July 21, 2022

SEC Proposes to Significantly Narrow Bases for Excluding Shareholder Proposals Under Rule 14a-8

Proposed Amendments Would Significantly Narrow Standards for Exclusion on the Bases of Substantial Implementation, Duplication and Resubmission

SUMMARY

On July 13, 2022, the Securities and Exchange Commission voted 3 to 2 (Commissioners Peirce and Uyeda dissenting) to propose amendments to three of the 13 substantive bases for excluding shareholder proposals provided for in Rule 14a-8 under the Securities Exchange Act of 1934.[1]

Specifically, the proposed amendments would revise the substantial implementation, duplication and resubmission bases for excluding shareholder proposals under Rule 14a-8 as follows (see Annex A to this memo for a redline of the proposed changes to the text of Rule 14a-8):

- **Substantial Implementation.** Under Rule 14a-8(i)(10), a company can exclude a shareholder proposal that "the company has already substantially implemented." The proposed amendments would provide that a proposal may only be excluded as substantially implemented if "the company has already implemented the essential elements of the proposal."
- **Duplication and Resubmission.** Under Rule 14a-8(i)(11), a company can exclude a proposal that "substantially duplicates" another proponent's proposal included in the proxy materials for the same meeting. In addition, under Rule 14a-8(i)(12), a company can exclude a proposal that "addresses substantially the same subject matter" as a proposal 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 failed to receive shareholder support above thresholds that were increased in 2020. The proposed amendments would replace the current resubmission standard with a "substantially duplicates" standard and, for both the duplication and resubmission exclusions, 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 proposed amendments would meaningfully narrow each of the three exclusions. If adopted as proposed, these proposed amendments, together with the significant change in staff guidance that narrowed the ordinary business and economic relevance bases for excluding shareholder proposals in November 2021,[2] will make it more challenging for companies to obtain no-action relief from the SEC with respect to the exclusion of Rule 14a-8 proposals and will almost certainly increase the prevalence of shareholder proposals. The deadline for comments on these proposed amendments is the later of September 12, 2022 and 30 days after their publication in the Federal Register.

BACKGROUND

Under Rule 14a-8, a company subject to the federal proxy rules must include a shareholder proposal in its proxy materials unless the proposal falls within a specified exclusion or the proposal or shareholder-proponent does not satisfy certain eligibility or procedural requirements. The SEC stated in the July 13, 2022 proposing release that it is revising the substantial implementation, duplication and resubmission bases for exclusion to "assist the staff in more efficiently reviewing and responding to no-action requests" and promote greater consistency and predictability in application.[3]

The SEC adopted amendments to Rule 14a-8 in September 2020 which, among other things, increased the share ownership requirements for eligibility to submit a proposal and broadened the resubmission exclusion by increasing the shareholder support thresholds required to not be subject to the exclusion.[4] These amendments went into effect for shareholder proposals submitted for meetings held on or after January 1, 2022.[5]

In November 2021, the SEC's Division of Corporation Finance issued new guidance on shareholder proposals under Staff Legal Bulletin No. 14L ("SLB No. 14L") that rescinded previous guidance issued in 2017, 2018 and 2019.[6] Under the new guidance, instead of focusing on a proposal's significance to the specific company, the staff will assess "whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company" in determining whether a proposal is excludable under Rule 14a-8(i)(7). Similarly, proposals that relate to operations below the economic thresholds of Rule 14a-8(i)(5) may not be excluded if they raise issues of broad social or ethical concern related to the company's business. Since the release of SLB No. 14L, there has been a marked decrease in the success of no-action requests, notably those seeking relief under the ordinary business and substantial implementation exclusions.[7]

Along with the ordinary business exclusion, the substantial implementation exclusion has been one of the most frequent bases under which companies have sought no-action relief to exclude shareholder proposals. Of the 266 total issuer requests for no-action relief under Rule 14a-8 in the 2020-2021 proxy season, substantial implementation was cited as a basis in 110 of the letters.[8] The SEC adopted the current

standard under Rule 14a-8(i)(10) in 1998 to achieve the exclusion's purpose of avoiding consideration of proposals on which a company has already "favorably acted."[9]

