Council of Institutional Investors®
The voice of corporate governance

Via Email

August 25, 2022

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

Re: File Number S7-20-22

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $40 trillion in assets under management.[1]

The purpose of this letter is to respond to the Securities and Exchange Commission's (SEC) proposed rule *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*[2] (Proposed Rule).[3] CII's long-standing interest in shareholder proposals and Rule 14a-8 is reflected in our membership-approved policies which state:

> CII supports shareowners' discretion to employ a variety of stewardship tools to improve corporate governance and disclosure at the companies they own. These tools include casting well informed proxy votes; engaging in dialogue with portfolio companies (including with board members, as appropriate), external managers and policymakers; *filing shareholder resolutions*; nominating board

[1] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.
[2] *See* Shareholder Proposals, 17 C.F.R § 240.14a-8 (as amended Nov. 2020), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-8.
[3] Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals under Exchange Act Rule 14a-8, Securities Act Release No. 95,267, Investment Company Act Release No. 34,647, 87 Fed. Reg. 45,052 (proposed rule July 13, 2022), https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf.

> candidates; litigating meritorious claims; and retaining or dismissing third parties charged with assisting in carrying out these activities.[4]

Consistent with that policy, CII has long believed that shareholder proposals, which are almost always nonbinding, are an essential tool for expressing the collective voice of a company's shareowners on particular matters, and have made important contributions to corporate governance over the last 50 years.[5] As a result, CII generally agrees with SEC Chairman Gary Gensler that the Proposed Rule could:

> [P]rovide greater certainty as to the circumstances in which companies are able to exclude shareholder proposals from their proxy statements. . . . [And], if adopted, . . . would improve the shareholder proposal process.
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> . . . .
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> [The Proposed Rule] would [also] provide a clearer framework for the application of [Rule 14a-8] . . . which market participants have sought. [It] . . . also would help shareholders exercise their rights to submit proposals for consideration by their fellow shareholders.[6]

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[4] Council of Institutional Investors, Corporate Governance Policies, Preamble (updated Mar. 7, 2022), https://www.cii.org/files/03_07_22_corp_gov_policies.pdf (emphasis added).

[5] *See* Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 1 (Jan. 30, 2020), https://www.cii.org/Files/issues_and_advocacy/correspondence/2020/20201030%2014a-8%20comment%20letter%20FINAL.pdf ("Shareowner proposals, which almost always are nonbinding, are an essential tool for expressing the collective voice of a company's shareowners on particular matters, and have made important contributions to corporate governance over the last 50 years."); *see* Brief of Council of Institutional Investors as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment at 1-2 (Sept. 24, 2021), ICCR v. SEC, U.S.D.D.C. (No. 1:21-cv-1620-RBW), https://www.cii.org/files/issues_and_advocacy/legal_issues/17_Brief_final.pdf ("Because sound corporate governance is critical to long-term returns — and because poor governance can have a negative result on returns — CII members have a strong interest in seeing that shareholders can submit and vote on shareholder proposals that raise important corporate governance issues."), *see also* Commissioner Allison Herren Lee, *Improving the Shareholder Proposal Process: Statement on Proposed Amendments to Rule 14a-8* (July 13, 2022), https://www.sec.gov/news/statement/lee-statement-proposed-amendments-rule-14a-8-071322 ("Through this process, shareholders have introduced significant improvements in corporate governance including majority vote rules for the election of directors, elimination of staggered board terms, limits on poison pills that serve to entrench management, and requirements for independent board chairs [and] [i]ndeed shareholder proposals have often been a catalyst for pivotal corporate governance reforms.").

