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SEC Updates Shareholder Proposal Rule

October 5, 2020

Securities and Capital Markets

On September 23, 2020, the Securities and Exchange Commission (SEC) adopted amendments to the shareholder proposal rule: Rule 14a-8 under the Securities Exchange Act of 1934. Rule 14a-8 requires companies that are subject to the federal proxy rules to include shareholder proposals in their shareholder meeting proxy statements, subject to certain procedural and substantive requirements. These amendments are part of an ongoing effort by the SEC to examine the proxy rules and focus rulemaking efforts on elements of the proxy voting and advice ecosystem.[1]

The amendments, which are summarized below, (i) revise the current ownership requirements for proponents, (ii) require enhanced documentation and communication between proponents and companies, (iii) clarify that a shareholder and shareholder representative may submit no more than one proposal for the same shareholder meeting, and (iv) raise the levels of shareholder support a proposal must receive to be eligible for resubmission at a future shareholder meeting.

The amendments were originally proposed in November 2019 and were adopted largely as proposed, with certain modifications. The SEC declined to amend Rule 14a-8 to include a "Momentum Requirement" for resubmitted proposals, as had been originally proposed. This requirement would have prevented the resubmission of proposals that had been voted on previously and for which shareholder support had declined over time.[2]

1 Revised Eligibility Requirements — Rule 14a-8(b)

Rule 14a-8(b) outlines several requirements that a shareholder must satisfy in order to be eligible to submit a proposal for inclusion in a company's proxy statement. To be eligible to submit a proposal, a shareholder must (i) meet a specific ownership requirement, (ii) hold a minimum ownership amount for at least one year and through the date of the shareholder

[1] Some of these amended provisions of Rule 14a-8 have not been updated or substantially revised in decades: the ownership eligibility requirements were last updated in 1998 while the resubmission thresholds were last updated in 1954.

[2] A company would have been able to exclude a proposal under the "Momentum Requirement" if other proposals, of substantially the same subject matter, were (i) voted on three or more times in the preceding five calendar years, (ii) the most recent of such proposals received less than a majority of the votes cast and (iii) support for any one of these proposals had declined by 10% or more compared to the immediately preceding shareholder vote on the matter.

meeting, and (iii) provide proof of ownership to the company at the time of submitting the proposal.

The amendments revise the minimum ownership requirement and prohibit the aggregation of holdings in order to meet the amended ownership threshold.

- ***Revised Ownership Threshold: New Length of Ownership Element***

  - Current rule requirement. To submit a proposal, Rule 14a-8(b)(1) currently requires that a shareholder has held at least (i) $2,000 or (ii) 1% of a company's securities entitled to vote on the proposal continuously for one year at the time of submission and continues to hold those securities through the date of the meeting.

  - Amended rule requirements. As amended, Rule 14a-8(b)(1) removes the percentage test and ties eligibility to ownership tiers based on market value of a company's securities and the length of time those securities have been held:

Minimum Ownership Eligibility Options	
Current Rule	**Amended Rule**
▪ At least $2,000 for one year; or ▪ At least 1% for one year	▪ At least $25,000 for one year; ▪ At least $15,000 for two years; or ▪ At least $2,000 for three years

  If a shareholder meets one of the ownership tiers, the shareholder must also provide a written statement to the company stating that the shareholder intends to hold the requisite amount of securities through the date of the shareholder meeting.

- ***No Aggregation of Ownership***

  - Amended Rule 14a-8(b) will also prohibit shareholders from aggregating their securities. Shareholders cannot "pool" securities into a group for the purpose of meeting the applicable minimum ownership threshold to submit a proposal. Shareholders will continue to be permitted to co-file or co-sponsor shareholder proposals as a group, so long as each shareholder in the group meets one of the ownership requirements.

2 Enhanced Documentation and Engagement Requirements

Revised Rule 14a-8(b) includes two new procedural criteria: an information requirement for shareholder proposal representatives and a shareholder engagement component.

