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September 12, 2022

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

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

Dear Ms. Countryman:

The Investment Company Institute (ICI)[1] is commenting on behalf of the $29 trillion regulated investment company ("fund") industry on the proposed amendments to the shareholder proposal rule.[2] Funds are unique in that as investors they vote company proxies, and as issuers they conduct their own proxy campaigns. This positions us well to assist the SEC in considering the legitimate interests of each.

The proposal would narrow three bases upon which companies may exclude shareholder proposals from their proxy statements: the "substantial implementation," "duplication," and "resubmission" exclusions. The proposal follows other recent changes to the shareholder proposal rule and how the SEC staff is interpreting it.

In 2020, the SEC amended the shareholder proposal rule to raise the eligibility requirements for submitting and resubmitting shareholder proposals. In November 2021, the SEC staff moved in a very different direction, rescinding prior guidance and issuing new guidance making it more difficult for companies to exclude certain shareholder proposals. Collectively, these changes appear to have contributed to a sizable increase in shareholder proposals appearing on company

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[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $29.6 trillion in the United States, serving more than 100 million investors, and an additional $8.1 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, SEC Release No. 34-95267; IC-34647 (July 13, 2022) (the "proposal"), available at www.sec.gov/rules/proposed/2022/34-95267.pdf.

proxy statements during the 2022 proxy season, which also has been accompanied by a *decrease* in average shareholder support for shareholder proposals. We address these matters in Section 1.

In Section 2, we analyze the merits of the proposal. The proposal's economic analysis states,

> The value of including a shareholder proposal in a company's 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.[3]

We support the Commission using this analytical framework for evaluating any potential rule changes.

The three exclusions serve a useful policy purpose—minimizing shareholder proposals with similar subject matter, along with the costs and burdens that they otherwise would impose on shareholders and companies alike. However, as the SEC proposes to amend them, the exclusions would limit only those shareholder proposals that precisely replicate, or deviate in trivial respects from, prior company actions or shareholder proposals. We see no clear benefit to shareholders generally, or a company, from allowing a proposal on a company's proxy statement that differs insubstantially in its totality from:

- an action the company already has taken;
- another shareholder proposal already appearing on the company's proxy; or
- a shareholder proposal that previously appeared on the company's proxy and garnered low shareholder support.

We believe that adopting these proposed amendments would increase the quantity of shareholder proposals but not necessarily their overall quality. Consequently, any cost increases for shareholders and companies may not be accompanied by improved company performance. We therefore question whether the proposal aligns with the exclusions' policy underpinnings. The SEC's own economic analysis expressly avoids opining on whether the proposed changes would be "value-enhancing,"[4] which severely undermines the case for adopting these proposed amendments.

We therefore recommend that the SEC not adopt this proposal. Instead, the SEC first should assess comprehensively how both the 2020 rule amendments and the staff's 2021 guidance have affected the quantity *and quality* of shareholder proposals. The SEC and participants in the proxy

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[3] Proposal at 48-49.

[4] *See infra*, note 22 and accompanying text.

system then would be better positioned to evaluate the costs and benefits of re-calibration of these or other rule provisions.

1. Background on the Shareholder Proposal Rule and Recent Developments

Rule 14a-8 under the Securities Exchange Act of 1934 conditionally permits a company's shareholders to include proposals—recommendations or requirements that a company and/or its board take some action—on the company's shareholder meeting proxy statement, on which all shareholders may vote. The rule provides several bases upon which a company may exclude a shareholder proposal. If a company intends to exclude a shareholder proposal from its proxy statement, it must "file its reasons" for doing so with the SEC, generally in the form of a no-action request seeking the SEC staff's concurrence. The staff then offers its views on the matter to assist companies and shareholder-proponents in complying with the federal proxy rules.

The rule and the staff's interpretation of some of its key provisions have changed in important ways during the last two years. In 2020, the SEC amended the rule to raise the eligibility requirements for shareholders wishing to submit and resubmit proxy proposals.[5] Generally, these amendments applied to proposals submitted for an annual or special meeting held on or after January 1, 2022.

