

PROVING SHAREHOLDER ELIGIBILITY UNDER RULE 14A-8(B)

I. INTRODUCTION

Rule 14a-8 requires management to include a properly submitted shareholder proposal in the company's proxy materials.¹ The Rule, however, limits applicability to owners holding at least \$2,000 in market value of the company's securities, or 1%, of the outstanding voting shares for at least one year through the date of the meeting.² Beneficial owners must establish their eligibility by submitting a written statement from the record holder.³ The registrant has fourteen days to provide notification of any deficiency in the required proof and the owner has fourteen days to respond.⁴

The share ownership requirements of subsection (b) have been among the most common and reliable methods for barring proposals from company's proxy materials.⁵ Problems with establishing eligibility range from inclusion of the wrong dates in the letter from the broker, the failure to obtain a letter from a broker not participating in Cede & Co., and inability to own shares for the requisite amount of time in newly public companies.⁶

This Article will focus on the eligibility requirements for shareholders, particularly for street name holders. Part II of this Article will lay out the administrative history of the ownership requirements in Rule 14a-8(b). Part III of the Article will trace the interpretation of the Securities and Exchange Commission (SEC or Commission) staff on the provision, with emphasis on how shareholders prove their ownership of the required value of securities continuously for one full year. Finally, part IV of the Article will suggest potential improvements.

1. Exchange Act Release No. 3347 (Dec. 18, 1942).

2. 17 C.F.R. § 240.14a-8(b)(1) (2011). Evidence may also be obtained from certain SEC filings.

3. 17 C.F.R. § 240.14a-8(b)(2) (2011).

4. Craig Eastland, *Through(out) the Looking-Glass: Proving Eligibility to Submit a Shareholder Proposal Under SEC Rule 14a-8(b)*, THOMSON REUTERS (May, 2014), <http://legalsolutions.thomsonreuters.com/law-products/news-views/corporate-counsel/through-out-the-looking-glass-proving-eligibility-to-submit-a-shareholder-proposal-under-sec-rule>.

5. *Id.*; see also *Shareholder Proposal Developments During the 2016 Proxy Season*, GIBSON DUNN (June 28, 2016), <http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf>.

6. *Id.*

II. ADMINISTRATIVE HISTORY

A. The Early Period

Enacted in 1942, Rule 14a-8⁷ initially applied to “qualified” security holders.⁸ In 1954, the Commission extended the provision to “any security holder entitled to vote at a meeting of security holders of the issuer.”⁹ The Rule did not explicitly reference beneficial owners, although the staff administratively acceded the right to these investors.¹⁰ The provision did not, however, require the ownership of a specified number of shares or mandate a minimum holding period.

Changes made in 1976 codified the staff’s position on the need to hold shares through the date of meeting and the right of beneficial owners to submit proposals under the Rule.¹¹ The Commission also received comments urging the implementation of “eligibility requirements.”¹² Some favored the imposition of a minimum ownership threshold in order to curtail potential abuse and limit the number of proposals.¹³ Others, however, opposed eligibility requirements, contending that: (1) minimum ownership thresholds created the appearance of discrimination against small shareholders; (2) computation of share values could raise practical difficulties because of changing market prices; (3) a holding period, when added to the early time for submission, disadvantaged investors; and (4) the limitations would have had little effect on reducing the number of proposals.¹⁴

The staff agreed with the opponents and concluded that the lack of eligibility requirements did not result in abuse and, declined to impose

7. Timothy L. Feagans, *SEC Rule 14a-8: New Restrictions on Corporate Democracy*, 33 BUFF. L. REV. 225 n.1 (1984) (explaining that in 1942, the shareholder proposal rule was originally “x-14a-7,” later changed and renumbered, it required corporate management to include in its proxy materials any non-management proposal that was a “proper subject for action by the security holders.”).

8. Leila N. Sadat-Keeling, *The 1983 Amendment to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy?*, 59 TUL. L. REV. 161 (1984); see also Exchange Act Release No. 3347, *supra* note 1.

9. Tomas M. Clusserath, *Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 50 (1964).

10. Exchange Act Release No. 34-3998 (Oct. 10, 1947); see also AMY L. GOODMAN, JOHN F. OLSON, & LISA A. FONTENOT, *A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES* (5th ed. 2016) (“Any security holder entitled to vote at a meeting of security holders of the issuer and which is accompanied by notice of his intention to present the proposal for action at the meeting.”).

