SHAREHOLDER RIGHTS GROUP

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

Interfaith Center on Corporate Responsibility

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

Via rule-comments@sec.gov
October 4, 2022

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 is an association of leading proponents of shareholder proposals. We previously submitted comments on July 25, 2022 in support of the proposed amendments to the shareholder proposal rule regarding substantial implementation, duplication and resubmission.[1]

After the comment deadline of September 12, 2022, we reviewed the docket of comments. Most of the comments submitted were in support of the proposed rule changes. Of the 58 total comments, 42 letters, or 72%, were supportive of the proposed rule change.

However, a few comments on the docket, principally from trade associations, expressed opposition to the proposed amendments. In general, these comments asserted that the rulemaking proposal could lead to an increased number of proposals on proxy statements, the potential for proposals which contain only minor or trivial differences from issuer activities or previously submitted proposals, and that not enough time had passed since the 2020 amendments to assess the economic effect or need for the proposed rule changes.[2]

After consulting with the membership of the Shareholder Rights Group on the stated concerns, we write in response to such opposing comments and stand by our prior comments in support of the proposed changes. We believe the proposed amendments would be efficacious and supportive of the interests of investors,

[1] *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, Release No. 34-95267; IC-34647; File No. S7-20-22, hereafter "Rulemaking Proposal."

[2] Letters reviewed: Investment Company Institute (September 12, 2022); American Securities Association, Nariet, National Association of Manufacturers, NIRI: The Association for Investor Relations, US Chamber of Commerce (September 12, 2022); Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (September 12, 2022); Davis Polk & Wardwell LLP (September 15, 2022); James R. Copland, Senior Fellow and Director, Legal Policy, Manhattan Institute for Policy Research (September 12, 2022); David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation (September 12, 2022); Maria Ghazal, Business Roundtable (September 12, 2022).

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companies and the Commission. To summarize our response to the few critical comments we note that:

• The proposed rules are clearer than the current rules of decision and therefore will provide a more efficient, accountable and objective set of principles for resolving no-action requests. We view the proposed amendments as *good government* reforms, removing subjectivity from Staff decision-making and increasing the efficiency of shareholder proposal related activities by investors and issuers alike.

• Proponents generally have little motivation to submit "trivial" proposals that would make little difference to a company, or that are identical with other proposals that would appear on the proxy. We do not believe that the proposed rules would invite or lead to an increase in such proposals. However, the proposed amendments also would provide the Commission and Staff with sufficient latitude to exclude any "trivial" proposals that do not provide meaningful choices for investor deliberation and proposals that present only trivial differences from company actions could be evaluated and potentially excluded as micromanagement pursuant to Rule 14a-8(i)(7), including the clear principles for assessing micromanagement as set forth in Staff Legal Bulletin 14 L.

• The proposed clarifications as to how shareholders can avoid exclusion on these technical bases are appropriate and necessary given the escalating demand of investment sector entities for ESG related information. The demand for such information has been elevated by assertions of ESG greenwashing and by proposed Commission ESG fund regulations that will increase the obligation of investment funds to have the data necessary to support ESG determinations regarding the adequacy of disclosure or performance from investee companies. The proposed rules will support the capacity and efficiency of investors exercising their rights to file and vote upon shareholder proposals to support these needs.

I. <u>Substantial Implementation</u>

The amended rule on substantial implementation would provide that a proposal is substantially implemented if the company has implemented the *essential elements* of the proposal. This is a clearer requirement than the existing rule, which merely asks whether the proposal is substantially implemented by the company, and which has traditionally been interpreted by issuers and Staff under a two-part test of whether the company has met the *guidelines* and *essential objectives* of the proposal. As we noted in our prior letter, the "essential objectives" line of analysis has necessitated a highly subjective debate and analysis by the Staff as to the underlying purpose of a proposal; often the issuer's interpretation of the purpose of the proposal has been allowed to supersede the proponent's own explanation of their purpose in filing the proposal.

Proponents do not object to companies arguing that they have met the essential objectives of a proposal when they have not met the guidelines, but the appropriate forum to make such an argument is in the board or management opposition statement that appears on the proxy, not in a no action request seeking to exclude the proposal. In contrast, the proposed rule focusing no action exclusion evaluations on "essential elements" of a proposal is much clearer and will avoid subjective, inefficient and philosophical debates we have seen in no action requests.

