

Legal Update

SEC Proposes Changes to Rule 14a-8 – the Shareholder Proposal Process

On November 5, 2019, the US Securities and Exchange Commission (SEC) proposed several amendments to Rule 14a-8 promulgated under the Securities Exchange Act of 1934 (Rule 14a-8).¹ The proposed amendments are intended to “recognize the significant changes that have taken place in our markets in the decades since these regulatory requirements were last revised...”

In particular, the rule proposals would amend:

- Rule 14a-8(b) to (i) create a range of the amount of shares required to be held in order to submit a proposal, which in some situations would increase the threshold amount of shares needed to be held in order to submit a proposal; (ii) potentially increase the amount of time those shares must be held; (iii) require a proponent to be available to meet with the company regarding the shareholder proposal; and (iv) require a proponent to provide specified information about any representative the proponent is using to submit a proposal or to act on the proponent’s behalf;
- Rule 14a-8(c) to provide that any one person can submit no more than one proposal, directly or indirectly, in connection with a particular shareholders’ meeting; and

- Rule 14a-8(i)(12) to increase the resubmission thresholds that must be obtained in order for a proposal that was included in a prior year’s annual meeting proxy statement to be resubmitted for a vote of shareholders in a subsequent year.

Comments on the proposals are due 60 days after publication of the proposal in the *Federal Register*.

Background

Over the past several years, the SEC has modernized, or proposed to modernize, several of its rules. The proposal to modernize Rule 14a-8 extends this effort to some of the rule’s procedural requirements. Rule 14a-8 is the SEC’s rule that requires companies to include shareholder proposals in their proxy statements. The rule also governs the process for shareholder proposals submitted for inclusion in company proxy statements, allowing companies to exclude proposals if substantive, eligibility and procedural requirements are not satisfied. The rule was first adopted in 1942 and was last substantively amended in 1998. In the proposing release, the SEC acknowledges the balancing role that Rule 14a-8 plays between the ability of shareholders to engage with the

company by submitting proposals and the burdens, primarily expenses, incurred by companies as a result of those proposals. In proposing its changes discussed below, the SEC is trying to maintain this balance while updating and modernizing several of the procedural requirements.

Proposed Changes

SHARE OWNERSHIP REQUIREMENTS

Under current Rule 14a-8(b)(1), a shareholder “must have continuously held at least \$2,000 in market value, or 1%, of the company’s securities entitled to be voted on at the meeting for at least one year by the date” the proposal is submitted to the company. The SEC has proposed amending this requirement by creating a tiered approach based on the amount of securities held, such that the more securities held, the shorter the period during which they must have been held.

In particular, the SEC is proposing that in order for a shareholder to be eligible to submit a proposal, the shareholder must have continuously held:

- At least \$2,000 in market value of the company’s securities entitled to vote on the matter for at least 3 years;
- At least \$15,000 in market value of the company’s securities entitled to vote on the matter for at least 2 years; or
- At least \$25,000 in market value of the company’s securities entitled to vote on the matter for at least 1 year.

In addition, the proposal retains the current requirement that a proponent provide the company with a written statement that the shareholder intends to continue to hold the requisite amount of securities through the date of the shareholders’ meeting for which the proposal is submitted.

The proposed amendments also make clear that the shareholder submitting the proposal

must own all of the securities being used to meet this eligibility requirement. The shareholder is not permitted to aggregate holdings with any other shareholder for this purpose. However, as noted in the proposing release, the SEC will continue to allow shareholders to co-file or co-sponsor a proposal so long as each shareholder meets the eligibility requirements.

ABILITY TO MEET WITH THE COMPANY TO DISCUSS THE PROPOSAL

The SEC is proposing to add a new provision to Rule 14a-8(b)(1) to require that a proponent provide the company with a written statement that:

- Says the shareholder is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal;
- Includes the shareholder’s contact information; and
- Proposes business days and specific times that the shareholder is available to discuss the proposal with the company.