11. Exchange Act Release No. 9343 (July 7, 1976).

12. Exchange Act Release No. 12999 (Nov. 22, 1976).

13. *Id.* (“Among such recommendations were that the proponent be required to have been a security holder of the issuer for a minimum period of time (e.g., six months or one year) prior to the submission of his proposal, or that the proponent be required to own at the time of submission a minimum investment interest in the issuer, either in terms of a minimum number of shares or a minimum dollar amount according to the market value of the securities.”).

14. Sadat-Keeling, *supra* note 8, at 176.

the requested requirements.¹⁵ The staff reiterated the position in a subsequent study of Rule 14a-8.¹⁶

B. The Addition of Ownership and Holding Requirements

The Commission nonetheless revisited the idea in 1982. The proposing release sought comment on amendments to require ownership of \$1,000 or 1% of the market value of the voting securities for one year.¹⁷ The Commission reasoned that that the requirement would ensure that submitting shareholders had “some measured economic stake or investment interest in the corporation”¹⁸ and that the Rule was unavailable to “activists of one kind or another” who used “a share of stock as the pass-key to the proxy bullhorn.”¹⁹

The Commission amended the rule in 1987 to specify the documentary proof needed to establish ownership by beneficial owners.²⁰ Street name and beneficial owners were to submit a written statement from the record holder verifying continuous ownership and “his or her eligibility to submit a proposal to the company.”²¹ The exclusion was intended to relieve registrants and the Commission of unnecessary administrative burdens and costs associated with the filing and processing of proxy materials.²²

C. Final Adjustments

The Commission decided to rewrite the Rule in plain English in 1997 and, as part of that process, revise and adjust the ownership to reflect the effects of inflation.²³ The proposal sought to raise the eligibility

15. Exchange Act Release No. 12999, *supra* note 12.

16. Staff Report on Corporate Accountability, Division of Corporate Finance, Securities and Exchange Commission, presented to Committee on Banking, Housing & Urban Affairs, U.S. Senate, 96th Cong., 20 Sess. 34-35, 181-82 (Sept. 4, 1980) (“The staff’s own examination has produced little support for the rationale that a reasonable ‘minimum investment’ requirement would eliminate a substantial proportion of the proposals or, more importantly, that it would distinguish between those which were offered in good faith and those which were frivolous or abusive.”).

17. Exchange Act Release No. 12999, *supra* note 12 (“The one-year ownership requirement sought to curtail abuse of the rule by requiring a continuous investment interest for those who put the company and other shareholders to the expense of including a proposal in proxy materials.”).

18. Exchange Act Release No. 19135 (Oct. 14, 1982).

19. This proposal originated from a speech by former Commissioner Bevis Longstreth. The S.E.C. and Shareholder proposals: Simplification in Regulation, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶83,067, at 84,708 (Dec. 23, 1981). This proposal also included notice, timing, minimum investment, and minimum holding requirements. See Exchange Act Release No. 19135, *supra* note 18, at 47, 420, 47,422-23, 47, 434-35.

20. See Exchange Act Release No. 34-25217 (Dec. 21, 1987).

21. See *id.*; SEC Staff Legal Bulletin No. 14F (Oct. 18, 2011) (providing the following sample language to include in a proof of ownership letter that would satisfy the requirements of Rule 14a-8(b): “As of [the date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities.]”).

22. See Exchange Act Release No. 25217, *supra* note 20.

23. Séan Patrick O’Brien, *The 1983 Amendments to SEC Rule 14A-8: Upsetting a Precarious Balance*, 19 VAL. U. L. REV. 221, 224 art. 9 (1984); Exchange Act Release No. 12999, *supra* note 12.

threshold to \$2,000.²⁴ The amendment balanced a “meaningful” increase against the need to provide “an avenue of communication for small investors.”²⁵ The Commission received little opposition to the changes and adopted them as proposed.²⁶

III. STAFF INTERPRETATION

In establishing the ownership requirements, the staff has required the use an average of the bid and ask price.²⁷ Specifically, the staff instructed shareholders to look to “whether at any time within sixty days before the proposal submission, their investment was valued at \$2,000 or more, based on the average of bid and ask prices.”²⁸ To the extent unavailable, shareholders may rely on the highest selling price during the prior sixty days.²⁹

