SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 276

[Release Nos. 34-95266; IA-6068; File No. S7-17-21]

RIN: 3235-AM92

Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the Federal proxy rules governing proxy voting advice as part of our reassessment of those rules and in light of feedback from market participants on those rules, certain developments in the market for proxy voting advice, and comments received regarding the proposed amendments. The amendments 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. The release also rescinds certain guidance that the Commission issued to investment advisers about their proxy voting obligations. In addition, the amendments 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 discusses our views regarding the application of that prohibition to proxy voting advice, in particular with respect to statements of opinion.

DATES: *Effective date:* The amendments and the rescission of the guidance are effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Valian Afshar, Special Counsel, Office of Mergers and Acquisitions, Division of Corporation Finance, at (202) 551-3440, regarding the

amendments, and Thankam A. Varghese, Senior Counsel, Chief Counsel's Office, Division of Investment Management, at (202) 551-6825, regarding the rescission of the guidance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting 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.

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I. INTRODUCTION

In 2020, the Securities and Exchange Commission (the "Commission") 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

[2] *See Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-89372 (July 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.*

mechanism by which they can reasonably be expected to become aware of any 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").

- Adopted Note (e) to Rule 14a-9, which prohibits false or misleading statements, to include examples of material misstatements or omissions related 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," may, depending upon particular facts and circumstances, be misleading within the meaning of the rule.[3]

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) became effective on December 1, 2021.[4]

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.[5] In the adopting release for the 2020 Final Rules (the "2020 Adopting Release"), the Commission recognized the "important and prominent role" that PVABs play in

[3] 17 CFR 240.14a-9, note (e).

[4] *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.). In addition, on Oct. 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 18 (discussing the Division of Corporation Finance's June 1, 2021 statement).

[5] 2020 Adopting Release at 55082.

the proxy voting process[6] and adopted the 2020 Final Rules, in part, to address certain concerns that "registrants, investors, and others have expressed . . . about the role of [PVABs]."[7] 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 independent proxy voting advice.[8]

After the Commission adopted the 2020 Final Rules, however, institutional investors and other PVAB clients continued to express strong concerns about the rules' impact on their ability to receive independent proxy voting advice in a timely manner. Furthermore, PVABs 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. The Commission subsequently determined that it was 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 passing on higher costs to their clients. As such, in November 2021, the Commission proposed the following changes to the rules governing proxy voting advice (the "2021 Proposed Amendments"):

- Amend Rule 14a-2(b)(9) to remove the Rule 14a-2(b)(9)(ii) conditions and 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; and

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

[7] *Id.* at 55085.

[8] *Id.* at 55082, 55112.

- Amend Rule 14a-9 to remove Note (e) to that rule.[9]

The 2021 Proposed Amendments would not affect other aspects of the 2020 Final Rules, which would remain in place and effective as to PVABs and their advice.[10] As such, under the 2021 Proposed Amendments, proxy voting advice would remain a solicitation subject to the proxy rules.[11] 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 requirement.[12] Finally, although the 2021 Proposed Amendments would remove Note (e) to Rule 14a-9, material misstatements of fact in, and omissions of material fact from, proxy voting advice would remain subject to liability under that rule.[13] The proposing release for the 2021 Proposed Amendments (the "2021 Proposing Release") also requested comment as to whether the Commission should rescind or revise the supplemental guidance that it issued to investment advisers in 2020 about their proxy voting obligations (the "Supplemental Proxy Voting Guidance")[14] because it was prompted, in part, by the adoption of the Rule 14a-2(b)(9)(ii) conditions.[15] Finally, the 2021 Proposing Release provided a discussion of the application of Rule 14a-9 to proxy voting advice, specifically with

[9] *See Proxy Voting Advice*, Release No. 34-93595 (Nov. 17, 2021) [86 FR 67383 (Nov. 26, 2021)] ("2021 Proposing Release").

[10] *Id.* at 67384.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Release No. IA-5547 (July 22, 2020) [85 FR 55155 (Sept. 3, 2020)].

[15] 2021 Proposing Release at 67388-89.

respect to a PVAB's statements of opinion.[16]

We received a number of comments in response to the 2021 Proposed Amendments.[17] After considering the public comments, we are adopting the 2021 Proposed Amendments, as proposed, for the reasons set forth below. Consistent with the proposal, we are amending Rules 14a-2 and 14a-9 to rescind the Rule 14a-2(b)(9)(ii) conditions (as well as the related safe harbors and exclusions set forth in Rules 14a-2(b)(9)(iii) through (vi)) and delete Note (e) to Rule 14a-9. In addition, we are rescinding the Supplemental Proxy Voting Guidance. Finally, in Section II.B.3 below, we reiterate our discussion regarding the application of Rule 14a-9 to proxy voting advice, specifically with respect to a PVAB's statements of opinion.[18]

These final amendments reflect the fact that our thinking has evolved with respect to the Rule 14a-2(b)(9)(ii) conditions and Note (e) to Rule 14a-9, informed, in part, by the concerns expressed by PVABs' clients and other investors that were among the primary intended beneficiaries of the 2020 Final Rules. The Rule 14a-2(b)(9)(ii) conditions and Note (e) reflected an effort to balance competing policy concerns. As initially proposed, Rule 14a-2(b)(9) would have required that PVABs allow registrants multiple opportunities to review proxy voting advice

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[16] *Id.* at 67390.

[17] *See generally* letters submitted in connection with the 2021 Proposed Amendments, *available at* https://www.sec.gov/comments/s7-17-21/s71721.htm. Unless otherwise specified, all references in this release to comment letters are to comments submitted on the 2021 Proposed Amendments.

[18] On June 1, 2021, the Division of Corporation Finance issued a statement that it would not recommend enforcement action based on the 2020 Final Rules (or on a related 2019 interpretive release discussed further *infra* note 165 and accompanying text) during the period in which the Commission was 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-statement/corp-fin-proxy-rules-2021-06-01. As the Commission noted in the 2021 Proposing Release, this staff statement did not alter PVABs' obligation to comply with the Rule 14a–2(b)(9) conditions by Dec. 1, 2021. *See* 2021 Proposing Release at 67393, n.120; *see also infra* note 278. In light of today's action, we hereby rescind the staff's statement.

and provide feedback on such advice in advance of its distribution to PVABs' clients. In declining to adopt those proposed advance review and feedback provisions in the 2020 Final Rules, the Commission recognized the significant concerns raised by investors and other commenters that the proposed rules would have adverse effects on the cost, timeliness, and independence of proxy voting advice.[19] The Commission responded to those concerns by instead adopting the modified, more principles-based conditions in Rule 14a-2(b)(9)(ii) and the related safe harbors.[20]

The Commission reasonably determined at the time it adopted the 2020 Final Rules that the revised Rule 14a-2(b)(9)(ii) conditions struck an appropriate balance between the risks raised by commenters and the Commission's interest in facilitating more informed proxy voting decisions. We have revisited our analysis of those issues, however, and are now striking a different and improved policy balance. We believe this new policy balance better alleviates the costs and risks to PVABs, as compared to the 2020 Final Rules, and better addresses PVAB clients' and other investors' concerns about receiving timely and independent advice from PVABs. In particular, we are no longer persuaded that the potential benefits of those conditions sufficiently justify the risks they pose to the cost, timeliness, and independence of proxy voting advice and believe that the final amendments strike a better policy balance. Several factors support the reasonableness of our analysis. For example, it is supported by the continued, strong opposition to the Rule 14a-2(b)(9)(ii) conditions from many institutional investors and other PVAB clients, as well as many of the commenters on the 2021 Proposed Amendments, who have continued to raise concerns that the 2020 Final Rules would have adverse effects on the cost,

[19] 2020 Adopting Release at 55107-08.

[20] *Id.*

timeliness, and independence of proxy voting advice. Our analysis is also supported by certain voluntary practices of PVABs. We believe those practices are likely, at least to some extent, to advance the goals underlying the Rule 14a-2(b)(9)(ii) conditions, thereby providing institutional investors and other PVAB clients with some of the benefits that those conditions were expected to produce while avoiding the potentially significant associated costs.

The Commission also determined at the time it adopted the 2020 Final Rules that the addition of Note (e) to Rule 14a-9 would clarify the application of the rule to proxy voting advice while balancing concerns regarding heightened legal uncertainty and litigation risk for PVABs. We now conclude, however, that rather than reducing legal uncertainty and confusion, the addition of Note (e) has unnecessarily exacerbated it by creating a risk of confusion regarding the application of Rule 14a-9 to proxy voting advice.[21]

We emphasize that the final amendments do not represent a wholesale reversal of the 2020 Final Rules. Proxy voting advice generally remains a solicitation subject to the proxy rules, including liability under Rule 14a-9 for material misstatements or omissions of fact. Further, 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 will still have to satisfy Rule 14a-2(b)(9)'s conflicts of interest disclosure requirements. As we explain in greater detail in Section II.B.3 below, our deletion of Note (e) does not affect the scope of Rule 14a-9 or its application to proxy voting advice. As with any other person engaged in a solicitation as defined in Rule 14a-1(l), a PVAB may be liable under Rule 14a-9 for a material misstatement of fact, or an omission of material fact, including, depending on the facts and circumstances, with regard to its methodology, sources of information, or conflicts of interest.

[21] *See infra* Section II.B.3.

The intent of the final amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of their proxy voting advice and avoid misperceptions[22] regarding the application of Rule 14a-9 liability to proxy voting advice, while also preserving investors' confidence in the integrity of such advice. We believe that the final amendments, in combination with the unaffected portions of the 2020 Final Rules, strike a more appropriate balance than the 2020 Final Rules, as originally adopted, because they will address PVAB clients' and other investors' concerns about potential impediments to the timely provision of independent proxy voting advice.

II. DISCUSSION OF FINAL AMENDMENTS

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

The 2020 Final Rules amended Rule 14a-2(b) by adding paragraph (9),[23] which sets forth 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.[24] Rule 14a-2(b)(9)(i) requires PVABs to provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice.[25] 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

[22] We discuss these misperceptions in more detail in Section II.B.3 below. *See infra* notes 221-222 and accompanying text.

[23] 17 CFR 240.14a-2(b)(9).

[24] 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, 66525 & n.68 (Dec. 4, 2019)] ("2019 Proposing Release").

[25] 17 CFR 240.14a-2(b)(9)(i).

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).[26]

In addition to those 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.[27] Further, Rules 14a-2(b)(9)(v) and (vi) contain exclusions from the Rule 14a-2(b)(9)(ii) conditions.[28] 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.[29]

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[26] 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 were included in the Commission's 2019 proposed rules (the "2019 Proposed Rules"). Under the advance review and feedback conditions in the 2019 Proposed Rules, a PVAB would have been required 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 to these comments, 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.

