

## **SEC Proposes to Modernize the Shareholder Proposal Process**

### **I. Overview**

On November 5, 2019, the Securities and Exchange Commission (the “SEC”) proposed amendments to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the “Act”). Rule 14a-8 permits a company to exclude a shareholder proposal from its proxy statement if the proposal fails to meet any of several specified substantive requirements or if the shareholder-proponent does not satisfy certain eligibility or procedural requirements.<sup>1</sup> The purpose of the proposed amendments to Rule 14a-8 (“Proposed Amendments”) is to modernize the eligibility and procedural requirements governing the inclusion of shareholder proposals in a company’s proxy statement, in light of the significant changes that have taken place in the markets in the decades since these regulatory requirements were last revised.<sup>2</sup>

### **II. Ownership Requirements**

Rule 14a-8(b) establishes the eligibility requirements that a shareholder-proponent must satisfy in order for the company to be required to include a proposal in the company’s proxy statement. Currently under Rule 14a-8(b), to be eligible to submit a proposal, a shareholder-proponent must have continuously held at least (i) \$2,000 in market value, or (ii) one percent of the company’s securities entitled to vote on the proposal at the meeting, for at least one year by the date the proposal is submitted.<sup>3</sup>

The Proposed Amendments would (i) eliminate the current one-percent ownership threshold, and (ii) adopt a tiered approach under which the required holding period for the company’s securities entitled to vote on the proposal would vary depending on the value of securities held by the shareholder-proponent. Specifically, a shareholder-proponent would satisfy the ownership requirements if the shareholder has continuously held at least:

- \$2,000 of the company’s securities entitled to vote on the proposal for at least three years;
- \$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 explained that this tiered approach would balance the burden of proxy access and ensure that shareholders who seek proxy access have a sufficient economic stake or investment interest to warrant such access.<sup>4</sup>

### **III. Documentation Requirements for Proposals Submitted by Representatives**

Companies receive proposals under Rule 14a-8 from individuals and entities that may not be eligible to submit proposals to a particular company in their own name, but have entered into arrangements to serve as a representative to submit a proposal on behalf of individuals or entities that have held a sufficient number of shares for the requisite period.<sup>5</sup> However, Rule 14a-8 currently does not address a shareholder’s ability to submit a

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<sup>1</sup> SEC Press Release, available at <https://www.sec.gov/news/press-release/2019-232> (November 5, 2019).

<sup>2</sup> See *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, Release Nos. 34-87458, S7-23-19 (“Proposing Release”), available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf> (November 5, 2019).

<sup>3</sup> 17 CFR 24.14a-8(b)(1).

<sup>4</sup> Proposing Release, at 18.

<sup>5</sup> *Id.* at 29.

proposal for inclusion in a company’s proxy materials through a representative. According to the SEC, the Proposed Amendments would allow shareholders to act through representatives but also safeguard the integrity of the shareholder-proposal process and the eligibility restrictions.<sup>6</sup>

The Proposed Amendments would amend Rule 14a-8 to require shareholders that use a representative to submit a proposal for inclusion in a company’s proxy statement to provide documentation attesting that the shareholder supports the proposal and authorizes the representative to submit the proposal on the shareholder’s behalf, including 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-proponent and the designated representative;
- includes the shareholder’s statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder’s behalf;
- identifies the specific proposal to be submitted;
- includes the shareholder’s statement supporting the proposal; and
- is signed and dated by the shareholder.

#### **IV. Documentation Requirements for Proposals Submitted by Shareholders**

Although Rule 14a-8 provides a means for shareholder-proponents to advance proposals and solicit proxies from other shareholders, shareholders often engage with companies by initiating a dialogue directly between a shareholder and management instead.

The Proposed Amendments seek to encourage that dialogue by amending Rule 14a-8(b) to add a shareholder engagement component. The Proposed Amendments would require a statement from each shareholder-proponent that the shareholder is able to meet with the company 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 would be required to include the shareholder’s contact information as well as specific dates and times that the shareholder is available to discuss the proposal with the company.<sup>7</sup>

#### **V. One Proposal Limit**

Rule 14a-8(c) currently provides that “each shareholder” may submit no more than one proposal to a company for a particular shareholders’ meeting.<sup>8</sup>

The Proposed Amendments would amend Rule 14a-8(c) to apply the one-proposal rule to “each person” rather than “each shareholder” who submits a proposal. Effectively, a shareholder-proponent would not be permitted to submit one proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder’s behalf for consideration at the same meeting.<sup>9</sup> Similarly, a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative

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<sup>6</sup> *Id.* at 31.

<sup>7</sup> *Id.* at 35.

<sup>8</sup> 17 CFR 240.14a-8(c).

<sup>9</sup> Proposing Release, at 38.

would be submitting each proposal on behalf of a different shareholder.<sup>10</sup> The SEC explained that the Proposed Amendment is not intended to hamper a shareholder's ability to consult lawyers and advisors in drafting shareholder proposals and making a submission.<sup>11</sup> However, the SEC is also seeking comments on whether to simply eliminate the practice of using representatives.

## VI. Resubmission Thresholds

Rule 14a-8(i)(12) currently allows companies to exclude a shareholder proposal that deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding five calendar years, if the matter was voted on at least once in the last three years and did not receive at least<sup>12</sup>:

- three percent of the vote if previously voted on once;
- six percent of the vote if previously voted on twice; or
- 10% of the vote if previously voted on three or more times.

The Proposed Amendments would amend Rule 14a-8(i)(12) by (i) replacing the current resubmission thresholds with new thresholds of five, 15, and 25%, respectively, and (ii) allowing companies to exclude proposals that would not otherwise be excludable under the new 25% threshold if:

- the proposal deals with substantially the same subject matter as proposals previously voted on by shareholders three or more times in the preceding five calendar years;
- the most recent proposal voted on received less than a majority of the votes cast; and
- support declined by 10% or more compared to the immediately preceding shareholder vote on the matter.

The SEC explained that the current resubmission thresholds may allow proposals that have not received widespread support from a company's shareholders to be resubmitted, in some cases, year after year.<sup>13</sup> By increasing the resubmission thresholds, the SEC believes that companies could exclude resubmitted proposals that have not received broad support.<sup>14</sup>

## VII. Conclusion

The SEC believes that if the Proposed Amendments are adopted, companies would be able to exclude more proposals and shareholders would be discouraged from submitting proposals that likely would be excluded based on the Proposed Amendments, resulting in potential cost savings for companies and higher returns on investment for the shareholders.<sup>15</sup> The comment period will close 60 days after publication in the Federal Register.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 17 CFR 240.14a-8(i)(12).

<sup>13</sup> Proposing Release, at 48.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 136.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Helene Banks at 212.701.3439 or [hbanks@cahill.com](mailto:hbanks@cahill.com); Bradley J. Bondi at 202.862.8910 or [bbondi@cahill.com](mailto:bbondi@cahill.com); Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Elai Katz at 212.701.3039 or [ekatz@cahill.com](mailto:ekatz@cahill.com); Geoffrey E. Liebmann at 212.701.3313 or [gliebmann@cahill.com](mailto:gliebmann@cahill.com); Ross Sturman at 212.701.3831 or [rsturman@cahill.com](mailto:rsturman@cahill.com); or Joseph Cho at 212.701.3589 or [jcho@cahill.com](mailto:jcho@cahill.com).

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