Katten

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SEC/CORPORATE

SEC Proposes New Amendments to Modernize Shareholder Proposal Rules

On November 5, the Securities and Exchange Commission voted to propose amendments to Rule 14a-8 of the Securities Exchange of 1934 (Exchange Act) to address required share ownership thresholds for a proponent to submit a shareholder proposal, update the "one proposal" rule to clarify the rule that a person can only submit one proposal per meeting and amend the vote support thresholds required for a proponent to resubmit a shareholder proposal at subsequent shareholder meetings.

Rule 14a-8 requires that registrants holding a shareholder meeting subject to the proxy rules include proposals submitted by shareholders in their proxy statement, subject to the shareholder and the proposal satisfying certain procedural and substantive requirements. In announcing the proposed amendments, the SEC noted that market practice and the use of shareholder proposals has evolved significantly since the relevant rules were last amended. The process for submitting proposals, and for registrants to exclude proposals, has been the subject of considerable attention by the SEC, by registrants and by investors in recent years. In particular, the SEC noted that in 2018 alone it received more than 250 no-action requests relating to shareholder proposals.

Eligibility and Ownership Thresholds

Under current Rule 14a-8(b) a shareholder must continuously hold at least $2,000 or 1 percent of a registrant's securities for at least one year in order to be eligible to submit a proposal for inclusion in the registrant's proxy statement for its shareholder meeting. This threshold was last amended in 1998 when it was raised from $1,000 to the current $2,000. The proposed amendments would eliminate the 1 percent threshold option and create a new tiered dollar threshold as follows: either 1) continuous ownership of at least $2,000 of securities for at least three years; 2) continuous ownership of at least $15,000 of securities for at least two years; or 3) continuous ownership of at least $25,000 of securities for at least one year. The new thresholds are designed to demonstrate long-term investment in the registrant by the shareholder proponent seeking to submit a proposal.

In addition, the proposed amendments would require that a shareholder proponent submitting a proposal through a representative provide the registrant documentation demonstrating that the representative is authorized to act on behalf of the shareholder proponent and provide a meaningful degree of assurance as to the identity, role and interest in the proposal by the underlying proponent. The shareholder proponent would be required to sign the verification documentation.

Under the proposed amendments, any shareholder proponent seeking to submit a shareholder proposal would be required to state that the proponent is able to meet with the registrant, either in person or via teleconference, no less than 10 days nor more than 30 days after submitting the proposal. The proponent would have to provide contact information and business days and times when the proponent would be available to discuss the proposal with the registrant. According to the SEC, this new proposal is designed to encourage greater dialogue between the shareholder proponent and the registrant and possibly lead to more efficient and less costly resolutions to matters underlying the shareholder proposals.

One Proposal Rule

Rule 14a-8(c) provides that a shareholder may submit no more than one proposal to a registrant for any particular shareholder meeting. Under the proposed amendments the rule would be expanded to apply to "each person" submitting a proposal either "directly or indirectly" as opposed to just "each shareholder." This would prevent a shareholder proponent from submitting one proposal in the proponent's own name and a second proposal as a representative of a different shareholder.

Resubmission Thresholds

Currently, Rule 14a-(8)(i)(12) allows a registrant to exclude a shareholder proposal from its proxy statement under certain circumstances if the proposal deals with substantially the same subject matter as another proposal that has been previously included in the registrant's proxy statement within the preceding five years. In particular, the registrant may exclude such a resubmission for any meeting within three years of the last time the proposal was submitted if the proposal received less than 3 percent of the vote if proposed once within the preceding five years, less than 6 percent of the vote if proposed twice within the preceding five years and less than 10 percent of the vote if proposed three times or more within the preceding five years. The amended rule would increase these thresholds to 5 percent, 15 percent and 25 percent, respectively.

In addition, the SEC has proposed a new rule that would allow a registrant to exclude a shareholder proposal that has been previously voted on three or more time in the last five years, even if it satisfied the 25 percent threshold the last time the matter was vote on, if the proposal received support of less than 50 percent of the votes cast and support for the proposal declined 10 percent or more compared to the prior vote.

Not surprisingly, reaction to the proposed amendments has been mixed, with the US Chamber of Commerce supporting the proposed amendments and the Council of Institutional Investors opposing the proposed amendments.

The SEC's proposing release is available here.

SEC Proposes Amendments Relating to Proxy Voting Advice

On November 5, the Securities and Exchange Commission voted to propose amendments to the rules governing proxy solicitations to expressly apply them to proxy voting advisors. The proposed amendments would codify the SEC's position that proxy voting advice is a "solicitation" within the meaning of the proxy rules, place certain disclosure requirements on proxy voting advice and define what would be impermissible false or misleading disclosure in the context of proxy voting advice.

