

Client Alert

October 2020

SEC Modernizes Rule 14a-8 Governing Shareholder Proposals

On September 23, 2020, the Securities and Exchange Commission (**SEC**) voted to adopt amendments to modernize its shareholder proposal rule, Rule 14a-8 of the Securities Exchange Act of 1934 (**Exchange Act**). Rule 14a-8 of the Exchange Act governs the process for including a shareholder proposal in a company's proxy statement. Among other changes, the amendments (1) replace the ownership threshold for submission with a tiered system; (2) apply the one-proposal rule to an individual, thus restricting an individual from submitting a proposal in his or her own name and submitting a different proposal as a representative of another shareholder for consideration at the same meeting; (3) require certain documentation when a proposal is submitted by a representative on behalf of the shareholder; (4) require a proponent to provide information regarding his or her availability to engage with the company concerning the proposal; and (5) increase the required levels of shareholder support a proposal must receive for resubmission at the same company's future shareholder meetings. These amendments mark the first revisions to the submission threshold in over 20 years, and the first revisions to the resubmission threshold since 1954.

Overview

Under Rule 14a-8, a company must include a shareholder proposal in its proxy statement unless the proponent fails to meet certain eligibility and procedural requirements, or the proposal falls within one of the bases for exclusion specified in Rule 14a-8(i). The SEC Commissioners voted 3-2 to adopt the amendments. In the [press release announcing the adoption of these amendments](#), Chairman Jay Clayton stated that "these amendments ensure there is an appropriate alignment of interests between shareholder-proponents and their fellow shareholders and illustrate again why retrospective review and, as appropriate, modernization of our rules is necessary. There have been many significant changes in communication methods and technology, as well as the methods investors, particularly retail investors, use to access our markets in the 20 years and 75 years since the initial and resubmission thresholds were last revised."

The [SEC's press release also includes a Fact Sheet](#), which highlights the key changes to Rule 14a-8. The amendments will become effective 60 days after publication in the Federal Register. The final amendments will apply to any proposal submitted for an annual or special meeting held on or after January 1, 2022, notwithstanding the transition period described below.

In summary, the new amendments, which were passed by a 3-2 vote:

- impose new share ownership requirements that vary based on the amount of time in which the proponent has owned the company's shares;
- limit representatives from presenting more than one proposal at a meeting;
- require documentation proving that representative is authorized to act for the shareholder;
- require the proponent to provide his or her availability to engage with the company concerning the proposal; and
- raise the resubmission thresholds for proposals previously voted on.

Submission Thresholds–Tiered System

Currently under Rule 14a-8, a shareholder must have continuously held at least \$2,000 in market value or 1% of the company's securities for at least one year in order to be eligible to submit a shareholder proposal for inclusion in the company's proxy statement.

The amendments replace the current ownership threshold with three tiered thresholds based on the amount of time that the proponent has held the company's securities. The amendments will require a shareholder to demonstrate continuous ownership of at least:

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

Additionally, the amendments prohibit the aggregation of holdings for purposes of satisfying the amended ownership thresholds.

Although the final amendments apply to any proposal submitted for an annual or special meeting held on or after January 1, 2022, the amendments provide a transition period with respect to the ownership thresholds. Shareholders that meet certain specified conditions may rely on the \$2,000/one-year ownership threshold for proposals submitted for an annual or special meeting held prior to January 1, 2023.

One Proposal per Individual

Rule 14a-8(c) permits a shareholder to submit only one proposal to a company for a particular shareholders' meeting. Despite this restriction, under the current rule, a representative could submit multiple proposals on behalf of multiple shareholders at the same shareholders' meeting.

The amendments to Rule 14a-8(c) will apply the one-proposal rule to "each person" rather than "each shareholder" who submits a proposal. Accordingly, 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. Likewise, a representative may submit only one proposal for consideration at a single meeting.

Shareholder Representative Documentation

The amendments require that a shareholder electing to use a representative to submit a shareholder proposal provide documentation proving the representative is authorized to act on the shareholder's behalf which will provide a meaningful degree of assurance as to the shareholder's identity, role and interest in the proposal that is submitted for inclusion in a company's proxy statement.

Shareholder Engagement Activity

The amendments require that each shareholder-proponent state that he or she 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, and provide contact information as well as specific business days and times that the shareholder is available to discuss the proposal with the company.

Resubmission Thresholds

Rule 14-a(8)(i) provides 13 substantive bases for a company to exclude a shareholder proposal, even if the shareholder complies with the procedural requirements. Rule 14-a(8)(i)(12) addresses resubmissions of a proposal 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. The current rule

permits a company to exclude a resubmitted proposal from its proxy materials if the most recent vote within the preceding three calendar years was:

- less than 3% of the vote if voted on once;
- less than 6% of the vote if voted on twice; and
- less than 10% of the vote if voted on three or more times.

The amendments raise the levels of shareholder support a proposal must receive to be eligible for resubmission at the same company's future shareholder meetings. Under amended Rule 14a-8(i)(12), a proposal dealing with substantially the same subject matter as a previous proposal within the preceding five calendar years may be excluded if the most recent vote within the preceding three calendar years was:

- less than 5% of the vote if voted on once;
- less than 15% of the vote if voted on twice; and
- less than 25% of the vote if voted on three or more times.

Final Thoughts

Although some of the reporting on the new rules in the popular press has characterized the amendments as a great blow to shareholder democracy, in practice we expect the amendments to impact only a relatively small number of serial proponents who have come to dominate the shareholder proposal process at certain large-cap companies. Few (if any) institutional investors are likely to be impacted by the new eligibility requirements, and institutional investors seldom resubmit proposals that garner minimal support after one shareholder meeting. Dialogue with companies outside the Rule 14a-8 process is entirely unaffected, and true shareholder activists universally rely on means other than Rule 14a-8 to engage with boards and management.

The lengthy transition periods mean that the upcoming 2021 proxy season will be conducted as it has in years past, with the rules having no applicability at all to the submission of shareholder proposals before January 1, 2022. Corporate secretaries should gird themselves for the usual onslaught of shareholder proposals as we approach the end of 2020. The extensive transition period also leaves ample time for Congress or a future SEC to further amend or even override the new rules before they take effect in 2022, all of which will be influenced by the outcome of the upcoming national election. The amendments remain politically unpopular in some quarters, and shortly after their publication the president of the AFL-CIO tweeted, "This will not stand!" We will have greater clarity on political fallout impacting these amendments to Rule 14a-8 after the upcoming election cycle is decided.

Contacts

Steven M. Haas
shaas@HuntonAK.com

Scott H. Kimpel
skimpel@HuntonAK.com

W. Lake Taylor, Jr.
tlake@HuntonAK.com

Lawton B. Way
lway@HuntonAK.com

Mayme Beth F. Donohue
mdonohue@HuntonAK.com

Jessica Kirkland
jkirkland@HuntonAK.com

Shelby Stanton
sstanton@HuntonAK.com

© 2020 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.