[27] 17 CFR 240.14a-2(b)(9)(iii) and (iv).

[28] 17 CFR 240.14a-2(b)(9)(v) and (vi).

[29] *Id.*

The Commission adopted Rule 14a-2(b)(9)(ii)(A) to help ensure that registrants are timely informed of proxy voting advice that bears on the solicitation of their shareholders.[30] The Commission stated in the 2020 Adopting Release that the rule was intended as a means to "further the goal of ensuring that [PVABs'] clients have more complete, accurate, and transparent information to consider when making their voting decisions" by facilitating opportunities for registrants to review and respond to proxy voting advice.[31] 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.[32] 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 PVABs' clients, including investment advisers voting shares on behalf of their own clients, to consider registrants' views along with the proxy voting advice and before making their voting determinations.[33] 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.[34]

[30] 2020 Adopting Release at 55109.

[31] *Id.*

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

[33] *Id.*

[34] *Id.* at 55113.

1. Proposed Amendments

In the 2021 Proposing Release, the Commission proposed to amend Rule 14a-2(b)(9) by rescinding the Rule 14a-2(b)(9)(ii) conditions. The Commission noted that investors and others continued to express significant concerns that the Rule 14a-2(b)(9)(ii) conditions would increase PVABs' compliance costs and impair the independence and timeliness of their proxy voting advice and that such effects are not justified by corresponding investor protection benefits.[35] Further, the Commission described PVABs' efforts to develop industry-wide best practices, in addition to certain of their existing business practices, and noted that those practices could address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. The Commission also observed that, although these practices differ from the Rule 14a-2(b)(9)(ii) conditions, they could provide PVABs' 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.[36]

The Commission also proposed to 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.[37] Because the other paragraphs of Rule 14a-2(b)(9) would all be deleted, the Commission proposed to redesignate the conflicts of interest disclosure condition set forth in Rule 14a-2(b)(9)(i) as Rule 14a-2(b)(9).[38] The Commission stated that the substance of that condition would otherwise remain unchanged.[39]

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[35] 2021 Proposing Release at 67385-86.

[36] *Id.* at 67387.

[37] *Id.*

[38] *Id.* at 67387, n.55.

[39] *Id.*

2. Comments Received

Commenters expressed a range of views on the proposed amendments to Rule 14a-2(b)(9). A number of commenters supported rescinding the Rule 14a-2(b)(9)(ii) conditions and deleting paragraphs (iii) through (vi) of Rule 14a-2(b)(9).[40] Those supporting commenters included some institutional investors[41] and some organizations that represent institutional investors and investment advisers,[42] among others. Several commenters reiterated the concerns regarding the 2020 Final Rules that prompted the Commission to issue the 2021 Proposed Amendments, including expressing concern that the Rule 14a-2(b)(9)(ii) conditions would impair the independence of proxy voting advice,[43] impede the timeliness of proxy voting

[40] *See* letters from Fran Seegull, President, U.S. Impact Investing Alliance (Dec. 17, 2021) ("Alliance"); Anonymous (Nov. 20, 2021) ("Anonymous 1"); Ben J., Administrative Services Manager (Dec. 7, 2021) ("Ben J."); Stephen Hall, Legal Director and Securities Specialist, and Jason Grimes Senior Counsel, Better Markets, Inc. (Dec. 27, 2021) ("Better Markets"); Marcie Frost, Chief Executive Officer, California Public Employees' Retirement System (Dec. 27, 2021) ("CalPERS"); Jeff Mahoney, General Counsel, Council of Institutional Investors (Dec. 24, 2021) ("CII"); Ron Baker, Executive Director, Colorado Public Employees' Retirement Association (Dec. 27, 2021) ("CO Retirement"); Dan Jamieson (Dec. 7, 2021) ("D. Jamieson"); Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis (Dec. 27, 2021) ("Glass Lewis"); Gail C. Bernstein, General Counsel, Investment Adviser Association (Dec. 27, 2021) ("IAA"); Kerrie Waring, Chief Executive Officer, ICGN (Dec. 22, 2021) ("ICGN"); Matt Thornton, Associate General Counsel, and Susan Olson General Counsel, Investment Company Institute (Dec. 23, 2021) ("ICI"); Gary Retelny President and CEO, Institutional Shareholder Services Inc. (Dec. 22, 2021) ("ISS"); Justin Giorgio, Doctorate of Computer Science (Nov. 20, 2021) ("J. Giorgio"); Jennifer Han Executive Vice President, Chief Counsel and Head of Regulatory Affairs, Managed Funds Association (Dec. 20, 2021) ("MFA"); Melanie Senter Lubin, NASAA President, Maryland Securities Commissioner (Dec. 27, 2021) ("NASAA"); Thomas P. DiNapoli, State Comptroller, New York State Common Retirement Fund (Dec. 27, 2021) ("New York Comptroller"); Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System (Dec. 23, 2021) ("Ohio Public Retirement"); Richard A. Kirby and Beth-ann Roth, RK Invest Law, PBC ESG Legal Services, Inc. (Dec. 27, 2021) ("RK Invest Law and ESG Legal Services"); Donna F. Anderson, Vice President, Head of Corporate Governance, and Bob Grohowski, Managing Legal Counsel, Head of Legislative and Regulatory Affairs, T. Rowe Price (Dec. 21, 2021) ("TRP"); Lisa Woll, CEO, US SIF: The Forum for Sustainable and Responsible Investment (Dec. 23, 2021) ("US SIF"); Theresa Whitmarsh, Chief Executive Officer, Washington State Investment Board (Dec. 22, 2021) ("Washington State Investment").

[41] *See, e.g.*, letters from CalPERS; CO Retirement; New York Comptroller; Ohio Public Retirement; TRP; Washington State Investment.

[42] *See, e.g.*, letters from CII; ICGN; ICI; IAA; MFA.

[43] *See* letters from Alliance; CO Retirement; Glass Lewis; IAA; ICGN; ISS; NASAA; New York Comptroller; Ohio Public Retirement; US SIF; Washington State Investment.

advice,[44] and increase PVABs' compliance costs.[45] For example, one commenter asserted that the Rule 14a-2(b)(9)(ii) conditions "threaten[] the independence of the proxy advisory process by requiring that their voting advice be made available to corporate management at or prior to the time the advice is sent to their clients."[46] Another commenter stated that those conditions "disrupt[] the preparation and delivery of proxy voting advice to fund managers and increases compliance costs," noting that PVABs "may engage with hundreds of issuers regarding thousands of shareholder proposals during a critical shareholder season" and that "additional compliance burdens not only muddle the timely delivery of materials to fund managers making it difficult to use the advice in advance of a shareholder meeting, but also increase compliance costs which get passed on to clients."[47]

Other commenters questioned the necessity of the Rule 14a-2(b)(9)(ii) conditions, asserting that they would not improve the accuracy of PVABs' advice.[48] One commenter that is a PVAB stated that PVABs already are incentivized to engage with registrants regarding their proxy voting advice in order to provide potentially useful information to their clients.[49] Some commenters asserted that registrants have ways to express their views on proxy voting advice other than via the Rule 14a-2(b)(9)(ii) conditions, such as by publicly filing additional soliciting materials,[50] with one of those commenters stating the types of investors that utilize proxy voting

[44] *See* letters from CO Retirement; Glass Lewis; IAA; ICI; ISS; MFA; NASAA; New York Comptroller; US SIF.

[45] *See id.*

[46] *See* letter from Alliance.

[47] *See* letter from MFA.

[48] *See* letters from CalPERS; ICI; TRP; US SIF.

[49] *See* letter from Glass Lewis.

[50] *See* letters from Glass Lewis; NASAA.

advice are sophisticated enough to know where to find registrants' responses to such advice.[51] Further, several commenters asserted that PVABs' existing practices already address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions[52] and indicated that they expect PVABs to continue to maintain those practices even if the Rule 14a-2(b)(9)(ii) conditions are rescinded.[53]

Other commenters questioned, as an initial matter, whether the adoption of the Rule 14a-2(b)(9)(ii) conditions was warranted. For example, some commenters noted that although the Rule 14a-2(b)(9)(ii) conditions were intended to benefit investors, most investors did not request or support the adoption of those conditions.[54] Other commenters asserted that the 2020 Adopting Release failed to identify or provide credible evidence of a market failure.[55] Some commenters also highlighted the low prevalence of errors in proxy voting advice historically, including by reference to data the Commission included in the 2019 Proposing Release that indicated an approximately 0.3% error rate in proxy voting advice.[56] One commenter expressed skepticism that the Rule 14a-2(b)(9)(ii) conditions would significantly improve the accuracy of proxy voting advice.[57] Another commenter observed that it has not experienced a significant increase in registrant outreach regarding disputes over proxy voting advice since the adoption of the 2020 Final Rules, including through the Report Feedback Service that Glass Lewis

[51] *See* letter from NASAA.

[52] *See* letters from CII; Glass Lewis; IAA; ICI; ISS; Ohio Public Retirement.

[53] *See* letters from CII; ICI; Ohio Public Retirement.

[54] *See* letters from CII; Ohio Public Retirement.

[55] *See* letters from Better Markets; Glass Lewis; US SIF.

[56] *See* letters from Better Markets; CalPERS; ICI; Ohio Public Retirement; US SIF; Washington State Investment.

[57] *See* letter from ICI.

implemented and made available to registrants before the Commission adopted the 2020 Final Rules and continues to make available.[58] Other commenters expressed concern that the Rule 14a-2(b)(9)(ii) conditions inappropriately privilege the views of registrants' management.[59] For example, one of these commenters noted that the Rule 14a-2(b)(9)(ii) conditions "tilt the playing field in favor of company management and create unequal access to the proxy solicitation process" because those conditions "do[] not require a PVAB to afford these opportunities to any other stakeholders," including shareholder proponents.[60]

In addition to expressing concerns regarding the Rule 14a-2(b)(9)(ii) conditions, some commenters highlighted the potential benefits of rescinding those conditions as proposed. For example, one commenter stated that the 2021 Proposed Amendments would better ensure that investors have access to clear, timely, and impartial proxy voting advice and that the 2021 Proposed Amendments are appropriately tailored and responsive to investor concerns.[61] Another commenter asserted that rescinding the Rule 14a-2(b)(9)(ii) conditions would give PVABs and investors flexibility to select mechanisms that best serve their needs and market conditions.[62]

Finally, some of the commenters that supported the 2021 Proposed Amendments expressed concerns regarding the legal basis or constitutionality of the Rule 14a-2(b)(9)(ii) conditions. Several commenters maintained that the Rule 14a-2(b)(9)(ii) conditions exceed the

[58] *See* letter from Ohio Public Retirement. This commenter also noted that much of the registrant feedback that it had observed "involve[d] differences of opinion regarding the methodologies used by our proxy advisory firm, which is less useful in helping us to formulate our proxy votes." *Id.*

[59] *See* letters from Alliance; NASAA.

