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SEC Modernizes Shareholder Proposal Requirements

New Rule Finalizes More Stringent Minimum Shareholding and Resubmission Requirements for Shareholder Proposals and Will Be Effective for 2022 Proxy Season

SUMMARY

On September 23, the Securities and Exchange Commission (“SEC”) amended the shareholder proposal requirements set forth in Rule 14a-8 under the Securities Exchange Act of 1934. These changes represent the first substantive revisions to the rule’s shareholding requirements since 1998 and the rule’s resubmission thresholds since 1954.¹

Key changes include:

- amending the share ownership requirements for eligibility to submit a proposal;
- increasing the levels of shareholder support required for a proposal to be resubmitted at a subsequent annual meeting;
- permitting only one proposal submission per *person*, rather than per *shareholder*; and
- requiring that shareholder proponents provide identifying documentation and their availability to engage with the issuer on their proposal.

The SEC approved the Rule 14a-8 amendments by a 3-to-2 vote, with Commissioners Lee and Crenshaw dissenting.² The full text of the Rule 14a-8 amendments is available [here](#), and the SEC’s press release announcing these changes is available [here](#). The Rule 14a-8 amendments will become effective 60 days after publication in the Federal Register and will apply to any shareholder proposal submitted for an annual or special meeting to be held on or after January 1, 2022.

OVERVIEW

Updated Shareholding Requirements

The Rule 14a-8 amendments update the previous requirement that, in order to be eligible to submit a shareholder proposal to be voted upon at an issuer's shareholder meeting, a shareholder must hold \$2,000 in market value, or 1%, of that issuer's securities entitled to be voted on the proposal at the meeting, for at least one year by the date of submission. The Rule 14a-8 amendments eliminate the 1% shareholding alternative, which shareholder proponents have not generally used. Under the Rule 14a-8 amendments, the SEC has introduced a tiered approach with three alternative shareholding thresholds measured on the date of submission:

- \$2,000 in market value of the issuer's securities entitled to vote on the proposal for at least three years;
- \$15,000 in market value of the issuer's securities entitled to vote on the proposal for at least two years; or
- \$20,000 in market value of the issuer's securities entitled to vote on the proposal for at least one year.

In addition, under the Rule 14a-8 amendments, shareholders will not be able to aggregate their holdings in order to meet the new thresholds—each submitting or co-submitting shareholder will be required to meet the new requirements to be eligible.

The revised rule provides for a limited transition period that grandfathers in eligibility for shareholder proponents who meet the \$2,000 ownership threshold and one-year holding period as of the effective date of the Rule 14a-8 amendments. Provided they continue to maintain ownership of at least \$2,000 of such securities, these shareholders are eligible to submit proposals at annual meetings held prior to January 1, 2023—sufficient time to meet the three-year holding period requirement under the new rule. Notably, 29% of shareholder proposals submitted in 2020 were made by individual shareholders who generally focus on governance matters at numerous issuers and have relatively low shareholdings at companies to which they submit proposals.³

The SEC did not adopt one of its proposed provisions that would have required co-submitting shareholders to designate a lead-filer or specify whether that filer may negotiate on behalf of the other co-filers.⁴

Increased Shareholder Support Requirement for Resubmission

Rule 14a-8 previously provided that, if a proposal deals with “substantially the same subject matter as another proposal or proposals that have been previously included” in the issuer's proxy materials within the preceding five calendar years, an issuer may exclude the proposal from its proxy materials for any meeting held within three calendar years of the last time the proposal was included if such proposal received less than:

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- 3% of the votes if proposed once within the preceding five years;
- 6% of the votes on its last submission to shareholders if proposed twice previously within the preceding five years; and
- 10% of the votes on its last submission to shareholders if proposed three times or more previously within the preceding five years.

