Corporate

SEC Revises Thresholds and Processes for Shareholder Proposals under Rule 14a-8

By: Alexander J. May

On September 23, 2020, the Securities and Exchange Commission, or the SEC, adopted rules to significantly modify the shareholder proposal process under Rule 14a-8 of the Exchange Act.[1] The amended rules are intended to reduce the cost and burden borne by public companies in complying with Rule 14a-8 while allowing for shareholders who have a meaningful economic stake in the company to influence the corporate governance and direction of the company. Similar to its other recent amendments to its proxy advisor rules[2] and Regulation S-K,[3] the SEC was informed by changes in technology and how companies interact with shareholders in an age of electronic communication and social media and thoroughly considered the burdens of compliance with Rule 14a-8 in adopting the amendments.

The amended rules are effective 60 days after publication in the Federal Register ***and will apply to any shareholder proposal submitted for a shareholder meeting held on or after January 1, 2022***, except for a transition period with respect to certain of the ownership thresholds discussed below.

Rules at a Glance

Revised Shareholder Ownership Thresholds	Adopted a tiered ownership threshold requiring shareholders to own $2,000 in voting securities for 3 years, $15,000 for 2 years or $25,000 for 1 year to submit proposals.
Revised Representative Process	Submissions made via a representative must contain seven requirements largely in accordance with existing guidance.
Process to Encourage Shareholder Discussions	Shareholders must provide a window of availability for the company to potentially discuss the shareholder proposal with the shareholder. Doesn't require the shareholder and company to meet and discuss the proposal, but encourages the process.
One Proposal Per Company Per Person	Each person (rather than shareholder) may only submit one proposal per company per meeting.
Increased Support Required for Resubmission	Significantly increased the support required by shareholders to re-submit a proposal that gained shareholder support, but not majority support.

Revisions to Shareholder Ownership Thresholds

Current 14a-8 Ownership Thresholds

Under Rule 14a-8, a shareholder that wishes to have a proposal included in a public company's proxy statement must have continuously held at least $2,000 in market value, or 1%, of such company's voting securities for at least one year as of the date the shareholder submits the proposal. These thresholds were longstanding and, in the view of some commenters, were not substantial enough to allow for many shareholders to have the right to offer proposals, particularly given the cost of responding to such proposals by public companies.

Revised 14a-8 Ownership Thresholds

In lieu of the longstanding ownership threshold noted above, the SEC adopted a tiered test, allowing for shareholders who own any tier listed below the ability to submit a shareholder proposal:

1. **"2K for 3"**: $2,000 of the company's securities entitled to vote on the proposal for at least three years.
2. "**15K for 2"**: $15,000 of the company's securities entitled to vote on the proposal for at least two years.
3. **"25K for 1"**: $25,000 of the company's securities entitled to vote on the proposal for at least one year.

In adopting the revised thresholds, the SEC wanted to balance the shareholder's economic stake with the costs imposed by the shareholder proposal process. The SEC reasoned that holding securities, even if the dollar value was modest, for a multiple year period would evidence the type of economic stake and investment intent that separated investors from those holding securities to further their "narrow or personal interests."

It is worth noting that the SEC considered the various methods that shareholders possess to communicate with company management and the board of directors in considering these thresholds. In particular, the SEC specifically cited "email, video conference calls, one-on-one 'sunny day' meetings, shareholder surveys, and e-forums" as avenues for communication[4] independent of the shareholder proposal process. Through these means, even smaller shareholders have the ability to have their voices heard.

Transition Period

To not disenfranchise small shareholders from submitting proposals, the SEC provided an additional transition period for the thresholds. Any shareholder who owns shares at the $2,000 and one year threshold discussed above (*i.e.* under the old rules) will be able to submit proposals for shareholder meetings held prior to January 1, 2023, provided that such shareholder continues to hold $2,000 worth of such shares from the effective date of the rules (60 days after publication in the Federal Register) through the submission date.