ICI generally supported the 2020 amendments.[6] We viewed the amendments as a reasonable regulatory approach, which would preserve access to the company proxy for smaller shareholders while also supporting the alignment of the interests of shareholder-proponents with those of long-term shareholders generally. We also believe that the resubmission exclusion changes appropriately recognized the costs that a single shareholder's proposal can generate for all shareholders and the importance of permitting long-term shareholders to submit shareholder proposals.

In November 2021, the SEC staff rescinded prior guidance and issued new guidance on the rule.[7] Chair Gensler stated that SLB 14L "will provide greater clarity to companies and

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[5] *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, SEC Release No. 34-89964 (Sept. 23, 2020), available at www.sec.gov/rules/final/2020/34-89964.pdf. The amendments updated the ownership requirements by: (i) eliminating the 1 percent ownership threshold, and (ii) providing three alternative continuous ownership thresholds to establish eligibility to submit a proposal: (a) at least $2,000 of the company's securities for at least three years; (b) at least $15,000 for at least two years; or (c) at least $25,000 for at least one year. The SEC also amended the resubmission exclusion to increase the requisite support necessary for a proposal to qualify for inclusion on future ballots from 3% (if voted on once), 6% (if voted on twice), and 10% (if voted on three times) to 5, 15, and 25%, respectively.

[6] *See* Letter from Paul Schott Stevens, President and CEO, ICI, to Vanessa Countryman, Secretary, SEC, dated Feb. 3, 2020, available at www.sec.gov/comments/s7-22-19/s72219-6743669-207831.pdf.

[7] *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, SEC Division of Corporation Finance (Nov. 3, 2021) ("SLB 14L"), available at www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals. Among other things, SLB 14L provides new guidance on the "ordinary business" and "economic relevance" exclusions. The former permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business

shareholders on these matters, so they can better understand when exclusions may or may not apply."[8]

Any number of factors may affect the volume of shareholder proposals in a year. Regulatory changes clearly matter, and we expected the 2020 amendments, by themselves, might slightly reduce the overall number of shareholders proposals. But we also expected that SLB 14L by itself —which reduces the ability of companies to exclude shareholder proposals in reliance on the "ordinary business" and "economic relevance" exclusions—would increase the overall number of proposals on companies' proxy statements. Heading into the 2022 proxy season, the net effect of these countervailing regulatory actions was an open question.

With the 2022 proxy season complete, there is now information available for considering how the amendments and changes in staff guidance have affected the number of shareholder proposals and shareholders' responses to them. Collectively, companies in the Russell 3000 Index saw a sizable increase in shareholder proposals in 2022—an increase of 18 percent from the prior year—as indicated in the table below.[9]

operations." The latter permits a company to exclude a proposal that "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business."

[8] *Statement regarding Shareholder Proposals: Staff Legal Bulletin No. 14L*, SEC Chair Gensler (Nov. 3, 2021), available at www.sec.gov/news/statement/gensler-statement-shareholder-proposals-14l. However, Commissioner Peirce and then-Commissioner Roisman stated that it "furthers the recent trend of erasing previous Commissions' and staffs' work and replacing it with the current Commission's flavor-of-the-day regulatory approach." *Statement on Shareholder Proposals: Staff Legal Bulletin No. 14L*, Commissioners Hester Peirce and Elad Roisman (Nov. 3, 2021), available at www.sec.gov/news/statement/peirce-roisman-statement-shareholder-proposals-staff-legal-bulletin-14l.

[9] The numbers in the table (i) are based on proxy proposals for companies in the Russell 3000 Index; (ii) are ICI tabulations of ISS Corporate Services data of shareholder proposals voted on (rather than those submitted, which would be larger); and (iii) are preliminary, as ISS could add information on a delayed basis. A proxy year starts on July 1 of the preceding year through June 30 of the listed year.

