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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34- 93595; File No. S7-17-21]

RIN: 3235-AM92

Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing amendments to the Federal proxy rules governing proxy voting advice. The Commission is proposing these amendments in light of feedback from market participants on those rules and certain developments in the market for proxy voting advice. The proposed amendments would remove a condition to the availability of certain exemptions from the information and filing requirements of the Federal proxy rules for proxy voting advice businesses. In addition, the proposed amendments would remove a note that provides examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the Federal proxy rules' prohibition on material misstatements or omissions. Finally, the release includes a discussion regarding the application of that prohibition to proxy voting advice, in particular with respect to statements of opinion.

DATES: Comments should be received by December 27, 2021.

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

Electronic comments:

- Use the Commission's internet comment form (https://www.sec.gov/rules/submitcomments.htm); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-17-21 on the subject line.

Paper comments:

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-17-21. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all submitted comments on its website (http://www.sec.gov/rules/proposed.shtml). Typically, comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information. You should submit only information that you wish to make publicly available.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Valian Afshar, Special Counsel, Office of Mergers and Acquisitions, Division of Corporation Finance, at (202) 551-3440, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to 17 CFR 240.14a-2 ("Rule 14a-2") and 17 CFR 240.14a-9 ("Rule 14a-9") under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq*.] ("Exchange Act").[1]

[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR 240], in which these rules are published.

TABLE OF CONTENTS

I. INTRODUCTION

The Commission recently adopted final rules regarding proxy voting advice (the "2020 Final Rules") provided by proxy advisory firms, or proxy voting advice businesses ("PVABs").[2] The 2020 Final Rules, among other things, did the following:

- Amended 17 CFR 240.14a-1(l) ("Rule 14a-1(l)") to codify the Commission's interpretation that proxy voting advice generally constitutes a "solicitation" subject to the proxy rules.
- Adopted 17 CFR 240.14a-2(b)(9) ("Rule 14a-2(b)(9)") to add new conditions to two exemptions (set forth in 17 CFR 240.14a-2(b)(1) and (3) ("Rules 14a-2(b)(1) and (3)")) that PVABs generally rely on to avoid the proxy rules' information and filing requirements. Those conditions include:
    - New conflicts of interest disclosure requirements in 17 CFR 240.14a-2(b)(9)(i) ("Rule 14a-2(b)(9)(i)"); and
    - A requirement in 17 CFR 240.14a-2(b)(9)(ii) ("Rule 14a-2(b)(9)(ii)") that a PVAB adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants 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 PVAB's clients and (B) the PVAB provides its clients with a mechanism by which they can reasonably be expected to become aware of any

[2] *See Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-89372 (Jul. 22, 2020) [85 FR 55082 (Sept. 3, 2020)] ("2020 Adopting Release"). For purposes of this release, we refer to persons who furnish proxy voting advice covered by 17 CFR 240.14a-1(l)(1)(iii)(A) ("Rule 14a-1(l)(1)(iii)(A)") as "proxy voting advice businesses," which we abbreviate as "PVABs." *See* 17 CFR 240.14a-1(l)(1)(iii)(A). Rule 14a-1(l)(1)(iii)(A) provides that the terms "solicit" and "solicitation" include any proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee. *Id.*

written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the security holder meeting (the "Rule 14a-2(b)(9)(ii) conditions").

- Amended the Note to Rule 14a-9, which prohibits false or misleading statements, to include specific examples of material misstatements or omissions related to proxy voting advice.

The amendments to Rules 14a-1(l) and 14a-9 became effective on November 2, 2020. The conditions set forth in new Rule 14a-2(b)(9) are set to become effective on December 1, 2021.[3]

The 2020 Final Rules were intended to help ensure that investors who use proxy voting advice receive more transparent, accurate and complete information on which to make their voting decisions.[4] The Commission recognized the "important and prominent role" that PVABs play in the proxy voting process[5] and adopted the 2020 Final Rules, in part, to address certain concerns that "registrants, investors, and others have expressed . . . about the role of [PVABs]."[6] At the same time, the Commission endeavored to tailor the 2020 Final Rules to avoid imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice.[7]

[3] *Id.* at 55122. Institutional Shareholder Services, Inc. has filed a lawsuit challenging the 2020 Final Rules. *See Institutional Shareholder Services, Inc. v. SEC*, No. 1:19-cv-3275-APM (D.D.C.). That case is currently being held in abeyance until the earlier of December 31, 2021 or the promulgation of final rule amendments addressing proxy voting advice. In addition, on October 13, 2021, the National Association of Manufacturers and Natural Gas Services Group, Inc. filed a lawsuit arising out of a statement issued by the Division of Corporation Finance on June 1, 2021 regarding the 2020 Final Rules. *See* National Association of Manufacturers et al. v. SEC, No. 7:21-cv-183 (W.D. Tex.); *see also infra* note 120 (discussing the Division of Corporation Finance's June 1, 2021 statement).

[4] 2020 Adopting Release at 55082.

[5] *Id.* at 55083 (noting that institutional investors and investment advisers generally retain PVABs to assist with voting determinations on behalf of their clients as well as "other aspects of the voting process, which for certain investment advisers has become increasingly complex and demanding over time").

[6] *Id*. at 55085.

[7] *Id.* at 55082.

Since the Commission adopted the 2020 Final Rules, however, institutional investors and other clients of PVABs have continued to express strong concerns about the rules' impact on their ability to receive independent proxy voting advice in a timely manner. Furthermore, PVABs have continued to develop industry-wide best practices and improve their own business practices to address the concerns that were the impetus for the 2020 Final Rules. Accordingly, we believe it is appropriate to reassess the 2020 Final Rules, solicit further public comment and, where appropriate, recalibrate the rules to preserve the independence of proxy voting advice and ensure that PVABs can deliver advice in a timely manner without ultimately passing on higher costs to their clients. As described in more detail below, we are proposing the following changes:

- Amend Rule 14a-2(b)(9) to remove the Rule 14a-2(b)(9)(ii) conditions; and
- Amend Rule 14a-9 to remove Note (e) to that rule, which sets forth specific examples of material misstatements or omissions related to proxy voting advice.

These proposed amendments would not affect the other aspects of the 2020 Final Rules, which would remain in place and effective as to PVABs and their advice. As such, under the proposed amendments, proxy voting advice would remain a solicitation subject to the proxy rules. Additionally, in order to rely on the exemptions from the proxy rules' information and filing requirements set forth in Rules 14a-2(b)(1) and (3), PVABs would continue to be subject to Rule 14a-2(b)(9)'s conflicts of interest disclosure requirements. Finally, although the proposed amendments would remove Note (e) to Rule 14a-9—which was added in the 2020 Final Rules—material misstatements or omissions of fact in proxy voting advice would remain subject to liability under that rule. In this release, however, we discuss the application of Rule 14a-9 to

proxy voting advice, specifically with respect to a PVAB's statements of opinion.[8]

The proposed amendments do not represent a wholesale reversal of the 2020 Final Rules. Rather, they are intended to be tailored adjustments in response to concerns and developments related to particular aspects of the 2020 Final Rules. The goal of the proposed amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of their proxy voting advice and subject them to undue litigation risks and compliance costs, while simultaneously preserving investors' confidence in the integrity of such advice. We believe that the proposed amendments, in tandem with the unaffected portions of the 2020 Final Rules and other existing mechanisms in the proxy system, including certain policies and procedures that PVABs have adopted, strike a more appropriate balance.

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

II. DISCUSSION OF PROPOSED AMENDMENTS

A. Proposed Amendments to Rule 14a-2(b)(9)

1. Background

The 2020 Final Rules amended Rule 14a-2(b) by adding paragraph (9),[9] which sets forth two conditions that a PVAB must satisfy in order to rely on the exemptions in Rules 14a-2(b)(1) and (b)(3) from the proxy rules' information and filing requirements.[10] Rule 14a-2(b)(9)(i)

[8] *See infra* Section II.B.2.

[9] 17 CFR 240.14a-2(b)(9).

[10] PVABs have typically relied upon the exemptions in Rules 14a-2(b)(1) and (b)(3) to provide advice without complying with the proxy rules' information and filing requirements. *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-87457 (Nov. 5, 2019) [84 FR 66518 (Dec. 4, 2019)] ("2019 Proposing Release") at 66525 and n.68. Unless otherwise indicated, all comments cited and referenced in this

requires PVABs to provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice.[11] The Rule 14a-2(b)(9)(ii) conditions require that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants that are the subject of their proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the PVABs' clients and (B) the PVABs provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding their proxy voting advice by registrants who are the subject of such advice, in a timely manner before the relevant shareholder meeting (or, if no meeting, before the votes, consents or authorizations may be used to effect the proposed action).[12]

In addition to those two conditions, Rule 14a-2(b)(9) also sets forth two non-exclusive safe harbor provisions in paragraphs (iii) and (iv) that, if met, are intended to give assurance to PVABs that they have satisfied the conditions of Rules 14a-2(b)(9)(ii)(A) and (B), respectively.[13] Further, Rules 14a-2(b)(9)(v) and (vi) contain exclusions from the Rule 14a-2(b)(9)(ii)

release are to public comments on the rules proposed in the 2019 Proposing Release (the "2019 Proposed Rules"). Comments on the 2019 Proposed Rules are available at https://www.sec.gov/comments/s7-22-19/s72219.htm.

[11] 17 CFR 240.14a-2(b)(9)(i).

[12] 17 CFR 240.14a-2(b)(9)(ii). The Commission adopted the Rule 14a-2(b)(9)(ii) conditions, in part, in response to the concerns expressed by commenters about the "advance review and feedback" conditions that the Commission originally proposed. Under the advance review and feedback conditions in the 2019 Proposed Rules, a PVAB would have had to, as a condition to relying on the exemptions in Rules 14a-2(b)(1) and (3), provide registrants and certain other soliciting persons covered by its proxy voting advice a limited amount of time to review and provide feedback on the advice before it is disseminated to the PVAB's clients, with the length of time provided depending on how far in advance of the shareholder meeting the registrant or other soliciting person has filed its definitive proxy statement. *See* 2019 Proposing Release at 66530-35. These conditions were among the most contentious features of the 2019 Proposed Rules and drew a significant number of opposing public comments. 2020 Adopting Release at 55103-07. In response, the Commission reconsidered its approach and, in the 2020 Final Rules, adopted the Rule 14a-2(b)(9)(ii) conditions in place of the advance review and feedback conditions. *Id.* at 55107-08.

[13] 17 CFR 240.14a-2(b)(9)(iii) and (iv).

conditions.[14] Those rules provide that PVABs need not comply with Rule 14a-2(b)(9)(ii) to the extent that their proxy voting advice is based on a client's custom voting policy or if they provide proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.[15]

The Commission adopted Rule 14a-2(b)(9)(ii)(A) to facilitate effective engagement between PVABs and registrants, help ensure that registrants are timely informed of proxy voting advice that bears on the solicitation of their shareholders and further the goal of ensuring that PVABs' clients have more complete, accurate and transparent information to consider when making their voting decisions.[16] Ultimately, the Commission intended that this condition would benefit the shareholders on whose behalf PVABs' clients may be voting.[17] Similarly, the Commission adopted Rule 14a-2(b)(9)(ii)(B) as a means of providing PVABs' clients with additional information that would assist them in assessing and contextualizing proxy voting advice.[18] The Commission intended that this condition would supplement existing mechanisms—including registrants' ability to file supplemental proxy materials to respond to proxy voting advice that they may know about and to alert investors to any disagreements with such advice—so as to permit clients, including investment advisers voting shares on behalf of other shareholders, to consider registrants' views along with the proxy voting advice and before

[14] 17 CFR 240.14a-2(b)(9)(v) and (vi).

[15] *Id.*

[16] 2020 Adopting Release at 55109.

[17] *Id.*

[18] *Id.* at 55112-13.

making their voting determinations.[19] This condition reflected the Commission's views that PVABs' clients would benefit from more information when considering how to vote their proxies and that shareholders should have ready access to information to make informed voting decisions.[20]

We continue to believe that these goals are important, but we also believe it is appropriate to reassess our policy judgment to adopt the Rule 14a-2(b)(9)(ii) conditions. We adopted those conditions, in part, in response to investors who expressed concerns regarding the advance review and feedback conditions in the 2019 Proposed Rules.[21] Accordingly, we made adjustments to remove the 2019 Proposed Rules' advance review condition and replace it with Rule 14a-2(b)(9)(ii)'s requirement that PVABs make their advice available to registrants at or prior to the time it is disseminated to their clients.[22] Investors, however, have continued to express strong concerns about the Rule 14a-2(b)(9)(ii) conditions even as modified in the 2020 Final Rules.[23] Notwithstanding our efforts to adopt somewhat more limited and principles-based

[19] *Id.*

[20] *Id*. at 55113.

[21] Specifically, investors expressed concerns that the 2019 Proposed Rules' advance review and feedback conditions would adversely affect the independence, cost and timeliness of that advice. *See supra* note 12.

[22] Although the 2020 Final Rules did not include an advance review requirement, we encouraged PVABs that already were providing registrants with this opportunity to continue to do so. 2020 Adopting Release at n.339.

