

Proxy Voting Advice Amendments and Related Guidance to Investment Advisers

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August 19, 2020

The SEC recently amended rules related to proxy voting advice and related guidance to investment advisers.

Final Proxy Rule Amendments

Solicitation Definition

The SEC codified its longstanding staff position that proxy voting advice generally constitutes a “solicitation” under the proxy rules. This means that certain activities of a proxy advisory firm, such as ISS or Glass Lewis, are subject to proxy solicitation rules. The SEC clarified that proxy voting advice in response to an unprompted request will not be deemed to be a solicitation.

Exemptions from Certain Proxy Rules

The amendments to Rules 14a-2(b)(1) and (3) provide that a proxy advisory firm with exemptions from certain information and filing requirements of the proxy rules if it:

- requires specified conflicts of interest disclosure in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice (new Rule 14a-2(b)(9)(i)); and
- requires adoption and disclosure of written policies and procedures reasonably designed to ensure that (1) registrants subject of proxy advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting adviser’s clients, and (2) the proxy adviser provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by the registrant subject of the proxy advice in a timely manner before the shareholder meeting (new Rule 14a-2(b)(9)(ii)).

The amended rules permit proxy advisers to use their discretion and particular knowledge of circumstances to assess the materiality and level of detail to disclose conflicts such as dollar amounts or terminated relationships. It should be noted that the notice requirements do not

apply to advice regarding mergers and other business combinations or contested matters that are subject of a competing solicitation.

The following non-exclusive safe harbors should give proxy advisers assurance that its policies and procedures satisfy the above exemptions:

- written policies and procedures designed to provide registrants subject to proxy voting advice without charge at or prior to distribution of the advice to proxy adviser's clients may include conditions requiring such registrants to (1) file their definitive proxy statements at least 40 calendar days before the shareholder meeting, and (2) expressly acknowledge that they will only use the proxy voting advice for internal purposes in connection with the solicitation and will not publish or otherwise share the proxy advice except with the registrant's employees or advisers (new Rule 14a-2(b)(9)(iii)); and
- the written policies and procedures may be reasonably designed to provide notice on the proxy adviser's electronic client platform or through email or other electronic means that the registrant has filed or has informed the proxy adviser that it intends to file, additional soliciting materials setting forth the registrant's statement regarding the advice (and include an active hyperlink to those materials on EDGAR when available). Note that this does not require proxy advisers to disable or suspend prepopulated and auto submission of votes (even when the registrant indicates its intent to file or files a response (new Rule 14a-2(b)(9)(iv)).

These amendments will be effective 60 days after publication in the Federal Register, but proxy advisers are not required to comply with Rule 14a-2(b)(9) until December 1, 2021, meaning the 2022 proxy season.

Proxy Advice Subject to Rule 14a-9

Rule 14a-9 was modified to include examples of when the failure to disclose material information in proxy voting advice could be misleading depending upon the particular facts and circumstances. These examples include the proxy adviser's methodology, sources of information or conflicts of interest to the extent it is material information.

Supplemental Guidance on Proxy Voting Responsibilities of Investment Advisers

The supplemental guidance should assist investment advisers in fulfilling their proxy voting responsibilities related to these amendments to the solicitation rules under Exchange Act. Commissioner Roisman stated that there is doubt as to whether prepopulating ballots based on the proxy advisers voting advice and automatically voting their shares ("robo-voting") is consistent with an investment adviser's fiduciary duties to vote on an "informed basis." It is not clear whether these amendments will change this practice, but the supplemental guidance reiterates that investment advisers owe a fiduciary duty to disclose all material facts of the investment advisory relationship between the investment advisers and their clients. Investment advisers should consider whether its policies and procedures address circumstances when it becomes aware that a company intends to file or has filed additional

soliciting materials with the SEC after the investment adviser has received the proxy adviser's voting recommendation, but before the submission deadline for proxies to be voted at a shareholder meeting.

The supplemental guidance will be effective upon publication in the Federal Register.

Potential Impact of Amendments and Supplemental Guidance

The amendments and guidance should provide registrants and investors with a better opportunity to review and challenge recommendations of proxy advisers, even though they are scaled back from the original proposal which would have allowed registrants to review and comment on the voting advice prior to its dissemination. Registrants will need to establish procedures and teams to be ready to review voting advice and determine whether it would be worth it to provide a rebuttal or rely on its proxy statement as filed. It remains to be seen whether registrants will be able to effectively respond to proxy advice before the meeting as additional soliciting material filed with the SEC. Registrants would have preferred to be able to review and provide feedback to proxy adviser's voting recommendations. We expect that registrants will be discussing these amendments with proxy advisers prior to the 2022 proxy season.

As noted earlier, it is not clear whether investment advisers will delay voting until shortly before the meeting to satisfy their fiduciary duties regarding notice of a registrant's response.

For questions regarding these amendments on proxy voting advice and related SEC guidance, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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