February 3, 2020

The Honorable Jay Clayton, Chairman
Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549

Re: SEC Proposed Amendments to Exchange Act Rule 14a-8

Dear Commissioner Clayton and Ms. Countryman,

The Energy Infrastructure Council ("***EIC***") is a non-profit trade association of companies that develop and operate energy infrastructure, including traditional and renewable energy infrastructure companies, service providers and other businesses and individuals that operate in and around the energy industry. The EIC appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's ("***Commission***" or "***SEC***") proposed amendments to 17 C.F.R. § 240.14a-8 ("***Rule 14a-8***") under the Securities and Exchange Act of 1934 ("***Exchange Act***").

As the SEC indicates in its November 5, 2019 proposing release (the "***Proposing Release***"), Rule 14a-8 is designed to facilitate shareholder engagement by making it affordable for shareholders to present their proposals for consideration at a company's annual or special meeting. While the EIC supports the engagement purpose of Rule 14a-8, we are of the view that this purpose must be balanced with due consideration of a company's resources, as well as the existence of other mechanisms through which investor input is received. We are also of the view that it is appropriate for the Commission to consider the modernization of Rule 14a-8 from time to time, with appropriate attention given to how the proxy process and investor engagement trends have changed over time. Given these considerations, and after due deliberation, the EIC respectfully submits this comment letter in support of the amendments to modernize Rule 14a-8.

I. THE RISE OF INVESTOR ENGAGEMENT EFFORTS

The EIC believes that open and timely communication between companies and their investors is critical to the success of the modern company. Since the Commission last considered amending Rule 14a-8, the level and number of mechanisms for engagement between companies and their investors have increased significantly. Following the SEC's adoption of say-on-pay in 2011 and pay ratio disclosure in 2017, companies have increasingly sought to enhance their disclosures and engage with investors year-round. Moreover, whereas investor engagement had historically been limited to a company's investor

relations function and management team, it is now increasingly common for independent directors to participate meaningfully in a company's shareholder engagement efforts.[1] Many of our EIC members engage with their investors not only through the shareholder proposal process, but also through formal investor outreach and engagement programs that include members of their boards. For example, we have recently formed a board-level environmental, social and governance ("***ESG***") working group to provide all of our members with resources in engaging in meaningful ESG communications following the lead of some of our largest publicly traded members. In addition, with the rise of social media, stakeholders, including but not limited to investors, can now engage with companies in real time, and can effect change while incurring little to no cost. Social media has afforded stakeholders with the ultimate voice—the ability to reach not only a company's investors, but also its customers, communities, employees, regulators and other constituents, in a moment. Lastly, but no less importantly, large investors have become more proactive in the shareholder engagement process, including with respect to areas of emerging investor interest. These developments are having a significant impact on how our members consider issues that would traditionally be the subject of Rule 14a-8 proposals. For example, a number of our members have begun to publish comprehensive reports setting goals and measuring the results of their efforts to reduce the environmental impact of their operations.

II. RULE 14a-8 DEVELOPMENTS AND CONSIDERATIONS

In comparison to the reality of multiple accessible engagement channels, Rule 14a-8 is decidedly dated. As the Commission notes in the Proposing Release, the last meaningful revision of Rule 14a-8 was in 1998, and many of its substantive provisions, including the resubmission thresholds, are far older than that. In the decades since the provisions of Rule 14a-8 were last revisited, the evolution of the proxy process has outpaced the development of the SEC's regulations, resulting in a significantly more complex and expensive proxy system. Consequently, Rule 14a-8 has become increasingly inefficient and misaligned with long-term shareholders' interests and concerns.

