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SEC Proposes Amendments to Certain Bases to Exclude Shareholder Proposals Under Rule 14a-8

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On July 13, the Securities and Exchange Commission (SEC) released a proposed rule that would amend 17 CFR 240.14a-8 (Rule 14a-8) to revise three of the bases for excluding shareholder proposals from a company's proxy statement: (1) substantial implementation, (2) duplication, and (3) resubmission. In a statement, SEC Chair Gary Gensler maintained that the amendments "would provide a clearer framework for the application of this rule" and "help shareholders exercise their rights to submit proposals for consideration by their fellow shareholders." The proposed amendments narrow the affected bases for exclusion and will likely increase the number of shareholder proposals on company ballots.

Background

Rule 14a-8 facilitates shareholder rights under state law to make proposals to company management for consideration by fellow shareholders at a company's annual or special meeting. Under Rule 14a-8, shareholders submitting a proposal must satisfy eligibility and procedural requirements, and each proposal must satisfy certain substantive requirements. If satisfied, a company must include the shareholder's proposal in its proxy materials unless the company is permitted to exclude the proposal pursuant to 13 bases provided for in Rule 14a-8. If a company chooses to exclude a proposal, the rule mandates that the company "file its reasons" with the SEC, typically in the form of a no-action request.

Substantial Implementation

Rule 14a-8(i)(10) currently states that a company may exclude a shareholder proposal if the company has already substantially implemented the proposal. The rule reflects a shift in 1983 from a "full implementation" standard that required a company to have fully effected a proposal to exclude it to the current "substantial implementation" standard. When determining whether a proposal has been substantially implemented, the SEC previously considered whether a company's particular policies, practices, and procedures compare favorably with the proposal guidelines, whether it addressed the proposal's underlying concerns, and whether the proposal's essential objectives have been met. In the proposing release, the SEC expressed the concern that the fact-intensive nature of the current rule has led to a variety of interpretive frameworks, which can cause inconsistent rule application.

The proposed amendment provides that a company may exclude a proposal if the company has already implemented the essential elements of the proposal. While this new standard, focused on the proposal's elements, would still require substantive analysis — identifying the essential elements and determining whether

they have been addressed — the SEC expects that the proposal's specificity and its stated primary objectives would guide the analysis, and the more objectives, elements, or features a proponent identifies, the less essential the SEC staff would view each of them.

The SEC provided two examples of the proposed rule's application. First, where a proposal seeks to adopt a proxy access provision that would allow an unlimited number of shareholders to comprise a nominating group, the SEC stated that it would view the aggregation of shareholdings by an unlimited number of shareholders as an essential element so that exclusion would not be appropriate by a company that adopts any numerical limit on the nominating group when implementing proxy access.

Second, the essential elements of a proposal for a company report on a given topic may not be satisfied by existing reports or disclosures about that topic, especially if the plain language of the proposal explains how the company's existing reports or disclosures are insufficient. In addition, the essential elements of a proposal for a board report may not be satisfied by a report that instead comes from company management.

Duplication

Under Rule 14a-8(i)(11), a company may 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.

In analyzing proposals under this rule, the SEC staff has historically considered whether the proposals share the same "principal thrust" or "principal focus." That is, proposals that differ as to terms and/or scope may nevertheless be deemed substantially duplicative if the principal thrust or focus is the same.

The proposal would amend this standard by providing that a proposal can be excluded as substantially duplicative if it addresses the same subject matter and seeks the same objective by the same means as the other proposal. Accordingly, proposals that address the same subject matter but seek different objectives would not be excludable.

The SEC provided an example of the application of the proposed rule. If the following two proposals were submitted — "(1) a proposal requesting that the company publish in newspapers a detailed statement of each of its direct or indirect political contributions or attempts to influence legislation; and (2) a proposal requesting a report to shareholders on the company's process for identifying and prioritizing legislative and regulatory public policy advocacy activities" — the SEC would determine that they are not duplicative because, while related to the same general topic, they do not seek the same objective by the same means.

As Commissioner Peirce highlights in her statement, the application of the proposed standard will likely result in multiple potentially overlapping or even conflicting proposals on the same topic on the same proxy. In light of this concern, the SEC, in its request for comments, asked whether there should be a limit on the number of proposals addressing the same subject matter or whether priority should be given to proposals with the largest number of co-proponents.

Resubmissions

Rule 14a-8(i)(12) currently allows a company to exclude a shareholder proposal from its proxy materials if the proposal 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 proposal was previously voted on and received support of less than specified voting thresholds.

The amendment would provide that a company may exclude a proposal if the proposal substantially duplicates (*i.e.,* 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, subject to the same voting thresholds. This would harmonize the standard with the duplication basis for exclusion.

As an example of applying the proposed rule, the SEC referenced two proposals: (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 (a government service golden parachute); and (2) a proposal requesting that the board prepare a report to shareholders regarding the vesting of such government service golden parachutes that identifies eligible senior executives and the estimated dollar value of each senior executive's government service golden parachute. Under the proposed rule, a company could not exclude one of these proposals as a resubmission because they do not seek the same objectives by the same means.

Applying the proposed standard would permit proponents who did not receive the requisite support in a given year to resubmit a proposal addressing the same subject matter and seeking the same objective but by different means.

The SEC seeks public comment on the proposed amendments within 30 days after the date of publication in the *Federal Register* or September 12, 2022, whichever is later.

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