



Securities Law ADVISORY ■

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SEC Proposes Changes to the Shareholder Proposals Requirements in Rule 14a-8

On July 13, 2022, the U.S. Securities and Exchange Commission (SEC) [proposed amendments](#) to its shareholder proposal rules in Rule 14a-8 under the Exchange Act. The amendments seek to clarify standards for the bases for exclusion of shareholder proposals. Specifically, the amendments would update:

- The “substantial implementation” exclusion to allow exclusion under this provision only if the company has implemented the “essential elements” of the proposal.
- The “duplication” exclusion to define “substantial duplication” as a proposal that addresses the same subject matter and seeks the same object through the same means.
- The “resubmission” exclusion to define a “resubmission” as a proposal that substantially duplicates a prior proposal or “addresses the same subject matter and seeks the same objective by the same means.”

Background

Rule 14a-8 requires companies that are subject to proxy rules to include shareholder proposals in proxy statements unless the proposal falls under one of the provided exclusions.

Through no-action relief letters, companies often request that the SEC refrain from recommending enforcement actions against them for omitting shareholder proposals under one of the exclusions in Rule 14a-8. The three relevant bases for exclusion represented approximately 45% of no-action relief requests from companies under Rule 14a-8 from 2018 to 2021. Under the proposed amendments, companies would have a more restricted ability to rely on these bases for exclusion.

Revision of Substantial Implementation Exclusion

Rule 14a-8(i)(10) currently provides a basis for exclusion if the company has already “substantially implemented” the proposal. The purpose of this exclusion is to avoid having shareholders consider proposals that the company has already implemented.

The proposed amendment would provide a framework to interpret and apply this substantial implementation standard. Specifically, the analysis would focus on the essential elements of each proposal and whether the company

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has implemented policies or practices that further these elements. This analysis would require a degree of substantive analysis to determine which elements are “essential,” focusing on how specific the proposal is and its stated primary objectives.

The proposing release also emphasizes that a proposal may still be considered substantially implemented even if the company has not implemented all the elements. However, if a proposal contains an essential element, each essential element would need to be implemented to be excluded.

Revision of Duplication Exclusion

Rule 14a-8(i)(11) currently provides a basis for exclusion 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 proposed amendment would provide a different framework to assess duplication by looking at whether a proposal “addresses the same subject matter and seeks the same objective by the same means,” rather than using the current “principal thrust” or “principal focus” framework.

The release states that this proposed amendment would provide a more efficient and more transparent standard by allowing shareholders to consider proposals that surround the same subject matter but have different objectives or means. The SEC acknowledges that this proposed amendment may lead to a proxy statement with multiple proposals regarding similar issues.

Revision of Resubmission Exclusion

Rule 14a-8(i)(12) provides a basis for exclusion if a 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 shareholders voted on the matter at least once in the last three years and the matter did not receive the necessary amount of support: (1) 5% of the vote if previously voted on once; (2) 15% of the vote if previously voted on twice; or (3) 25% of the vote if previously voted on three or more times.

The proposed amendment would amend the duplication standard by changing the resubmission definition from a proposal that addresses “substantially the same subject matter” to a proposal that substantially duplicates another by “address[ing] the same subject matter and seek[ing] the same objective by the same means.”

The SEC believes this update would create more consistency in comparing similar proposals, although this will likely lead to more proposals.

The SEC emphasizes that it is attempting to alleviate the risk that too many proposals will be excluded that actually have different objectives and means of addressing the same subject matter. Under this proposed analysis, a proposal would not need to be substantially the same or identical to warrant an exclusion, but it could not be excluded just by addressing the same subject matter or objective through the same means.

What’s Next

The proposed amendments will be open for public comment until September 12, 2022. After the comment period, the proposed amendments may be revised.

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