Proxy Season	Total Number of Shareholder Proposals
2012	454
2013	472
2014	473
2015	567
2016	531
2017	457
2018	438
2019	424
2020	447
2021	485
2022	574

Another recent analysis suggests that the activity related to shareholder proposals in 2022 also was noteworthy because:

- The overall success rate for no-action requests dropped to 38%, a drastic decline from success rates of 71% in 2021 and 70% in 2020 (and also significantly below even the previous lowest exclusion rate in recent times—the 2012 proxy season when the success rate dipped to 66%).
- Average support for all shareholder proposals voted on decreased to 30.4% in 2022 from 36.3% in 2021.
- The number of shareholder proposals that received majority support in 2022 was 55, down from 74 in 2021.[10]

These numbers suggest that SLB 14L and perhaps the staff's interpretation of the rules' exclusions more generally have contributed to an increase in the overall number of shareholder proposals on companies' proxy statements, and arguably also have contributed to a decline in shareholders' overall level of support for those proposals.

2. Analysis of the Proposed Amendments

The proposal would amend three of the substantive bases upon which companies may exclude shareholder proposals: the "substantial implementation," "duplication," and "resubmission" exclusions.[11]

[10] Gibson Dunn, *Shareholder Proposal Developments During the 2022 Proxy Season* (July 11, 2022), available at www.gibsondunn.com/wp-content/uploads/2022/07/shareholder-proposal-developments-during-the-2022-proxy-season.pdf.

[11] Rule 14a-8(i)(10) through (12).

2.1 "Substantial Implementation" Exclusion

Rule 14a-8(i)(10) currently allows a company to exclude a shareholder proposal that

> the company has already substantially implemented.

The proposed amendment instead would provide that a proposal may be excluded as substantially implemented if

> the company has already implemented the essential elements of the proposal.

We support the existing exclusion and its purpose—to "avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management."[12] We do not support the proposed amendment because it would undermine this legitimate purpose and produce potentially negative policy results.

To illustrate, suppose that a company's shareholder submitted the following proposal: "Shareholder requests that the company publish an assessment of long-term portfolio impacts of public climate change policies. The reporting should assess the resilience of the company's full portfolio of reserves and resources through Year X and beyond and address the financial risks associated with such a scenario." Assume further that the company complies fully with the shareholder proposal. Finally, assume that the following year a shareholder submits a proposal that is identical, except now the relevant period specified in the new proposal is Year Y and beyond. Under the proposed amendment, we do not believe that a company could exclude the new shareholder proposal.[13]

An (all) "essential elements" test would allow exclusions of only those proposals whose deviations from prior company actions are trivial. Therefore, the proposed amendment would risk empowering each shareholder to continuously micromanage and second-guess a company's decisions, even in cases where a company responds in good faith to shareholder concerns (following a shareholder proposal or otherwise). If a single shareholder-proponent can keep requesting modifications (which may become increasingly granular) of prior company actions, there is a real possibility that certain matters would be beyond reasonable resolution. The costs associated with such serial proposals—differing slightly in degree but not kind—ultimately would be borne by all shareholders with no discernible corresponding benefit.

2.2 "Duplication" Exclusion

Rule 14a-8(i)(11) currently allows a company to exclude a shareholder proposal that

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[12] Proposal at 10 (quoting *Proposals by Security Holders*, SEC Release No. 34-12598 (July 7, 1976)).

[13] We assume that the staff would view the period covered by the report as an "essential element."

> 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.

The proposed amendment instead 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.

We support the existing exclusion and its purpose— 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."[14] We do not support the proposed amendment because, again, we are concerned that the proposed amendment undermines this laudable purpose and will generate unnecessary costs for *all* shareholders.

To illustrate, a company's proxy statement could include more than one proposal calling for a report on the effects of climate change on the company, with each differing only with respect to the periods (e.g., Year X, Y, and Z and beyond). Under the proposed amendment, we do not believe that any of the proposals would be excludable—in one key respect, they are not the "same."[15] This would produce unreasonable results that would lengthen and increase the complexity of proxy statements, likely discouraging retail shareholders from voting.