[60] *See* letter from NASAA.

[61] *See* letter from Alliance.

[62] *See* letter from CII.

Commission's authority under Section 14(a) of the Exchange Act because proxy voting advice does not constitute a "solicitation."[63] Other commenters asserted that the Rule 14a-2(b)(9)(ii) conditions could violate the First Amendment.[64]

A number of commenters opposed rescinding the Rule 14a-2(b)(9)(ii) conditions and deleting paragraphs (iii) through (vi) of Rule 14a-2(b)(9).[65] Several of those commenters expressed concern regarding the process by which the 2021 Proposed Amendments were formulated, including by comparison to the process by which the 2020 Final Rules were adopted. Those process-based concerns generally were based on commenters' assertions that the 2021 Proposed Amendments were not justified by sufficient evidence, data, or changes in the market

[63] *See* letters from CII; ISS; RK Invest Law and ESG Legal Services.

[64] *See* letters from D. Jamieson; Glass Lewis; ISS; RK Invest Law and ESG Legal Services.

[65] *See* letters from John Endean, President, American Business Conference (Dec. 23, 2021) ("ABC"); Kyle Isakower, SVP of Regulatory and Energy Policy, American Council for Capital Formation (Dec. 22, 2021) ("ACCF"); Anonymous (Dec. 16, 2021) ("Anonymous 2"); Anne Smith (Dec. 27, 2021) ("A. Smith"); Lynnette Fallon, Executive Vice President HR/Legal, General Counsel and Secretary, Axcelis Technologies, Inc. (Dec. 20, 2021) ("Axcelis"); Michele Nellenbach, Vice President of Strategic Initiatives, Bipartisan Policy Center (Jan. 4, 2022) ("BPC"); Carlo Passeri, Senior Director of Capital Markets and Financial Services Policy, Biotechnology Innovation Organization (Dec. 23, 2021) ("BIO"); Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (Dec. 23, 2021) ("BRT"); Benjamin Zycher, Senior Fellow, American Enterprise Institute (Dec. 23, 2021) ("B. Zycher"); Coalition of Business Trades (Dec. 23, 2021) ("CBT"); Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Nov. 30, 2021) ("CCMC I"); Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Dec. 23, 2021) ("CCMC II"); Ani Huang, President and CEO, Center On Executive Compensation (Dec. 27, 2021) ("CEC"); Eric Mills (Dec. 27, 2021) ("E. Mills"); Mark R. Allen, Executive Vice President, General Counsel and Secretary, Member of the Executive Committee, FedEx Corporation (Dec. 23, 2021) ("FedEx"); Frederick A. Brightbill, CEO and Chairman of the Board, MasterCraft Boat Holdings, Inc. (Dec. 17, 2021) ("MasterCraft"); Chris Netram, Vice President, Tax and Domestic Economic Policy, National Association of Manufacturers (Dec. 24, 2021) ("NAM"); John A. Zecca, Executive Vice President, Chief Legal and Regulatory Officer, Nasdaq, Inc. (Dec. 27, 2021) ("Nasdaq"); Stephen C. Taylor and John W. Chisholm, Chairman, President, CEO, and Lead Independent Director, Natural Gas Services Group, Inc. (Dec. 27, 2021) ("Natural Gas Services"); Gary A. LaBranche, FASAE, CAE, President and CEO, National Investor Relations Institute (Dec. 27, 2021) ("NIRI"); Wayne Winegarden, Ph.D., Sr. Fellow, Business and Economics Pacific Research Institute (Dec. 22, 2021) ("Pacific Research"); J.W. Verret, George Mason University Antonin Scalia Law School (Dec. 21, 2021) ("Prof. Verret"); Paul Rose and Christopher J. Walker, Professors of Law, The Ohio State University (Dec. 22, 2021) ("Profs. Rose and Walker"); Bryan Steil and Bill Huizenga, Members of Congress (Feb. 2, 2022) ("Reps. Steil and Huizenga"); Ted Allen, Vice President, Policy and Advocacy, Society for Corporate Governance (Dec. 30, 2021) ("SCG"); Tim Doyle, Founder and Principle, Doyle Strategies, LLC (Dec. 27, 2021) ("T. Doyle"); Douglas A. Cifu, Chief Executive Officer, Virtu Financial, Inc. (Dec. 20, 2021) ("Virtu").

for proxy voting advice and that the Commission lacked a reasonable basis for the 2021 Proposed Amendments because the Commission proposed those amendments before the 2020 Final Rules took effect.[66]

Similarly, some commenters submitted a report that analyzed and highlighted the benefits of the 2020 Final Rules as support for the proposition that those rules were adopted pursuant to a careful, methodical process and should not be amended at this time.[67] Other commenters expressed concern that registrants and investors may have changed their practices in reliance on the Commission's adoption of the 2020 Final Rules,[68] with one of these commenters indicating that it and other registrants have been preparing for the effectiveness of the 2020 Final Rules.[69] One commenter asserted that the 2021 Proposing Release did not take into account the factors that Congress intended the Commission to consider with respect to Section 14(a) of the Exchange Act.[70] Finally, several commenters raised concerns regarding the 30-day comment period specified in the 2021 Proposing Release, including concerns that such comment period did not provide the public sufficient time to consider and comment on the 2021 Proposed Amendments.[71]

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[66] *See* letters from ABC; ACCF; BIO; BRT; B. Zycher; CBT; CCMC II; CEC; E. Mills; NAM; Natural Gas Services; NIRI; Pacific Research; Prof. Verret; Reps. Steil and Huizenga; SCG; T. Doyle; Virtu.

[67] *See* letters from CCMC II; Profs. Rose and Walker.

[68] *See* letters from NAM; Nasdaq; Natural Gas Services; Prof. Verret.

[69] *See* letter from Natural Gas Services.

[70] *See* letter from CCMC II.

[71] *See* letters from ABC; American Securities Association (Dec. 3, 2021); BIO; CCMC I; CCMC II; CEC; IAA; NIRI; Prof. Verret; SCG; Reps. Steil and Huizenga; Patrick McHenry, Ranking Member, House Committee on Financial Services, and Pat Toomey, Ranking Member, Senate Committee on Banking, Housing, and Urban Affairs (Jan. 10, 2022) ("Rep. McHenry and Sen. Toomey"); T. Doyle. We believe that the 30-day comment period for the 2021 Proposed Amendments provided adequate opportunity for interested parties to share their views, especially given the targeted nature of such amendments. We have reviewed and considered the numerous comment letters

In addition to expressing concern about the process by which the 2021 Proposed Amendments were formulated, some commenters asserted that rescinding the Rule 14a-2(b)(9)(ii) conditions would have a negative impact on proxy voting advice. For example, some commenters stated that rescinding the Rule 14a-2(b)(9)(ii) conditions would decrease the transparency and accuracy of proxy voting advice and confidence in the proxy process generally.[72] Relatedly, another commenter asserted that the Rule 14a-2(b)(9)(ii) conditions would improve the accuracy and reliability of proxy voting advice.[73] Other commenters expressed concern that rescinding the Rule 14a-2(b)(9)(ii) conditions would jeopardize the Commission's stated goals for the 2020 Final Rules[74] and would decrease the amount of information available to investors.[75]

Further, some commenters asserted that without the Rule 14a-2(b)(9)(ii) conditions, registrants will struggle to address PVABs' advice in a timely manner before a shareholder meeting.[76] One of these commenters asserted that if registrants do not have an opportunity to timely address the logic behind a voting recommendation, PVABs can "essentially unilaterally control[] the outcome of" shareholder votes.[77] Some commenters also cited support from

received in response to the proposal, including the five comment letters submitted after the comment period deadline. *See* letters from BPC; Reps. Steil and Huizenga; SCG; Rep. McHenry and Sen. Toomey; S. Milloy.

[72] *See* letters from BPC; CEC; E. Mills; MasterCraft; NAM; Nasdaq; Natural Gas Services; Pacific Research.

[73] *See* letter from NAM.

[74] *See* letter from Profs. Rose and Walker.

[75] *See* letter from B. Zycher.

[76] *See* letters from Axcelis; CEC; Natural Gas Services; T. Doyle.

[77] *See* letter from Axcelis.

registrants, investors, and others for the Rule 14a-2(b)(9)(ii) conditions, including certain surveys,[78] and the historically bipartisan support for reforming the proxy process.[79]

Some commenters maintained that the Commission should retain the Rule 14a-2(b)(9)(ii) conditions due to continued concerns regarding errors in proxy voting advice. For example, some commenters asserted that a 2021 study (the "ACCF study") demonstrates the continued prevalence of errors in, and disagreements by registrants with, proxy voting advice.[80] According to the ACCF study, there were 50 instances in 2021 in which registrants filed supplemental proxy materials to dispute the data or analysis in a PVAB's proxy voting advice, an increase from 42 such instances in 2020.[81] That study also asserted that the Rule 14a-2(b)(9)(ii) conditions provide a better process for registrants to access and respond to proxy voting advice than the current process in which registrants "who receive a proxy advisor recommendation where they believe there is an error or serious disagreement must submit a supplemental filing to their proxy statement and take on additional anti-fraud liability."[82] Another commenter cited a December 2019 survey of compensation and human resource professionals at 105 public registrants (the "Willis Towers Watson survey") in which 59% of respondents "considered

[78] *See* letter from Nasdaq. This commenter cited a 2020 proxy season survey indicating that registrants would utilize the Rule 14a-2(b)(9)(ii) conditions (the "CCMC and Nasdaq survey") and a survey conducted in Nov. 2019 indicating that retail investors were in favor of providing registrants with an opportunity to review and provide feedback on proxy voting advice (the "Spectrem Group survey"). *Id.*

[79] *See* letter from BPC.

[80] *See* letters from ACCF; CCMC II; CEC; Natural Gas Services; NIRI; Profs. Rose and Walker.

[81] *See* AMERICAN COUNCIL FOR CAPITAL FORMATION, PROXY ADVISORS ARE STILL A PROBLEM: 2021 PROXY SEASON ANALYSIS SHOWS COMPANIES CONTINUE TO REPORT SIMILAR RATE OF ERRORS DESPITE HEIGHTENED SCRUTINY 9-10 (Dec. 2021) ("ACCF Study"), *available at* https://accf.ftlbcdn.net/wp-content/uploads/2021/12/ACCF_proxy_advisor_rule_report_2021-FINAL.pdf.