[6] Chair Gary Gensler, *Statement on Proposed Amendments to Rule 14a-8* (July 13, 2022), https://www.sec.gov/news/statement/gensler-statement-proposed-amendments-rule-14a-8-071322; *see, e.g.*, Schulte Roth & Zabel LLP, Alerts, *Shareholder Rights Update: SEC Proposes to Narrow Ability to Exclude Shareholder Proposals from Company Proxy Materials* (July 28, 2022), https://www.srz.com/resources/sec-proposes-to-narrow-ability-to-exclude-shareholder-proposals.html ("The Proposed Amendments represent a positive development for shareholders and should result in an overall increase in the percentage of shareholder proposals that shareholders will have an opportunity to vote on.").

The following are CII's comments in response to the Proposed Rule's three proposed amendments:

1. Rule 14a-8(i)(10)—Substantial implementation[7]

CII generally supports the proposed "amendment to Rule 14a–8(i)(10) that would maintain a 'substantial' implementation standard and provide a clearer framework for its application [by stating] . . . that a proposal may be excluded as substantially implemented '[i]f the company has already implemented the essential elements of the proposal.'"[8]

It is our understanding that the adoption of this proposed amendment would, for example, prevent a company from excluding—as "substantially implemented"—governance proposals "to eliminate supermajority vote provisions when the company had previously adopted a 'majority of votes outstanding' standard if the proposal called for a 'majority of votes cast' standard."[9] For example, at United Technologies Corporation (Mar. 1, 2019)[10] and AbbVie Inc. (Feb. 27, 2019),[11] shareholder proposals sought to replace supermajority provisions contained in a company's certificate of incorporation and bylaws with a majority of votes cast standard. But when the amendments proposed or adopted by the company proposed implementing a 'majority of outstanding shares' voting standard, the SEC staff excluded the proposals as having been "substantially implemented" under Rule 14a–8(i)(10).

We acknowledge that CII's membership-approved policies indicate that supermajority vote provisions should generally be replaced by provisions providing for a "majority vote of common shares outstanding."[12] Our policies, however, also reflect the view that that there is a substantial

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[7] *See* Shareholder Proposals, 17 C.F.R § 240.14a-8(i)(10) ("**(i)** ***Question 9:*** If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal? . . . **(10)** ***Substantially implemented:*** If the company has already substantially implemented the proposal . . . . '').

[8] 87 Fed. Reg. at 45,055; *see id.* at 45,075 (proposed § 240.14a–8(i)(10): "Substantially implemented: If the company has already implemented the essential elements of the proposal . . . .").

[9] Client Update from Davis Polk, *SEC proposes to substantially restrict grounds for excluding shareholder proposals* (July 15, 2022), https://www.davispolk.com/insights/client-update/sec-proposes-substantially-restrict-grounds-excluding-shareholder-proposals.

[10] *See* Courtney Haseley, Special Counsel, Securities and Exchange Commission, Response of the Office of Chief Counsel, Division of Corporation Finance, Re: United Technologies Corporation Incoming letter dated December 21, 2018 (Mar. 1, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/cheveddenutc030119-14a8.pdf ("The Proposal requests that the board take each step necessary so that each voting requirement in the Company's charter and bylaws . . . that calls for a greater than simple majority vote be eliminated and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws . . . [and] [t]here appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(10).").

[11] Courtney Haseley, Special Counsel, Securities and Exchange Commission, Response of the Office of Chief Counsel, Division of Corporation Finance, Re: AbbVie Inc. Incoming letter dated December 21, 2018 (Feb. 27, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/steinerabbvie022719-14a8.pdf ("The Proposal requests that the board take each step necessary so that each voting requirement in the Company's charter and bylaws . . . that calls for a greater than simple majority vote be eliminated and replaced by a requirement for a majority of the votes cast for and against applicable proposals, or a simple majority in compliance with applicable laws . . . [and] [t]here appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(10).").

[12] Council of Institutional Investors, Corporate Governance Policies § 3.6 Voting Requirement.

difference in shareholder rights between a provision that provides for a majority vote of common shares outstanding[13] and a provision that provides for a majority of votes cast.[14] We therefore believe it is appropriate that the proposed substantial implementation standard would not allow a company to exclude a proposal where the specific actions or essential elements requested by the proposal have clearly not been implemented by the company.