USE OF A REPRESENTATIVE TO SUBMIT A PROPOSAL

Existing Rule 14a-8 does not address whether a shareholder may use a representative to submit a proposal. To address this, the SEC is proposing to add a second new provision to Rule 14a-8 to clarify that a shareholder may use a representative to submit a proposal or to act on the shareholder’s behalf and to set forth the additional written information that a shareholder must provide to the company when a shareholder uses a representative for either of these purposes. This proposal would codify and refine the guidance issued by the staff of the Division of Corporation Finance (Division) in Staff Legal Bulletin 14I on November 1, 2017, relating to what it called “proposals by proxy.” In this situation, the

shareholder must provide written documentation to the company 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 person acting on the shareholder's behalf as a 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 proposal to be submitted;
- Includes the shareholder's statement supporting the proposal; and
- Is signed and dated by the shareholder.

NUMBER OF PROPOSALS A PERSON MAY SUBMIT

Under existing Rule 14a-8(c), a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. The SEC is proposing to amend Rule 14a-8(c) to make clear that this includes direct submissions as well as indirect submissions by making explicit that "[a] person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting." As the SEC noted in the proposing release, "[u]nder the proposed rule, a shareholder-proponent may not submit one proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting. Similarly, a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative would be submitting each proposal on behalf of different shareholders."

RESUBMISSION OF PROPOSALS

Under existing Rule 14a-8(i)(12), if a proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude the proposal from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

- Less than 3% of the vote if proposed once within the preceding 5 calendar years;
- Less than 6% of the vote on its last submission to shareholders if proposed twice within the preceding 5 calendar years; and
- Less than 10% of the vote on its last submission to shareholders if proposed three times or more within the preceding 5 calendar years.

The SEC is proposing to increase these thresholds to 5%, 15% and 25%, respectively, of the votes cast on the proposal. In addition, a proposal that has been voted on three or more times in the preceding 5 calendar years may be excluded from a company's proxy materials, even if it had received more than 25% of the votes cast, if:

- The proposal received less than 50% of the votes cast; and
- The percentage of votes cast declined by 10% or more compared to the immediately preceding shareholder vote on substantially the same subject matter.

Practical Considerations

As of the date of this Legal Update, the proposal has not yet been published in the *Federal Register*, so it is not yet known when the comment period will close. And it is too early to predict if and when the SEC will adopt final amendments to Rule 14a-8 to implement

these proposals or when any of those amendments would become effective. Although these proposals to amend Rule 14a-8 will not be adopted in time for this upcoming proxy season, at the meeting discussing the proposed amendments, several commissioners were very eager to move forward with the proposal. As a result, they could significantly impact the shareholder proposal process in future proxy seasons. And, therefore, it is important to understand the potential changes being considered.

Rule 14a-8 is an active area of focus for the SEC and its staff. This is their third effort in this area in the past three months. On September 6, 2019, the Division announced a significant change to its process with respect to reviewing no-action requests submitted to the Division pursuant to Rule 14a-8.² And on October 16, 2019, the Division issued Staff Legal Bulletin No. 14K to provide additional guidance on shareholder proposals submitted pursuant to Rule 14a-8.³ Interested companies should continue to monitor this area for continuing developments.

The SEC is soliciting comments in 51 specific areas, some of which contain multiple questions, in addition to a general request for comments. Public companies have the opportunity to influence any final rules by submitting comments. Therefore, they should consider reviewing the proposed amendments and determining whether they want to submit comments or suggest revisions on any of the proposals.

If you have any questions regarding the proposed changes to Rule 14a-8, please contact the author of this Legal Update, Michael L. Hermsen, at +1 312 701 7960, any of the lawyers listed below or any other member of our Corporate & Securities group.

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Endnotes

- ¹ See Procedural Requirements and Resubmission Thresholds under Exchange Rule 14a-8, Exchange Act Release No. 34-87458 (proposed November 5, 2019), available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.
- ² See our Legal Update “SEC Announces Significant Changes to the Shareholder Proposal Process,” dated September 10, 2019.
- ³ See our Legal Update “SEC Staff Legal Bulletin No. 14K Provides Further Shareholder Proposal Guidance,” dated October 22, 2019.

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