

July 14, 2022

SEC Rescinds Certain Proxy Advisor Rules,
Proposes Amendments to Narrow Rule 14a-8 Exclusions

The U.S. Securities and Exchange Commission (the “Commission”) on July 13th adopted [amendments](#) to rules governing proxy voting advice that would eliminate certain information sharing requirements applicable to proxy advisory firms adopted in 2020, and proposed new [amendments](#) to Rule 14a-8 that would, if adopted, revise and clarify (and, effectively, narrow) the substantial implementation, duplication and resubmission bases for exclusion of shareholder proposals.

Amendments to Proxy Advisor Rules (Rules 14a-2(b)(9) and 14a-9)

Under the revised Rule 14a-2(b)(9), proxy advisors relying on exemption from proxy solicitation rules will no longer be required to (1) make their advice available to the companies that are the subject of their advice at or before the time that they make the advice available to their clients or (2) provide their clients with a mechanism by which they could reasonably be expected to become aware of any written statements by registrants who are the subject of the advice regarding the proxy advisory firms’ proxy voting advice. The Commission has also rescinded its [Supplemental Proxy Voting Guidance](#) issued to investment advisors following the adoption of Rule 14a-2(b)(9)(ii), and removed Note (e) to Rule 14a-9, which provided that failure by proxy advisors to disclose their methodology, sources of information, or conflicts of interest could constitute false or misleading proxy voting advice in violation of Rule 14a-9.

The Commission stated that the rescission of the 2020 proxy rule amendments “aim[s] to avoid burdens on [proxy voting advice businesses] that may impede and impair the timeliness and independence of their proxy voting advice.” Indeed, as we have noted [previously](#), the 2020 proxy rule amendments were met with a mix of supportive and dissenting views from investors — notably, stiff resistance from the proxy advisory firms and the Council of Institutional Investors, and clear support from public companies and other market participants who share the concern that proxy advisory firms wield undue power and influence in the proxy voting process. While the latest amendments will once again shift the balance of power and influence in favor of proxy advisory firms, ISS has indicated that it will continue its lawsuit to overturn the 2020 proxy rule amendments in their entirety. Meanwhile, the National Association of Manufacturers has indicated that it plans to file a lawsuit in the coming weeks to preserve the 2020 rule amendments.

Proposed Amendments to Shareholder Proposals (Rule 14a-8)

The proposed amendments to Rule 14a-8 would revise three substantive bases by which issuers may exclude shareholder proposals from their proxy statements, as described in more detail below. The common thread of the proposals in the release appears to be a desire to both promote clarity in the application of the exclusions, and to narrow the scope of the exclusions, based on the examples included in the release of proposals that would no longer be expected to qualify for exclusion as a result of the changes. The adopting release includes a number of specific SEC requests for comment on particular aspects of the proposed amendments.

- *Substantial Implementation:* Under the current rules, a shareholder proposal may be excluded if it has already been “substantially implemented.” In certain circumstances,

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the application of this exclusion can lead to a dispute about precisely how closely the existing actions need to match the suggestions or requirements set forth in the proposal (which the SEC notes is a case-by-case, factual determination). The proposed amendment would provide that this exclusion is available if there has been implementation of the “essential elements” of the proposal, with the goal of providing a “clearer framework” for the application of the rule. The release also offers, as an example, a determination that a proxy access proposal that does not contain a limit on the number of shareholders that may form a part of the nominating group generally would not be excludable under the amended exemption due to the adoption of a proxy access framework with a limitation on group size, as this would qualify as an essential element that has not been substantially implemented.

- *Duplication:* Under the current rules, a shareholder proposal may be excluded if it “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 proposed amendment clarifies “substantially duplicates” to mean a proposal that “addresses the same subject matter and seeks the same objective by the same means.” Among other reasons, the proposing release cites a concern that the current standard unduly advantages the “first mover” to submit a proposal, even if a later-received proposal would be more likely to receive investor support. It further notes the risk of confusion, inconsistency and implementation challenges if multiple similar proposals are required to be included in a proxy statement (as this rule change might permit), and specifically requests comment on this risk and potential alternative approaches.
- *Resubmission:* Current rules permit companies to exclude a shareholder proposal that “addresses substantially the same subject matter” as a proposal previously included in the company’s proxy materials within the five preceding calendar years that were voted on within the preceding three years and failed to receive certain minimum levels of support. The proposed amendments would align the resubmission exclusion with the duplication exclusion by replacing the “substantially the same subject matter” test with a standard based on whether the proposal “substantially duplicates” a prior proposal, as measured by whether it “addresses the same subject matter and seeks the same objective by the same means.”

The comment period for the proposed amendments to Rule 14a-8 will remain open until September 12, 2022 or 30 days following publication of the proposing release in the Federal Register, whichever period is longer. The final amendments to Rule 14a-2(b)(9) and 14a-9 and the rescission of the Supplemental Proxy Voting Guidance will become effective 60 days after publication in the Federal Register.

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