[23] *See, e.g.*, Peter Rasmussen, *Divided SEC Passes Controversial Proxy Advisor Rule*, BLOOMBERG LAW (Jul. 29, 2020), *available at* https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-divided-sec-passes-controversial-proxy-advisor-rule (noting criticism of the 2020 Final Rules by Nell Minow, Vice Chair of ValueEdge Advisors, that the 2020 Final Rules will make proxy voting advice "more expensive and less independent"); COUNCIL OF INSTITUTIONAL INVESTORS, *Leading Investor Group Dismayed by SEC Proxy Advice Rules* (Jul. 22, 2020), *available at* https://www.cii.org/july22_sec_proxy_advice_rules ("[T]he new rules . . . seem to effectively require investment advisors who vote proxies on behalf of investor clients to consider and evaluate any response from companies to proxy advice before submitting votes. That could cause significant delays in the already constricted proxy voting process. It also could jeopardize the independence of proxy advice as proxy advisory firms may feel pressure to tilt voting recommendations in favor of management more often, to avoid critical comments from companies that could draw out the voting process and expose the firms to costly threats of litigation."); US SIF, *US SIF Releases Statement On SEC Vote To Regulate Proxy Advisory Firms* (Jul. 22, 2020), *available at* https://www.ussif.org/blog_home.asp?display=146 ("Today's vote is a blow to the independence of research

requirements in the 2020 Final Rules, investors have asserted that the Rule 14a-2(b)(9)(ii) conditions nevertheless will impose increased compliance costs on PVABs and impair the independence and timeliness of their proxy voting advice and that such effects are not justified or balanced by corresponding investor protection benefits.[24] This investor opposition is evidenced by, among other things, the fact that many clients of PVABs, predominantly investors, continue to oppose the 2020 Final Rules. Others, including PVABs themselves, have expressed similar concerns.[25]

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provided by proxy advisors to investors. . . . The rule will make it more difficult, expensive and time-consuming for proxy advisors to produce their research.").

[24] *See supra* note 23. In addition, on June 11, 2021, Chair Gensler and members of the Commission staff met with representatives from the following organizations: AFL-CIO; AFR; AssuranceMark; CalPERS; CalSTRS; CFA Institute; Consumer Federation of America; Council of Institutional Investors; CtW Investment Group; Interfaith Center on Corporate Responsibility; LACERA; Legal & General; New York City Comptroller New York State Common; Segal Marco; Shareholder Rights Group; Sinclair Capital; Sustainable Investments Institute; T. Rowe Price; The Shareholder Commons; Trillium Asset Management; US SIF; and ValueEdge Advisors. During that meeting, the representatives from those organizations expressed general opposition to the 2020 Final Rules, including with respect to the Rule 14a-2(b)(9)(ii) conditions. Those representatives expressed concerns about the costs associated with the 2020 Final Rules, including the Rule 14a-2(b)(9)(ii) conditions, and the general lack of corresponding investor protection-based benefits.

[25] *See, e.g.*, John C. Coffee, Jr., *Biden and the SEC: Some Possible Agendas*, THE CLS BLUE SKY BLOG (Dec. 2, 2020), *available at* https://clsbluesky.law.columbia.edu/2020/12/02/biden-and-the-sec-some-possible-agendas/ (describing the 2020 Final Rules as "burdensome" and predicting that they would "stretch out the proxy solicitation process and possibly chill advisers' ability to recommend policies disliked by managements"); Kurt Schacht & Karina Karakulova, *SEC Proxy Rules Pose Threat To Markets, Shareholders*, LAW 360 (Aug. 26, 2020), *available at* https://www.law360.com/articles/1302091/sec-proxy-rules-pose-threat-to-markets-shareholders ("We can only imagine the number of legal challenges, delays and inefficiency [that the 2020 Final Rules] introduces to a well-functioning proxy voting process."); INSTITUTIONAL SHAREHOLDER SERVICES, *FAQs on July 22, 2020, SEC Rules & Supplemental Guidance* (Aug. 6, 2020), *available at* http://images.info.issgovernance.com/Web/ISSGovernance/%7B56ad0ea3-5d24-461e-b9c7-4ba8c6327435%7D_20200914_FAQs_SEC_July-22-2020_Rules_Supplemental_Guidance_FINAL.pdf/ ("[I]f the Rules are upheld, the current lack of clarity around the timing of any potential responses from the issuers may impact the timing of any 'Alerts' that might be warranted in response to issuers' written statements. . . . ISS is currently assessing the changes we need to make to our systems, processes, and staffing in order to accommodate the new Rules. ISS will be certain to provide advance notice of any fees we may need to charge to support the changes required by these regulatory actions."); INSTITUTIONAL SHAREHOLDER SERVICES, *Statement from ISS President & CEO, Gary Retelny, on Today's SEC Actions* (Jul. 22, 2020), *available at* https://insights.issgovernance.com/posts/statement-from-iss-president-ceo-gary-retelny-on-todays-sec-actions/ ("Despite seemingly reducing the previously contemplated burden on proxy advisers, the new rules . . . will hinder investors' ability to vote in a timely, cost-effective, and objective manner."); MINERVA ANALYTICS, *SEC ignores investor objections to implement new proxy rules* (Jul. 24, 2020), *available at* https://www.manifest.co.uk/sec-ignores-investor-objections-to-implement-new-proxy-rules/ ("Additional layers of scrutiny and back-and-forth

In addition, we are aware that the largest PVABs have current practices that could address some of the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. On July 1, 2021, the Independent Oversight Committee (the "Oversight Committee") of the Best Practice Principles Group (the "BPPG") published its first annual report (the "2021 Annual Report").[26] The BPPG is an industry group comprised of six PVABs, including Glass, Lewis & Co. ("Glass Lewis") and Institutional Shareholder Services, Inc. ("ISS"),[27] the two largest PVABs in the United States.[28] Shortly after its formation, the BPPG published the Best Practice Principles for Providers of Shareholder Voting Research and Analysis, which consist of three main principles and accompanying guidance that recommends how the principles should be applied.[29] The three principles are (1) service quality, (2) conflicts-of-interest avoidance or management and (3) communications policy.[30]

The Oversight Committee—which is comprised of non-PVAB stakeholders in proxy voting advice, including representatives from the institutional investor, registrant and academic communities—is responsible for reviewing the BPPG member-PVABs' compliance with the

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between proxy advisers, companies and investment managers would slow down the system and ultimately increase the cost to those paying for the service.").

[26] *See* BEST PRACTICE PRINCIPLES OVERSIGHT COMMITTEE, *Annual Report 2021* (Jul. 1, 2021), *available at* https://bppgrp.info/wp-content/uploads/2021/07/2021-AR-Independent-Oversight-Committee-for-The-BPP-Group-1.pdf ("2021 Annual Report"). The BPPG was formed in 2014 after the European Securities and Markets Authority requested that PVABs engage in a coordinated effort to develop an industry-wide code of conduct focusing on enhancing transparency and disclosure. *Id.* at 7.

[27] *Id*. The BPPG's six member-PVABs are Glass Lewis, ISS, Minerva, PIRC, Proxinvest and EOS at Federated Hermes. *Id*.

[28] 2020 Adopting Release at 55127.

[29] 2021 Annual Report at 8.

[30] *Id*. at 33-34.

principles.[31] In the 2021 Annual Report, after reviewing each member-PVABs' compliance report, the Oversight Committee found all six firms met the standards established in the three best practices principles.[32] Notably:

- Glass Lewis provides the subjects of its proxy voting advice with its Issuer Data Report ("IDR"), which details the key facts underlying Glass Lewis' advice, before that advice is finalized and sent to its clients.[33] Glass Lewis offers the IDR service to certain registrants, giving them 48 hours to review the IDR and provide suggested updates, which are then reviewed by Glass Lewis' research analysts who in turn make relevant updates and then provide high-level feedback regarding amendments made.[34]
- In addition to the IDR's advance review opportunity, Glass Lewis provides registrants with an opportunity to review and respond to its proxy voting advice after it has been disseminated to its clients pursuant to its Report Feedback Service (the "RFS"). Specifically, the RFS allows registrants to submit feedback about Glass Lewis' proxy voting advice and have that feedback delivered directly to Glass Lewis' clients.[35] Registrants can access Glass Lewis' proxy voting advice at the same time it is

[31] *Id.* at 7.

[32] Stephen Davis, *First Independent Report on Proxy Voting Advisory Firm Best Practices* (Jul. 14, 2021), *available at* https://corpgov.law.harvard.edu/2021/07/14/first-independent-report-on-proxy-voting-advisory-firm-best-practices/.

[33] GLASS LEWIS, *Glass Lewis Statement of Compliance for the Period 1 January 2019 through 31 December 2019* (May 2020), *available at* https://bppgrp.info/wp-content/uploads/2021/03/Glass-Lewis-BPP-Statement.pdf ("Glass Lewis Statement of Compliance") at 7-8.

[34] GLASS LEWIS, *Issuer Data Report*, *available at* https://www.glasslewis.com/issuer-data-report/. In the United States, the IDR service is available for "companies listed on the NASDAQ and NYSE exchanges" that register for the service with Glass Lewis and "disclose their meeting documents at least 30 days in advance of their meeting date." *Id*.

[35] Glass Lewis Statement of Compliance at 24.

disseminated to its clients and then, pursuant to the RFS, submit to Glass Lewis a statement that responds to and expresses disagreements with, or other opinions regarding, such advice.[36] If a registrant submits such a statement, Glass Lewis will republish its proxy voting advice with that statement attached and linked on the first page of Glass Lewis' report. Glass Lewis' clients will receive a notification as soon as the registrant's statement is available, and clients that have already downloaded an earlier version of the proxy voting advice will be sent an updated version that includes the registrant's statement.

- In addition, Glass Lewis has a separate process for registrants to report errors or omissions in its proxy voting advice and indicates that it reviews any such reported errors or omissions "immediately."[37] Glass Lewis states that if its proxy voting advice is updated to reflect new disclosure or the correction of an error, it notifies all clients that have accessed that advice, or have ballots in the system for the meeting tied to that advice, whether or not the updates or revisions affected Glass Lewis' voting recommendations, as well as the exact nature of those updates and revisions.[38]
- ISS also detailed in its compliance statement the relevant processes it has in place.[39] Significantly, ISS allows any registrant to request a copy of its proxy voting advice free of charge after such advice has been disseminated to ISS' clients.[40] Registrants can pre-

[36] GLASS LEWIS, *Report Feedback Statement*, *available at* https://www.glasslewis.com/report-feedback-statement/.

[37] GLASS LEWIS, *Report an Error or Omission*, *available at* https://www.glasslewis.com/report-error/.

[38] *Id*.

[39] ISS, *ISS Compliance Statement* (Jan. 11, 2021), *available at* https://bppgrp.info/wp-content/uploads/2021/03/best-practices-principles-iss-compliance-statement-jan-2021-update.pdf ("ISS Statement of Compliance").

[40] *Id*. at 23.

register to receive proxy voting advice, and ISS will send those registrants a notification when such advice is available for them to access.[41]

- If a registrant believes that ISS' proxy voting advice contains an error, it can notify ISS either via email or through its "Help Center" interface.[42] ISS states that if it determines that there is a material error, it will promptly issue an "Alert" to update previously issued proxy voting advice.[43]
- ISS also stated that it instituted a Feedback Review Board ("FRB") to provide a mechanism to all stakeholders to communicate with ISS regarding its proxy voting advice.[44] The FRB considers comments from market constituents regarding the accuracy of ISS' research and data, policy application and the general fairness of its policies, research and recommendations.[45] The FRB focuses on higher-level feedback and does not address registrant-specific or time-sensitive feedback.[46]
- Instead, ISS has other processes in place for registrants and other market participants to provide feedback on specific proxy voting advice (including via the above-described error reporting processes). For example, ISS noted that it provides draft reports to

[41] ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920.

[42] *Id.*

[43] *Id.*

[44] ISS Statement of Compliance at 21.

[45] *Id.*

[46] ISS, *Feedback Review Board*, *available at* https://www.issgovernance.com/contact/feedback-review-board/ (noting that the FRB is "[a]n ISS body that considers comments from stakeholders regarding the general fairness of ISS policies and methodologies as well those related to how we operate as a provider of research, voting recommendations, corporate ratings, and other solutions and services to financial market participants" and that "[c]omments should not be company specific nor should they be time-sensitive").

registrants in certain markets prior to publication.[47] Notably, ISS does not provide draft proxy voting advice to any United States registrants.[48] ISS can, however, choose to engage with registrants during the process of formulating its proxy voting advice.[49] Some of that engagement is initiated by ISS, but registrants themselves can also request engagement with ISS' proxy research teams.[50]

Finally, although Egan-Jones, the third major PVAB in the United States,[51] is not a member of the BPPG, it too appears to have adopted some policies and procedures that approximate at least a portion of the Rule 14a-2(b)(9)(ii) conditions. According to Egan-Jones, it provides a number of ways in which registrants can gain access to its reports and the models used to create them.[52] Specifically, Egan-Jones allows registrants to obtain and review a copy of its proxy voting advice before such advice is disseminated to its clients.[53] Registrants can then

[47] ISS Statement of Compliance at 23.

[48] ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920 ("In the US, as from January 2021, drafts are no longer provided to U.S. companies including those in the S&P500 index.").

[49] ISS Statement of Compliance at 21-23.

[50] ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920 ("ISS' proxy research teams interact regularly with company representatives, institutional shareholders, dissident shareholders, sponsors of shareholder proposals, and other parties in order to gain deeper insight into many issues and to check material facts relevant to our research. . . . Sometimes such dialogue is initiated by ISS, while other times it is initiated by the issuer or other stakeholders (including shareholders who may or may not be ISS clients).").

[51] 2020 Adopting Release at 55126.

[52] EGAN-JONES, *Egan-Jones Proxy Services Issuer Engagement*, *available at* https://www.ejproxy.com/issuers/.

