

CENTER FOR CAPITAL  
MARKETS COMPETITIVENESS

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CORPORATE GOVERNANCE:  
**2020 REGULATORY  
REFORMS**



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COMPETITIVENESS.

The climate for U.S. public companies has been less hospitable over the last few decades, harming their competitiveness. This has led to a steady decline in public companies, which adversely impacts a key source of growth, innovation, and job creation. The U.S. Chamber of Commerce is committed to reversing these trends and fighting for responsible corporate governance policies that focus on economic return and benefit the long-term position of shareholders, while opposing special-interest activist agendas unrelated to the interests of companies or investors.

These efforts are bearing fruit. The Securities and Exchanges Commission (SEC) has recently finalized new rules in proxy advisory reform (Proxy Advisory Rule) and shareholder proposal reform (Shareholder Proposal Reform) that reflect the Chamber's effectiveness in actualizing meaningful steps toward a better regulatory environment for public companies.

Building on these reforms with the Chamber's encouragement, the Department of Labor (DOL) is considering two rules that would ensure plans governed by the Employee Retirement Income Security Act (ERISA) prioritize economic return over all other considerations. Collectively, the DOL rules would apply to proxy voting behavior by ERISA plans as well as the consideration of economic, social, and governance (ESG) factors when selecting plan investments.

This document provides an overview of the two final SEC rules and the proposed rules being considered by the DOL.

## **OVERVIEW OF THE FINAL SEC PROXY ADVISOR RULE**

The Proxy Advisor Rule links recommendations to economic return, adds transparency within the proxy advisory industry, and increases the quality of vote recommendations received by institutional investors. As proxy advisory firms have a tendency to make factual errors and analytical mistakes when providing voting advice, the new rule allows issuers an opportunity to provide written feedback on proxy voting advice, and it requires that proxy advisors notify their clients of any written statements provided by an issuer regarding a vote recommendation.

Further, the new rule requires proxy advisory firms to disclose any policies and procedures to identify potential conflicts of interest in issuing voting advice and disclose those conflicts of interest in issuing voting advice. The final rule adopts more principles-based standards for how proxy advisory firms can meet the conditions laid out in the rule. The final rule also reaffirms that proxy advisory firms remain subject to the antifraud provisions of the Exchange Act for materially false or misleading statements.

## KEY TAKEAWAYS

1. The Proxy Advisor Rule codifies that providing proxy advice is a “solicitation” under the federal proxy rules.
2. The Proxy Advisor Rule should result in better disclosure regarding conflicts of interest from proxy advisory firms.
3. Any public company regardless of size that is the subject of proxy voting advice will be afforded the opportunity to correct errors and provide feedback on voting recommendations.
4. Clients of proxy advisory firms will have to be notified if an issuer has provided a written statement in response to a voting recommendation.
5. Proxy advisory firms will be held accountable by the antifraud standards under Rule 14a-9 regarding false or misleading statements.

## OVERVIEW OF THE FINAL SEC SHAREHOLDER PROPOSAL RULE

The Shareholder Proposal Rule adjusts shareholder proposal resubmission thresholds for the first time since the Eisenhower administration and establishes a new structure to determine the eligibility of a shareholder to submit a proposal. These changes are designed to prevent “gadfly” investors and activists uncommitted to a company’s long-term success from acting in concert and manipulating the proxy voting system to advance their political agendas. The more stringent resubmission requirements should eliminate many “zombie” proposals that appear on proxy ballots year after year despite majority shareholder opposition to them. The rule’s new structure for who is eligible to offer a shareholder proposal will substantially limit activist-investors’ ability to dominate annual shareholder meetings and should facilitate more constructive engagement with shareholders.

## KEY TAKEAWAYS

1. The Shareholder Proposal Rule creates a new three-tier structure for establishing eligibility of a shareholder to submit a proposal. Under the new rule, a shareholder may submit a proposal if that shareholder holds \$25,000 in shares for one year, \$15,000 for two years, or \$2,000 held for three years.
2. The Shareholder Proposal Rule adjusts resubmission thresholds for the first time since 1954, increasing the threshold to 5% support to resubmit after the first year, 15% after the second year, and 25% every year after.
3. The Shareholder Proposal Rule prevents shareholders from aggregating holdings to reach the new ownership thresholds, and requires representatives acting on behalf of an eligible shareholder to provide a meaningful degree of assurance that they are acting on the shareholder’s behalf.
4. Any shareholder submitting a proposal must be available for a meeting with the company after submission and before public consideration of the proposal.

# OVERVIEW OF PROPOSED DOL PROXY ADVISOR RULE

The Proxy Voting and Shareholder Rights Notice of Proposed Rulemaking (NPR) reaffirms that fiduciaries must act solely in the interests of ERISA plan participants and beneficiaries when engaged in proxy voting. The proposed rule would ensure that individuals responsible for the retirement savings of millions of Americans are voting proxies only where it is financially in the interest of the plan to do so.

## KEY TAKEAWAYS

1. The DOL has addressed duties related to proxy voting by ERISA plans through a series of interpretive bulletins over the last three decades that differed in their approach to compliance for ERISA fiduciaries. Given the steady increase in the number of proxy matters ERISA plans must consider every year—particularly those of a social or political nature—a formal rulemaking is welcome and necessary.
2. The rule states that ERISA fiduciaries have an obligation not to vote at all on a shareholder proposal or other proxy matter if they cannot demonstrate that the issue is fundamental to economic return. It would also ensure that fiduciaries conduct proper oversight over third parties they hire, including proxy advisory firms. The DOL rule incorporates many aspects of the SEC’s recent proxy advisor rulemaking.

# OVERVIEW OF PROPOSED DOL RULE ON INVESTMENT DUTIES OF PLAN FIDUCIARIES

In June 2020, the DOL proposed a separate rule to clarify the responsibilities of ERISA fiduciaries when selecting plan investments based on ESG criteria. Like the proxy rulemaking, this initiative is intended to provide regulatory certainty regarding an issue that had been only addressed through guidance by the DOL over the last 30 years.

## KEY TAKEAWAYS

The DOL ESG rule prohibits fiduciaries from selecting plan investments based on nonpecuniary factors, or from placing other objectives above the goal of providing economic return for plan participants and beneficiaries. While ESG criteria may be an important consideration for some companies or funds, the lack of a clear definition over what constitutes ESG and its correlation to economic return necessitates robust due diligence from ERISA fiduciaries.



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The Center for Capital Markets Competitiveness’s (CCMC) mission is to advance America’s global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.