

SEC PROPOSES AMENDMENTS TO IMPROVE ACCURACY OF PROXY VOTING ADVICE AND TO MODERNIZE SHAREHOLDER PROPOSAL RULES

On November 5, 2019, the U.S. Securities and Exchange Commission (the "Commission") voted to propose [amendments](#) to its proxy solicitation rules relating to the regulation of proxy advisory firms (the "Proxy Voting Advice Amendments"). The Commission also voted to propose [amendments](#) to Rule 14a-8 of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), to update the rules that govern the process by which shareholder proposals may be included on company proxy statements (the "Shareholder Proposal Amendments").

The proposed rules, passed by a 3-2 vote, are part of a larger debate regarding the role and regulation of proxy advisory firms and activist shareholders. If adopted, the proposed rules would introduce new regulatory hurdles for proxy advisory firms, potentially restricting their ability to influence shareholder voting decisions and creating new barriers to entry for smaller proxy advisory firms. Similarly, shareholder-activists would be subject to more stringent requirements when attempting to include proposals on a company's proxy, likely resulting in a significantly reduced range of shareholder proposals.

BACKGROUND

The Commission's proposed Proxy Voting Advice Amendments and Shareholder Proposal Amendments are part of its stated focus on improving the proxy process and the ability of shareholders to exercise their voting rights. Over the years, the Commission has noted the need to update certain of the rule's procedural and substantive requirements, some of which have not been reviewed by the Commission in more than 20 years. The proposed amendments follow the Commission's recent [guidance](#) clarifying the applicability of the federal proxy rules to advice provided by a proxy advisory firm.

PROXY VOTING ADVICE AMENDMENTS

Expansion of Rule 14a-1(l) to apply proxy solicitation rules to proxy voting advice

The Proxy Voting Advice Amendments would expand the scope of Rule 14a-1(l), which defines the terms "solicit" and "solicitation," to include "proxy voting advice that makes a recommendation to a shareholder as to its vote, consent or authorization on a specific matter for which shareholder approval is solicited, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee." The Proxy Voting Advice Amendments would also codify the Commission's view that voting advice provided in response to an unprompted request would not constitute a solicitation.

Additional requirements for proxy advisory firms seeking to rely on the exemptions from information and filing requirements

The Proxy Voting Advice Amendments would also revise Rule 14a-2(b)(1) and Rule 14a-2(b)(3), which provide exemptions from the information and filing requirements of the proxy rules. Rule 14a-2(b)(1) generally exempts solicitations by persons who do not seek the power to act as proxy for a shareholder and do not have a substantial interest in the subject matter of the communication beyond their interest as a shareholder. Rule 14a-2(b)(3) generally exempts proxy voting advice furnished by an advisor to any other person with whom the advisor has a business relationship. Under the proposed amendments, proxy advisory firms relying on these exemptions must also satisfy each of the following three conditions:

- *Disclosure of material conflicts of interest.* Proxy advisory firms must include prominent disclosure of material conflicts of interest in their proxy voting advice, including: (a) any direct or indirect material interests of the proxy voting advice business or its affiliates in the matter or parties concerning which it is providing the advice, (b) any material transaction or relationship between the proxy voting advice business and the company, another soliciting person or shareholder proponent, or any affiliates of the foregoing, (c) any other information regarding the interest, transaction or relationship of the proxy voting advice business or its affiliate 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 (d) 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.
- *Provide opportunities for companies to review and comment on proxy voting advice.* Companies and certain other soliciting persons must be given an opportunity to review and provide feedback on proxy voting advice before it is issued. The length of the proposed review period as outlined below is dependent on the number of days between the filing of the definitive proxy statement and the date of the shareholder meeting:

Number of days between the filing of proxy statement and the date of the shareholder meeting	Required review period
Less than 25 days	No review period required
Between 24 days and 44 days	Three business days
45 days or more	At least five business days

The proposed amendments would permit proxy advisory firms to require companies and other soliciting persons to enter into confidentiality agreements for materials exchanged during the review and feedback period and would allow them to rely on the exemptions where failure to comply with the new conditions was immaterial or unintentional.

