SEC Proposes New Rules on Proxy Voting Advice and Shareholder Proposals

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On November 5, 2019, the U.S. Securities and Exchange Commission (the "SEC") proposed amendments to its rules on proxy voting advice and shareholder proposal submissions. Highlighted below are the key takeaways, with the full text of the proposed amendments on proxy voting advice available here and on shareholder proposal submissions available here. The proposed amendments are currently in a 60-day public comment period and comments can be submitted to the SEC here.

Proposed Rules on Proxy Voting Advice

The proposed amendments to the rules on proxy voting advice would (1) impose additional disclosure and procedural requirements on proxy advisory firms and (2) codify the SEC's recent interpretation that proxy voting advice generally constitutes a "solicitation" under the federal proxy rules and guidance on when the failure to disclose certain information in proxy voting advice may be considered misleading. According to the SEC, the rule changes would ensure that investors who use proxy voting advice receive more accurate, transparent and complete information on which to make their voting decisions.

Impose New Requirements for Exemptions

Under current rules, proxy advisory firms may, with respect to proxy advice they provide, rely on the exemptions from the filing requirements of the federal proxy rules for "any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as a proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization." See Rule 14a-2(b)(1) under the Securities Exchange Act of 1934 (the "Exchange Act"). In addition, Rule 14a-2(b)(3) under the Exchange Act exempts the furnishing of proxy voting advice by any person to another person with whom a business relationship exists, subject to certain conditions.

The proposed amendments would amend Rule 14a-2(b) to condition proxy advisory firms' ability to rely on these exemptions upon the satisfaction of the following disclosure and procedural requirements.

- Proxy advisory firms must include conflicts of interest disclosures alongside the final proxy advice given and such reports must disclose:
  - any material interests, direct or indirect, of the proxy advisory firm in the matter or parties concerning the advice it is providing;
  - any material transaction or relationship between the proxy advisory firm and (a) the registrant, (b) another soliciting person or (c) a shareholder proponent, in connection with the matter covered by the proxy voting advice;
  - any other information regarding the interest, transaction or relationship of the proxy advisory firm that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction or relationship; and
  - any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction or relationship.
- Proxy advisory firms must provide registrants and certain other soliciting persons covered by their proxy voting advice a specified amount of time to review and provide comments on the advice before it is disseminated to clients: (a) at least five business days for proxy statements filed 45 calendar days or more before the shareholder meeting, (b) at least three business days for proxy statements filed 25-45 calendar days before the shareholder meeting, and (c) no required review period for proxy statements filed less than 25 calendar days before the shareholder meeting. Proxy advisory firms are not required to modify their advice based on the comments they receive during the review period.
- Proxy advisory firms must provide a final notice of the voting advice to the registrant and other soliciting persons at least two days prior to delivering the advice to their clients. Such notice must contain a copy of the proxy voting advice to be delivered and any revisions made as a result of the review and feedback period. Proxy advisory firms may require registrants and other soliciting persons to sign a confidentiality agreement before receiving the final notice.
- If registrants or other soliciting persons submit comments on the final notice of voting advice within the two-day period referenced above, they may require the

proxy advisory firm to include a hyperlink to these comments in the proxy advice disseminated to clients. If a registrant or soliciting person chooses to have comments included, these comments would be considered a solicitation and would be subject to SEC rules and regulations regarding solicitations of proxies.

If a proxy advisory firm experiences an immaterial or unintentional failure to comply with these new requirements after having put in a good faith and reasonable effort to comply and undertakes reasonable efforts to substantially comply with these requirements as soon as practicable, the proxy advisory may still be able to rely upon the filing requirement exemptions.

Codify Recent Interpretation and Guidance

The proposed amendments would amend Rules 14a-1(1) and 14a-9 under the Exchange Act to codify the SEC's interpretation and guidance issued on August 21, 2019.[1] According to the interpretation, proxy voting advice provided by proxy advisory firms generally constitutes a "solicitation" subject to the federal proxy rules. Additionally, the guidance clarified situations in which proxy voting advice could be deemed misleading within the meaning of Rule 14a-9. The SEC's interpretation and guidance are summarized in detail in the Debevoise Debrief article available here.