The duplication exclusion was adopted by the SEC to "eliminate the possibility of shareholders having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other."[10] In evaluating whether proposals are "substantially duplicative" under current Rule 14a-8(i)(11), the SEC has generally considered whether proposals share the same "principal thrust" or "principal focus."[11]

Similar to the duplication exclusion, the resubmission exclusion was adopted to permit exclusion of proposals "which have been previously submitted to security holders without evoking any substantial security holder interest therein."[12] In 1983, due to concerns that proponents were able to evade the exclusion and continue to raise "the same issue" year over year by recasting the form of the proposal, expanding its coverage, or otherwise making minor changes to its language, the SEC revised the standard for exclusion from "substantially the same proposal" to "substantially the same subject matter."[13] The SEC noted that its judgment of whether a proposal was a resubmission would be made "based upon a consideration of the substantive concerns raised by a proposal rather than the specific language or actions proposed to deal with those concerns" so as to avoid an improperly broad interpretation of the rule.[14]

DISCUSSION OF THE PROPOSED AMENDMENTS

In the proposing release, the SEC expressed the concern that the fact-intensive nature of the "substantial implementation" standard has led to the application of multiple interpretive frameworks to determine whether a proposal can be excluded under Rule 14a-8(i)(10) that result in varying degrees of implementation and unpredictability in the operative principles guiding the staff's no-action decisions. By amending Rule 14a-8(i)(10) to provide that a proposal may be excluded as substantially implemented if "the company has already implemented the *essential elements* of the proposal," the proposed amendments would shift the analytical focus from a general inquiry into the purpose of a proposal towards the specific actions requested by the proponent.

The SEC stated in the proposing release that its determination of which elements of a proposal are "essential" under the proposed framework would be guided by the degree of specificity of the proposal and of its stated primary objectives.[15] However, the more objectives, elements, or features a proponent identifies, the less essential the staff would view each of them.[16] For example, in the proposing release, the SEC notes that the staff has historically concurred in the exclusion of proxy access proposals seeking to allow an unlimited number of shareholders who collectively owned 3% of the company to nominate up to 25% of the company's directors where the company had adopted a bylaw affording a shareholder or group of up to 20 shareholders that collectively owned 3% the right to nominate up to 20% of the board.

Under the proposed amendment, the exclusion would not be appropriate because the number of shareholders would be an essential element of the proposal.

The proposed amendments to the duplication exclusion under Rule 14a-8(i)(11) and the resubmission exclusion under Rule 14a-8(i)(12) would similarly narrow the current "substantially duplicates" or "addresses substantially the same subject matter" standard, respectively, to a more restrictive standard of "addresses the same subject matter and seeks the same objective by the same means." The SEC stated in the proposing release that the "principal thrust" or "principal focus" analysis under Rule 14a-8(i)(11) can be difficult to apply in a consistent and predictable manner and noted its concern that delineating the principal thrust or focus too broadly or too narrowly can lead to under- or over-inclusion of shareholder proposals. The SEC also stated that because the current Rule 14a-8(i)(11) only allows exclusion of the later-received proposal, shareholders may be incentivized to submit a proposal quickly, unduly constraining proponents' ability to engage with companies on important issues.

The proposed standard would instead allow multiple proposals to be included on a proxy statement even if they address the same objective, so long as they seek to do so by different means. This would allow companies and shareholders to consider multiple proposals that present different means to address a particular issue. For example, the SEC noted that a different outcome would attain for a request to exclude one of the following similar proposals: (1) a proposal requesting that the company publish in newspapers a statement of political contributions and (2) a proposal requesting a report on the company's process for identifying and prioritizing public policy advocacy activities. The SEC staff had previously concurred that these proposals were substantially duplicative under the current principal thrust or focus framework. Under the proposed rules, these proposals would not be deemed substantially duplicative because they seek different objectives by different means.

