



## Securities Law ADVISORY ■

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### SEC Enacts Changes to 14a-8 Shareholder Proposal Requirements

On September 23, 2020, the Securities and Exchange Commission (SEC) approved amendments, [proposed](#) in 2019, to the procedural requirements of Rule 14a-8 governing the submission and resubmission of shareholder proposals for inclusion in an issuer's proxy statement. The amendments, based on the SEC staff's experience reviewing shareholder proposals and related no-action requests, aim to foster long-term shareholder engagement and may effectively limit the number of activist shareholder proposals included in proxy statements. SEC Chairman Jay Clayton and Commissioners Hester Pierce and Elad Roisman voted in favor of adopting the amendments, while Commissioners Caroline Crenshaw and Allison Herren Lee were opposed.

#### **AMENDMENTS TO RULE 14A-8**

##### **Ownership Thresholds for Submitting a Shareholder Proposal**

###### ***Prior Thresholds***

Before the new amendments, Rule 14a-8 stipulated that an issuer had to include in its proxy statement any proposal put forth by a shareholder holding the lesser of: (i) at least \$2,000 worth of the issuer's securities entitled to vote on the proposal or (ii) 1 percent of the issuer's securities entitled to vote on the proposal for at least one year as of the date the shareholder submits the proposal.

###### ***New Thresholds***

The amendments modify the ownership requirements and scale the length of ownership requirement based on the dollar amount of securities held. Once the new amendments are effective, to be eligible to submit a proposal, a shareholder must demonstrate one of the following: (i) at least three years continuous ownership of at least \$2,000 of the issuer's securities entitled to vote on the proposal; (ii) at least two years continuous ownership of at least \$15,000 of the issuer's securities entitled to vote on the proposal; or (iii) at least one year continuous ownership of at least \$25,000 of the issuer's securities entitled to vote on the proposal. The three-level threshold was adopted as proposed. Note that there is an ownership threshold phase-in period that is discussed further below.

The final amendments do not include an ownership requirement based on the percentage of the issuer's securities owned by a shareholder, as was initially proposed. In light of the revised ownership thresholds, the SEC found that a separate "percentage test" requirement was unnecessary.

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### ***Ownership Aggregation Not Permitted***

Additionally, as proposed, the final amendments do not permit multiple shareholders to aggregate their holdings to meet the ownership thresholds required to submit a proposal. The SEC noted that such an aggregation provision would contradict its goal of ensuring that only shareholders with a sufficient economic stake or investment interest are entitled to have their proposals included in an issuer's proxy statement. Shareholders will, however, continue to be allowed to co-file proposals as a group, provided that each shareholder individually meets one of the ownership requirements. The SEC did not adopt a proposed amendment that would have required co-filers to identify the leader of their filing group and specify whether the lead filer is authorized to negotiate a withdrawal on behalf of the co-filers, although it did suggest that this would be a best practice.

### **Proposals Submitted on Behalf of Shareholders**

The proposed amendments to Rule 14a-8 included a requirement that shareholders submitting a proposal through a representative also submit documentation with their proposal, signed and dated by the shareholder, disclosing: the identity of the issuer and the meeting for which the proposal is submitted; identity of the shareholder and its representative; specific language of the submitted proposal; a statement on why the shareholder supports the proposal; and a statement by the shareholder authorizing the representative to submit the proposal on the shareholder's behalf.

The proposed amendments were adopted in their entirety, with the modification that a shareholder must identify the "specific topic" of the proposal, rather than the "specific language" of the proposal. The SEC believes this clarification will help provide clarity and minimize the burden on shareholders.

### **Shareholder Engagement in the Shareholder-Proposal Process**

Prior to the new amendments, Rule 14a-8(b) did not include a shareholder engagement component. The proposed amendments added a requirement that shareholders submitting a proposal make themselves available to meet with the issuer to discuss the proposal. To facilitate engagement, the proposed amendments also required the shareholder to submit a written statement containing the shareholder's contact information and setting out dates and times, within 10 to 30 days of submission, when the shareholder would be available to meet with the issuer in person or via teleconference.

The amendments were largely adopted as proposed. In the final amendments, the SEC clarified that shareholders must be available to meet with the issuer during regular business hours of the issuer's principal offices. If such hours are not publicly disclosed in the issuer's proxy statement, then the shareholder must identify times between 9:00 a.m. and 5:30 p.m. on business days in the time zone of the issuer's principal offices. Notably, the SEC clarified that the contact information and availability must be the shareholder-proponent's and not the shareholder's representative, if any. However, this does not prevent the shareholder-proponent's representative from also participating in any discussions between the issuer and the shareholder.

### **One-Proposal Limit**

The proposed amendments also clarified the "one proposal" requirement of Rule 14a-8, which limited shareholder proposals to one per person. The final amendment was adopted as proposed and provides that "each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting."

## Eligibility Thresholds for Resubmitting Proposals

### ***Previous Resubmission Thresholds***

Prior to the new amendments, Rule 14a-8 allowed an issuer to exclude a shareholder proposal if, in the last five calendar years, the proposal: (i) was proposed once and received less than 3 percent of the vote; (ii) was proposed twice and received less than 6 percent of the vote on the proposal's last submission; or (iii) was proposed three or more times and received less than 10 percent of the vote on the proposal's last submission. The amendments modify the resubmission eligibility scheme for the first time since 1954.

### ***New Resubmission Thresholds***

Under the final rule, the thresholds were revised, and the rule was clarified to state that the most recent vote on the proposal must have occurred within the last three calendar years. To be eligible for resubmission, the thresholds now require a proposal (i) that was submitted once in the past five years to earn at least 5 percent of the vote; (ii) that was submitted twice in the past five years to earn at least 15 percent of the vote; or (iii) that was submitted three times or more in the last five years to earn at least 25 percent of the vote, in each case in the most recent vote on the topic.

### ***"Momentum Requirement" Not Adopted***

Notably, the final amendments to Rule 14a-8 did not include the proposed "momentum requirement" for resubmitting shareholder proposals. The momentum requirement would have allowed companies to exclude proposals dealing with substantially similar subject matter and which would otherwise meet the resubmission threshold if: (i) the proposal received less than a majority of the votes cast in the last vote and (ii) support for the proposal declined by 10 percent or more from the previous shareholder vote. The SEC felt that such a momentum requirement could lead to inconsistent results and add additional complexity to the resubmission process. However, the adopting release noted that the SEC would be open to reconsidering a momentum requirement after it had an opportunity to fully evaluate the application and implementation of the amended resubmission thresholds.

## Going Forward

The final amendments to Rule 14a-8 will become effective 60 days after they are published in the Federal Register (effective date) and will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022, except as noted below for the phase-in period.

### ***Temporary Phase-in Period***

However, a shareholder that has continuously held at least \$2,000 of an issuer's securities entitled to vote on a proposal for at least one year as of the effective date, and continuously maintains at least \$2,000 of such securities from the effective date through the date it submits a proposal, will be eligible to submit a proposal to such issuer and need not satisfy the amended share ownership thresholds under Rule 14a-8(b)(1)(i)(A)-(C) for an annual or special meeting to be held prior to January 1, 2023.

A shareholder determining whether it satisfies this ownership threshold should look at whether, on any date within 60 calendar days before the effective date, the shareholder's investment was valued at \$2,000 or greater. Aggregation will not be allowed for purposes of determining compliance with this temporary provision. Such shareholder will also be required to provide the issuer with a written statement that the shareholder intends to continue to hold at least \$2,000 of the issuer's securities through the date of the shareholders' meeting at which the proposal will be considered. This temporary provision will expire on January 1, 2023.

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