

SEC Proposes Amendments to the Proxy Rules Regarding Shareholder Proposals and Proxy Voting Advice

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On November 5, 2019, the Securities and Exchange Commission (SEC), by 3-2 votes, issued two releases proposing a number of amendments to the federal proxy rules. The first release proposed changes to certain procedural requirements relating to the submission of shareholder proposals and changes to the provision regarding the ability to exclude resubmitted proposals. The second release proposed amendments relating to the proxy voting advice business, particularly with respect to the exemptions from the proxy filing requirements for a proxy advisory firm's voting recommendations.

Comments on the proposals will be due 60 days after publication of the proposing releases in the Federal Register, meaning that comments likely will be due sometime in January 2020. As these are proposed rules rather than final rules, calendar year-end companies currently receiving shareholder proposals for 2020 annual meetings should continue to analyze those proposals under the existing rules.

In addition, at the SEC meeting at which these proposing releases were approved, SEC Chairman Jay Clayton stated that the SEC Staff has been instructed to prepare recommendations regarding "proxy plumbing" and universal proxy cards. The timing of any proposed amendments on these topics is not known.

Below is a summary of the proposed amendments.

Shareholder Proposals

The SEC voted to propose amendments to Exchange Act Rule 14a-8, the shareholder proposal rule. The proposed amendments would (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) amend the one-proposal rule to apply to a proponent's representative; (v) raise the levels of support that a proposal must receive to be resubmitted at future shareholder meetings; and (vi) add a new provision that would allow exclusion of certain resubmitted proposals that have experienced declining shareholder support.

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. The proposed amendments would change the eligibility requirements so that to be eligible to submit a proposal under Rule 14a-8 a shareholder must 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, although shareholders currently may aggregate their shares in order to meet the minimum ownership requirements, the proposed amendment would disallow aggregation.

Documentation when a proposal is submitted by a representative. In Staff Legal Bulletin No. 14I (Nov. 1, 2017), the SEC Staff stated that it would look to certain documentation describing a shareholder's delegation of authority to a representative to submit

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a shareholder proposal. The proposed rules would 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 would be required to provide the company with documentation signed and dated by the shareholder:

- identifying the company to which the proposal is directed;
- identifying the annual or special meeting for which the proposal is submitted;
- identifying the shareholder as the proponent and identifying the person acting on the proponent's behalf as the proponent's representative;
- including a statement authorizing the representative to submit the proposal and/or otherwise act on the proponent's behalf;
- identifying the specific proposal to be submitted; and
- including the shareholder's statement supporting the proposal.

Information regarding the proponent's availability for engagement with the company. As part of the Rule 14a-8 procedural requirements, the proposed amendments would 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 would need to provide the company with contact information and business days and specific times that the proponent is available to discuss the proposal with the company. The proposing release makes it clear that the contact information and availability for engagement would be that of the shareholder and not the representative, although the representative could participate in the discussions.

Amendment to the 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. Under the current rule, the same representative could submit multiple proposals for the same meeting on behalf of different shareholders. The proposed amendment would apply the one-proposal limit to each "person" so that a person could not submit one proposal as a shareholder and submit 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 proposing release makes clear that this limitation would not apply to providing assistance or advice (legal or otherwise), just to submitting proposals as a proponent or as a representative of a proponent.

Resubmission thresholds and "momentum." Currently, Rule 14a-8 provides a basis for exclusion of a proposal if the proposal addresses substantially the same subject matter as a proposal or proposals previously included in the company's proxy materials

within the preceding five years if the most recent vote occurred within the preceding three years and the proposal received less than 3%, 6% or 10% of votes cast if voted on once, twice or three or more times, respectively. The proposed amendments would 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 could be excluded 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 addition, the proposed amendments provide that a proposal may be excludable under a new "momentum" requirement. Specifically, a proposal that deals with substantially the same subject matter as proposals previously voted on three or more times in the preceding five years may be excluded if at the most recent shareholder vote:

- the proposal received less than 50% of the votes cast; and
- the percentage of votes cast declined by 10% or more compared to the immediately preceding vote on substantially the same subject matter.

The proposing release provides as an example that a proposal would be excludable where a proposal dealing with substantially the same subject matter had previously been voted on three times in the preceding five years and received 26% of votes cast on the third submission compared to 30% on the second submission. In this example, the 26% of votes cast represents a decline of more than 10% from the previous 30% of votes cast.

