

September 12, 2022

Ms. Vanessa 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
Release No. 34-95267; File No. S7-20-22

This letter is submitted on behalf of Business Roundtable, an organization whose CEO members lead America's largest companies, employing over 20 million workers. The total value of Business Roundtable companies, over \$20 trillion, accounts for half the value of all publicly traded companies in the United States. Business Roundtable companies spend and invest over \$7 trillion a year, helping sustain and grow tens of thousands of communities and millions of medium- and small-sized businesses.

We appreciate the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "Commission" or "SEC") on July 13, 2022, to amend Rule 14a-8 under the Securities Exchange Act of 1934 to modify the standards for exclusion of shareholder proposals under the "substantial implementation," "duplication," and "resubmission" exclusions provided for under Rule 14a-8 (the "Proposals").¹ As described throughout this comment letter, we believe the Proposals are ill-conceived and should not be adopted. Should the Commission nonetheless determine to move forward with adoption of the Proposals, the SEC should not do so until a reasonable amount of time has passed for companies and proponents to adapt to the numerous and significant recent changes to the rule itself, in how the staff interprets the rule, and in how the staff processes and responds to shareholder proposal no-action requests.

BACKGROUND

In 1942, the SEC amended the proxy rules to require disclosure of shareholder proposals opposed by management about which a company had received reasonable notice.² Rule 14a-8 has long provided shareholders with an inexpensive mechanism to put issues of concern before their fellow shareholders for consideration, including issues relating to significant policy issues. In the years since Rule 14a-8 was put in place, the rule has been amended through Commission rulemaking. In addition, the application of the rule has evolved through SEC staff

¹ Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 95267 (July 13, 2022), <https://www.sec.gov/rules/proposed/2022/34-95267.pdf>.

² Exchange Act Release No. 3347 (December 18, 1942).

interpretations, including no-action letters issued by the staff in response to company requests regarding exclusion of shareholder proposals.

Originally designed to replicate attendance and participation by shareholders at corporate annual meetings, Rule 14a-8 is an important component of good corporate governance in the United States. Over time, however, the process has been misused by a small number of individuals — with often de minimis holdings in companies — who file common proposals at an array of public companies to advance goals that are untethered to the economic best interest of the company’s shareholders. The significant time required by corporate management and directors to review, respond to and engage on these topics with a company’s shareholders is not only a burdensome distraction, but it also takes away valuable time and resources that could otherwise be focused on growth and investment in their businesses, creation of jobs and further development of the U.S. economy. For these reasons, Business Roundtable supported³ the reforms to Rule 14a-8 that were proposed in November 2019⁴ and adopted in September 2020 (the “2020 Reforms”),⁵ which reforms made long-needed and meaningful updates to the submission and resubmission thresholds for shareholder proposals, along with other modest procedural changes. These reforms were considered carefully and followed a thoughtful rulemaking process that took into account commenters’ views and, we believe, ultimately balanced the interests of shareholders in being heard on issues of concern to them against the time, attention and resources that such proposals consume, both for companies that receive such proposals and for shareholders that must review, consider, and make informed voting decisions on such proposals.

Unfortunately, however, these needed reforms were largely undercut by reversals of multiple staff positions in the past proxy season. These reversals include application of the ordinary business exclusion in Staff Legal Bulletin No. 14L⁶ (in particular with regard to topics that are deemed to relate to significant policy issues), which has resulted in the inability to exclude most proposals related to environmental, social, and governance (“ESG”) topics (or proposals that purport to relate to an ESG topic), regardless of whether the proposal is otherwise excludable under Rule 14a-8 (i.e., as relating to the ordinary business operations of the company). In addition, the staff has reversed longstanding precedent in no-action responses addressing other substantive and procedural bases for exclusion under Rule 14a-8.⁷

³ Business Roundtable, Comment Letter on Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (February 3, 2020), <https://www.sec.gov/comments/s7-23-19/s72319-6742491-207776.pdf>.

⁴ Exchange Act Release No. 87458 (November 5, 2019), <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.

⁵ Exchange Act Release No. 89964 (September 23, 2020), <https://www.sec.gov/rules/final/2020/34-89964.pdf>.