The proposed amendment to Rule 14a-1(l) also adds an exception to the revised definition of solicitation. According to this exception, proxy voting advice made in response to an unprompted request, as opposed to when a firm is marketing, offering or selling the advice, is not a solicitation. The SEC explained that this exception is designed to allow investment advisors to provide advice to their clients without being subject to the SEC rules and regulations regarding solicitations of proxies.

Proposed Rules on Shareholder Proposal Submissions

The proposed amendments to the rules on shareholder proposal submissions would amend Rule 14a-8 under the Exchange Act to (1) increase the ownership threshold for submission and resubmission of shareholder proposals, (2) impose additional procedural requirements on shareholders proposing submissions and disclosure requirements on shareholders proposing submissions through representatives and (3) limit the number of shareholder proposal submissions a single person can make directly or indirectly.

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[1] The SEC's interpretation and guidance is currently the subject of a lawsuit by the proxy advisory firm Institutional Shareholder Service Inc. The lawsuit is summarized in the Debevoise Client Debrief available here.

Increase the Threshold for Submission and Resubmission

Under current rules, a shareholder may submit a proposal for inclusion in a company's proxy statement under Rule 14a-8 if it has continuously held either $2,000 worth or 1% of a company's shares for at least one year.

The proposed amendments would raise the monetary threshold needed to submit shareholder proposals for a company's proxy and eliminate the 1% threshold. Under the proposed amendments, a shareholder may submit a 14a-8 proposal only if it has continuously held (a) $2,000 of a company's shares for at least three years, (b) $15,000 of a company's shares for at least two years or (c) $25,000 of a company's shares for at least one year. Shareholders would be permitted to co-file or co-sponsor shareholder proposals as a group only if each shareholder-proponent in the group meets one of these eligibility requirements.

Additionally, under current rules, a shareholder proposal may be excluded from a company's proxy statement for three calendar years if, within the last five years, a substantially similar proposal (a) did not receive 3% of the vote on its first submission, (b) did not receive 6% of the vote on its second submission or (c) did not receive 10% of the vote on its third submission.

Under the proposed amendments, this structure remains the same but the thresholds are raised. In order to avoid three-year disqualification from the proxy statement, a proposal needs to receive (a) 5% of the vote on its first submission, (b) 15% of the vote on its second submission or (c) 25% of the vote on its third submission.

The proposed amendments add a new "momentum requirement" whereby if a proposal has been voted on three or more times in the past five calendar years and loses 10% or more support from the immediately prior submission, even if it otherwise would have cleared the threshold to stay in the proxy statement, it may be excluded for three calendar years. The 10% is calculated as a percentage from the previous vote number. For example, if a proposal received 30% support on its second submission and 26% support on its third submission, it would be disqualified because it fell 10% from 30%, in that it lost more than 3% from one year to the next. This proposed rule does not apply if the most recent vote, despite any loss of momentum, received at least 50% of the votes cast.

Impose New Requirements for Submissions

The proposed amendments require a statement from each shareholder-proponent that the proponent is able to meet with the company in person or via teleconference between 10 and 30 calendar days after submission of the shareholder proposal. The

shareholder must also include contact information as well as business days and specific times that the proponent is available to discuss the proposal with the company.

The proposed amendments also require shareholders using a representative to submit a shareholder proposal to provide documentation attesting that the shareholder supports the proposal and authorizing the representative to submit the proposal on the shareholder's behalf. This documentation must:

- Identify the company to which the proposal is directed;
- Identify the annual or special meeting for which the proposal is submitted;
- Identify the shareholder-proponent and the designated representative;
- Include the shareholder's statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder's behalf;
- Identify the specific proposal to be submitted;
- Include the shareholder's statement supporting the proposal; and
- Be signed and dated by the shareholder.

Limit Shareholder Submissions

The proposed amendments change the number of shareholder proposals that can be submitted by a single person. Under current rules, each shareholder is limited to one proposal. However, a person can act as a representative for an unlimited number of shareholders and propose submissions on their behalf. Under the proposed amendments, each person will be limited to one shareholder proposal submission total, as either a shareholder or a representative.

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Please do not hesitate to contact us with any questions.

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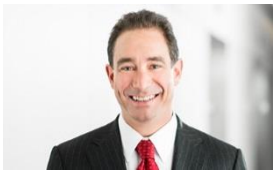
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