Proposed Amendments Regarding Proxy Voting Advice

In the release relating to proxy voting advice, the SEC proposed amendments to the proxy rules that would (i) codify the SEC's interpretation that proxy voting advice generally constitutes a "solicitation"; (ii) condition the availability of the exemption from the proxy information and filing requirements for a firm's proxy voting recommendations on compliance with (A) additional disclosure requirements concerning material conflicts of interest and (B) new procedural requirements requiring an opportunity for companies to review the voting recommendations and provide feedback in advance of the firm's issuance of the recommendations, as well as a company option to include in the firm's voting recommendations a hyperlink to the company's views on those recommendations; and (iii) provide examples of when the failure to disclose certain information in proxy voting advice may be considered misleading in violation of the proxy rules.

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Proxy voting advice is a “solicitation.” The proxy rules define a “solicitation” as, among other things, a “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” The SEC previously has observed that the circumstances in which proxy advisory firms provide proxy voting advice may constitute a solicitation.¹ The proposed amendments would modify Exchange Act Rule 14a-1(l) to specify that a solicitation exists when proxy voting advice that makes a recommendation on how to vote is provided by a person that markets its expertise as a provider of such proxy voting advice and sells such advice for a fee. The proposed amendment also would codify the SEC’s view that voting advice provided in response to an unprompted request would not constitute a solicitation.

New requirements for proxy voting recommendations to be exempt from the proxy information and filing requirements.

The proposed amendments would revise Exchange Act Rule 14a-2(b), which provides exemptions from the information and filing requirements of the federal proxy rules, by adding three new requirements in order for proxy voting advice to fall within these exemptions.

The first requirement under the proposed amendments would be inclusion in the firm’s proxy voting advice, and in any electronic medium used to deliver the proxy voting advice, of “prominent” disclosure of material conflicts of interest, including any information material to assessing the objectivity of the proxy voting advice, as well as any policies and procedures used to identify any material conflicts of interest and steps taken to address any such conflicts. The proposing release notes that this disclosure should be sufficiently detailed and that boilerplate language would be insufficient.

The second requirement under the proposed amendments would be the opportunity to review and provide feedback on the proxy voting advice in advance of the release of that advice to clients. Specifically, the company and any other person conducting a non-exempt solicitation (*i.e.*, a competing solicitation) would receive a copy of the proxy voting advice prior to the distribution of that advice to the proxy advisory firm’s clients, with the length of time provided for review and feedback dependent on how far in advance of the shareholder meeting the company or other soliciting person has filed its definitive proxy material. If the definitive proxy material is filed at least 45 days before the meeting date, the review and feedback period would be five business days, and if the definitive proxy material is filed less than 45 days, but at least 25 days, before the meeting date, the review and feedback period would be three business days.

¹ We note that, on October 31, 2019, ISS sued the SEC in response to SEC guidance issued in August 2019 that proxy voting advice might be a solicitation under the proxy rules.

In addition to the review and feedback period, the proxy advisory firm must then provide the company and other soliciting persons with a final notice of voting advice. This final notice must be no earlier than the expiration of the applicable review and feedback period and no later than two business days prior to the delivery of the proxy voting advice to the firm’s clients. This final notice must include a copy of the proxy voting advice that will be delivered to clients, including any revisions made by the proxy advisory firm after the review and feedback period.

The third requirement under the proposed amendments is that, if requested by the company or other person conducting a non-exempt solicitation prior to the expiration of the two business day period between the final notice of voting advice and delivery of the proxy voting advice to clients, the proxy advisory firm must include in the proxy voting advice, and in any electronic medium used to deliver the proxy voting advice, an active hyperlink that leads to the company’s or other soliciting person’s statement regarding the proxy voting advice. The proposing release observes that any such statement also would have to be filed by the company or other soliciting person with the SEC as additional soliciting material.

There would be no proxy voting advice review and feedback period, no final notice of voting advice and no opportunity to request inclusion of a hyperlinked statement regarding the proxy voting advice for a company or other soliciting person that filed a proxy statement less than 25 days prior to the meeting date.

Anti-fraud provisions. Soliciting material that is exempt from the proxy rule information and filing requirements is nevertheless subject to the anti-fraud provisions of the federal proxy rules. The proposed amendments would modify Exchange Act Rule 14a-9 to include examples of when the failure to disclose certain information in the proxy voting advice could, depending upon the particular facts and circumstances, be considered misleading. The examples include failure to disclose material information, such as the proxy advisory firm’s methodology, sources of information or conflicts of interest.

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More information on the proposed amendments to the shareholder proposal rule is available in the SEC’s [proposing release](#) and accompanying [press release](#). More information on the proposed amendments to the proxy rules regarding proxy voting advice is available in the SEC’s [proposing release](#) and accompanying [press release](#).

Associates **Blake Grady** and **Justin Kisner** assisted in the preparation of this alert.