With respect to the ownership and holding period requirements, record ownership raises few concerns since the company possesses the required proof.³⁰ The same, however, is not true of beneficial owners. A letter from the proponent will not suffice even when disclosing the number of shares and relevant brokerage account.³¹ The shareholder must instead provide documentation from the relevant broker.³² At the same time, monthly, quarterly or other periodic investment statements for the

24. See Proposed Rule: Amendments to Rules on Shareholder Proposals, U.S. SECURITY AND EXCHANGE COMMISSION, <https://www.sec.gov/rules/proposed/34-39093.htm> (noting since the Rule's adoption inflation has only accounted for \$600. The SEC proposes the \$1,000 increase “to account for future inflation, and because it will be easier to use for calculations.”).

25. Rules and Regulation, 63 Fed. Reg. 102 (Thursday, May 28, 1998) (stating small shareholders who equally with other holders have a strong interest in maintaining channels of communication with management and fellow shareholders.)

26. Exchange Act Release No. 34-40018 (May 26, 1998).

27. Exchange Act Release No. 34-2009 (Aug. 16, 1983). The bid price is that which dealers are currently offering to buy the security for. The asked price is that which dealers are currently offering to sell the security for. K. Smith & D. Eiteman, *Essentials of Investing*, 77-78 (1974). Quotations of such bid and asked prices for an over-the-counter stock may be secured through stockbrokers who can obtain information through a computerized network that furnishes continuous quotations or through printed sheets that are revised daily. SOLOMON, *supra* note 6, at 803. The aggregate worldwide market value of the issuer's outstanding voting and non-voting common equity shall be computed by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity. L. Solomon, R. Stevenson, & D. Schwartz, *Corporations*, 461 (1982).

28. See Staff Legal Bulletin No. 14, Exchange Act Release No. SLB-14 (July 13, 2001).

29. *Id.*

30. See News Corp., SEC No-Action Letter, 2010 WL 2171020, at *2 (July 27, 2010) (stating “Where, however, the company cannot verify record ownership, the proposal can be excluded.”); see also Schering-Plough Corporation, SEC No-Action Letter (Mar. 27, 2009) (stating “[t]he Company also had its transfer agent conduct a search of the Company's record holders, and it was unable to find any record indicating Mr. Loeb is a record holder of any shares.”).

31. See Am. Stores Co., SEC No-Action Letter, 1991 WL 176969 (Apr. 8, 1991) (stating “[w]hile Raymondale's affidavits provided the name of the brokerage account in which its 150 American Stores shares are supposedly held, Raymondale provided no independent confirmation from the broker that such shares have been held for Raymondale for at least one year.”).

32. Exchange Act Release No. 25217, *supra* note 20; See also Media Gen., Inc., SEC No-Action Letter, 2001 WL 114961 (February 8, 2001).

broker will not constitute adequate proof of continuous ownership.³³ Beneficial owners must establish ownership either through reference to an eligible SEC filing or through a letter from the record owner.³⁴ Record owner includes banks and brokers participating in a depository.³⁵

The need for a letter from the broker or bank has given rise to a number of issues. These include the ability (or inability) to obtain an appropriate letter from the record owner, the problems that arise with changes of brokers during the year, the use of introducing brokers and the applicability of the holding period to companies that recently went public.³⁶

A. Problems with Broker Letters

In some cases, the letter provided by the broker or other record owner will not include the information necessary to establish eligibility. The letter may not, for example, encompass the entire twelve month period or may fail to include the date of submission of the proposal.³⁷ Letters from record owners may also attest to beneficial ownership for a

33. See e.g., Duke Realty Corp., SEC No-Action Letter, 2002 WL 338408 (Feb. 7, 2002) (noting a company asserting that any “periodic investment statement” from a broker is insufficient to establish continuous ownership requirement). Exchange Act Release No. 25217, *supra* note 20 (stating that “monthly, quarterly or other periodic investment statements” from broker insufficient to establish continuous ownership requirement).

