

SEC Adopts Amendments to Shareholder Proposal Rules

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Brian V. Breheny

Partner / Washington, D.C.
202.371.7180
brian.breheny@skadden.com

Marc S. Gerber

Partner / Washington, D.C.
202.371.7233
marc.gerber@skadden.com

Richard J. Grossman

Partner / New York
212.735.2116
richard.grossman@skadden.com

Hagen J. Ganem

Counsel / Washington, D.C.
202.371.7503
hagen.ganem@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

On September 23, 2020, the Securities and Exchange Commission (SEC) adopted amendments to the procedural requirements and resubmission thresholds relating to shareholder proposals submitted for inclusion in company proxy statements pursuant to Securities Exchange Act Rule 14a-8. The amendments, which are summarized below, (i) replace the current ownership requirements with a tiered approach combining the number of shares owned and the length of ownership; (ii) require certain documentation when a proposal is submitted by a representative on behalf of a proponent; (iii) require a proponent to provide information regarding the proponent's availability for engagement with the company; (iv) end the ability of representatives to submit multiple proposals on behalf of other shareholders for the same meeting; and (v) raise the levels of support that a proposal must receive to be resubmitted at future shareholder meetings.

The effective date of the amendments will be 60 days after publication in the Federal Register, which date will be relevant only for the transition period applicable to the tiered ownership requirements described below. The amendments will apply to proposals submitted for annual or special meetings held on or after January 1, 2022, which means that the new rules will not be relevant when analyzing proposals received for the upcoming 2021 proxy season.

Tiered Ownership Requirements. Currently, in order to be eligible to have a proposal included in a company's proxy materials pursuant to Rule 14a-8, a proponent must have owned at least \$2,000 of company stock continuously for at least one year. Under the new rules, a proponent will be required to satisfy one of three alternative tests. To be eligible to submit a proposal under Rule 14a-8, a shareholder will need to have 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.

In addition, shareholders will no longer be permitted to aggregate their shares in order to meet the minimum ownership requirements.

The rules provide for an additional transition period so that shareholders currently eligible to submit shareholder proposals will not lose that eligibility if they continue to hold the shares. Specifically, shareholders who satisfy the \$2,000/one-year ownership test as of the effective date of the new rules will continue to be eligible to submit proposals for annual or special meetings held prior to January 1, 2023, provided they continuously hold at least \$2,000 of a company's securities from that effective date through the date of submission.

Documentation When a Proposal Is Submitted by a Representative. In Staff Legal Bulletin No. 14I (Nov. 1, 2017), the SEC's Division of Corporation Finance stated that it would look to certain documentation describing a shareholder's delegation of authority to a representative to submit a shareholder proposal. The amended rules codify this requirement. Specifically, if a shareholder uses a representative to submit a shareholder proposal or otherwise act on the proponent's behalf with respect to the proposal, the shareholder will be required to provide the company with documentation signed and dated by the shareholder:

- Identifying the company to which the proposal is directed;

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- Identifying the annual or special meeting for which the proposal is submitted;
- Identifying the shareholder submitting the proposal and the shareholder's representative;
- Including a statement authorizing the representative to submit the proposal and otherwise act on the shareholder's behalf;
- Identifying the specific topic of the proposal to be submitted; and
- Including the shareholder's statement supporting the proposal.

The rule provides that where a shareholder proponent is an entity, this documentation will not be required so long as the representative's authority to act for the shareholder is apparent and self-evident such that a reasonable person would understand that the agent has the authority to act on behalf of the entity. The adopting release provides examples of this, such as where an elected or appointed official who is the custodian of state or local trust funds submits a proposal on behalf of one or more of the funds.

Information Regarding the Proponent's Availability for Engagement With the Company. As part of the new Rule 14a-8 procedural requirements, the amendments will require a proponent to provide the company with a written statement that the proponent is able to meet with the company in person or by teleconference no less than 10 days nor more than 30 days after submission of the shareholder proposal. The proponent will be required to provide the company with contact information as well as specific times during the regular business hours of the company's principal executive offices that the proponent is available to discuss the proposal with the company. The adopting release makes it clear that the contact information and availability for engagement should be that of the shareholder and not the representative, although the representative may participate in the discussions. In addition, the rule provides that co-filers will have to agree on the same dates and times of availability or identify a single lead filer who will provide dates and times for the lead filer's availability to engage with the company on behalf of all co-filers.

One Proposal Limit. Currently, under Rule 14-8(c), a shareholder may submit no more than one proposal to a company for a particular meeting. However, under the current rule a single representative could submit multiple proposals for the same meeting on behalf of different shareholders. The amendments

will apply the one proposal limit to each "person" rather than each shareholder, so that a person is not able to submit one proposal as a shareholder and a different proposal for the same meeting as a representative of another shareholder, or submit different proposals for the same meeting as a representative for multiple shareholders. The adopting release makes clear that this limitation does not apply to providing assistance or advice (legal, investment or otherwise) and instead only applies to submitting proposals as a proponent or as a representative of a proponent. The adopting release also indicates that this rule is not intended to limit the ability of a representative to appear and present proposals on behalf of multiple shareholders at the same meeting.

Resubmission Thresholds. Rule 14a-8 currently provides a basis for exclusion of a proposal if the proposal addresses substantially the same subject matter as a proposal or proposals included in the company's proxy materials within the preceding five years. In order for the exclusion to apply, the most recent vote must have occurred within the preceding three years and the proposal must have received less than 3, 6 or 10% of votes cast if voted on once, twice, or three or more times, respectively. The amendments will increase the level of shareholder support that a proposal must receive to be eligible for resubmission. A proposal dealing with substantially the same subject matter as a previous proposal or proposals included in the company's proxy materials within the preceding five years may be excluded under the amended rules if the most recent vote was within the preceding three years and was:

- Less than 5% of the votes cast if previously voted on once;
- Less than 15% of the votes cast if voted on twice; and
- Less than 25% of the votes cast if voted on three or more times.

In a notable change from the proposed rules, the final amendments do not include a "momentum" provision, which would have permitted exclusion of certain resubmitted proposals that experienced declining shareholder support.

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Additional information is available in the SEC's [adopting release](#) and accompanying [press release](#).

Associates Ryan J. Adams and Blake M. Grady assisted in the preparation of this client alert.