[53] *Id.* ("Issuers may obtain a 'draft,' or pre-publication copy, of their report in order to review it by submitting a fully completed copy of our Draft Request Form to issuer@ejproxy.com.").

notify Egan-Jones of any material errors that they detect in the proxy voting advice so as to allow Egan-Jones to correct that advice.[54]

2. Proposed Amendments

We are proposing to amend Rule 14a-2(b)(9) by deleting paragraph (ii) and rescinding the Rule 14a-2(b)(9)(ii) conditions. The proposed amendments would also delete paragraphs (iii), (iv), (v) and (vi) of Rule 14a-2(b)(9), which contain safe harbors and exclusions from the Rule 14a-2(b)(9)(ii) conditions.[55] As discussed above, the Rule 14a-2(b)(9)(ii) conditions were intended to benefit shareholders by improving the overall mix of available information so as to allow them to make more informed voting decisions. While the goal of facilitating more informed voting decisions remains unchanged, we believe that the continued concerns expressed by the investors who rely on proxy voting advice to make their voting decisions warrants a reassessment of the appropriate means to achieve that goal.

As part of that reassessment, we have further considered PVABs' efforts to develop industry-wide practices, as well as improve their own business practices, that could address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. Although these practices differ from the Rule 14a-2(b)(9)(ii) conditions, the leading PVABs have adopted policies and procedures that provide their clients and registrants with some of the opportunities and access to information that would have been required pursuant to the Rule 14a-2(b)(9)(ii) conditions. Moreover, because PVABs developed these measures themselves, we believe they are less likely to

[54] *Id.* ("If an issuer believes there is a material error in an EJPS report, they should send a detailed email documenting what they believe the error to be to issuer@ejproxy.com.").

[55] Given that the other paragraphs of Rule 14a-2(b)(9) would all be deleted, the proposed amendments would redesignate the conflicts of interest disclosure condition set forth in Rule 14a-2(b)(9)(i) as Rule 14a-2(b)(9). The substance of that condition, however, would otherwise remain unchanged.

adversely affect the independence, cost and timeliness of proxy voting advice. And, although they are not the primary basis for these proposed amendments, we do find these industry-wide practices persuasive in these specific circumstances. This persuasiveness is due, in part, to the relative salience of a review of such industry-wide practices given the small number of PVABs in the U.S.

For example, Glass Lewis' IDR service goes beyond what the Rule 14a-2(b)(9)(ii) conditions would have required and allows registrants the opportunity to review the research and data on which Glass Lewis bases its voting recommendations before Glass Lewis disseminates its proxy voting advice to its clients. The RFS also operates in a similar manner to what the Rule 14a-2(b)(9)(ii) conditions would have required. As with the condition in Rule 14a-2(b)(9)(ii)(A), Glass Lewis makes its proxy voting advice available to registrants, for a fee, at the time such advice is disseminated to its clients. And, similar to the condition in Rule 14a-2(b)(9)(ii)(B), Glass Lewis will update its proxy voting advice to include a registrant's response to its advice and notify its clients of such response.

ISS also has mechanisms in place that approximate at least a portion of the Rule 14a-2(b)(9)(ii) conditions. Specifically, ISS makes its proxy voting advice available to registrants at the time such advice is disseminated to its clients. Although ISS does not update its proxy voting advice to incorporate any response a registrant may have to such advice, it does offer its advice to registrants for free. This presumably makes it easier for registrants to access ISS' proxy voting advice and respond to such advice by publishing and filing additional soliciting materials in a more timely manner. Further, ISS provides its clients with access to a registrant's EDGAR filings through the electronic platform that it uses to deliver its proxy voting advice. Because any response by a registrant to proxy voting advice is required to be filed with the Commission

as additional soliciting materials,[56] we believe that the access that ISS provides to its clients to a registrant's response via its electronic platform addresses many of the policy concerns underlying the Rule 14a-2(b)(9)(ii) conditions.[57]

We recognize that the mechanisms that these PVABs have in place may not perfectly replicate the requirements of the Rule 14a-2(b)(9)(ii) conditions or result in the same investor-oriented benefits that those conditions were intended to produce. These mechanisms are, in some ways, broader than the requirements of the Rule 14a-2(b)(9)(ii) conditions.[58] They also are, in other ways, more limited.[59] Furthermore, although some of the above-described mechanisms were developed after the Commission adopted the 2020 Final Rules,[60] we acknowledge that others were in place and considered by the Commission at the time it adopted

[56] *See* 17 CFR 240.14a-6(b).

[57] This belief is based on our understanding that ISS gives its clients the option of receiving push notifications via email from its electronic platform that will notify the clients of any additional soliciting materials filed by a registrant as to which those clients have received proxy voting advice.

[58] For example, both Glass Lewis, through the IDR service, and Egan-Jones allow registrants opportunities to review at least a portion of their proxy voting advice before it is disseminated to their clients. In addition, although the Rule 14a-2(b)(9)(ii) conditions would have applied only to registrants, Glass Lewis makes the RFS available to both registrants and shareholder proponents. GLASS LEWIS, *Report Feedback Statement, available at* https://www.glasslewis.com/report-feedback-statement/ ("Any company or shareholder proponent that purchases a Glass Lewis report will now automatically have the right to submit an RFS at no extra cost.").

[59] For example, ISS and Egan-Jones' public descriptions of their relevant services do not indicate whether they will notify their clients of any response to their proxy voting advice by a registrant. In addition, although ISS provides a copy of its proxy voting advice to registrants for free, it does not allow registrants to share that advice with any external parties, including its attorneys, proxy solicitors and compensation consultants. ISS, *FAQs regarding ISS Proxy Research, available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920 ("Our final, published proxy research reports are provided to companies free of charge as a courtesy, subject to the following conditions: (i) the reports are only for the subject company's internal use by employees of the company, and (ii) the company is expressly prohibited from making the report, or any part of it, public, or sharing the reports, profiles or login credentials with any external parties (including but not limited to any external advisors retained by the company such as a law firm, proxy solicitor or compensation consultant)."). These restrictions may inhibit a registrant's ability to adequately respond to ISS' proxy voting advice in a manner that would benefit its shareholders.

[60] Notably, the Oversight Committee convened for the first time on July 30, 2020 and issued its 2021 Annual Report on July 1, 2021. *See* 2021 Annual Report at 10.

the 2020 Final Rules.[61] Finally, we recognize that although the three major United States-based PVABs have some promising mechanisms in place, those mechanisms differ across the three PVABs, and, absent the Rule 14a-2(b)(9)(ii) conditions, there is no assurance that a new entrant to the PVAB market will adopt similar mechanisms or that existing PVABs will maintain them.

We have nevertheless decided to reconsider the Rule 14a-2(b)(9)(ii) conditions because we share the concerns that PVABs' clients and others continue to express about the conditions' potential adverse effects on the independence, cost and timeliness of proxy voting advice.[62] We have also taken notice of the efforts by PVABs to develop industry-wide standards, including the Oversight Committee's assessment of its members' compliance with the BPPG principles in the 2021 Annual Report. Notwithstanding our prior policy judgment, we believe there are market-based incentives for PVABs to adopt and maintain policies and procedures that provide some of the same benefits as those of the Rule 14a-2(b)(9)(ii) conditions without raising the concerns investors have expressed about those conditions. We believe that rescinding the Rule 14a-2(b)(9)(ii) conditions would give PVABs, investors and registrants the flexibility to select mechanisms that best serve the needs of investors and other stakeholders and adapt to evolving market practices. Furthermore, our continued observance of these mechanisms in practice, including during the 2021 proxy season, has given us additional confidence in their efficacy. Thus, although these mechanisms are not the primary basis for the proposed amendments, we do consider them to be relevant.

Because our proposed amendments to Rule 14a-2(b)(9) are based, in part, on our evaluation of the current state of the PVAB market, we will continue to monitor that market to

[61] *See* 2020 Adopting Release at 55128-29 (describing Glass Lewis' IDR service and the RFS and Egan-Jones' advance review service).

[62] *See supra* notes 23-25 and accompanying text.

help ensure that investors are adequately protected and have ready access to information that allows them to make informed voting decisions. To the extent that there are changes in the quality of PVABs' policies and procedures or new entrants to the PVAB market that do not adopt policies and procedures consistent with best practices, we will reevaluate the state of the PVAB market and consider whether further action should be taken.

Request for Comment

1. Should we amend Rule 14a-2(b)(9) as proposed to rescind the Rule 14a-2(b)(9)(ii) conditions? Would such a rescission help facilitate the provision of timely and independent proxy voting advice? Alternatively, rather than rescinding the Rule 14a-2(b)(9)(ii) conditions as proposed, should we commit to a retrospective review of the Rule 14a-2(b)(9)(ii) conditions after they have become effective? If so, what is the appropriate period of time after which we should conduct such review? What would be the potential drawbacks of conducting such a retrospective review?
2. Are the existing mechanisms in the proxy system, including the role played by the BPPG and the Oversight Committee and the policies and procedures that PVABs have in place, sufficient to obviate the need for the Rule 14a-2(b)(9)(ii) conditions? Are there other relevant existing mechanisms in the proxy system that the Commission should consider?
3. How might we address the risk that PVABs will change their policies and procedures to the detriment of investors if we rescind the Rule 14a-2(b)(9)(ii) conditions? How might we address the risk that, absent the Rule 14a-2(b)(9)(ii) conditions, new entrants to the PVAB market will not be properly incentivized to adopt policies and procedures that approximate those conditions?
4. Are there ways that we can mitigate the potential adverse effects on proxy voting advice

associated with the Rule 14a-2(b)(9)(ii) conditions other than by rescinding those conditions?

5. Have registrants or others relied on the Commission's adoption of the Rule 14a-2(b)(9)(ii) conditions? How, and to what extent, should any such reliance interests factor into the Commission's determination of whether to rescind those conditions?
6. Should we also reconsider the Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers that the Commission issued in connection with the 2020 Final Rules? Because that supplemental guidance was prompted, in part, by the Rule 14a-2(b)(9)(ii) conditions, will the guidance be useful if the Rule 14a-2(b)(9)(ii) conditions are rescinded? Should the guidance be rescinded concurrently with the Rule 14a-2(b)(9)(ii) conditions? Should it instead be revised, and, if so, how? Notwithstanding the proposed rescission of the Rule 14a-2(b)(9)(ii) conditions, are there aspects of the supplemental guidance that should be clarified?

B. Proposed Amendment to Rule 14a-9

1. Background

Before adopting the 2020 Final Rules, the Commission, in August 2019, issued an interpretation and guidance that clarified the application of the Federal proxy rules to the provision of proxy voting advice (the "Interpretive Release").[63] In the Interpretive Release, the Commission explained that the determination of whether a communication is a solicitation for purposes of Section 14(a) of the Exchange Act depends upon the specific nature, content and timing of the communication and the circumstances under which the communication is

[63] *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, Release No. 34-86721 (Aug. 21, 2019) [84 FR 47416 (Sept. 10, 2019)] ("Interpretive Release").

transmitted.[64] The Commission stated that PVABs' proxy voting advice generally would constitute a solicitation subject to the proxy rules.[65] As a solicitation, proxy voting advice is subject to Rule 14a-9. Rule 14a-9 "prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact."[66] The rule also requires that solicitations "must not omit to state any material fact necessary in order to make the statements therein not false or misleading."[67] The Commission noted that although PVABs may rely on exemptions from the proxy rules' information and filing requirements, even these exempt solicitations remain subject to Rule 14a-9.[68]

In the adopting release for the 2020 Final Rules, the Commission codified the guidance set forth in the Interpretive Release that proxy voting advice is generally subject to Rule 14a-9.[69] The 2020 Final Rules amended Rule 14a-9 by adding paragraph (e) to the Note to that rule. Paragraph (e) sets forth examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice. Specifically, Note (e) to Rule 14a-9 provides that the failure to disclose material information regarding proxy voting advice, "such as the [PVAB's] methodology, sources of information, or conflicts of interest" could, depending upon particular facts and circumstances,

[64] *Id.* at 47417-19.

[65] *Id.*

[66] *Id.* at 47419.

[67] *Id.*

[68] *Id.*

[69] 2020 Adopting Release at 55121.

be misleading within the meaning of the rule. In adopting these amendments, the Commission noted that "[t]he ability of a client of a [PVAB] to make voting decisions is affected by the adequacy of the information it uses to formulate such decisions" and stated that the amendments "are designed to further clarify the potential implications of Rule 14a-9 for proxy voting advice specifically, and to help ensure that [PVABs'] clients are provided with the material information they need to make fully informed decisions."[70]

Although commenters on the 2019 Proposed Rules expressed concern that the changes to Rule 14a-9 could heighten the litigation risk for PVABs, the Commission stated that the 2020 Final Rules were not intended to change the application or scope of Rule 14a-9 or create a new cause of action against PVABs.[71] The Commission also stated that the amendments do "not make 'mere differences of opinion' actionable under Rule 14a-9."[72] Instead, the amendments were intended to clarify "what has long been true about the application of Rule 14a-9 to proxy voting advice and, more generally, proxy solicitations as a whole: no solicitation may contain any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading."[73]

Despite these Commission statements regarding the intent of the 2020 Final Rules' amendments to Rule 14a-9, PVABs, their clients and other investors continue to express

[70] *Id.*

[71] *Id.*

[72] *Id.* The Commission also stated that "differences of opinion are not actionable under the final amendment to Rule 14a-9." *Id.* at n.443.