- *Inclusion of hyperlinks to the views of companies and/or soliciting persons.* Companies and certain other soliciting persons may request that proxy advisory firms include in their voting advice a hyperlink or analogous electronic medium directing the recipient of the advice to a written statement that sets forth the company's or soliciting person's views on the proxy voting advice.

Expansion of list of potentially misleading information under Rule 14a-9

Although proxy advisory firms would be exempt from certain information and filing rules, their voting advice as solicitations would be subject to Rule 14a-9's antifraud provisions. The Proxy Voting Advice Amendments modify Rule 14a-9 to add additional examples of where the failure to disclose certain information in the proxy voting advice could be considered misleading, including the failure to disclose information such as the proxy voting advice business's methodology, sources of information, conflicts of interest or the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves.

SHAREHOLDER PROPOSAL AMENDMENTS

Heightened eligibility requirements under Rule 14a-8(b)

- *Expanded minimum ownership thresholds and minimum continuous holding periods.* Under Rule 14a-8(b) in its current form, a shareholder-proponent must hold at least \$2,000 or 1% of a company's securities for at least one year to be eligible to submit a proposal. The Shareholder Proposal Amendments would eliminate the 1% threshold and add new tiered ownership thresholds in order to be eligible to submit a proposal, as set forth below:

Minimum ownership threshold	Minimum continuous holding period
\$2,000	3 years
\$15,000	2 years
\$25,000	1 year

Aggregation of share ownership to meet these thresholds would not be permitted.

- *Additional disclosure required for the use of representatives.* The Shareholder Proposal Amendments would further amend Rule 14a-8(b) to require that a shareholder-proponent who elects to use a representative for the purpose of submitting a shareholder proposal provide documentation to make clear that the representative is authorized to act on the shareholder-proponent's behalf and to provide a meaningful degree of assurance as to the shareholder-proponent's identity, role and interest in a proposal that is submitted for inclusion in a company's proxy statement.
- *Imposition of meeting requirements on shareholder-proponents.* The Shareholder Proposal Amendments to Rule 14a-8(b) also require that each shareholder-proponent state that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal, and provide contact information as well as business days and specific times that the shareholder-proponent is available to discuss the proposal with the company.

Narrowing of the one-proposal rule of Rule 14a-8(c)

The Shareholder Proposal Amendments to Rule 14a-8(c) would clarify that the one-proposal rule applies to "each person" rather than "each shareholder" who submits a proposal. This clarification precludes a shareholder-proponent from submitting one proposal in his or her own name and simultaneously serving as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting. A representative would also 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.

Heightened resubmission thresholds and additional basis for exclusion

- *Heightened resubmission thresholds.* The Shareholder Proposal Amendments would increase the resubmission thresholds under Rule 14a-8(i)(12) for matters voted on once, twice or three or more times in the last five years, respectively, as set out below:

Number of times a matter was voted on in last five years	Resubmission threshold under current Rule 14a-8(i)(12)	Resubmission threshold under proposed Rule 14a-8(i)(12)
One	3%	5%
Two	6%	15%
Three or more	10%	25%

- Additional proposal exclusion.* Lastly, the Shareholder Proposal Amendments would add a new provision to Rule 14a-8(i)(12) (referred to by the Commission as the "Momentum Requirement") that would allow for exclusion of a proposal that has been previously voted on three or more times in the last five years, notwithstanding having received at least 25% of the votes cast on its most recent submission, if the proposal received less than 50% of the votes cast and experienced a decline in shareholder support of 10% or more compared to the immediately preceding vote.

Comments on the Proxy Voting Advice Amendments and the Shareholder Proposal Amendments are due 60 days after their proposal in the *Federal Register*.

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