Proxy voting advice has been an area of recent focus and attention. The SEC's recent guidance on this subject was previously discussed in the August 23, 2019 edition of *Corporate & Finance Weekly Digest*. The previous guidance is also the subject of a lawsuit filed by Institutional Shareholder Services Inc. (ISS), which was previously discussed in the November 1, 2019 edition of *Corporate & Finance Weekly Digest*.

Solicitation

In the SEC's August 2019 release, the SEC expressed its position that proxy voting advice constitutes a "solicitation" within the meaning of the federal proxy rules and is subject to the general antifraud provisions of Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 14a-9 (False or Misleading Statements).

The proposed amendments to the proxy rules would codify this interpretation, amending the definition of the terms "solicit" and "solicitation" to 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 when furnished by a person that markets its expertise as a provider of such advice (separate from other forms of investment advice) and sells such advice for a fee. Such conduct, the SEC determined, is the type of activity that raises the investor protection concerns about inadequate or materially misleading disclosures that the proxy rules are intended to address.

The proposed amendments would exclude any proxy voting advice furnished in response to an unprompted request by someone not claiming to be an expert in proxy voting advice.

Disclosure Requirements

Generally, any person engaged in a proxy solicitation is subject to the filing and information requirements of the proxy rules, unless exempt from such requirements. Typically, proxy voting advisory firms could have relied on two exemptions from the filing and information requirements in order to provide proxy advice without being subject to the filing and information requirements: Rule 14a-2(b)(1) which exempts solicitations made by persons who do not seek the power to act as a proxy for a shareholder and do not have a substantial interest in the subject of the communication and Rule 14a-2(b)(3) which exempts proxy voting advice by an advisor to any person with whom the advisor has a business relationship.

The proposed amendments would continue to allow proxy voting advisors to rely on these exemptions from the filing and information requirements of the proxy rules only if they include disclosure on any material interests of the proxy voting advisor in the matter or parties relating to the advice, any material transaction or relationship between the proxy voting advisor and the registrant, other soliciting parties or any shareholder proponent and other material information regarding its interests in the transaction. The disclosure also would need to address any policies or procedures used by the proxy voting advisor to identify and address any material conflicts of interest.

The proposed amendments would require proxy voting advisors relying on an exemption from the filing and information requirements of the proxy rules to provide registrants with time to review and provide feedback on the proxy voting advice before it is disseminated to clients.

Under the proposed amendments, if the registrant files its definitive proxy statement less than 45 days but at least 25 days before its shareholder meeting, the proxy voting advisor would be required to provide at least three business days for the registrant to review and provide feedback. If the registrant files its definitive proxy 45 days or more before the meeting, the proxy voting advisor would be required to provide at least five business days for the registrant to review and provide feedback. These proposed review periods are designed to provide proxy voting advisors a reasonable amount of time to engage with registrants without jeopardizing their ability to provide timely advice to their clients. Once the review is complete, proxy voting advisors would be required to provide registrants a final notice of voting advice with the version of the advice to be sent to clients at least two business days in advance of delivery to clients. Registrants may request that the proxy voting advisor include a hyperlink in its voting advice that leads to a registrant's statement about the proxy advisor's voting advice.

False or Misleading Statements

Rule 14a-9 generally prohibits any proxy solicitation from containing a false or misleading statement with respect to any material fact. While solicitations made by proxy voting advisors may be exempt from the information and filing requirements of the proxy rules, they are subject to Rule 14a-9. Currently, Rule 14a-9 provides examples of certain statements that may be misleading in the context of the rule, including predictions as to specific future market values. The proposed amendments would add a new example to the rule, stating that failure by a proxy voting advisor to disclose information such as the proxy voting advisor's methodology, source of information and conflicts of interest may be misleading.

The proposed amendments have garnered significant public reaction, with the New York City Comptroller opposing the proposed changes and industry groups like the National Association of Manufacturers coming out in favor of the proposed amendments.

The SEC's proposing release is available here.

BROKER-DEALER

SEC Announces Extension of Temporary Measure to Facilitate Implementation of MiFID II

On November 4, the Securities and Exchange Commission extended temporary no-action relief to firms that are regulated in the United States in connection with their efforts to comply with the research provisions of the

European Union's Markets in Financial Instruments Directive II (MiFID II). Under the extension, the SEC staff will not recommend enforcement action under the Investment Advisers Act of 1940 against broker-dealers receiving payments in hard dollars or through research payment accounts from clients subject to MiFID II.

This no-action relief was set to expire July 3, 2020, but has now been extended until July 3, 2023.

The SEC No-Action Letter is available here.