[73] *Id.*

concerns and uncertainty regarding the extent of PVABs' liability under Rule 14a-9.[74] PVABs continue to assert that the amendments may increase their litigation risks, thereby increasing their costs, which, ultimately, may be passed along to their clients.[75] These parties indicate that those litigation risks could also impair the independence and quality of PVABs' proxy voting advice if, for example, registrants use the threat of litigation to pressure PVABs to make their proxy voting advice more favorable to such registrants. Further, PVABs and their clients remain concerned that Rule 14a-9 claims may be available for registrants who disagree with their proxy voting advice. Such disagreements could pertain not only to PVABs' voting recommendations, but also to the specific methodology, analysis and information that PVABs use to formulate their recommendations.

2. Proposed Amendment

As explained in the release adopting the 2020 Final Rules, the Commission's position is that proxy voting advice is a "solicitation" and, as such, is subject to Rule 14a-9's prohibition against material misstatements and omissions.[76] We recognize, however, that PVABs, their clients and other investors continue to express concerns that the 2020 Final Rules' amendments to Rule 14a-9 may extend liability to mere differences of opinion regarding the proxy voting

[74] *See supra* notes 23-25 (citing to concerns that investors and others have expressed regarding the 2020 Final Rules, including the amendment to Rule 14a-9). In addition, because of the large similarities between the proposed amendment to Rule 14a-9 in the 2019 Proposed Rules and the amendment to Rule 14a-9 adopted in the 2020 Final Rules, we also consider some of the comment letters that expressed concerns regarding the proposed amendment to be relevant for purposes of evaluating the ongoing concerns regarding Note (e) to Rule 14a-9, as adopted. *See* comment letters from Carl C. Icahn (Feb. 7, 2020), Marcie Frost, Chief Executive Officer, CalPERS (Feb. 3, 2020), Rob Collins, Council for Investor Rights and Corporate Accountability (Feb. 3, 2020), Richard B. Zabel, General Counsel and Chief Legal Officer, Elliott Management Corporation (Jan. 31, 2020), Kevin Cameron, Executive Chair, Glass Lewis (Feb. 3, 2020), and Gary Retelny, CEO, ISS (Jan. 31, 2020).

[75] *Id.*

[76] 2020 Adopting Release at 55093-94.

advice.[77] These differences of opinion could include disagreements regarding the substance of a PVAB's voting recommendations (*e.g.*, a registrant's disagreement with a PVAB's recommendation that shareholders vote against a director nominee recommended by the board) or the appropriate analysis, methodology or information that the PVAB should use to formulate its voting recommendations (*e.g.*, a disagreement between a registrant and a PVAB regarding the appropriate peer companies for a particular analysis). These parties have also expressed concerns that a PVAB could be liable under Rule 14a-9 solely because it declined to accept a registrant's suggested revisions or corrections to its proxy voting advice.[78] In their view, these uncertainties unnecessarily increase the litigation risk to PVABs and impair the independence of the proxy voting advice that investors use to make their voting decisions.

In light of these concerns, we are proposing to delete Note (e) to Rule 14a-9. As discussed above, Note (e) sets forth examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice. Although Note (e) was intended to clarify the potential implications of Rule 14a-9 for proxy voting advice under existing law, it appears instead to have unintentionally created a misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion.[79] The proposed deletion of Note (e) is intended to address that misperception and thereby reduce any resulting uncertainty that could lead to increased litigation risks or the threat of litigation and impaired independence of proxy voting advice.

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[77] *See supra* notes 23-25.

[78] *Id.*; *see also* comment letter from Gary Retelny, CEO, ISS (Jan. 31, 2020).

[79] *See supra* note 74 and accompanying text.

At the same time, we believe it may be helpful to briefly clarify our understanding of the limited circumstances in which a PVAB's statement of opinion may subject it to liability under Rule 14a-9. A PVAB, like any other person engaged in solicitation, may, depending on the facts and circumstances, be subject to liability under Rule 14a-9 for a materially misleading statement or omission of fact, including with regard to its methodology, sources of information or conflicts of interest. That conclusion would not be altered by virtue of our proposed deletion of Note (e). We recognize, however, that the formulation of proxy voting advice often requires subjective determinations and exercise of professional judgment. We do not interpret Rule 14a-9 to subject PVABs to liability for such determinations simply because a registrant holds a differing view.

Our conclusion that Rule 14a-9 liability cannot rest on mere differences of opinion is supported by the Supreme Court's decisions in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[80] and *Virginia Bankshares, Inc. v. Sandberg*.[81] As noted above, Rule 14a-9 prohibits misstatements or omissions of "material fact." In *Omnicare*, the Court explained that "a sincere statement of pure opinion is not an 'untrue statement of material fact'" even if the belief is wrong.[82] Thus, to state a claim under Rule 14a-9, it would not be enough to allege that a PVAB's opinions—regarding, for example, its determination to select a particular analysis or methodology to formulate its voting recommendations or the ultimate

[80] 575 U.S. 175 (2015).

[81] 501 U.S. 1083 (1991). While *Omnicare* involved claims brought under Section 11 of the Securities Act of 1933, we believe its discussion of the circumstances in which a statement of opinion may be actionable under that provision applies to Rule 14a-9. *See Omnicare*, 575 U.S. at 185 n.2 (noting that Rule 14a-9 "bars conduct similar to that described in § 11"); *see also, e.g., Golub v. Gigamon, Inc.*, 994 F.3d 1102 (9th Cir. 2021) (holding that the *Omnicare* standards apply to claims under Rule 14a-9); *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 322-23 (4th Cir. 2019) (applying the *Omnicare* standards to claims under Rule 14a-9).

[82] 575 U.S. at 186.

voting recommendations themselves—were wrong.[83]

As the Court explained in *Omnicare*, there are three ways in which a statement of opinion may be actionable as a misstatement or omission of material fact. First, every statement of opinion "explicitly affirms one fact: that the speaker actually holds the stated belief."[84] Thus, a PVAB may be subject to liability under Rule 14a-9 for a statement of opinion that "falsely describe[s]" its view as to the voting decision that it believes the client should make.[85] Second, a statement of opinion may contain "embedded statements of fact" which, if untrue, may be a source of liability under Rule 14a-9.[86] And third, "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view."[87] A PVAB's statement of opinion may thus give rise to liability if it "omits material facts about the [PVAB's] inquiry into or knowledge concerning [the] statement" and "those facts conflict with what a reasonable investor would take from the statement itself."[88]

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[83] *Id.* at 194.

[84] *Id.* at 184.

[85] *Id.*; *see also Virginia Bankshares*, 501 U.S. at 1092, 1095. For example, if a speaker states the belief that a company has the highest market share, while knowing that the company in fact has the second highest market share, that statement of belief would be an "untrue statement of fact" about the speaker's own belief.

[86] *Omnicare*, 575 U.S. at 185-86; *see also Virginia Bankshares*, 501 U.S. at 1092, 1095. For example, in stating its opinion that shareholders should vote for a particular director-candidate, a PVAB may support that opinion by reference to that candidate's prior professional experience. Those descriptions of the candidate's professional experience would be statements of fact potentially subject to liability under Rule 14a-9, notwithstanding the context in which they were made (*i.e.*, as support for a statement of opinion).

[87] *Omnicare*, 575 U.S. at 188.

[88] *Id.* at 189. In *Omnicare*, the court offered the example of "an unadorned statement of opinion about legal compliance: 'We believe our conduct is lawful.'" *Id.* at 188. The court noted that "[i]f the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete." *Id.* This example can also be applied to a PVAB's proxy voting advice if, for example, it makes a statement of opinion regarding the legality of a registrant's proposal or corporate action without having consulted a lawyer.

Omnicare and *Virginia Bankshares* support our view that neither mere disagreement with a PVAB's analysis, methodology or opinions, nor a bare assertion that a PVAB failed to reveal the basis for its conclusions, would suffice to state a claim under Rule 14a-9. Rather, a litigant "must identify particular (and material) facts" indicating a misstatement or omission of a material fact that renders a PVAB's statements misleading in one of the three senses above—which, the Supreme Court noted, is "no small task."[89] As such, a PVAB would not face liability under Rule 14a-9 for exercising its discretion to rely on a particular analysis, methodology or set of information—while relying less heavily on or not adopting alternative analyses, methodologies or sets of information, including those advanced by a registrant or other party—when formulating its voting recommendations. Similarly, a PVAB would not face liability under Rule 14a-9, for example, simply because it did not accept a registrant's suggested revisions to its proxy voting advice concerning such discretionary matters. Instead, a PVAB's potential liability under Rule 14a-9 turns on whether its proxy voting advice contains a material misstatement or omission of fact.[90]

Request for Comment

7. Should we amend Rule 14a-9 as proposed to remove Note (e)? Should we modify the Note instead of deleting it? If so, how should the Note be modified? Rather than rescinding or amending Note (e), should we instead commit to conducting a retrospective review of Note (e) after a given period of time? If so, what is the appropriate amount of time after which we should conduct such review? What would be the potential drawbacks of conducting such a

[89] *Id.* at 194. We further note that both *Omnicare* and *Virginia Bankshares* were cases against registrants; we are not aware of any enforcement actions or private lawsuits against a PVAB based on statements of opinion in connection with proxy voting matters.

[90] This release does not address any duties or liabilities that a PVAB may have under the Investment Advisers Act of 1940, as applicable.

retrospective review?

8. Has the addition of Note (e) to Rule 14a-9 improved the quality or integrity of proxy voting advice? Is there a risk that PVABs will change their policies and procedures to the detriment of investors if the Commission adopts the proposed amendments to Rule 14a-9? Are there any other adverse consequences associated with the removal of Note (e) to Rule 14a-9?
9. Has the addition of Note (e) to Rule 14a-9 resulted in increased litigation for PVABs? Have PVABs experienced an increase in litigation costs or credible threats of litigation since the adoption of the 2020 Final Rules? Have there been any other adverse consequences associated with the addition of Note (e) to Rule 14a-9?
10. We have set forth our understanding of the scope of Rule 14a-9 liability in the context of proxy voting advice. Are there other ways we could address concerns about potential increased litigation risks to PVABs and impairment of the independence of proxy voting advice? For example, should we amend Rule 14a-9 to codify this understanding? Alternatively, should we exempt all or parts of proxy voting advice from Rule 14a-9 liability entirely? For example, should we amend Rule 14a-9 to expressly state that a PVAB would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations, including its decision to use a specific analysis, methodology or information or its decision as to how to respond to any disagreement a registrant may have with its proxy voting advice?

III. ECONOMIC ANALYSIS

We are proposing amendments to Exchange Act Rule 14a-2(b)(9) to rescind the Rule 14a-2(b)(9)(ii) conditions. The purpose of these proposed amendments is to address concerns about the potential adverse effects of the 2020 Final Rules on the independence, cost and

timeliness of proxy voting advice, while still achieving many of the intended benefits of the 2020 Final Rules with respect to the quality of the advice provided to PVABs' clients. We also are proposing an amendment to Exchange Act Rule 14a-9 to remove paragraph (e) of the Note to that rule. The purpose of this proposed amendment is to avoid any misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing that rule's application and scope, including its application to statements of opinion.

The discussion below addresses the economic effects of the proposed amendments, including their anticipated costs and benefits, as well as the likely effects of the amendments on efficiency, competition and capital formation.[91] We also analyze the potential costs and benefits of reasonable alternatives to the proposed amendments. Where practicable, we have attempted to quantify the economic effects of the proposed amendments; however, in most cases, we are unable to do so because either the necessary data is unavailable or certain effects are not quantifiable. Below, we request comment on our analysis of these effects as well as data that could help us quantify these effects.

A. Economic Baseline

The baseline against which the costs, benefits and the impact on efficiency, competition and capital formation of the proposed amendments are measured consists of the current regulatory requirements applicable to registrants, PVABs, investment advisers and other clients

[91] Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] directs the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

of PVABs, as well as current industry practices used by these entities in connection with the preparation, distribution and use of proxy voting advice.

The adopting release for the 2020 Final Rules provided an overview of the role of PVABs in the proxy process, including a discussion of existing economic research on PVABs and the quality of proxy voting advice they provide.[92]

1. Affected Parties and Current Market Practices

a. Proxy Voting Advice Businesses

As of November 2021, to our knowledge, the proxy voting advice industry in the United States consists of three major firms: ISS, Glass Lewis and Egan-Jones.

- ISS, founded in 1985, is a privately held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote execution, governance data and related products and services.[93] ISS also provides advisory/consulting services, analytical tools and other products and services to corporate registrants through ISS Corporate Solutions, Inc. (a wholly owned subsidiary).[94] As of April 2020, ISS had nearly 2,000 employees in 30 locations, and covered approximately 44,000 shareholder meetings in 115 countries, annually.[95] ISS states that it executes about 10.2 million ballots annually on behalf of those clients representing 4.2 trillion

[92] *See* 2020 Adopting Release.

[93] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-47, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON ECONOMIC POLICY, COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE, CORPORATE SHAREHOLDER MEETINGS: PROXY ADVISORY FIRMS' ROLE IN VOTING AND CORPORATE GOVERNANCE PRACTICES, 6 (2016), *available at* https://www.gao.gov/assets/690/681050.pdf ("2016 GAO Report").

[94] *Id.*

[95] *See* ABOUT ISS, *available at* https://www.issgovernance.com/about/about-iss.

shares.[96] ISS is registered with the Commission as an investment adviser and identifies its work as pension consultant as the basis for registering as an adviser.[97]

- Glass Lewis, established in 2003, is a privately held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote execution and reporting and regulatory disclosure services to institutional investors.[98] As of April 2020, Glass Lewis had more than 380 employees worldwide that provide services to more than 1,300 clients that collectively manage more than $35 trillion in assets.[99] Glass Lewis states that it covers more than 20,000 shareholder meetings across approximately 100 global markets annually.[100] Glass Lewis is not registered with the Commission in any capacity.
- Egan-Jones was established in 2002 as a division of Egan-Jones Ratings Company.[101] Egan-Jones is a privately held company that provides proxy services, such as notification of meetings, research and recommendations on selected matters to be voted on, voting guidelines, execution of votes and regulatory disclosure.[102] As of September 2016, Egan-Jones' proxy research or voting clients mostly consisted of mid- to large-sized mutual

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[96] *See* ABOUT ISS, https://www.issgovernance.com/about/about-iss.

