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How to submit comments on SEC rulemaking

by Neil Stewart Comments (0) | 7 Oct 2010 | Rating 

Eight rule creation myths showing how IROs can – and should – be heard, starting with the proxy system

Given the huge number of new rules sprouting from the rubble of the financial crisis, an overtaxed SEC badly needs external input. And given the vociferousness of investors and their intermediaries, the corporate world needs to be heard.

Myth 1: The SEC works in a vacuum

Transparency, participation and collaboration are wafting through Washington, propelled by President Barack Obama's Open Government Initiative. Indeed, out of the hundreds of stipulations in the Dodd-Frank financial reform act, there are some that widen the SEC's already open rulemaking process.

The first item on IROs' action plan – revamping shareholder communications – didn't come from Dodd-Frank. But aspects of Dodd-Frank, including say on pay and proxy access (if they survive legal challenges), make proxy plumbing all the more important. Paul Conn, Computershare's president of global capital markets, says it could be the first major overhaul since the Shareholder Communications Act of 1985, and if issuers don't make themselves heard now, they may have to wait another 25 years before their needs are addressed.

In July the SEC addressed shareholder communications with a proxy system 'concept release', a rarely used first step meant to elicit comment before a rule proposal is drafted. A 90-day public comment period will end on October 20. As of October 1, 45 comments had been posted on the SEC's website, including a handful from the issuer community.

Conn expects the bulk of comments to come in the last few weeks as campaigns step up on both sides. 'People like us who service the issuer community are looking to get issuers to put their support behind the proposals that are out there,' he says. 'Others who are keen to see the status quo maintained will be putting up their side of the story as well.'

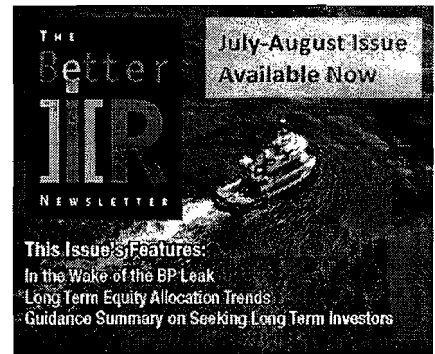
What's remarkable is that Computershare and Georgeson, its proxy solicitation unit, are rallying their clients like never before. In a series of webinars, research papers, a Twitter feed (@proxyreform), and most recently a website with an animated video (www.reformtheproxy.com), launched in conjunction with four other transfer agents, Computershare and Georgeson have not only tried to inform clients about the issues, they have pressed them to submit comments.

'There is an opportunity in the concept release to voice your concern... I urge you to take the time to review it and review the notes we've sent. This is a once-in-a-lifetime opportunity for folks to effect change,' said Charlie Rossi, executive vice president of client services at Computershare and president of the Securities Transfer Association, during a September 22 webcast.

Myth 2: IROs don't get involved

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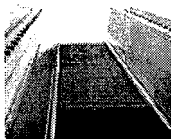
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Most IROs have never submitted comments to the SEC; this territory is usually left to corporate secretaries and legal counsel or, for headline issues, CEOs and CFOs. According to Jeff Morgan, president and CEO of NIRI, 'It doesn't matter who from a company is commenting, the value is there.'

Now is the moment for IROs to get involved. Here's what's different today. 'Usually the SEC has only a couple of issues a year that hit IR. But now there's a heck of a lot going on that hits squarely in the IR space, and a lot is changing under our feet,' explains Morgan. 'The SEC is seeking knowledge from lots of different people to make sure its perception is not one-sided.'

Morgan devoted five of his president's notes to the issue in NIRI's IR Weekly newsletter during August and September. He not only boiled down the long concept release, but also exhorted IROs to get involved. 'I'll also urge you to add your voice to this process by submitting a comment letter to the SEC regarding those issues your company views as most important,' he wrote.

On fees for the distribution of proxy materials – a contentious issue for corporates – Morgan wrote, 'Therefore, we urge issuers to write to the SEC with their specific thoughts and opinions on this subject, as well as any details of perceived inequities in fees.'

In an interview with *IR magazine*, Morgan repeats his earnest plea: 'This goes to the core of how in America we all have a voice. You can sit and grumble about things, but here is a chance to say what you think.'

Niels Holch, the Shareholder Communications Coalition's (SCC) executive director, is trying as much to get issuers to submit comments to the SEC as he is pushing directly on policy changes. He predicts there will be a substantial number of issuer comments by the deadline, helped by the grassroots efforts of NIRI, Computershare and others related to the SCC.

'This is your opportunity,' Holch announces to IROs. 'This is a chance to show the SEC that you'd like to see changes to the system. The more people who get involved in a positive way, the more the SEC will see this as significant for the issuer community.'

Myth 3: Comment letters have to be long and footnoted

The SEC concept release is 151 pages long with more technical detail than most IROs want to grapple with. A lot of the work of the SCC, NIRI, Computershare and others has been to sum up all the issues in the release and provide clear background information. Some issuers have already submitted comments simply endorsing the recommendations of the SCC and NIRI.

Holch encourages IROs to send in any kind of letter, and assures that it doesn't have to be a lengthy white paper replete with footnotes. 'Whether it's for a concept release or a proposed rule, a government agency is looking for a wide range of comments and reactions,' he says. 'It is looking for data, for anecdotes – anything that will help it make a good set of decisions. It can't do it in isolation.'

Morgan emphasizes the importance of providing the SEC with real-life cases. 'The SEC is very keen on examples of how the system has failed,' he says. But he encourages any kind of input, from a brief personal opinion to a more formal response like the one NIRI is preparing.

