

Legal Update

SEC Amends Shareholder Proposal Rule

On September 23, 2020, the US Securities and Exchange Commission (SEC) adopted amendments to Rule 14a-8 promulgated under the Securities Exchange Act of 1934 (Rule 14a-8).¹ The SEC initially proposed amendments to Rule 14a-8 on November 5, 2019. The amendments will generally be effective for shareholders' meetings to be held on or after January 1, 2022.

According to the SEC, the amendments are "intended to help ensure that the ability to have a proposal included alongside management's in a company's proxy materials—and thus to draw on company and shareholder resources and to command the time and attention of the company and other shareholders—is appropriately calibrated and takes into consideration the interests of not only the shareholder who submits a proposal but also the company and other shareholders who bear the costs associated with the inclusion of such proposals in the company's proxy statement."²

The final rule amends:

- Rule 14a-8(b) to
 - (i) replace the current ownership threshold to be eligible to submit a proposal with three alternative thresholds starting with a requirement that a proponent hold at least \$2,000 of company voting securities for at least three years, with higher values required for shorter holding periods;
 - (ii) require a proponent to provide the company a written statement that says the proponent is able to meet with the company and includes specific days and times of availability during the company's regular business hours; and
 - (iii) require a proponent to provide specified information about any representative the proponent is using to submit a proposal on the proponent's behalf;
- Rule 14a-8(c) to provide that any one person can submit only one proposal, directly or indirectly, to a company for a particular shareholders' meeting; and
- Rule 14a-8(i)(12) to increase the level of support a proposal must receive to be eligible for resubmission of a proposal addressing substantially the same subject matter at future shareholders' meetings.

Background

Over the past several years, the SEC has modernized, or proposed to modernize, several of its rules. The amendments to Rule 14a-8 extend this effort and are intended to “modernize and enhance the efficiency and integrity of the shareholder-proposal process for the benefit of all shareholders.”³

Rule 14a-8 governs the process by which shareholders can submit proposals for inclusion in company proxy statements and allows companies to exclude proposals if substantive, eligibility or procedural requirements are not satisfied. The rule was first adopted in 1942 and was last substantively amended in 1998.

The SEC has acknowledged the balancing role that Rule 14a-8 plays between the ability of shareholders to engage with the company by submitting proposals and the burden on the company and its other shareholders, primarily expense and diversion of management’s time and attention, as a result of those proposals. In revising the rule, the SEC is trying to maintain this balance as part of its ongoing focus on improving the proxy process and the ability of shareholders to exercise their voting rights.

Amendments

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 the proposal at the meeting for at least one year” by the date the proposal is submitted to the company. The SEC has amended this requirement by creating a tiered approach, based on the value of voting securities held, that provides three options for demonstrating a sufficient ownership stake in the company—through a combination of amount of securities owned and length of time held.

In particular, to be eligible to submit a proposal, a shareholder must have continuously held:

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

The amendments provide for a transition period for proposals submitted for a meeting to be held before January 1, 2023, that will allow shareholders that are currently eligible at the \$2,000/1-year threshold to submit a proposal for inclusion in the company’s proxy statement so long as they have continuously held the securities for at least one year as of the date the amendments become effective and maintain this minimum investment from the date the amendments become effective through the date the proposal is submitted and the date of the shareholders’ meeting for which the proposal is submitted. The amendments also retain 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.

The 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 or group of shareholders for this purpose. However, the SEC will continue to allow shareholders to co-file or co-sponsor a proposal so long as each shareholder in the group meets the eligibility requirements.

ABILITY TO MEET WITH THE COMPANY TO DISCUSS THE PROPOSAL

The amendments add a new provision to Rule 14a-8(b)(1) that requires a proponent to 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 are within the regular business hours of the company's principal executive offices when the shareholder is available to discuss the proposal with the company.

If the shareholder is co-filing a proposal, all co-filers must either agree to the same dates and times of availability or identify one lead filer who will provide dates and times of availability to engage on behalf of all co-filers.

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.⁴ To address this, the SEC has added a provision to Rule 14a-8 to clarify that a shareholder may use a representative to submit a proposal. When a shareholder uses a representative, the shareholder must provide additional 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 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.

However, a shareholder using a representative need not provide this written documentation if the shareholder is an entity and the representative's authority to act on the shareholder's behalf is apparent and self-evident such that a reasonable person would understand that the representative has authority to submit the proposal and otherwise act on the shareholder's behalf.

