



SEPTEMBER 30, 2020

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SEC Approves Polarizing 14a-8 Reforms

On September 23, 2020, the SEC adopted long-awaited amendments to Rule 14a-8 modifying the criteria for eligibility and resubmission of shareholder proposals. Prior to these amendments, the submission threshold had not been amended since 1998, and the resubmission threshold had not been amended since 1954.

This rulemaking has been polarizing among stakeholders, drawing a significant amount of public comments as well as vibrant public dialogue among the Commissioners. For those in favor, the amendments represent an overdue recalibration of costs and interests of shareholder proponents compared to the target companies and their other shareholders, who carry those costs.

For those against, the amendments restrict a path to oversight of management in an environment where shareholder proposals are playing a role of increasing importance, particularly on environmental and social issues. In particular, Commissioner Lee noted that the amendments were most likely to shut smaller, retail investors out of the shareholder proposal process by increasing the ownership requirements and by reversing SEC policy to now prohibit shareholders from aggregating their holdings to submit a proposal. Commissioner Lee also noted that the comments the SEC received were overwhelmingly opposed to these amendments.

The amendments will become effective 60 days after publication in the Federal Register and will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022. The final rules also provide for a transition period with respect to the ownership thresholds that will allow shareholders meeting specified conditions to rely on the existing \$2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023.



Summary of the Amendments Adopted

The amendments to Rule 14a-8 make the following changes, among others:

- *Increases the Ownership Threshold* – The amendments increase the current ownership threshold that requires a shareholder proponent to continuously own at least \$2,000 or 1% of the company’s voting securities for at least one year to a graduated ownership threshold that requires a shareholder proponent to continuously own at least:
 - \$2,000 of the company’s voting securities for at least three years;
 - \$15,000 of the company’s voting securities for at least two years; or
 - \$25,000 of the company’s voting securities for at least one year.

Further, the amendments prohibit shareholders from aggregating holdings with each other for purposes of satisfying these amended thresholds.

As a transitional measure for meetings held prior to January 1, 2023, a shareholder may continue to comply with the prior \$2,000 threshold for submitting a shareholder proposal if the shareholder:

- has continuously held at least \$2,000 of the company’s voting securities for at least one year as of the date the amendments become effective; and
- has continuously maintained a minimum investment of at least \$2,000 of the company’s voting securities from the date the amendments become effective through the date the proposal is submitted to the company.

Shareholders must submit proof of such ownership to the company consistent with existing requirements.

- *Requires Offer to Discuss the Proposal* – A shareholder proponent must offer to meet with the company in person or by teleconference no less than 10 days and no more than 30 days after submission of the proposal. Further, a shareholder proponent must provide specific dates and times of availability for such a meeting. If a proposal is filed by multiple co-filers, all co-filers must (i) agree to the same dates and times for the meeting or (ii) identify a single lead filer who can engage on behalf of all co-filers.
- *Specifies Documentation to Appoint a Representative* – A shareholder proponent that elects to appoint a representative to submit the proposal must provide documentation that:
 - identifies the company and the annual or special meeting where the proposal will be submitted;
 - identifies the shareholder as the proponent and the person who will be acting as representative;
 - includes a statement authorizing the representative to submit the proposal and otherwise act on the shareholder’s behalf;
 - identify the specific topic of the proposal to be submitted and include a statement by the shareholder supporting the proposal; and
 - be signed and dated by the shareholder.
- *Clarifies the “One Proposal” Limitation* – As amended, the “one proposal” limitation applies to each person rather than each shareholder that submits a proposal. As a result, a person cannot act as a representative for multiple proposals at the same meeting or submit a proposal while acting as a representative for another proposal at the same meeting.



- *Increases Resubmission Thresholds* – The amendments increase the resubmission thresholds for proposals previously voted on one, two or three or more times in last five years from 3%, 6% and 10%, respectively, to 5%, 15% and 25%, respectively.

Notably, the final amendments eliminated the “momentum” requirement included in the SEC’s proposing release that would have permitted exclusion of a shareholder proposal if the proposal had been voted on three or more times in the last five years and, on its most recent submission, (i) received less than 50 percent of the votes cast and (ii) experienced a decline in shareholder support of 10 percent or more compared to the immediately preceding vote.

Takeaways

As expected, these amendments generated very strong reactions. Some business leaders commended the SEC for actions that better balance the interests of corporations and their shareholders. Tom Quaadman, head of the U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness, said, “The Eisenhower-era rules on shareholder proposals no longer reflected the needs of 21st century investors and businesses ... The U.S. Chamber commends the SEC on today’s shareholder proposal rule which will improve communications between investors and businesses and ultimately promote a modern and effective regulatory structure.”

Conversely, the Council of Institutional Investors (CII) immediately issued an alert titled, “SEC Muzzles the Voice of Investors by Raising the Bar on Shareholder Proposals.” CII’s Executive Director Amy Borrus said “The amendments weaken the voice of investors and jeopardize faith in the fairness of U.S. public capital markets by making the filing process more complicated, constricting and costly.”

It is not yet clear if these reforms will cause major institutional investors to change their voting behavior. Might investors be more willing to vote in favor of some proposals to help them get past the more stringent resubmission thresholds? Many of these investors have long been reluctant to vote in favor of shareholder proposals absent aggravating factors, but it is possible that they will be more willing to throw support behind some proposals to help them meet resubmission thresholds, keeping the underlying topics alive for shareholder engagement. Given the remarkable concentration of voting power today, particularly the “Giant Three” of BlackRock, Vanguard, and State Street Global Advisors, any movement here would substantially alter the calculus for those proposals that do end up in the proxy.

It is clear that the proposals will make it harder for shareholders to have proposals voted on at annual meetings. The SEC did not, and cannot, stem the tide of shareholder and other stakeholder interest ESG topics that are the subject of many of these proposals. Understanding the breadth and depth of shareholder interest in these issues remains important.



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