O'Melveny

Alerts & Publications

SEC Proposes Changes to Procedural Requirements and Resubmission Thresholds Under Rule 14a-8

November 15, 2019

KEY CONTACTS

Shelly Heyduk
Newport Beach
D: +1-949-823-7968

John-Paul Motley
Los Angeles
D: +1-213-430-6100

Robert Plesnarski
Washington, DC
D: +1-202-383-5149

Su Lian Lu
Century City
D: +1-310-246-6746

Sarah J. Levesque
Newport Beach
D: +1-949-823-7924

On November 5, 2019, the Securities and Exchange Commission proposed amendments to Exchange Act Rule 14a-8 governing the process for shareholder proposals to be included in a company's proxy statement. These amendments address eligibility and procedural requirements for the submission of shareholder proposals and requirements relating to the resubmission of shareholder proposals. In its press release announcing the proposed amendments, the SEC noted that the amendments are intended to "facilitate and encourage meaningful company-shareholder engagement, and make changes that can help prevent misuse of the process."

The proposed amendments follow a November 15, 2018 SEC roundtable on the proxy process during which panelists expressed their views on the application of Rule 14a-8 and the impact of the current rule on companies and shareholder-proponents as well as a related written comment process that commenced in July 2018.

The proposed amendments to Exchange Act Rule 14a-8 are summarized below:

Eligibility Requirements

Ownership Thresholds and Holding Periods

Rule 14a-8(b) sets forth the level of share ownership necessary for a shareholder to be eligible to submit a proposal to a company for inclusion in the company's proxy materials. Currently, a shareholder-proponent is eligible to submit a proposal if it has continuously held at least $2,000 in market value or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the proposal is submitted. These ownership thresholds were last substantively reviewed and updated in 1998.

The SEC is proposing to enhance these ownership requirements by establishing tiered ownership requirements that take into account both the amount of securities owned and the length of time they have been held. Under the SEC's proposed amendments to Rule 14a-8(b), a shareholder would be eligible to submit a Rule 14a-8 proposal for inclusion in a company's proxy materials if the shareholder satisfies at least one of the following three ownership requirements by continuously holding 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.

The SEC has also proposed to eliminate the current 1% ownership threshold alternative, noting that it has not been utilized historically. In addition, the proposed amendments would not allow shareholders to aggregate their securities with other shareholders to meet the applicable minimum ownership thresholds.

In proposing the revised ownership thresholds and holding periods, the SEC noted that the aim was to "strike an appropriate balance such that a shareholder has some meaningful 'economic stake or investment interest' in a company before the shareholder may draw upon company resources to require the inclusion of a proposal in the company's proxy statement, and before the shareholder may use the company's proxy statement to command the attention of other shareholders to consider and vote upon the proposal."

Co-Filed and Co-Sponsored Proposals

In its proposing release, the SEC noted that shareholders would continue to be permitted to co-file or co-sponsor shareholder proposals as a group so long as each shareholder-proponent in the group met one of the three proposed continuous ownership requirements. The SEC also made clear in the proposing release that it believes best practice is for shareholder-proponents co-filing a proposal to clearly state in their submittal letter to the company that they are co-filing the proposal, to identify the lead filer and to specify whether the lead filer is authorized to negotiate with the company and withdraw the proposal on the co-filer's behalf. The SEC is seeking comment on whether it should revise the rules to explicitly require that co-filers identify a lead filer.

Required Documentation When Submitting a Proposal

Currently, Rule 14a-8 does not address a shareholder's ability to submit a proposal for inclusion in a company's proxy materials through a representative. Although this practice is governed by state agency law, the SEC recognizes that concerns are often raised about whether the shareholder-proponent has a genuine interest in the proposal and whether documentation provided to the company is sufficient to establish an agency relationship between the shareholder-proponent and representative. To address these concerns, the SEC is proposing that Rule 14a-8 be amended to require that shareholders using a representative 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-proponent and the designated representative;

- includes the shareholder's statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder's behalf;
- identifies the specific proposal to be submitted;
- includes the shareholder's statement supporting the proposal; and
- is signed and dated by the shareholder.

In the proposing release, the SEC noted that it believes the proposed amendments "would help safeguard the integrity of the shareholder-proposal process … and provid[e] a meaningful degree of assurance as to the shareholder-proponent's identity, role, and interest in a proposal that is submitted for inclusion in a company's proxy statement."