The principal objection in the opposing comments is that the proposed rule would lead to micromanagement of companies by proponents, in which they could develop extremely granular proposals that only slightly deviate from existing company actions — just enough that the proposal will

not be excludable under the "essential elements" test. For example, the Business Roundtable asserted that, "[a]s a practical matter, the proposed change in approach means that proponents could be incredibly detailed and prescriptive in how a company should accomplish the objectives of a proposal and merely ensure that one or more 'elements' of achieving that objective differ from what a company already has in place."[3] The Investment Company Institute ("ICI") specifically referred to the potential for this process to lead to micromanagement.[4]

These opposition arguments are misdirected. The Commission has already created a vehicle for exclusion of proposals engaging in micromanagement under Rule 14a-8(i)(7). Under that rule, a shareholder proposal containing only a de minimis deviation from existing company action could be considered too granular, and excludable under the micromanagement guidance. As an example, if a company has a proxy access policy in place that allows up to 20 shareholders to aggregate their shares to nominate board directors, and a proposal were filed asking the company to change the policy to allow 21 shareholders to aggregate, it is reasonable to anticipate that the Staff might find that such a minor change is overly granular and therefore micromanagement.

We urge the Commission to resist any inclination to bring micromanagement criteria, tests or concerns into the Rule 14a-8(i)(10) analysis. The recently repealed Staff Legal Bulletins 14I, 14J and 14K complicated the no-action process drastically by interpolating into the ordinary business rule principles of significance to the company, which was already addressed by the Commission in Rule 14a-8(i)(5) (relevance), and by creating a new "delta" test assessing the degree to which company activities could be seen to implement the requested activities. Staff Legal Bulletin 14 L (SLB 14L) restored Staff interpretation in line with the Commission's clearly articulated mechanisms for addressing both of those issues. SLB 14L is consistent with the Commission's intent to have assessments of significance to the company determined under Rule 14a-8(I)(5) (relevance) and the company's activities to implement the proposal assessed under Rule 14a-8(i)(10)'s substantial implementation test. As we wrote in the Harvard Law School Corporate Governance Forum:

> The new bulletin SLB 14L has appropriately revoked nonconforming administrative guidance and realigned Staff interpretation with that of the Commission and the language of Rule 14a-8… Over time, Staff interpretations of the ordinary business exclusion have produced inconsistent add-ons to the clearly articulated principles of the Rule. Several Staff interpretations, beginning as early as 2009, deviated from core concepts of Rule 14a-8 as adopted by the Commission. Staff Legal Bulletin 14L resets the process to eliminate these deviations.

The Harvard Forum article may be useful background for the Commission to draw upon the lessons learned from recent Staff initiatives that had the effect of cross-wiring the rules. We believe it would be inappropriate and complicate decision-making and no-action requests to assess micromanagement under or in relation to Rule 14a-8(i)(10). Interpolating the rules into each other in this manner leads to a more complex no action process, with additional subjectivity and uncertainty. The virtue and integrities of rule 14a-8 as written, and of the proposed amendments at issue here, is that company

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[3] Maria Ghazal, Business Roundtable, Comment Letter, September 12, 2022, p. 4.; see also, Davis Polk & Wardwell LLP, Comment Letter, September 15, 2022, p. 1. (

[4] Investment Company Institute, Comment Letter, September 12, 2022, p.6.

implementation, significance and micromanagement are each housed in separate decision rules.

Although the proposing release for the current amendments reaffirms the interpretation of ordinary business in the 1998 release, given the focus of some commenters on the risk of micromanagement, we recommend that the Commission include in the final release an affirmation of the micromanagement criteria articulated in Staff Legal Bulletin 14L. The bulletin notes that, when considering a micromanagement argument, the Staff "will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." The Staff also said they "would expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input." We believe these are the right criteria for assessing whether a proposal micromanages, and that this is a Rule 14a-8(i)(7) issue, not a Rule 14a-8(i)(10) issue.

II. Duplication

The amended duplication rule would revise Rule 14a-8(i)(11) to provide that a shareholder proposal "substantially duplicates" another previously submitted proposal and is excludable if it "addresses the same subject matter and seeks the same objective by the same means." We strongly support this proposed amendment, which would reduce the likelihood of exclusions of proposals that provide meaningful choices to investors regarding the objectives or means they may wish to support for a given subject matter.