[97] *See* Form ADV filing for ISS, *available at:* https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=111940 (last accessed April 23, 2020) ("ISS Form ADV filing"). *See also* 2016 GAO Report at 9.

[98] *Id.* at 7.

[99] *See* GLASS LEWIS COMPANY OVERVIEW, *available at* https://www.glasslewis.com/company-overview/.

[100] *Id*.

[101] *See* 2016 GAO Report at 7.

[102] *Id*.

funds,[103] and the firm covered approximately 40,000 companies.[104] Egan-Jones Ratings Company (Egan-Jones' parent company) is registered with the Commission as a Nationally Recognized Statistical Ratings Organization.[105]

Of the three PVABs identified, ISS and Glass Lewis are the largest and most often used for proxy voting advice.[106] We do not have access to general financial information for ISS, Glass Lewis and Egan-Jones such as annual revenues, earnings before interest, taxes, depreciation and amortization and net income. We also do not have access to client-specific financial information or more general or aggregate information regarding the economics of the PVABs.

As part of our consideration of the baseline for the proposed amendments, we focus on the industry practice that is particularly relevant for the proposed amendments to Rule 14a-2(b)(9): the PVABs' procedures for engagement with registrants. As mentioned above, all three major PVABs have certain policies, procedures and disclosures in place intended to assure clients that the proxy voting advice they receive will be based on accurate, transparent and complete information.[107] In some cases, PVABs seek input from registrants to further these

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[103] *Id*.

[104] *Id*. While ISS and Glass Lewis have published updated coverage statistics on their websites, the most recent data available for Egan-Jones was compiled in the 2016 GAO Report.

[105] *See* Order Granting Registration of Egan-Jones Rating Company as a Nationally Recognized Statistical Rating Organization, Exchange Act Release No. 34-57031 (Dec. 21, 2007), *available at* https://www.sec.gov/ocr/ocr-current-nrsros.html#egan-jones.

[106] *See* 2016 GAO Report at 8, 41 ("In some instances, we focused our review on Institutional Shareholder Services (ISS) and Glass Lewis and Co. (Glass Lewis), because they have the largest number of clients in the proxy advisory firm market in the United States."). *See also* letters in response to the SEC Staff Roundtable on the Proxy Process from Center on Executive Compensation (Mar. 7, 2019) (noting that there are "two firms controlling roughly 97% of the market share for such services"); Society for Corporate Governance (Nov. 9, 2018) ("While there are five primary proxy advisory firms in the U.S., today the market is essentially a duopoly consisting of Institutional Shareholder Services . . . and Glass Lewis & Co. . . . .").

[107] *See supra* Section II.A.1.

objectives. Glass Lewis and Egan-Jones offer registrants some form of pre-release review of at least some of their proxy voting advice reports, or the data used in their reports. ISS does not provide draft proxy voting advice to any United States registrants, but it engages with registrants during the process of formulating its proxy voting advice. Also, all three PVABs offer registrants access to proxy voting advice after it is distributed to clients, in some cases for a fee, and offer mechanisms by which registrants can provide feedback on such advice. In the 2021 Annual Report, after reviewing each member-PVAB's compliance report, the Oversight Committee found that ISS and Glass Lewis met the standards established in the three best practices principles, which include communication with and feedback from registrants.[108]

Additionally, it is our understanding that some PVABs currently provide their clients with notifications of and links to filings by registrants that are the subject of proxy voting advice in their online platforms.[109] These notifications and links provide a means by which clients may access additional definitive proxy materials that registrants may file in response to proxy voting advice.

b. Clients of Proxy Voting Advice Businesses as Well as Underlying Investors

Clients that use PVABs for proxy voting advice will be affected by the proposed amendments. In turn, investors and other groups on whose behalf these clients make voting determinations will be affected. One of the three major PVABs—ISS—is registered with the Commission as an investment adviser and, as such, provides annually updated disclosure with

[108] *See supra* Section II.A.1.

[109] *See supra* note 57.

respect to its types of clients on Form ADV. Table 1 below reports client types as disclosed by ISS.[110]

Table 1: Number of Clients by Client Type (as of March 28, 2020)

Type of Client[a]	Number of Clients[b]
Banking or thrift institutions	195
Pooled investment vehicles	300
Pension and profit sharing plans	170
Charitable organizations	110
State or municipal government entities	10
Other investment advisers	960
Insurance companies	40
Sovereign wealth funds and foreign official institutions	10
Corporations or other businesses not listed above	70
Other	225
Total	2,095

[a] The table excludes client types for which ISS indicated either zero clients or fewer than five clients.

[b] Form ADV filers indicate the approximate number of clients attributable to each type of client. If the filer has fewer than five clients in a particular category (other than investment companies, business development companies, and pooled investment vehicles), it may indicate that it has fewer than five clients rather than reporting the number of clients.

Table 1 illustrates the types of clients that utilize the services of one of the largest PVABs. For example, while investment advisers ("Other investment advisers" in Table 1)

[110] *See* ISS Form ADV filing (describing clients classified as "Other" as "Academic, vendor, other companies not able to identify as above").

constitute a 46 percent plurality of clients for ISS, other types of clients include pooled investment vehicles (14 percent) and pension and profit sharing plans (eight percent). Other users of the services offered by ISS include corporations, charitable organizations and insurance companies.[111] Certain of these users of PVABs' services make voting determinations that affect the interests of a wide array of individual investors, beneficiaries and other constituents.

c. Registrants

Registrants also will be affected by the proposed amendments. Registrants that have a class of equity securities registered under Section 12 of the Exchange Act as well as non-registrant parties that conduct proxy solicitations with respect to those registrants are subject to the Federal proxy rules.[112] In addition, there are certain other companies that do not have a class of equity securities registered under Section 12 of the Exchange Act that file proxy materials with the Commission. Finally, Rule 20a-1 under the Investment Company Act subjects all registered management investment companies to the Federal proxy rules.[113]

We note that because registrants are owned by investors, effects on registrants as a result of the proposed amendments will accrue to investors. Among the investors in a given registrant, there may be individual investors or groups of investors that may want to influence the direction

[111] *Id.*

[112] Foreign private registrants are exempt from the Federal proxy rules under Rule 3a12-3(b) of the Exchange Act. *See* 17 CFR 240.3a12-3. Furthermore, we are not aware of any asset-backed registrants that have a class of equity securities registered under Section 12 of the Exchange Act. Most asset-backed registrants are registered under Section 15(d) of the Exchange Act and thus are not subject to the Federal proxy rules. Nine asset-backed registrants obtained a class of debt securities registered under Section 12 of the Exchange Act as of December 2018. As a result, these asset-backed registrants are not subject to the Federal proxy rules.

[113] Under Rule 20a-1 of the Investment Company Act, registered management investment companies must comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made with respect to a security registered pursuant to Section 12 of the Exchange Act. *See* 17 CFR 270.20a-1. Additionally, "registered management investment company" means any investment company other than a face-amount certificate company or a unit investment trust. *See* 15 U.S.C. 80a-4.

that the registrant should pursue. Those individual investors or groups of investors could be clients of PVABs. Separately, because of the principal-agent relationship between investors and management in a corporation, there may exist conflicts between management of the registrant and investors. It is possible that some investors may use PVABs' advice as part of their decision-making process on a particular matter presented for shareholder approval for which management's interests may not be aligned with those of investors in general.

As of December 31, 2020, we estimate that approximately 5,400 registrants had a class of securities registered under Section 12 of the Exchange Act.[114] As of the same date, there were approximately 86 companies that did not have a class of securities registered under Section 12 of the Exchange Act that filed proxy materials.[115] As of September 30, 2021, there were 14,062 registered management investment companies that were subject to the proxy rules: (i) 13,347 open-end funds, out of which 2,497 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share class; (ii) 701 closed-end funds; and (iii) 14

[114] We are able to estimate the number of registrants with a class of securities registered under Section 12 of the Exchange Act by reviewing all Forms 10-K and 10-K amendments filed during calendar year 2018 with the Commission. After reviewing all forms, we then count the number of unique registrants that identify themselves as having a class of securities registered under Section 12(b) or Section 12(g) of the Exchange Act. Foreign private registrants that filed both Forms 20-F and 40-F, as well as asset-backed registrants that filed Forms 10-D and 10-D/A during calendar year 2018 with the Commission are excluded from this estimate. This estimate excludes BDCs that filed Form 10-K or an amendment in 2020.

[115] We identify these issuers as those that: (1) are subject to the reporting obligations of Exchange Act Section 15(d), but do not have a class of equity securities registered under Exchange Act Section 12(b) or 12(g); and (2) have filed any proxy materials during calendar year 2020 with the Commission. Additionally, we are considering the following proxy materials in our analysis: DEF14A; DEF14C; DEFA14A; DEFC14A; DEFM14A; DEFM14C; DEFR14A; DEFR14C; DFAN14A; N-14; PRE 14A; PRE 14C; PREC14A; PREM14A; PREM14C; PRER14A; PRER14C. Form N-14 can be a registration statement and/or proxy statement. We also manually review all Forms N-14 filed during calendar year 2020 with the Commission, excluding any Forms N-14 that are exclusively registration statements from our estimates. To identify registrants reporting pursuant to Section 15(d), but not registered under Section 12(b) or Section 12(g), we review all Forms 10-K filed in calendar year 2020 with the Commission. We then count the number of unique registrants that identify themselves as subject to Section 15(d) reporting obligations with no class of equity securities registered under Section 12(b) or Section 12(g).

variable annuity separate accounts registered as management investment companies.[116] As of June 2021, we identified 99 Business Development Companies ("BDCs") that could be subject to the proposed amendments.[117] The summation of these estimates yields 19,647 companies that may be affected by the proposed amendments.[118]

The above estimates are an upper bound of the number of potentially affected companies because not all of these registrants may file proxy materials related to a meeting for which a PVAB issues proxy voting advice in a given year. Out of the 19,647 potentially affected registrants mentioned above, approximately 5,350 filed proxy materials with the Commission during calendar year 2020.[119] Out of the 5,350 registrants, 4,500 (84 percent) were Section 12 or Section 15(d) registrants and the remaining 850 (16 percent) were registered management investment companies.

2. Current Regulatory Framework

On July 22, 2020, the Commission adopted the 2020 Final Rules. The 2020 Final Rules:

- Amended Rule 14a-1(l) to codify the Commission's interpretation that proxy voting advice generally constitutes a "solicitation" subject to the proxy rules.

[116] We estimate the number of unique registered management investment companies based on Forms N-CEN filed between December 2020 and September 2021 with the Commission. Open-end funds are registered on Form N-1A, while closed-end funds are registered on Form N-2. Variable annuity separate accounts registered as management investment companies are trusts registered on Form N-3.

[117] BDCs are entities that have been issued an 814-reporting number. Our estimate includes 82 BDCs that filed Form 10-K in 2020, as well as 17 BDCs that were not traded.

[118] The 19,647 potentially affected registrants is the sum of: (a) 5,400 registrants with a class of securities registered under Section 12 of the Exchange Act; (b) 86 registrants without a class of securities registered under Section 12 of the Exchange Act that filed proxy materials; (c) 14,062 registered management investment companies; and (d) 99 BDCs.

[119] *See* 2020 Adopting Release at n.544 (setting forth details on the estimation of companies that filed proxy materials with the Commission during calendar year 2018).

- Adopted Rule 14a-2(b)(9) to add new conditions to two exemptions (set forth in Rules 14a-2(b)(1) and (3)) that PVABs generally rely on to avoid the proxy rules' information and filing requirements. Those conditions include:
    - New conflicts of interest disclosure requirements; and
    - The Rule 14a-2(b)(9)(ii) conditions.
- Amended the Note to Rule 14a-9, which prohibits false or misleading statements, to include specific examples of material misstatements or omissions related to proxy voting advice. Specifically, Note (e) provides that the failure to disclose material information regarding proxy voting advice, "such as the [PVAB's] methodology, sources of information, or conflicts of interest" could, depending upon particular facts and circumstances, be misleading within the meaning of the rule.

The changes to the definition of "solicitation" and to Rule 14a-9 became effective on November 2, 2020. The conditions set forth in Rule 14a-2(b)(9) will become effective on December 1, 2021.

B. Benefits and Costs

In the following sections, we discuss the specific benefits and costs of the proposed amendments.