34. Exchange Act Release No. 25217, *supra* note 20, at Section C.1.c of SLB 14; Staff Legal Bulletin No. 14F (CF), *supra* note 21; (“You can confirm whether your broker or bank is a DTC participant by asking your broker or bank or by checking DTC’s participant list, which is available at <http://www.dtc.com/client-center/dtc-directories>.”); David M. Lynn & Anna T. Pinedo, *Frequently Asked Questions About Shareholder Proposals and Proxy Access*, MORRISON & FOERSTER LLP (2015), <https://media2.mofo.com/documents/frequently-asked-questions-about-shareholder-proposals-and-proxy-access.pdf> (stating that beneficial owners may providing proof of ownership by proving a copy of a Schedule 13D, Schedule 13G, Form 3, Form 4, Form 5, or amendments to those documents or updated forms, reflecting the shareholder’s ownership of the shares as of or before the date on which the one-year eligibility period begins or by submitting a written statement “from the ‘record’ holder of [the] securities (usually a broker or bank),” verifying that, “at the time the proposal was submitted, the shareholder held the required amount of securities continuously for at least one year.”)

35. Today, the most commonly used depository is the Depository Trust Company (DTC), a registered clearing agency acting as a securities depository. As a result, record ownership appears in the name DTC’s nominee, Cede & Co.

36. See SEC Staff Legal Bulletin No. 14G (Oct. 16, 2012), <http://www.sec.gov/interps/legal/cfslb14g.htm> (asserting that the staff will not “concur in the exclusion of a proposal under Rules 14a-8(b) ... on the basis that a proponent’s proof of ownership does not cover the one-year period preceding and including the date the proposal is submitted unless the company provides a notice of defect that identifies the specific date on which the proposal was submitted and explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the defect.”)

37. Staff Legal Bulletin No. 14F, *supra* note 21 (“In some cases, the letter speaks as of a date *before* the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the shareholder’s beneficial ownership over the required full one-year period preceding the date of the proposal’s submission.”).

specified date without referencing the continuous ownership requirement.³⁸

In *Johnson and Johnson*,³⁹ the proponent submitted a letter showing continuous ownership of shares since “November of 2011” but did not otherwise “sufficiently pinpoint the dates for which the proponent had ownership of its stock.”⁴⁰ In *Coca-Cola Company*,⁴¹ the staff granted relief where the documentary proof provided by the proponent referred to the wrong beneficial owner.

In some cases, the letter submitted by the proponent failed to include the dates need to meet the continuous ownership requirement. In *Bank of America Corporation*,⁴² the letter verified ownership from January 22, 2009 through November 18, 2014. The one-year period for purposes of Rule 14a-8, however, ran through November 22, 2014, the date the proposal was submitted to the Company. The letter did not, therefore, demonstrate that “the shares were held continuously during the required one-year period.”⁴³ Similarly, in *Union Pacific*, the proponent submitted its proposal on December 3, 2009. The letter, however, stated that the proponent held the shares for one year from December 11, 2009, providing a gap of eight days.⁴⁴

B. Changes in Brokers or Custodians

Gaps in ownership may potentially appear as a result of changes in brokers or custodians.⁴⁵ To meet the continuous ownership requirement, investors must demonstrate that the transfer to the new account did not involve a sale. Doing so requires ownership verification from multiple brokers and an explanation for any apparent gap.⁴⁶ Exclusion will occur

38. *Id.* (stating [t]he Commission recommends the following language: “As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]. - This format is acceptable for purposes of Rule 14a-8(b), but it is not mandatory or exclusive.”)

39. Johnson & Johnson, SEC No-Action Letter, 2012 WL 6723105 (Jan. 8, 2013).

40. *Id.*

41. The Coca-Cola Co., SEC No-Action Letter, 2008 WL 353402 (Feb. 4, 2008).

42. Bank of Am. Corp., SEC No-Action Letter, 2015 WL 81901 (Feb. 11, 2015).

43. *Id.*; *See also* DST Sys. Inc., SEC No-Action Letter, 2014 WL 606197 (Feb. 4, 2014).

44. Union Pac. Corp., SEC No-Action Letter, 2010 WL 97617 (Jan. 29, 2010).

45. Staff Legal Bulletin No. 14F, *supra* note 21, at Section C. (“In some cases, the letter speaks as of a date *before* the date the proposal was submitted, thereby leaving a gap between the date of verification and the date the proposal was submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the proponent’s beneficial ownership over the required full one-year period preceding the date of the proposal’s submission.”)