Some commenters argued that the proposed amendment will lead to confusion among shareholders. The ICI, for example, contended that "allowing multiple proposals . . . could adversely impact overall shareholder engagement if shareholders . . . become confused or frustrated by multiple proposals on the same issue."[5]

To the contrary, experience from the 2022 proxy season, as discussed below, illustrates that proposals addressing a single subject matter with different objectives or means provide meaningful choices to investors, are not too confusing to investors and provide better information for boards and management. Moreover, there is generally no incentive for proponents to knowingly file and seek votes on proposals that have only trivial differences.

a. Staff Precedents and proxy outcomes from the 2022 proxy season reveal that shareholders are able to distinguish purportedly duplicative proposals.

Johnson & Johnson (February 11, 2022)

An example of a 2022 instance in which purportedly duplicative proposals appeared on the proxy statement occurred at Johnson & Johnson. In *Johnson & Johnson* (February 11, 2022), the Staff found two proposals seeking racial equity audits to not be duplicative for purposes of Rule 14a-8(i)(11). In that case, the proponent successfully argued that the later submitted proposal had a different principal thrust and therefore was not duplicative.

[5] Investment Company Institute, Comment Letter, September 12, 2022, p. 7.

Both proposals asked for an audit of the company's diversity and racial equity programs, but the proponents had opposite objectives. The proposal submitted by Mercy Investments sought an independent examination of issues of systemic racism at Johnson & Johnson. The background section of the proposal stated:

> "Given the many companies across sectors embroiled in race-related controversies, any company without a comprehensive third-party audit and plan for improvement of its internal and external racial impacts could be at risk.[4] Companies such as Facebook, Starbucks, Blackrock and Citi have committed to such audits, and practitioners have developed guidelines.
>
> Healthcare companies have a history with and ongoing struggle to address disparate racial impacts.
>
> We are concerned about the ongoing controversies the company faces related to its 2020 decision to discontinue sales of talcum-based powder in North America, but continue sales globally. Claims that it aggressively marketed to Black and Brown women after its talc supplier included the WHO's "possibly carcinogenic" label on shipments are troubling. Organizations from 51 countries called on the company to halt sales worldwide. Yet, the most visible response to date was its attempt to use U.S. bankruptcy to shield liabilities from product lawsuits."

In contrast, the previously submitted proposal from the National Center for Public Policy Research called for a similar audit but had a very different objective as articulated in the background statement, leaning into the idea that antiracism and diversity programs could be discriminatory against "non-diverse" people.

> "Some have pressured companies to adopt 'anti-racism' programs that seek to establish 'racial equity,' which appears to mean the distribution of pay and authority on the basis of race, sex, orientation and ethnic categories rather than by merit. Where adopted, however, such programs raise significant objection, including concern that the 'anti-racist' programs are themselves deeply racist and otherwise discriminatory.
>
> Many companies have been found to be sponsoring and promoting overtly and implicitly discriminatory employee-training programs, including Bank of America, American Express, Verizon, Pfizer and CVS.…
>
> If the Company is, in the name of racial equity, diversity and inclusion, committing illegal discrimination against employees deemed 'non-diverse,' then the Company will suffer in myriad ways — all of them both unforgivable and avoidable."

The Staff rejected Johnson & Johnson's argument that the proposals were duplicative and allowed both proposals to appear on the proxy despite the similar subject matter and resolved clauses.

It is clear that voting shareholders evaluated and were not confused by the two proposals, as they demonstrated an overwhelming preference for the proposal that sought rigorous review of systemic

racism issues at the company with 63% support, and disfavored the proposal focusing on discrimination against non-diverse employees, which earned only 2.7% support.

Amazon, Inc. (April 7, 2022)

Another example from the 2022 proxy season involves Amazon, which requested no-action relief against a shareholder proposal submitted by, among others, the New York City Employees' Retirement System (hereinafter the "NYCERS proposal" or "worker safety proposal") pursuant to Rule 14a-8(i)(11), arguing that the proposal was duplicative of another proposal submitted by the New York State Common Retirement Fund et al. (hereinafter the "Fund proposal" or "racial equity audit proposal"). The NYCERS proposal requested "a report . . . examining whether Amazon's health and safety practices give rise to any racial and gender disparities in workplace injury rates among its warehouse workers and the impact of any such disparities on the long-term earnings and career advancement potential of female and minority warehouse workers." The Fund proposal called for an independent "racial equity audit analyzing Amazon's impacts on civil rights, diversity, equity and inclusion, and the impacts of those issues on Amazon's business."

