

[Securities Regulation Daily Wrap Up, PROXIES—SEC advisory committee recommends ‘proxy plumbing’ changes, \(Sept. 9, 2019\)](#)

Securities Regulation Daily Wrap Up

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Members praised the work of the committee on the recommendation, although some members expressed disappointment that it did not address issues related to proxy advisory firms or shareholder proposals.

The SEC's Investor Advisory Committee recently voted to approve a series of recommendations regarding the Commission's rules on "proxy plumbing," or the mechanics of communication and voting under the proxy rules. While the recommendation was approved by a distinct majority of the IAC, some members dissented due to some specific language used in the text and the recommendation to adopt with some changes the 2016 proposal on universal proxy.

Recommendation. The approved [recommendation](#) consists of four parts: (1) requiring end-to-end vote confirmations; (2) reconciliation of vote-related information; (3) conducting studies on investor views on anonymity and share lending; and (4) adopting the SEC's proposed universal proxy rule with certain changes.

Regarding end-to-end vote confirmations, the recommendation notes that investors are currently unable to determine whether their voting instructions for shares they own are carried out and counted in votes. In implementing the confirmation requirement for end-users, the SEC should require that confirmations indicate that proxies and/or voting instructions were received and implemented, or if not, give a reason as to why not. Confirmations could take any reasonable form, including electronic delivery or delivery through the system already developed by proxy servicing firm Broadridge Financial Solutions.

A duty to cooperate in regular reconciliations is driven by routine errors and mismatches in the system in place today, according to the recommendation. The SEC should therefore require every participant in the proxy system to cooperate with the others to reconcile ownership and voting information on a regular basis. The recommendation advised that costs associated with this requirement would fall over time as the process becomes more routine.

The staff should study the reasons for and the extent to which customers of intermediaries actually want to remain anonymous (that is, to not be "non-objecting beneficial owners" or "NOBOs") to the companies in which they own stock, the committee recommended. A second study should examine the extent to which share lending contributes to errors, over-votes, or under-votes, as well as whether the effect of share lending on voting entitlements is effectively disclosed to investors. Both studies would inform further monitoring or rulemaking by the Commission.

Finally, the IAC recommended that the SEC move forward on implementing a universal proxy to allow shareholders to vote for the combination of nominees they wish to represent them. The committee offered suggestions to revise certain aspects of the [Commission's 2016 proposal](#), including revisiting what percentage of shareholders dissidents should be required to solicit to be able to use universal proxy and addressing the issue of incumbents that may refuse to serve if elected to a split slate.

Objections. While most committee members approved of the recommendation, some members dissented. Professor J.W. Verret of Antonin Scalia Law School at George Mason University expressed his dissatisfaction that the recommendation did not address the role of proxy advisory firms. According to Verret, the proxy system is so interrelated that the issue of proxy advisors should have been considered as part of the recommendation. He also was disappointed that the recommendation did not consider revising the rules on shareholder proposals, some of which are "conflicted and politically motivated," Verret lamented.

Verret and Lydia Mashburn of the Cato Institute also expressed concern about the universal proxy recommendation. Verret said that what the committee is recommending goes further than the IAC's previous recommendation, which encouraged the SEC to remove barriers to universal proxy, not mandate them.

Mashburn also took issue with some of the language included in the recommendation: "We do not believe private actors will improve the system without SEC intervention." Mashburn disagreed with this characterization and said she could not put her name on it. However, she indicated that she was in favor of the recommendations regarding confirmations and reconciliation.

Professor John Coates of Harvard Law School, who chaired the Investor-as-Owner subcommittee that developed the recommendation, agreed that there is work yet to be done regarding shareholder proposals and proxy advisory firms to improve the proxy system. However, he added that wanted to recognize that those issues may involve some tricky policy issues and political trade offs that may make it hard to progress in those areas and may need to be worked through in the form of a comment process.

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