many hundreds of Rule 14a-8 shareholder proposals on behalf of Newground clients.

> If there are two observations that have been true or might broadly characterize the entirety of our nearly 30 years of filing shareholder resolutions, they would be that the process: **(1)** has been fraught with subjectivity; and **(2)** has thwarted a nuanced and robust discussion of important ideas – often ahead of these issues emerging as everyday topics of national conversation.

The proposed amendments to Rule 14a-8, the *Shareholder Proposal Rule*, would clarify when a shareholder proposal (or "resolution", used here interchangeably) can be excluded as being **(A)** "substantially implemented" by the issuer; **(B)** because its subject matter "duplicates" another proposal submitted for the current year; or **(C)** because it is a "non-qualifying resubmission" of a subject matter voted on in a recent prior year.

[1] ESG = Environmental, Social & Governance issues or criteria. For the purposes of this comment letter, we will group these corporate policies and practices under the label "ESG issues"

Referencing the two overarching observations made above, the existing rules have placed the SEC staff (the "Staff") in the untenable position of making highly subjective determinations under these rules – often, especially for emerging issues, with inadequate background or context for deliberation. We note appreciatively that Staff has striven mightily and done a laudable job in regard to these ESG topics over the years. That said, this context has created uncertainty, inefficiency, and a costly increase in the number of no-action requests related to these issues.

Also relating to the two overarching observations made above, the existing rules have led to the exclusion of numerous proposals, the consideration of which – whether as counterpoint or as complement – we can now observe would have been of clear benefit to both companies and their investors.

Because they will largely relieve Staff of the often subjective business of deciding whether to exclude shareholder resolutions, the technical changes proposed in these amendments constitute a significant improvement – we see them as being a substantial benefit for proponents, for investors who vote their proxies, as well as for issuers.

(A)
SUBSTANTIAL IMPLEMENTATION

Regarding 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." In their no-action requests under the existing Rule, companies typically *do not* assert that they have implemented the proposal *as intended by the proponent*. Instead, they re-characterize (and often mis-characterize) the essential purpose of the proposal in a kind of straw-man exercise that then allows the assertion that existing company actions have fulfilled the proponents' wishes – when nothing could be further from the truth.

Because no one can forecast an issuer or Staff's subjective, item-by-item assessment of *essential purpose*, it becomes nearly impossible for proponents to know whether a proposal will withstand a "substantial implementation" challenge.

In fact, even when proponents have affirmed in a no-action response what the *essential purpose* of a proposal in fact was, the Staff has felt permissioned – in an unpredictable and seemingly arbitrary way – to substitute a company's significantly less exacting interpretation of the *purpose*.

This process has never seemed appropriate. For instance, even when proposals asked for <u>specific</u> criteria or responses, issuers have frequently claimed that the company's existing reports meet the essential purpose when they only discuss its <u>general</u> approach – entirely failing to address the clearly articulated intent of the proposal.

The new proposed rules ask whether a company has addressed the essential elements of a proposal. This 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 the drafting of their proposals. As a proponent, under the revised rules' guidance we will be able to draft proposals more clearly, which will avoid guesswork and provide investors a more clear basis for deliberation and voting.

Viewed in another light – from the perspective of voting proxies on behalf of Newground clients – the proposed substantial implementation rule will benefit not just our firm but all others who undertake proxy voting on behalf of clients. This is because proponents will not balk at making the essential purpose of a proposal clear for fear of being overly prescriptive and being no-actioned.

This will benefit deliberation, dialogue, and voting across the spectrum of both issuers and topics; more rapidly bring emerging issues to the fore; and increase efficiency and therefore profitability as companies will be better able to assess issues then either avoid risk to seek opportunities in light of evolving knowledge and understanding.

(B)
DUPLICATION

Newground has directly suffered as a result of the current interpretations around duplication. In multiple instances, clients we've represented have had proposals blocked by "copy-cat" proposals that were submitted significantly ahead of the filing deadlines for the sole purpose of blocking Newground's proposal from the proxy. These manipulations were successfully used against us despite the fact that the copy-cat proposals were diametrically opposed to the intent of Newground's proposals, and were similar only so far as general topic area.

In consequence, Newground employed a counter-strategy of filing proposals quite early so as to preempt being blocked by antithetical copy-cat resolutions. However, this resulted in a setback because the companies involved then viewed our actions as those of a shoot-first-ask-questions-later type mud-slinging activist, instead of as someone with genuine interest in dialogue with the company concerning its wellbeing. This created an untenable *Catch 22* type double-jeopardy for Newground, because we either risked being preempted by others and blocked from the proxy, or being discounted and ignored when the goal was constructive engagement. Neither outcome benefited voting investors, nor the contributions we sought to bring to companies' attention.