We also agree with following the example described in the Proposed Rule relating to the adoption of a provision and related proposal to implement CII's membership-approved policy on proxy access:[15]

> [T]he staff historically has concurred in the exclusion, under Rule 14a–8(i)(10), of proposals seeking the adoption of a proxy access provision that allows an unlimited number of shareholders who collectively have owned 3 percent of the company's outstanding common stock for 3 years to nominate up to 25 percent of the company's directors, where the company had adopted a proxy access bylaw allowing a shareholder or group of up to 20 shareholders owning 3 percent of its common stock continuously for 3 years to nominate up to 20 percent of the board. *Under the proposed amendment, because the ability of an unlimited number of shareholders to aggregate their shareholdings to form a nominating group generally would be an essential element of the proposal, exclusion would not be appropriate.*[16]

We again acknowledge that CII's proxy access policy does not state that a company's proxy access bylaw should provide for an unlimited number of shareholders to aggregate their shareholdings and that a 20 shareholder cap has become the market standard.[17] We, however, agree with the SEC's conclusion that the proposed substantial implementation standard should not allow a company to exclude a proxy access proposal where a specific action or essential element requested by the proposal—permitting an unlimited number of shareholders to aggregate their shareholdings—has clearly not been implemented by the company.[18]

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[13] *See* § 1.5 Shareholder Participation ("Shareowners also should have meaningful ability to propose bylaw amendments that become effective upon the approval of a majority of outstanding shares."); § 3.6 Voting Requirement ("A majority vote of common shares outstanding should be sufficient to amend company bylaws or take other action that requires or receives a shareowner vote").

[14] *See* § 2.2 Director Elections ("Directors in uncontested elections should be elected by a majority of the votes cast."); § 2.6a Majority Shareholder Vote ("Boards should take actions recommended in shareowner proposals that receive a majority of votes cast for and against.").

[15] *See* § 3.2 Access to the Proxy ("Companies should provide access to management proxy materials for a long-term investor or group of long-term investors owning in aggregate at least three percent of a company's voting stock, to nominate less than a majority of the directors.").

[16] 87 Fed. Reg. at 45,056 (emphasis added).

[17] *See, e.g.*, Council of Institutional Investors, Proxy Access: Best Practices 2017 at 7 (July 2017), https://www.cii.org/files/publications/misc/Proxy_Access_2017_FINAL.pdf ("CII has not supported limits on the number of shareholders that may aggregate their shares to satisfy the ownership requirement, but we recognize that a 20-shareholder cap has become the market standard.").

[18] We note, for example, that if a proxy access shareholder proposal provides for a 25-shareholder cap and the company's proxy access bylaw provides for a 20-shareholder cap, the application of the proposed substantial implementation standard is less clear. In that regard, we would not object to the final rule including additional

Finally, we generally agree with the SEC that "[b]y providing the staff with a more objective and specific framework for analyzing the [Rule 14a–8(i)(10)] exclusion when reviewing and responding to no-action requests, . . . the amended standard should result in no-action positions that are more predictable and consistent than under the current rule."[19]

2. Rule 14a-8(i)(11)—Duplication[20]

CII generally supports the proposed "amendment to Rule 14a–8(i)(11) providing that a proposal 'substantially duplicates' another proposal if it 'addresses the same subject matter and seeks the same objective by the same means.'"[21]

CII generally agrees with the SEC that the proposed amendment: "reduce[s] incentives for proponents to submit a proposal quickly; reduce[s] incentives for proponents to attempt to preempt other proposals those proponents do not agree with;[22]and facilitate[s] the consideration at the same shareholder meeting of multiple shareholder proposals that present different means to address a particular issue."[23]

CII also generally agrees with the SEC that the Proposed Rule's 14a–8(i)(11) amendment could provide:

> greater predictability and certainty about the application of Rule 14a– 8(i)(11) and, therefore, facilitate more informed decision-making around the submission of no-action requests.
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> . . . .
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> [And] if shareholder consideration of similar, but not duplicative, proposals leads to greater support for, and improved likelihood of implementation of, a proposal

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guidance regarding when quantitative differences in an essential element of the proposal and the related bylaw should or should not allow a company to exclude a proposal.

