

# Alert

September 28, 2020



## SEC Adopts Amendments to Modernize Shareholder Proposal Rules

On September 23, 2020, the Securities and Exchange Commission (SEC) adopted amendments to modernize Rule 14a-8, which governs the process for shareholder proposals to be included in a company's proxy statement. The amendments change the shareholder proposal submission requirements under Rule 14a-8 by: (1) changing the eligibility criteria that a shareholder must satisfy to include a shareholder proposal in a company's proxy statement; (2) increasing the levels of required shareholder support a proposal must receive to be eligible for resubmission at the same company's future meetings; and (3) requiring specified documentation for a representative to submit a proposal on behalf of a shareholder.

### Eligibility Criteria

Currently a shareholder-proponent must hold at least \$2,000 or 1 percent of the company's securities for at least one year to submit a shareholder proposal under Rule 14a-8(b). The amendments will delete the "1% of the company's securities" threshold altogether and replace the "\$2,000 for at least one year" requirement with three alternative continuous ownership thresholds with three alternative thresholds of at least:

- \$2,000 of the company's securities for at least three years;
- \$15,000 of the company's securities for at least two years; or
- \$25,000 of the company's securities for at least one year.

Under the final rule's transition provision, however, these rule changes will not impact shareholders that meet the currently required threshold and continue to hold their shares through the date the shareholder submits a shareholder proposal to the company. Such shareholders will be able to rely on the \$2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023. In attempting to satisfy the shareholding requirements, shareholders will not be allowed to aggregate their holdings with those of another shareholder or group of shareholders to meet a minimum ownership threshold necessary to be eligible to submit a proposal. Shareholders may, however, co-file or co-sponsor proposals as a group if each shareholder-proponent separately meets one of the eligibility requirements.

In addition to the changes in ownership thresholds, the amendments will now require a shareholder proponent to state that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, but no more than 30 calendar days, after submission of the shareholder proposal. The shareholder proponent must provide contact information as well as specific business days and times that the shareholder is available to discuss the proposal with the company. The contact information and availability must be that of the shareholder-proponent, not a designated representative, although a representative may participate in the meeting between the shareholder and the company regarding the proposal.

### Resubmission Criteria

Under Rule 14a-8(i)(12), a shareholder proposal is excludable from a company's proxy materials if (1) it addresses substantially the same subject matter as a proposal, or proposals, previously



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included in the company's proxy materials within the preceding five calendar years, (2) the most recent vote occurred within the preceding three calendar years and (3) the most recent vote was below a specified threshold. The SEC amended Rule 14a-8(i)(12) to replace the levels of shareholder support a proposal must receive to be eligible for resubmission at the same company's future shareholder meetings from 3 percent for matters voted on once, 6 percent for matters voted on twice and 10 percent for matters voted on three or more times in the last five years to 5 percent, 15 percent, and 25 percent, respectively.

Notably, the SEC did not adopt the proposed "momentum requirement" that had been part of the proposed rules. This requirement would have permitted exclusion of a proposal dealing with substantially the same subject matter as proposals previously voted on by shareholders three or more times in the preceding five calendar years that would not otherwise be excludable under the 25 percent threshold if (i) the most recently voted on proposal received less than a majority of the votes cast and (ii) support declined by 10 percent or more compared to the immediately preceding shareholder vote on the matter.

## Representative Documentation

The SEC's amendments also make important updates to the rule with regard to the role of representatives in submitting shareholder proposals. Under amended Rule 14a-8(b), if a shareholder chooses to designate a representative to submit a proposal on its behalf, the shareholder must provide the company with a written statement evidencing the representative's authority to act on its behalf and addressing the shareholder's identity, role and interest in the proposal. Specifically, a shareholder-proponent using a representative to submit a shareholder proposal on its behalf must 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 topic of the proposal to be submitted;
- includes the shareholder's statement supporting the proposal; and
- is signed and dated by the shareholder.

The amended rules also clarify that a shareholder-proponent that is an entity need not comply with this requirement as long as the representative's authority to act on the shareholder's behalf is apparent and self-evident such that a reasonable person would understand that the agent has authority to submit the proposal and otherwise act on the shareholder's behalf.

The amended rule can be found [here](#). The amendments will be effective 60 days following publication in the Federal Registrar and the final amendments will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022, subject to the special transition period described above.

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