Amazon contended that including both proposals in its proxy materials would "risk creating shareholder confusion by asking them to vote on two proposals addressing the same concern."

The Staff ultimately denied relief to Amazon, finding that the NYCERS proposal did not "substantially duplicate" the Fund proposal. In making such determination, the Staff likely concluded that the purpose behind the proposals substantially differed, even when they had overlapping areas of concern. Indeed, while the worker safety proposal centered around racial and gender inequalities stemming from Amazon warehouse health and safety practices, the racial equity audit proposal was concerned with racial equality across Amazon's operations. By focusing only on worker safety and health, the worker safety proposal failed to touch upon the other areas of Amazon's business where racial inequalities may be present.

At the 2022 annual meeting, the voting results significantly differed: the racial equity audit proposal received 40.7% of votes, whereas the workplace safety proposal only received support from 13.2% of shareholders. Contrary to Amazon's contention, this three-fold voting difference suggests that shareholders were not confused by the proposals and preferred the broader racial equity audit.

We note as well that in several instances during the 2022 proxy season, proposals with arguably overlapping subject matters were consistent with the proposed rule, because they had different objectives or means.

Meta 2022 Proxy Voting Outcome

The Meta 2022 proxy statement included three proposals concerning content misinformation. A *diversified shareholders proposal* requested a report on: (1) risks created by [Meta's] business practices that prioritize internal financial return over healthy social and environmental systems and (2) the manner in which such risks threaten the returns of its diversified shareholders who rely on a productive economy to support their investment portfolios. A *user content* focused proposal sought "a report analyzing why the enforcement of [Meta's] 'Community Standards' . . . has proven ineffective at

controlling the dissemination of user content that contains or promotes hate speech, disinformation, or content that incites violence and/or harm to public health or personal safety." Lastly, an *audit committee proposal* sought an "assessment of the Audit and Risk Oversight Committee's capacities and performance in overseeing company risks to public safety and the public interest and in supporting strategic risk oversight on these issues by the full board."[6]

In the end, shareholders were not confused by these three proposals and favored one course of action over the others: 19.2% of all voting shareholders supported the proposal on an independent study of content management, whereas only 2.7% and 10.5% were in favor of the proposals on external costs and the audit committee, respectively.[7] Thus, it is reasonable to conclude that voting shareholders found that an independent, third-party assessment of Meta's content management policies was a better way to address the challenges with content management than either concentrating on mitigation efforts in board oversight committees or focusing only on quantifying the impacts on diversified shareholders.

Alphabet 2022 Proxy Voting Outcome

Similarly, Alphabet's 2022 proxy materials included two proposals concerning race and racial inequality. The Racial Equity Audit proposal requested a "racial equity audit analyzing Alphabet Inc.'s adverse impacts on Black, Indigenous and People of Color (BIPOC) communities." The Board diversity proposal called for an annual report "on [Alphabet's] policies and practices to help ensure its elected Board of Directors attains racial and gender representation that is better aligned with the demographics of its customers and/or regions in which it operates." These proposals are remarkably different, even though they address overlapping issues of race, bias and discrimination, with the former proposal concerned with a variety of racial issues ranging from workplace retaliation to product bias and advertisement discrimination, and the latter narrowly focused on board diversity. To the extent that these proposals competed against each other, shareholders ultimately made a clear choice as to their preference: the companywide racial equity proposal successfully garnered 22.4% of shareholder votes, whereas the board-focused proposal only received support from 5.3% of shareholders. Such results suggest that shareholders are concerned with systemic bias and discrimination throughout Alphabet's

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[6] In support of their requests, the three shareholder proposals noted how *content misinformation* in Meta's platforms adversely affected investor returns and society at large. For instance, the diversified shareholders proposal stated that climate change misinformation impacts the value of diversified investment portfolios. The user content proposal asserted that Facebook-related harms like "election misinformation" and untruthful political advertisements "create investor risk." Moreover, the audit committee proposal avowed that "a lack of rigorous risk oversight and culture at [Meta]" concerning content misinformation "will ultimately result in further damage to shareholder value." Nonetheless, the proposals suggested substantially different courses of action — an external costs report, an independent evaluation of specific and existing corporate policies, and a performance review of Meta's board oversight committee. Notably, the proposals were aligned in tone and policy position.