⁶ Staff Legal Bulletin No. 14L (November 3, 2021) (rescinding Staff Legal Bulletin Nos. 14I, 14J and 14K; outlining the Division of Corporation Finance’s views on Rule 14a-8(i)(7), the ordinary business exception, and Rule 14a-8(i)(5), the economic relevance exception; republishing, with primarily technical, conforming changes, the guidance contained in Staff Legal Bulletin Nos. 14I and 14K, relating to the use of graphics and images, and proof of ownership letters; and providing new guidance on the use of e-mail for submission of proposals, delivery of notices of defects, and responses to those notices), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>.

⁷ Overall, the percentage of no-action requests granted dropped from 53.3% in 2021 to 32.1% in 2022. Proxy Analytics.

A common theme in these changes seems to be to prioritize shareholder access to the company's proxy statement with little regard to the rationale for Rule 14a-8's substantive and procedural exclusions or any balancing considerations. Such considerations include years of carefully developed precedent and the significant company and shareholder resources that shareholder proposals consume. Unfortunately, the Proposals continue this theme and, we fear, will result in further abuse of the shareholder proposal process by a small number of proponents or embolden a wider body of shareholders to submit proposals that may unnecessarily burden companies with overly prescriptive ways and means of achieving certain results, which may have already been obtained through different, more appropriate means. In particular, the Proposals, if adopted, will result in companies being forced to run (and shareholders to spend time considering): i) proposals on topics with respect to which the company has already taken action, ii) multiple (and potentially conflicting) versions of the same proposal in the same year, and iii) proposals concerning topics that have been put before shareholders in prior consecutive years without garnering meaningful shareholder support.

In addition to Business Roundtable's substantive concerns about the Proposals – in particular that they make it too easy for proponents to evade longstanding guardrails on the shareholder proposal process – the Proposals will exacerbate the confusion and disruption caused by the SEC staff's recent interpretive changes in administering Rule 14a-8. Accordingly, we believe the Proposals should not be acted upon at all, or at least not until all parties to the shareholder proposal process have had time to adjust and adapt to the multiple reversals of SEC staff positions (many of which have been longstanding positions) and the 2020 Reforms.

THE PROPOSALS

Substantial Implementation

Rule 14a-8(i)(10) allows a company to exclude a shareholder proposal that “the company has already substantially implemented.” The purpose of the Rule 14a-8(i)(10) exclusion is to “avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by management.”⁸ While the exclusion was originally interpreted to allow exclusion of a shareholder proposal only when the proposal was “fully effected” by the company, the Commission has revised its approach to the exclusion over time to allow for exclusion of proposals that have been “substantially implemented.”⁹ In applying this standard, the staff has looked to whether a company's policies, practices and procedures compare favorably with the guidelines of the proposal. In addition, when a company can demonstrate that it already has taken actions that address the “essential objective” of a shareholder proposal, the staff has concurred that the proposal has been “substantially

⁸ Exchange Act Release No. 12598 (July 7, 1976).

⁹ Exchange Act Release No. 20091 (August 16, 1983) and Exchange Act Release No. 34-40018 (May 21, 1998), <https://www.sec.gov/rules/final/34-40018.htm>.

implemented” and may be excluded as moot, even where the company’s actions do not precisely mirror the terms of the shareholder proposal. Accordingly, a company’s actions need not match exactly every specific element of a proposal to be viewed as having substantially implemented the proposal, which enables companies to address the concerns and goals of a proposal in a way that makes sense from a practical and legal perspective for a particular company (which is particularly important in light of the number of proposals that are submitted by a small number of proponents to multiple companies without regard to the specific circumstances of any particular recipient of the proposal). Further, and consistent with the intent of the exclusion, it helps to avoid shareholders spending time reviewing, considering and voting on proposals where the overarching objective has been accomplished already, but with differences around the margin.