1. Benefits

The main benefit for PVABs from our proposed rescission of the Rule 14a-2(b)(9)(ii) conditions would be the reduction of the initial or ongoing[120] direct costs associated with

[120] The compliance date for the Rule 14a-2(b)(9)(ii) conditions is December 1, 2021. On June 1, 2021, the Division of Corporation Finance issued a statement that it would not recommend enforcement action based on the Interpretive Release or the 2020 Final Rules during the period in which the Commission is considering further regulatory action in this area. Division of Corporation Finance, *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9*, U.S. SECURITIES AND EXCHANGE COMMISSION, *available at* https://www.sec.gov/news/public-

modifying their current systems and methods, or developing and maintaining new systems and methods, to satisfy the requirement of Rule 14a-2(b)(9)(ii)(A) that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that registrants 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 PVABs' clients. Additionally, the proposed amendments would reduce the direct costs of satisfying the requirement of Rule 14a-2(b)(9)(ii)(B) that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that PVABs provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the shareholder meeting. As set forth in the 2020 Final Rules, to be eligible for the safe harbor in Rule 14a-2(b)(9)(iv), a PVAB could provide: (i) notice on its electronic client platform that the registrant has filed, or has informed the PVAB that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available); or (ii) notice through email or other electronic means that the registrant has filed, or has informed the PVAB that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available). Both mechanisms for informing clients could involve initial set-up costs as well as ongoing costs.

statement/corp-fin-proxy-rules-2021-06-01. This staff statement does not alter the December 1, 2021 compliance date for the Rule 14a-2(b)(9)(ii) conditions, and thus we recognize that PVABs may have already incurred certain costs to modify their systems or otherwise ensure that the conditions of the exemption are met. Even so, the elimination of these conditions would eliminate any ongoing costs or other costs of the conditions that have not yet been incurred. To the extent a PVAB has not yet incurred any direct costs from the Rule 14a-2(b)(9)(ii) conditions, the proposed amendments would eliminate or avoid potential future costs.

To the extent PVABs already have similar systems in place to meet the requirements of Rules 14a-2(b)(9)(ii)(A) and (B), any benefits from the proposed amendments may be limited.[121] For purposes of the Paperwork Reduction Act of 1995 ("PRA"),[122] in the adopting release for the 2020 Final Rules, we estimated that each PVAB would incur 2,845 burden hours to satisfy Rule 14a-2(b)(9)(ii)(A) and 2,845 burden hours to satisfy Rule 14a-2(b)(9)(ii)(B).[123] Also for purposes of our PRA analysis, we estimated that each PVAB would incur a burden of between 50 and 5,690 hours per year associated with securing an acknowledgment or other assurance that the proxy voting advice will not be disclosed.[124] We believe that the proposed amendments would eliminate these PRA burdens.

Additionally, while all three major PVABs currently offer registrants access to their proxy voting advice, in some circumstances they may charge a fee to registrants for such access.[125] Once the Rule 14a-2(b)(9)(ii) conditions become effective, the requirement to share full reports with registrants under Rule 14a-2(b)(9)(ii) may result in a PVAB providing access to proxy voting reports at no charge to registrants to the extent that the PVAB relies on the safe harbor provided in Rule 14a-2(b)(9)(iii) to satisfy the condition in Rule 14a-2(b)(9)(ii)(A).[126] This would cause such a PVAB to lose fees it otherwise would have earned from selling proxy voting advice to registrants. By eliminating the Rule 14a-2(b)(9)(ii) conditions (and, therefore,

[121] *See supra* Section II.A.1.

[122] 44 U.S.C. 3501 *et seq*.

[123] *See* 2020 Adopting Release at Section V.B.1.

[124] *See* 2020 Adopting Release at Section V.B.1.

[125] *See* 2020 Adopting Release at Section IV.B.1.a.ii.

[126] To rely on the safe harbor in Rule 14a-2(b)(9)(iii), a PVAB must provide registrants with a copy of the proxy voting advice at no charge.

the need to rely on the Rule 14a-2(b)(9)(iii) safe harbor), the proposed amendments could allow PVABs to charge registrants for access to the proxy voting reports, thus increasing their revenues.

The proposed amendments may also benefit other parties. PVABs may pass through a portion of the costs of modifying, developing or maintaining systems to meet the Rule 14a-2(b)(9)(ii) conditions to their clients through higher fees for proxy voting advice. Eliminating such costs could therefore be beneficial to clients of PVABs.

Some commenters on the 2019 Proposed Rules suggested that the proposal could negatively affect PVABs' independence: because of the ability of registrants to review and provide feedback on proxy voting advice in advance of its dissemination to PVABs' clients (and potentially lobby PVABs for changes to recommendations), the 2019 Proposed Rules could have diminished PVABs' willingness to recommend votes against management, thus substantially diminishing the independent information available to investors and impeding investors' ability to monitor company management.[127] The 2020 Final Rules did not include a registrant advance review and feedback process, and instead implemented a principles-based approach, in an effort to address such concerns. However, notwithstanding these changes, clients of PVABs have continued to express strong concerns about the adverse effects of the amendments on the independence of proxy voting advice. To the extent that the proposed amendments eliminate the possibility of such alleged adverse effects, they would benefit PVABs, their clients and investors in general.

[127] *See* comment letters from Fiona Reynolds, Chief Executive Officer, Principles for Responsible Investment (Feb. 3, 2020) and ISS.

Lastly, we do not expect the proposed deletion of paragraph (e) to the Note to Rule 14a-9 to generate any significant benefits other than avoiding any misperception that the 2020 Final Rules' addition of that paragraph purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion. Notwithstanding this proposed deletion, a PVAB may still be subject to liability under Rule 14a-9, depending on the facts and circumstances, for a materially misleading statement or omission of fact, including with regard to its methodology, sources of information or conflicts of interest. Thus, we expect that this proposed amendment would not have any significant economic effect.

2. Costs

The proposed amendments may impose costs on the clients of PVABs—and thereby ultimately the investors they serve—by potentially reducing the overall mix of information available to those clients as they assess proxy voting advice and make determinations about how to cast votes. Requiring timely notice to registrants of proxy voting advice could allow registrants to more effectively determine whether they wish to respond to the recommendation by publishing additional soliciting materials and to do so in a timely manner before shareholders cast their votes. Registrants may wish to do so for a variety of reasons, including, for example, because they have identified what they perceive to be factual errors or methodological weaknesses in a PVAB's analysis or because they have a different or additional perspective with respect to the advice. In either case, clients of PVABs, and registrants' investors in general, may benefit from the availability of additional information upon which to base their voting decisions. Clients of PVABs often must make voting decisions in a compressed time period. Timely access to registrant responses to proxy voting advice could facilitate a client's evaluation of the advice by highlighting disagreements regarding facts and data, differences of opinion or additional perspectives before the client casts its votes. To the extent that the proposed amendments reduce

this type of information and it is valuable to investors, the proposed amendments may make it more costly for investors to obtain such information and to make timely voting decisions. Additionally, to the extent that a PVAB relies on the safe harbor Rule 14a-2(b)(9)(iii), which requires PVABs to provide registrants with their proxy voting advice for free, the proposed amendments may cause some registrants to incur costs in the form of fees or the purchase of additional PVAB services in order to obtain and respond to proxy voting advice. Such costs will ultimately be borne by investors.

We note, however, that some PVABs currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue voting advice.[128] Additionally, the above-described efforts by PVABs to develop industry-wide standards, such as the BPPG's principles and the Oversight Committee's role in assessing compliance with such standards, could address some of the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. Thus, if PVABs already provide accurate and complete proxy voting advice to their clients, this potential cost associated with the proposed amendments may not be significant. Moreover, because PVABs developed these internal policies and measures themselves, we believe they are less likely to adversely affect the independence, cost and timeliness of proxy voting advice than measures they would adopt to satisfy the Rule 14a-2(b)(9)(ii) conditions.

Lastly, we do not expect the proposed deletion of Note (e) to Rule 14a-9 to create any significant costs for PVABs. Given that this proposed amendment would not alter a PVAB's liability under Rule 14a-9, we would expect that its economic impact would be minimal.

[128] *See, e.g.*, comment letters from Kevin Cameron, Executive Chair, Glass Lewis (Feb. 3, 2020) and ISS.

C. Effects on Efficiency, Competition, and Capital Formation

As discussed in Section III.A above, PVABs perform a variety of functions for their clients, including analyzing and making voting recommendations on matters presented for shareholder votes and included in registrants' proxy statements. As an alternative to utilizing these services, clients of PVABs could instead conduct their own analyses and execute votes using internal resources.[129] Given the costs of analyzing and voting proxies, the services offered by PVABs may offer economies of scale relative to their clients performing those functions themselves. For example, a GAO study found that among 31 institutions, including mutual funds, pension funds and asset managers, large institutions rely less than small institutions on the research and recommendations offered by PVABs.[130] Small institutional investors surveyed in the study indicated they had limited resources to conduct their own research.[131]

To the extent the 2020 Final Rules increase compliance costs and litigation-risk costs for PVABs which could be passed on to clients, the proposed amendments could reverse those

[129] Clients of PVABs may also rely on some combination of internal and external analysis.

[130] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-765, REPORT TO CONGRESSIONAL REQUESTERS, CORPORATE SHAREHOLDER MEETINGS: ISSUES RELATING TO THE FIRMS THAT ADVISE INSTITUTIONAL INVESTORS ON PROXY VOTING, 2 (2007), *available at* https://www.gao.gov/new.items/d07765.pdf ("2007 GAO Report"). *See generally* comment letter from Business Roundtable (Feb. 3, 2020) (stating that because many institutional investors face voting on a large number of corporate matters every year but lack personnel and resources for managing such activities, they outsource tasks to proxy advisors). *See also* letters in response to the SEC Staff Roundtable on the Proxy Process from BlackRock (Nov. 16, 2018) (stating that "BlackRock's Investment Stewardship team has more than 40 professionals responsible for developing independent views on how we should vote proxies on behalf of our clients"); NYC Comptroller (Jan. 2, 2019) (stating that we "have five full-time staff dedicated to proxy voting during peak season, and our least-tenured investment analyst has 12 years' experience applying the NYC Funds' domestic proxy voting guidelines").

[131] *See* 2007 GAO Report at 2. *See also* letters in response to the SEC Staff Roundtable on the Proxy Process from Ohio Public Retirement (Dec. 13, 2018) ("OPERS also depends heavily on the research reports we receive from our proxy advisory firm. These reports are critical to the internal analyses we perform before any vote is submitted. Without access to the timely and independent research provided by our proxy advisory firm, it would be virtually impossible to meet our obligations to our members."); Transcript of Roundtable on the Proxy Process at 194 (comments of Mr. Scot Draeger, stating that: "If you've ever actually reviewed the benchmarks, whether it's ISS or anybody else, they're very extensive and much more detailed than small firm[s] like ours could ever develop with our own independent research.").

increases along with any decrease in demand for PVABs' advice they may have caused. To the extent PVABs offer economies of scale relative to their clients performing certain functions themselves, increased demand for, and reliance upon, PVABs' services could lead to greater efficiencies in the proxy voting process.

To the extent that the Rule 14a-2(b)(9)(ii) conditions impair the independence of PVABs or reduce the diversity of thought in the market for proxy voting advice (*e.g.*, by PVABs erring on the side of caution in complex or contentious matters), the proposed elimination of those conditions could reverse those effects, thus leading to advice from PVABs that is more accurate, useful and valuable to their clients. If clients perceive the proposed amendments as positively affecting PVABs' objectivity and independence, this could lead to an increase in demand for proxy voting advice and potentially greater efficiencies in the proxy voting process.[132]

If the proposed amendments reduce costs for PVABs, this could increase competition for proxy voting advice compared to the current baseline, which includes the effect of the 2020 Final Rules. In particular, if costs associated with the 2020 Final Rules are passed on to clients, the reduction of these costs because of the proposed amendments could encourage some investors to retain the services of PVABs, which could reduce the use of internal resources for voting. Also, if the proposed amendments improve the independence of PVABs and thus increase the quality of proxy voting advice, this could cause PVABs to compete more on this dimension. Lastly, reduction in compliance costs and litigation-risk costs, if large enough, may encourage entry into the market for proxy voting advice, increasing the competition among PVABs.[133] However,

[132] As noted above, we do not have financial data about PVABs, including financial data by services provided or by client type. This makes these assessments on a quantitative basis difficult.

[133] *See* comment letter from Sarah Wilson, CEO, Minerva Analytics (Feb. 22, 2020). In its comment letter, Minerva, a PVAB in the U.S. market prior to 2010, stated that the threat of litigation for "errors" is a factor influencing its views on whether to reenter the U.S. market. *Id.*

given the fact that prior to the adoption of the 2020 Final Rules there were only three major PVABs in the United States, we do not expect that the proposed amendments would significantly increase the likelihood of new entry into this market.

If the proposed amendments facilitate the ability of clients of PVABs to make informed voting determinations, this could ultimately lead to improved investment outcomes for investors. This, in turn, could lead to a greater allocation of resources to investment. To the extent that the proposed amendments lead to more investment, we could expect greater demand for securities, which could, in turn, promote capital formation. Overall, given the many factors that can influence the rate of capital formation, any effect of the proposed amendments on capital formation is expected to be small.

Lastly, we do not expect the proposed deletion of Note (e) to Rule 14a-9 to have any significant economic effect on efficiency, competition and capital formation.

D. Reasonable Alternatives

1. Interpretive Guidance or No-Action Relief on Whether Systems and Processes Satisfy the 2020 Final Rules

Alternatives to rescinding the Rule 14a-2(b)(9)(ii) conditions that could reduce compliance costs and independence concerns for PVABs include the Commission issuing interpretive guidance or the staff providing no-action relief regarding whether the systems and processes that PVABs have in place satisfy the 2020 Final Rules. The benefit of either of these approaches is that they could reduce PVABs' initial or ongoing costs of complying with the 2020 Final Rules if the Commission were to determine that their current systems and processes already satisfy the conditions in Rule 14a-2(b)(9), at least to the extent PVABs have not already made modifications to their existing business models. To the extent PVABs' existing systems and processes satisfy the Rule 14a-2(b)(9)(ii) conditions, these approaches could also mitigate

concerns that the independence of the advice could become impaired by making clear that modifications are not required. The potential cost of these alternatives is that, to the extent that PVABs' current systems and processes do not satisfy the 2020 Final Rules, they may not eliminate potential costs or concerns associated with the requirements of Rule 14a-2(b)(9).