[7] The results were significantly higher when only taking outside shareholders into account, particularly as to the proposal for an independent assessment of content management, which garnered 63.1% of the votes by investors excluding insider shares. Indeed, inside shareholders, who directly participate in the management of the company, largely vote against a shareholder proposal when, as was the case with all of the proposals referenced in this memorandum, their respective companies recommend a vote against it.

policies, procedures and practices, not just in its board of directors.

ExxonMobil 2022 Proxy Voting Outcomes

In most instances, ostensibly duplicative proposals will not be seen as duplicative if they truly address underlying subject matter by different means. For instance, proposals may seek reduction of greenhouse gasses by different means. As has been the case with many companies, one proposal may request that the company set targets while another urges them to explore options for adopting or abandoning technologies to accelerate decarbonization. These different approaches are appropriate for separate consideration and may be supported by technical literature or external standards that reference those different methods.

For example, in 2022, there were three proposals voted upon at ExxonMobil focusing on climate change. One proposal sought an audited report assessing how applying the International Energy Agency's ("IEA's") Net Zero by 2050 pathway would affect the assumptions, costs, estimates, and valuations underlying ExxonMobil's financial statements, including those related to long-term commodity and carbon prices, remaining asset lives, future asset retirement obligations, capital expenditures and impairments. This proposal received a 51% vote.

A second proposal on the same proxy statement requested the company set and publish medium- and long-term targets to reduce the greenhouse gas emissions of its operations and energy products (Scope 1, 2, and 3) consistent with the goal of the Paris Climate Agreement: to limit global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C. This proposal received only a 27.1% vote.

A third proposal requesting that ExxonMobil issue a report describing how the company could alter its business model to yield profits within the limits of a 1.5 degree Celsius global temperature rise by substantially reducing its dependence on fossil fuels received a 10.5% vote.

While all three proposals addressed greenhouse gas emissions and climate impact, it is apparent that shareholders were able to differentiate among the three, with more shareholders favoring the request to assess the impact of IEA's Net Zero pathway.

In sum, a review of the 2022 proxy season demonstrates that shareholders were not confused by competing proposals on similar topics and were able to discern their preferences and to make their views known on significant social and economic issues. This market of choice can inform corporations on how to solve the complex issues that they face. If the range of proposals on these subject matters had been constrained by the artificial premise that only the first file resolution may move forward, the voting outcome would have been far less informative to board and management. The proposed rule amendment on duplication thus places appropriate faith in investors and the market to discern which approaches to an issue are supported by investors.

b. The potential for multiple advisory proposals will result in additional useful information for board and management deliberation.

We note that another argument made in some of the opposition letters is that voting on multiple proposals could lead to a situation in which more than one proposal with different means or objectives might receive majority support, providing a confusing signal to the board and management as to what the investors are requesting.[8] We note in response that, in the vast majority of cases, proposals are advisory only and thus the strong support for multiple objectives or means is merely useful advisory information; the board and management in such situation will ultimately be the decider as to what kinds of implementing measures should best be deployed. Therefore, if anything, the strong support for multiple proposals would provide additional useful information for ultimate board and management deliberation and would not, in our view, reflect a reason to not allow consideration of the divergent proposals.

c. The Commission should informally encourage companies and proponents to work through issues of duplication rather than positioning SEC Staff as the arbitrator.

As proponents, we have seen that the shareholder proposal rule often works best when it encourages issuers to engage in genuine communication and collaboration with investors. Although we do not believe that any change to the text of the proposed rule amendments is needed or appropriate, we do believe that it would be helpful, perhaps in the background section of the accompanying release or a future Staff Legal Bulletin, for the Commission to discourage the use of the no action process as the first or best means of resolving controversies between issuers and proponents over duplicative proposals in particular.[9]

A good-faith response by companies to shareholder proposals ought to begin with communication with the proponents, not with a no action request. It would be more efficacious to the goals of issuers and proponents alike, for instance, for issuers to inform any group of proponents that filed purportedly duplicative proposals to be aware of one another's proposals, putting them in touch, and giving them the opportunity to assess for themselves whether it is in the best interests of investors, following deliberation on the related issues, to withdraw a particular proposal that the company views as duplicative. We are aware of instances, including in the last year, in which if the company *had* contacted the proponents rather than filing a no action request, they would have readily agreed to withdraw one of the duplicative proposals.