A. Resubmission Thresholds

The current resubmission thresholds of 3, 6 and 10 percent approval votes have been in place since 1954 and were last substantively reconsidered by the Commission in 1998. When the Commission last proposed changes to the resubmission thresholds in 1997, it proposed changing the current thresholds of 3, 6 and 10 percent to 6, 15 and 30 percent, respectively, and stated that, in its view at the time, "a proposal that has not achieved these levels of support has been fairly tested and stands no significant chance of obtaining the level of voting support required for approval."[2] Over two decades later, much has changed—as mentioned above, the opportunities for and speed of investor engagement have exploded, and companies have increasingly provided investors with more convenient methods for attending and voting at shareholder meetings, including through web-based attendance and participation and electronic and telephonic voting options, making meeting attendance and voting easier than it has ever been, but the resubmission thresholds have not changed. Currently, a proposal that is opposed by even 90 percent of a company's shareholders may be resubmitted perpetually, diverting company resources and board attention away from engaging with

[1] According to PwC, board members now commonly participate in shareholder engagement matters that were once conducted by investor relations or management teams. For example, Vanguard reported that nearly 50 percent of their engagements now include independent directors. PwC Governance Insights Center, PwC's 2019 Annual Corporate Directors Survey (2019), https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2019-annual-corporate-directors-survey-full-report-v2.pdf.pdf.

[2] SEC Proposed Rule: Amendments to Rules on Shareholder Proposals, Release No. 34-39093 (Sept. 18, 1997), https://www.sec.gov/rules/proposed/34-39093.htm.

long-term investors and creating long-term value for the company. Now the Commission is proposing to increase the still current thresholds of 3, 6 and 10 percent to 5, 15 and 25 percent, and we entirely agree with the Commission's views back in 1997 and today—specifically, proposals that have not achieved these reasonable levels of support over the enumerated timelines have been fairly tested and a cooling period is therefore appropriate. Moreover, we believe that increasing the current thresholds will improve the mix of proposals companies consider each year without impeding shareholder advocacy on material issues, and will require proponents to more carefully consider a company's broader investor base before submitting, or resubmitting, proposals that are of particular interest to a limited few.

It is worth noting that, in contrast to the claims of certain special interest groups, increasing the resubmission thresholds will not prevent proposals from garnering support over time any more than the current resubmission thresholds do. The Commission has not proposed changes to the 5-calendar year look-back contained in Rule 14a-8(i)(12). As a result, while the proposed amendments could initially eliminate more proposals with low-level investor support, the amendments would only affect these proposals for the same period as the current rule—no more than 5 calendar years. Moreover, in our view, the resubmission thresholds merely provide a cooling period during which companies may engage with investors and, ideally, reach a more thoughtful and nuanced approach than might result from a hurried effort to negotiate for the speedy withdrawal of a shareholder-proponent's proposal.

B. Ownership Threshold

The ownership thresholds for making shareholder proposals were last reviewed, and updated, by the Commission in 1998. Currently, for a shareholder to qualify to submit a proposal, the shareholder need own only $2,000 in market value or 1 percent (whichever is less) of a company's outstanding stock for at least one year. The 1 percent threshold is so rarely utilized as a method for qualification that it has effectively become irrelevant, and for many public companies, a $2,000 investment similarly represents a statistically insignificant ownership standard. As the Commission notes in the Proposing Release, a $2,000 investment in a company in 1998 would be worth approximately $8,379 today, and yet the ownership threshold has nominally remained the same, which in practice means it has fallen substantially. Therefore, shareholders that hold a nominal investment may submit proposals requiring company resources and potentially effecting company policy without their ownership being material in amount or duration.

Whereas the existing requirements apply a one-size-fits-all methodology, the tiered approach proposed by the Commission's amendments would take into account a variety of current shareholding patterns. Requiring shareholders owning only $2,000 of a company's outstanding stock to hold the securities for at least three years to be eligible to submit a proposal would give small shareholders the opportunity to submit proposals after demonstrating long-term economic interest in the company. The two additional tiers – thresholds of $15,000 for at least two years and $25,000 for at least one year – represent increasingly material economic stakes which would justify requiring the company to include a shareholder's proposal in its proxy materials after a shorter ownership duration.

C. One-Proposal Limit Rule

The issues created by the current low submission and resubmission thresholds are aggravated by loopholes that allow individuals to bypass the one-proposal limit rule. Currently, Rule 14a-8(c) provides that each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. As the Commission stated in its Proposed Rule, this restriction was adopted in order to balance the interest of individual shareholders with the costs borne by all of a company's shareholders to include a proposal in that company's proxy materials. Over the years, a limited number of investors have circumvented this restriction in order to utilize the proxy process to submit multiple proposals at a single

company meeting. For instance, a shareholder can submit a proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting. Alternatively, an individual can submit multiple proposals as a representative without owning a single share of the company's stock.

