

Corporate & Financial Weekly Digest

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SEC Publishes Concept Release on "Proxy Plumbing"

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On July 14, the Securities and Exchange Commission unanimously approved the long-awaited concept release on mechanics of proxy distribution and collection. The release marks the Commission's first public review of the proxy voting system in nearly 30 years. Highlighting that the proxy process is the principal means of communication between companies and investors, SEC Chairman Mary Schapiro stressed that the "transmission of this communication must be—and must be perceived to be—timely, accurate, unbiased, and fair." The SEC hopes that the release will help guide the agency's revisions of proxy mechanics and ensure that all market participants are afforded adequate proxy access.

The release solicits public comment on a number of key issues in three main areas: (1) accuracy, transparency and efficiency of the proxy voting process, (2) communication and shareholder participation, and (3) the relationship between voting power and economic interest. Within this framework, the release comprehensively analyzes a number of specific topics including:

- Over-voting and under-voting of shares: Securities intermediaries sometimes cast more or fewer votes than they actually hold as a result of the way securities transactions are cleared and settled and the way intermediaries then "allocate" votes to investors. The SEC questions whether it should regulate this practice and whether intermediaries should disclose the procedures they use to allocate votes to investors on whose behalf they hold securities.
- Vote confirmation: Under the current system, investors have limited ability to confirm whether their shares have been voted according to their instructions. The release suggests the possibility of requiring a process for vote confirmation.
- Proxy voting by institutional securities lenders: The release evaluates the impact of institutional securities lenders on the proxy voting process. Shares on loan cannot be voted unless the lender "recalls" the shares. The SEC considers the possibility of advance notice of matters to be voted on, which would give lenders adequate time to recall their shares and vote on relevant issues. The release also questions whether there is a need for more transparent disclosure of votes cast by institutional holders of securities.
- Proxy distribution fees: The proxy distribution fee structure has consistently been an area of major concern for the SEC. The release addresses various options for revamping the

structure and size of fees charged, including the revision or elimination of stock exchange maximum fee schedules.

- Communication between issuers and beneficial owners of securities: The practice of holding securities in street name and rules enabling beneficial owners to conceal their identities from issuers have inhibited the ability of issuers to communicate with shareholders. The release seeks feedback on whether so-called “OBO” status should be revised or eliminated.
- Means to facilitate retail investor participation: Low retail investor participation rates have been an area of major concern for the SEC. The release suggests several initiatives to increase retail investor voting including better investor education, enhanced brokers’ Internet platforms, advance voting instructions, enhancing investor-to-investor communications and improving the use of the Internet for distribution of proxy materials.
- Data-tagging proxy related materials: The release examines the costs and benefits of data-tagging proxy statement disclosure and asks whether such organization of information would enhance investor participation in the proxy voting process.
- Role and legal status of proxy advisory firms: Institutional investors’ increased reliance on proxy advisory firms has raised various concerns. The release examines the necessity of enhancing disclosure of potential conflicts of interest and improving regulatory supervision over the formation of advisory firms’ voting recommendations.
- Dual record dates: Some new state laws (Delaware, for example) permit dual record dates, changing the long established procedure of using a single record date to determine which shareholders are entitled to notice of a meeting and which shareholders are entitled to vote. Under the new laws, a shareholder who sells his shares after the record date no longer holds the right to vote. The release examines whether SEC rules should be revised to accommodate dual record dates.
- Empty voting: Investors have developed a variety of techniques to “decouple” voting rights from their economic interest in a company, resulting in the investor’s having voting rights that exceed his/her economic interest in the company. The SEC examines whether such practice unduly influences voting results and asks whether disclosure of decoupling activities should be required.

The publication of the concept release triggers a 90-day public comment period, during which market participants will have an opportunity voice their opinions about the SEC’s concerns related to proxy mechanics.

Click [here](#) to read the Securities and Exchange Commission Concept Release No. 34-62495.

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