

Proposed SEC Amendment on Shareholder Proposal Rules

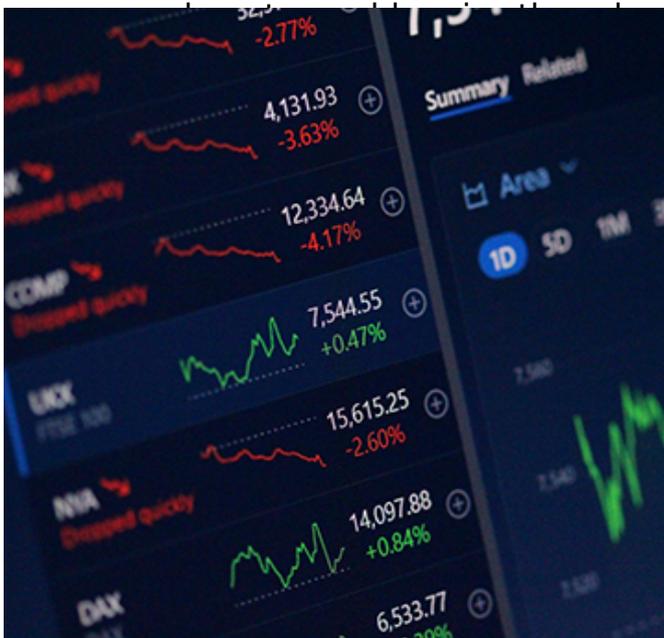
By Bill Hayes

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There are benefits for shareholders, but possible complications for boards.

The SEC recently proposed amendments to Rule 14a-8, which governs the process for including shareholder proposals in company proxy statements. The bases of exclusion in hopes of establishing application.



The bases of exclusion that would be

changed by the amendment are:

- **Substantial implementation.** A proposal could be excluded if a company has already implemented the “essential elements” of the proposal.
- **Duplication.** A proposal could be excluded if it addresses the same subject matter and seeks the same objective by the same means.
- **Resubmission.** A proposal could be excluded if it substantially duplicates another proposal that was previously submitted for the same company’s

prior shareholder meetings.

Christina Thomas, a partner in law firm Mayer Brown, says the proposal, which is currently open for public comment, is a continuing reflection of the SEC staff's approach to the shareholder proposal process under the Biden administration.

"The staff is focused on both interpreting and amending the rules to allow more shareholder proposals to be included in proxy statements than in previous years," Thomas says. "The goal is to allow shareholders to consider a greater number of proposals than would have previously appeared on ballots in prior years."

While the SEC claims that the proposed amendments will provide more consistency in application, Thomas thinks the rules as proposed would present possible complications for boards and their companies. She anticipates the possibility that fewer shareholder proposals being excludable could lead to conflicting and duplicative proposals on the ballot, leading to complicated questions for boards.

"If there are overlapping proposals on the ballot, should the board express a preference for one over the other, or just recommend a vote against both?" says Thomas. "Is there one proposal that is better than the other? If so, should the board explain that in its statement responding to the proposal? I think boards will want to think through the strategy in those circumstances, especially if there is a likelihood that one or both proposals will receive majority approval."

As for public company shareholder proponents, the benefit of the rule amendments is clear, says Thomas: a greater number of shareholder proposals being included in company proxy statements.

"The SEC's view is that the amendments to Rule 14a-8 would allow more proponents to engage with their fellow shareholders," says Thomas. "However, this would likely also create issues for boards and companies in trying to respond to and implement these proposals."