2. Exempting Certain Parts of PVABs' Proxy Voting Advice from Rule 14a-9 Liability

Rather than, or in addition to, deleting Note (e) to Rule 14a-9, the Commission could amend Rule 14a-9 to exempt certain portions of proxy voting advice from Rule 14a-9 liability. For example, the Commission could amend Rule 14a-9 to expressly state that a PVAB would not be subject to liability under that rule for any subjective determinations it makes in formulating its recommendations, including its decision to use a specific analysis, methodology or information. The benefit of this alternative would be that it may give PVABs additional comfort that they will not be subject to liability under Rule 14a-9 on the basis of mere disagreement over their analysis, methodology or sources of information. The main cost of this alternative is that it may lower the overall quality of the advice that PVABs provide, and thus negatively affect the voting decisions of institutional investors and investment advisers, and ultimately the other investors they serve. In addition, creating such an exemption from Rule 14a-9 liability that differs from existing law may generate additional uncertainty and litigation.

Request for Comment

11. Have we correctly characterized the benefits and costs for PVABs from the proposed amendments? Are there any other benefits and costs that should be considered? Please provide supportive data to the extent available.
12. Have we correctly characterized the benefits and costs for institutional investors, their clients and registrants from the proposed amendments? Are there any other related

benefits and costs that should be considered? Please provide supportive data to the extent available.

13. We assume that the proposed amendments would strengthen the independence of PVABs. Are we correct in that characterization? Please provide supportive data to the extent available.

14. Have we correctly characterized the effects on efficiency, competition and capital formation from the proposed amendments? Are there any effects that should be considered? Please provide supportive data to the extent available.

IV. PAPERWORK REDUCTION ACT

A. Summary of the Collections of Information

Certain provisions of our rules, schedules and forms that would be affected by the proposed amendments contain "collection of information" requirements within the meaning of the PRA. We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[134] The hours and costs associated with maintaining, disclosing or providing the information required by the proposed amendments constitute paperwork burdens imposed by such collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. The title for the affected collection of information is: "Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A)" (OMB Control No. 3235-0059).

[134] 44 U.S.C. 3507(d); 5 CFR 1320.11.

We adopted existing Regulation 14A[135] pursuant to the Exchange Act. Regulation 14A and its related schedules set forth the disclosure and other requirements for proxy statements, as well as the exemptions therefrom, filed by registrants and other soliciting persons to help investors make informed voting decisions.[136] A detailed description of the proposed amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the proposed amendments can be found in Section III above.

B. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

Below we estimate the incremental and aggregate effect on paperwork burden as a result of the proposed amendments. Most, if not all, of the effect on paperwork burden as a result of the proposed amendments would come from the rescission of Rule 14a-2(b)(9)(ii) and would be expected to reduce the burden from Rule 14a-2(b)(9). However, because Rule 14a-2(b)(9) has not yet become effective, that rule has not yet resulted in any paperwork burden, and there is nothing yet to reduce. Our proposed amendments to Rule 14a-2(b)(9), therefore, would not have any effect on the current paperwork burden as of the date of this release. Nonetheless, as Rule 14a-2(b)(9) is scheduled to become effective on December 1, 2021, to fully analyze the impact of the proposed amendments, for purposes of this PRA analysis, we instead set forth the estimated amount of paperwork burden that the parties affected by Rule 14a-2(b)(9) would avoid

[135] 17 CFR 240.14a-1 *et seq.*

[136] To the extent that a person or entity incurs a burden imposed by Regulation 14A, it is encompassed within the collection of information estimates for Regulation 14A. This includes registrants and other soliciting persons preparing, filing, processing and circulating their definitive proxy and information statements and additional soliciting materials, as well as the efforts of third parties such as PVABs whose proxy voting advice falls within the ambit of the Federal rules and regulations that govern proxy solicitations.

as a result of our proposed amendments to Rule 14a-2(b)(9), including our proposed rescission of the Rule 14a-2(b)(9)(ii) conditions.

1. Impact on Affected Parties

As discussed above in Section III.A.1, there are a variety of parties that may be affected, directly or indirectly, by the proposed amendments. These include PVABs; the clients to whom PVABs provide proxy voting advice; investors and other groups on whose behalf the clients of PVABs make voting determinations; registrants who are conducting solicitations and are the subject of proxy voting advice; and the registrants' shareholders, who ultimately bear the costs and benefits to the registrant associated with the outcome of voting matters covered by proxy voting advice.

Of these parties, we expect that PVABs would avoid some additional paperwork burden as a result of the proposed amendments.[137] As discussed further below, we believe that any avoidance of an incremental increase in burdens would be attributable primarily to the rescission of Rule 14a-2(b)(9)(ii). With respect to the proposed amendment to Rule 14a-9, we do not expect the economic impact of this amendment will be significant because it would not change existing law and, therefore, would not change respondents' legal obligations.[138] Moreover, any

[137] The PRA requires that we estimate "the total annual reporting and recordkeeping burden that will result from the collection of information." [5 CFR 1320.5(a)(1)(iv)(B)(5)] A "collection of information" includes any requirement or request for persons to obtain, maintain, retain, report or publicly disclose information [5 CFR 1320.3(c)]. OMB's current inventory for Regulation 14A, therefore, is an assessment of the paperwork burden associated with such requirements and requests under the regulation, and this PRA is an assessment of changes to such inventory expected to result from these proposed amendments. While other parties, such as the clients of PVABs, may have benefits and costs associated with the proposed amendments (*see supra* Section III.B.), only PVABs and registrants will avoid any additional paperwork burden as a result of the proposed amendments.

[138] The proposed amendment to Rule 14a-9 may relieve PVABs of direct costs to the extent Note (e) to that rule prompted some PVABs to provide additional disclosure about the bases for their proxy voting advice. However, we expect any such costs would be minimal because the adoption of that Note did not represent a change to existing law, nor did it broaden the concept of materiality or create a new cause of action. *See* 2020 Adopting Release at n.685. Similarly, we expect that any avoidance of incremental burdens associated with our proposed amendment to

impact arising from this proposed amendment is not expected to materially change the average PRA burden hour estimates associated with Regulation 14A. Thus, we have not made any adjustments to our PRA burden estimates in respect of the proposed amendment to Rule 14a-9.

a. Proxy Voting Advice Businesses

We expect that PVABs would avoid increased paperwork burden as a result of our proposed amendments to Rule 14a-2(b)(9), which, when effective,[139] will apply to anyone relying on the exemptions in Rules 14a-2(b)(1) or (b)(3) who furnishes proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A). The amount of burdens that PVABs would avoid depends on a number of factors that are firm-specific and highly variable, which makes it difficult to provide reliable quantitative estimates.[140]

There are two components of the proposed amendments to Rule 14a-2(b)(9) that we expect to result in an avoidance of increased burdens. First, under Rule 14a-2(b)(9)(ii)(A), PVABs are required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the PVABs' clients. Second, under Rule 14a-2(b)(9)(ii)(B), PVABs are required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that PVABs provide their clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the

Rule 14a-9 would be minimal because our proposed rescission of Note (e) to Rule 14a-9 is not intended to alter that rule's application to proxy voting advice. *See supra* Section II.B.2.

[139] *See supra* note 3 and accompanying text.

[140] *See generally* the discussion in Section III.B.1 *supra* concerning the difficulty in providing quantitative estimates of the benefits to PVABs associated with the proposed amendments.

shareholder meeting. The proposed amendments would rescind both of these rules, thereby relieving PVABs of the obligation to comply with these requirements. The proposed amendments would also rescind the non-exclusive safe harbors (set forth in Rules 14a-2(b)(9)(iii) and (iv)) that PVABs may use to satisfy the principle-based requirements in Rule 14a-2(b)(9)(ii). We address each of these components in turn.

In the release adopting the 2020 Final Rules, we estimated that PVABs would incur an annual incremental paperwork burden to comply with Rules 14a-2(b)(9)(ii), (iii) and (iv) as follows:

New Requirement	**PVAB** **Estimated Incremental Annual Compliance Burden**
Rule 14a-2(b)(9)(ii)(A) – Notice to Registrants and Rule 14a 2(b)(9)(iii) Safe Harbor	Increase in paperwork burden corresponding to:
The PVAB has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that registrants who are the subject of proxy voting advice have such advice made available to them at or prior to the time the advice is disseminated to clients of the PVAB. Safe Harbor – The PVAB has written policies and procedures that are reasonably designed to provide a registrant with a copy of the PVAB's proxy voting advice, at no charge, no later than the time it is disseminated to the PVAB's clients. Such policies and procedures may include conditions requiring that: (A) The registrant has filed its definitive proxy statement at least 40 calendar days before the security holder meeting date (or if no meeting is held, at least 40 calendar days before the date the votes, consents, or authorizations may be used to effect the proposed action); and (B) The registrant has acknowledged that it will only use the copy of the proxy voting advice for its internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant's employees or advisers.	To the extent that the PVAB's current practices and procedures are not already sufficient: o Developing new or modifying existing systems, policies and methods, or developing and maintaining new systems, policies and methods to ensure that it has the capability to timely provide each registrant with information about its proxy voting advice necessary to satisfy the requirement in Rule 14a-2(b)(9)(ii)(A) and/or the safe harbor in Rule 14a-2(b)(9)(iii) o If applicable, obtaining acknowledgments or agreements with respect to use of any information shared with the registrant; and o Delivering copies of proxy voting advice to registrants We estimate the increase in paperwork burden to be 8,535 hours per PVAB, consisting of 2,845 hours for system updates and 5,690 hours for acknowledgments regarding sharing information.

Rule 14a-2(b)(9)(ii)(B) – Notice to Clients of Proxy Voting Advice Businesses and Rule 14a-2(b)(9)(iv) Safe Harbor	Increase in paperwork burden corresponding to:
The PVAB has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that the PVAB provides clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding proxy voting advice by registrants who are the subject of such advice, in a timely manner before the shareholder meeting. Safe harbor – The PVAB has written policies and procedures that are reasonably designed to inform clients who receive the proxy voting advice when a registrant that is the subject of such voting advice notifies the proxy voting advice business that it intends to file or has filed additional soliciting materials with the Commission setting forth the registrant's statement regarding the voting advice, by: (A) providing notice to its clients on its electronic client platform that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available; or (B) The PVAB providing notice to its clients through email or other electronic means that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available.	To the extent that the PVAB's current practices and procedures are not already sufficient: Developing new or modifying existing systems, policies and methods, or developing and maintaining new systems, policies and methods capable of: o Tracking whether the registrant has filed additional soliciting materials; o Ensuring that PVABs provide clients with a means to learn of a registrant's written statements about proxy voting advice in a timely manner that satisfies the requirement in Rule 14a-2(b)(9)(ii)(B) and/or the safe harbor in Rule 14a-2(b)(9)(iv). If relying on the safe harbor in Rule 14a-2(b)(9)(iv)(A) or (B), the associated paperwork burden would include the time and effort required of the PVAB to: o provide notice to its clients through the PVAB's electronic client platform or email or other electronic medium, as appropriate, that the registrant intends to file or has filed additional soliciting materials setting forth its views about the proxy voting advice; and o include a hyperlink to the registrant's statement on EDGAR We estimate the increase in paperwork burden to be 2,845 hours per PVAB.
TOTAL	11,380 hours per PVAB

Altogether, we estimated an annual total increase of 34,140 hours[141] in compliance burden to be incurred by PVABs that would be subject to Rules 14a-2(b)(9)(ii), (iii) and (iv). Accordingly, we expect that our proposed amendments would allow PVABs to avoid these burdens that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

b. Registrants

In addition to PVABs, we anticipate that registrants would avoid increased paperwork burden as a result of our proposed amendment to Rule 14a-2(b)(9). In the adopting release for the 2020 Final Rules, we noted that registrants could, as a result of the adoption of Rule 14a-2(b)(9), experience increased burdens associated with coordinating with PVABs to receive the proxy voting advice, reviewing the proxy voting advice and preparing and filing supplementary proxy materials in response to the proxy voting advice, if they choose to do so. Because Rule 14a-2(b)(9) does not require registrants to engage with PVABs or take any action in response to proxy voting advice, we stated that we expected a registrant would bear additional paperwork burden only if it anticipated the benefits of engaging with the PVABs would exceed the costs of participation. We noted that these costs would vary depending upon the particular facts and

[141] This represented the annual total burden increase expected to be incurred by PVABs (as an average of the yearly burden predicted over the three-year period following adoption of the 2020 Final Rules) and was intended to be inclusive of all burdens reasonably anticipated to be associated with compliance with the Rule 14a-2(b)(9)(ii) conditions. The Commission is aware of three PVABs in the U.S. (*i.e.*, Glass Lewis, ISS and Egan-Jones) whose activities fall within the scope of proxy voting advice constituting a solicitation under amended Rule 14a-1(l)(1)(iii)(A). We estimated that each of these would have a burden of 11,380 hours per year associated with Rules 14a-2(b)(9)(ii), (iii) and (iv). *See* 2020 Adopting Release at n.700. We recognized that there could be other PVABs, including both smaller firms and firms operating outside the U.S., which may also be subject to those rules. However, we expected such a number to be small. Accordingly, rather than increasing our estimate of the number of affected PVABs beyond the three discussed above, we increased our annual total burden estimate by 500 hours to account for those businesses. However, that 500 hour increase also accounted for the burden imposed by Rule 14a-2(b)(9)(i), which is not affected by the proposed amendments. Because we did not indicate, in the adopting release for the 2020 Final Rules, what portion of that 500 hour increase would be attributable to the various conditions in Rule 14a-2(b)(9), we do not include that 500 hour increase in this PRA analysis in order to avoid overestimating the amount of burden that PVABs would be relieved of as a result of the proposed amendments.

circumstances of the proxy voting advice and any issues identified therein, as well as the resources of the registrant, which made it difficult to provide a reliable quantifiable estimate of these costs.