- ***Additional Documentation When Using Shareholder Representatives***. Companies often receive shareholder proposals from individuals and entities that are not eligible to submit proposals in their own names, but arrange to serve as representatives to submit proposals on behalf of those who are eligible. The amended rule requires that a shareholder who relies on a representative to submit a proposal must provide the company with written documentation, signed and dated by the shareholder, that identifies:
  - the company to which the proposal is directed;
  - the annual or special meeting for which the proposal is submitted;
  - the shareholder submitting the proposal and the shareholder's designated representative; and
  - the specific topic of the proposal to be submitted.

  The documentation must also include a statement from the shareholder authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf and the shareholder's statement supporting the proposal.[3]

  This documentation requirement will not apply to shareholders that are entities, such as asset managers, so long as the authority of the shareholder representative to act on the shareholder's behalf is apparent and self-evident.

- ***Facilitated Engagement Between Shareholders and Companies***. As a condition to submitting a proposal, the amendments require a shareholder to state that the shareholder is available to discuss the proposal with the company. To meet Rule 14a-8(b)'s eligibility criteria, a shareholder must state that the shareholder is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. The shareholder, and not a representative, must provide contact information as well as specific business days and times that the shareholder is available to discuss the proposal with the company. [4]

  Under the new rule, a company will not be required to engage with a shareholder or to state that they attempted to engage with the shareholder. The rule does not impose requirements governing specific engagement activities between the shareholder and a company, and there is no penalty for failing to engage.

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[3] This documentation requirement codifies existing SEC staff guidance outlined in Staff Legal Bulletin No. 14I (Nov. 1, 2017).
[4] Co-filers must agree to the same dates and times of availability or identify a single lead filer who can engage on behalf of all co-filers.

3 One Proposal Limit — Rule 14a-8(c)

Rule 14a-8(c) currently states that each shareholder may directly submit no more than one proposal to a company for a particular meeting. Under the current rule, however, the same shareholder may also indirectly submit a proposal if the shareholder acts as a representative of another shareholder and submits an additional proposal to a company on that other shareholder's behalf.

The amendments have revised the rule to state that each person may submit no more than one proposal, directly or indirectly, to a company for a particular meeting. The revised language substitutes "each person" for "each shareholder" and clarifies that the one proposal limit applies to proposals submitted either "directly or indirectly." The revised rule also states that a person may not rely on the securities holdings of another to meet the eligibility requirements and submit multiple proposals at a particular shareholder meeting.

4 Resubmission Thresholds Raised — Rule 14a-8(i)(12)

Rule 14a-8(i)(12) currently allows for a proposal to be excluded if the proposal addresses substantially the same subject matter as a proposal, or proposals, included in the company's proxy materials within the preceding five years which received less than a certain minimum level of shareholder support. The amended rule raises the tiered levels of those minimum levels of support.

- ***Revised Minimum Voting Thresholds***
  - Current rule requirements. Rule 14a-8(i)(12) states that a company may exclude a proposal if (i) the proposal deals with substantially the same subject matter as another proposal, or proposals, last voted on within the preceding three years and (ii) when last voted on, the similar proposal did not reach a certain threshold level of support. The relevant level of support varies based upon the number of times the proposal has been voted on within the previous five years: 3, 6, and 10% of votes cast if voted on once, twice, or three or more times, respectively.
  - Amended rule requirements. The amended rule raises the 3, 6 and 10% voting thresholds to 5, 15, and 25%, respectively:

Voting Thresholds for Exclusion		
Number of Votes in Past Five Years	**Current Rule**	**Amended Rule**
Voted on once	3%	5%
Voted on twice	6%	15%
Voted on three times	10%	25%

5 Delayed Implementation: Not Applicable During 2021 Proxy Season

The amendments will not apply to proposals submitted for annual or special meetings to be held during the remainder of 2020 or during 2021. The amendments will begin to apply to proposals submitted for an annual or special meeting to be held on or after January 1, 2022.

Commentary: Transition Period for Current Shareholders

- The amended rule provides for a transition period with respect to the ownership thresholds: any shareholder who meets the $2,000 and one-year ownership threshold as of the effectiveness of the rule (later this fall) will not be foreclosed from submitting a proposal in 2022. Absent this temporary rule, some existing shareholders would not meet the three-year ownership requirement and would lose the ability to submit shareholder proposals for most annual meetings held in 2022.

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