Myth 4: Commenting directly to the SEC is the only way

One hitch with public comments is that issuers might hesitate to provide specific examples. With the proxy concept release, for example, they may not want to criticize Broadridge or ISS. Conn says one Computershare client that had a particularly bad proxy voting experience would be a prime example for the SEC, but the company probably wouldn't submit a letter because it would bring its problems back to the public's attention. Other companies might support the changes but have a corporate policy not to write comment letters to the SEC.

This is where an organization like NIRI can play an important role, passing on examples even where the IROs don't write letters to the SEC themselves.

Morgan is a savvy Washington player who brought to NIRI lessons from the Futures Industry Association and other industry organizations where he previously worked. He has ramped up NIRI's advocacy initiatives, for example by taking the NIRI board to meet SEC staff starting in fall 2009. Last month he again took his directors to meet corporation finance staff in a meeting devoted to proxy plumbing.

In preparation for the recent meeting and for NIRI's own comment letter, Morgan issued a mid-August executive alert boiling down the long concept release into a series of key questions relevant to IROs, and asking NIRI members to submit thoughts and examples NIRI could use, whether anonymously or attributed. He got dozens of responses.

Myth 5: No one reads the comments

It will likely take the SEC at least six to eight months to decide whether to move ahead with proxy system changes stemming from the concept release and, if so, to come up with a rule proposal for further comment. Some observers predict it will take years.

Morgan is confident the agency will digest all the comments and give them careful consideration. 'And the more people comment, the more they understand,' he says. Holch adds that the SEC spends a lot of time going through comments as part of a 'very fact-driven process'.

Remember that many others besides the SEC will read the comments. The trade press and mainstream media look at the letters, along with other issuers, intermediaries and lawyers – and anyone who may submit a comment him or herself.

Myth 6: Majority rules

The comment process is not a numbers game. For example, during last year's comment period for changes to NYSE Rule 452 on broker discretionary voting, more than 90 out of around 130 comment letters were from issuers saying the rule shouldn't be changed unless it was part of a comprehensive review of the whole system – in line with the SCC's stance. The change went ahead anyway.

Form letter campaigns seem to be occurring more and more for some types of rule proposals but Morgan doesn't think they carry much weight.

Myth 7: It's too late – or too early

A comment period, most often 30-60 days, formally begins on the date a rule proposal or concept release is published in the Federal Register, the government's official daily publication, although releases are sometimes available sooner on the SEC website. Comments received are posted as soon as possible to the website. 'Comment periods are designed to get as much input from the public as possible in a transparent process,' says John Heine, SEC spokesperson.

All material submitted is carefully considered including comments received outside the formal comment period, when possible, Heine adds. Late comments can be found on the SEC's website along with those that met the deadline.

Sometimes earlier comments are also posted, even if they're from months earlier, like the SCC's discussion draft from August 2009, which appears among the proxy concept release comments.

Under Dodd-Frank, the SEC is now taking comments even before it proposes rules or issues a concept release, holding more public hearings and disclosing more about staff meetings. Prospective rules arising from the Dodd-Frank Act are already up for comment here.

Myth 8: It all started with the internet

Under the Administrative Procedure Act of 1946, public notices and comments have long been integral to how US government agencies work. Of course the internet has reshaped the process: it used to be that if you wanted to see the comments, you had to go to the SEC in Washington, DC and ask to see the letters. Now it takes a few clicks on the web. 'The internet has made it even more transparent than the act required,' Holch points out.

Box 1: SCC recommendations overview

Issuers are collectively well represented by the Shareholder Communications Coalition (SCC), a lobby coalition formed in 2005 by the Business Roundtable, the Securities Transfer Association, the National Association of Corporate Directors, NIRA and the Society of Corporate Secretaries and Governance Professionals.

The SCC's August 2009 discussion draft on public company proxy voting, which included concrete proposals, seems to have been inserted virtually intact into the SEC's concept release:

- Enable ownership transparency by eliminating the objecting beneficial owner (OBO) system, allowing issuers to communicate directly with all shareholders.
- Improve voting integrity with processes for increasing vote accuracy and auditability.
- Allow a choice of service provider and create cost savings by establishing a non-profit, regulated 'data aggregator' (such as the Depository Trust & Clearing Corporation) and opening distribution and vote tabulation to competition (Broadridge currently holds a virtual monopoly).
- Launch a national campaign to reengage investors in proxy voting.

Box 2: Where to start

Shareholder Communications Coalition

www.reformtheproxy.com

NIRA executive alert on the release

Computershare's ThoughtCentric library of information on proxy reform

Public comments on the SEC's proxy concept release

How to submit comments on SEC rulemaking

How to submit comments on any of the SEC's future Dodd-Frank initiatives

Box 3: Instructions for submitting comments on the proxy concept release

Dates: Comments should be received on or before October 20, 2010.

Addresses: Comments may be submitted by any of the following methods:

Electronic comments

- Use the SEC's internet comment form (www.sec.gov/rules/concept.shtml).
- Send an email to rule-comments@sec.gov or use the Federal eRulemaking Portal (www.regulations.gov). Follow the instructions for submitting comments.

Paper comments

- Send paper comments in triplicate to Elizabeth Murphy, secretary, SEC, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to file number S7-14-10. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The SEC will post all comments on its website (www.sec.gov/rules/concept.shtml). Comments are also available for website viewing and copying in the commission's public reference room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10.00 am and 3.00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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