[19] 87 Fed. Reg. at 45,068.

[20] *See* Shareholder Proposals, 17 C.F.R § 240.14a-8(i)(11) ("**(11)** ***Duplication:*** 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 . . . .").

[21] 87 Fed. Reg. at 45,057; *see id.* at 45,075 (proposed § 240.14a–8(i)(11): "Duplication: If the proposal substantially duplicates (i.e., addresses the same subject matter and seeks the same objective by the same means as) another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting").

[22] *See, e.g.*, Paul Verney, *SEC moves to soften filing requirements for shareholder proposals*, Resp. Investor (July 14, 2022) (on file with CII) (Noting the trend, and providing examples, of some groups using Rule 14a-8(i)(11) "to strike an unwanted resolution off the agenda by filing one that repeats sections of it verbatim, but outlines a contrary viewpoint in its supporting statement").

[23] 87 Fed. Reg. at 45,058; *see* Marc. S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP et al., *Proposed Amendments to the Shareholder Proposal Rules,* Harv. L. Sch. On Corp. Governance (Aug. 11, 2022), https://corpgov.law.harvard.edu/2022/08/11/proposed-amendments-to-the-shareholder-proposal-rules/ ("As described in the proposing release, the amendment would 'facilitate the consideration at the same shareholder meeting of multiple shareholder proposals that present different means to address a particular issue.'").

> that aligns more closely with the objectives of shareholders, then shareholders could benefit.[24]

3. Rule 14a-8(i)(12)—Resubmission[25]

CII generally supports the proposed amendment to "revise the standard of what constitutes a resubmission under Rule 14a–8(i)(12) from a proposal that 'addresses substantially the same subject matter' as a prior proposal to a proposal that 'substantially duplicates' a prior proposal. . . [and] a proposal 'substantially duplicates' another proposal if it 'addresses the same subject matter and seeks the same objective by the same means.'" [26]

As indicated in the Proposed Rule,[27] the proposed amendment to Rule 14a–8(i)(12) is, in part, responsive to a CII recommendation contained in our January 2020 comment letter (CII 2020 Letter)[28] regarding the SEC's November 2019 proposed amendments to Rule 14a-8 in Release No. 34–87458, *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8.*[29] More specifically, the CII 2020 Letter stated:

> [W]e would ask that if the SEC raises resubmission thresholds, it review whether it should narrow the definition of "Resubmissions" in (12)[]. Currently and as proposed, the rule provides that "if the [shareholder] proposal addresses substantially the same subject matter" as a proposal previously submitted that received a low vote, it may be omitted. This appears to permit a proposal that has minimal support and would go in the opposite direction of what a significant group of shareholders would advocate, and could be used (intentionally or not) to take an item off the agenda for a period of three years. In other words, the higher

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[24] 87 Fed. Reg. at 45,069.

[25] *See* Shareholder Proposals, 17 C.F.R § 240.14a-8(i)(12) ("**(12)** ***Resubmissions.*** 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 most recent vote occurred within the preceding three calendar years and the most recent vote was: **(i)** Less than 5 percent of the votes cast if previously voted on once; **(ii)** Less than 15 percent of the votes cast if previously voted on twice; or **(iii)** Less than 25 percent of the votes cast if previously voted on three or more times.").

[26] 87 Fed. Reg. at 45,060; *see id.* at 45,075 (proposed § 240.14a–8(i)(12): "Resubmissions: If the proposal substantially duplicates (i.e., addresses the same subject matter and seeks the same objective by the same means as) a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was: (i) Less than 5 percent of the votes cast if previously voted on once; (ii) Less than 15 percent of the votes cast if previously voted on twice; or (iii) Less than 25 percent of the votes cast if previously voted on three or more times.").