The proposed Rule would remedy a long-standing defect of Rule 14a-8 by enabling investors to vote on more than one approach to an issue, which will provide meaningful counterpoint and nuance for shareholder consideration.

More technically, the new Rule remedies the current flaw by stating that a first-submitted proposal will only block another resolution on the same proxy under Rule 14a-8(i)(11) if it "addresses the same subject matter and seeks the same objective by the same means." This tri-part test is a commendable improvement to the existing Rule, which currently uses a subjective (therefore inconsistent) test of whether a later-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."

Until such time as it proves to be a problem, we recommend against establishing a limit on the number of proposals in regard to a particular topic. Not only – especially in regard to emerging issues – would this squelch the quality and rigor of discussion, it would have the unintended consequence of causing a race to be first in line to file. This would neither support the careful crafting of proposals, nor allow success in engagement to determine whether-or-not filing a proposal will even be necessary.

Rest assured that proponents have no interest in multiplying the number of proposals that appear on a proxy statement. Rather than encourage proponents to file as quickly as possible and issuers to resort to no-action requests at the drop of a hat, a better alternative would be for companies to notify the respective proponents if there happens to be more than one proposal that an issuer believes may be duplicative. This would allow the proponents involved to discuss potential overlaps and to orchestrate the withdrawal of an unnecessary proposal – one that might not meaningfully add to investor deliberation. We feel the Staff should encourage issuers in this direction, which would create a self-regulating process that would both strengthen and streamline the proceeding, while removing from Staff the responsibility of refereeing the playfield.

As with the *substantial implementation* rule change, the *duplication* rule change will also benefit investors who vote their proxies by permitting proposals that address a subject matter with distinct points of view or approaches. This will allow investors a more rich field of consideration from which to assess the optimal approach to a topic, and provide Boards and management a better flow of information upon which to base future action.

(C)
RESUBMISSION

Newground has had proposals blocked from resubmission by the 2020 amendments to the shareholder proposal rule, which sharply elevated the resubmission eligibility thresholds to 5%, 15%, and 25% in years 1-2-3 sequentially. We've also observed a decreased appetite for substantive and productive engagement from companies who seem inclined to wait before engaging in hopes that the higher thresholds will block the proposal from the proxy and thus preempt the conversation.

In beneficial contrast, the proposed Rule would only lead to the exclusion of a proposal if it "addresses the same subject matter and seeks the same objective by the same means" as a recent prior proposal. This will allow investors to revisit a topic from different perspectives in subsequent years. This provides an appropriate and important opportunity – *especially in regard to emerging topics* – for investors, Boards, and management to fine-tune and evolve their understanding of a topic over time. Nothing could be more detrimental to the sober consideration of unfolding issues (that often exhibit crisis-level dimensions) than a hyper short-term, one-and-done type mentality as-is encouraged by the current resubmission eligibility regime.

(D)
Improving the Architecture of Proponent and Investor Decision-Making

Together, these proposed changes to the Rule represent important relief for investors, while making the operation of the Rule much clearer. This reduces the opportunity for circular-debate over subjective issues, and secures the opportunity for proponents to provide meaningful resolutions and choices for voting investors.

In our view, the proposed changes will have beneficial effects because they will:

1. Improve the architecture of decision-making for both proponents and issuers by **(a)** making it easier to know how to draft a proposal that will be meaningful to investors and also palatable to issuers, while **(b)** reducing the incentive for parties in either camp to file or to no-action preemptively.

2. Support the rights and responsibilities of investment fiduciaries – including pension funds – to assess and manage risk in their portfolios. This includes the often longer-term risks associated with issues highlighted by shareholder proposals.

3. Provide greater choice for voting investors as they consider alternate approaches to addressing that critical issues that face their portfolio companies.

4. Allow investors to address – not just one-by-one but portfolio-wide – the risks posed by issuer activities when it comes to systemic issues and externalities.

5. Provide recourse for investors concerned with potentially misleading statements or commitments by corporations, which in turn provides critical information to the marketplace.

   For instance: shareholder proposals may be the least costly and most efficient avenue for confirming whether a company's net zero by 2050 or diversity commitments are backed by actions and metrics.

6. Reduce costs of the no-action process and increase efficiency for proponents and issuers alike – not to mention reducing the amount of Staff time spent deliberating the subjective nuances that can swirl around proposals, arguments, and counter-arguments.

In Closing

We wish to thank Staff for their deliberations on these proposed changes to the Rule, which would broadly benefit Newground, its clients, the companies we invest in, as well as the spectrum of voting investors.

Newground wholeheartedly urges adoption of the changes as proposed, and would be happy to discuss any questions that may arise regarding these comments.

Sincerely,

Bruce Herbert

Bruce T. Herbert, AIF
Chief Executive *and* ACCREDITED INVESTMENT FIDUCIARY