

Excluding Shareholder Proposals May Get Tougher with SEC Proposal

On July 13, 2022, the SEC voted three to two to issue a proposal to update three of the substantive bases for excluding a shareholder proposal from a company's proxy statement. The changes would restrict the grounds for excluding shareholder proposals and, if adopted, would most likely increase the number of shareholder proposals that would have otherwise been excluded under prior SEC conclusions. Comments are due 30 days after publication in the **Federal Register** or September 12, 2022, whichever is later.

Proxy Voting Rule 14a-8	
Current	Proposed
Substantial Implementation Rule 14a-8(i)(10)	
A company can exclude a shareholder proposal that the company has already substantially implemented	A company can exclude a shareholder proposal for which a company has already implemented the proposal's essential elements
Duplication Rule 14a-8(i)(11)	
A shareholder proposal can be excluded if it 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	A shareholder proposal substantially duplicates another proposal if it addresses the same subject matter and seeks the same objective by the same means
Resubmission Rule 14a-8(i)(12)	
A shareholder proposal can be excluded if it addresses substantially the same subject matter as a proposal(s) 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 sufficient shareholder support	A shareholder proposal can be excluded if it substantially duplicates a prior proposal and addresses the same subject matter and seeks the same objective by the same means as a proposal(s) 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 sufficient shareholder support

Background

The number of shareholder proposals continues to rise. According to Harvard Law School Forum on Corporate Governance, the 2022 proxy season to date has had 924 shareholder proposal submissions, breaking the previous record set in 2021. Most have focused on environmental, social, and governance issues.

The proxy voting rule 14a-8 (Rule) was adopted in 1942 and most recently amended in 2020 with updates to the eligibility criteria and increases in the resubmission thresholds.¹ Those changes became effective on January 1, 2022.

Companies generally must include shareholder proposals in their proxy statements unless a proposal is eligible for exclusion on a procedural or substantive basis. To omit a

¹ Prior to the 2020 amendments, resubmission required a proposal to receive at least: 3% of the vote if previously voted on once; 6% of the vote if previously voted on twice; or 10% of the vote if previously voted on three or more times. In 2020, the levels of support were increased to 5, 15, and 25%, respectively.

shareholder proposal, a company must submit its reasoning to the SEC including one or more of the procedural or the 13 substantive bases for exclusion. This no-action request seeks assurance that the SEC will not recommend enforcement action against the company if it fails to include the proposal in its proxy statement.

Substantial Implementation

The current Rule allows a company to exclude a shareholder proposal that the company has substantially implemented. This exclusion was added in 1983 and prior to that omission was permitted only if a proposal was fully implemented. Determining if a shareholder proposal can be excluded under this update would still require a degree of judgment to determine which elements are **essential** and if those elements have been addressed.

*Example: The SEC historically approved exclusions for proposals seeking the adoption of a proxy access provision that allows an unlimited number of shareholders who collectively have owned 3% of the company's outstanding common stock for three years to nominate up to 25% of the company's directors, where the company had adopted a proxy access bylaw allowing a shareholder or group of up to 20 shareholders owning 3% of its common stock continuously for three years to nominate up to 20% of the board. Under the proposal, because the ability of an unlimited number of shareholders to aggregate their shareholdings to form a nominating group generally would be an **essential element** of the proposal, exclusion would not be appropriate.*

Duplication

The current Rule allows companies to exclude a shareholder proposal that substantially duplicates another proposal. With this revision, even if the substance of the proposal is the same but the implementation method is different, the SEC would require a company to include both proposals.

Example: A proposal that asks a company to publish in newspapers a detailed statement of each of its direct or indirect political contributions or attempts to influence legislation and another shareholder proposal requesting a report on the company's process for identifying and prioritizing legislative and regulatory public policy

advocacy activities would not be duplicative. Although they both address political and lobbying expenditures, they seek different objectives by different means.

Resubmission

The current Rule allows companies to exclude a shareholder proposal that addresses substantially the same subject matter. Very few companies submit under this exclusion, and the SEC has fluctuated from agreeing with all submissions in a particular year to rejecting all in another year.

Example: The SEC previously viewed the following proposals as addressing the same subject matter for purposes of the resubmission exclusion: (1) a proposal requesting that the board adopt a policy prohibiting the vesting of equity-based awards for senior executives due to a voluntary resignation to enter government service and (2) a proposal requesting that the board prepare a report to shareholders regarding the vesting of a government service golden parachute that identifies eligible senior executives and the estimated dollar value of each senior executive's government service golden parachute. Under these amendments, although these items concern the same subject matter, exclusion would not be allowed because they do not seek the same objectives by the same means.

Analysis

SEC commissioners who approved the proposal cited greater clarity, consistency, and predictability for companies before submitting exclusion requests and for shareholders as they draft shareholder proposals to withstand company challenges. The 2022 proxy season saw the SEC overturning long-standing, no-action letter precedence on shareholder proposals.

Commissioners Hester Peirce and Mark Uyeda opposed the proposal in a statement on the SEC website, noting "shareholders' ability to vote in corporate elections is not at issue. Rather, the proposal we are considering is about whether shareholders have to vote on the same issues over and over again." They also cited lack of analysis on the recently effective updates to the Rule.

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