The Proposals would provide that a company may exclude a proposal as substantially implemented “[i]f the company has already implemented the essential elements of the proposal.” The proposing release notes in this regard that the proposed amendment would permit a shareholder proposal to be excluded as substantially implemented only if the company has implemented *all* of its essential elements. Further, the proposing release states that “the degree of specificity of the proposal and of its stated primary objectives” would guide the determination of which elements of a proposal are “essential elements” (with the caveat that as the proponent identifies more elements, each becomes less essential). The proposing release provides as an example the staff’s historic approach of allowing exclusion of proxy access proposals where the company has put in place a proxy access provision that would limit aggregation to 20 shareholders where the shareholder proposal would allow for unlimited aggregation. The SEC notes that under the proposed change, unlimited aggregation would generally be viewed by the staff as an essential element of the proposal and therefore the proposal would not be excludable as substantially implemented. In essence, whether a proposal has been substantially implemented remains a subjective determination that the staff historically would have made in determining whether the essential objective of the proposal had been accomplished, but instead the SEC is proposing an entirely new (and more complicated) and subjective standard that will unnecessarily introduce confusion and may allow for further abuse of the shareholder proposal process.

As 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, thus disqualifying such proposal from exclusion in the company’s proxy and thereby forcing both companies and their shareholders to spend significant time and resources on a proposal that is essentially moot – all to the detriment of shareholders that the SEC is tasked with protecting. For instance, in May 2022, BlackRock announced that it expected to support proportionally fewer climate-related proposals in 2022 than it did in 2021 because the overly prescriptive proposals are not “consistent with [its] clients’ long-term financial

interests.”¹⁰ That indeed occurred, with BlackRock announcing in July that it supported just 24% of environmental and social proposals in the 2022 proxy season, compared to 43% in 2021, due to the more prescriptive nature of the 2022 proposals.¹¹ Ultimately, the proposed change in approach would eviscerate the fundamental purpose of the Rule 14a-8(i)(10) exclusion and do nothing to change the inherently subjective determinations the staff will need to make in determining whether a proposal has been substantially implemented.

Furthermore, it should be emphasized that not being able to exclude such detailed and prescriptive shareholder proposals may encroach on the roles and responsibilities of management and the board of directors. Such leaders are expected to have intricate knowledge of the businesses and the companies they lead, and to use their professional and business judgment to make decisions on how best to implement shareholder proposals that may pass, in ways that make legal, operational and practical sense in the context of that particular company. The proposed change, however, seeks to give shareholders, who may not have such familiarity with the company’s operations, disproportionate control of how approved shareholder proposals are to be implemented and the end results they call for are achieved. Thus, this outcome would force companies to commit inordinate amounts of time and resources to satisfy certain elements of shareholder proposals that may be deemed “essential” under the Proposals, even when the proposal’s overarching objectives and goals have already been met.

Duplication

Under Rule 14a-8(i)(11), a company may exclude a shareholder proposal if the 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.” The Commission has stated that the purpose of Rule 14a-8(i)(11) is to eliminate the possibility of shareholders having to consider two or more substantially identical proposals at the same meeting of shareholders.¹² The proposals are not required to be identical to provide a basis for exclusion under Rule 14a-8(i)(11). Rather, the proposals will be deemed to be excludable where the proposals have the same “principal thrust” or “principal focus,” notwithstanding that the terms or scope differ. As above, the SEC and its staff historically have focused on the larger picture goals versus the “how” of achieving those goals.

The Proposals would amend Rule 14a-8(i)(11) to specify that a proposal “substantially duplicates” another proposal previously submitted for the same shareholder meeting if it “addresses the same subject matter and seeks the same objective by the same means.” The SEC states that this change would “facilitate the consideration at the same shareholder meeting

¹⁰ BlackRock, 2022 Climate-Related Shareholder Proposals More Prescriptive than 2021 (May 2022), <https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf>.

¹¹ BlackRock, 2022 Voting Spotlight Summary (July 26, 2022), <https://www.blackrock.com/corporate/literature/publication/2022-investment-stewardship-voting-spotlight-summary.pdf>.