As we discussed in our prior letter, in the absence of the proposed rule changes, we anticipate an increasing tendency of proponents to file their proposals early in order to maintain "first in line" status against other proposals that overlap with their subject matter. With the diversity of perspectives in the market, as reflected by the foregoing Johnson & Johnson example, the proposed duplication rule obviates what could otherwise become a race to submit proposals with different and sometimes opposing objectives. In contrast, the proposed rule reconciles such proposals and trusts investors to engage in needed deliberation and assessment.[10]

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[8] James R. Copland, Senior Fellow and Director, Legal Policy, Manhattan Institute for Policy Research, Comment Letter, September 12, 2022, p. 8.

[9] *See also* Con Hitchcock, on behalf of SOC Investment Group, Comment Letter, September 12, 2022.

[10] In the absence of the rule change, we anticipate increasing inefficiencies and complexities for proponents and

d. The Commission should not set a numerical maximum for proposals on a subject matter.

Though suggested in some of the opposition comments[11], we urge the Commission to avoid adding a new numerical maximum number of proposals on a given topic. The number of proposals that are suitable on a topic is best determined by proponents, not the SEC, because the need for diversified approaches varies significantly with the issue. For example, it is not at all uncommon for there to be multiple proposals relating to dimensions of climate change on a proxy statement, as appropriate given the existential risks to companies and their finances associated with climate change.

Setting a specific number would sustain the pressure on proponents to file early in order to be first in line and would impose an arbitrary limit on proposals. It would also demand new subjective interpretations of "subject matter." For instance, if the Commission were to set a subject matter limit, would the subject matter be as broad as "climate change" or as narrow as "proposals relating to the board's oversight of climate change"?

III. **Resubmission**

a. The 2022 proxy season demonstrates the need for the proposed rule change in light of the 2020 Rule 14a-8 amendments.

Several of the opposing comments noted the short timeframe between the 2020 Rule 14-a8 amendments and the proposed 2022 amendments. The 2020 amendments addressed some issues which are not affected by the proposed amendments, such as filing thresholds and engagement and representation requirements. However, the 2020 amendments did address one issue that is *relevant* to the 2022 proposed amendments: the resubmission thresholds. Reviewing the outcomes of the 2022 proxy season, including those discussed above, demonstrates that the recent season provides further evidence of the need for the proposed changes to the resubmission exclusion.

Prior to the 2020 amendments, the rule provided that a proposal that addressed substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials may be excluded if the proposal received:

i. Less than 3% of the vote if proposed once within the preceding 5 calendar years;
ii. Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or
iii. Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years.

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issuers alike. For example, proponents seeking to ensure that their proposals will appear on the proxy would have continuing incentives to file early. Yet, early-filed proposals may merit amendment due to subsequent developments such as changing circumstances, company actions, and feedback from the market. This would lead to efforts to amend the proposal prior to the filing deadline, but a lack of clarity as to whether and when the "first in line" status is retained for an amended proposal.

[11] Davis Polk & Wardwell LLP, Comment Letter, September 15, 2022, p. 8.

The 2020 amendments changed the applicable rule by increasing the thresholds dramatically so that a proposal was excludable if it was supported by "(i) [l]ess than 5 percent of the votes cast if previously voted on once; (ii) [l]ess than 15 percent of the votes cast if previously voted on twice; or (iii) [l]ess than 25 percent of the votes cast if previously voted on three or more times."

The 2022 proposed amendment would allow exclusion of a proposal resubmission only if the subsequently submitted proposal "addresses the same subject matter and seeks the same objective by the same means."

As a threshold matter, several of the opposing comments noted the short timeframe between the 2020 amendments and the proposed 2022 proposed amendments. To that end, some commenters on the proposed rule change contended that, in developing the proposed amendments, the Commission failed to consider data from the 2022 proxy season, when the 2020 amendments first took effect. In particular, ICI noted that an assessment of the 2022 data could have revealed whether the 2020 amendments impacted "the quality and quantity of shareholder proposals."[12] However, contrary to such comments and contentions, the Commission ***did*** consider the impact of the 2020 amendments in putting forth the proposed amendments. As to resubmissions, for example, the Commission noted that, in 2022, "staff received 11 no-action requests asserting the resubmission exclusion, which represents an increase in requests compared to the 2020 and 2021 proxy seasons . . . likely due to the higher resubmission thresholds under Rule 14a-8(i)(12) adopted in the 2020 [amendments]." [13]

b. The proposed rule change encourages substantive changes and refinement to resubmitted proposals based on investor learning and market guidance.

