Securities Regulation Daily Wrap Up, REGULATORY ACTIVITY—SEC commissioners back revisions to 2020 shareholder rule in 3-2 vote, (Jul. 13, 2022)

Securities Regulation Daily Wrap Up

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By Suzanne Cosgrove

Amendments seek to revise three substantive bases for the exclusion of shareholder proposals: the substantial implementation exclusion, the duplication exclusion and the resubmission exclusion.

In an open meeting, SEC commissioners Wednesday approved a proposed revision to Exchange Act Rule 14a-8 that its backers contend will improve the process for including shareholder proposals by limiting the conditions for their exclusion. Under the rule, companies generally must include shareholder proposals in their proxy statements, with certain exceptions.

Voicing his support for the changes revisions, SEC Chairman Gary Gensler said they would provide a clearer framework for the rule's application for investors. "When shareholders buy stock in a public company, they own a piece of the company, which comes with certain rights under state law," he said. "That includes the right to elect directors to the company's board and the right to make proposals to the management team for consideration by fellow shareholders."

Seeking greater balance. Weighing in with her support, outgoing SEC Commissioner Allison Herren Lee noted shareholder proposals represent a critical mechanism for shareholders to engage with management and put issues of importance on the proxy ballot. "Shareholder proponents have been early and leading voices–bellwethers for management–on significant issues such as climate risk, workforce diversity, and political spending disclosure," Lee stated.

"It is imperative that the substantive bases for excluding shareholder proposals from the ballot are not overbroad and create as balanced, predictable and efficient a framework as possible," Lee said.

The amendments "help ensure that all proposals that ought to be put to a shareholder vote will be," said Commissioner Caroline Crenshaw, who also voted in favor of the amendments.

SEC proposal affects three of 13 substantive bases for exclusion.

- Substantial Implementation. The proposed amendments would specify that a proposal may be excluded under this provision if the company has already implemented the "essential elements" of the proposal.
- Duplication. The proposed amendments would specify that a proposal "substantially duplicates" another proposal previously submitted for the same shareholder meeting if it addresses the same subject matter and seeks the same objective by the same means.
- Resubmission. The proposed amendments would provide that a proposal constitutes a resubmission if it substantially duplicates another proposal that was previously submitted for the same company's prior shareholder meetings.

Too soon for change? Prior to Wednesday's vote, the SEC's most recent review of aspects of Rule 14a-8 was in 2020, a point Commissioner Hester Peirce noted when voting against the proposed revisions.

"The September 2020 amendments recalibrated the rule to balance the benefit of allowing shareholder proposals to be included in a company's proxy materials with the reality that consideration of such proposals consumes company and shareholder resources," Peirce said in a statement.

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“I cannot support today’s plan to upset that careful calibration by narrowing companies’ ability to exclude proposals that they have substantially implemented, are duplicative of other proposals, or are resubmissions of prior failed proposals,” Peirce added. “A better approach would be for the Commission to allow sufficient time to see how our 2020 rules operate, and then review the results to determine whether further changes are appropriate.”

Mark Uyeda, a longtime SEC staffer who recently joined the commission, also voted against the shareholder proposal, taking a similar stance to that of Peirce.

Given that the 2022 proxy season is ongoing, “why not simply wait another 90 days to evaluate the data from the 2022 proxy season and then decide whether to proceed with a proposal?” Uyeda asked. He also expressed his concern that the proposal could create an uneven playing field for U.S. public companies relative to those that are not subject to the federal proxy rules—namely foreign companies and U.S. private companies.

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