

[Securities Regulation Daily Wrap Up, PROXIES—Proxy season illustrates harmful impact of proposed amendments on shareholder proposals, investor groups say, \(Jul. 31, 2020\)](#)

Securities Regulation Daily Wrap Up

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While the stated goal of the proposal is to reduce the burdens on companies that must include doomed-to-fail shareholder proposals in their annual proxy materials, the groups suggest that Commissioner Roisman's comments reveal the true goal is to curtail proposals on environmental and social issues.

Several investor advocacy groups have sent a letter to the SEC urging it to reject proposed changes to the SEC's shareholder proposal rules. In addition to reiterating earlier objections to the proposal relating to its impact on smaller investors and a lack of substantive economic analysis in the proposing release, the letter cites several shareholder proposals from the 2020 proxy season that would have been excluded had the proposed rule been in effect. The [letter](#) is signed by representatives from the Council of Institutional Investors (CII), Ceres, The Forum for Sustainable and Responsible Investment, the Shareholder Rights Group, the AFL-CIO, and the Interfaith Center on Corporate Responsibility.

Scaling back shareholder proposals. In November 2019, the Commission voted three-to-two to [approve](#) the proposal for comment. Under the proposal, a proponent that meets the \$2,000 ownership threshold that wishes to have its proposal included in the company's proxy statement must have held shares in the company for three years, with a shorter holding period for shareholders with a larger ownership amount (ownership requirement amendments). The proposal also would change resubmission thresholds for shareholder proposals that had failed to gain a certain amount of shareholder support in previous years (resubmission threshold amendments). CII [outlined](#) its objections to the proposed amendments in a lengthy comment letter submitted in January.

Reducing shareholder proposals: A 2020 case study. In their letter, the investor groups cite the proposing release, which estimates that the proposed rules would eliminate approximately 37 percent of shareholder proposals but does not provide a "rational, economic justification" for doing so. In fact, the letter states, the SEC's own proposal would save all companies in the aggregate a "meagre" \$70.6 million.

The letter outlines a number of shareholder proposals from the 2020 proxy season that would have been disallowed under the proposed rule, including those with significant or even majority support. According to an analysis by the Sustainable Investments Institute (Si2), the resubmission threshold amendments would make 27 percent of social and environmental proposals voted in 2020 ineligible for consideration in 2021. The study showed that requests for the disclosure of political contributions and lobbying expenditures accounted for the largest number of proposals that would be blocked. Nearly half the shareholder proposals on pay disparity would have missed the proposed thresholds, and 46 percent of board ESG matters (such as board diversity and requests for specific board member expertise) voted from 2010 to 2020 would have been ineligible, including two proposals from 2020.

The Si2 study also indicated that governance proposals often raise important issues that take time to garner significant shareholder support. For example, it cited independent board chair proposals that have received less than 25 percent support in the past but averaged 37.3 percent during the 2020 proxy season. Executive compensation clawback proposals, which averaged 10.7 percent support in 2008, won strong support in 2020 at Eli Lilly (35.1 percent) and Stericycle (54.5 percent), according to the study.

The proposed ownership requirement amendments would also have an unjustified impact on Main Street investors because even proposals with significant support would have been disallowed under the steeped

proposed requirements. "If most shareholders support a proposal, why should it matter that the shareholder who went to the trouble of crafting and filing the proposal owned less than \$25,000 in shares for less than three years?" the letter asks. At least nine proposals in the 2020 proxy season that garnered the support of the majority of the companies' shareholders could not have been filed if the proposed ownership thresholds had been in effect, the letter admonishes.

The letter summarizes some of the findings from *Report on Case Studies from the 2020 Proxy Season* by the Shareholder Rights Group and the Interfaith Center on Corporate responsibility (included in the letter's appendix), which, according to the letter, illustrate the important role that 2020 shareholder proposals have played in protecting minority shareholder interests. These include:

- A Tyson Foods shareholder proposal on human rights due diligence (the letter notes that following the vote, nearly 10,000 Tyson employees have tested positive for COVID-19 and more than 25 have died);
- A Facebook shareholder proposal on the company's failure to manage content containing hate speech (the letter notes that Facebook's stock price dropped after the Black Lives Matter movement catalyzed a boycott by major advertisers); and
- An Alphabet/Google shareholder proposal on the effect of Google's treatment of internal critics and whistleblowers on shareholder value.

The letter explains that these examples show that the shareholder proposal process is effective at allowing shareholders to benefit from each other's ideas to efficiently leverage time and resources to avoid duplicate efforts. The SEC's proposed amendments would damage these benefits, according to the letter.

Technological advances? The letter advises that the proposing release states, without any explanation or evidence, that the proposal process may be unnecessary due to developments in technology such as social media that allow shareholders to communicate their preferences to companies and effect change. According to the letter, the 2020 proxy season did not bear that claim out, and there is no evidence that shareholders use social media or other technology in a way that obviates the need for the shareholder proposal process.

If anything, the letter states, technology has made it easier for shareholders to become informed about the context for shareholder proposals by helping them research, analyze, and judge investment risks, resulting in record high levels of support for shareholder proposals in the 2020 proxy season. Taking a jab at the lack of evidence provided for the SEC's position, the letter finds that "a vague reference to technological advances" is insufficient under the Administrative Procedure Act's notice and comment process.

Commissioner Roisman's ESG remarks. The letter also takes aim at recent [remarks](#) made by Commissioner Elad Roisman, who had been tasked by Chairman Jay Clayton with heading up the Commission's proxy process reform efforts. In a July 7 speech, Roisman had expressed that when it comes to companies reporting on environmental and social matters, investors should use "private ordering" to motivate companies to make these disclosures, rather than using the shareholder proposal process. This statement, according to the letter, indicates that the proposed amendments reveal a different regulatory goal than the de minimis cost-reduction goal that was articulated in the SEC's proposing release. The letter also expresses concern with Roisman's comments separating environmental and social factors from governance factors.

With these comments in mind, the letter states that the true regulatory goal of the proposed amendments may not be cost reduction, but the curtailment of shareholder proposals related to environmental and social topics. This goal was not disclosed in the release, and there was not an economic justification for this goal in the release either. "The public is entitled to the Commission's rationale and economic justification" for the goal of curtailing environmental and social shareholder proposals to allow for a meaningful opportunity to comment on that analysis, the letter chides.

Regulation S-K proposal. Finally, the letter criticizes the SEC for not taking into account the economic effect of its proposed amendments on the shareholder proposal process in its January 2020 [proposal](#) to scale back Regulation S-K disclosures. That proposal would remove certain historical, prescriptive disclosure requirements in favor of a more flexible, principles-based approach. Commissioner Allison Herren Lee had expressed

frustration at the Regulation S-K proposal for failing to consider a standardized framework for climate risk disclosure.

Bringing up Roisman's stated desire for a "private ordering" approach to motivate companies to adopt certain environmental and social policies, the letter noted that the shareholder proposal process prompts voluntary disclosure. Without a standardized framework, which investors want according to a [recent GAO study](#), ESG disclosures can be inconsistent, unreliable, and not comparable across companies. And without the shareholder proposal process to encourage voluntary disclosure, the result could be lost opportunities to increase stock market liquidity and decrease the cost of capital, the letter cautions. If the Commission's preference is for private ordering over mandatory disclosure, then the shareholder proposal process is more important now than ever, the letter concludes.

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