[82] *Id.* at 11-12.

factual errors to be a big problem under the current system" of proxy voting advice.[83] In addition, several commenters highlighted their own experience with, or anecdotal evidence of, inaccurate or misleading proxy voting advice and described the burdens associated with responding to and correcting such advice in a timely manner.[84] Another commenter expressed the view that the prevalence of errors in and omissions from proxy voting advice has not changed since 2020, citing a December 2019 survey of its members (the "SCG survey").[85] Several other commenters asserted that the 2020 Final Rules would allow registrants to more efficiently and effectively communicate their perspective on errors in and disagreements with proxy voting advice.[86]

Other commenters disputed the concerns expressed regarding the Rule 14a-2(b)(9)(ii) conditions that the 2021 Proposing Release described. Some commenters asserted that the Rule 14a-2(b)(9)(ii) conditions would not disproportionately or negatively impact the independence, cost, or timeliness of proxy voting advice.[87] One commenter stated that the Commission's concern for the timeliness and cost of proxy voting advice is misplaced given that the 2020 Final

[83] *See* letter from T. Doyle. Mr. Doyle's comment letter on the 2019 Proposed Rules also cited this same Dec. 2019 survey. *See* letter in response to the 2019 Proposing Release of T. Doyle (Feb. 3, 2020), *available at* https://www.sec.gov/comments/s7-22-19/s72219-6742431-207767.pdf.

[84] *See* letters from Nasdaq; Natural Gas Services.

[85] *See* letter from SCG. SCG's membership is comprised "of more than 3,400 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry." *Id.* SCG's comment letter on the 2019 Proposed Rules also cited this same Dec. 2019 survey. *See* letter in response to the 2019 Proposing Release of SCG (Feb. 3, 2020), *available at* https://www.sec.gov/comments/s7-22-19/s72219-6743687-207853.pdf. The Dec. 2019 survey of 134 members found that 42% of respondents answered affirmatively when asked whether they were "aware of any factual errors, omissions of material facts, or errors in analysis in the last three years." *Id.*

[86] *See* letters from ACCF; Natural Gas Services; T. Doyle.

[87] *See* letters from ABC; BIO; BRT; NAM; T. Doyle.

Rules did not require advance review of proxy voting advice.[88] This commenter also disputed the notion that the Rule 14a-2(b)(9)(ii) conditions would increase costs for PVABs.[89] Other commenters asserted that PVABs' compliance costs associated with the Rule 14a-2(b)(9)(ii) conditions did not support rescinding those conditions in light of the duopolistic nature of the proxy voting advice market.[90] Finally, some commenters stated that, even if the Rule 14a-2(b)(9)(ii) conditions increase the costs of proxy voting advice, such costs are justified and preferred by investors if they ensure accurate advice and give registrants a chance to respond to such advice in a timely manner.[91]

Several commenters took issue with the Commission's discussion in the 2021 Proposing Release of PVABs' existing practices. Some of those commenters asserted that PVABs' current practices are insufficient substitutes for the Rule 14a-2(b)(9)(ii) conditions, which, in the view of these commenters, provide more comprehensive and consistent standards.[92] Other commenters asserted that the Commission's discussion of PVABs' policies and procedures does not support rescission of the Rule 14a-2(b)(9)(ii) conditions.[93] One commenter asserted that because ISS and Glass Lewis already provide registrants access to their advice at the same time that it is disseminated to their clients, compliance with the Rule 14a-2(b)(9)(ii) conditions should not be

[88] *See* letter from Axcelis.

[89] *See id.*

[90] *See* letters from BIO; B. Zycher.

[91] *See* letters from Axcelis; Natural Gas Services.

[92] *See* letters from BIO; BRT; CEC; NAM; Nasdaq; NIRI; SCG; T. Doyle.

[93] *See* letters from CCMC II; Prof. Verret.

burdensome.[94] Other commenters expressed concern that without the Rule 14a-2(b)(9)(ii) conditions, PVABs could change their practices to the detriment of their clients.[95]

Similarly, some commenters expressed specific concerns regarding ISS' practices. One commenter asserted that ISS has increasingly resisted making changes to its proxy voting advice in response to registrant feedback and has been less inclined to engage with registrants regarding its advice.[96] Other commenters stated that ISS has recently reduced communications and transparency below what it would have provided prior to the adoption of the 2020 Final Rules by ending its practice of providing S&P 500 companies with the opportunity to review and provide feedback on draft proxy voting advice.[97] Some of these commenters highlighted the fact that ISS still provides registrants in jurisdictions other than the U.S. with this opportunity.[98] Finally, one commenter asserted that, because ISS no longer provides U.S. registrants with an opportunity to review draft proxy voting advice, more errors in proxy voting advice now go uncorrected.[99]

One commenter referenced broader, policy-based justifications for opposing the proposed amendments to Rule 14a-2(b)(9). For example, the commenter expressed concern that rescinding the Rule 14a-2(b)(9)(ii) conditions would exempt PVABs from the transparency standards that the Commission applies to other similarly-situated market participants, such as exchanges, registrants, and broker-dealers.[100] This commenter also highlighted the duopolistic

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[94] *See* letter from CEC.

[95] *See* letters from BIO; SCG.

[96] *See* letter from CEC.

[97] *See* letters from CCMC II; CEC; Nasdaq; SCG.

[98] *See* letters from Nasdaq; SCG.

[99] *See* letter from SCG.

[100] *See* letter from BIO.

nature of the proxy voting advice market as a justification for additional regulation, rather than de-regulation, of PVABs to ensure transparency.[101]

Finally, some commenters expressed concerns regarding potential consequences of rescinding the Rule 14a-2(b)(9)(ii) conditions. One commenter expressed concern that, without these conditions, the Commission would allow PVABs to be exempt from the proxy rules' information and filing requirements without sufficient alternative investor protection mechanisms to justify that exemption.[102] Another commenter expressed concern that rescinding the Rule 14a-2(b)(9)(ii) conditions would reduce the transparency of proxy voting advice and allow PVABs to increase the relative weight of their political preferences, such as by introducing environmental, social, and governance ("ESG") objectives.[103] Similarly, one commenter cited a 2021 research paper that found that PVABs' advice favors ESG proposals that may not necessarily be in the best economic interests of all investors.[104] Another commenter asserted that although it appreciated the Commission's retention of the conflicts of interest disclosure requirement in Rule 14a-2(b)(9)(i), that requirement is hollow without the Rule 14a-2(b)(9)(ii) conditions.[105]

In addition to expressing concerns regarding the 2021 Proposed Amendments, some commenters that opposed the proposed rescission of the Rule 14a-2(b)(9)(ii) conditions made

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[101] *See id.*

[102] *See* letter from Prof. Verret ("This new proposal would generate all the harm that may come from allowing the proxy advisors an exemption from the proxy solicitation rules with none of the mechanisms previously attached to the exemption to limit conflicts and to address problems with the reliability of proxy advisor recommendations.").

[103] *See* letter from B. Zycher.

[104] *See* letter from CCMC II.

[105] *See* letter from Natural Gas Services.

alternative recommendations to the Commission. For example, some commenters recommended that the Commission commit to a retrospective review of the 2020 Final Rules rather than adopting the 2021 Proposed Amendments.[106] One commenter recommended that the Commission rescind the 2021 Proposed Amendments and issue an Advanced Notice of Proposed Rulemaking that would permit all interested parties to provide input and inform the Commission's deliberations on whether to reconsider the 2020 Final Rules.[107] Another commenter suggested that the Commission could mitigate concerns about whether waiting for a registrant's response to proxy voting advice could shorten the proxy voting period by providing guidance on how long a registrant has to provide a response or the applicability of the rules in sensitive cases (*e.g.*, proxy contests, vote no campaigns, or special meetings).[108] One commenter recommended that the Commission adopt an "advance review and feedback" requirement consistent with the 2019 Proposed Rules.[109] Another commenter recommended that if the Commission does not believe that the 2020 Final Rules are appropriate, it should consider implementing an alternative regulatory framework.[110] In addition, one commenter asserted that the Rule 14a-2(b)(9)(ii) conditions should be maintained but modified to require that PVABs provide their advice to registrants at no cost.[111]

[106] *See* letters from ABC; BIO; NAM; NIRI; Virtu.

[107] *See* letter from CCMC I.

[108] *See* letter from CEC.

[109] *See* letter from NIRI.

[110] *See* letter from SCG.

[111] *See* letter from Axcelis.

Finally, one commenter, which generally supported the proposal, recommended that the Commission focus more on the accuracy of registrants' disclosures, rather than PVABs, given the low incidence of errors in their proxy voting advice.[112]

3. Final Amendments

We are adopting the amendments to Rule 14a-2(b)(9) as proposed. Specifically, we are amending Rule 14a-2(b)(9) to delete paragraphs (ii), (iii), (iv), (v), and (vi) and to redesignate Rule 14a-2(b)(9)(i) as Rule 14a-2(b)(9).

The Commission recognized when it adopted the 2020 Final Rules that "introducing new rules into a complex system like proxy voting . . . could inadvertently disrupt the system and impose unnecessary costs if not carefully calibrated."[113] The Commission acknowledged that many investors had expressed serious concerns that the proposed advance review and feedback conditions would adversely affect the cost, timeliness, and independence of proxy voting advice.[114] The Commission nonetheless concluded that the Rule 14a-2(b)(9)(ii) conditions adequately mitigated those concerns and, despite existing mechanisms in the proxy voting system that advance similar objectives, were justified in light of their potential to facilitate timely access by PVABs' clients to information material to their voting decisions.[115]

We weigh these competing concerns differently today, especially in light of the continued, strong opposition to the Rule 14a-2(b)(9)(ii) conditions from many institutional investors and other PVAB clients as well as many of the comments we received on the 2021

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[112] *See* letter from CalPERS.

[113] 2020 Adopting Release at 55107.

[114] *Id.* at 55107-08, 55111-12.

[115] *Id.*

Proposed Amendments. The Commission's 2020 adoption of the Rule 14a-2(b)(9)(ii) conditions was grounded in its view that "more complete and robust information and discussion leads to more informed investor decision-making."[116] We agree with that general principle, but, upon further analysis in light of the continued concerns expressed by investors and others, we now conclude that the potential informational benefits to investors of the Rule 14a-2(b)(9)(ii) conditions do not sufficiently justify the risks they pose to the cost, timeliness, and independence of proxy voting advice on which many investors rely.

Investor protection has always been the touchstone of the Commission's rulemaking efforts with respect to PVABs. Accordingly, our decision to rescind the Rule 14a-2(b)(9)(ii) conditions is significantly informed by the concerns expressed by investors and other PVAB clients regarding the Rule 14a-2(b)(9)(ii) conditions. PVABs serve an important role in the proxy process, and their clients depend on receiving independent proxy voting advice in a timely manner. The Rule 14a-2(b)(9)(ii) conditions were intended to benefit PVABs' clients (*i.e.*, institutional investors and investment advisers) and the underlying investors they serve, among others.[117] However, many investors and PVAB clients have continued to warn, both in response to the adoption of the 2020 Final Rules and again in comments on the 2021 Proposing Release, that the Rule 14a-2(b)(9)(ii) conditions risk impairing the independence and timeliness of proxy voting advice and imposing increased compliance costs on PVABs, without corresponding

[116] *Id.* at 55107.