Notwithstanding those difficulties, we estimated an average increase of 50 hours per registrant in connection with the amendments for a total annual increase of 284,500 hours, assuming that a registrant's annual meeting of shareholders is covered by at least two of the three major PVABs in the United States, and the registrant has opted to review both sets of proxy voting advice and file additional soliciting materials in response.[142] Accordingly, we expect that by eliminating the Rule 14a-2(b)(9)(ii) conditions, our proposed amendments would result in a corresponding reduction of potential paperwork burdens that those registrants would have otherwise been expected to incur once Rule 14a-2(b)(9) becomes effective.

2. Aggregate Burden Avoided as a Result of the Proposed Amendments

Table 1 summarizes the calculations and assumptions used in the adopting release for the 2020 Final Rules to derive our estimates of the aggregate increase in burden for all affected parties corresponding to the Rule 14a-2(b)(9)(ii) conditions.

PRA Table 1. Calculation of Aggregate Increase in Burden Hours Resulting from the Rule 14a-2(b)(9)(ii) Conditions

	Affected Parties	
	Proxy Voting Advice Businesses (A)	Registrants (B)
Burden Hour Increase	34,140	284,500

[142] We also noted that such burden increase would be offset against any corresponding reduction in burden resulting from the registrant forgoing other methods of responding to the proxy voting advice (such as investor outreach) that the registrant determines are no longer necessary or are less preferable in light of Rule 14a-2(b)(9).

Aggregate Increase in Burden Hours	[Column Total (A)] + [Column Total (B)] = [318,640]

Accordingly, we expect that our proposed amendments would allow the affected parties to avoid these estimated burden hours that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

3. Increase in Annual Responses Avoided as a Result of the Proposed Amendments

We believe that the proposed amendments would avoid an increase in the number of annual responses[143] to the existing collection of information for Regulation 14A. In the adopting release for the 2020 Final Rules, we stated that we do not expect registrants to file any different number of proxy statements as a result of those rules. We did state, however, that we anticipated that the number of additional soliciting materials filed under 17 CFR 240.14a-6 may increase in proportion to the number of times that registrants choose to provide a statement in response to a PVAB's proxy voting advice as contemplated by Rule 14a-2(b)(9)(ii)(B) or the safe harbor under Rule 14a-2(b)(9)(iv). For purposes of the PRA analysis in that release, we estimated that there would be an additional 783 annual responses to the collection of information as a result of the 2020 Final Rules.[144] Accordingly, we expect that our proposed amendments would result in an

[143] For purposes of the Regulation 14A collection of information, the number of annual responses corresponds to the estimated number of new filings that will be made each year under Regulation 14A, which includes filings such as DEF 14A; DEFA14A; DEFM14A; and DEFC14A. When calculating PRA burden for any particular collection of information, the total number of annual burden hours estimated is divided by the total number of annual responses estimated, which provides the average estimated annual burden per response. The current inventory of approved collections of information is maintained by the Office of Information and Regulatory Affairs ("OIRA"), a division of OMB. The total annual burden hours and number of responses associated with Regulation 14A, as updated from time to time, can be found at https://www.reginfo.gov/public/do/PRAMain.

[144] 2020 Adopting Release at n.707.

avoidance of such an increase in the number of additional annual responses to the collection of information for Regulation 14A.

4. Incremental Change in Compliance Burden for Collection of Information

PRA Table 2 below illustrates our estimated incremental change to the total annual compliance burden for the Regulation 14A collection of information in hours and in costs[145] as a result of the Rule 14a-2(b)(9)(ii) conditions, as calculated in the PRA analysis for the 2020 Final Rules. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA Table 2. Increase in Burden Hours Resulting from the Rule 14a-2(b)(9)(ii) Conditions as Reflected in the 2020 Final Rules

Number of Estimated Responses (A)†	Total Increase in Burden Hours (B)††	Increase in Burden Hours Per Response (C) = (B)/(A)	Increase in Internal Hours (D) = (B) x 0.75	Increase in Professional Hours (E) = (B) x 0.25	Increase in Professional Costs (F) = (E) x $400
6,369	318,640	50†††	238,980	79,660	$31,864,000

† This number reflects an estimated increase of 783 annual responses to the existing Regulation 14A collection of information as a result of the Rule 14a-2(b)(9)(ii) conditions. *See supra* text accompanying note 144. The adopting release for the 2020 Final Rules indicated that 5,586 responses are filed annually. 2020 Adopting Release at 55151.

†† Calculated as the sum of annual burden increases estimated for PVABs (34,140 hours) and registrants (284,500 hours). *See supra* PRA Table 1.

††† The estimated increases in Columns (C), (D), and (E) are rounded to the nearest whole number.

Accordingly, we expect that our proposed amendments would allow the affected parties to avoid

[145] Our estimates in the adopting release for the 2020 Final Rules assumed that 75% of the burden would be borne by the company and 25% would be borne by outside counsel at $400 per hour. We recognized that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of the PRA analysis, we estimated that such costs would be an average of $400 per hour. This estimate was based on consultations with several registrants, law firms and other persons who regularly assist registrants in preparing and filing reports with the Commission. *See* 2020 Adopting Release at n.708.

these estimated burden hours and costs that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

5. Program Change and Revised Burden Estimates

PRA Table 3 summarizes the estimated change to the total annual compliance burden of the Regulation 14A collection of information, in hours and in costs, as a result of the Rule 14a-2(b)(9)(ii) conditions, as calculated in the PRA analysis for the 2020 Final Rules.

PRA Table 3. Paperwork Burden under the Rule 14a-2(b)(9)(ii) Conditions as Reflected in the 2020 Final Rules

	Current Burden			Program Change			Revised Burden		
Reg. 14A	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Increase in Responses (D)[±]	Increase in Internal Hours (E)[±±]	Increase in Professional Costs (F) [±±±]	Annual Responses	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)
	5,586	551,101	$73,480,012	783	238,980	$31,864,000	6,369	790,081	$105,344,012

[±] *See* Column (A) in PRA Table 2 noting an estimated increase of 783 annual responses to the Regulation 14A collection of information as a result of the Rule 14a-2(b)(9)(ii) conditions.

[±±]*See* Column (D) in PRA Table 2.

[±±±]From Column (F) in PRA Table 2.

Accordingly, we expect that our proposed amendments would allow the affected parties to avoid these estimated burden hours and costs that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File No. S7-17-21. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-17-21 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60

days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[146] the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act ("RFA")[147] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act, to consider the impact of those

[146] 5 U.S.C. 801 *et seq.*

[147] 5 U.S.C. 601 *et seq*.

rules on small entities. The Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") in accordance with Section 603 of the RFA.[148] It relates to the proposed amendments to the proxy solicitation exemptions in Rule 14a-2(b) and the prohibition on false or misleading statements in solicitations in Rule 14a-9 of Regulation 14A under the Exchange Act.

A. Reasons for, and Objectives of, the Proposed Action

The purpose of the proposed amendments to Rule 14a-2(b)(9) is to address concerns about the potential adverse effects of the 2020 Final Rules on the independence, cost and timeliness of proxy voting advice, while still achieving many of the intended benefits of the 2020 Final Rules with respect to the quality of the advice provided to clients. In addition, the purpose of the proposed amendment to Rule 14a-9 is to avoid any misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion. The reasons for, and objectives of, these proposed amendments are discussed in more detail in Sections I and II above.

B. Legal Basis

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 14, 23(a) and 36 of the Securities Exchange Act of 1934, as amended.

C. Small Entities Subject to the Proposed Amendments

The proposed amendments are likely to affect some small entities; specifically, those small entities that are either: (i) PVABs; or (ii) registrants conducting solicitations covered by proxy voting advice.

[148] 5 U.S.C. 603.

The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[149] For purposes of the RFA, under our rules, an issuer of securities or a person, other than an investment company or an investment adviser, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year.[150] An investment company, including a business development company,[151] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[152] An investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[153] We estimate that there are 660 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.[154] In

[149] 5 U.S.C. 601(6).

[150] *See* Exchange Act Rule 0-10(a) [17 CFR 240.0-10(a)].

[151] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64].

[152] *See* Investment Company Act Rule 0-10(a) [17 CFR 270.0-10(a)].

[153] *See* Advisers Act Rule 0-7(a) [17 CFR 275.0-7(a)].

[154] This estimate is based on staff analysis of issuers potentially subject to the final amendments, excluding co-registrants, with EDGAR filings on Form 10-K, or amendments thereto, filed during the calendar year of January 1, 2020 to December 31, 2020, or filed by September 1, 2021, that, if timely filed by the applicable deadline, would have been filed between January 1 and December 31, 2020. This analysis is based on data from XBRL filings, Compustat, Ives Group Audit Analytics, and manual review of filings submitted to the Commission.

addition, we estimate that, as of June 2021, there were 70 registered investment companies that would be subject to the proposed amendments that may be considered small entities.[155] Finally, we estimate that, as of June 2021, there were 548 investment advisers that may be considered small entities.[156] As discussed above, one of the three major PVABs in the United States—ISS—is a registered investment advisor.[157]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

If adopted, the proposed amendments would apply to small entities to the same extent as other entities, irrespective of size. Therefore, we expect that the nature of any benefits and costs associated with the proposed amendments would be similar for large and small entities. Accordingly, we refer to the discussion of the proposed amendments' economic effects on all affected parties, including small entities, in Section III above.[158] Consistent with that discussion, we anticipate that the economic benefits and costs likely would vary widely among small entities based on a number of factors, including the nature and conduct of their businesses, which makes it difficult to project the economic impact on small entities with precision.[159] Compliance with the proposed amendments may require the use of professional skills, including legal skills.

As a general matter, however, we recognize that any costs of the proposed amendments borne by the affected entities could have a proportionally greater effect on small entities, as they

[155] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data filed with the Commission (Forms N-Q and N-CSR) for the second quarter of 2021.

[156] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[157] *See supra* Section III.B.1.

[158] In particular, we discuss the estimated benefits and costs of the proposed amendments on affected parties in Section III.B. *supra.* We also discuss the estimated compliance burden associated with the proposed amendments for purposes of the PRA in Section IV *supra*.

[159] *See supra* Section III.C.

may be less able to bear such costs relative to larger entities. For example, as discussed in Section III.B.2, the proposed amendments to Rule 14a-2(b)(9) could potentially reduce the overall mix of information available to PVABs' clients as they assess proxy voting advice and make determinations about how to cast votes. Further, as noted in Section III.C, small institutions tend to rely more heavily on PVABs' proxy voting advice than larger institutions because those smaller institutions have more limited resources to conduct their own research. As such, to the extent the proposed amendments to Rule 14a-2(b)(9) reduce the overall mix of information available to PVABs' clients in connection with PVABs' proxy voting advice, the costs associated by such reduction would be borne disproportionately by smaller institutions. That said, as discussed in Section III.B.2, we expect that any such costs imposed on PVABs' clients would be mitigated to the extent that PVABs currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue proxy voting advice. However, we request comment on the extent to which PVABs' current internal policies and procedures would mitigate any costs imposed on PVABs' clients as a result of the proposed amendments to Rule 14a-2(b)(9).

We do not expect that PVABs or registrants would incur significant costs as a result of the proposed amendments to Rule 14a-2(b)(9). However, we request comment on how PVABs and registrants may be affected by the proposed amendments.

Finally, as discussed in Section III.B.2. above, we do not expect the proposed amendment to Rule 14a-9 would create any significant costs. However, we request comment on how the proposed amendment may affect PVABs, their clients and registrants.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap or conflict with

other Federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Exempting small entities from all or part of the requirements;
- Using performance rather than design standards; and
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities.

The purpose of these proposed amendments is to address concerns about the potential adverse effects of the 2020 Final Rules on the independence, cost and timeliness of proxy voting advice, while still achieving many of the intended benefits of the 2020 Final Rules with respect to the quality of the advice provided to PVABs' clients. The proposed amendments do not impose any compliance or reporting requirements; rather, they would remove certain conditions for PVABs of all sizes, including small entities. Our objectives would not be served by establishing different compliance or reporting requirements for small entities, exempting small entities from all or part of the requirements, or clarifying, consolidating or simplifying compliance and reporting requirements for small entities. Similarly, because the proposed amendments do not set forth any standards, our objectives would not be served by establishing performance rather than design standards.

VII. STATUTORY AUTHORITY

We are proposing the rule amendments contained in this release under the authority set

forth in Sections 3(b), 14, 23(a) and 36 of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSED RULE AMENDMENTS

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Amend § 240.14a-2 by revising paragraph (b)(9) to read as follows:

§240.14a-2 Solicitations to which §240.14a-3 to §240.14a-15 apply.

* * * * *

(b) * * *

(9) Paragraphs (b)(1) and (b)(3) of this section shall not be available to a person furnishing proxy voting advice covered by §240.14a-1(l)(1)(iii)(A) (“proxy voting advice business”) unless

the proxy voting advice business includes in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice prominent disclosure of:

(i) Any information regarding an interest, transaction, or relationship of the proxy voting advice business (or its affiliates) that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction, or relationship; and

(ii) Any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction, or relationship.

§ 240.14a-9 [Amended]

3. Amend § 240.14a-9 by removing paragraph e. of the Note.

By the Commission.

Dated: November 17, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.