

[Securities Regulation Daily Wrap Up, TOP STORY—CorpFin Director Hinman elaborates on shareholder proposal changes at virtual conference, \(Sept. 24, 2020\)](#)

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By [Mark S. Nelson, J.D.](#)

CorpFin Director William Hinman discussed policies underlying the recent revisions to the shareholder proposal process and the transition rules for shareholders who already are eligible to submit proposals under the Commission's prior rules.

Keith Higgins, chair of Ropes & Gray LLP's securities and governance practice and former Director of the SEC's Division of Corporation Finance (CorpFin), moderated a discussion with William Hinman, current CorpFin director, on a variety of topics. The discussion occurred at the [2020 Garrett and Corporate Counsel Virtual Institute](#), a combination of the 40th Annual Ray Garrett Jr. Corporate & Securities Law Institute and the 59th Annual Corporate Counsel Institute, both hosted by Northwestern Pritzker School of Law.

Shareholder proposals. Hinman's remarks on the SEC's new regulation for shareholder proposal submissions and resubmissions are among his first since the Commission [adopted](#) those requirements at an open meeting yesterday. In general, the Commission created tiered submission thresholds based on the amount of stock owned by a shareholder and the time the stock has been held. The Commission also increased the resubmission thresholds. The rules changes are effective 60 days after publication in the *Federal Register* and will apply to annual or special meetings to be held on or after January 1, 2022.

Higgins asked Hinman to comment on the purpose of the amendments to the shareholder process. According to Hinman, the Commission sought to refresh the shareholder submission rules because they had not been addressed for several decades. Previously, a shareholder need only own \$2,000 (or one percent) of a company's stock for one year. Under the new rules, a shareholder must continuously hold \$2,000 for three years, \$15,000 for two years, or \$25,000 for one year.

However, Hinman emphasized that a set of transition rules will allow a shareholder who is already eligible to submit a proposal to do so for a period of time. Specifically, the adopting release provides that a shareholder that meets the immediately prior submission threshold of \$2,000 for at least one year as of the effective date of the amendments and continuously holds such securities from the effective date of the amendments to the date on which she submits a proposal remains eligible to submit a shareholder proposal to a company without having to meet the amended submission requirements for an annual or special meeting to be held before January 1, 2023.

With respect to the resubmission thresholds, the Commission increased them from 3-, 6-, and 10 percent to 5-, 15-, and 25 percent. Hinman said the purpose of this amendment was to modernize the regulatory requirement to ensure that a resubmitted shareholder proposal has a reasonable chance of obtaining higher support or approval. Hinman also suggested that social media had perhaps made it easier to get votes, but the Commission wanted to achieve a balance regarding the costs and administrative issues associated with the companies' efforts to deal with shareholder proposals.

By way of further background, the now-defunct, Republican-led Financial CHOICE Act would have reset the resubmission thresholds at 6-, 15-, and 30 percent. Reform of the SEC's shareholder proposal process described in Exchange Act Rule 14a-8 had also prompted the Treasury Department to express concerns about the \$2,000 holding amount and resubmission thresholds but without offering a specific recommendation. The Treasury's [Capital Markets report](#) had recommended only that the Exchange Act Rule 14a-8 thresholds be "substantially revised." The Treasury report also had recommended that shareholder eligibility requirements be

... tied to something other than "solely" a fixed dollar holding or percentage of a company's outstanding stock (e.g., the "shareholder's dollar holding in company stock as a percentage of his or her net liquid assets").

Higgins, upon re-entering private practice after his stint as CorpFin director, had [blogged](#) about freshening the resubmission thresholds, which he said were "low." Higgins suggested that proper thresholds could be reset near to those proposed in the CHOICE Act, which mirrored the SEC's [proposal](#) from 1997 (See also, Commissioner Wallman's [concurrence](#) to the SEC proposal, noting that the proposed resubmission thresholds "...will rise to the very high level of 30% in the third year—without any practical benefits being provided in return to a large percentage of the proponents").

Higgins also asked Hinman about a few other less well known aspects of the amended shareholder proposal regulation. For example, Hinman said the new rules put a premium on shareholder engagement with a company. The amended regulation requires that a shareholder provide a written statement that she is able to meet with the company in person or via teleconference sometime between 10 and 30 days after submitting a proposal.

Hinman said the Commission had been worried that, in the past, shareholders sometimes did not make themselves available to engage with companies. Hinman noted that 80 percent of proposals recently had been submitted by a small group of shareholders with whom it was a challenge for companies to engage. Hinman also observed that companies sometimes change their policies after shareholder engagement.

Moreover, unlike the prior rules, the amended rules prohibit shareholders from aggregating holdings to meet the submission thresholds. Hinman explained that the Commission wanted to make sure that "a" shareholder has a meaningful interest and that aggregation would undercut the need for a shareholder to have such a meaningful interest in a company.

Lastly, although not mentioned at the conference, the Commission struck the momentum provision from the final version of the shareholder proposal regulation. That provision had been proposed as a method to weed out proposals that received less than a majority of votes and whose support had declined by 10 percent.

Insider trading. Hinman also spoke about good corporate hygiene and insider trading as part of a larger discussion on a variety of topics that was initiated by Higgins. Specifically, Hinman pointed to SEC Chairman Jay Clayton's [letter](#) responding to a request by Rep. Brad Sherman (D-Cal). The SEC has, in the context of COVID-19 relief, warned against executives and others possessing material nonpublic information (MNPI) about trading company stock in a volatile market environment and such trades have ensnared members of Congress and Kodak executives in recent insider trading investigations.

Clayton stated in the letter that "My view is that, during this time of stress and acute uncertainty, our public companies as a general matter have discharged their responsibilities in the related areas of public disclosure and corporate controls well. That said, these are areas where market confidence, integrity and fairness require a universal commitment to compliance and regulatory vigilance." Clayton's letter also addressed the specific topics of company policies for executives and directors on insider trading, Rule 10b5-1 trading plans, and the issuance and pricing of stock options.

Hinman observed that the SEC had talked to the market about good corporate hygiene in the context of COVID-19 and cybersecurity. He also acknowledged that Congress had taken note of the topic by introducing legislation focused on Form 8-K black-out periods for company executives. Hinman reiterated that executives and directors should carefully consider trades, even if they lack personal knowledge of MNPI. Hinman further explained that good corporate hygiene on insider trading can dovetail with good corporate citizenship. Higgins suggested that attorneys send the Clayton letter to their clients.

Virtual annual meetings. The onset of the COVID-19 pandemic accelerated the pace at which many companies sought to hold virtual annual meetings. Hinman observed that roughly 1,500 companies held virtual annual meetings in 2020, which was significantly more than the 300 companies in prior years. Hinman said participation in virtual meetings ranged from about 1,000 to 5,000 shareholders.

According to Hinman, however, one source of "friction" was that some companies restricted the Zoom microphone to company representatives that read shareholder proposals instead of allowing proponents to

speak directly. Hinman reminded listeners that the SEC does not directly regulate the microphone at annual meetings because that is a topic for state corporate laws. But the SEC had encouraged companies to make virtual meetings as close as possible to in-person meetings.

Attorneys: Keith Higgins (Ropes & Gray LLP's).

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