

September 30, 2020

SEC Modernizes the Shareholder Proposal Rule

On September 23, 2020, the SEC adopted [final amendments](#) to modernize the process for shareholder proposals under Exchange Act Rule 14a-8 (the “Amendments”). As with the rules affecting proxy advisory firms, the Amendments were adopted on a 3-2 vote, with Chairman Clayton and Republican Commissioners Peirce and Roisman forming the majority and Democratic Commissioners Lee and Crenshaw dissenting. The Amendments, which will not apply to any shareholder proposals submitted during the 2021 proxy season, update the initial ownership threshold for eligibility, increase the resubmission thresholds and make several procedural changes. This Alert summarizes key aspects of the Amendments.

Observations

Most public companies should welcome the Amendments, which balance a shareholder’s ability to submit proposals with the costs incurred in addressing them. The SEC imposed a tiered approach for the initial submission threshold, but overall the changes are modest. The lowest level remains \$2,000, but the minimum holding period is extended to three years. Shorter holding periods apply to higher ownership levels. In addition, by increasing the highest resubmission threshold from 10% to 25%, the Amendments should reduce the costs of repeat consideration of proposals that garner low support. The other procedural changes will require shareholder “representatives” – a small group that is responsible for around one-third of all shareholder proposals – to modify their methods.

Rule 14a-8 Amendments

Ownership and Resubmission Thresholds

The following chart briefly summarizes how the existing Rule 14a-8 requirements for initial submission and resubmission are revised by the Amendments:

Provision	Current Rule 14a-8 Requirements	New Rule 14a-8 Requirements
Ownership Thresholds (Rule 14a-8(b))	<p>Shareholder must have continuously held at least \$2,000 in market value, or 1%, of the company’s securities entitled to vote on the proposal at the meeting for at least one year.</p> <p>Two or more shareholders can aggregate their holdings to meet the threshold.</p>	<p>Shareholder must have continuously held at least:</p> <ul style="list-style-type: none"> • \$2,000 in market value of the company’s securities entitled to vote on the proposal for at least three years; • \$15,000 in market value for at least two years; or • \$25,000 in market value for at least one year. <p>In addition, the 1% ownership threshold – which is essentially irrelevant – has been eliminated.</p>

Provision	Current Rule 14a-8 Requirements	New Rule 14a-8 Requirements
		Two or more shareholders are not allowed to aggregate their holdings to reach a threshold.
Resubmission Thresholds (Rule 14a-8(i)(12))	<p>If the proposal deals with substantially the same subject matter as another proposal that has been previously included in the company’s proxy materials within the preceding five calendar years, a company may exclude the proposal from its proxy materials for any shareholder meeting if the most recent vote occurred within the preceding three calendar years and the most recent vote was:</p> <ul style="list-style-type: none"> • Less than 3% of the votes cast if previously voted on once; • Less than 6% of the votes cast if previously voted on twice; or • Less than 10% of the votes cast if previously voted on three times or more. 	<p>The applicable resubmission thresholds are increased to 5%, 15%, and 25% for matters previously voted on once, twice or three or more times, respectively, in the last five calendar years.</p>

The SEC believes that each shareholder-proponent should have a meaningful ownership stake in a company before being permitted to draw on company resources to include a proposal in the company’s proxy statement as well as draw on the time, attention and other resources of non-proponent shareholders. With respect to aggregation, the SEC does not believe that group ownership, where each member of the group does not individually satisfy one of the ownership requirements, represents a sufficient economic or investment interest to require inclusion of a proposal in the company’s proxy statement. Notably, the SEC did not adopt a provision that would require periodic future inflation adjustments.

The new resubmission thresholds are designed to serve as better indicators of a proposal’s path toward potentially greater shareholder support. Based on the SEC’s analysis, fewer than 7% of proposals that fail to win majority support the first time go on to pass in a subsequent attempt. Thus, under the current thresholds, the vast majority of shareholder proposals remained eligible for resubmission regardless of their likelihood of gaining broader or majority shareholder support, requiring companies and shareholders to continually expend resources and consider proposals with minimal likelihood of success. The SEC also declined to adopt its proposed “momentum requirement,” which would have allowed companies to exclude proposals that met the 25% threshold but otherwise had evidenced declining support.