46. SEC Staff Legal Bulletin No. 14G, *supra* note 36 (stating: “We are concerned that companies’ notices of defect are not adequately describing the defects or explaining what a proponent must do to remedy defects in proof of ownership letters. For example, some companies’ notices of defect make no mention of the gap in the period of ownership covered by the proponent’s proof of ownership letter or other specific deficiencies that the company has identified.”); Exxon Mobil Corp., SEC No-Action Letter, 2015 WL 3332189 (Feb. 23, 2015) (stating that the shares were transferred not sold: “Company believed because the Systems’ initial bank custodian, Bank of New York Mellon, submitted proof of ownership letters for the period from October 20, 2013 through October

where the street name owner fails to provide proof that a sale did not occur.⁴⁷

In *Chevron Corporation*,⁴⁸ the shareholder changed bank custodians during the year. The shareholder submitted a letter from one bank stating the shares were held through October 31 and from another confirming that the shares were held since November 1. The shares appeared in two different accounts, one on October 31 and the other on November 1. As a result, the company argued that the shares could have been sold on one day and repurchased the next, thereby failing to meet the continuous ownership requirement.⁴⁹ The shareholder, however, pointed out the logistical difficulties in the simultaneous sale of three million shares by portfolio managers and that the trading volume that day did not reflect an unusual increase.⁵⁰ Staff denied the no-action request.⁵¹

C. Introducing Brokers

Beneficial owners obtain the required letter from their broker. Not all brokers, however, will suffice. Investors sometimes have accounts with an introducing broker.⁵² An introducing broker engages with the customer but does not typically maintain control of the client's funds or securities.⁵³ Introducing brokers instead rely on clearing brokers to perform these functions. Clearing brokers in turn participate in the Depository Trust Company (DTC).⁵⁴ Since introducing brokers generally do not participate in DTC, they typically do not appear on DTC's securities position listing.⁵⁵

31, 2013, and the Systems' successor bank custodian, State Street, submitted proof of ownership letters for the period from November 1, 2013 through October 28, 2014, the Systems must have sold and repurchased their Chevron shares between October 31 and November 1, 2013, thereby creating an alleged "2013 Ownership Gap" between those two successive days.")

47. *Id.* (noting in *Exxon Mobil Corporation*, the Proponents provided no evidence within the required time for a response to indicate that they transferred their shares of the Company from the first to the second broker; and the Company was therefore unable to verify that the Proponents continuously held their shares of the Company.); *See also* The Coca-Cola Co., SEC No-Action Letter, 2001 WL 78113 (Jan. 19, 2001) (describing when the shareholder transferred Coke shares to another broker during the one-year preceding submission of proposal and was unable to provide a statement from the broker verifying ownership for a year).

48. Chevron Corp, SEC No-Action Letter, 2015 WL 274204 (Feb. 23, 2015).

49. *Id.*

50. *Id.* (stating the shareholder noted an absence of any "spike" in the trading activity of Chevron and asserted that, for the "mass divestiture and repurchase" to have occurred, "all of the multiple independent managers for each of the NYC Systems [would have to] decide to sell all of their three-million-plus Chevron shares (and presumably all shares of all of the Systems' equity holdings) on the same day. and buy them back the next.")

51. *Id.*

52. *Supra* note 10 at 12-26.

53. Staff Legal Bulletin No. 14F, *supra* note 21; *see* Net Capital Rule Release, Exchange Act Release No. 34-31511 (Nov. 24, 1992) [57 FR 56973], at Section ILC.

54. Staff Legal Bulletin No. 14F, *supra* note 21.

55. *Id.*

In 2008, the Staff in *The Hain Celestial Group, Inc.* agreed that an introducing broker could be considered a “record holder.”⁵⁶ The court in *Apache v. Chevedden*, however, rejected this interpretation, holding that a company did not have to accept evidence of ownership from “an unregistered entity that is not a DTC participant” at least “when the company has identified grounds for believing that the proof of eligibility is unreliable.”⁵⁷ The court in *KBR v. Chevedden*⁵⁸ agreed with the *Apache* analysis.⁵⁹