[117] *See supra* notes 31-34 and accompanying text.

investor protection benefits.[118] And, as noted above,[119] we agree that the risks posed by the Rule 14a-2(b)(9)(ii) conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently significant such that it is appropriate to rescind the conditions now to limit any burdens that PVABs and their clients may experience.

Although we recognize that some commenters disputed these concerns,[120] we nonetheless believe that the risks to investors support rescinding the Rule 14a-2(b)(9)(ii) conditions, particularly in light of the limited reliance interests at stake[121] and the existence of other mechanisms in the proxy system that promote informed shareholder voting.[122] It is also noteworthy that the vast majority of PVABs' clients and investors that expressed views on the Rule 14a-2(b)(9)(ii) conditions continue to be concerned about the risks those conditions pose, including institutional investors[123] and organizations that represent institutional investors and

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[118] *See supra* notes 43-47 and accompanying text; 2021 Proposing Release at 67385 & nn.23-24 (citing Peter Rasmussen, *Divided SEC Passes Controversial Proxy Advisor Rule*, BLOOMBERG LAW (July 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* (July 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* (July 22, 2020), *available at* https://www.ussif.org/blog_home.asp?display=146 ("Today's vote is a blow to the independence of research provided by proxy advisors to investors. . . . The rule will make it more difficult, expensive and time-consuming for proxy advisors to produce their research.")).

[119] *See supra* notes 113-116 and accompanying text.

[120] *See supra* notes 87-91 and accompanying text.

[121] *See infra* notes 153-154 and accompanying text.

[122] *See infra* notes 139-141 and accompanying text.

[123] *See* letters from CalPERS; CO Retirement; New York Comptroller; Ohio Public Retirement; TRP; Washington State Investment.

investment advisers.[124]

Nor do we find the studies and surveys that some opposing commenters cited as support for their continued concerns regarding errors in proxy voting advice to be persuasive evidence for retaining the Rule 14a-2(b)(9)(ii) conditions.[125] For example, several commenters asserted that the ACCF study demonstrates the continued prevalence of errors in, and disagreements by registrants with, proxy voting advice.[126] As an initial matter, we note that the 2020 Final Rules were not predicated on any Commission finding with regard to the prevalence of errors in proxy voting advice,[127] which was a matter of dispute among commenters on both the 2019 Proposed

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[124] *See* letters from CII; ICGN; ICI; IAA; MFA. We recognize that one commenter cited the Spectrem Group survey which indicated that 79% of retail investors were in favor of providing registrants with an opportunity to review and provide feedback on proxy voting advice. *See supra* note 78 and accompanying text; SPECTREM GROUP, RECLAIMING MAIN STREET: SEC HEARS RETAIL INVESTORS' CRIES FOR PROXY ADVISORY OVERSIGHT 3 (Dec. 16, 2019), *available at* https://spectrem.com/Content_Whitepaper/white-paper-reclaiming-main-street.aspx. We note, however, that no such investors submitted comments opposing the proposed rescission of the Rule 14a-2(b)(9)(ii) conditions. We further note that the Spectrem Group survey was conducted in Nov. 2019 with respect to the 2019 Proposed Rules rather than the 2020 Final Rules and, therefore, is less relevant for our determination as to whether to rescind the Rule 14a-2(b)(9)(ii) conditions. In addition, as discussed in the 2020 Adopting Release, one commenter on the 2019 Proposed Rules "disputed the methodology used" in the Spectrem Group survey and "claim[ed] it used leading questions and ultimately showed that retail investors are generally uninformed about the proxy voting advice market." 2020 Adopting Release at 55125, n.491. One commenter also cited the CCMC and Nasdaq survey indicating that 97% of the 182 registrants surveyed would utilize the Rule 14a-2(b)(9)(ii) conditions. *See supra* note 78 and accompanying text. But, for the reasons discussed above, we do not believe the potential benefits of those conditions are justified in light of the risks they present. In addition, while we recognize that this survey indicates that registrants would use the conditions, we do not believe that the Rule 14a-2(b)(9)(ii) conditions have engendered significant reliance interests for the reasons discussed later in this section.

[125] *See supra* notes 80-83, 85 and accompanying text.

[126] *See supra* notes 80-82 and accompanying text.

[127] *See* 2020 Adopting Release at 55107. We note that the Willis Towers Watson survey and the SCG survey both were conducted in Dec. 2019, before the Commission adopted the 2020 Final Rules, and were submitted by commenters on the 2019 Proposed Rules. *See supra* notes 83, 85 and accompanying text. The Commission, however, did not rely on either survey as support for adopting the Rule 14a-2(b)(9)(ii) conditions. We also do not find those surveys to be persuasive indicators of systemic inaccuracies in proxy voting advice, as neither survey identified any specific instances of errors in proxy voting advice. In addition, although the ACCF study identified 50 and 42 instances, respectively, in 2021 and 2020 in which registrants filed supplemental proxy materials to dispute the data or analysis in a PVAB's proxy voting advice, when compared to the 5,565 and 5,350 unique registrants that filed proxy materials with the Commission in 2021 and 2020, respectively, *see infra* note 274 and accompanying text, that study indicates that only 0.90% of all registrants disputed a PVAB's proxy voting advice in supplemental filings in 2021, which is only a 0.11% increase (*i.e.*, 0.90% versus 0.79%) from 2020. Finally, it is worth noting that these percentages may not reflect the error rates in proxy voting advice, as the fact that a registrant

Rules[128] and the 2021 Proposed Amendments.[129] In any event, the ACCF study does not, in our view, establish the necessity of the Rule 14a-2(b)(9)(ii) conditions. Rather, in the 50 instances that the study identified, registrants were able to effectively review and respond to proxy voting advice. Those 50 instances included situations in which a registrant alleged that a PVAB's advice contained a factual or analytical error and situations in which the registrant had a "serious dispute" with a PVAB's advice (or a combination of these concerns).[130] The registrant, in turn, either provided corrective disclosure with respect to the purported factual or analytical error or explained the basis for its dispute with the proxy voting advice.[131] This form of discourse is precisely what the Commission envisioned when adopting the Rule 14a-2(b)(9)(ii) conditions.[132] It is noteworthy that registrants were able to identify those issues and respond using pre-existing mechanisms rather than mechanisms that were adopted to satisfy the Rule 14a-2(b)(9)(ii) conditions given that individual PVABs generally do not appear to have implemented new practices in response to the Commission's adoption of the 2020 Final Rules.[133]

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raises a dispute regarding proxy voting advice in a supplemental filing does not necessarily indicate that an error exists in such advice.

[128] *See* 2020 Adopting Release at 55103-04.

[129] *See supra* note 56 and accompanying text; *see also* letter from ICI (expressing skepticism that the Rule 14a-2(b)(9)(ii) conditions would significantly improve the accuracy of proxy voting advice).

[130] ACCF Study, *supra* note 81, at 14-17.

[131] *Id.*

[132] *See* 2020 Adopting Release at 55136 (noting that registrants may wish to respond to proxy voting advice for various reasons, including "because they have identified what they perceive to be factual errors or methodological weaknesses in the [PVAB's] analysis or because they have a different or additional perspective with respect to the recommendation").

[133] *See infra* note 142 and accompanying text. Although PVABs have introduced certain industry-wide practices since the Commission adopted the 2020 Final Rules, the relevant practices at individual PVABs described in the 2021 Proposing Release appear to have been in place prior to the adoption of the 2020 Final Rules. *See* 2021 Proposing Release at 67388 & nn.60-61.

It also is unclear how retaining the Rule 14a-2(b)(9)(ii) conditions would address concerns raised by the ACCF study about the process by which registrants respond to proxy voting advice. The study asserts that supplemental proxy filings, which ACCF reviewed to arrive at its findings, are costly and burdensome, and subject registrants to antifraud liability.[134] The 2020 Adopting Release contemplated, however, that even pursuant to the Rule 14a-2(b)(9)(ii) conditions, registrants would respond to proxy voting advice via a supplemental proxy filing.[135] Finally, although the study asserts that the Rule 14a-2(b)(9)(ii) conditions "would better ensure that investors review information that companies are now including in often ignored supplemental filings,"[136] we expect that the types of investors that utilize proxy voting advice are sufficiently sophisticated to know where to find registrants' responses to such advice.[137]

We note that several commenters expressed concerns regarding the potential adverse impacts of rescinding the Rule 14a-2(b)(9)(ii) conditions, including the ability of registrants to address errors in or disagreements with proxy voting advice in a timely manner.[138] To the extent the Rule 14a-2(b)(9)(ii) conditions help to facilitate timely investor access to information

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[134] ACCF Study, *supra* note 81, at 10-11.

[135] *See, e.g.*, 2020 Adopting Release at 55135-36 ("Providing timely notice to registrants of voting advice will allow registrants to more effectively determine whether they wish to respond to the recommendation by publishing additional soliciting materials . . . ."). While the Rule 14a-2(b)(9)(iv) safe harbor is non-exclusive, it also contemplates that registrants will file additional soliciting materials as it requires a PVAB to have "written policies and procedures that are reasonably designed to inform clients who receive proxy voting advice when a registrant . . . notifies the [PVAB] that it intends to file or has filed additional soliciting materials." 17 CFR 240.14a-2(b)(9)(iv).

[136] ACCF Study, *supra* note 81, at 12.

[137] *See supra* note 51 and accompanying text. Additionally, it is our understanding that the leading 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, which provide a means for clients to access additional definitive proxy materials that registrants may file in response to proxy voting advice. 2021 Proposing Release at 67388, n.57.

[138] *See supra* notes 72-77 and accompanying text.

material to their voting decisions, we recognize that rescinding those conditions could reduce those benefits. At the same time, we note that any such benefits of the Rule 14a-2(b)(9)(ii) conditions could be undermined to the extent those conditions make proxy voting advice more costly or reduce its timeliness and independence.[139] In our judgment, the potential benefits of the Rule 14a-2(b)(9)(ii) conditions do not justify these risks.

