

SEC Adopts Amendments to Modernize Shareholder Proposal Rule

The Securities and Exchange Commission on September 23, 2020, adopted [final amendments](#) to Rule 14a-8, which governs the process for shareholder proposals submitted for inclusion in a company's proxy statement. The amendments will increase the eligibility requirements for submitting and resubmitting shareholder proposals. Specifically, the amendments:

- Replace the current ownership requirements with a tiered approach based on the amount of securities owned and length of time held
- Require specified documentation when a proposal is submitted by a representative on behalf of a shareholder proponent
- Require shareholder proponents to identify specific dates and times they can be available to engage with the company to discuss the proposal
- Amend the "one-proposal" rule to provide that no person acting as a representative may submit more than one proposal for the same shareholder meeting
- Raise the threshold levels of shareholder support a proposal must receive to be eligible for resubmission at future shareholder meetings

In adopting these increased eligibility requirements for a shareholder proposal to be included in the company's proxy statement, the SEC noted that shareholders' ability to communicate with the company and other shareholders has evolved significantly since the current thresholds were adopted. The final amendments reflect not only the comments received by the SEC on the amendments as [proposed](#) in November 2019, but engagement with companies and investors on this topic over several years.

Implementation Dates

The amendments will be effective 60 days after publication in the Federal Register (the effective date) and will first apply to any shareholder proposal submitted for an annual or special meeting held on or after January 1, 2022. This timing means that the amended rules will not be relevant for proposals submitted for the 2021 proxy season. In addition, shareholders that meet the prior rule's eligibility requirements as of the effective date and certain other requirements may continue to rely on the prior rule's ownership threshold during a temporary transition period for any meeting held before January 1, 2023.

Tiered Ownership Requirements for Submission

Prior to the amendments, to be eligible to have a proposal included in a company's proxy statement, a shareholder proponent was required to have held at least \$2,000 of a company's securities continuously for at least one year. The amendments eliminated an alternative 1% threshold (which was rarely relevant) and adopted a tiered approach based on a combination of the amount of securities a shareholder proponent holds and the length of time the securities have been held.

Under the amended rules, shareholder proponents must satisfy one of three alternative tests:

- Continuous ownership of at least \$2,000 of the company's securities for at least three years
- Continuous ownership of at least \$15,000 of the company's securities for at least two years
- Continuous ownership of at least \$25,000 of the company's securities for at least one year

Transition Period. Under a temporary phase-in period, a shareholder that has continuously held at least \$2,000 of a company's securities for at least one year as of the effective date, and continuously maintains at least \$2,000 of such securities through the date it submits a proposal, will be eligible to submit a proposal without satisfying the new ownership thresholds for an annual or special meeting to be held prior to January 1, 2023.

Aggregation No Longer Permitted. Historically, the SEC permitted shareholders to aggregate their holdings for purposes of meeting the ownership requirements. Under the amendments, shareholders will continue to be permitted to co-file proposals as a group, but each shareholder must now satisfy one of the three ownership thresholds. The SEC did not adopt a proposed rule that would have required each co-filer to identify a lead filer or specify whether the lead filer is authorized to negotiate with the company and withdraw the proposal on behalf of the co-filers, but notes that it continues to be a best practice to do so.

Documentation Required When a Proposal Is Submitted by a Representative

If a shareholder chooses to use a representative to submit a proposal on its behalf, the shareholder is required to provide the company with documentation signed and dated by the shareholder, 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 representative
- Identifies the specific topic of the proposal (rather than the specific language of the proposal)
- Includes the shareholder's statement authorizing the representative to submit the proposal and otherwise act on the shareholder's behalf
- Includes the shareholder's statement supporting the proposal

Pursuant to prior SEC guidance in [Staff Legal Bulletin 14I](#), much of this information is already required to be provided. The last two items are new requirements.

Where the shareholder is an entity and therefore can act only through an agent, documentation is not required if the authority of the agent acting on behalf of the entity is apparent and self-evident such that a reasonable person would understand that the agent has authority. The adopting release provides examples, such as a CEO submitting a proposal on behalf of the corporation. Compliance would be required where the agency relationship is not apparent and self-evident, such as an investment adviser submitting a proposal on behalf of a client that is a shareholder.

Information Regarding the Shareholder's Availability for Engagement with the Company

The amendments require shareholder proponents to provide the company with a written statement that the shareholder is available to meet with the company in person or by teleconference no less than 10 and no more than 30 days after submission of the shareholder proposal. The shareholder must provide contact information and dates and times within reasonable business hours (based on the location of the company's principal executive offices) when the shareholder is available to meet.

Where a representative is used, the contact information and availability must be that of the shareholder and not the representative, although the representative may participate in the discussions. All co-filers must either agree to the same dates and times of availability or identify a single lead filer who will provide dates and times of the lead filer's availability to engage on behalf of all co-filers. Companies are not required to engage with a shareholder proponent or to state that they attempted to engage prior to submitting a no-action request.

Broadened One-Proposal Limit

The amendments broaden the current one-proposal rule, which prohibits a "shareholder" from submitting more than one proposal to a company for a particular meeting. The amendments broaden the rule to apply the one proposal limit to each "person," which prevents one person from acting as a representative on behalf of different shareholders.

Under the amendments, a person is not able to submit one proposal as a shareholder and a different proposal for the same meeting as a representative of another shareholder, or to act as a representative for different proposals for the same meeting. For purposes of the amendments, an entity and its employees will all be treated as one "person." The amendment will not prohibit a representative from representing multiple co-filers in connection with a single proposal, from providing assistance or advice to multiple shareholders, or from appearing and presenting proposals on behalf of multiple shareholders at the same meeting.

Increased Thresholds for Resubmitting Shareholder Proposals

Shareholder proposals may be excluded if they address substantially the same subject matter as a proposal or proposals previously included in the company's proxy materials within the past five years if (1) the most recent vote occurred within the preceding three years and (2) the resulting vote in favor of the proposal was below specified thresholds. The amendments increase these resubmission thresholds as shown below:

Times the Proposal Was Voted on in the Last Five Years: Prior Rule Amended Rule

Once	3%	5%
Twice	6%	15%
Three or more times	10%	25%

The adopting release directs that when calculating the voting results for purposes of applying this rule, only votes for and against a proposal should be included in the calculation. Abstentions and broker non-votes should not be included. Also, voting results should not be rounded up for purposes of determining whether the resubmission thresholds have been met.

Steps to Prepare for the 2022 Proxy Season

Companies reviewing shareholder proposals submitted for meetings held on or after January 1, 2022, should revise procedural compliance checklists to reflect:

- Increased ownership thresholds, and eligibility for the phase-in period
- The required documentation for representatives
- The broadened one-proposal rule
- The required information regarding availability for engagement
- Increased thresholds for resubmission eligibility

In view of the new requirement that shareholder proponents notify the company of their availability for engagement no less than 10 days and no more than 30 days after submission of the proposal, companies should consider whether the timing for engaging with shareholder proponents will be accelerated, and how that engagement aligns with other procedural deadlines involving internal processes and/or board engagement: the continued requirements for notifying proponents of procedural deficiencies within 14 days of receipt of the proposal and for submitting no-action requests to the SEC no later than 80 days before the filing of the definitive proxy statement.

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