In 2011, the SEC adopted the positions reflected in the *KBR* and *Apache* decisions. Only DTC participants would be viewed as “record holders,” eliminating introducing brokers from the definition.⁶⁰ The change in position meant that beneficial owners generally had to obtain ownership letters from both the introducing broker and the DTC participant.⁶¹ Shareholders and companies could confirm whether a particular broker or bank participated in the depository by checking DTC's participant list.⁶²

D. Twelve Month Holding Requirement for Recently Public Companies

In the case of a newly public company, shareholders acquiring securities in the initial public offering (IPO) will not, for the first year, meet the continuous ownership requirement. Shareholders have argued that in these circumstances, the staff should put the holding period aside. In *Meridian Interstate Bancorp, Inc.*,⁶³ however, the SEC determined the Rule contained no exemption for shareholders in newly-public companies. The SEC similarly granted the company no-action relief where the proponent purchased the company's common stock on the date of the

56. *Id.*

57. *Supra* note 10, at 12-25.

58. *See KBR Inc. v. Chevedden*, 2011 WL 1463611 (S.D. Tex. 2011) and *Apache Corp v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010) (concluding that a securities intermediary was not a record holder for purposes of Rule 14a-8(b) because it did not appear on a list of the company's non-objecting beneficial owners or on any DTC securities position listing, nor was the intermediary a DTC participant).

59. *KBR Inc. v. Chevedden*, *supra* note 58 (finding that letter submitted by introducing broker not adequate “because the summary judgment evidence did not show that RTS appeared on either the NOBO list or on any “Cede breakdown,” nor was RTS a DTC participant”).

60. *See supra* notes 21 and note 10 at 12-27.

61. *Id.* (stating that letters from an affiliate of a DTC participant, however are considered acceptable).

62. *See supra* notes 21 and note 35 (detailing the DTC participant list, <http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>.)

63. *See Meridian Interstate Bancorp, Inc.*, SEC No-Action Letter, 2008 WL 2447326 (June 17, 2008)

(“The Division has taken the position on several occasions that a company may exclude proposals where the proponent fails to meet, or provide evidence of satisfaction of, the eligibility requirements set forth in Rule 14a-8(b).”); *see also Anthracite Cap., Inc.*, (Mar. 11, 2008); *Office Depot, Inc.*, (Feb. 25, 2008); *New York Community Bancorp, Inc.*, (Feb. 19, 2008); *Safeway Inc.*, (Feb. 6, 2008); and *Exxon Mobil Corp.*, (Jan. 29, 2008).

company's IPO and submitted a shareholder proposal less than one year later.⁶⁴

IV. ANALYSIS

Ownership thresholds remain an important component to the rule. Moreover, some commenters favor an increase in these thresholds. Suggestions have included (1) a change in the ownership requirements based on a sliding scale related to a company's size; (2) an increase in the length of the holding requirement to mirror the standard frequently used for proxy access; (3) additional disclosure by proponents, including their intentions, economic interests and holdings in the target company; and (4) the raising of the resubmission threshold for proposals that have been rejected in previous years.⁶⁵

Former SEC Commissioner Daniel M. Gallagher argued for dramatic increases in 14a-8(b) ownership thresholds to bar "[a]ctivist investors and corporate gadflies" who have "hijack[ed] the shareholder proposal system."⁶⁶ Gallagher proposed either increasing the value of the required investment to "perhaps \$200,000 or even better, \$2 million," or dropping the "flat dollar test ... leaving only a percentage test."⁶⁷ He also recommended prolonging the holding period, deeming a one-year holding period "hardly a serious impediment to some activists."

Opposition to these changes exist, particularly because of the disproportionate impact on small investors who, through long term ownership, have demonstrated a continuing interest in a company.⁶⁸ One possible solution would be to permit small investors to aggregate their

64. Hewlett-Packard Enter. Co., SEC No-Action Letter, ("Mr. Chevedden could not have owned Company stock 'continuously ... since July 1, 2015' because the Company was not a publicly traded company until November 1, 2015").

65. *Supra* note 19. ("For proposals related to topics other than director elections, a truly reasonable standard could be to use a sliding scale based on the market capitalization of the company, with a required ownership percentage of 0.15 percent for proposals submitted to the largest companies and up to 1 percent for proposals submitted to smaller companies. Additionally, if a proposal were submitted by a group or by a proponent acting by proxy, the ownership percentage sliding scale could be increased to up to 3 percent.")