We also believe that any negative effects of rescinding the Rule 14a-2(b)(9)(ii) conditions will be mitigated, to some extent, by existing mechanisms in the proxy system that advance some of the same goals. As one commenter pointed out, PVABs already are incentivized to engage with registrants regarding their proxy voting advice, as evidenced by the fact that some PVABs voluntarily implemented means for registrants to communicate their views or concerns regarding the PVABs' advice even before the Commission adopted the 2020 Final Rules (*e.g.*, Glass Lewis' Report Feedback Service).[140] These incentives also are demonstrated by the fact that the leading PVABs have voluntarily adopted practices 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. We described those practices in detail in the 2021 Proposing Release.[141] Based on our review of PVABs' public descriptions of their policies and procedures, those practices appear to remain in place. Further, none of the comment letters submitted on the 2021 Proposed Amendments asserted that PVABs' practices differ from those described in the

[139] *See supra* notes 43-47 and accompanying text. For example, to the extent that the Rule 14a-2(b)(9)(ii) conditions impede the timeliness of proxy voting advice, that could impair the ability of PVABs' clients to receive and process that advice sufficiently in advance of the relevant shareholder vote.

[140] *See supra* note 49 and accompanying text. One commenter also stated that it has not experienced a significant increase in registrant outreach regarding disputes over proxy voting advice since the adoption of the 2020 Final Rules, including through Glass Lewis' Report Feedback Service. *See supra* note 58 and accompanying text; *see also* 2021 Proposing Release at 67386 (describing Glass Lewis' Report Feedback Service).

[141] *See* 2021 Proposing Release at 67386-87.

2021 Proposing Release or that PVABs had altered those practices described in the release.[142]

Several commenters expressed concern that PVABs' current practices are insufficient substitutes for the Rule 14a-2(b)(9)(ii) conditions.[143] As noted in the 2021 Proposing Release,[144] we recognize that those practices do not perfectly replicate the requirements of the Rule 14a-2(b)(9)(ii) conditions or result in the same benefits that those conditions were intended to produce. Nonetheless, the existence of market-based incentives for PVABs to provide their

[142] We note that some commenters expressed concerns regarding ISS' practices. For example, several commenters expressed concern that ISS has eliminated the opportunity for certain U.S. registrants to review draft proxy voting advice before ISS sends the advice to its clients. *See supra* note 97 and accompanying text. One of those commenters appeared to assert that ISS made this change "in reaction to the SEC's announcement of the non-enforcement of the 2020 Final Rules." Letter from CCMC II. However, ISS announced that it was making this change as of January 2021, well before June 1, 2021, when the Division of Corporation Finance issued a statement that it would not recommend enforcement action based on a 2019 interpretive release (discussed further *infra* note 165 and accompanying text) or the 2020 Final Rules during the period in which the Commission is considering further regulatory action in this area. *Compare* 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&P 500 index."), *with* 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-statement/corp-fin-proxy-rules-2021-06-01. Given this timing, the assertion that ISS formally altered its engagement practices as a result of the Division of Corporation Finance's statement or in response to the 2021 Proposed Amendments is implausible. In addition, some commenters noted that ISS provides some non-U.S. companies with the opportunity to review its draft proxy voting advice before its publication. Similarly, one commenter asserted that ISS has increasingly resisted making changes to its proxy voting advice in response to registrant feedback and has been less inclined to engage with registrants regarding its proxy voting advice. *See supra* note 96 and accompanying text. This commenter asserted that "[c]ompanies have requested discussions with ISS staff to highlight errors, omissions, or mischaracterizations, but the ISS research team has noticeably scaled back its willingness to engage" and that "given that errors corrected post-publication necessitate a public alert to clients, ISS is far more reticent to make such changes and even more resistant if the error requires a change in a vote recommendation." Letter from CEC. Based on those concerns, the commenter appeared to advocate for giving registrants the opportunity to review proxy voting advice before its publication. *Id.* ("Thus, fixing errors highlighted by companies in a final report is much more complex than doing so to a draft report."). Rescinding the Rule 14a-2(b)(9)(ii) conditions, however, should not impact the availability of such opportunities because the conditions do not require that PVABs provide registrants with draft proxy voting advice. We find it more relevant that ISS continues to allow any registrant to request a copy of its proxy voting advice issued under its Benchmark policy guidelines free of charge after ISS has disseminated the advice to its clients. *See* ISS, *FAQs Regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276741161-7ca718d3-32ae.

[143] *See supra* note 92 and accompanying text.

[144] *See* 2021 Proposing Release at 67388.

clients and some 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[145]—which may provide institutional investors and other PVAB clients with some of the benefits that those conditions were intended to produce—reinforces our determination that those conditions should be rescinded, especially when balanced against the risks that those conditions present to the cost, timeliness, and independence of proxy voting advice.

Further, one opposing commenter asserted that because ISS and Glass Lewis already provide registrants with access to their advice at the same time it is disseminated to their clients, compliance with the Rule 14a-2(b)(9)(ii) conditions should not be burdensome.[146] We note, however, that ISS and Glass Lewis adopted those practices voluntarily, before the 2020 Final Rules were adopted.[147] We believe that voluntarily adopted practices, as a general matter, would not have the same adverse impact on the independence, cost, and timeliness of proxy voting advice as mandatory measures that PVABs may implement solely to comply with the Rule 14a-2(b)(9)(ii) conditions, as we expect that PVABs would only implement voluntary practices to the extent that the benefits of such practices would exceed their costs. This belief is also consistent with the Commission's economic analysis in the 2020 Adopting Release, which noted the existence of ISS' and Glass Lewis' voluntary practices[148] but still projected direct and indirect costs for PVABs as a result of the Rule 14a-2(b)(9)(ii) conditions.[149]

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[145] *See* letter from Glass Lewis (asserting that PVABs already are incentivized to engage with registrants regarding their proxy voting advice in order to provide potentially useful information to their clients).

[146] *See supra* note 94 and accompanying text.

[147] *See* 2021 Proposing Release at 67388, nn.60-61 and accompanying text.

[148] 2020 Adopting Release at 55128-29.

[149] *Id.* at 55136-39.

Although some commenters expressed concern that PVABs could change their practices to the detriment of their clients if the Rule 14a-2(b)(9)(ii) conditions are rescinded,[150] other commenters indicated that there are market-based incentives for PVABs to maintain the practices they have voluntarily adopted[151] and that they see little risk that PVABs will change these practices.[152] In addition, we will continue to monitor the PVAB market to 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 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 to take further action.

Some commenters expressed concern that both registrants and investors may have changed their practices in reliance on the Commission's adoption of the 2020 Final Rules.[153] We note, however, that none of the commenters that raised such concerns were investors. In addition, although some of the commenters suggested steps that registrants may have taken in reliance on the effectiveness of the Rule 14a-2(b)(9)(ii) conditions—and one commenter that is a registrant asserted that it has been preparing for the effectiveness of those conditions—these commenters did not provide specific examples of actions registrants have actually taken or costs

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[150] *See supra* note 95 and accompanying text.

[151] *See supra* note 53 and accompanying text. Those commenters included an institutional investor that utilizes proxy voting advice (Ohio Public Retirement) and an organization that represents institutional investors (CII). *Id.* With respect to PVABs' incentives, we note that one commenter asserted that "[i]f errors [in proxy voting advice] are found, the cost of correcting those errors creates a disincentive for [PVABs] to acknowledge them." Letter from CEC. We believe, however, that the perpetuation of material errors in proxy voting advice would reduce the quality and usefulness of such advice, which, in the long-term, would reduce a PVAB's credibility in the market and its competitiveness. As such, we believe that PVABs are financially motivated to address errors in their advice.

[152] *See* letters from CII; Ohio Public Retirement.

[153] *See supra* notes 68-69 and accompanying text.

that registrants have actually incurred in preparation for the effectiveness of those conditions.

We recognize that many registrants may have anticipated taking advantage of the opportunities to review and respond to proxy voting advice pursuant to the Rule 14a-2(b)(9)(ii) conditions, but commenters did not present evidence that registrants have incurred significant costs or significantly altered existing practices in reliance on the conditions, nor are we aware of any information suggesting that is the case. Moreover, we note that the Rule 14a-2(b)(9)(ii) conditions only impose obligations on PVABs, as opposed to registrants, and that the 2020 Adopting Release contemplated that, even pursuant to the Rule 14a-2(b)(9)(ii) conditions, registrants would respond to proxy voting advice via existing mechanisms (*i.e.*, a supplemental proxy filing) that registrants have historically utilized.[154] Nor is there any other reason to believe that the Rule 14a-2(b)(9)(ii) conditions have engendered significant reliance interests given that the conditions were adopted only two years ago and took effect less than a year ago.

Some commenters asserted that it was inappropriate for the Commission to propose amendments to Rule 14a-2(b)(9) before that rule had gone into effect.[155] To the contrary, we believe it is appropriate to proceed expeditiously to rescind the Rule 14a-2(b)(9)(ii) conditions rather than wait until the risks those conditions pose materialize and investors are harmed. This belief is animated, in large part, by (1) the important role that PVABs play in the proxy voting process and the scope of the potential consequences should that role be disrupted, (2) the fact that the vast majority of PVABs' clients that expressed views on the Rule 14a-2(b)(9)(ii) conditions opposed them, and (3) our conclusion that the reliance interests implicated by

[154] *See supra* note 135 and accompanying text.

[155] *See supra* note 66 and accompanying text.

rescinding those conditions are limited, as discussed above.

Finally, we note that some opposing commenters also expressed broader, policy-based concerns associated with rescinding the Rule 14a-2(b)(9)(ii) conditions[156] and the potential consequences that may result from such rescission.[157] Those commenters generally appeared to be concerned that PVABs' advice would become largely unregulated, especially given the important role that PVABs play in the proxy process. However, it is important to note that, notwithstanding our rescission of the Rule 14a-2(b)(9)(ii) conditions and our amendment to Rule 14a-9, proxy voting advice generally will remain a "solicitation" under Rule 14a-1(l)(1)(iii)(A). As such, proxy voting advice generally will remain subject to Rule 14a-9 liability, and, in order to qualify for the exemptions set forth in Rules 14a-2(b)(1) and (3) from the proxy rules' information and filing requirements, PVABs will have to satisfy the conflicts of interest disclosure requirements set forth in Rule 14a-2(b)(9).[158]

4. 2020 Supplemental Proxy Voting Guidance

The 2021 Proposing Release requested comment on whether the Commission should rescind or revise the Supplemental Proxy Voting Guidance because it was prompted, in part, by the adoption of the Rule 14a-2(b)(9)(ii) conditions.[159] The Supplemental Proxy Voting Guidance was intended to assist investment advisers in assessing how to consider registrant

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[156] *See supra* notes 100-101 and accompanying text.

[157] *See supra* notes 102-105 and accompanying text.

[158] One commenter asserted that the conflicts of interest disclosure requirement in Rule 14a-2(b)(9) is "hollow without assurances that issuers and investors are protected from materially false, inaccurate and incomplete data as a result of unchecked critiques from proxy advisory firm." Letter from Natural Gas Services. Notwithstanding our rescission of the Rule 14a-2(b)(9)(ii) conditions, the fact that proxy voting advice generally will remain subject to liability under Rule 14a-9 should mitigate this concern. *See infra* Section II.B.

