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SEC Adopts Final Rules on Shareholder Proposals

The SEC recently adopted amendments (available [here](#)) to modernize important aspects of the Rule 14a-8 process for shareholder proposals to be included in domestic SEC reporting company proxy statements. The amendments were adopted largely as proposed and, among other things:

- establish a tiered system of ownership and holding period thresholds pursuant to which shareholder proponents will now need to hold \$2,000, \$15,000 or \$25,000 of the company's securities for at least three, two or one year, respectively, in order to submit a proposal, subject to a transition period that allows shareholders meeting the current \$2,000/one-year ownership threshold to submit proposals so long as they continue to hold such shares until 2023;
- clarify and enhance the "one proposal-per person" and the representative requirements;
- require that shareholder proponents be available for engagement with the company; and
- increase the resubmission thresholds for proposals that have previously been submitted by shareholder proponents to 5%, 15% and 25% for proposals that have been submitted 1, 2 or 3 times, respectively, in the last five years.

The amendments will apply to any proposal submitted for annual or special meetings held on or after January 1, 2022.

In the face of significant opposition from the investor community, the SEC decided not to adopt the previously proposed "momentum" resubmission provision, which would have provided that shareholder proposals with specified decreases in levels of shareholder support could be excluded, but noted that further consideration may be appropriate once the SEC has had an opportunity to evaluate the revised resubmission thresholds.

Amendments to Rule 14a-8 under the Exchange Act

Tiered Ownership Thresholds under Rule 14a-8(b). Under the new ownership thresholds, a shareholder proponent will be eligible to submit a proposal for inclusion in the company's proxy statement if they demonstrate continuous ownership as of the time of submission of:

- \$2,000 of the company's securities entitled to vote on the proposal for at least three years;

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- \$15,000 of the company's securities entitled to vote on the proposal for at least two years, or
 - \$25,000 of the company's securities entitled to vote on the proposal for at least one year.

The SEC eliminated the 1% ownership option as being rarely used and unnecessary given the revised thresholds.

Shareholders who, on the 60th day following publication of the final rules in the Federal Register, meet the current ownership threshold of \$2,000 of a company's securities entitled to vote on the proposal for at least one year and continuously own at least \$2,000 of such securities through the date they submit a proposal, will be eligible to submit a shareholder proposal for any shareholder meetings held prior to January 1, 2023.

No Ownership Aggregation or Mandatory Lead-Filer Designation under Rule 14a-8. The amendments prohibit aggregation of holdings for purposes of meeting the ownership requirements. While shareholder proponents may still jointly submit proposals, each shareholder will individually need to meet the ownership requirements. In this regard, while certain procedures reference lead filers as discussed below, the amendments do not add any requirements to designate a lead-filer, as the SEC has determined that it currently does not appear necessary since many co-filers already do so of their own accord.

Requirements for Representatives under Rule 14a-8(b). To ensure that persons acting on behalf of shareholders are properly authorized to do so, the amendments require that shareholder proponents using representatives to act on their behalf with respect to a proposal provide the company with written documentation that:

- identifies the company to which the proposal is directed;
- identifies the annual or special meeting for which the proposal is submitted;
- identifies the shareholder submitting the proposal and the shareholder's designated representative;
- includes the shareholder's statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf;
- identifies the specific topics of the proposal to be submitted;
- includes the shareholder's statement supporting the proposal; and
- is signed and dated by the shareholder.

These provisions do not apply to shareholders that are entities (if the representative's authority to act on behalf of the shareholder is apparent and self-evident to a reasonable person).

Engagement Requirements under Rule 14a-8(b). In an effort to promote company-shareholder engagement, the amendments add requirements that shareholder proponents include with their proposal a statement that they are available to meet with the company, in person or via teleconference, 10-30 calendar days after the submission of their proposal. Shareholder proponents must provide their contact information (not that of their representatives, if any) and identify specific days and times (more than one date and time) that they are available to discuss the proposal, which times should be from 9:30 a.m. to 5:30 p.m. in the time zone of the company's principal executive offices or otherwise, if disclosed in the company's proxy statement. All co-filers must agree to the same dates and times or identify a single lead filer who will be available to engage on behalf of all co-filers. Companies are not required to engage with the shareholder proponent.

One Proposal per Person Limit under Rule 14a-8(c). As had been proposed, the amendments extend the one-proposal rule to each person, rather than just each shareholder. Under the new one person/one proposal rule, each person may submit only one proposal for consideration at the meeting, regardless of the capacity in which he or she is acting. As a result, a representative will not be permitted to submit more than one proposal (even on behalf of different shareholder proponents) or be permitted to submit one proposal in their name and serve as the representative to other shareholder proponents for other proposals at the same company for the same meeting. The one person/one proposal rule does not limit the ability of one person to present multiple proposals at the actual shareholder meeting as required under Rule 14a-8(h) and a company's governing documents or state law requirements. Entities and all persons under their control, including employees, will be treated as one person for this purpose.

Increased Re-submission Thresholds under Rule 14a-8(i); No "Momentum" Provision. The amendments increase the re-submission thresholds for shareholder proposals previously considered. A shareholder proposal will be excludable from a company's proxy materials if it addresses substantially the same subject matter as a proposal previously included within the last five calendar years if the most recent vote occurred within the last three calendar years and was:

- less than 5% of the votes cast if previously voted on once (increased from 3%);
- less than 15% of the votes cast if previously voted on twice (increased from 6%); or
- less than 25% of the votes cast if previously voted on three or more times (increased from 10%).

The amendments do not include the so-called "momentum" provision, which faced opposition from investors and which the SEC determined could lead to anomalous results and unnecessary complexity, though the SEC did note it may consider the concept in the future after evaluating the impact of the new

resubmission thresholds. Under the SEC's initial proposal, companies would have been permitted to exclude a proposal that had been voted on three or more times in the prior five years and garnered more than 25% but less than a majority of the votes cast if support for the proposal declines by 10% or more compared to the prior shareholder vote.

Concerns Expressed

The SEC received thousands of letters opposing these changes, greatly outnumbering the letters it received in support of the proposals. Commenters, and SEC Commissioners Lee and Crenshaw, expressed concerns that the new requirements create too high an obstacle for shareholder proponents, individual investors in particular, and will reduce the number of shareholder proposals, especially on ESG-related topics that typically require a long lead time before general acceptance, if ultimately achieved. Shareholder proposals have been at the vanguard of bringing ESG issues to companies, and these proposals, directly and indirectly, have led to significant broader corporate governance changes (e.g., annual director elections, majority vote rules in director elections, proxy access). Environmental and social issues are now increasingly the focus of shareholder attention and, as Commissioner Lee noted in her statement, they make up more than half of shareholder proposals in the last few years. The impact of these changes on evolving ESG initiatives remains to be seen.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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