Other Threshold Modifications

In addition to the three tiers noted above, the SEC made additional changes in line with the proposed rules.

- **No 1% Rule**: The SEC eliminated the alternative (and little-used) 1% threshold, where any shareholder owning 1% of a public company's voting securities could use the Rule 14a-8 process.
- **No Clubbing or Aggregation**: The SEC also rejected the ability for shareholders not meeting the thresholds above to aggregate their holdings to meet the thresholds. Only shareholders who individually own the requisite threshold may use the Rule 14a-8 process.
- **No Required Lead Filer**: The SEC also clarified that shareholders will be permitted to co-file proposals, but Rule 14a-8 will not require co-filers to identify a lead filer or specify whether the lead filer is authorized to negotiate a withdrawal on behalf of the co-filers.[5]

Process Amendments: Using Representatives to Submit Proposals

Current Representative Process

In accordance with Staff Legal Bulletin 14I,[6] shareholders are allowed to submit "proposals by proxy" or through an authorized representative. This process often provides for a third party possessing more experience with the "dance" of the Rule 14a-8 process to represent such shareholders. To provide safeguards, the SEC's Division of Corporation Finance provided guidance on what documentation was necessary for a representative to issue a shareholder proposal on behalf of another shareholder. But like other Staff Legal Bulletins, this was only guidance and did not have the force of notice and comment rulemakings.

Revised Representative Process

The SEC elected to substantially adopt the current guidance and added requirements for any shareholder proposals submitted by proxy. Revised Rule 14a-8(b)(iv) will require shareholders who use a representative to submit a proposal for inclusion in a company's proxy statement to provide documentation 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 submitting the proposal and the shareholder's designated 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.

Furthermore, under revised Rule 14a-8(b)(v), the SEC clarified that compliance with such procedures will not be necessary if the agent's authority to act is apparent and self-evident such that a reasonable person would understand that the agent has authority to act. The SEC specifically cited, by way of example, a CEO submitting a proposal on behalf of the corporation or an elected or appointed official who is the custodian of state or local trust funds submitting a proposal on behalf of one or more such funds.[7]

Process Amendments: Shareholder Engagement

A criticism of the existing shareholder proposal process is that it does not require the shareholder and the public company to meaningful discuss the proposal, what corporate governance actions are occurring at the company and how best to address the applicable issue other than through paper submissions from party to party. This often means that withdrawal or modification to resolve the proposal without submitting it to stockholders occurs at a slow rate, if at all.

To remedy this issue, the SEC adopted revised Rule 14a-8(b)(iii) requiring any shareholder submitting a proposal to provide the company with a written statement that the shareholder is able to meet with the company in person or via teleconference at specified dates and times that are no less than 10 calendar days, nor more than 30 calendar days, after submission of the proposal.

Shareholders submitting a proposal will also be required to provide their contact information and identify specific business days and times that they are available to discuss the proposal during the regular business hours of the company. If the company doesn't disclose its business hours in its proxy statement, then the shareholder should identify times between 9:00 am and 5:30 pm on business days in the time zone of the company's principal executive offices. If a company is unavailable on the specific date(s) or time(s) originally identified by the shareholder, the discussion may take place at a different

date and/or time, provided that it is acceptable to both the shareholder and company. If the shareholder availability changes, the shareholder or representative should notify the company should be notified and alternative date(s) and time(s) should be provided to the company.

While public companies are not required to disclose the regular business hours of the company pursuant to Reg. S-K or Schedule 14A, the SEC suggested that companies do so near the shareholder proposal deadline disclosure.[8]

It's best to think of this requirement as an invitation to engage, rather than a mandate by the company to talk to the shareholder. There are no penalties for the failure of the company to discuss with the shareholder and there is no requirement to come to a resolution. The SEC reasoned that, due to the cost of shareholder proposals and the no-action letter process, the company would be motivated to speak with the shareholder to potentially gain some level of resolution before the proposal was subject to no-action relief or required to be submitted in the proxy statement.

