

SEC Adopts Amendments Intended to Modernize Shareholder Proposal Process

I. Overview

On September 23, 2020, the Securities and Exchange Commission (the “SEC”) voted to adopt amendments (the “Final Amendments”)¹ to Rule 14a-8 under the Securities Exchange Act of 1934, as amended, in a three-to-two vote. Under Rule 14a-8, a company must include a shareholder proposal in its proxy statement provided the proposal meets various substantive and procedural criteria. The Final Amendments largely mirror the amendments as proposed on November 5, 2019 (the “Proposed Amendments”)² and were adopted “to modernize and enhance the efficiency and integrity of the shareholder-proposal process for the benefit of all shareholders.”

II. Final Amendments

The Proposed Amendments were adopted substantially as proposed, except for the changes described below.

A. Ownership Requirements

Currently under Rule 14a-8(b), to be eligible to submit a proposal, a shareholder-proponent must have continuously held at least (i) \$2,000 in market value or (ii) one percent of the company’s securities entitled to vote on the proposal, in either case for at least one year by the date the proposal is submitted.³ The Final Amendments amend Rule 14a-8 so that a shareholder may only submit a proposal if the shareholder continually has held at least:

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

B. Documentation Requirements

1. Proposals Submitted by Representatives

Although a common practice, Rule 14a-8 currently does not address a shareholder’s ability to submit a proposal for inclusion in a company’s proxy materials through a representative. The Proposed Amendments on this topic were adopted substantially as proposed, except for a modification providing that a shareholder-proponent must establish the proposal’s specific “topic,” rather than the proposal’s specific “language” (see below). The Final

¹ For the full text of the Final Amendments and related SEC release, see Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-89964; File No. S7-23-19, available at <https://www.sec.gov/rules/final/2020/34-89964.pdf> (September 23, 2020) [hereinafter, the “Adopting Release”]. Unless otherwise specified, all quoted statements in this memorandum are taken from the Adopting Release.

² For the full text of the Proposed Amendments and related SEC release, see Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458; File No. S7-23-19, available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf> (November 5, 2019). Our memorandum summarizing the Proposed Amendments is available here: <https://www.cahill.com/publications/firm-memoranda/2019-11-19-sec-proposes-to-modernize-the-shareholder-proposal-process>.

³ 17 CFR 24.14a-8(b)(1).

Amendments amend Rule 14a-8 to mandate that a representative who submits a proposal on behalf of shareholders must provide documentation that:

- identifies the company to which the proposal is directed;
- identifies the 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 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.

The SEC also clarified in the Adopting Release that, if a shareholder-proponent is an entity that can act only through an agent, compliance with the Final Amendments regarding representatives will not be necessary if the agent's authority to act is self-evident "such that a reasonable person would understand that the agent has authority to act."

2. Proposals Submitted by Shareholders

Similarly, the SEC adopted its Proposed Amendments regarding proposals submitted by individual shareholders substantially as proposed. The amended Rule 14a-8 requires all shareholder-proponents to provide the company with a written statement of their availability to meet with the company no less than 10 days, nor more than 30 days, following the proposal's submission. With respect to the written statement, a shareholder must specify particular dates and times of availability, and the contact information and availability must be that of the shareholder, not the shareholder's representative, although the representative may participate in any discussions between the company and the shareholder.

C. One Proposal Limit

Rule 14a-8(c), which previously provided that "each shareholder" may submit no more than one proposal to a company for a particular shareholders' meeting, is amended by replacing the "each shareholder" standard with an "each person" standard. Effectively, a shareholder-proponent will not be able to submit a proposal in his or her own name and also serve as a representative for a different proposal on another shareholder's behalf for the same meeting. Similarly, a representative will not be able to submit more than one proposal for the same meeting, even if the proposals are on behalf of different shareholders. The SEC also clarified that "entities and all persons under their control, including employees," will be considered a "person" for this purpose.

D. Resubmission Thresholds

Rule 14a-8(i)(12) currently allows companies to exclude a shareholder proposal that deals with substantially the same subject matter as another proposal previously included in the company's proxy materials within the preceding five years, if the matter was voted on at least once in the last three years and did not receive at least:

- three percent of the vote if previously voted on once;
- six percent of the vote if previously voted on twice; or

- 10% of the vote if previously voted on three or more times.⁴

The amended Rule 14a-8(i)(12) changes the thresholds of votes received in any of the prior three calendar years to:

- less than five percent 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.

Notably, the SEC did not adopt the Proposed Amendment that would have allowed a company to exclude shareholder proposals that would not otherwise be excludable under the new 25% threshold if, among other things, support declined by 10% or more compared to the immediately preceding shareholder vote on the matter. The SEC rejected the proposal in part because it could lead to an incongruous result whereby a proposal that receives a higher overall level of shareholder support could be excluded if it undergoes a 10% or more decline in support, but a proposal that receives a lower overall level of shareholder support that does not undergo a 10% decline could not be excluded.

III. Conclusion

Although the Final Amendments were adopted by a three-vote majority, Commissioners Allison Herren Lee and Caroline Crenshaw dissented. Commissioner Lee stated in her dissent that the amendments “collectively put a thumb on the scale for management in the balance of power between companies and their owners” and “will restrict shareholders’ ability to oversee and engage with management of the companies they own,”⁵ while Commissioner Crenshaw stated in her dissent that “there are benefits, and not just costs, to giving corporate boards the opportunity to engage with shareholders” and that the amendments will “rais[e] the bar for retail shareholder proposals to save corporate costs that the Commission’s own analysis acknowledges are minimal.”⁶

The Final Amendments will become effective 60 days following their publication in the Federal Register and will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022, except that a shareholder who (i) has held continuously for at least one year \$2,000 or more of a company’s securities entitled to vote on the proposal, and (ii) continuously maintains at least \$2,000 of such securities through the date he or she submits a proposal, will be eligible to submit a proposal to such company without satisfying the amended share ownership thresholds for annual or special meetings held prior to January 1, 2023.

* * *

⁴ 17 CFR 240.14a-8(i)(12).

⁵ For the full text of Commissioner Allison Herren Lee’s Public Statement, see Securities and Exchange Commission, Statement on the Amendments to Rule 14a-8, available at <https://www.sec.gov/news/public-statement/lee-14a8-2020-09-23> (September 23, 2020).

⁶ For the full text of Commissioner Caroline Crenshaw’s Public Statement, see Securities and Exchange Commission, Statement on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, available at <https://www.sec.gov/news/public-statement/crenshaw-14a8-2020-09-23-0> (September 23, 2020).

CAHILL

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; or Joseph E. Cho at 212.701.3589 or jcho@cahill.com; or Taylor Jansen at 212.701.3291 or tjansen@cahill.com; or email publications@cahill.com.

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.