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January 6, 2020

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

VIA ELECTRONIC MAIL: rule-comments@sec.gov

Re: File Number S7-23-19: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (the "**Resubmission Proposal**")

Dear Madam:

I appreciate the opportunity to comment on the Resubmission Proposal by the the Securities and Exchange Commission (the "**SEC**").[1] Emeritus Nomura Professor of International Financial Systems at Harvard Law School, President of the Program on International Financial Systems, and President of the Committee on Capital Markets Regulation, I am committed to advocating policies that enhance the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. I am concerned that the Resubmission Proposal does not afford proponents sufficient opportunity to resubmit shareholder proposals when legal and regulatory circumstances relevant to the proposal have materially changed in the interim.

Pursuant to Rule 14a-8 of the Securities and Exchange Act of 1934, as amended, public company shareholders meeting certain ownership, procedural and substantive requirements may submit a proposal for inclusion in the company's proxy statement.[2] Under certain circumstances, Rule 14a-8(i)(12) allows the company to exclude proposals that are rejected by shareholders and then resubmitted again.[3] Specifically, the company can exclude proposals addressing "substantially the same subject matter" for three calendar years after their last submission if, within the preceding five calendar years, they failed to meet the following thresholds: (i) less than 3% of the vote if proposed once; (ii) less than 6% of the vote on their last submission if proposed twice; or (iii) less than 10% of the vote on their last submission if proposed three times.[4] As noted in the Resubmission Proposal, "[i]f a proposal fails to generate meaningful support on its first submission… it is doubtful that [it will succeed]… without a significant change in circumstances."[5]

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[1] U.S. SEC. & EXCH. COMM'N, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, 84 FED. REG. 66458 (Dec. 4, 2019), available at https://www.federalregister.gov/documents/2019/12/04/2019-24476/procedural-requirements-and-resubmission-thresholds-under-exchange-act-rule-14a-8 [the "**Resubmission Proposal**"].

[2] 17 C.F.R. § 240.14a-8.

[3] 17 C.F.R. § 240.14a-8(i)(12).

[4] 17 C.F.R. § 240.14a-8(i)(12).

[5] Resubmission Proposal, *supra* note 1, at 48.

In order for resubmission thresholds to more effectively exclude proposals with little chance of success, the Resubmission Proposal would increase existing thresholds to 5%, 15% and 25%, respectively.[6] Furthermore, proposals submitted three times in the previous five years would be excludable if (i) they received less than majority support in the last submission and (ii) support declined by at least 10% compared to the preceding submission.[7] The SEC considered an exception allowing "an otherwise excludable proposal to be resubmitted if there are material developments that suggest a resubmitted proposal may garner significantly more votes than when previously voted on."[8] However, because "it would be difficult in many cases to determine how the intervening developments would affect shareholders' voting decisions," the SEC did not include such an exception in the Resubmission Proposal.[9]

I believe the Resubmission Proposal should include an exception allowing resubmission if legal or regulatory circumstances relevant to the proposal have materially changed since its last submission. The SEC itself acknowledged that past shareholder support is a poor predictor of the likelihood of success when there has been a "significant change in circumstances."[10] For example, some shareholder proposals address novel issues, such as mandatory securities claim arbitration,[11] or evolving regulatory regimes, such as energy and climate.[12] Votes on these proposals are necessarily influenced by existing legal and regulatory uncertainty, which may militate against approval. To the extent intervening legislation, regulation or litigation eliminates this uncertainty or otherwise changes the law applicable to the subject matter of a proposal, it profoundly changes the relative merit of the affected proposal. As such, in such cases, shareholders should be afforded the opportunity to reconsider the proposal in a timely fashion free of the new restrictions imposed by the Resubmission Proposal.

To the extent such an exception raises interpretive questions in defining a material change in applicable law, companies can use the existing no-action letter process to resolve any ambiguity.[13] Moreover, cabining the exception to changes in or clarifications of applicable law offers a clear baseline to determine which proposals qualify for the exception, since the existence

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[6] Resubmission Proposal, *supra* note 1, at 50.
[7] Resubmission Proposal, supra note 1, at 58.
[8] Resubmission Proposal, supra note 1, at 50.
[9] Resubmission Proposal, supra note 1, at 50.
[10] Resubmission Proposal, supra note 1, at 48.
[11] *See, e.g.*, INTUIT INC., *Proxy Statement on Schedule 14A* (Nov. 27, 2019), https://www.sec.gov/Archives/edgar/data/896878/000110465919068149/0001104659-19-068149-index.htm ("Given this continued uncertainty, we believe that the adoption of such a bylaw likely would expose Intuit to unnecessary litigation or other actions challenging the bylaw and its consequences. Such challenges would not only be economically costly, but also would divert management's time and focus away from Intuit's business.")
[12] *See, e.g.*, EXXON MOBIL CORPORATION, *Proxy Statement on Schedule 14A* 62-65 (April 13, 2017), https://www.sec.gov/Archives/edgar/data/34088/000119312517122538/0001193125-17-122538-index.htm ("This resolution aims to ensure that ExxonMobil fully evaluates and discloses to investors risks to the viability of its assets as a result of the transition to a low carbon economy, including a 2 degrees scenario, in line with sector good practice.").
[13] 17 C.F.R. § 240.14a-8(j).

of material changes in law or regulation can be reasonably evaluated. There would be no need to assess the impact on voting—it would be assumed that it was or could be substantial.

Therefore, the Resubmission Proposal should not be approved unless it includes an exception for proposals impacted by subsequent material changes in applicable law or regulation.

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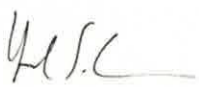
Thank you very much for your consideration of my position. Should you have any questions or concerns, please do not hesitate to contact the me by email at [redacted] at your convenience.

Respectfully submitted,



Hal S. Scott