

SEC Proposes Amendments to Shareholder Proposal Rule

JULY 21, 2022

On July 13, 2022, the SEC [proposed amendments to Rule 14a-8](#), the shareholder proposal rule, to modify three of the bases for excluding shareholder proposals from a company's proxy materials. SEC Chair Gary Gensler stated, "I believe these proposed amendments would provide a clearer framework for the application of this rule, which market participants have sought. They also would help shareholders exercise their rights to submit proposals for consideration by their fellow shareholders."

Proposed Modifications to Exclusions

The substantial implementation, duplication, and resubmission exclusions account for a significant percentage of the no-action requests that the SEC receives under Rule 14a-8. The SEC believes that the proposed amendments would provide a more objective and specific framework for these exclusions, assist the SEC staff in more efficiently reviewing and responding to no-action requests, and benefit shareholders and companies by promoting more consistent and predictable determinations. By providing greater certainty and transparency, the SEC believes that the proposed amendments would aid shareholders in drafting their proposals and companies in determining whether a proposal may be excluded.

Substantial Implementation

Rule 14a-8(i)(10) allows companies to exclude a shareholder proposal that the company has already substantially implemented. The proposed amendment would specify that a proposal may be excluded as substantially implemented if the company has already implemented the "essential elements" of the proposal.

The SEC believes that an analysis that focuses on the specific elements of a proposal would provide a reliable indication of whether the actions taken to implement a proposal are sufficiently responsive to the proposal such that it has been substantially implemented. In determining the essential elements of a proposal, the SEC anticipates that the degree of specificity of the proposal and of its stated primary objectives would guide the analysis. The SEC expects that the more objectives, elements, or features a proponent identifies, the less essential the SEC staff would view each of them to be. 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. A company would be

permitted to exclude a proposal that it has not implemented precisely as requested if the differences between the proposal and the company's actions are not essential to the proposal.

Duplication

Rule 14a-8(i)(11) allows companies to exclude a shareholder proposal that “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 shareholder meeting. The proposed amendment would specify that a proposal “substantially duplicates” another proposal if it addresses the same subject matter and seeks the same objective by the same means.

The SEC believes that the proposed amendment would promote more consistent outcomes when comparing a given proposal against other proposals submitted for the same shareholder meeting for purposes of the duplication exclusion. The proposed amendment would reduce incentives for proponents to submit a proposal quickly in order to gain the perceived advantage of being the first to submit a proposal, reduce incentives for proponents to attempt to preempt other proposals that those proponents do not agree with, and facilitate the consideration at the same shareholder meeting of multiple proposals that present different means to address a particular issue. The new standard would enable shareholders to consider later-received proposals that may be similar to and/or address the same subject matter as an earlier-submitted proposal but seek different objectives or present different means of addressing the same matter.

Resubmission

Rule 14a-8(i)(12) allows companies to exclude a shareholder proposal that 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 did not receive at least (i) 5% of the votes cast if voted on once, (ii) 15% of the votes if voted on twice, or (iii) 25% of the votes if voted on three or more times. The proposed amendment would provide that a resubmission is a shareholder proposal that “substantially duplicates” a proposal previously included in the company's proxy materials, replacing the current “substantially the same subject matter” test. The “substantially duplicates” standard for this exclusion would be the same as the standard in Rule 14a-8(i)(11) described above. This would align the resubmission exclusion with the duplication exclusion, given the similar objectives of these two exclusions.

The SEC believes that the proposed amendment would allow proponents to make adjustments to their proposals in subsequent years to build broader shareholder support and allow other shareholders to present different approaches to addressing the same issue. As with the proposed amendment to the duplication exclusion, the SEC believes that the proposed amendment would promote more consistent outcomes when comparing a given proposal against proposals considered at prior shareholder meetings for purposes of the resubmission exclusion.

Reaffirmation of Ordinary Business Exclusion

Rule 14a-8(i)(7) allows companies to exclude proposals that relate to the company's ordinary business operations. Although the SEC did not propose to amend the ordinary business exclusion, the proposing release reaffirms the standards the SEC articulated in 1998 for determining whether a proposal relates to ordinary business for purposes of the exclusion. In [the 1998 adopting release](#), the SEC stated that the policy underlying the ordinary business exclusion rests on two central considerations: (i) the subject matter of the proposal; and (ii) the degree to which the proposal seeks to “micro-manage” the company. The SEC believes that proposals relating to ordinary business matters but focusing on sufficiently significant social policy issues generally would not be excludable, because such proposals transcend day-to-day business matters and raise policy issues so significant that they would be appropriate for a shareholder vote. The SEC further believes that a proposal would be considered to seek to micro-manage the company if it probes too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. The SEC noted that specific methods, time frames, or details do not necessarily amount to micro-management and are not dispositive of excludability.

Comments on the proposed amendments are due 30 days after publication in the Federal Register or September 12, 2022, whichever is later, and can be submitted either electronically or on paper. All submissions should refer to File Number S7-20-22.

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