

## Insights

# DIVIDED SEC INCREASES RULE 14A-8 SHAREHOLDER PROPOSAL REQUIREMENTS

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On September 23, 2020, a divided SEC adopted amendments to the Rule 14a-8 shareholder proposal rule by a 3-2 vote. The changes, among other things:

- increased the stock ownership requirement for eligibility to submit a proposal,
- strengthened certain procedural requirements, and
- raised the thresholds to resubmit a proposal that was previously voted on by shareholders.

The SEC did not adopt a controversial “momentum” requirement that had been originally proposed.

The two dissenting Commissioners ([Lee](#) and [Crenshaw](#)) objected strongly to the amendments, expressing concern that the changes would disenfranchise small, retail shareholders and interfere with important ESG initiatives that have become the main topics for proposals. Commissioner Lee viewed the proposal as “the capstone in a series of policies that will dial back shareholder oversight at the companies they own,” despite strong opposition of shareholders. Some investor groups, including the [Council of Institutional Investors](#), expressed disappointment in the amendments and agreed with the concerns expressed by the two dissenting Commissioners.

By contrast, one of the majority ([Commissioner Roisman](#)) stated:

“The thresholds in Rule 14a-8 were always intended to strike a balance. On the one hand the rule offers a powerful tool for a shareholder to bring attention to his or her particular proposal. But, on the other hand, each proposal comes at a cost, since other shareholders bear the expense associated with including a proposal in a company’s proxy statement and they must devote time and attention to considering each proposal. The amendments . . . aim to strike a better balance by ensuring that a shareholder who submits a proposal to a public company has interests that are more likely to be aligned with the other shareholders who bear the expense.”

The amendments will be effective 60 days after publication in the Federal Register, and the final amendments will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022. The final rules also provide for a transition period with respect to the

ownership thresholds that will allow shareholders meeting specified conditions to rely on the \$2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023.

## Higher Ownership Threshold

The amendments replace the current ownership threshold (at least \$2,000 or 1% of a company's securities for at least one year) with three alternative thresholds that will require a shareholder to demonstrate continuous ownership of at least:

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

The SEC majority believe the changes better calibrate the threshold so that the proponent has a meaningful economic stake, thereby making it more likely proposals would reflect general and not personal interests. In their view, the combination of the amount of stock owned and length of time owned is "a more meaningful indicator that a shareholder has a sufficient interest that warrants use of the company's proxy statement." They also noted the ability of ineligible shareholders to engage with management and other shareholders through other means, such as emails, conferences calls or other forums.

*Aggregation Prohibited.* The amendments prohibit the aggregation of holdings of multiple shareholders for purposes of satisfying the amended ownership thresholds. The SEC majority believe aggregation undermines the goal of ensuring proponents have a sufficient economic stake in the company.

*No Lead Filer Requirement.* The SEC considered but declined to require designation of a lead filer by co-filers as unnecessary, observing that co-filers tend to do so voluntarily.

## Heightened Procedural Requirements

*Proposals Submitted on behalf of Shareholders.* The amendments require that a shareholder who elects to use a representative to submit a shareholder proposal provide documentation to make clear that the representative is authorized to act on the shareholder's behalf and to provide a meaningful degree of assurance as to the shareholder's identity, role and interest in a proposal that is submitted for inclusion in a company's proxy statement. The amendments require that the documentation provided, among other things:

- 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.

*Promoting Shareholder Engagement.* The amendments require that each shareholder state that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the proposal. The shareholder must also provide contact information as well as specific business days and times that he or she is available to discuss the proposal with the company. The times should be during regular business hours of the company's principal executive offices; the SEC notes companies may choose to disclose such hours in proxy statements, for example, alongside the deadline for submitting proposals.

The SEC believes that "having shareholder-proponents state their availability to discuss their proposal will facilitate dialogue between shareholders and companies in the shareholder-proposal process, and may lead to more efficient and less costly resolution of these matters."

*One Proposal Limit Broadened.* The amendments extend the one-proposal rule to "each person", not just "each shareholder" who submits a proposal. The amendments also provide that a person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting. Further, a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve 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 to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders.

The SEC explained the one-proposal limit is appropriate, with the amendments intended to extend it to representatives, as they can raise the same concerns about "the expense and obscuring effect of including multiples proposals" in proxy materials.

The adopting release states that the amendment is not intended to limit a representative's ability to present proposals on behalf of multiple shareholders at the same shareholders' meeting, noting that "[t]he conduct of shareholder meetings, including how proposals are presented, is generally governed by state law, and does not raise the same concerns that are raised by a proponent's use of a company's proxy statement under the federal proxy rules."

## **Resubmission Thresholds Increased**

The amendments increase the levels of shareholder support a proposal must receive to be eligible for resubmission at the same company's future shareholder meetings from 3%, 6% and 10% for

matters previously voted on once, twice or three or more times in the last five years, respectively, with thresholds of 5%, 15% and 25%, respectively. For example, a proposal would need to achieve support by at least 5% of the voting shareholders in its first submission in order to be eligible for resubmission in the following three years. Proposals submitted two and three times in the prior five years would need to achieve 15% and 25% support, respectively, in order to be eligible for resubmission in the following three years.

The existing test for applying the resubmission thresholds to a proposal – that it addresses substantially the same subject matter as a previous proposal – remains unchanged.

The SEC majority believe that the existing thresholds, which have been in effect since 1954, are not “functioning effectively to 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 a proposal could gain traction among the broader shareholder base in the near future.”

According to [Chairman Clayton](#):

“Under today’s amendments, generally speaking, a proponent submitting a proposal for the first time will only need to garner the support of 1 out of 20 of the votes cast by fellow shareholders in order to avoid taking a time out before submitting again. If a proposal has been submitted three or more times, the amendments to the resubmission thresholds will do nothing to prevent the proposal from being submitted again as long as the most recent submission received the support of at least 1 out of every 4 votes cast. If that doesn’t happen – that is, if 3 or more out of every 4 votes cast votes against the proposal, the proposal can still be submitted again, but just after a brief time out. Considering the aggregate time and attention required of non-proponent shareholders to review, consider and vote on each proposal, these modest amendments to the resubmission thresholds make common sense.”

## **Proposed Momentum Requirement Dropped**

The SEC considered but decided not to adopt a proposal to allow companies to exclude proposals previously voted on three or more times in the past five years that would not otherwise be excludable under the 25% threshold if (i) the most recently voted on proposal received less than a majority of the votes cast and (ii) support declined by 10% or more compared to the immediately preceding shareholder vote.

The SEC concluded that the rule could lead to anomalous results; for example, a proposal that gets higher overall support (e.g., 44%) compared to another proposal may be excluded if it experiences a decline in support of 10% or more, whereas a proposal receiving lower support (e.g., 27%) that does not experience a decline in support of 10% or more would not be excludable. The SEC also believed that the rule could render the resubmission basis for exclusion unnecessarily complex.

For further information on this topic, please contact [Randy Wang](#) or any other BCLP Securities and Corporate Governance lawyer. Additional resources are available on our website for the [BCLP Securities and Corporate Governance Practice](#).

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