[159] 2021 Proposing Release at 67388-89.

responses to proxy voting advice that may become more readily available as a result of the 2020 Final Rules. The Supplemental Proxy Voting Guidance also specifically addressed situations in which advisers use a PVAB's electronic vote management system and related disclosure obligations, as well as client consent relating to the use of automated voting services. The Commission received several comments on this issue,[160] with most of those commenters recommending that the Commission rescind the Supplemental Proxy Voting Guidance.[161]

We are rescinding the Supplemental Proxy Voting Guidance. While aspects of the guidance could be relevant to investment advisers in situations in which they become aware that a registrant that is the subject of a voting recommendation intends to file or has filed additional soliciting materials with the Commission setting forth the registrant's views regarding the voting recommendation, we are mindful of the comments received with respect to the Supplemental Proxy Voting Guidance. Moreover, we believe that existing Commission guidance, including the response to Question No. 2 in the 2019 Proxy Voting Guidance, which discusses how advisers could consider policies and procedures that provide for consideration of additional information that may become available regarding a particular proposal, will serve to assist investment advisers in carrying out their obligations under rule 206(4)-6 under the Investment

[160] *See* letters from BIO; CII; Glass Lewis; IAA; ICI; ISS.

[161] *See* letters from CII; Glass Lewis; IAA; ICI; ISS. These commenters generally indicated that because the Supplemental Proxy Voting Guidance was tied to the 2020 Final Rules, any rescission of those rules should also include the Supplemental Proxy Voting Guidance. Some of these commenters further stated that the Supplemental Proxy Voting Guidance was too prescriptive for investment advisers. *See* letters from IAA; Glass Lewis. Other commenters suggested the Supplemental Proxy Voting Guidance could contribute to uncertainty and delays in voting. *See* letters from CII; IAA. Another stated the 2019 Proxy Voting Guidance provided sufficient guidance to investment advisers on this subject. *See* letter from ICI. On the other hand, one commenter recommended retaining the Supplemental Proxy Voting Guidance on the basis that it encouraged helpful disclosure to investors. *See* letter from BIO.

Advisers Act of 1940 and their fiduciary duty in such situations.[162] Further, an investment adviser's fiduciary duty requires, among other things, that an adviser conduct a reasonable investigation into an investment sufficient not to base its advice on materially inaccurate or incomplete information.[163] The duty of loyalty also requires, among other things, full and fair disclosure to clients about all material facts relating to the advisory relationship.[164]

B. Amendment to Rule 14a-9

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").[165] 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 transmitted.[166] The Commission stated that PVABs' proxy voting advice generally would constitute a solicitation subject to the proxy rules.[167] 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

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[162] *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Release Nos. IA-5325; IC-33605 (Aug. 21, 2019) [84 FR 47420, 47424 (Sept. 10, 2019)].

[163] *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248 (June 5, 2019) [84 FR 33669, 33674 (July 12, 2019)].

[164] *Id.* at 33675.

[165] *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").

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

[167] *Id.*

misleading with respect to any material fact."[168] 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."[169] 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.[170]

In the 2020 Adopting Release, the Commission codified the guidance set forth in the Interpretive Release that proxy voting advice is generally subject to Rule 14a-9.[171] 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," may, depending upon particular facts and circumstances, be misleading within the meaning of the rule.[172] 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

[168] *Id.* at 47419.

[169] *Id.*

[170] *Id.*

[171] 2020 Adopting Release at 55121.

[172] 17 CFR 240.14a-9, note (e).

informed decisions."[173]

1. Proposed Amendment

In the 2021 Proposing Release, the Commission proposed to amend Rule 14a-9 by deleting Note (e). The proposed amendment was intended to address concerns by PVABs, their clients, and other investors that the Commission's adoption of Note (e) to Rule 14a-9 had created uncertainty regarding the application of Rule 14a-9 to proxy voting advice and that such uncertainty unnecessarily increases the litigation risk to PVABs and impairs the independence of the proxy voting advice that investors use to make their voting decisions.[174] That proposed amendment also was intended to address any misperception that the Commission's adoption of Note (e) purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion, in order to reduce any resulting uncertainty that could lead to increased litigation risks, or the threat of litigation, and impaired independence of proxy voting advice.[175]

Notwithstanding the proposed deletion of Note (e) to Rule 14a-9, the Commission stated that PVABs "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," and that "such conclusion would not be altered by virtue of our proposed deletion of Note (e)."[176] The Commission also provided a discussion regarding the application of Rule 14a-9 to proxy voting advice, in particular with

[173] 2020 Adopting Release at 55121.

[174] 2021 Proposing Release at 67389-90.

[175] *Id.* at 67390.

[176] *Id.*

respect to a PVAB's statements of opinion.[177]

2. Comments Received

Commenters expressed a range of views on the proposed amendment to Rule 14a-9. A number of commenters supported the proposed deletion of Note (e) to Rule 14a-9.[178] Some of these commenters reiterated the concerns regarding the 2020 Final Rules that prompted the Commission to issue the 2021 Proposed Amendments, including that the threat of litigation as a result of Note (e) would impair the independence and decrease the quality of proxy voting advice[179] and that heightened legal risks as a result of Note (e) would increase compliance costs for PVABs, which could increase the cost of proxy voting advice for their clients.[180] One commenter also asserted that increased costs of proxy voting advice as a result of Note (e) could reduce some clients' use of proxy voting advice and result in less shareholder engagement and participation in shareholder voting and that deleting Note (e) would provide PVABs with more legal certainty, as Note (e) has created ambiguity as to the nature and scope of PVABs' Rule 14a-9 liability.[181]

Further, one commenter expressed concern that the examples in Note (e) extend beyond material, factual information and subject PVABs to the threat of litigation in cases where registrants may disagree with the analysis and voting recommendations regardless of whether the

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[177] *See id.*

[178] *See* letters from Alliance; Anonymous 1; Ben J.; Better Markets; CalPERS; CII; CO Retirement; D. Jamieson; Glass Lewis; IAA; ICGN; ISS; J. Giorgio; MFA; NASAA; New York Comptroller; Ohio Public Retirement; RK Invest Law and ESG Legal Services; US SIF.

[179] *See* letters from IAA; MFA; NASAA; New York Comptroller.

[180] *See* letters from CO Retirement; MFA; New York Comptroller.

[181] *See* letter from MFA.

advice contains factual errors.[182] Similarly, one commenter suggested that Note (e) could invite litigation even if proxy voting advice was accurate on the basis that it was somehow misleading because a PVAB did not disclose enough about its methodology, sources of information, or conflicts of interest.[183] Other commenters asserted that Note (e) should be deleted because it does not appear to add anything of interpretive significance[184] and imposes more stringent obligations on PVABs than registrants.[185]

In addition to reiterating some of the concerns that prompted the 2021 Proposed Amendments, supporting commenters also critiqued the process by which the Commission adopted Note (e). For example, as noted earlier, some commenters asserted that the 2020 Final Rules were flawed because they did not provide credible evidence of a market failure that would warrant further regulation of PVABs or their advice.[186] Another commenter maintained that the Commission neither sufficiently explained how the examples in Note (e) created a risk of misleading PVABs' clients nor clarified its expectations for non-misleading disclosure.[187]

Finally, and more broadly, some commenters asserted that subjecting PVABs to Rule 14a-9 liability unnecessarily increases PVABs' litigation risks and could impair the independence and increase the costs of proxy voting advice,[188] and another commenter expressed

[182] *See id.*

[183] *See* letter from Glass Lewis.

[184] *See* letter from NASAA.

[185] *See* letter from CalPERS.

[186] *See* letters from Better Markets; Glass Lewis; US SIF.

[187] *See* letter from Glass Lewis.

[188] *See* letters from CII; Glass Lewis.

concern regarding the constitutionality of the 2020 Final Rules and requested that the Commission "fix" those rules by adopting the 2021 Proposed Amendments.[189]

Other commenters opposed deleting Note (e).[190] Several of those commenters expressed process-based concerns regarding the 2021 Proposed Amendments that were similar to those they expressed in the context of the proposed amendments to Rule 14a-2(b)(9).[191]

Some commenters opposed deleting Note (e) based on concerns regarding the detrimental effect that such amendment could have on proxy voting advice. For example, some commenters stated that the deletion of Note (e) would weaken antifraud provisions that were intended to protect investors against PVABs' false or misleading statements.[192] Other commenters asserted that deleting Note (e) could reduce transparency in the public markets[193] and could actually lead to increased litigation for PVABs.[194]

In addition, one commenter stated that Note (e) is "critical" to ensuring that Rule 14a-9 fully and fairly applies to PVABs and that they are held to comparable liability standards as other soliciting entities.[195] Other commenters asserted, as they did in the context of the proposed amendments to Rule 14a-2(b)(9), that the 2020 Final Rules should not be rescinded given the continued prevalence of errors in and disagreements by registrants with proxy voting advice,

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[189] *See* letter from D. Jamieson.

[190] *See* letters from ACCF; Anonymous 2; A. Smith; BIO; BRT; B. Zycher; CBT; CCMC I; CCMC II; E. Mills; FedEx; MasterCraft; NAM; Nasdaq; Natural Gas Services; NIRI; Pacific Research; Prof. Verret; Profs. Rose and Walker; Reps. Steil and Huizenga; Steve Milloy (Jan. 3, 2022) ("S. Milloy"); T. Doyle; Virtu.

[191] *See supra* notes 66-70 and accompanying text.

[192] *See* letters from ACCF; NAM; NIRI.

[193] *See* letters from Nasdaq; Natural Gas Services.

[194] *See* letter from T. Doyle.

[195] *See* letter from NAM.

based on the ACCF study.[196] Similarly, one commenter cited a 2021 research paper that found that PVABs' advice favors ESG proposals that may not necessarily be in the best economic interests of all investors.[197]

Other commenters disagreed with the Commission's bases for proposing to delete Note (e). Several commenters disputed the 2021 Proposing Release's suggestion that Note (e) caused misperceptions as to the applicability of Rule 14a-9 to proxy voting advice.[198] Other commenters asserted that the deletion of Note (e) will lead to more confusion, not less, when interpreting the application of the rule to proxy voting advice.[199] In addition, some commenters characterized the deletion of Note (e) as exempting PVABs from Rule 14a-9 liability[200] and asserted that PVABs should be held to the same standard of liability and accountability as other similar market participants.[201]

In addition, one commenter addressed the Commission's discussion in the 2021 Proposing Release regarding the application of Rule 14a-9 to proxy voting advice.[202] The commenter expressed concern that the Commission's discussion did not "appreciate the wealth of conflicted reasons why a [PVAB] may be making a recommendation," and stated that a PVAB may "be making a recommendation on the basis of little evidence despite purporting to conduct

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[196] *See* letters from ACCF; CCMC II; Natural Gas Services; NIRI; Profs. Rose and Walker. See *supra* notes 80-82 and accompanying text for a description of the ACCF study.

