

July 19, 2022

SEC Proposes to Narrow Exclusions under Rule 14a-8

On July 13, 2022, the SEC proposed amendments (available [here](#)) to Rule 14a-8, which would narrow the circumstances under which companies may exclude shareholder proposals on the grounds that they are “substantially implemented,” “substantially duplicate” another proposal or are a resubmission that did not meet specified approval rates in prior years. These grounds for exclusion represent a significant proportion of Rule 14a-8 no-action requests,¹ and many shareholder proposals that would have been excludable under current practice would no longer be under the proposed amendments. This proposal is the most recent move by the SEC to limit exclusion of shareholder proposals, following Staff Legal Bulletin 14L and other policy changes. If adopted, the practical implication is that more shareholder proposals will be included in proxy materials, and companies will have to appeal directly to shareholders regarding their suitability either in the company statement of opposition or via engagement. The comment period ends on the later of (i) 30 days after the proposal is published in the *Federal Register* and (ii) September 12, 2022.

- **Substantially Implemented:** Under Rule 14a-8(i)(10), a company may exclude a proposal that has been “substantially implemented.” The amendments would provide that a company has substantially implemented a proposal only if the company has already “implemented the essential elements of the proposal.” This would involve a factual analysis to identify the essential elements of the proposal and whether they have been addressed. All essential elements would need to be implemented in order to exclude the proposal. The SEC identified examples highlighting the strict focus on the implementation of the “essential element” requirement, which reflect changes to the Staff’s historical practice:
 - A proxy access proposal requesting to allow an unlimited number of shareholders who collectively own 3% of the company’s outstanding common stock for 3 years to nominate up to 25% of the company’s directors would not be excludable where the company already has a proxy access provision that allows a group of up to 20 shareholders meeting those ownership thresholds to nominate up to 20% of the board because the essential element of the proposal is that the group be an *unlimited* number of shareholders;
 - A proposal requesting a report from the company’s board of directors, where management already delivers such a report, would not be excludable if the proposal emphasizes reporting from the board and thus an essential element is the involvement of the board (rather than management).

The SEC noted, however, that the more objectives, elements or features a proposal identifies, the more likely that the Staff would view each of them as less essential.

- **Substantially Duplicates:** Under Rule 14a-8(i)(11), a company may exclude a proposal that “substantially duplicates” another proposal that has been submitted for the same meeting. The amendments would provide that a proposal “substantially duplicates” another proposal if it “addresses the same subject matter and seeks the same objective by the

¹ For example, in 2020-2021, 41.4% of Rule 14a-8 no action letters claimed the proposal had been substantially implemented (33% of which were granted relief on that basis); 4.5% claimed the proposal was substantially duplicative and 0.8% claimed the proposal was resubmitted.

same means as” the other proposal. These proposed changes would also require an analysis of the objectives and means of the proposals and where they differ (even though addressing the same subject matter), would not permit exclusion of subsequent proposals.

- **Resubmission:** Under Rule 14a-8(i)(12), a company may exclude a proposal that addresses “substantially the same subject matter” as a previous proposal that failed to meet required voting thresholds. The amendments would incorporate the “substantially duplicates” standard in Rule 14a-8(i)(11) above. As a result, proposals would only be excludable under Rule 14a-8(i)(12) if they address the same subject matter and seek the same objective by the same means as a prior proposal.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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