MORROW SODALI

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PROXY UPDATE

# SEC PROPOSED PROXY RULE AMENDMENTS

On November 5, 2019, the Securities and Exchange Commission voted to propose certain amendments to its proxy rules. One of the proposed changes seeks to "modernize the criteria for use of the shareholder-proposal process through the company's proxy statement." Another proposed change relates to proxy advisory services such as ISS and Glass, Lewis & Co. and is "intended to help ensure that proxy voting advice used by investors and others who vote on investors' behalf is accurate, transparent, and materially complete." The proposed changes are summarized below.

## Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8

It's been over 20 years since the SEC last reviewed the procedural requirements related to the shareholder proposal process.

### Rule 14a-8(b)

Under current rules, a proponent must hold at least $2,000 or 1% of a company's securities for a period of at least one year to be eligible to submit a shareholder proposal. Under the proposed amendments, the percentage threshold would be eliminated. Instead, a shareholder would have to satisfy at least one of three alternative minimum dollar amount thresholds, each with a minimum holding period. The proposed thresholds and corresponding minimum holding periods are as follows:

- A minimum investment of $2,000 of an issuer's securities for at least three years
- A minimum of $15,000 for at least two years
- A minimum of $25,000 for at least one year

Further, proponents would be required to make themselves available (and state as such) for engagement with the company, either in person or by teleconference, between 10 and 30 calendar days after submission of a shareholder proposal. He or she would have to provide the company with contact information as well as specific dates and times that the proponent would be available to discuss the proposal.

If a proponent wishes to use a representative to submit a proposal, they would be required to provide documentation making it clear that the representative is authorized to act on the proponent's behalf.

### Rule 14a-8(c)

The one-proposal limit has been in place for decades, though some shareholders have found ways to skirt the restriction by acting as a representative of another shareholder and submitting a proposal on their behalf or by having a representative submit a proposal on their behalf. The proposed amendment would clarify that each "person" may submit only one proposal rather than each "shareholder."

### Rule 14a-8(i)(12)

Shareholder proposal resubmission thresholds would be substantially increased under the new policy. Currently, a shareholder proposal is eligible for resubmission if, within the previous 5 years, it received support from 3% or more of the shares voted on the proposal in its first submission. This threshold jumps to 6% on the second attempt and 10% on the third attempt. Under the proposed rule change, these thresholds would increase to 5%, 15% and 25%.

The proposed new provision would also 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 percent of the votes cast on its most recent submission, if the proposal (i) received less than 50 percent of the votes cast and (ii) experienced a decline in shareholder support of 10 percent or more compared to the immediately preceding vote.

## Proposed Rule Amendments for Proxy Voting Advice

Federal proxy rules state that a person or entity engaging in a "solicitation" must comply with certain filing and informational requirements in order to ensure that investors are receiving complete and accurate information. The SEC considers the furnishing of proxy voting advice to be a "solicitation" that is subject to filing requirements under the proxy rules. To avoid having to comply with these requirements, proxy advisory services like ISS and Glass Lewis rely on exemptions under Rule 14a-2(b) of the Exchange Act. The SEC has proposed adding certain conditions to this practice to improve accuracy and transparency.

### Rule 14a-1(I)

The SEC proposes to amend Rule 14a-1(I) to "specify the circumstances when a person who furnishes proxy voting advice will be deemed to be engaged in a solicitation subject to the proxy rules." It will also codify the view that "voting advice provided in response to an unprompted request would not constitute a solicitation."

### Rule 14a-2(b)(1) and 14a-2(b)(3)

In order to rely on the exemptions under these rules, a proxy advisor would be required to meet the following conditions:

- Provide enhanced disclosure around conflicts of interest (boilerplate language will not suffice)
- Give issuers an opportunity to review and provide feedback on proxy voting advice before it is issued
- Give issuers the option to request that the proxy advisor include within their proxy voting advice a hyperlink or other electronic medium directing the recipient of the voting advice to a written response from the issuer, to be used in lieu of or as a supplement to the filing of additional definitive proxy materials

In order to take advantage of the proposed review/feedback opportunity, an issuer would need to file definitive proxy materials at least 25 calendar days prior to the meeting date. The length of the review period is dependent upon how far in advance of the meeting date the definitive materials are filed. If materials are filed less than 45 but at least 25 calendar days prior to the meeting, the review window would be at least three business days. If materials are filed at least 45 calendar days before the meeting, the review window would be at least five business days.

### Rule 14a-9

The current rule prohibits false or misleading statements in proxy material, including:

- Predictions as to specific future market values
- Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes changes concerning improper, illegal or immoral conduct or associations without factual foundation;
- Failure to identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter and;
- Claims made prior to a meeting regarding the results of a solicitation.

The SEC proposes to amend the list to add potential disclosure requirements for proxy advisory firms such as the firm's methodology, sources of information and conflicts of interest. The proposed amendments also seek to clarify different criteria used by the proxy advisory firms and the SEC. For example, advisory firm against recommendations due to disclosure that may be considered inadequate by advisory firms' standards but sufficient to meet the Commission's criteria.

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The changes being proposed are issuer friendly. The vote to propose the changes was 3-2 and along party lines, with the two dissenters noting that they believe the proposals stack the odds against shareholders and tilt the playing field towards corporations.

The proposed rules relating to shareholder proposals will potentially make it harder for shareholder proponents to submit a proposal because some proponents are either not long-term holders or don't hold enough stock to qualify under the proposed thresholds. In addition, the proposed resubmission guidelines will make it more difficult for proposals to be resubmitted.

The proposed changes to the proxy advisor rules pertaining to additional disclosure by the advisors should allow more transparency for issuers. In addition, issuers would be able to review the advisory service recommendation report and would be able to have a link to the company's thoughts about the advisory firm's conclusions within the advisor's reports.

The SEC's proposed changes are subject to a 60-day comment period. To view the proposed amendments and submit comments, please follow this **link**.

Please contact your Morrow Sodali representative if you have any questions.