

September 23, 2020

SEC Amends Eligibility Requirements for Rule 14a-8 Shareholder Proposals

The SEC today announced [amendments](#) to the eligibility requirements for a shareholder to have a proposal included in an issuer's proxy materials under Rule 14a-8. The amendments improve and rationalize long-outdated eligibility standards by emphasizing long-term investment, while leaving ample space for vibrant shareholder engagement.

The amendments address requirements for proposing shareholders, the mechanics around shareholder proposals and shareholder support requirements for resubmissions of proposals.

*Ownership Requirements.* Currently, to be eligible to submit a shareholder proposal under Rule 14a-8, the proponent must hold at least \$2,000, or 1%, of the issuer's securities entitled to vote on the proposal for a period of one year. The amendments create a tiered approach to ownership: the proponent will now be required to hold \$2,000 of the issuer's securities for three years, \$15,000 for two years, or \$25,000 for one year. These eligibility requirements cannot be satisfied by aggregating holdings of multiple shareholders, and in the case of multiple proponents, each proponent must satisfy one of the eligibility requirements. The percentage test (which was seldom relevant in practice) has been removed.

As pointed out in the promulgating release, this is the first update to the ownership requirements in over 20 years. The new requirements are balanced: the extension of the holding period at the \$2,000 level emphasizes the importance of long-term investors, while the one- and two-year tiers provide a path for holders with more significant stakes. Not only that, the increase in these thresholds is quite modest.

*Availability Requirement.* A new provision in the amended rules requires that the proponent state their availability, within the period from 10 to 30 days following submission of the proposal, to meet with the issuer in person or via teleconference. This signals the SEC's encouragement of shareholder engagement, and issuers should consider whether direct discussion could resolve a proponent's concerns without taking the proposal to a vote.

*Limitations on Representatives.* The amendments add information requirements for proposals submitted by representatives of a shareholder, including clear identification of the represented shareholder and a statement of the representative's authority. The amendments also clarify the existing one-proposal-per-shareholder rule to preclude a single person from submitting one proposal in their own name and another proposal as a representative, or multiple proposals as a representative of different shareholders. These changes further support the direct engagement of the proposing shareholder and limit circumvention of the eligibility requirements.

*Support Required for Resubmissions.* Under the existing rule, a proposal may be excluded from the issuer's proxy materials if it addresses substantially the same subject matter as a proposal previously included in the issuer's proxy materials, the most recent vote on the matter occurred within the preceding three calendar years, and in that most recent vote received less than a specified percentage of the votes: 3% if voted on once within the preceding five calendar

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years, 6% if voted on twice in such period, and 10% if voted on three or more times in such period. The amendments raise these thresholds to 5%, 15% and 25%, respectively.

These changes should not significantly inhibit the ability of proponents to continue putting forth meritorious proposals. Indeed, the promulgating release includes a study of the proposals that ultimately win majority approval, concluding that nearly all either won a majority on their first introduction, or met the increased thresholds. For proposals with minimal support, on the other hand, the amendments may help limit the not-insignificant costs to issuers in responding to repeat proposals. However, institutional investors may also begin to factor in the higher resubmission bars in their voting decisions. Institutions may feel that certain proposals that they are not prepared to have adopted immediately because of a lack of thorough vetting and discussion should remain eligible for reconsideration. In those situations, it is possible that the amendments will drive a change in voting behavior, with institutional investors or proxy advisory firms erring more on the side of voting in favor of a proposal so as not to foreclose future resubmissions of that proposal. As the amendments are implemented, it will be useful to consider if they have had this effect and for issuers to take it into account in reacting to proposals.

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The amendments will be applicable for all shareholder meetings to be held on or after January 1, 2022, although transition rules will permit a shareholder that has held \$2,000 of an issuer's securities for one year as of the effective date of the amendments, and continuously maintains ownership of at least \$2,000 of the issuer's securities, to qualify to submit a proposal for meetings to be held before January 1, 2023.

Overall, while some issuers may have hoped for more substantial changes to reduce the number of proposals, the amendments are a welcome and measured step forward. We particularly applaud the themes of long-term investing and shareholder engagement, which we have consistently advocated for in [The New Paradigm](#).

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