

# PUBLICATION

---

## SEC Amends 14a-8 Shareholder Proposal Rule

October 01, 2020

**On September 23, 2020, the Securities and Exchange Commission (the Commission) adopted final rules amending the shareholder proposal rule (Exchange Act Rule 14a-8), which allows shareholders of a company with a class of securities registered under Section 12 of the Exchange Act to have a proposal included in the company's proxy materials for a vote of the company's shareholders, at little expense to the shareholder proponent, when the shareholder complies with the substantive and procedural requirements set out in Rule 14a-8.**

The final amendments (collectively, the Amendments) relate to Rule 14a-8(b), Rule 14a-8(c) and Rule 14a-8(i)(12), which deal with eligibility requirements, the one-proposal limit and resubmission thresholds, respectively.

### **Tiered Ownership Requirements**

The amendments to Rule 14a-8(b) replace the current eligibility requirements, which require a shareholder to hold at least \$2,000 in market value or 1% of the company's securities for at least one year to be eligible to submit a proposal, with a tiered approach that provides three options for demonstrating an ownership stake in the company. The Amendments eliminate the 1% ownership threshold, and a shareholder will be eligible to submit a proposal for inclusion in the company's proxy statement if such shareholder has continuously held at least:

- \$2,000 of the company's securities for at least three years;
- \$15,000 of the company's securities for at least two years; or
- \$25,000 of the company's securities for at least one year.

Shareholders may no longer aggregate their holdings with other shareholders in order to satisfy the minimum ownership requirements. Notwithstanding these revised ownership thresholds, shareholders meeting the current \$2,000/one-year ownership threshold may continue to be eligible to submit proposals for an annual or special meeting to be held prior to January 1, 2023.

### **Additional Information Requirements When Using a Representative**

The amendments to Rule 14a-8(b) also require a shareholder, who uses a representative to submit a proposal, to provide documentation with specified information, including an affirmative statement that the representative is authorized to act on the shareholder's behalf and that the shareholder supports the proposal, thereby providing a meaningful degree of assurance as to the shareholder proponent's identity, role and interest in the proposal and reducing some administrative burdens on companies to verify the agency relationship. Additionally, the amended rule requires a statement from each shareholder proponent that he or she is able to meet with the company, either in person or via teleconference, 10-30 calendar days after the proposal has been submitted. This rule reflects the Commission's belief that such requirements will encourage greater discussion between the company and the proposing shareholder and may lead to a more efficient and less costly resolution of the matter, including the potential for withdrawal of the proposal.

### **One Proposal Per "Person"**

The amendment to Rule 14a-8(c) limits shareholder proposals to only one proposal per person. Currently, the one-proposal rule applies to "each shareholder," not "each person." The current "each shareholder" regime allows a shareholder to submit a proposal in his or her name, while also submitting a different proposal on another's behalf as a shareholder representative. The amendment prevents a shareholder from submitting one proposal in its own name and simultaneously submitting a different proposal as a shareholder representative and also prohibits a shareholder representative from submitting more than one proposal for the same shareholder meeting even if submitting proposals on behalf of different shareholders.

### **Amended Resubmission Thresholds and Requirements**

Finally, the Commission has raised the resubmission thresholds under Rule 14a-8(i)(12) that allow a company to exclude a shareholder proposal from the company's proxy materials if substantially the same proposal was submitted to shareholders at a previous shareholder meeting. Under the amended rule, a company can exclude a proposal from its proxy materials if the proposal deals with substantially the same subject matter as a proposal submitted within the preceding five years if the most recent vote occurred within the preceding three years and that vote received:

- Less than 5% of the votes cast if previously voted on once;
- Less than 15% of the votes cast if previously voted on twice; or
- Less than 25% of the votes cast if previously voted on three times or more.

The amendments to the resubmission thresholds and requirements are intended to reduce the costs associated with the repeated consideration of these proposals by management and shareholders as a result of their recurrent inclusion in the company's proxy statement, while at the same time maintaining the ability for shareholders to submit proposals and engage with companies on matters that are important to shareholders.

The Commission determined not to adopt proposed rules that would allow for the exclusion of a proposal that was previously voted on three or more times in the past five years if the proposal received less than 50% of the votes cast and experienced a decline in shareholder support of at least 10% compared to the preceding vote. In the adopting release, the Commission indicated that it may consider such a momentum requirement after it has an opportunity to evaluate its experience with the revised resubmission thresholds.

### **Commission's Role in 14a-8 / No-Action Process**

In the proposing rule release for the Amendments, the Commission requested comments on the Rule 14a-8 process generally and whether the Commission and Commission staff's role in the process should be changed in order to identify possible areas for improvement. While several commenters responded with criticism of certain aspects of the no-action process for the exclusion of shareholder proposals, the Commission determined not to make any changes with respect to its role in the shareholder proposal process at this time, but it will consider the comments received in connection with any future rulemaking or changes to the no-action process.

### **General**

The Amendments reflect the Commission's continuing undertaking to review and, where appropriate, to revise and modernize its rules to account for changes in technology and practices over time. The Amendments aim to strike an appropriate balance between the interests of the shareholder proponent and the other shareholders of the subject company who bear the costs associated with a shareholder proposal.

Prior to these Amendments, the procedural and substantive requirements of Rule 14a-8 had not been reviewed by the Commission in more than 20 years. The Amendments to Rule 14a-8 stem from feedback received from the Commission's 2018 roundtable on the proxy process and public input and also reflect the

increased engagement between shareholders and companies since that time and the alternative ways shareholders can communicate their preferences to companies, including through social media.

The Amendments will apply to shareholder proposals submitted for an annual or special meeting to be held on or after January 1, 2022, other than the transition rule allowing shareholders who meet the current \$2,000/one-year ownership threshold (but do not satisfy the new ownership requirements) to submit proposals for an annual or special meeting to be held prior to January 1, 2023.

For more information, please contact any member of Baker Donelson's [Corporate Finance and Securities Group](#).