

SEC Adopts Proxy Rule Amendments Relating to Proxy Voting Advice Businesses

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On July 22, 2020, the U.S. Securities and Exchange Commission (SEC), by a 3-1 vote, adopted amendments to the federal proxy rules relating to proxy voting advice businesses (proxy advisors). The amendments categorize the voting advice issued by these firms generally as a solicitation under the federal proxy rules and place additional conditions on these firms to qualify for exemptions from the information and filing requirements under the proxy rules. These new conditions will require proxy advisors to provide disclosure regarding conflicts of interest, to adopt and publicly disclose policies designed to ensure that their voting advice is made available to subject companies on a timely basis, and to report to their clients any company responses regarding the voting advice. Also by a 3-1 vote, the SEC issued supplemental guidance to investment advisers, often clients of proxy advisors, regarding those advisers' proxy voting responsibilities in light of these new rules.

The final rules are significantly more flexible than the proposed rules, which, among other things, would have required proxy advisors to provide subject companies with an opportunity to review and provide feedback on the voting advice prior to its dissemination to the firm's clients.

Proxy advisors are not required to comply with the new requirements to qualify for exemptions from the information and filing requirements of the proxy rules until December 1, 2021. Accordingly, these amendments will not impact the 2021 proxy season. Moreover, they may have only a modest impact thereafter.

Proxy Voting Advice Is a Solicitation

The amendments codify the SEC's long-standing view that proxy voting advice provided in the context of a firm that markets its expertise as a provider of such advice and sells that advice for a fee falls within the definition of "solicitation." This establishes the predicate for regulation of the voting advice under the federal proxy rules. Note that Institutional Shareholder Services had initiated a lawsuit against the SEC challenging the position that proxy voting advice is a solicitation under the proxy rules. Whether that litigation, which had been stayed pending the adoption of final rules, will now move forward remains to be seen.

Requirements for Proxy Voting Advice To Be Exempt From the Proxy Information and Filing Requirements

A solicitation under the proxy rules is subject to certain information and filing requirements unless an exemption from those requirements is available. The final rules, which adopt a principles-based approach, condition the exemptions relied on by proxy advisors on two new requirements: (i) conflict of interest disclosure and (ii) policies requiring notice of proxy voting advice and of company responses to that advice.

Conflicts of Interest Disclosure

The first new requirement is that the proxy advisor must include in the proxy voting advice, or in an electronic medium used to deliver the proxy voting advice, prominent disclosure regarding (i) any interest, transaction or relationship that is material to assessing the objectivity of the proxy voting advice and (ii) any policies and procedures the firm uses to identify material conflicts of interest and steps taken to address any such conflicts. The SEC's adopting release affirms that this materiality standard allows firms to apply their judgment to determine which situations merit disclosure and the level of detail of such disclosure.

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Notice of Proxy Voting Advice and Company Responses

The second requirement is that the proxy advisor must have adopted and publicly disclosed written policies and procedures reasonably designed to ensure that (i) companies that are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the firm's clients and (ii) the firm provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding the voting advice by the companies that are the subject of that advice in a timely manner before the shareholder meeting.

The final rules include nonexclusive safe harbors for satisfying these notice requirements. A firm will be deemed to satisfy the first notice requirement by having a written policy to provide a subject company with a copy of the firm's proxy voting advice, at no charge, no later than when the advice is distributed to the firm's clients. The safe harbor provides that the policy may include conditions requiring that the subject company has filed its definitive proxy statement at least 40 calendar days before its shareholder meeting and requiring the subject company to expressly acknowledge that it will only use the copy of the voting advice for its internal purposes or in connection with the solicitation and will not publish or otherwise share the advice except with the company's employees and advisors.

A firm will be deemed to satisfy the second notice requirement if its policies and procedures are reasonably designed to inform clients through the firm's electronic platform, email or other electronic means that the firm has been notified that a subject company intends to file, or has filed, with the SEC additional soliciting materials containing the company's statement regarding the voting advice. The client notifications must include an EDGAR hyperlink to the subject company's statement when available.

The notice requirements do not apply to proxy voting advice regarding mergers and other business combination transactions or regarding contested matters that are the subject of a competing solicitation.

Anti-Fraud Provisions

Soliciting material that is exempt from the proxy rule information and filing requirements is still subject to the anti-fraud provisions of the federal proxy rules. The amendments add a new note to the anti-fraud provision to establish that, depending upon the particular facts and circumstances, the failure to disclose material information regarding proxy voting advice, such as the proxy advisor's methodology, sources of information or conflicts of interest, could be considered misleading.

Guidance to Investment Advisers

The SEC previously issued guidance to investment advisers regarding their proxy voting responsibilities, including considerations the investment adviser should take into account when utilizing a proxy advisor to assist it with voting securities. The new supplemental guidance discusses how an investment adviser can demonstrate that it is making voting decisions in its clients' best interests when it utilizes a proxy advisor's pre-populated or automated voting system and becomes aware that a company has filed additional soliciting materials containing the company's statement regarding the voting advice of the proxy advisor. One possible consequence of this guidance is that more institutional investors will delay voting until the day or two prior to a shareholder meeting, resulting in less advance visibility for companies into voting outcomes.

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More information on the amendments to the proxy voting advice rules and the guidance to investment advisers is available in the SEC's [adopting release](#), [supplemental guidance](#) and accompanying [press release](#).

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