

SEC Adopts Amendments to Modernize Shareholder Proposal Rule

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PRACTICES Corporate, Capital Markets and Securities

On September 23, 2020, the Securities and Exchange Commission (“**SEC**”) announced amendments to its shareholder proposal rule, Exchange Act Rule 14a-8, which governs the process by which shareholders may submit proposals to be included in a company’s proxy materials for consideration at its annual meeting. The full text of the final rule, which will apply to any annual or special meeting to be held after January 1, 2022, may be accessed [here](#). Most notably, the amendments revise and heighten the eligibility requirements for both initial submissions and resubmissions of shareholder proposals.

The amendments were adopted in connection with the SEC’s ongoing initiative to modernize and enhance the efficiency and integrity of the shareholder proposal process for the benefit of all shareholders, including to help ensure that a shareholder proponent has demonstrated a meaningful “economic stake or investment interest” in a company before the shareholder may draw on company resources to include the proposal in the proxy materials and command the attention of all the company’s shareholders.

Eligibility for Initial Submissions of Shareholder Proposals

As currently in effect, Rule 14a-8(b) allows any shareholder to submit a proposal for inclusion in a company’s proxy materials so long as such shareholder has held at least \$2,000 or 1% of a company’s securities for at least one year. Under the new rules, the prior eligibility requirement will be replaced with three alternative ownership requirements. To be eligible to submit a proposal, a shareholder will need to have 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.

The amendments will also prohibit shareholder proponents from aggregating their holdings for purposes of satisfying these ownership thresholds.

In addition to satisfying the ownership requirements outlined above, the amendments will require shareholder proponents to be willing to engage with company management to discuss and seek to resolve the issues underlying their proposal. Specifically, the amendments will require shareholder proponents to provide contact information and a written statement that the proponent is willing to meet with the company to discuss the proposal, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the proposal.

The final rule provides for a transition period that will allow shareholders currently eligible to submit proposals under the \$2,000/one-year ownership threshold to remain eligible for shareholder meetings held prior to January 1, 2023. Shareholders relying upon the transition period must

continuously hold at least \$2,000 of the company's securities from the effective date of the final rule through the date that they submit a proposal to the company, and must provide the company with a written statement of their intent to maintain such holdings through the date of the relevant shareholder meeting.

Eligibility for Resubmission of Shareholder Proposals

Once effective, the amendments will also significantly raise the level of shareholder support a failed shareholder proposal must receive to be eligible for resubmission at future meetings of shareholders of the same company.

Currently, under Rule 14a-8(i)(12), a company may exclude a shareholder proposal that is substantially similar to a proposal previously included in the company's proxy materials if the most recent vote on the matter occurred within the preceding three years and received:

- less than 3% shareholder support if voted on once in the preceding five years;
- less than 6% if voted on twice in the preceding five years; or
- less than 10% if voted on three or more times in the preceding five years.

The amendments will maintain the same framework, while raising the required levels of shareholder support to 5%, 15%, and 25%, respectively. For example, a proposal would need to achieve support by at least 5% of the voting shareholders in its first submission to be eligible for resubmission in the following three years. If resubmitted within three years of its initial submission, the same proposal would need to garner at least 15% support to again be eligible for resubmission in the following three years. Finally, a proposal submitted for a third time in five years would need to achieve at least 25% support to be eligible for resubmission in the following three years.

In raising the level of shareholder support required for resubmission, the SEC stated that "we do not believe that companies and other shareholders should repeatedly bear the costs of proposals that have not demonstrated the potential of obtaining broader or majority support in the near term absent a significant change in circumstance."

Additional Features – Representatives of Shareholders

In addition to revising the eligibility requirements for shareholder proposals, the amendments also update and clarify the role of representatives of shareholder proponents. Under the amendments, a person may only submit one proposal to a company per year. This update will effectively prohibit the common practice in which a shareholder proponent submits a proposal in his or her own name and then submits additional proposals to the same company as a representative of other shareholders.

Under the amended rules, shareholders acting through representatives will be required to provide the company with certain documentation signed and dated by the shareholder which, among other things, identifies the representative, authorizes him or her to act on behalf of the shareholder, and identifies the proposal and shareholder's supporting statement.

Effective Dates of Amendments

The amendments will become effective 60 days following publication in the Federal Register, and the final amendments will apply to any proposal submitted for an annual or special meeting to be

held on or after January 1, 2022. Please note that because the amendments will only become effective after January 1, 2022, the upcoming 2021 proxy season will not be affected by these changes.

For further information, please contact a member of the Haynes Boone [Capital Markets and Securities Practice Group](#) and see these additional resources:

- [SEC Expands Accredited Investor and Qualified Institutional Buyer Definitions](#) (October 9, 2020)
- [SEC Adopts New Round of Amendments to Simplify and Modernize Disclosure Requirements](#) (September 14, 2020)
- [SEC Adopts Rule Amendments for Proxy Advisory Firms](#) (September 1, 2020)
- [SEC Issues Additional Guidance on COVID-19 Disclosure Considerations](#) (July 13, 2020)