In the proposing release, the SEC also expressed the concerns that the current resubmission standard unduly constrains shareholder suffrage, as it may 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."[17] The SEC believes that the proposed standard would enable proponents to adjust their proposals to build broader support and allow other proponents to offer different ways to address the same issue.[18] The SEC indicates in the proposing release that a proposal asking the board to adopt a policy prohibiting government service golden parachutes would not be excluded as a resubmission of a proposal requesting a report to shareholders on the same subject, since the two proposals do not seek the same objectives by the same means.

The SEC further stated that while it is not proposing to amend the ordinary business exclusion, it is reaffirming the standards that it articulated in 1998, under which proposals focusing on "sufficiently significant social policy issues" are generally not excludable under Rule 14a-8(i)(7).[19]

IMPLICATIONS

If adopted, the proposed amendments would likely result in more granular proposals on similar topics to be included in issuers' proxy materials for each meeting, year over year. For example, in the case of two proposals to permit shareholders to call a special meeting, it appears under the proposed rules that a mere one percent difference in the percentage of shareholders necessary to call a special meeting would require both proposals to be submitted to shareholders. And we would expect there to be multiple proposals addressing a single topic but offering different means to implement them — for example, a company report to be published on the company's website, a plan to be approved by the board of directors, or a report by a third party.

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ENDNOTES

[1] Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, SEC Release No. 34-95267 (July 13, 2022) ("Proposing Release"); *see also* Fact Sheet: Shareholder Proposals under Rule 14a-8: Proposed Rules.

[2] SEC Division of Corporation Finance, Shareholder Proposals: Staff Legal Bulletin No. 14L (CF). For more information about the new guidance in SLB No. 14L, see our publication, New SEC Staff Guidance on Shareholder Proposals (Nov. 8, 2021).

[3] Proposing Release at 16, 19, 29.

[4] Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, SEC Release No. 34-89964 (Sept. 23, 2020) [85 FR 70240 (Nov. 4, 2020)] ("2020 Adopting Release"). For a summary of the 2020 amendments, see our publication, SEC Modernizes Shareholder Proposal Requirements (Sept. 30, 2020). In his dissenting statement, Commissioner Uyeda stated that the proposed amendments could "effectively nullify the 2020 amendments to the resubmission exclusion and render this basis almost meaningless." Commissioner Mark T. Uyeda, Statement on Proposed Amendments for Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals under Exchange Act Rule 14a-8 (July 13, 2022).

[5] *See* 2020 Adopting Release, at 70263.

[6] *See supra* note 2.

[7] See our forthcoming 2022 Proxy Season Review memo for a more detailed discussion.

[8] Proposing Release at 8.

[9] *Id.* at 10–11; Amendments To Rules On Shareholder Proposals, Release No. 34-40018 (May 21, 1998) [63 FR 29106 (May 28, 1998)]; Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982 (July 20, 1976)], at 29985.

[10] Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994 (Dec. 3, 1976)], at 52999.

[11] Proposing Release at 17.

[12] *Id.* at 22–23 (quoting Notice of Proposal to Amend Proxy Rules, Release No. 34-4114 (July 6, 1948) [13 FR 3973 (July 14, 1948)]).

[13] *See id.* at 23–24.

[14] Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983) [48 FR 38218 (Aug. 23, 1983)], at 38221.

[15] Proposing Release at 14.

[16] *Id.* at 14 n.39.

[17] *Id.* at 27.

[18] *Id.* at 28–29.

[19] *Id.* at 7.

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ANNEX A

Redline of Proposed Amendments Against Current Rule 14a-8(i)(10), (11) and (12).

§ 240.14a-8 Shareholder proposals.

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(i) * * *

(10) *Substantially implemented:* If the company has already ~~substantially~~ implemented the essential elements of the proposal;

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(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;

(12) *Resubmissions:* If the proposal substantially duplicates (*i.e.*, addresses ~~substantially~~ 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.