Proposals Submitted on Behalf of Shareholders

The Amendments address so-called “proposal by proxy” where a proposal is brought by someone on behalf of a shareholder. It codifies and expands upon the Staff guidance provided in November 2017 in Staff Legal Bulletin No. 14I. A person seeking to act for a shareholder in submitting a proposal must provide written documentation that:

- Identifies the company to which the proposal is directed;
- Identifies the annual or special meeting for which the proposal is submitted;
- Identifies the shareholder-proponent and the designated representative;

- Includes the shareholder’s statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder’s behalf;
- Identifies the specific topic of the proposal to be submitted;
- Includes the shareholder’s statement supporting the proposal; and
- Is signed and dated by the shareholder.

These requirements are intended to help safeguard the integrity of the shareholder-proposal process and the eligibility restrictions by making clear that representatives are authorized to so act, and by providing a meaningful degree of assurance as to the shareholder-proponent’s identity, role and interest in a proposal that is submitted for inclusion in a company’s proxy statement.

Where a shareholder-proponent is an entity, and thus can only act through an agent, compliance with these requirements will be required where the agency relationship is not apparent and self-evident (e.g., where an investment adviser submits a proposal on behalf of a client that is a shareholder).

One-Proposal Limit

The current rules provide that each shareholder may submit no more than one proposal to a company per meeting. The Amendments revise this provision so that no “person” can submit more than one proposal per meeting. This change is designed to prohibit situations in which a person submits a proposal on his or her own behalf and a different proposal on behalf of another shareholder for consideration at the same shareholders’ meeting. In addition, a shareholder representative will not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders.

Shareholder Engagement

To address a problem that companies face dealing with some proponents who are notoriously difficult to deal with and refuse to engage, the Amendments require the shareholder-proponent to provide a written statement that he or she is able to meet with the company in person or by telephone at specified dates and times (during the company’s principal executive offices’ regular business hours) that are no fewer than ten nor more than 30 days after submitting the proposal. The proponent will be required to provide the company with contact information and specific business days and times during which he or she would be available. Failure to provide this information could be grounds for procedural exclusion of the proposal.¹

The SEC’s adopting release makes clear that the person who must be available is the shareholder-proponent, not the representative who submitted the proposal on the shareholder’s behalf. The SEC believes that a shareholder-proponent who elects to require a company to include a proposal in its proxy statement, requiring the company and other

¹ Companies that intend to seek exclusion under Rule 14a-8(b) based on a shareholder-proponent’s failure to provide some or all of this information must notify the proponent of the specific defect within 14 calendar days of receiving the proposal so that the shareholder-proponent has the opportunity to cure the defect, and the shareholder-proponent is required to respond to this notice within 14 days. Where a company sends a deficiency notice for the purpose of requesting identification of a shareholder-proponent’s availability to engage, the shareholder-proponent must identify dates of the shareholder-proponent’s availability that are within the remaining 10- to 30-day window. For example, where a proposal is submitted on October 1, the company’s deficiency notice is received by the shareholder-proponent on October 15, and the shareholder-proponent responds to the deficiency notice by email on October 20, the shareholder-proponent would be required to identify business days and times between October 21 and October 31 that the shareholder-proponent is available to discuss the proposal.

shareholders to bear the related costs, should be willing and available to discuss the proposal with the company and not simply rely on its representative to do so. The SEC believes that having shareholder-proponents state their availability to discuss their proposal will facilitate dialogue between shareholders and companies in the shareholder-proposal process and may lead to more efficient and less costly resolution of these matters.

Effective Date; Transition

The Amendments will be effective 60 days after publication in the *Federal Register* and will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022. However, an investor who currently is eligible to submit proposals under the current \$2,000 threshold/one-year minimum holding period, but currently does not satisfy the new requirements, will continue to be eligible to submit proposals through the expiration of the transition period that extends for all annual or special meetings held prior to January 1, 2023, provided that he or she continue to hold at least \$2,000 of a company's securities from the effective date through the date that he or she submits a proposal.

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If you have any questions about this Alert, please contact your usual legal advisor at Ropes & Gray.