[27] *See* 87 Fed. Reg. at 45,059 & n.63 ("one commenter suggested that, if the 2020 amendments raised the resubmission thresholds, the Commission should consider whether to 'narrow the definition of 'Resubmissions' because 'the higher resubmission thresholds could expand the ability of a shareholder to preempt future proposals by submitting (intentionally or not) an unpopular idea that 'addresses substantially the same subject matter' as an idea that many shareholders support'").

[28] *See* Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 22.

[29] *See* Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a–8, Exchange Act Release No. 87,458, 84 Fed. Reg. 66,458 (Nov. 5, 2019), https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24476.pdf.

> resubmission thresholds could expand the ability of a shareholder to preempt future proposals by submitting (intentionally or not) an unpopular idea that "addresses substantially the same subject matter" as an idea that many shareholders support.[30]

The CII 2020 Letter provided the following example:

> In 2016-19, five shareholder proposals advocating for board diversity received majority support, although only three of those proposals (Cognex 2017, Hudson Pacific Properties 2017, and Waste Connections, Inc. 2019) were opposed by management. Average voting support on board diversity matters over that period was 20%, although this was pulled down by a number of proposals receiving very little support that were submitted by the National Center for Public Policy Research. Those proposals appeared to be intended to promote disclosures that some shareholders considered to be redundant, and that put particular emphasis on ideological diversity, on the assertion that companies, as indicated in one proposal, "operate in ideological hegemony that eschews conservative people. *One effect of the low votes was to preempt for a period of time consideration of proposals that might support gender and racial diversity on boards, since the SEC resubmission thresholds apply to "substantially the same subject matter*."[31]

Accordingly, we believe that the SEC's proposed amendment to Rule 14a-8(i)(12) appropriately responds to our recommendation by reducing the '"potential 'umbrella' effect—i.e., that [existing the Rule 14a-8(i)(12)] . . . could be used to exclude proposals that have only a vague relation, or are not sufficiently similar, to earlier proposals that failed to receive the necessary shareholder support."[32]

CII also generally agrees with the SEC that the proposed amendment to Rule 14a-8(i)(12) could:

> [F]acilitate proponents experimenting and making adjustments to previously submitted proposals to build broader support, [and] . . . could also lead to proposals that align more closely with the objectives of shareholders to be put to a shareholder vote. Voting outcome data for these additional proposals could further inform

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[30] Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 22. CII also generally believes the Securities and Exchange Commission should consider our recommendation that "for purposes of determining eligibility of a proposal [for resubmission], votes . . . be counted on a one-share, one-vote basis [since] [s]ome of the most pressing governance and other problems we see occurring now are at dual-class stock companies [and] [t]he current thresholds already make it difficult to press proposals at some dual-class stock companies over several years." *Id.* at 49; *see* Brief of Council of Institutional Investors as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment at 7 ("A related concern to which the Commission paid short shrift is the effect of higher resubmission thresholds on shareholder votes at companies that have multiple classes of stock, e.g., one class of 'common stock' that sold to the public and a smaller number of 'Class B' shares that are held by company founders, founders' families and other insiders . . . and because those shares are usually voted against shareholder proposals, the higher resubmission requirements in the 2020 amendments have a disproportionate impact on proposals submitted at such dual class companies.").

[31] Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 21 n.46 (emphasis added).

[32] 87 Fed. Reg. at 45,059.

> management about shareholder views, allowing it to consider actions that are of greater importance across larger swaths of the shareholder base and potentially leading to improved efficiency in the management-shareholder engagement process.[33]

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For all of the above reasons, CII generally supports the Proposed Rule. We appreciate your consideration of our comments. Please let me know if you have any questions.

Sincerely,

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel

[33] *Id.* at 45,070.