

MEMO# 34227

July 18, 2022

SEC Proposes Amendments to Shareholder Proposal Rule (Rule 14a-8)

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TO: ICI Members

Investment Company Directors SUBJECTS: Closed-End Funds

Compliance

Fund Governance

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Transfer Agency RE: SEC Proposes Amendments to Shareholder Proposal Rule (Rule 14a-8)

Last week, the SEC proposed amendments to Rule 14a-8 (the shareholder proposal rule) by a 3-2 vote.[\[1\]](#) The proposal would amend and narrow three bases upon which companies may exclude shareholder proposals from their proxy statements, namely the "substantial implementation," "duplication," and "resubmission" exclusions.

Comments are due 30 days after publication in the Federal Register or September 12, whichever is later.

Summary of the Proposed Amendments

Rule 14a-8 under the Exchange Act conditionally permits a company's shareholders to include proposals (i.e., recommendations or requirements that a company and/or its board take action) on the company's shareholder meeting proxy statement, on which all shareholders may vote. The rule provides several bases upon which a company may exclude a shareholder proposal. If a company intends to exclude a shareholder proposal from its proxy statement, it must "file its reasons" for doing so with the SEC, generally in the form of a no-action request seeking the SEC staff's concurrence. The staff then offers its views on the matter to assist companies and shareholder-proponents in complying with the federal proxy rules.

The proposal would amend three of the substantive bases upon which companies may exclude shareholder proposals—the "substantial implementation," "duplication," and "resubmission" exclusions.[\[2\]](#) We summarize the proposed changes to each below.

"Substantial Implementation" Exclusion

Rule 14a-8(i)(10) currently allows a company to exclude a shareholder proposal that "the company has already substantially implemented." The exclusion's purpose is to "avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management."[\[3\]](#) The SEC notes the provision's fact-intensive nature and the difficulty in applying it in a consistent and predictable manner.

The proposed amendment instead would provide that a proposal may be excluded as substantially implemented if "the company has already implemented the essential elements of the proposal." The SEC recognizes that the revised provision still would require a degree of subjective analysis, but that its emphasis on "essential elements" would provide a "clearer framework" for application.[\[4\]](#)

"Duplication" Exclusion

Rule 14a-8(i)(11) currently allows a company to exclude a shareholder proposal that "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 exclusion's purpose is to "eliminate the possibility of shareholders having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other."[\[5\]](#) The SEC again notes the provision's fact-intensive nature and the difficulty in applying it in a consistent and predictable manner.

The proposed amendment instead would specify that a proposal "substantially duplicates" another proposal if it "addresses the same subject matter and seeks the same objective by the same means." In support of this change, the SEC states that it would:

- Provide a clearer standard for the SEC staff to apply and yield more consistent and predictable determinations; and
- "[E]nable the consideration by a company's shareholders of later-received proposals that may be similar to and/or address the same subject matter as an earlier-received proposal but which seek different objectives or offer different means of addressing the same matter."[\[6\]](#)

The SEC also recognizes, however, that this change "could result in the inclusion in a company's proxy materials of multiple shareholder proposals dealing with the same or similar issue [which] could cause shareholder confusion and may lead to conflicting or inconsistent results and implementation challenges for companies... ." [\[7\]](#)

"Resubmission" Exclusion

Rule 14a-8(i)(12) currently 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 did not receive sufficient shareholder support.[\[8\]](#) The exclusion's purpose is to "relieve the management of the necessity of including proposals which have been previously submitted to security holders without evoking any substantial security holder interest therein."[\[9\]](#) The SEC expresses concern with this provision's potential "umbrella effect"—i.e., it could "exclude proposals that have only a vague relation, or are not sufficiently similar, to earlier proposals that failed to receive the necessary shareholder support."[\[10\]](#)

The proposed amendment instead would provide that a proposal constitutes a resubmission if it "substantially duplicates" a prior proposal, aligned with the proposed "substantial duplication" standard quoted above.^[11] The SEC explains that this standard "would focus on the specific objectives and means sought by a proposal with respect to a given subject matter" and suggests that this approach "may provide a more accurate indication of whether shareholders have already provided their views on a particular issue and the proposed means to address it."^[12] And here too, the SEC suggests that the new standard would provide a clearer standard for exclusion and promote more consistent outcomes.

Re-Affirmation of the "Ordinary Business" Exclusion Standards

While the SEC does not propose amendments to the "ordinary business" exclusion,^[13] the proposing release "reaffirm[s] the standards the Commission articulated in 1998 for determining whether a proposal relates to ordinary business" and quotes those standards at length in a footnote.^[14]

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endnotes

^[1] Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, SEC Release No. 34-95267; IC-34647 (July 13, 2022)(the "proposing release"), available at www.sec.gov/rules/proposed/2022/34-95267.pdf. Chair Gensler and Commissioners Lee and Crenshaw voted in favor of each, and Commissioners Peirce and Uyeda voted against each.

^[2] Rule 14a-8(i)(10) through (12).

^[3] Proposing release at 10 (quoting Proposals by Security Holders, SEC Release No. 34-12598 (July 7, 1976)).

^[4] The SEC further clarifies that "[w]here a proposal contains more than one element, every element of the proposal need not be implemented, although each essential element would need to be implemented." Proposing release at 15.

^[5] Proposing release at 17 (quoting Adoption of Amendments Relating to Proposals by Security Holders, SEC Release No. 34-12999 (Nov. 22, 1976)).

^[6] Proposing release at 20.

^[7] Proposing release at 20.

^[8] The SEC amended this exclusion in 2020 to increase its support thresholds from 3% (if voted on once), 6% (if voted on twice), and 10% (if voted on three times) to 5, 15, and 25%,

respectively.

[\[9\]](#) Proposing release at 22-23 (quoting Notice of Proposal to Amend Proxy Rules, SEC Release No. 34-4114 (July 6, 1948)).

[\[10\]](#) Proposing release at 27.

[\[11\]](#) Exclusion would be permitted only if the proposal "addresses the same subject matter and seeks the same objective by the same means as" the prior proposal(s).

[\[12\]](#) Proposing release at 27. The SEC also states, however, that "the previous proposal(s) and the current proposal need not be identical to warrant exclusion." Proposing release at 28.

[\[13\]](#) This permits a company to exclude a proposal if it "deals with a matter relating to the company's ordinary business operations."

[\[14\]](#) The footnote also states that in connection with this guidance, the Commission "clarified that specific methods, time-frames, or detail do not necessarily amount to micromanagement and are not dispositive of excludability."