

Alert

Shareholder Rights Update: SEC Proposes to Narrow Ability to Exclude Shareholder Proposals from Company Proxy Materials

July 28, 2022

- Under the SEC's proposed amendments, companies would have a harder time excluding shareholder proposals.
- The proposed amendments are expected to increase the number of shareholder proposals that shareholders will be able to vote on.
- Shareholders would have a stronger voice in advancing value-enhancing policy changes.

On July 13, 2022, the Securities and Exchange Commission (the "SEC") proposed amendments (the "Proposed Amendments") to the shareholder proposal rule, otherwise known as Rule 14a-8.

Rule 14a-8 provides shareholders with the right to submit proposals for inclusion in a company's proxy statement in connection with its annual meeting. A proposal submitted pursuant to Rule 14a-8 must be added to a company's annual meeting agenda and included in its proxy statement, unless the proposal runs afoul of certain procedural or substantive requirements, as outlined under Rule 14a-8, in which case a company may exclude the shareholder proposal.

There are currently 13 substantive bases upon which companies may rely in excluding shareholder proposals. The Proposed Amendments revise three of these bases in an effort to "provide a clearer framework [...] which market participants have sought."

The three exclusionary bases and their Proposed Amendments are as follows:

1. **Substantial Implementation:** Rule 14a-8(i)(10) currently allows a company to exclude shareholder proposals asking the company to take an action that it has already substantially implemented.
 - **Proposed Amendments:** The Proposed Amendments clarify that substantial implementation means the company must have already implemented all of the "essential elements" of the shareholder proposal.
 - **Takeaway:** The "essential elements" test represents a narrowing of the basis for exclusion based on substantial implementation. Companies will now need to demonstrate that they have already implemented each and every essential element of a proposal. Implementation of some of a proposal's essential elements or achievement of a proposal's essential objectives, without implementation of all of a proposal's essential elements, can no longer provide a basis for exclusion under the substantial implementation exception.

2. **Duplication:** Rule 14a-8(j)(11) currently allows a company to exclude a shareholder proposal that “substantially duplicates” a proposal previously submitted to the company by another proponent that will be included in the company’s proxy materials for the same meeting.
 - **Proposed Amendments:** The Proposed Amendments clarify that a proposal would only be considered to “substantially duplicate” another proposal if it “addresses the same subject matter and seeks the same objective by the same means.” This represents a departure from prior SEC and market interpretation, which only looked at whether the proposals shared the same principal focus and sought the same objective.
 - **Takeaway:** Under this new interpretation, it will be more difficult for companies to show substantial duplication. For example, two shareholder proposals focused on achieving the same objective but seeking to do so via different means can no longer be excluded under a substantial duplication analysis.
3. **Resubmission:** Rule 14a-8(i)(12) currently allows a company to exclude a shareholder proposal addressing substantially the same subject matter as a previous proposal that was included in a company’s proxy statement within the preceding five calendar years (and assuming the proposal was voted on at least once in the prior three years and did not receive sufficient shareholder support¹).
 - **Proposed Amendments:** Similar to the interpretive updates noted above under ‘Duplication,’ the Proposed Amendments clarify that a proposal would be excludable as a resubmission only if it substantially duplicated the proposal from a prior year, meaning the proposal would need to address “the same subject matter and seek [...] the same objective by the same means.”
 - **Takeaway:** Under this new interpretation, companies will have a harder time excluding a proposal on the basis that it constitutes a resubmission.

The SEC has stated that the Proposed Amendments are designed to provide “greater certainty and transparency” to shareholders and companies evaluating shareholder proposals and to “facilitate shareholder suffrage and communication between shareholders and the companies they own,” with a goal of putting forward more value-enhancing policy changes. In November 2021 the SEC also released guidance favorable to shareholders submitting Rule 14a-8 proposals, particularly those related to ESG matters (discussed [here](#)).

The Proposed Amendments represent a positive development for shareholders and should result in an overall increase in the percentage of shareholder proposals that shareholders will have an opportunity to vote on.

The comment period for the Proposed Amendments will close 30 days after publication in the *Federal Register* or Sept. 12, 2022, whichever is later.

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¹ The resubmission support thresholds were the subject of a previous *Alert* we authored and can be found [here](#).

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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