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## The SEC Adopts Amendments to the Shareholder Proposal Rule

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On September 23, 2020, the Securities and Exchange Commission (SEC) adopted amendments to Exchange Act Rule 14a-8, also known as the “shareholder proposal rule.” The SEC press release announcing the adopted changes are available [here](#) and the final amendments are available [here](#). Rule 14a-8 provides procedural and substantive requirements shareholders must satisfy to be eligible to include a proposal in a company’s proxy statement to shareholders. The adopted amendments will, among other things, make the following changes to the shareholder proposal rule:

- tighten the minimum ownership threshold a shareholder must satisfy for eligibility to include a shareholder proposal in a company’s proxy statement, generally replacing the current threshold of holding at least \$2,000 or 1% ownership of a company’s securities for at least one year with a sliding scale that will require a shareholder to demonstrate continuous ownership of at least (i) \$2,000 of the company’s securities for at least three years, **or** (ii) \$15,000 of the company’s securities for at least two years, **or** (iii) \$25,000 of the company’s securities for at least one year, and no longer allowing multiple shareholders to aggregate securities holdings to meet the new thresholds;
- require that shareholders who elect to use a representative, such as an attorney or investment advisor, to submit a proposal for inclusion in a company’s proxy statement provide documentation to the company that: (i) identifies the shareholder submitting the proposal and the shareholder’s designated representative; (ii) includes the shareholder’s statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder’s behalf; (iii) identifies the specific topic of the proposal to be submitted (this was changed from identifying the specific proposal to be submitted, in response to comments received on the amendments when proposed in November 2019); (iv) includes the shareholder’s statement supporting the proposal; and (v) is signed and dated by the shareholder;
- revise the “one proposal” rule to clarify that a single person may not submit multiple proposals at the same shareholder’s meeting, whether the person submits a proposal as a shareholder or as a representative of a shareholder; and
- increase the levels of shareholder support a proposal must receive to be eligible for resubmission at a company’s future shareholder meeting, if it addresses substantially the same subject matter as a proposal previously included in the company’s proxy materials within the preceding five calendar years and if the most recent vote occurred within the preceding three calendar years. Under the prior structure, in order to be eligible for resubmission, the most recent vote received must be (i) at least 3% of the votes cast if

previously voted on once in the last five years; (ii) at least 6% of the votes cast if previously voted on twice in the last five years; or (iii) at least 10% of the votes cast if previously voted on three or more times in the last five years, and the new rule requires higher shareholder support thresholds of at least 5%, 15% and 25%, respectively, within the same structure.

The SEC largely adopted the amendments as proposed on November 5, 2019, except most notably the SEC did not adopt what the staff referred to as the “momentum requirement,” which, if adopted, would have allowed companies to exclude proposals 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% threshold if (i) the most recently voted on proposal received less than a majority of the votes cast and (ii) support declined by 10% or more compared to the immediately preceding shareholder vote on the matter. The SEC rejected the “momentum requirement” amendment after commenters noted the inconsistencies and complexities the amendment would create for shareholders’ to resubmit a proposal.

Split by a 3-2 vote, the SEC Commissioners voted along party lines, with the deciding vote cast by Chairman Jay Clayton.

The Commissioners opposed to these amendments generally argued that the amendments make it more difficult for smaller shareholders to participate in the shareholder proposal process. Chairman Jay Clayton championed the SEC’s decision as a necessary change to facilitate an engagement process that is “reasonable, transparent and fair” for both companies and shareholders. In the view of Republican SEC Commissioner Hester Peirce, the prior rule did not require enough of a meaningful commitment (financial or otherwise) from shareholders in order to participate in the proposal process. Ultimately, Peirce advocates for less involvement by the SEC in “mediating interactions between companies and shareholders.” Peirce also argued that shareholder proposals are unduly burdensome to the SEC staff tasked with reviewing proposals excluded by companies under Rule 14a-8.

Democrat SEC Commissioner Allison Herren Lee criticized the SEC’s decision as an unreasonable prioritization of reducing costs for corporations over encouraging shareholder oversight. “Today’s rules do not take a balanced approach to this division of interests, but rather almost universally reject the comments and data submitted by shareholders, failing in the process to reckon with very real costs of reducing shareholder oversight,” Lee said.

Democrat SEC Commissioner Caroline Crenshaw also disapproved of the decision by the SEC to shift the costs of the shareholder proposal process to investors. Crenshaw argued that the one proposal rule and the more stringent thresholds to satisfy ownership and resubmission combine to impose an excessive burden on investors. “Now not only are we requiring retail investors to increase their investments by over 1000% to help improve those companies, we are mandating they take on greater relative risk to do so,” said Crenshaw.

The final amendments will become effective 60 days following their publication in the Federal Register and will be applicable for an annual or special meeting held on or after January 1, 2022. Additionally, the amended rules



contain a transition period that will allow shareholders to continue using the \$2,000 one-year ownership threshold subject to certain conditions, until January 1, 2023.

We invite you to contact us if you have any questions regarding the shareholder proposal rule, as amended.