

SEC Setback for Shareholders

New rule amendments will hinder corporate engagement

On September 23, 2020, the Securities and Exchange Commission (SEC) announced amendments to the rule that determines eligibility requirements for a shareholder proposal to be included in the proxy statement of a public company.¹ It took this decision despite vocal opposition from asset managers and asset owners, shareholder advocacy and financial industry organizations.

In our opinion, these amendments to Rule 14a-8 will significantly hinder the ability of shareholders to advocate for positive changes in corporate governance and practices. While these amendments will affect all resolutions, we are especially concerned that shareholders will find it significantly harder to raise critical environmental, social and governance (ESG) issues with companies.

More specifically, in our opinion, the amendments will greatly hinder the ability of investors to gain access to data that helps them assess corporate ESG performance. **Shareholder resolutions are one of the only tools available to concerned shareholders who want to understand what companies are doing** in relation to various ESG issues and ultimately to help improve corporate practices. Examples of successful shareholder initiatives in recent years includes:

- Barclays PLC is the largest fossil fuel financier in Europe and among the largest globally. In 2020, investors identified Barclays as having weaker climate policy vs. some of its European peers. The campaign group, ShareAction, spearheaded the shareholder vote with support from As You Sow and various other shareholder advocates. Following this investor engagement, Barclays said it will implement measures to reduce its carbon footprint to net zero by 2050 beginning with its power and energy portfolios, which it plans to reduce in carbon-dioxide intensity by 30% and 15%, respectively, by 2025.²
- In 2017, a coalition of 71 investors issued a warning regarding the overuse of antibiotics by food and restaurant companies. The concern focused on how overuse of antibiotics in meat and poultry builds resistance in humans.³ As of 2019, 13 of the biggest restaurant chains have made progress putting responsible antibiotic use policies into place including Burger King, Chipotle, McDonald's and others. More are making headway to improve, e.g., Applebee's and Pizza Hut. Action to eliminate and or reduce the use of antibiotics in beef is lagging behind poultry but some progress has been made thanks to shareholder engagement and action.⁴

Ultimately, shareholders are the biggest losers in this change to SEC regulations. Resolutions often raise critical issues and provide companies with important information that can be used by management to prevent future financial and reputational risks related to ESG factors.

The amendments to SEC rule won't end shareholder engagement, though they will make the process more drawn-out and costly. Nonetheless, we strongly encourage investors to continue engaging with the companies they are invested in and to work with their asset managers, investment advisors and/or nonprofit intermediaries and actively vote their proxies and support important resolutions on the issues they care about. The results may prove to be worth the effort.

Heidi Bush, CFA | *Director, Thematic Research*

Rule 14a-8: Before and After ^{5 6}

Current Rule

To submit shareholder proposal:

- Minimum \$2k in market value of a company's stock
- Shareholder permitted one proposal per company per meeting

To resubmit shareholder proposal:

Company can exclude resubmitted shareholder proposals that address essentially the same subject included in proxy materials within the prior five calendar years, if the most recent vote occurred within the prior three calendar years and was less than:

- 3% of the votes cast if previously voted on once,
- 6% of the votes cast if previously voted on twice or
- 10% of the votes cast if previously voted on three or more times.

Engagement requirements:

Engagement encouraged but not required.

On or After January 1, 2022

To submit shareholder proposal:

Shareholders will be required to own:

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

The amendments require shareholder representatives (e.g., proxy voting services, asset managers) to identify their clients. They also prohibit a shareholder from submitting multiple proposals to the same company under different names or through different representatives.

To resubmit shareholder proposal:

Company can exclude resubmitted shareholder proposals that address essentially the same subject included in proxy materials within the prior five calendar years, if the most recent vote occurred within the prior three calendar years and was less than:

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

Engagement requirements:

The amendments disallow aggregation of holdings of multiple shareholders for purposes of satisfying the ownership requirements. For eligibility, each shareholder must satisfy one of the three ownership minimum levels noted above. The amendments require a shareholder to provide the company with a written statement confirming its ability to meet with the company in person or via teleconference not less than 10 calendar days nor more than 30 calendar days after submission of the proposal, and provide contact information including specific availability to discuss the proposal with the company. However, the company is not required to meet or engage with the shareholder.

Endnotes

¹ <https://www.sec.gov/news/press-release/2020-220>

² <https://www.wsj.com/articles/barclays-pledges-net-zero-emissions-by-2050-11585594682#:~:text=Barclays%20PLC%20said%20Monday%20that,Paris%20Agreement%20on%20climate%20change.>

³ <https://www.foodingredientsfirst.com/news/investors-push-food-giants-to-a-path-of-less-antibiotic-resistance.html>

⁴ <https://www.consumerreports.org/overuse-of-antibiotics/most-fast-food-chains-still-serve-beef-raised-with-antibiotics/>

⁵ <https://www.sec.gov/news/press-release/2020-220>

⁶ <https://www.foley.com/en/insights/publications/2020/09/sec-amends-rule-14a-8-modernize-shareholder>

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