Common circumvention of the one-proposal limit has allowed proponents to magnify their influence on a company beyond the Commission's original intent and has allowed individuals with no actual economic interest in a company to command company resources without incurring any cost or risk. The combination of the ease with which a proponent may submit multiple proposals by acting as a representative and the low ownership threshold for initially submitting proposals has created an environment in which a small number of proponents can file similar proposals across a wide range of companies in which they have no or low economic stakes and at little to no cost to themselves. In contrast, the proposed rule would require a proponent to have an economic stake in the companies to which it submits proposals, which is completely in tune with the Commission's original purpose in adopting the restriction in Rule 14a-8(c)—to protect investors from unfairly bearing the costs of multiple proposals submitted by the same individual.

D. Additional Requirements

Because the EIC supports the engagement purpose of Rule 14a-8, we are of the view that the proposed requirement for a shareholder engagement component to the current eligibility criteria of Rule 14a-8 is particularly prudent. Although the current proxy rules require a proponent or its representative to attend the applicable shareholder meeting in person to present the shareholder-proponent's proposal, we are of the view that earlier engagement is particularly important and useful. Requiring that shareholder-proponents make themselves available to engage with a company when they submit a proposal for inclusion in that company's proxy materials will increase the likelihood of a productive dialogue between shareholder-proponents and the company.

E. Timeline for Submitting Proposals

Lastly, we would like to take this opportunity to request that the Commission reconsider the deadline for submitting shareholder proposals under Rule 14a-8(e)(2). Per the current rule, a shareholder proposal must be received by the company's principal executive offices at least 120 calendar days before the one year anniversary of the date that the company's proxy statement was released to shareholders in connection with the previous year's annual meeting (provided that the date of the annual meeting for the current year has not been changed by more than 30 days from the date of the previous year's meeting). It has been the experience of EIC members that 120 calendar days does not consistently provide enough time to appropriately address shareholder proposals, particularly for members that receive multiple proposals each year. Practically speaking, this 120-calendar day period is limited by the fact that Rule 14a-8(j) requires companies to file any no-action request letters no later than 80 calendar days before they file their definitive proxy statements with the Commission, and Rule 14a-8(m) requires companies to provide their statements in opposition to shareholder proposals to the proponents no later than 30 calendar days before they file their definitive proxy statements with the Commission. Functionally this means that companies may have as little as 40 days (or less if their filing date for the current year has moved up) to meaningfully engage with a proponent before filing a no-action request letter that may result in the proponent being reluctant or unwilling to continue to negotiate, and companies may have as little as 90 days (or less if their filing date for the current year has moved up) to thoughtfully consider and craft a response to each of the proposals—potentially requiring input from experts throughout the organization as well as external advisors—and submit the responses for board review and comment before sharing them with the proponents. Additionally, certain business realities may impair the 120-calendar day period. For instance,

the time that companies have to address proposals internally and engage with proponents may overlap with their annual reporting and budget processes, preparations for filing their Forms 10-K and the winter holidays.

Therefore, to ensure that companies have sufficient time to thoroughly respond to shareholder proposals and engage with proponents, the EIC respectfully requests that the Commission expand the deadline for submitting shareholder proposals to 180 calendar days before the one year anniversary of the date that the company's proxy statement was released to shareholders in connection with the previous year's annual meeting (provided that the date of the annual meeting for the current year has not been changed by more than 30 days from the date of the previous year's meeting).

III. CONCLUSION

The EIC supports the Commission's goal of maintaining fair, orderly and efficient markets through robust shareholder engagement, and the Commission's efforts to modernize Rule 14a-8 to account for the evolution of the proxy process and companies' approaches to investor outreach. As the proposed amendments are tailored to modern shareholders and capital markets, the EIC is confident that the proposed changes will refine and improve, rather than materially limit, the investor engagement process. The EIC respectfully urges the Commission to adopt the proposed amendments.

Thank you for considering our comments. We would be happy to discuss our comments or any other matters that you believe would be helpful. Please contact me at 202-747-6570 or lori@eic.energy if you have questions or wish to discuss our comments.

Sincerely,

Lori E. L. Ziebart
President & CEO
Energy and Infrastructure Council