Required Meeting Between Shareholder-Proponent and Company

In the proposing release, the SEC acknowledged that there are many forms of engagement between companies and their shareholders outside of the Rule 14a-8 process, and the SEC encourages such engagement before and after the submission of a shareholder proposal. In order to encourage greater dialogue between shareholders and companies during the Rule 14a-8 process, the SEC is proposing to amend Rule 14a-8(b) to require a statement from each shareholder-proponent that s/he is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after the submission of a shareholder proposal. The shareholder would also be required to provide contact information and the business days and specific times that s/he is available to discuss the proposal with the company. While not expressly requiring engagement between the shareholder-proponent and the company, the SEC's proposed amendments are intended to facilitate engagement that can potentially lead to "a more mutually satisfactory and less burdensome resolution of the matter."

Limit on Number of Proposals Submitted for Same Shareholders' Meeting

Rule 14a-8(c), which was adopted in 1976, currently provides that "each shareholder" may submit no more than one proposal to a company for a particular shareholders' meeting. The SEC continues to believe that the one-proposal limit is appropriate and that permitting shareholder-proponent representatives to submit multiple proposals for the same shareholders' meeting undermines the purpose of this limit. Accordingly, the SEC is proposing to amend Rule 14a-8(c) to apply the one-proposal limit to "each person" rather than to "each shareholder" who submits a proposal. The proposed revision to Rule 14a-8(c) would also add that "a person may not rely on the security holdings of another person for purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting." In other words, if the proposed amendments are approved, a shareholder-proponent could not submit one proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting, nor could a representative submit more than one proposal to be considered at the same meeting on behalf of different shareholders.

The SEC is also expressly seeking comment on whether the proposed amendment applying the one-proposal limitation to shareholder-proponent representatives would have unintended consequences on the use of representatives to submit proposals and whether the SEC should entirely eliminate the practice of allowing natural-person shareholders to use a representative to submit shareholder proposals.

Resubmission of Proposals

Resubmission Thresholds

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

- 3% of the vote if previously voted on once;
- 6% of the vote if previously voted on twice; and
- 10% of the vote if previously voted on three or more times.

These resubmission thresholds have been in place since 1954 and were last substantively reviewed in 1998.

In the proposing release, the SEC noted its concern "that the current resubmission thresholds may allow proposals that have not received widespread support from a company's shareholders to be resubmitted -- in some cases year after year -- with little or no indication that support for the proposal will meaningfully increase or that the proposal ultimately will obtain majority support."

Based on the SEC's analysis, under the current resubmission thresholds, approximately 97% of proposals remain eligible for resubmission after the initial submission, 94% after the second submission, and 90% after the third or subsequent submission.

As a result, the SEC is proposing to revise Rule 14a-8(i)(12) such that a shareholder proposal may be excluded from a company's proxy materials if it deals with substantially the same subject matter as a proposal or proposals previously included in a company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and did not receive at least:

- 5% of the votes cast if previously voted on once;
- 15% of the votes cast if previously voted on twice; and
- 25% of the votes cast if previously voted on three or more times.

The SEC considered, but did not propose, changes to the vote-counting methodology, including whether votes by insiders should be excluded from the calculation of votes cast or whether to apply a different vote-count methodology for companies with dual-class voting structures. While the SEC did not propose any such changes, it is seeking comment on whether changes to the vote-counting methodology are necessary. The SEC is also seeking comment on whether an exception should be added to Rule 14a-8(i)(12) to permit a proposal to be resubmitted if there are material developments that suggest a resubmitted proposal may garner significantly more votes than when previously voted on.

The Momentum Requirement

The SEC is also proposing to amend Rule 14a-8(i)(12) to allow companies to exclude proposals dealing with substantially the same subject matter as proposals previously voted on by shareholders three or more times in the preceding five calendar years that would not otherwise be excludable under the proposed 25% threshold discussed 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. Importantly, the ability to exclude a proposal on this basis would apply only to matters that have been previously voted on three or more times in the preceding five years. The SEC noted that a 10% decline in the percentage of votes cast compared to the immediately preceding shareholder vote may warrant a cooling-off period, which would relieve companies and shareholders from having to repeatedly consider matters for which shareholder interest had declined.

* * *

The SEC's proposing release is available here and comments are due 60 days following publication in the Federal Register.