66. Daniel M. Gallagher, *Remarks at the 26th Annual Corporate Law Institute*, Tulane University Law School: Federal Preemption of State Corporate Governance (Mar. 27, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370541315952#_edn10 ("The push to increase the eligibility threshold is seen in a number of no-action letters including one from Chevron urging the eligibility threshold to be at least \$10,000, or 2% of shares entitled to be voted on the proposal. 3M also pushed for the Commission to revisit the current eligibility requirements to submit stockholder proposals under Rule 14a-8(b) (arguing for a requirement of at least 1% of the company's outstanding voting stock that has been held for three years. This enhanced eligibility requirement would help ensure proxy access stockholder proponents have both a significant stake and a long-term interest in the company.)")

67. *See* Eastland, *supra* notes 4; Gallagher, *supra* note 66.

68. Sadat-Keeling, *supra* note 8, at 179 ("AT&T noted in its comments to the proposed amendment it does not seem sensible to forbid a long-time shareholder who has demonstrated a continuing interest in a company from participating in the proposal process simply because his shareholding is too small."); Securities and Exchange Commission, Division of Corporate Finance, Summary of Comments, Shareholder Proposal Proposed Amendments Release 10.

shares.⁶⁹ Thresholds, however, would still need to be low enough to provide small shareholders with meaningful access to the Rule. Moreover, the right to aggregate would need to address the serious logistical difficulties that in obtaining a list of shareholders under both state and federal law.⁷⁰

The debate over thresholds, however, has not adequately focused upon the unnecessary complications associated with establishing beneficial ownership. Shareholders, particularly retail investors, often incur significant difficulty in obtaining an adequate letter from brokers within the relevant time periods.⁷¹ Moreover, in the case of an introducing broker or change in custodian, the beneficial must obtain two letters, exacerbating the logistical difficulties.

The unnecessary complexity has consequences. The ownership thresholds and holding period seek to ensure that investors submitting proposals have “skin in the game.” The excessive complexity in demonstrating these requirements, however, all but guarantees that in some instances shareholders meeting these requirements will have their proposal excluded. Moreover, by requiring a letter from the broker, the Commission has imposed an essential obligation on third parties that do not receive compensation for the service and view the matter a “chore.”

One solution may be to allow the use of monthly broker statements that establish ownership over a twelve month period. Statements can demonstrate ownership and the length of the holding period.⁷² To include the date of submission, the shareholder could submit the statement from the month that included the submission date. These statements could also be supported by representations from the beneficial owner that he or she had not sold and repurchased the shares during the period.

69. Exchange Act Release No. 20091, 48 Fed. Reg. 38, (Aug. 16, 1983) (stating that holdings of proponents will be aggregated in determining the includability of a proposal; up to 20 shareholders are permitted to aggregate their shares in order to meet the 3% ownership threshold (mutual funds under common management and investment control and funds within the same family are counted as one holder).

70. *Id.*; see also Exchange Act Release No. 34-62495 (July 14, 2010) [75 FR 42982] (stating the term “beneficial owner” does not have a uniform meaning under the federal securities laws. It has a different meaning in this bulletin as compared to “beneficial owner” and “beneficial ownership” in Sections 13 and 16 of the Exchange Act. Our use of the term in this bulletin is not intended to suggest that registered owners are not beneficial owners for purposes of those Exchange Act provisions). See Exchange Act Release No. 34-12598 (July 7, 1976) [41 FR 29982], at n.2 (“The term ‘beneficial owner’ when used in the context of the proxy rules, and in light of the purposes of those rules, may be interpreted to have a broader meaning than it would for certain other purpose[s] under the federal securities laws, such as reporting pursuant to the Williams Act.”).

71. Nonetheless, concerns over documentary evidence have also been raised in connection with proposals submitted by large institutional investors. See Chevron Corp, SEC No-Action Letter, 2015 WL 274204 (Feb. 23, 2015) (proposal submitted by ***).

72. See Understanding Your Brokerage Account Statements, <http://www.nasaa.org/wp-content/uploads/2011/08/SIFMA-SIPC-NASAA-Broker-Statements-Brochure.pdf> (“Your brokerage account statement ‘keeps score’ of your investments and reports all transactions during the statement period.”).

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