Asking investors to vote on—and companies to respond to—multiple proposals with insubstantial differences is costly and burdensome for all involved. Theoretically, there would be no limit to how many proposals addressing the same subject matter could appear on a single company proxy. The SEC appears to recognize this, stating that this change "could result in the inclusion in a company's proxy materials of multiple shareholder proposals dealing with the same or similar issue … [which] could cause shareholder confusion and may lead to conflicting or inconsistent results and implementation challenges for companies… ."[16] Allowing multiple proposals also could adversely impact overall shareholder engagement if shareholders—particularly retail shareholders—become confused or frustrated by multiple proposals on the same issue. Retail shareholder participation in the proxy system is already low,[17] and we do not see how this change would help boost their engagement or serve any other legitimate policy purpose.

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[14] Proposal at 17 (quoting *Adoption of Amendments Relating to Proposals by Security Holders*, SEC Release No. 34-12999 (Nov. 22, 1976)).

[15] By using the term "same" three times—which the Cambridge dictionary defines as "exactly like another or each other"—the amendment would require that the relevant proposals be nearly identical for one or more to be excludable and therefore would not be consistent with the purpose of the existing exclusion.

[16] Proposal at 20.

[17] *See, e.g.*, ProxyPulse, 2022 Proxy Season Preview, available at www.broadridge.com/proxypulse/_assets/docs/broadridge-proxypulse_2022-season-preview-and-2021-review.pdf. ("Retail voting [in 2021] was down slightly to 30% of their owned shares, continuing a trend over the last five years.").

Extending our hypothetical, suppose that each of the three distinct climate change impact reporting proposals garners support from 20 percent of the company's shareholders. In this case, it would be difficult for a company to interpret the results and determine what an appropriate and "shareholder-responsive" course of action would be. For example, did shareholders supporting the general *idea* of this reporting—which in sum may very well constitute a majority—split their vote by voting only for the proposal they liked best? Alternatively, did only a distinct minority of the shareholders support the general idea of this reporting, with each supporter voting in favor of all three? There would be no clear way for the company to know.

2.3 "Resubmission" Exclusion

Rule 14a-8(i)(12) currently allows a company 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 sufficient shareholder support.[18] The proposed amendment instead would provide that a proposal constitutes a resubmission if it "substantially duplicates" a prior proposal, aligned with the proposed "substantial duplication" standard quoted above.[19]

Here too, we support the existing exclusion and its purpose—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."[20] And once again, our concern is that the proposed amendment undermines this purpose.

Continuing with the climate change impact report hypothetical, assume that the shareholder proposal calling for a "Year X and beyond" company report appears on a company's proxy statement and fails with very low shareholder support, and the company does not prepare the requested report. The following year a shareholder submits an identical proposal, except now the proposed period is "Year Y and beyond." This year's proposal—despite being similar to, and possibly more demanding than, the prior year's unsuccessful proposal—in our view would not be excludable (as with the "duplication" hypothetical, in one key respect the proposals are not the "same").

Here too, we do not support the change and such a result, for reasons similar to those set forth above for the duplication exclusion. In fact, the result here is more problematic because shareholders have already considered and decisively rejected a similar proposal at least once.

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[18] *See supra*, note 5 for a description of the 2020 amendments to the exclusion's support thresholds.

[19] Exclusion would be permitted only if the proposal "addresses the same subject matter and seeks the same objective by the same means as" the prior proposal(s).

[20] Proposal at 22 (quoting *Notice of Proposal to Amend Proxy Rules*, SEC Release No. 34-4114 (July 6, 1948)).

2.4 Comments Applicable to All Three Proposed Amendments

Funds must, and do, take their proxy voting responsibilities seriously. The fund industry devotes substantial resources to this function. For instance, during the 2020 proxy voting season, funds cast more than 7.6 million votes for proxy proposals, and the average mutual fund voted on about 1,500 separate proxy proposals. Due to the large number of portfolio securities that funds hold in the US and abroad, efficient and informed proxy voting is a large undertaking and substantial responsibility.