Under the Rule 14a-8 amendments, these resubmission thresholds have been revised to 5%, 15% and 25%, respectively. While many categories of shareholder proposals that tend to be submitted year over year (for example, proposals related to environmental disclosure, political contributions and structural governance matters, such as declassification of boards) are able to meet these increased thresholds, other types of shareholder proposals (for example, certain human capital proposals that have yet to gain meaningful traction and proposals against investing or managing on the basis of environmental, social and political factors) may see a decline in resubmission as a result of these increased thresholds.⁵

Notably, the SEC did not adopt a proposed “momentum” requirement that would have permitted companies to exclude proposals voted on three or more times in the last five years even if they met the new thresholds 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 on the matter. The rulemaking release cited the added complexity of this requirement and the potential for the anomalous result of excluding proposals that received a higher level of support than other proposals that remained eligible.⁶ The release did note that consideration of such a requirement may be appropriate after evaluation of the impact of the revised thresholds.

One Proposal per Shareholder

The Rule 14a-8 amendments revise the limitation of one proposal per *shareholder* to permit only one proposal per *person* for a particular shareholders’ meeting, including in cases where a person is acting as a shareholder representative. As a result, shareholder proponents will not be able to rely on the holdings of others in order to submit multiple proposals for a vote at the same meeting, a tactic that is frequently used by individual proponents to put more than one proposal on the ballot of the same issuer. In addition, this new limitation defines “person” to include entities and their employees, which will limit the ability of shareholder representatives, such as investment advisory funds, to submit multiple proposals to the same issuer on behalf of their clients. Notably, however, shareholder representatives will be permitted to *present* proposals on behalf of multiple shareholders at an issuer’s annual meeting without rendering the proposal ineligible.

Procedural Requirements

The Rule 14a-8 amendments add procedural requirements for submission of proposals by shareholders as well as by shareholder representatives. In an effort to encourage shareholder engagement and avoid potentially unnecessary shareholder votes, the new rule includes a requirement that shareholder proponents provide their availability for an in-person or telephonic meeting with the issuer to discuss their

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proposal not less than 10 nor more than 30 days following submission. Shareholder proponents must provide specific dates, times and their contact information for this purpose. Providing contact information for a shareholder representative is not sufficient, but the rulemaking release acknowledges that the Rule 14a-8 amendments do not preclude a shareholder representative from participating in any discussions between the company and the shareholder proponent.⁷

In addition, shareholders who have representatives make proposals on their behalf will be required to provide documentation that (i) identifies the company to which the proposal is directed, (ii) identifies the annual or special meeting for which the proposal is submitted, (iii) identifies the shareholder submitting the proposal and the shareholder's designated representative, (iv) includes the shareholder's statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf, (v) identifies the specific topic of the proposal to be submitted, (vi) includes the shareholder's statement supporting the proposal, and (vii) is signed and dated by the shareholder. These requirements formalize staff guidance on the level of documentation required for a person making a proposal on behalf of a shareholder to be clearly designated as that shareholder's representative; the adopting release further clarifies that these requirements will not apply to shareholders that are entities so long as the representative's authority to act on the shareholder's behalf is apparent and self-evident.

CONCLUSION

The overall effect of the Rule 14a-8 amendments is to tighten the SEC's current requirements for submission of shareholder proposals. As a result, once the Rule 14a-8 amendments become effective, there may be a lower volume of shareholder proposals (in particular, generic proposals that topic-focused proponents address to issuers *en masse* and/or year over year) that come to a vote at U.S. public companies, especially if issuers elect to take advantage of the higher resubmission thresholds. Moreover, while institutional investors already tend to engage with issuers on environmental, social, political and governance matters outside the Rule 14a-8 process, these amendments may further increase the level of private engagement between companies and institutional investors, as well as individuals and entities that may no longer be able to bring Rule 14a-8 proposals but may instead seek to put pressure on management's handling of these issues by resorting to other outlets (such as letter writing or publicity campaigns).

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ENDNOTES

- ¹ The full release of the Rule 14a-8 amendments can be found [here](#).
- ² Commissioner Lee's and Commissioner Crenshaw's statements in dissent of the Rule 14a-8 amendments can be found [here](#) and [here](#), respectively.
- ³ See our publication entitled "2020 Proxy Season Review: Part 1—Rule 14a-8 Shareholder Proposals," available at <https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf>.
- ⁴ Release No. 34-87458, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.
- ⁵ See *supra* note 3.
- ⁶ See *supra* note 1.
- ⁷ See *supra* note 1.

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