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 has amended Rule 14a-8(c) to provide that each "person" may submit no more than one proposal. This amendment makes clear that this one-proposal rule applies to direct submissions as well as indirect submissions, expressly stating 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 explained in the adopting press release, “a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder’s behalf for consideration at the same meeting,” and, “[l]ikewise, a 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.”⁵

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 previously included in the company’s proxy materials within the preceding 5 calendar years, a company may exclude the proposal from its proxy materials if the most recent vote occurred within the preceding 3 calendar years and the most recent vote was:

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

The amendments increase these thresholds to 5%, 15% and 25%, respectively, of the votes cast on the proposal.

EFFECTIVENESS AND TRANSITION PERIODS

The amendments become effective 60 days after publication in the *Federal Register* and will apply to any shareholder proposal submitted for an annual or special meeting to be held on or after January 1, 2022.

In addition, the amendments provide for a transition period with respect to the share ownership requirements that will allow shareholders to rely on the \$2,000/1-year ownership threshold currently in effect for proposals submitted for an annual or special meeting to be held before January 1, 2023, if the shareholder has continuously held the securities for at least 1 year as of the date the amendments become effective and maintains this minimum investment from the date the amendments become effective through the date the proposal is submitted and the date of the shareholders’ meeting for which the proposal is submitted.

Practical Considerations

The amendments seek to balance the interests of shareholder proponents, companies and non-proponent shareholders. For companies and most shareholders, the amendments are likely to represent a cost savings. Shareholders, including individuals, who want to submit proposals for inclusion in a company’s proxy statement may continue to do so with a holding in a company’s voting securities valued at \$2,000. However, after the initial transition period, they will have to have held those securities for a longer period of time. Shareholders will need to keep this in mind as they think about how they will proceed in the future.

Although the amendments may give companies greater ability to exclude some shareholder proposals, shareholder proponents still have the ability to use the company’s proxy statement as a tool to engage with management and other shareholders at little cost to themselves by complying with the requirements of amended Rule 14a-8. As a result, for some companies the amendments might not have a significant impact, and they should continue to prepare for the shareholder proposals in the upcoming and future proxy seasons as they have done historically.

It is important to remember that the amendments only revised a few, specific provisions of Rule 14a-8. For those companies that are more likely to be significantly impacted by the amendments, it is important to understand how the changes affect the shareholder proposal process sooner rather than later and what the proposed amendments might mean for their planning and shareholder engagement strategy since for many companies that is now a year-round process.

In addition, it is important to remember that, whether or not shareholders are eligible to submit a shareholder proposal, they can use alternative engagement methods to raise matters that are important to them with companies and other investors, such as through email, video conference calls, one-on-one meetings, shareholder surveys and e-forums. The adopting release noted that raising issues of concern “through one-on-one engagement with management may produce better outcomes than submitting shareholder proposals.”

With respect to co-filers, the SEC stated in the adopting release that it believes “that, as a best practice, co-filers should clearly state in their initial submittal letter to the company that they are co-filing the proposal with other proponents and identify the lead filer, specifying whether such lead filer is authorized to negotiate with the company and withdraw the proposal on behalf of the other co-filers.”

Proxy matters, in addition to the shareholder proposal process, have been an active area of focus for the SEC and its staff for a number of years. For example, the SEC recently adopted amendments concerning the provision of proxy voting advice.⁶ And the SEC has indicated that it plans to consider proxy plumbing and universal proxy issues.⁷ Interested companies should continue to monitor this area for continuing developments.

If you have any questions regarding the amendments to Rule 14a-8, please contact 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. 34-89964 (adopted September 23, 2020) (the “Adopting Release”), available at <https://www.sec.gov/rules/final/2020/34-89964.pdf>
- ² See SEC Adopts Amendments to Modernize Shareholder Proposal Rule (“Adopting Press Release”), available at <https://www.sec.gov/news/press-release/2020-220>
- ³ See Adopting Release at 1.
- ⁴ Prior guidance issued by the staff of the Division of Corporation Finance (Division) in Staff Legal Bulletin 14I on November 1, 2017 addressed what it called “proposals by proxy.” New Rule 14a-8(b)(iv) codifies and refines this guidance.
- ⁵ See Adopting Press Release.
- ⁶ See our Legal Update, “SEC Adopts Proxy Voting Advice Rule Amendments,” dated July 28, 2020, available at <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/07/sec-adopts-proxy-voting-advice-rule-amendments.pdf>
- ⁷ See the SEC’s regulatory agenda, available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235

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