

SEC Proposes Amendments to the Shareholder Proposal Regime

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Late last year, the Securities and Exchange Commission announced a number of proposed amendments intended to “modernize” rules governing the inclusion of shareholder proposals in a company’s proxy statements. The period for public comment has now ended. The proposed amendments, if implemented, would result in a more stringent shareholder proposal regime in the US and would make Canadian shareholder proposal rules comparatively more shareholder-friendly.

Key Takeaways

- **The SEC has recommended a number of amendments that would heighten requirements for shareholders to submit proposals.** The proposed amendments would raise eligibility requirements, revise the “one-proposal limit” to clarify that a single person may not submit more than one shareholder proposal at the same meeting, and increase shareholder proposal resubmission thresholds for future shareholder meetings.
- **The proposed amendments have not yet been adopted.** The SEC called for public comments over a period of 60 days following announcement of the proposed amendments. The public comment period closed on February 3, 2020, with a broad range of investors submitting feedback.¹
- **There is no indication that Canadian legislators will follow suit in implementing more stringent requirements for the inclusion of shareholder proposals in a company’s proxy statement.** The shareholder proposal regime under the CBCA mirrors the current regime in the US and is more favourable to shareholders than the amended regime proposed by the SEC.

Overview of Proposed Amendments

The SEC’s proposed amendments would increase both substantive and procedural requirements under the “shareholder proposal rule,” which permits a company to exclude certain shareholder proposals from its proxy statement if the proposal fails to meet certain requirements. Most significantly, the proposed amendments would:

- amend eligibility requirements for shareholder submissions by increasing ownership thresholds;
- revise and clarify the “one-proposal limit”; and

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- increase shareholder resubmission thresholds.

The SEC announced that the proposed amendments are meant to facilitate constructive engagement by long-term shareholders and prevent misuse of processes by limiting the number of frivolous or unsuccessful proposals that can be both time-consuming and costly for a company to include its proxy statement².

Changes to Eligibility Requirements

The proposed amendments to Rule 14a-8(b) would increase the eligibility requirements for shareholders who wish to submit a proposal. Currently, a shareholder must have continuously held at least 1% or US\$2,000 of a company's securities for at least one year. The proposed amendment would eliminate the 1% threshold. In addition, it would increase the ownership thresholds by requiring:

- continuous ownership of at least US\$2,000 for three years;
- continuous ownership of at least US\$15,000 for two years; or
- continuous ownership of at least US\$30,000 for one year.

The proposed amendments would also prevent shareholders from aggregating their securities to meet the applicable minimum thresholds to submit a proposal and require a shareholder who submits a proposal through a representative to provide documentation confirming their identity, a statement confirming that they support the proposal, and their availability to meet with the corporation to discuss the proposal between 10 and 30 days following the submission.

Revision of the One-Proposal Limit

The proposed amendments to Rule 14a-8(c) would revise the "one-proposal limit" to limit proposal requests to one per "person" rather than one per "shareholder."

Under the current regime, shareholder representatives are able to submit proposals on their own behalf and on behalf of other shareholders. Under the proposed regime, a shareholder will be permitted to submit only a single proposal.

Shareholder representatives would also be limited to a single proposal, even if the representative is seeking to submit additional proposals on behalf of different shareholders.

Resubmission Thresholds

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The proposed amendments to Rule 14a-8(i)(12) would increase resubmission thresholds. Under the current regime, a proposal that was previously voted on and rejected could be resubmitted if it was voted on once in the preceding five years and received 3% or more of the total votes, voted on twice in the preceding five years and received 6% or more of the total votes, or voted on three times in the preceding five years and received 10% or more of the total votes. The proposed amendments would increase these thresholds to 5%, 15%, and 25%, respectively.

The proposed amendments would also add a new provision allowing corporations to exclude proposals voted on three or more times in the past five years if the proposal received less than 50% of votes cast and if the proposal experienced a decline in shareholder support of 10% or more since it was last voted on.

Comparison to the Canadian Shareholder Proposal Regime

If implemented, the SEC's proposed amendments would undoubtedly make Canada a more favourable jurisdiction for shareholder proposals.

The regulations under the *Canada Business Corporations Act* only require shareholders to have held at least 1% or \$2,000 of total outstanding voting shares over the previous six-month period to submit a shareholder proposal. Moreover, the CBCA allows shareholders to aggregate their shares to meet this threshold provided that all shareholders have met the *six-month* continuous ownership requirement.

The thresholds under the British Columbia *Business Corporations Act* are also at least 1% or \$2,000 of total outstanding voting shares, but with a two-year holding period. The BCBCA permits aggregating ownership to meet these requirements. The thresholds under the Alberta *Business Corporations Act* are also the same as those under the CBCA, but require support of at least 5% of shareholders. The Ontario *Business Corporations Act* only requires that a shareholder be entitled to vote to submit a proposal.

The resubmission thresholds under the CBCA, BCBCA, and OBCA are 3%, 6%, and 10% for substantially the same proposal submitted one, twice, or three times, respectively, over the past five years. Under the ABCA, if substantially the same proposal was submitted within the past two years and defeated, it does not need to be included in the management proxy circular.

The Upshot

While the SEC's proposed amendments would make it easier for corporations to control the number of shareholder proposals required to be included in proxy statements, it may also inhibit shareholder activism and limit shareholder influence over corporate governance.

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There is no indication that Canada will follow suit in implementing more stringent requirements following the announcement of the SEC's proposed amendments. Rather, it appears that Canadian jurisdictions will continue to maintain their current, more lenient shareholder proposal requirements.

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1 Securities and Exchange Commission, *Comments on Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, SEC Release No. 43-87458.

2 Securities and Exchange Commission, *SEC Proposes Amendments to Modernize Shareholder Proposal Rule*, SEC Release 34-87458.

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