

MEMO# 34285

September 13, 2022

ICI Submits Comment Letter on the SEC's Rule 14a-8 Proposal

[34285]

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TO: ICI Members
Investment Company Directors
SUBJECTS: Compliance
Disclosure
ESG
Fund Governance
Investment Advisers
Operations
Portfolio Oversight
Transfer Agency
RE: ICI Submits Comment Letter on the SEC's Rule 14a-8 Proposal

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

Yesterday, ICI filed a comment letter in response (linked below) on behalf of the regulated investment company ("fund") industry.

The proposal follows other recent changes to the shareholder proposal rule and how the SEC staff is interpreting it. In 2020, the SEC amended the shareholder proposal rule to raise the eligibility requirements for submitting and resubmitting shareholder proposals. In November 2021, the SEC staff moved in a very different direction, rescinding prior guidance and issuing new guidance making it more difficult for companies to exclude certain shareholder proposals. Collectively, these changes appear to have contributed to a sizable increase in shareholder proposals appearing on company proxy statements during the 2022 proxy season, which also has been accompanied by a decrease in average shareholder support for shareholder proposals. 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 support the Commission using this analytical framework for evaluating any potential rule changes.

The three exclusions serve a useful policy purpose—minimizing shareholder proposals with similar subject matter, along with the costs and burdens that they otherwise would impose on shareholders and companies 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. Consequently, any cost increases for shareholders and companies may not be accompanied by improved company performance. We therefore question whether the proposal aligns with the exclusions' policy underpinnings. 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.

We therefore recommend that the SEC not adopt this proposal. Instead, the SEC first should assess comprehensively how both the 2020 rule amendments and the staff's 2021 guidance have affected the quantity and quality of shareholder proposals. The SEC and participants in the proxy system then would be better positioned 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. 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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