The extension letter is available here.

DERIVATIVES

See "NFA Issues Notice to Members Regarding the Designation of NFA Swaps Proficiency Requirements Administrator" in the CFTC section.

CFTC

CFTC Approves Three Foreign Board of Trade Applications

On November 5, the Commodity Futures Trading Commission (CFTC) approved Foreign Board of Trade (FBOT) registration applications for three non-US exchanges to allow their members and other US participants to enter orders directly into their respective trade matching systems. The FBOTs receiving such approvals were: 1) Euronext Amsterdam N.V.; 2) Euronext Paris SA; and 3) the European Energy Exchange of Germany, bringing the total number of FBOTs registered with the CFTC to 21.

In order to be registered, these exchanges were required to demonstrate, among other things, that they possess the attributes of established, organized exchanges (e.g., being subject to a level of regulatory oversight in their home country similar to the CFTC's level of oversight over designated contract markets).

The CFTC's press release, including links to copies of the Orders of Registration, is available here.

NFA Issues Notice Regarding the Designation of NFA Swaps Proficiency Requirements Administrator

On November 1, the National Futures Association (NFA) issued Notice to Members I-19-22, announcing that NFA's Swap Proficiency Requirements would launch and become accessible online on January 31, 2020 (Swap Proficiency Requirements). Each NFA Member with associated persons required to take the Swap Proficiency Requirements must designate at least one Swaps Proficiency Requirements Administrator who will coordinate enrollment and track progress.

The NFA Notice to Members is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Proposes Changes to the Advertising and Cash Solicitation Rules for Investment Advisers

On November 4, the Securities and Exchange Commission announced that it voted to propose amendments to modernize the rules under the Investment Advisers Act of 1940 (Advisers Act) addressing investment adviser advertisements and payments to solicitors. According to the SEC, the "proposed amendments to the advertising rule (Rule 206(4)-1 under the Advisers Act) would replace the current rule's broadly drawn limitations with principles-based provisions," and would permit the use of testimonials, endorsements and third-party ratings, subject to certain conditions. The proposed rule also would include tailored requirements for the presentation of performance results based on an advertisement's intended audience.

The SEC also proposed amendments to the cash solicitation rules under the Advisers Act. The proposed amendments to Rule 206(4)-3 would expand the current rule to cover solicitation arrangements involving all forms

of compensation, rather than only cash, subject to a new *de minimis* standard. Non-cash compensation would include directed brokerage, awards or other prizes and free or discounted services. Importantly, the proposed rule would apply to the solicitation of current and prospective investors in private funds, rather than only to the solicitation of current and prospective clients of the adviser.

The proposed amendments are published on the SEC's website and will be in the *Federal Register*. The public comment period will remain open for 60 days after publication in the *Federal Register*. Watch for more detailed information on these proposals from Katten.

BREXIT/UK DEVELOPMENTS

See "SEC Announces Extension of Temporary Measure to Facilitate Implementation of MiFID II" in the Broker-Dealer section.

FCA Extends Brexit Deadlines

On October 31, the Financial Conduct Authority (FCA) published five revised directions, extending the Temporary Permissions Regime (TPR) to January 20, 2020. This coincides with the most recent extension of the Brexit deadline from October 31 to January 31, 2020 and is the fourth time that the TPR has been extended.

The specific revised directions published by the FCA were for:

- European Economic Area (EEA) firms with passports and Treaty firms, here;
- EEA collective investment schemes, here;
- EEA alternative investment funds, here;
- authorized payment institutions and EEA registered account information service providers, here; and
- e-money institutions, here.

For more information on the TPR, please see the January 11, 2019 edition of the *Corporate & Financial Weekly Digest*.

HMT Publishes Letter on Equivalence

On October 31, the European Scrutiny Committee published a letter they received from John Glen MP, Economic Secretary to the Treasury, regarding potential equivalence arrangements that might be put in place between the UK and the EU following Brexit. The European Scrutiny Committee is a committee of the House of Commons and is chaired by Sir William Cash MP.

Reciprocal equivalence between the UK and the EU are highly important post-Brexit in order to minimize disruption to financial services, which has been the topic of many previous *Corporate & Financial Weekly Digest* articles (e.g., see the August 16, 2019 edition).

In the letter, Mr. Glen explained that the UK and EU will "start assessing equivalence with respect to each other" as soon as possible after Brexit, and intend to have completed these assessments by the end of June 2020. This statement affirms the position set out in the original and the revised Political Declarations between the UK and the EU.

Mr. Glen also emphasized that the goal of the UK government is to have a "deep and comprehensive future relationship with the EU," but did not provide any further details.

The letter is available here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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