¹² Exchange Act Release No. 12598 (July 7, 1976).

of multiple shareholder proposals that present different means to address a particular issue.” This approach undermines the very purpose of this exclusion, in that shareholders will be forced to consider dueling shareholder proposals that may, for example, seek the same outcome and address the same issues but with differences in the “means” of addressing a particular issue. In addition to increasing the already significant amount of time and resources companies spend addressing shareholder proposals each year (again, to the detriment of shareholders), this will result in significant shareholder confusion and, where numerous proposals receive majority support at the same meeting, will put companies in the difficult or impossible position of determining which version of a proposal to implement or how to implement various courses of action that may not be complementary to one another. While the SEC acknowledges these issues in the proposing release, it nonetheless has chosen to prioritize the “how” (i.e., the “means”) over the overarching objectives. Further, and as discussed with regard to the proposed change to substantial implementation, the proposed change would merely substitute one subjective test for a new and more complicated one, while also introducing additional confusion and opportunity for abuse of the shareholder proposal process.

Resubmission

Under Rule 14a-8(i)(12), a company may exclude a shareholder proposal from the company’s proxy materials if the proposal “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 received support below certain specified thresholds on the most recent vote. These thresholds were updated as part of the 2020 Reforms to prevent companies and their shareholders from having to consider proposals that repeatedly receive only nominal shareholder support year after year.

The Commission has indicated that the condition in Rule 14a-8(i)(12) that the shareholder proposal deal with “substantially the same subject matter” does not mean the previous proposal(s) and the current proposal must be exactly the same. Although the predecessor to Rule 14a-8(i)(12) required a proposal to be “substantially the same proposal” as prior proposals, the Commission amended the rule in 1983 to permit exclusion of a proposal that “deals with substantially the same subject matter.” The Commission explained the reason and meaning of the revision, stating:

The Commission believes that this change is necessary to signal a clean break from the strict interpretive position applied to the existing provision. The Commission is aware that the interpretation of the new provision will continue to involve difficult subjective judgments, but anticipates that those judgments will be based upon a consideration of the substantive concerns raised by a proposal rather than the specific language or actions proposed to deal with those concerns.¹³

¹³ Exchange Act Release No. 20091 (August 16, 1983).

Following this clearly articulated and well-founded approach, under the current resubmission basis for exclusion, a proposal may be found to deal with “substantially the same subject matter” as a previous proposal when it shares the same “substantive concerns.” In conducting this analysis, the staff does not focus on the “specific language or actions proposed to deal with those concerns.”

The SEC now proposes to return to an approach that focuses on the “how” (i.e., the “means”) rather than the “substantive concern” being addressed in the proposal. In this regard, the Proposals would amend Rule 14a-8(i)(12) to provide that a proposal will qualify as a resubmission that may be excluded under the rule if it “substantially duplicates” another proposal that was previously submitted for the same company’s prior shareholder meetings, meaning that it “addresses the same subject matter and seeks the same objective by the same means.” While we believe that all three of the proposed rule changes will undermine entirely the purpose and function of the original respective exclusion, we are particularly concerned that the proposed change to Rule 14a-8(i)(12) will result in significant abuse and circumvention of the rule. 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. While not all (or even most) proponents will abuse the rule in this way, history has shown that a small number of proponents, who are responsible for a significant percentage of proposals submitted to companies, almost certainly will abuse the process in this way, resulting in wasted time and resources and thus harming investors and companies alike. At best, the proposed change would do nothing to meaningfully impact or improve the rights and voices of shareholders. At worst, the proposed change would result in companies and shareholders overall to be held hostage by the whims of a small number of proponents, spending valuable time and resources in reviewing, considering, and otherwise responding to their proposals. Further, and as discussed with regard to the proposed changes to substantial implementation and duplication grounds for exclusion, the proposed change would merely substitute one subjective test for a new and more complicated one, while also introducing additional confusion and opportunity for abuse of the shareholder proposal process.

CONCLUSION

Business Roundtable strongly urges the SEC not to move forward with the Proposals. As discussed, the Proposals are inconsistent with the original and well-founded purposes of the exclusions and would exacerbate existing abuses of the Rule 14a-8 shareholder proposal process. Further, the Proposals will result in significant complications to the process in light of the magnitude of changes that have been made to Rule 14a-8 and the staff’s interpretations of the rule over the past two proxy seasons.

Business Roundtable appreciates the opportunity to provide our input during this process. We would be happy to discuss these comments or any other matters you believe would be helpful. Please contact Maria Ghazal, Senior Vice President & Counsel of Business Roundtable, at mghazal@brt.org or 202-496-3268.