

SEC Amends and Updates Shareholder Proposal Submission Requirements Under Rule 14a-8

October 7, 2020

On September 23, 2020, the Securities and Exchange Commission (“SEC”) adopted final rule amendments intended to modernize the shareholder proposal submission requirements under Securities Exchange Act Rule 14a-8. The rule amendments are part of the SEC’s focus on improving the proxy process generally and updating aspects of Rule 14a-8 that have not been amended since 1998 (in regard to the initial proposal submission thresholds) and 1954 (in regard to proposal resubmission support thresholds). The rule amendments are largely consistent with those proposed by the SEC on November 5, 2019 and outlined in Debevoise’s [summary insight](#) on November 12, 2019. Highlighted below are the key changes to Rule 14a-8. The full text of the rule amendments is available [here](#).

KEY CHANGES

Increased Ownership Requirements for Proposal Submission

Rule 14a-8(b) currently permits a shareholder to submit a proposal for inclusion in a company’s proxy statement if the shareholder had continuously held either \$2,000 worth or 1% of a company’s shares for at least one calendar year as of the date the shareholder submits the proposal. The rule amendments eliminate the one-percent test and now require a shareholder to satisfy one of the following ownership thresholds in order to be eligible to submit a proposal for inclusion in a company’s proxy statement:

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

The rule amendments also prohibit shareholders from aggregating their securities with other shareholders to meet the submission threshold requirements (a practice previously permitted by the SEC). As such, each shareholder must individually satisfy one of the ownership thresholds above in order to submit or co-file a proposal. With regard to co-filed proposals, the SEC did decline to adopt rules requiring a co-filer to

identify a lead filer or specify whether the lead filer is authorized to negotiate a withdrawal on behalf of the co-filers.

Updated Proposal Resubmission Thresholds

Rule 14a-8(i)(12) has been amended such that a shareholder proposal may be excluded from a company's proxy statement if it addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

- Less than 5% of the vote on its first submission (increased from 3% under the previous rule);
- Less than 15% of the vote on its second submission (increased from 6% under the previous rule); or
- Less than 25% of the vote on its third or subsequent submission (increased from 10% under the previous rule).

As noted in the SEC adopting release, these new thresholds are intended to better distinguish between proposals that have a realistic prospect of obtaining broader or majority support in the near term and those that do not.

Proposals Submitted on Behalf of Shareholders

The rule amendments add a new eligibility requirement to Rule 14a-8(b) that requires shareholders that use a representative to submit a proposal 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 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.

If the shareholder-proponent is an entity (and thus can only act through an agent), compliance with this amendment is not 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.

Shareholder Engagement Requirement

Rule 14a-8(b), as amended, requires a written statement from each shareholder-proponent that the shareholder-proponent is able to meet with the company in person or *via* teleconference between 10 and 30 calendar days after submission of the shareholder proposal. The amended rule does not allow the shareholder to provide availability sooner than the ten days following submission to ensure that the company has sufficient time to review the proposal. Shareholder-proponents must also provide their contact information and identify specific business days and times during the regular business hours of the company's principal executive offices that the proponent is available to discuss the proposal with the company. If a company is not available to engage with the shareholder-proponent on the specified dates and times, the meeting may take place at a different date or time that it is acceptable to both the shareholder-proponent and company. A shareholder proponent's representative also may participate in any discussions between the company and the shareholder.

One-Proposal Limit

Rule 14a-8(c), as amended, limits the number of submissions for a particular shareholders' meeting to one proposal for "each person" as opposed to "each shareholder." This amendment is intended to prevent shareholder-proponents from submitting more than one proposal at a meeting by submitting a proposal both in their name and also as a representative of (or otherwise on behalf of) another shareholder.

Momentum Requirement

The SEC chose not to adopt the proposed amendment to Exchange Act Rule 14a-8(i)(12), that would have allowed companies to exclude proposals dealing with substantially the same subject matter as proposals previously voted on three or more times in the past five calendar years that would not otherwise be excludable under the 25% threshold (noted above) if: (i) the most recently voted on proposal received less than a majority of the votes cast and (ii) support declined by 10 percent or more compared to the immediately preceding shareholder vote on the matter.

TIMING AND TRANSITION

The rule amendments will become effective 60 days after publication in the Federal Register and will apply to any shareholder proposals submitted for an annual or special meeting held on or after January 1, 2022. However and subject to certain verification requirements, a shareholder that has continuously held at least \$2,000 of a company's securities entitled to vote on the proposal for at least one year as of the effective date of the rule amendments, and continuously maintains at least \$2,000 of such securities from such date through the date he or she submits a proposal, will be eligible to submit a proposal to such company.

* * *

Please do not hesitate to contact us with any questions.

NEW YORK

Matthew E. Kaplan
mekaplan@debevoise.com



Paul M. Rodel
pmrodel@debevoise.com



Joshua M. Samit
jmsamit@debevoise.com



Aleena B. Aspervil
abaspervil@debevoise.com



Erica C. Reich
ecreich@debevoise.com