

SEC Modifies Shareholder Proposal Requirements

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On September 23, 2020, the [SEC modified Rule 14a-8 in Regulation S-K](#) related to shareholder proposals. The modifications include the following:

Ownership Requirement for Submission

Under the modified rules, one of three alternative tests must be satisfied by the proponent: (i) \$25,000 of the company's securities entitled to vote on the proposal must have been continuously held for at least one year; (ii) \$15,000 of the company's securities entitled to vote on the proposal must have been continuously held for at least two years; or (iii) \$2,000 of the company's securities entitled to vote on the proposal must have been continuously held for at least three years. The amendments provide for a transition period that will allow proponents to rely on the \$2,000/one year requirement currently in effect for proposals submitted for shareholder meetings to be held before January 1, 2023.

In another limitation on the use of Rule 14a-8, the SEC now prohibits shareholders from aggregating their shares in order to meet the minimum ownership requirement.

Resubmission Thresholds

The amendments increase the level of shareholder support of a proposal to be eligible for resubmission in the future. A proposal on substantially the same subject matter previously included in the company's proxy materials within the preceding five years may now be excluded if the most recent vote was within the preceding three years and was (i) less than 5% of the votes cast if previously voted on once; (ii) less than 15% of the votes cast if previously voted on twice; and (iii) less than 25% of the votes cast if previously voted on three or more times. The proposed "momentum" provision that would permit exclusion of certain resubmitted proposals with declining shareholder support was not adopted.

One Proposal Limit

The amendments provide that each "person" may "submit" only one proposal, directly or indirectly, to a company for a particular meeting. Under this rule, a shareholder-proponent is not permitted to submit a proposal in its own name and simultaneously serves as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting. Similarly, a representative will not be permitted to submit more than one proposal for consideration at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders. The ability of lawyers, investment advisers or others to help draft proposals and navigate the proposal process to more than one shareholder is not affected.

Shareholder-proponents must appear at the meeting and “present” their proposal. However, a shareholder-proponent may satisfy this requirement by employing a qualified representative. The amendment is not intended to limit a representative’s ability to present (not submit) proposals on behalf of multiple shareholders at the same meeting. Entities and all persons under their control, including employees, will be treated as a “person” for purposes of the amendment. When multiple shareholders co-file a proposal, the company is deemed to have received only one proposal.

Representative Documentation

The amendments require a shareholder that uses a representative to submit its proposal to provide certain documentation that demonstrates the shareholder’s identity, role and interest in the proposal along with a statement authorizing the representative to submit the proposal and act on the shareholder’s behalf. If the shareholder-proponent is an entity and a reasonable person would understand that the agent has the authority to act on behalf of the entity, then this documentation will not be required.

Proponent’s Availability with the Company

The amendments require that each shareholder state when it is available to meet with the company in the 10-30 calendar days after submission of the proposal, and provide certain contact and availability details of the shareholder (not the representative), although a representative may participate in the discussion. Co-filers must agree on the same dates/times of availability or may identify a single lead filer and its availability to engage with the company on behalf of all co-filers.

Effectiveness

The amendments will be effective 60 days after publication in the Federal Register, which is applicable only for the ownership transition described above. Otherwise, the amendments will apply to proposals submitted for meetings held on or after January 1, 2022 (the 2022 proxy season, not the upcoming 2021 proxy season).

For questions regarding the amendments to shareholder proposals, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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