

# Memorandum

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## SEC Proposes Amendments to Procedural Requirements and Resubmission Thresholds for Rule 14a-8 Shareholder Proposals

December 5, 2019

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On November 5, 2019, the SEC [proposed changes](#) to the eligibility and procedural requirements for the submission of shareholder proposals and to the applicable resubmission thresholds under Rule 14a-8. These proposals continue the SEC's recent efforts to streamline and modernize the shareholder proposal process.

The Division of Corporate Finance ("Corp Fin") also recently launched its "[Shareholder Proposal No-Action Responses Chart](#)" and began posting "informal" no-action responses under its new Rule 14a-8 process. As a reminder, in early September 2019, Corp Fin [announced](#) that it may respond orally instead of in writing to some no-action requests. For those companies that do not receive a formal no-action response to their request to exclude a shareholder proposal submitted pursuant to Rule 14a-8, Corp Fin has indicated that it will generally be emailing the company and the shareholder proponent to notify them of a response and will then post on its website these responses, along with the correspondence relating to the submission. The response will generally consist of a simple yes or no and will indicate the basis for the exclusion of a proposal so that others can easily understand it.

### Proposed Changes to Ownership Requirements

Under the current rule, to be eligible to submit a proposal, a shareholder must have continuously held at least \$2,000 in market value or 1 percent of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the proposal is submitted.

Under the proposed amendments, a shareholder would be eligible to submit a proposal 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 is also proposing to eliminate the 1 percent ownership threshold, which it indicates historically has not been utilized.

The SEC has indicated that it is trying ensure that every shareholder who wishes to use a company's proxy statement to advance a proposal has a sufficient economic stake or investment interest in the company. The new tiered approach is intended to enable both smaller shareholders who have held securities for a longer period of time and other shareholders who have demonstrated an economic stake or investment interest through larger ownership interests and shorter holding periods to utilize the rule.

The proposed rule amendments would not allow shareholders to aggregate their securities with other shareholders to meet the applicable minimum ownership thresholds. Shareholders, however, would continue to be permitted to co-file or co-sponsor shareholder proposals as a group if each shareholder proponent in the group meets an eligibility requirement. Although the SEC is not proposing to require a lead filer, it has indicated that it believes that it is a best practice for shareholders to clearly state in their initial submission letter to the company that they are co-filing the proposal with other proponents and identify the lead filer, specifying whether such lead filer is authorized to negotiate with the company and withdraw the proposal on the co-filer's behalf, and has requested comment on this point.

### **Proposed Rules Regarding Proposals Submitted by a Shareholder Representative**

At present, Rule 14a-8 does not address a shareholder's ability to submit a proposal for inclusion in a company's proxy materials through a representative; absent SEC regulation, this practice has been governed by state agency law. In order to reduce the administrative burden on companies to establish proper authority of a representative, for those shareholder proponents who elect to use a representative for the purpose of submitting a proposal under Rule 14a-8, the proposed rule would require 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.

### **Shareholder Engagement Driven Proposals**

The proposed amendment would require a statement from each shareholder proponent that he or she 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 proposal. The proponent would be required to include contact information as well as the business days and specific times that such proponent is available to discuss the proposal with the company.

The SEC has indicated that it believes that such a statement would encourage greater dialogue between shareholders and companies in the shareholder proposal process and may lead to more efficient and less costly resolution of these matters.

### **Proposed Changes to the “One Proposal Rule”**

Rule 14a-8(c) currently provides that each shareholder proponent may submit no more than one proposal to a company for a particular shareholders’ meeting. The proposed amendments would extend the application of the one-proposal rule to “each person” rather than “each shareholder” who submits a proposal. Specifically, under the proposed rule, a shareholder may not 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. Similarly, a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative would be submitting each proposal on behalf of different shareholders. The SEC has indicated that it believes that permitting representatives to submit multiple proposals for the same shareholders’ meeting undermines the purpose of the one-proposal limit.

### **Proposed Changes to Resubmission Thresholds**

Under the current rule, companies generally may be able to exclude shareholder proposals submitted under Rule 14a-8 if such proposals deal with substantially the same subject matter as previous proposals if, within the preceding five calendar years, the proposal received (1) less than 3 percent of the vote if proposed once; (2) less than 6 percent of the vote on its last submission to shareholders if proposed twice; and (3) less than 10 percent of the vote on its last submission to shareholders if proposed three times or more.

The SEC is proposing to replace the current resubmission thresholds of 3, 6, and 10 percent with new thresholds of 5, 15, and 25 percent, respectively, and to add an additional provision to the rule that would allow companies to exclude proposals that have been submitted three or more times in the preceding five years if they received more than 25 percent, but less than 50 percent, of the vote and support declined by more than 10% the last time substantially the same subject matter was voted on compared to the immediately preceding vote. The SEC has referred to the last requirement as the “momentum requirement” and intends for it to address proposals that once received a fair degree of shareholder interest but have since stalled.

The SEC has indicated that it is concerned that the present thresholds may not demonstrate sufficient shareholder support to warrant resubmission, or adequately distinguish between proposals that ultimately are more likely to obtain majority support upon resubmission and those that are not. According to the SEC, companies and their shareholders bear the burdens associated with management’s and shareholders’ repeated consideration of these proposals and/or their recurrent inclusion in the company’s proxy statement. The “cooling-off” period is intended to help ensure that the inclusion of such proposals does not result in unjustified burdens on companies and shareholders.

For further information regarding this memorandum, please contact **Karen Hsu Kelley** at +1-212-455-2408 or [kkelley@stblaw.com](mailto:kkelley@stblaw.com), **Shari A. Ness** at +1-212-455-2383 or [shari.ness@stblaw.com](mailto:shari.ness@stblaw.com), or any other member of the Firm's Public Company Advisory Practice.

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