In opposition to the proposed amendment, the trade association comments asserted that "proponents will be able to resubmit proposals that garner only nominal support year after year, by merely changing one small feature of the proposal each year."[14]Contrary to that argument, however, the rule change instead encourages substantive changes to the proposal's objectives or means which in turn creates stronger proposals. Indeed, the proposed rule change supports proponent learning and the refinement of their proposals. Through the shareholder proposal process, a proponent may receive feedback that their proposal was too prescriptive or contained other objectionable "means" or "objectives." For example, BlackRock recently shared concern that "many of the proposals coming to a vote are more prescriptive and constraining on management."[15] Allowing for resubmission of proposals on the same subject matter, with either different objectives or means, allows for an ongoing and evolving deliberative process through education, engagement, and persistence. This learning process enables stronger shareholder proposals with greater investor support.

It is notable that, in our experience, many of the larger asset managers support proposals only after the issue has persisted long enough to assess the fiduciary arguments for support and establish a voting

[12] Investment Company Institute, Comment Letter ,September 12, 2022, p. 10.

[13] Rulemaking Proposal, fn 48.

[14] Maria Ghazal, Business Roundtable, Comment Letter, September 12, 2022, p. 7..

[15] BlackRock, "2022 climate-related shareholder proposals more prescriptive than 2021"
https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf

policy relevant to the specific issue raised. In particular, a first-time proposal may be unfamiliar enough that it takes a cycle of a year or two for asset managers and proxy advisors to fully assess the issue and determine to support it. Without the amended rule change, important proposals could be excluded at the point where they would have garnered majority support.

The proposed rule change is appropriate because it more accurately assesses whether shareholders have had the ability to provide their views on a particular issue, allows for more finely tuned proposals on emerging issues, and allows for materially different proposals which share the same subject matter.

In addition to granting an individual proponent the ability to further refine a proposal on a certain subject matter, the proposed rule change allows a *different* proponent to file a proposal on the same subject matter as a previous proposal, but with different means or objectives.

Taking the Johnson & Johnson Rule 14a-8(i)(11) duplication precedent above, we can also see how the conflict over divergent objectives and means could undercut the ability of shareholders in subsequent years to engage in an issue addressed by a proposal. At Johnson & Johnson, the two proposals concerning systemic racism and discrimination against non-diverse people, respectively, appeared on the same proxy statement. However, if they had been submitted and voted on in preceding years, the resubmission rule, rather than the duplication rule, would have been implicated. Since the proposal with the objective of opposing discrimination against non-diverse people had been submitted first, and received a vote below the resubmission threshold, submissions in later years of a proposal aimed at countering systemic racism could be barred, despite its very different objective. A similar problem could arise under the current resubmission exclusion. AT&T, Citigroup, and Bank of America, had shareholder proposals following the model of the "discrimination against non-diverse people" proposal and receiving less than 5% of the vote. This is a major concern for the current rule formulation - an opponent of a popular issue could preemptively file a proposal on that subject matter and effectively block future proposals on the issue.

In view of the foregoing, we submit that the Commission does not need additional time in order to assess that the new higher thresholds interfere with the kinds of learning and proposal revisions that are appropriate. Shareholders should be encouraged to revise their approach on proposals following low votes into approaches that they anticipate may receive greater voting support.

For example, BlackRock is in the crosshairs of a major social controversy over ESG and systemic risk. A 2022 shareholder proposal at BlackRock which requested that the company "adopt stewardship practices designed to curtail corporate activities that externalize social and environmental costs that are likely to decrease the returns of portfolios that are diversified" received 3.7% of the vote. This is insufficient under the 2020 amendments to be included in next year's proxy. However, under the proposed rule change, a proposal on this general subject could be included on the 2023 proxy statement if it proposed different means or objectives. This is important because BlackRock's stewardship practices regarding social and environmental concerns is a hotly contested issue that is ripe for an updated shareholder proposal. The Comptroller of the City of New York recently wrote a letter to BlackRock urging the company to support shareholder proposals on climate issues such as the adoption of net-zero

targets.[16] Contrarily, 19 attorneys general signed a letter to BlackRock alleging that the company may be violating its fiduciary duty by "implementing an ESG engagement and voting strategy across all assets under management."[17] Considering the increasing focus on BlackRock's stewardship, it is critical that its shareholders have the ability to resubmit modified proposals on this issue.