One Proposal Per Person Rule

The SEC elected to restrict the ability of shareholders or their representatives to submit multiple proposals per shareholder meeting. Under revised Rule 14a-8(c), each ***person*** (rather than shareholder) may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. In addition, a person may not rely on the securities ownership of another person for the purpose of meeting the eligibility requirements in Rule 14a-8 and submitting multiple proposals for a particular shareholders' meeting. Ultimately, this means that the following actions are restricted under Rule 14a-8(c):

- **No Double Dipping**: A person may not both submit their own proposal and then act as a representative in submitting another proposal.
- **No Dual Representation**: The same representative may not represent two different shareholders at the same meeting.
- **Person Includes Affiliates**: Any person under common control with the shareholder or representative would be considered as the "person" for these requirements to the exclusion of other affiliates.

Revised Resubmission Thresholds

Current Rules on Resubmission

To prevent repeat submissions by shareholders, Rule 14a-8(i)(12) provides that a public company may exclude any shareholder proposal under certain circumstances if it has been submitted and voted on in the past. If a shareholder's proposal is substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years; and the most recent vote occurred within the preceding three calendar years, the proposal can be excluded if the most recent vote received:

- Less than 3% of the votes cast if previously voted on once;
- Less than 6% of the votes cast if previously voted on twice; or
- Less than 10% of the votes cast if previously voted on three or more times.

The SEC sought comments on the thresholds, concerned that they did not exclude proposals that would be unable to achieve majority support, but would still "hang around" for resubmission and voting each year and incur needless costs.

Revised Resubmission Thresholds

The SEC adopted increased resubmission thresholds in accordance with the proposed rules, which

significantly increased the thresholds. While the substantive requirements are still the same,[9] instead of 3, 6, and 10 percent, the SEC adopted the following thresholds under revised Rule 14a-8(i)(12):

- 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 or more times.

The SEC reasoned that the previous resubmission thresholds did not relieve companies and their shareholders of the obligation to consider, and spend resources on, matters that had previously been voted on and rejected by a substantial majority of shareholders without sufficient indication that such proposal could gain traction among the broader shareholder base in the near future.[10] In addition, the SEC did not adopt a "momentum" rule that would have allowed companies to exclude proposals that receive more than 25% support but less than majority support if the level of support declined more than 10% from year to year.

Finally, in a win for companies with dual-class share structures, the SEC considered whether to adopt any change to the vote-counting methodologies and rejected adopting revised voting disclosure or disaggregation rules to determine whether a proposal is eligible for resubmission.

---

[1] Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Sept. 23, 2020) *available at* https://www.sec.gov/rules/final/2020/34-89964.pdf (Adopting Release).

[2] See Jenner & Block's Client Alert regarding the proxy advisor rules, *available at* https://jenner.com/library/publications/20206.

[3] See Jenner & Block's Client Alert regarding the Regulation S-K amendments, *available at* https://jenner.com/library/publications/20287.

[4] Adopting Release at 28.

[5] However, the SEC did indicate 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." Adopting Proposal at 34.

[6] Securities and Exchange Commission, Division of Corporation Finance, Staff Legal Bulletin 14I, Paragraph D (Nov. 1, 2017) *available at* https://www.sec.gov/interps/legal/cfslb14i.htm.

[7] Adopting Release at 42.

[8] Adopting Release at 50, n. 154.

[9] The shareholder's proposal must still be substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years; and the most recent vote must have occurred within the preceding three calendar years.

[10] Adopting Release at 66.

Contact Us

Alexander J. May
amay@jenner.com | Download V-Card

Meet Our Team

Practice Leaders

Kevin T. Collins
Co-chair, Corporate
kcollins@jenner.com
Download V-Card

Carissa Coze
Co-chair, Corporate
ccoze@jenner.com
Download V-Card

Joseph P. Gromacki
Chair, Transactional Department and Corporate Practice
jgromacki@jenner.com
Download V-Card

Thomas A. Monson
Co-chair, Corporate
tmonson@jenner.com
Download V-Card