

LEGAL ALERT

Securities Law and Practice Updates

October 2020

SEC Adopts Amendments to Shareholder Proposal Rules

On September 23, 2020, the Securities and Exchange Commission ("SEC"), adopted amendments to Rule 14-8 under the federal proxy rules, which govern the manner in which shareholders may seek to include a proposal in a company's proxy statement to shareholders. Rule 14a-8 requires companies that are subject to the federal proxy rules to include certain shareholder proposals in their proxy statements, subject to certain procedural and substantive requirements.

The amendments will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022. The amendments also provide for a transition period with respect to the ownership thresholds that will allow shareholders meeting specified conditions to rely on the current \$2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023.

A. Ownership Requirements

i. Ownership Thresholds

Under new Rule 14a-8(b), a shareholder will be eligible to submit a Rule 14a-8 proposal if the shareholder demonstrates continuous ownership of 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.

We are able to provide counsel and guidance in SEC and New Mining Disclosure matters. For additional information, please contact the attorneys named below or the attorney with whom you have a primary relationship.

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ii. **Aggregation**

Aggregation of holdings for purposes of meeting the ownership requirements will not be permitted. Instead, each shareholder must satisfy one of the three ownership thresholds to be eligible to submit or co-file a proposal.

iii. **Lead-File Designation**

Although shareholders will not be able to aggregate their holdings under the amendment, they will continue to be permitted to co-file proposals as a group if each shareholder-proponent in the group meets an eligibility requirement. The SEC believes that, as a best practice, co-filers should clearly state in their initial submittal 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 behalf of the other co-filers.

B. Proposals Submitted on Behalf of Shareholders

The amendments require shareholders that use a representative to submit a proposal for inclusion in a company's proxy statement to provide 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 submitting the proposal and the shareholder's designated representative;
- Includes the shareholder's statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf;
- Identifies the specific topic of the proposal to be submitted;
- Includes the shareholder's statement supporting the proposal; and
- Is signed and dated by the shareholder.

However, where a shareholder-proponent is an entity, and thus can act only through an agent, compliance with the amendment will not be necessary if the agent's authority to act is apparent and self-evident such that a reasonable person would understand that the agent has authority to act. For example, compliance generally would not be necessary where a corporation's CEO submits a proposal on behalf of the corporation, 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 such funds, where a partnership's general partner submits a proposal on behalf of the partnership, or where an adviser to an investment company submits a proposal on behalf of an investment company. On the other hand, compliance would be required where the agency relationship is not apparent and self-evident. For example, compliance would be required where an investment adviser submits a proposal on behalf of a client that is a shareholder.

C. The Role of the Shareholder-Proposal Process in Shareholder Engagement

Under the amendments, shareholder-proponents will be required to provide the company with a written statement that they are able to meet with the company in person or via teleconference at specified dates and times that are no less than 10 calendar days, nor more than 30 calendar days, after submission of the proposal. For example, for a proposal submitted on October 1, the shareholder-proponent would be required to identify dates of availability between October 11 and October 31.

Shareholder-proponents will also be required to provide their contact information and identify specific business days and times (i.e., more than one date and time) that they are available to discuss the proposal. The times specified should be during the regular business hours of the company's principal executive offices. If these hours are not disclosed in the company's proxy statement, the shareholder-proponent should identify times between 9:00 a.m. and 5:30 p.m. on business days in the time zone of the company's principal executive offices. If a company is not available to engage with the shareholder-proponent on the specific date(s) or time(s) originally identified by the shareholder-proponent, engagement may take place at a different date and/or time, provided that it is acceptable to both the shareholder-proponent and company. If the shareholder-proponent's availability changes, the company should be notified and alternative date(s) and time(s) should be provided to the company.

The contact information and availability must be the shareholder-proponent's, and not that of the shareholder's representative, if any. However, the shareholder-proponent's representative may participate in any discussions between the company and the shareholder.

D. One-Proposal Limit

Under the amendments, each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. Also, a person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting. Under the new rule, a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting. Likewise, a representative will not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders.

In order for shareholder-proponents who have submitted a proposal for inclusion in a company's proxy statement to remain eligible to do so at the same company within the following two years, shareholder-proponents must appear at the meeting

and present their proposal. However, a shareholder-proponent may satisfy this requirement by employing a representative who is qualified under state law to present the proposal on the proponent's behalf.

Under the amendments, entities and all persons under their control, including employees, will be treated as a "person" for purposes of the amendment. As such, if an investment adviser at Advisory Firm A submits a proposal on behalf of a shareholder-proponent to Company Y, neither that investment adviser nor any other adviser at Advisory Firm A would be permitted to submit a proposal on behalf of a different shareholder-proponent at Company Y for the same meeting. However, the amendment will not prohibit a single representative from representing multiple co-filers in connection with the submission of a single shareholder proposal.

E. Resubmission Thresholds

Under amended Rule 14a-8(i)(12), a shareholder proposal will be excludable from a company's proxy materials if it addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

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

For additional information, see the SEC's Adopting Release at:
<https://www.sec.gov/rules/final/2020/34-89964.pdf>