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6TH DISTRICT, TENNESSEE
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– DIVERSITY AND INCLUSION

Congress of the United States
House of Representatives
Washington, DC 20515–4206

January 13, 2023

Mr. Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair Gensler,

This year has marked an unprecedented proxy season, with the number of shareholder proposals submitted significantly passing the record-breaking number of submissions in 2021.[1] Shareholder proposals relating to environmental and social issues have been a major theme of proposals this year.[2] This increase in shareholder proposals relating to environmental and social issues followed the Commission's issuance of Staff Legal Bulletin No. 14L ("SLB 14L") on November 3, 2021.

The Commission's staff plays a critical role with respect to the shareholder proposal process, determining which proposals may be excluded from proxy statements pursuant to Rule 14a-8. Even with the uptick in proposals, new SEC policy has resulted in significantly fewer proposals being excluded under the SEC no-action process.[3] In 2022, the success rate for no-action requests has fallen to 38%, a steep decline from 71 percent in 2021 and 70 percent in 2020.[4] Moreover, "[n]umerous no-action letters relating to the 2022 proxy season overturned both recent and long-standing precedent, creating a level of uncertainty that companies will need to factor into their future no-action strategies and engagement with shareholder proponents."[5]

In light of the new approach articulated in SLB 14L and the unprecedented low rate of proposals permitted to be excluded during the most recent proxy season, I am concerned that the Commission and its staff may be making no-action determinations based on factors other than the impartial application of Rule 14a-8 and longstanding no-action precedent. Accordingly, I would like to obtain a greater understanding of the Commission's application of Rule 14a-8(i)

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[1] *See* Hannah Orowitz, Rajeev Kumar, & Lee Anne Hagel, *An Early Look at the 2022 Proxy Season*, GEORGESON (June 7, 2022), https://corpgov.law.harvard.edu/wp-content/uploads/2022/06/Georgeson_EPS_whitepaper_2022_v6.pdf.
[2] *See id.*
[3] *See* Renee Jones, SEC, Director of the Division of Corporation Finance, *The Shareholder Proposal Rule: A Cornerstone of Corporate Democracy* (Mar. 8, 2022), https://www.sec.gov/news/speech/jones-cii-2022-03-08.
[4] *See* Memorandum from Gibson Dunn, *Shareholder Proposal Developments During the 2022 Proxy* Season, (Jul. 11, 2022), https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season/.
[5] *See* Memorandum from Skadden, Ryan J. Adams and Marc S. Gerber, *Hitting Reset or Flipping the Table? SEC Staff Significantly Increases the Unpredictability of the Shareholder Proposal No-Action Process*, (Jun. 28, 2022), https://www.skadden.com/insights/publications/2022/06/quarterly-insights/hitting-reset-or-flipping-the-table.

COOKEVILLE OFFICE
321 EAST SPRING STREET, SUITE 301
COOKEVILLE, TN 38501
(931) 854-9430
FAX: (615) 206-8980

WASHINGTON OFFICE
1124 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4231
FAX: (202) 225-6887

GALLATIN OFFICE
355 NORTH BELVEDERE DRIVE, SUITE 308
GALLATIN, TN 37066
(615) 206-8204
FAX: (615) 206-8980

and the standards guiding the staff's decisions regarding whether to grant or deny no-action requests.

In recent years, countless groups have been pressuring companies to take action on a broad array of environmental, social, and political issues often unrelated – or even detrimental – to the companies' ability to create shareholder value. Including through proliferating shareholder proposals, these groups are increasingly calling upon corporations to solve complex societal issues that are more properly within the domain of democratically elected government officials, driving the allocation of capital, and increasing costs for public companies and shareholders. In light of this reality, please answer the following questions by **January 27, 2023:**

1. Is it appropriate for Rule 14a-8 to be used to drive social changes through public companies? Do you believe it is right for institutional shareholders, with their own social and political agendas, to exercise the voting rights on behalf of beneficial owners of the shares who are likely to have widely varying views?

2. Given the recent use of Rule 14a-8 to advance environmental, social, and political agendas, do you believe the SEC should study the impact of Rule 14a-8 proposals on corporate culture and cohesion?

3. Given the recent use of Rule 14a-8 to advance environmental, social, and political agendas, do you believe the SEC should study the risk that Rule 14a-8 proposals will result in the polarization of the U.S. economy?

4. The record number of shareholder proposals relating to environmental, social, and political issues are imposing tremendous costs and burdens on public companies to advance issues often divorced from companies' ability to create shareholder value. Should an updated cost-benefit analysis be conducted of Rule 14a-8?

    a. In your view, do the current thresholds in Rule 14a-8 sufficiently ensure that shareholder proponents have real 'skin in the game?'

    b. Are the current thresholds appropriate from a cost-benefit perspective?

5. We have heard from certain constituents that the cumulative effect of the politicization of the Securities Exchange Act of 1934 is significantly increasing the costs to companies of being public and also discouraging private companies from going public. Do you believe the SEC should conduct an analysis of whether this presents a meaningful risk of coming to fruition if this troubling trend continues?

6. As noted above, it has been reported that significantly fewer no-action requests regarding shareholder proposals were granted by the SEC staff this year as compared to last year. One of the reasons for this shift seems to be the staff's recently announced position regarding proposals relating to "significant social policy issues," which the staff considers to override the ordinary business exclusion provided in Rule 14a-8.

    a. Especially at a time when the country is deeply divided, is it appropriate for the staff of our country's securities regulator to determine whether an environmental

or social issue is one of significance, and is it appropriate for the SEC staff to utilize this determination to make decisions regarding whether a proposal should be properly voted upon pursuant to Rule 14a-8?

b. Should the SEC staff be directed to grant or deny no-action requests based solely on the exclusions provided within the rule, irrespective of whether a proposal relates to a so-called "significant social policy issue"?

c. When asked in 1943 about the potential for the proposal process to be usurped by "either the nuisance man or the man with a particular idea or even an 'ism' or something he wants to advance," then-SEC Commissioner Ganson Purcell told Congress that such a case would require the SEC to "make such appropriate changes as might seem necessary." Now seems to be the time to make those changes – specifically, to amend Rule 14a-8 to prohibit the submission of environmental, social, and political proposals. Do you agree?

7. What are the staff's standards, processes, and rationale for determining whether and when it is appropriate to depart from precedent? Does the SEC and its staff consider the costs to companies associated with the regulatory uncertainty that is created through widespread and/or seemingly irrational reversal of no-action precedent?

Thank you for your prompt attention to these matters. If you have any questions regarding the content of this letter, please contact my Legislative Counsel, Graham Conlan, at Graham.Conlan@mail.house.gov

Respectfully,

John Rose
Member of Congress

Pete Sessions
Member of Congress

Bryan Steil
Member of Congress