

**MEMO# 34278**

September 1, 2022

# **ICI's Draft Comment Letter on the SEC's Rule 14a-8 Proposal; Comments Due by September 8 (COB)**

[34278]

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TO: Chief Compliance Officer Committee  
Closed-End Investment Company Committee  
Compliance Advisory Committee  
ESG Fund Disclosure Working Group  
Investment Advisers Committee  
Operations Committee  
Proxy Working Group  
SEC Rules Committee  
Small Funds Committee RE: ICI's Draft Comment Letter on the SEC's Rule 14a-8 Proposal; Comments Due by September 8 (COB)

In July, the SEC proposed amendments to Rule 14a-8 (the shareholder proposal rule) by a 3-2 vote.<sup>[1]</sup> The proposal would narrow three bases upon which companies may exclude shareholder proposals from their proxy statements: the "substantial implementation," "duplication," and "resubmission" exclusions.

Attached is ICI's draft comment letter. Please provide any comments you may have to me ([matt.thornton@ici.org](mailto:matt.thornton@ici.org)) by September 8. Comments are due to the SEC by September 12.

We comment on behalf of registered investment companies as both investors and issuers. Our comments seek to assist the SEC in considering the legitimate interests of each.

In 2020, the SEC amended the shareholder proposal rule to raise the eligibility requirements for shareholders wishing to submit and resubmit proxy proposals. In November 2021, the SEC staff moved in a very different direction, rescinding prior guidance and issuing new guidance which restricts companies' ability to exclude proposals on certain grounds. Collectively, these changes appear to have contributed to a sizable increase in shareholder proposals during the 2022 proxy season. We address these matters in Section 1.

In Section 2, we analyze the merits of the proposal. The proposal's economic analysis

states, "The value of including a shareholder proposal in a company's proxy statement for shareholder consideration and vote at a meeting depends fundamentally on the tradeoff between the potential for improving a company's future performance and the costs associated with the submission and consideration of a shareholder proposal borne by the company and its non-proponent shareholders." We agree, and we believe that this is a useful analytical framework for evaluating any potential rule changes.

The three exclusions serve a useful policy purpose—minimizing shareholder proposals with similar subject matter and the burdens that they may impose on companies and shareholders alike. However, as the SEC proposes to amend them, the exclusions would limit only those shareholder proposals that precisely replicate, or deviate in trivial respects from, prior company actions or shareholder proposals. We see no clear benefit to shareholders generally, or a company, from allowing a proposal on a company's proxy statement that differs insubstantially in its totality from:

- an action the company already has taken;
- another shareholder proposal already appearing on the company's proxy; or
- a shareholder proposal that previously appeared on the company's proxy and garnered low shareholder support.

We believe that adopting these proposed amendments would increase the quantity of shareholder proposals but not necessarily their overall quality. We therefore question whether the proposal aligns with the exclusions' policy purpose. The SEC's own economic analysis expressly avoids opining on whether the proposed changes would be "value-enhancing," which severely undermines the case for adopting these proposed amendments.

In the absence of a more thorough analysis and support for the amendments, the SEC should not proceed with this proposal. Instead, the SEC should assess comprehensively how both the 2020 rule amendments and the staff's 2021 guidance have affected the quantity and quality of shareholder approvals. The SEC and public stakeholders then would be in a better position to evaluate the costs and benefits of re-calibration of these or other rule provisions.

Matthew Thornton  
Associate General Counsel

#### **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 "proposal"), available at [www.sec.gov/rules/proposed/2022/34-95267.pdf](https://www.sec.gov/rules/proposed/2022/34-95267.pdf). Chair Gensler and Commissioners Lee and Crenshaw voted in favor of the proposal, and Commissioners Peirce and Uyeda voted against it. For a more detailed summary of the proposal, see ICI Memo to Members No. 34227, dated July 18, 2022.

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