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SEC Proposes Changes to Shareholder Proposal Rule 14a-8

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On July 13, 2022, the U.S. Securities and Exchange Commission (SEC) proposed amendments to Rule 14a-8, which would revise three of the potential bases for a company's exclusion of a Rule 14a-8 shareholder proposal – "substantial implementation," "duplication" and "resubmissions." The proposal is intended to "improve the shareholder proposal process and promote consistency." However, as noted below, without additional clarifications, the proposed amendments could create confusion and pose a greater challenge for companies seeking to exclude shareholder proposals under these rule exclusions.

These proposed amendments come less than two years after the September 2020 Rule 14a-8 amendments and a mere eight months after the Staff of the SEC's Division of Corporation Finance issued Staff Legal Bulletin No. 14L (SLB 14L), pursuant to which the Staff walked back previous guidance addressing how the Staff would consider Rule 14a-8 no-action requests to exclude shareholder proposals raising a significant policy issue, and rescinded prior Staff guidance which primarily addressed the Division's views on excluding shareholder proposals pursuant to the "ordinary business" and "economic relevance" exceptions. See our prior alert covering the issuance of SLB 14L.

The proposed amendments to the three bases for exclusion are as follows:

Rule 14a-8(i)(10) – Substantial Implementation

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

While the SEC proposing release states that this change "would provide a clearer standard for exclusion and promote more consistent and predictable determinations regarding the exclusion of proposals under the rule," what remains unclear is what exactly are considered the "essential elements" of a proposal and who will make that determination. In fact, the SEC release acknowledges that the process of determining whether the essential elements have been met will still require a substantive analysis, and it simply explains that "[i]n determining the essential elements of a proposal, we anticipate that the degree of specificity of the proposal and of its stated primary objectives would guide the analysis" – seemingly leaving this determination exclusively in the hands of shareholder-proponents.

Rule 14a-8(i)(11) – Duplication

The current text of Rule 14a-8(i)(11) allows a company to exclude a shareholder proposal "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 specify that a proposal may be excluded as substantially duplicative if the proposal "addresses the same subject matter and seeks the same objective by the same means."

The SEC proposing release acknowledges the possibility that multiple shareholder proposals dealing with the same or similar issue may make their way into a company's proxy materials as a result of this proposed amendment to the "duplication" standard, which they note "could cause shareholder confusion and may lead to conflicting or inconsistent results and implementation challenges for companies if shareholders approve multiple similar, although not duplicative, proposals." With this potential outcome seemingly in conflict with the goals of consistency and predictability underlying these proposed amendments generally, the SEC is seeking comments on the possible implications here for companies and shareholders.

Rule 14a-8(i)(12) – Resubmissions

The current text of Rule 14a-8(i)(12) allows a company 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 received support below specified vote thresholds on the most recent vote. The proposed amendment would specify that a "resubmission" is a shareholder proposal that "substantially duplicates" a proposal previously included in a company's proxy materials, accordingly aligning the "resubmission" and "duplication" standards, as revised.

Here, too, the proposing release admits that this revised standard will still necessitate a fact-intensive judgment, and that, as with the revised "duplication" standard under Rule 14a-8(i)(11), "delineating the 'substantive concerns' of a proposal either too broadly or too narrowly may result in the under- or over-inclusion of proposals, respectively."

Key Takeaways

The proposed amendments to Rule 14a-8 evidence the SEC's continued focus on shareholder suffrage, protecting their communication rights and emphasizing shareholders' ability to engage with companies and other shareholders through the use of shareholder proposals, even at the expense of possibly allowing duplicative proposals to be included in company proxy materials. If these proposed amendments become final rules, at least without further clarification on the matters raised above (and as acknowledged in the proposing release), the result likely will be an increased difficulty on companies trying to obtain no-action relief pursuant to the three revised bases of exclusion and less clarity as to how such proposals can be excluded. Further, it remains to be seen whether the proposed amendments, if adopted, will encourage shareholder-proponents to submit more shareholder proposals, or, as mentioned at the SEC's meeting, whether they will lead to companies seeking no-action letters less frequently and thus reallocating the SEC Staff's time and resources to other issues. SEC Commissioner Uyeda, in his dissenting statement, portends that the proposed changes in part might send a message to public companies to not even bother trying to exclude shareholder proposals – he predicts that this "will become one more reason for not becoming a public company to begin with."

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