

## SEC Proposes Changes to Three Shareholder Proposal Exclusion Bases

Yesterday, at an open Commission meeting, the SEC proposed a number of rulemakings: one of which proposes revising three bases for exclusion under Rule 14a-8 [the SEC also amended the proxy advisor rules; we'll have a blog on that soon enough]. Here's the [shareholder proposal fact sheet](#) and the [82-page proposing release](#). The comment period is 60 days following publication of the proposing release on the SEC's website or 30 days following publication of the proposing release in the Federal Register, whichever is longer

The Rule 14a-8 rule change would revise these three bases of exclusion, summarized below. Each of these rule changes appears likely to result in proposals that have been excluded in recent years no longer being excludable.

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1. **Rule 14a-8(i)(10) "Substantial Implementation"** - Under the proposed rule change, the key text of the exclusionary rule would change from "substantially implemented" to "implemented the essential elements."

Under the current phrasing of the rule, no action letter practice has developed to focus on (1) whether a company's "particular policies, practices and procedures compare favorably with the guidelines of the proposal" and (2) whether the company has addressed the proposal's underlying concerns and met the underlying objectives of the proposal. The proposing release posits that the current rule, including these practices, "may be difficult to apply in a consistent and predictable manner."

Even with the proposed change, the rule would still be subject to interpretation. Companies, proponents and the SEC staff may still come to different conclusions about which elements of the proposal are the "essential elements."

Notably, the proposing release specifically discusses an area of contention and confusion for many proponents and companies in recent years - proxy access "fix-it" proposals. The release says that under the new rule, a "fix-it" proposal calling for proxy access allowing an unlimited number of shareholders collectively owning 3% of a company's stock for 3 years to nominate up to 25% of company directors would not be excludable for a company with proxy access allowing up to 20 shareholders owning 3% of common stock for 3 years to nominate up to 20% of directors.

The release states that the unlimited size of the shareholder group in the proposal "would be an essential element" of the proposal. No explanation is provided for why that aspect of the proposal should be considered "essential."

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2. **Rule 14a-8(i)(11) "Duplication"** - The proposed rule change would define the phrase "substantially duplicates" to mean "addresses the same subject matter and seeks the same objective by the same means as."

Historically, in evaluating whether proposals are substantially duplicative, the SEC Staff has considered whether the proposals share the same "principal thrust" or "principal focus" - although that focus wasn't fully determinative. The proposing release argues that this analysis is too fact intensive and rewards those proponents that submit their proposal first during a proxy season.

The new proposed standard of "the same subject matter and seeks the same objective by the same means" is intended to provide a clearer standard and reduce the incentive for a proponent to be the first to lob in a proposal on a particular topic.

These improvements in clarity of this basis for exclusion would certainly come at the cost of far fewer proposals being excludable. It also has the potential to result in confusion for both shareholders and companies in considering how to vote, and interpreting voting results, on multiple overlapping proposals on the same topic in a given year.

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**3. Rule 14a-8(i)(12) "Resubmission"** - The proposed rule change would shift from using a standard of whether a proposal deals with "substantially the same subject matter" as a proposal or proposals receiving low voting results in prior years to adopting the same standard described above for proposals made in the same year. Under the proposed rule change, the test would instead be whether a proposal "substantially duplicates" a prior year proposal, including the new definition of that term described above.

Although the SEC has revisited the minimum vote thresholds necessary for resubmission a number of times over the years - including increasing the resubmission thresholds in 2020 - the "substantially the same subject matter" test has been in place since 1983.

The existing "substantially the same subject matter" test involves a fact-intensive analysis of whether the proposals share the same "substantive concerns" rather than the "specific language or actions proposed to deal with those concerns." The proposing release states that the 1983 analysis may not avoid an "improperly broad interpretation" and that the analysis should be better focused on the specific language or actions proposed to deal with those concerns in the shareholder proposal.

This rule change has the potential to substantially increase the ability of proponents to make resubmissions of proposals receiving low levels of support. The proposing release suggests that this change will allow proponents to tweak their proposals to gain additional support from shareholders. But, arguably, the existing stepped thresholds for resubmission already provide this flexibility.

If a proposal is popular enough to garner more than 5% of the vote within the last three years, a proponent would already have the ability to resubmit (with adjustments to increase popularity) and still have another chance if the second submission receives more than 15% of the vote.

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