

SEC Adopts Proposed Rules for Procedural Requirements and Resubmission Thresholds for Shareholder Proposals and Exemptions from Proxy Rules for Proxy Voting Advisors

November 6, 2019

by Jason Brenkert and Anthony Epps

At the Securities and Exchange Commission's (the "Commission") open meeting yesterday, the Commissioners approved two new proposed rules in their ongoing efforts to modernize proxy solicitation and shareholder proxy access, as follows: (1) amendments to certain procedural requirements, including ownership requirements, documentation requirements, meetings to discuss proposals and limitations on the number of proposals submitted, and resubmission thresholds for shareholder proposals and (2) amendments to proxy rules conditioning the availability of certain existing exemptions from the information and filing requirements of the proxy rules for proxy voting advice businesses upon compliance with additional disclosure and procedural requirements.

The following is a summary only of the proposed rules. As the proposed amendments are extensive and complex, registrants, shareholders and proxy voting advisors should consult legal counsel regarding the potential impact of the proposed rules on their activities and obligations. Comments on the proposals are due on or before 60 days after publication in the Federal Register.

Shareholder Submissions

Procedural Amendments for Submissions

The proposed rule provides for amendments to procedural requirements for shareholder submissions to (i) replace the current ownership requirements with a tiered approach with three options; (ii) require certain documentation to be provided when a proposal is submitted on behalf of a shareholder-proponent; (iii) require shareholder-proponents to state when they would be able to meet with the company with respect to the proposal; and (iv) clarify that a "person" may submit no more than one proposal, directly or indirectly, for the same shareholders' meeting.

Related People

- Jason Brenkert
- Anthony Epps

Related Capabilities

- Corporate Governance & Compliance
- Capital Markets

Ownership Requirements

Rule 14a-8(b) currently requires that a shareholder-proponent's eligibility to submit proposals is conditioned upon the owning of at least 1% or \$2,000 in market value of the securities entitled to be voted at the meeting and having held such securities for at least one year. Co-proponents may aggregate their holdings to meet the ownership requirements.

Under the proposed amendments, a shareholder would be eligible to submit a Rule 14a-8 proposal for inclusion in a company's proxy materials if the shareholder satisfies one of the following three ownership requirements:

- \$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.

Documentation of Representative Relationship

Rule 14a-8 does not address a shareholder's ability to submit a proposal for inclusion in a company's proxy materials through a representative. Absent Commission regulation, this practice has typically been governed by state agency law. This uncertainty has raised questions about whether the eligibility requirements of Rule 14a-8(b) have been satisfied.

To help address these challenges and concerns, the proposed rule amends the eligibility requirements of Rule 14a-8 to require shareholders that use a representative to submit a proposal to provide documentation attesting that the shareholder supports the proposal and authorizes the representative to submit the proposal.

Specifically, the proposed rule would require documentation that: (i) identifies the company to which the proposal is directed; (ii) identifies the annual or special meeting for which the proposal is submitted; (iii) identifies the shareholder-proponent and the designated representative; (iv) includes the shareholder's statement authorizing the designated representative to submit the proposal and/or otherwise act on the shareholder's behalf; (v) identifies the specific proposal to be submitted; (vi) includes the shareholder's statement supporting the proposal; and (vii) is signed and dated by the shareholder.

Meeting to Discuss Proposal

The proposed rule would amend Rule 14a-8(b) to add a shareholder engagement requirement to the current eligibility criteria. Specifically, the proposed amendment would require a statement from each shareholder-proponent that he or she is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal.

The shareholder would be required to include contact information as well as business days and specific times that he or she is available to discuss the proposal with the company.

Clarification of Proposal Limits

While currently Rule 14a-8(c) provides for a limitation of one proposal to each shareholder, the Commission has noted that some proponents “may attempt to evade the new limitations through various maneuvers, such as having other persons whose securities they control submit...proposals each in their own names.” Additionally, the Commission noted that the one-proposal limit “applies equally to representatives who submit proposals on behalf of shareholders they represent.”

To address this point, the proposed rule would amend Rule 14a-8(c) to apply the one-proposal rule to “each person” rather than “each shareholder” who submits a proposal. The amended rule would state, “Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders’ meeting. 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 proposed rule, a shareholder-proponent may not submit one proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder’s behalf for consideration at the same meeting.

Resubmission Thresholds

Currently, under Rule 14a-8(i)(12), if a proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company’s proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received (i) less than 3 percent of the vote if proposed once within the preceding 5 calendar years, (ii) less than 6 percent of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years or (iii) less than 10 percent of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years.

The proposed amendments to the resubmission thresholds would raise the current resubmission thresholds of 3, 6, and 10 percent to 5, 15, and 25 percent, respectively.

New “Momentum Requirement”

In addition to raising the resubmission thresholds, the proposed amendments would add an additional provision to allow companies to exclude proposals dealing with substantially the same subject matter as proposals previously voted on by shareholders three or more times in the preceding five calendar years that would not otherwise be excludable under the 25 percent threshold if (i) the most recently voted on proposal

received less than a majority of the votes cast and (ii) support declined by 10 percent or more compared to the immediately preceding shareholder vote on the matter.

The purpose of this requirement is to relieve management and shareholders from having to repeatedly consider, and bear the costs related to, matters for which shareholder interest has declined.