With such a consequential debate focused on the company, it is highly appropriate for its shareholders to have the opportunity to weigh in, yet the current resubmission rule could jeopardize the potential for filing of a salient proposal for 2023. Hearing where investors stand on this issue would provide significant benefits and guidance to the company leadership as it navigates the increasingly contentious terrain of concerns and perspectives on the implementation of its fiduciary duties.

As the Commission wrote in the rulemaking release regarding the resubmission exclusion:

> [T]he 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.[18]

In sum, we believe the above evidence from the 2022 season strongly supports the proposed amendment on the resubmissions rule.

IV. Cost of Proposals versus Value of Proposals

Some of the opposition letters asserted that the proposed rule amendments will increase the number of proposals filed, which in turn will increase cost for companies and their shareholders. ICI wrote that the proposed amendments would "increase the quantity of shareholder proposals but not necessarily their overall quality."[19]

This limited view ignores the economic value of the deliberative process and information provided to companies through the shareholder proposal process. Proposals often shed light on emerging issues not yet on the agenda of boards and management. Proposals have helped companies avoid looming liabilities or reputational harm and to capitalize on unrecognized opportunities. Many current beneficial corporate practices and corporate best practices, such as climate change strategies, pollution prevention, board gender diversity, and workplace inclusion have been substantially initiated and shaped by shareholder proposals and resulting shareholder engagement.

As the rulemaking proposal notes:

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[16] Brad Lander, "Re: BlackRock Inc.'s Commitment to Net Zero Emission" (September 21, 2022) https://comptroller.nyc.gov/wp-content/uploads/2022/09/Letter-to-BlackRock-CEO-Larry-Fink.pdf

[17] https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf

[18] Rulemaking Proposal, Page 27.

[19] Investment Company Institute, Comment Letter, September 12, 2022, p.2.

> A shareholder proposal could improve a company's performance because it could motivate a value-enhancing corporate policy change, limit insiders' entrenchment, and provide management with information about the views of shareholders. …. 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 proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value-enhancing.[20]

Consultations between investors and companies on ESG issues reduce agency problems, improve disclosure essential for well-functioning markets, and reduce downside risk.[21] The impact extends beyond the company where the proposal was filed, since shareholder support for proposals prompts other companies to adopt the "best practices" modeled in proposals, without the need for receiving shareholder proposals.

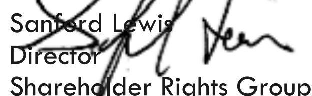
Consider the potential cost of errors of omission — exclusion of proposals seeking improved performance and risk oversight — that are destined to be viewed in hindsight as indicative of risk to reputation and goodwill, of potential bankruptcies, systemic impacts and other foreseeable problems on which proposal exclusion may obstruct, rather than assist, investor self-help strategies through the shareholder proposal process.

In particular with regard to resubmissions, there are only minimal necessary costs of the resubmitted proposals — the costs to the firm of physically printing the proposal on the proxy, nominal reconsideration of the proposal by board and management if that is all that the proposal merits, and updating its opposition statement to reflect any further developments on the issue. The cost of no-action requests, which are always discretionary spending by companies, tends to be reduced for resubmitted proposals as many of the potential grounds for exclusion have been resolved in prior Staff decisions.[22]

The value of shareholder proposals greatly outweighs the potential cost of any increase in the amount of proposals filed under the proposed amended rules.

We urge the Commission to adopt the rulemaking proposal in its entirety.

Respectfully Submitted,



Sanford Lewis
Director
Shareholder Rights Group

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[20] Rulemaking Proposal, Page 50 (footnotes omitted).

[21] See, e.g., Hoepner et al., ESG Shareholder Engagement and Downside Risk. *AFA 2018 paper* http://www.q-group.org/wp-content/uploads/2018/02/SHAREHOLDER-ENGAGEMENT-2018-01-31.pdf

[22] For one article addressing the cost calculations see, https://www.investorrightsforum.com/new-blog-1/the-cost-to-companies-is-generally-low-and-spending-is-within-their-control.