We recognize that shareholder proposals represent a relatively small percentage of the overall number of proxy proposals on which funds and others vote. Still, each time a shareholder proposal is submitted, companies and shareholders alike bear real costs. Shareholder proposals often require careful case-by-case analysis and take a disproportionate amount of time relative to management proposals, in part due to their diverse subject matter and nuance. Therefore, the rule's provisions—including its exclusions—should ensure that shareholder proposals have a reasonable connection to promoting long-term shareholder value and are not introducing repetition that harms the effectiveness of the process.

While it is unclear what effect the amendments, if adopted, would have on the promotion of long-term value, we believe they would encourage—or at least not discourage—proposals that are repetitive and/or seek to micromanage the target company. If the number of proposals spikes significantly—including on an individual company's proxy statement—and shareholders see similar proposals each year or year after year, we doubt whether such repetition would be value-enhancing in the aggregate. We appreciate that some value-enhancing proposals may take time to gain traction among shareholders, but we also would note that:

- The substantial implementation and duplication exclusions in their current forms do not preclude shareholder proposals with genuinely novel subject matter from appearing on a company's proxy statement each year; and
- The resubmission exclusion in its current form gives sufficient time and latitude for potentially viable proposals to re-appear and eventually succeed.

Also, with respect to all three of the exclusions, the SEC offers an identical rationale—to provide a clearer standard for the SEC staff to apply and yield more consistent and predictable determinations. This is a rather odd justification for the duplication and resubmission exclusions. The staff considered very few exclusion requests each year on these bases: in 2020-2021, 2019-2020, and 2018-2019, the figures were 12, 9, and 16, respectively for the duplication exclusion, and 2, 3, and 1 for the resubmission exclusion. If the Commission's goal to ease burdens on the staff, then the proposal's focus on these two exclusions is misplaced. We recognize the demands that the rule's exclusion process places on the staff, but those demands are secondary to Rule 14a-8's main objective: establishing a fair and reasonable process for including shareholder proposals on companies' proxy statements that considers the legitimate interests of shareholders and companies.

Finally, this proposal's economic analysis appears to be current through part of May, prior to the conclusion of the 2022 proxy season. The proposal would benefit from, at least, an assessment of the full 2022 proxy season and how it compared to prior seasons. We do this at a very high level in Section 1, but the SEC could, and should, do much more to establish the baseline to better assess the effect of any proposed changes. This also would allow for analysis of how other developments—specifically the 2020 amendments and SLB 14L—are affecting the quality and quantity of shareholder proposals, and how the proposed amendments would further impact matters.

In addition to this fundamental flaw, the economic analysis makes no attempt to consider how the proposed amendments would affect behavior[21] or the value of shareholder proposals,[22] which is critical to understanding the impact of the amendments. Before finalizing any rule amendments, the SEC first should explore the following (among other matters):

- How many more proposals could companies see following the narrowing of the exclusions, and of what quality and purpose?
- What would be the overall costs to shareholders and companies from these additional proposals?
- Would companies be more or less likely to seek to exclude the proposals using the modified exclusions, or perhaps rely instead to a greater degree on others?
- If the volume of proposals increases, could the SEC staff's workload also increase if the absolute number of exclusion requests also increases (using these or other exclusions)?
- Would any new shareholder proposals be more or less likely to be voluntarily withdrawn, or deemed excludable by the SEC staff?
- Would the average percentage of shareholder support for these additional proposals change, and if so, how? What might a change indicate about the value-enhancing quality of these additional proposals?
- Would retail shareholders be more or less likely to vote if the volume of proposals increases?
- Overall, would shareholder-company engagement improve or regress?

All are relevant and important questions, and the rulemaking process unquestionably would benefit from more information and analysis.

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[21] *See, e.g.*, proposal at 31 ("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.").

[22] Proposal at 49-50 ("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.").

We appreciate your consideration of our comments. If you have any questions, please do not hesitate to contact Susan Olson at (202) 326-5813 or Matthew Thornton at (202) 371-5406.

Sincerely,

/s/ Susan Olson	/s/ Matthew Thornton
Susan Olson General Counsel	Matthew Thornton Associate General Counsel

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw
The Honorable Mark T. Uyeda
The Honorable Jaime Lizárraga