Proxy Voting Advisory Businesses

Clarification of “Solicitation” for Proxy Advisors

The Commission has previously observed that the broad scope of the definition of “solicitation” in the Commission’s proxy rules may result in proxy advisory firms being subject to proxy rules because “they provide recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy and that, as a general matter, the furnishing of proxy voting advice constitutes a solicitation.” The Commission has also issued an interpretative release regarding the application of the proxy rules to proxy voting advice, noting several factors that indicate that proxy advisory firms generally engage in solicitations.

To clarify the Commission’s interpretation, under the proposed rule, Rule 14a-1(1) would be amended to state that the terms “solicit” and “solicitation” include “any 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.”

Additional Requirements for Exemptions for Proxy Voting Advisory Businesses

Proxy voting advisors typically rely upon the exemptions from the filing and information requirements of the proxy rules set forth in Rule 14a-2(b)(1) (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) and

Rule 14a-2(b)(3) (exempts proxy voting advice furnished by an advisor to any other person with whom the advisor has a business relationship).

The proposed rule would add new conditions to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3) that would apply specifically to persons furnishing proxy voting advice that constitutes a “solicitation” as follows:

- ***Conflicts of Interest*** -The proposed rule would add Rule 14a2(b)(9)(i), to require proxy voting advisors to include in such voting advise the following disclosures:
 - Any material interests, direct or indirect, of the proxy voting advice business (or its affiliates) in the matter or parties concerning which it is providing the advice;
 - Any material transaction or relationship between the proxy voting advice business (or its affiliates) and (i) the registrant (or any of the registrant’s affiliates), (ii) another soliciting person (or its affiliates), or (iii) a shareholder proponent (or its

- affiliates), in connection with the matter covered by the proxy voting advice;
 - 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
 - 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.
- *Review of Proxy Voting Advice by Registrants and Other Soliciting Persons* - Proposed amendments to Rule 14a-2(b) would require one standardized opportunity for timely review and feedback by registrants of proxy voting advice before a proxy voting advice business disseminates its voting advice, regardless of whether the advice on the matter is adverse to the registrant's own recommendation. New proposed Rule 14a-2(b)(9)(ii) would require, as one of the conditions to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3), that, subject to certain conditions, the proxy voting advice business provide registrants and certain other soliciting persons covered by its proxy voting advice a limited amount of time to review and provide feedback on the advice before it is disseminated to clients. The length of time provided depends on how far in advance of the shareholder meeting the registrant or other soliciting person has filed its definitive proxy statement, as follows:
 - if the definitive proxy statement is filed less than 45 but at least 25 calendar days before the date of the shareholder meeting, the proxy voting advice business would be required to provide the registrant (or certain other soliciting person) no fewer than three business days to review the proxy voting advice and provide feedback as a condition of the exemptions;
 - if the definitive proxy statement is filed 45 calendar days or more before the shareholder meeting, the proxy voting advice business would be required to provide the registrant (or certain other soliciting person) at least five business days to review the proxy voting advice and provide feedback; and
 - in the event the definitive proxy statement is filed less than 25 calendar days before the meeting, the proxy voting advice business would have no obligation under the proposed amendment to provide the proxy voting advice to the registrant (or certain other soliciting person) as a condition of the exemption.
- *Final Notice of Advice* - In addition to the review and feedback period, in order to rely on the exemptions in Rules 14a-2(b)(1) or (b)(3), a proxy voting advice business would be required to provide registrants and certain other soliciting persons with a final notice of voting advice. This notice, which must contain a copy of the proxy voting advice that the proxy voting advice business will deliver to its clients, including any revisions to such advice made as a result of the review and feedback period above, must be provided by the proxy voting advice business no later than two business days prior to delivery of the proxy voting advice to its clients. Registrants and certain other soliciting persons would be entitled to this two-business day final notice period whether or not they provided comments on the version of proxy voting advice they received in connection with the review and feedback period above. The proposed amendments permit a proxy voting advice business to require that registrants and certain other soliciting persons, as applicable, agree to keep the information confidential, and refrain from commenting publicly on the information until after dissemination, as a condition of receiving the proxy voting advice.
- *Company Feedback* - Under proposed Rule 14a-2(b)(9)(iii), as a condition to the exemptions found in Rules 14a- 2(b)(1) and 14a-2(b)(3), a proxy voting advice business must, upon request, include in its proxy voting advice and in any electronic

medium used to deliver the advice, a hyperlink (or other analogous electronic medium) that leads to the registrant's statement about the proxy advisor's voting advice. Registrants would be required to provide the hyperlink (or other analogous electronic medium) to the proxy voting advice business no later than the expiration of the two-day final notice period that would be required under the proposed rules (see above).

Amendment to Rule 14a-9

Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made. Currently, the text of Rule 14a-9 provides certain examples of what may be misleading within the meaning of the rule. The proposed rule would amend the list of examples in Rule 14a-9 to address potential information a proxy voting advice business may need to disclose to avoid a potential violation of the rule, including failure to disclose information such as (i) the proxy voting advice business's methodology, (ii) sources of information, (iii) conflicts of interest and (iv) the use of standards or requirements that materially differ from relevant standards or requirements that the Commission sets or approves.

Transition Period

The Commission has proposed to provide a one-year transition period after the publication of a final rule in the Federal Register to give sufficient time to comply with the proposed new requirements for proxy voting advice.