National Investor Relations Institute

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SEC Proposes Rules on Proxy Advisors, Shareholder Resolutions

Proposed Rules Would Enable All Issuers to Receive Draft Proxy Reports

In a pair of significant victories for issuers, the U.S. Securities and Exchange Commission voted Nov. 5 to propose new restrictions on proxy advisory firms and shareholder proposals.

However, the proposed rules, which were approved in separate 3-2 votes, will face considerable opposition from governance activists and some institutional investors. NIRI encourages public companies, IR practitioners, and NIRI chapters to write comment letters to the SEC in support of these draft rules.

“NIRI thanks Chairman Jay Clayton and the SEC for proposing these much-needed reforms,” said NIRI CEO Gary A. LaBranche, FASAE, CAE. “Now is the time for the issuer community to stand up and let the SEC know that these proposed rules will improve the accuracy of proxy research for investors, encourage more companies to go public, and promote long-term share growth.”

The proxy advisor proposal includes a new draft review process for all issuers, a safeguard that NIRI has long sought. Issuers that file their definitive proxy materials at least 25 days before their annual meeting would receive a three-day period to review proxy advisor report drafts. If an issuer files its proxy materials more than 45 days in advance of the meeting, it would receive a five-day review period. In addition, issuers would receive a final notice that the proxy advisor is about to publish its research; the issuer would have the opportunity to provide a written response that would be hyperlinked to the proxy advisor’s final report. These provisions should greatly help many companies during proxy season and give their IR teams more time to develop their messaging and engagement strategy in response to an adverse proxy advisor recommendation on executive compensation, board elections, or other matters.

“I believe such a measure could substantially improve the mix of information available to the clients of proxy voting advice businesses,” said Commissioner Elad Roisman, who

oversaw the SEC's proxy reform efforts. "To the extent an issuer . . . believes the [proxy] firm's voting advice contains errors or methodological biases, it would have an opportunity to note that in a way that proxy voting advice business clients can more easily access than they can today."

Proxy advisors also would be required to disclose material conflicts of interest, another reform that NIRI has sought.

Shareholder Proposal Modernization

In its proposed amendments to Rule 14a-8, the SEC went further than many agency observers were expecting and addressed a variety of corporate concerns about the shareholder resolution process. In commenting on the need for reform, Chair Jay Clayton noted that five individual activists now account for about 78 percent of the resolutions filed by retail investors.

The proposal includes several significant reforms:

A new tiered approach to minimum economic requirements based on ownership duration. An investor who holds a company's shares for at least a year would have to own at least a $25,000 stake to file a proposal, while an investor holding shares for at least two years would have to own a $15,000 stake. The current $2,000 ownership threshold would be maintained, but only for investors who could show that they held their shares continuously for at least three years. This reform would require short-term investors to own a more meaningful stake, while not raising the requirements for long-term holders.

Higher support thresholds for the resubmission of proposals at the same company. A proponent would have to earn at least 5 percent support the first time that his or her resolution appeared on a company's ballot in order to resubmit it the following year. That threshold would rise to 15 percent support in year two and 25 percent in year three and thereafter. The current resubmission thresholds, which are 3, 6, and 10 percent, respectively, have not been updated since 1954. This reform should reduce the number of special-interest resolutions that reappear on proxy ballots each year despite receiving low levels of support.

The amendments include tighter rules on the use of proponent representatives at annual meetings that would prevent activists from presenting multiple resolutions from family members and affiliated investors at the same meeting. The proposed rules also include a new mandate that resolution proponents indicate their availability for engagement, which should make it easier for companies to negotiate with these investors.

Commissioners Robert J. Jackson, Jr. and Allison Herren Lee voted against the two proposed rules, warning that the measures would insulate CEOs from accountability to shareholders. Lee argued that allowing issuers to review draft reports would undermine the independence of proxy advisory firms.

The rules are subject to a 60-day comment period that will commence after the rules are published in the Federal Register next week. “Today’s actions . . . are proposals — we welcome and encourage comment, analysis, including analysis supported by data, and direct engagement,” Clayton said during the SEC’s meeting.

Given the controversial nature of the two rule proposals and the large number of comment letters that the SEC likely will receive, it appears unlikely that the SEC would vote on final rules before the summer of 2020.

Resources

- SEC Press Release, SEC Proposes Rule Amendments to Improve Accuracy and Transparency of Proxy Voting Advice, Nov. 5, 2019.
- SEC Press Release, SEC Proposes Amendments to Modernize Shareholder Proposal Rule, Nov. 5, 2019.
- Commissioner Elad Roisman, Statement at the Open Meeting: Modernizing SEC Rules Governing Proxy Voting Advice, Nov. 5, 2019.
- Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System, Nov. 5, 2019.
- NIRI Resources on Proxy Advisory Firms and Proxy System Reforms

About the National Investor Relations Institute (NIRI)

Founded in 1969, NIRI (www.NIRI.org) is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts and other financial community constituents. NIRI is the largest professional investor relations association in the world with more than 3,000 members representing 1,600 publicly held companies and $9 trillion in stock market capitalization.