[197] *See* letter from CCMC II.

[198] *See* letters from NAM; Profs. Rose and Walker.

[199] *See* letters from BRT; CCMC II; T. Doyle.

[200] *See* letter from Profs. Rose and Walker.

[201] *See* letters from BIO; NIRI.

[202] *See* letter from Prof. Verret.

robust analysis of the vote's impact on shareholder returns."[203] This commenter also expressed the view that the discussion would not receive any judicial deference.[204]

Some commenters that generally supported the proposed deletion of Note (e) also recommended that the Commission take additional actions to address their concerns. For example, some commenters recommended that the Commission amend Rule 14a-9 to expressly exempt all or portions of proxy voting advice from liability.[205] One of those commenters recommended that the Commission amend Rule 14a-9 to clarify that PVABs are not liable simply because a registrant disagrees with their subjective determinations in proxy voting advice.[206] Other commenters recommended that the Commission amend Rule 14a-9 to exempt PVABs from liability for their voting recommendations, any subjective determinations they make in formulating such recommendations, including decisions to use a specific analysis, methodology, or information, and their decisions regarding how to respond to registrants' disagreements with their advice.[207] One of those commenters stated that such an exemption would not harm investors or the integrity of the proxy process because PVABs are already subject to a more relevant and robust antifraud rule under the Investment Advisers Act of 1940.[208] Finally, another commenter asserted that the Commission should amend Rule 14a-9 to provide PVABs with a safe harbor from private actions.[209]

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[203] *See id.*

[204] *See id.*

[205] *See* letters from CII; Glass Lewis; ICGN; ISS; Ohio Public Retirement.

[206] *See* letter from ICGN.

[207] *See* letters from CII; ISS.

[208] *See* letter from ISS.

[209] *See* letter from Glass Lewis.

In addition, one commenter that generally supported deleting Note (e) expressed concern that the Commission did not consider that the drafting and distribution of proxy voting advice to clients can be part of a PVAB's broader engagement strategy.[210] One commenter recommended that the Commission require registrants, rather than PVABs, to disclose the methodologies and assumptions they use to formulate disclosures in public filings.[211] Another commenter recommended that if the Commission does not at least partially exempt PVABs from Rule 14a-9 liability for their proxy voting advice, it should: (1) reaffirm its prior statements about the "judgmental" nature of most corporate governance issues[212] and state that subjective determinations on corporate governance issues are not subject to Rule 14a-9 liability; and (2) clarify that when determining whether an opinion is actionable under Rule 14a-9, it is important to consider the context in which the statement is made.[213]

Finally, some of the commenters that generally opposed deleting Note (e) also made recommendations to the Commission. Consistent with their recommendations regarding the proposed amendments to Rule 14a-2(b)(9), some commenters recommended that the Commission commit to a retrospective review of the 2020 Final Rules or issue an Advanced Notice of Proposed Rulemaking rather than adopting the 2021 Proposed Amendments.[214] One commenter recommended that, rather than deleting Note (e), the Commission provide an

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[210] *See* letter from ICGN.

[211] *See* letter from CalPERS.

[212] *See* letter from Glass Lewis (citing *Regulation of Communications Among Shareholders*, Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276 (Oct. 22, 1992)]).

[213] *See id.*

[214] *See supra* notes 106-107 and accompanying text.

interpretation regarding the application of Rule 14a-9 to proxy voting advice.[215] Other commenters opposed any efforts to exempt all or parts of proxy voting advice from Rule 14a-9 liability.[216] Another commenter recommended an alternative approach of amending Note (e) to include the Commission's view that Rule 14a-9 liability does not extend to mere differences of opinion regarding proxy voting advice.[217]

3. Final Amendment

We are adopting the amendment to Rule 14a-9 as proposed. Specifically, we are amending Rule 14a-9 to delete Note (e). We reiterate, however, that this amendment is not intended to, and does not, affect the scope of Rule 14a-9 or its application to proxy voting advice, just as the adoption of Note (e) in the 2020 Final Rules was not intended to, and did not, affect the scope of Rule 14a-9 or its application to proxy voting advice. Thus, to the extent that a PVAB's proxy voting advice constitutes a "solicitation" under Rule 14a-1(l)(1)(iii)(A), it is subject to liability under Rule 14a-9 to the same extent that any other solicitation is, or would have been, prior to the 2020 Final Rules. And, like any other person that engages in a solicitation, a PVAB may, depending on the facts and circumstances, be subject to liability under Rule 14a-9 for a material misstatement of fact in, or an omission of material fact from, its proxy voting advice, including with regard to its methodology, sources of information, or conflicts of interest.

While several commenters expressed concerns regarding the potential impact of the

[215] *See* letter from CCMC II.

[216] *See* letters from NAM; NIRI.

[217] *See* letter from Nasdaq.

deletion of Note (e),[218] as the Commission explained in the 2020 Adopting Release, Note (e) itself did not alter Rule 14a-9's application or scope.[219] Rather, Note (e) was intended to further clarify the application of Rule 14a-9 to proxy voting advice by providing 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.[220] However, PVABs, their clients, and other investors have asserted that, instead of clarifying the application of Rule 14a-9 to proxy voting advice, Note (e) has in fact heightened legal uncertainty, particularly with respect to PVABs' statements of opinion, and that such uncertainty unnecessarily increases the litigation risk to PVABs and threatens the independence of their advice.[221]

In retrospect, we conclude that Note (e) has created a risk of confusion regarding the application of Rule 14a-9 to proxy voting advice in at least two respects. First, the fact that Note (e) concerns a particular type of solicitation—in contrast to the other paragraphs of the note, which apply to all types of solicitations—unintentionally could imply that proxy voting advice poses heightened concerns and should be treated differently than other types of solicitations under Rule 14a-9. Second, singling out a PVAB's methodology, sources of information, and conflicts of interest as examples of material information regarding proxy voting advice unintentionally could suggest that PVABs have a unique obligation to disclose that information with their advice. Note (e), however, was not intended to impose any such affirmative requirement. Whether such information must be disclosed depends on the same facts and

[218] *See supra* notes 192-193, 195-196, 199-201 and accompanying text.

[219] *See* 2020 Adopting Release at 55121.

[220] *See id.*

[221] *See supra* notes 179-180 and accompanying text; *see also* 2021 Proposing Release at 67389-90 & n.74.

circumstances-based analysis that applies to all solicitations. Accordingly, because Note (e) appears not to have achieved—and, instead, appears to have undermined—its stated goal, we conclude that deleting Note (e) is appropriate.[222]

Contrary to the concerns expressed by some commenters,[223] deleting Note (e) does not in any respect weaken the application of Rule 14a-9 to proxy voting advice or otherwise reduce antifraud protection for investors. Proxy voting advice that falls within the scope of Rule 14a-1(l)(1)(iii)(A) is subject to liability under Rule 14a-9(a) to the same extent as any other solicitation.[224] Just as the addition of Note (e) did not alter the application of Rule 14a-9 to proxy voting advice, our deletion of it will not do so either. Thus, any suggestion that the deletion of Note (e) would provide PVABs with an exemption from Rule 14a-9 liability is incorrect.

As was the case both before and after Note (e) was added to Rule 14a-9, a PVAB may, depending on the particular facts and circumstances, be subject to liability for a material misstatement in, or an omission of material fact from, proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A), including with regard to its methodology, sources of information, or conflicts of interest.

We recognize that PVABs, their clients, and other investors continue to express concerns

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[222] We disagree with those commenters who suggested that deleting Note (e) will lead to more confusion. *See supra* note 199 and accompanying text. We do not believe that returning to the *status quo* that existed before the addition of Note (e) will lead to more confusion particularly in light of our repeated emphasis in both this release and the 2021 Proposing Release that the deletion of Note (e) will have no effect on the scope or application of Rule 14a-9.

[223] *See supra* notes 192, 195, 200 and accompanying text.

[224] The definition of "solicitation" is set forth in Rule 14a-1(l) and includes, in paragraph (1)(iii)(A), certain types of proxy voting advice. 17 CFR 240.14a-1(l)(1)(iii)(A). Rule 14a-9(a), in turn, provides that "[n]o solicitation . . . shall be made . . . 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, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 CFR 240.14a-9(a).

about whether Rule 14a-9 liability may extend to mere differences of opinion regarding proxy voting advice. We are therefore reiterating our understanding of the limited circumstances in which a PVAB's statement of opinion may subject it to liability under Rule 14a-9, consistent with the discussion in the 2021 Proposing Release. We recognize that the formulation of proxy voting advice often requires subjective determinations and the exercise of professional judgment, and we do not interpret Rule 14a-9 to subject PVABs to liability for such determinations simply because a registrant holds a differing view.

Our understanding that Rule 14a-9 liability does not extend to mere differences of opinion is supported by the Supreme Court's decisions in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[225] and *Virginia Bankshares, Inc. v. Sandberg*.[226] 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.[227] 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 voting recommendations themselves—were wrong.[228]

As the Court explained in *Omnicare*, there are three ways in which a statement of opinion

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[225] 575 U.S. 175 (2015).

[226] 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).

[227] 575 U.S. at 186.

[228] *Id.* at 194.

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."[229] 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.[230] Second, a statement of opinion may contain "embedded statements of fact" which, if untrue, may be a source of liability under Rule 14a-9.[231] 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."[232] 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."[233]

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

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[229] *Id.* at 184.

[230] *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.

[231] *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).

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

[233] *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.

"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."[234] 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[235] turns on whether its proxy voting advice contains a material misstatement or omission of fact.[236]

One commenter asserted that the Commission's discussion in the 2021 Proposing Release "fails to appreciate that any statements of opinion by [PVABs] must be considered as a part of the total mix of information being provided by [PVABs] as to how their opinions are generated" and that "[a]ny statement of opinion by a [PVAB] will carry with it the implicit representation

[234] *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.

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

[236] Several commenters expressed concern that a statement in the Interpretive Release suggests a PVAB may be subject to liability under Rule 14a-9 for its "opinions, reasons, recommendations or beliefs" even in the absence of a misstatement or omission of material fact. *See* letters from Glass Lewis; ISS. That is not the case. Rather, the Commission noted, citing *Virginia Bankshares*, that "Rule 14a-9 extends to opinions, reasons, recommendations, or beliefs that are disclosed as part of a solicitation, *which may be statements of material facts for purposes of the rule*." Interpretive Release at 47419 & n.31 (emphasis added). That statement is consistent with, and was merely intended to reflect, the case law summarized above regarding the limited circumstances in which a statement of opinion may be actionable under Rule 14a-9 as a misstatement or omission of material fact.

that the opinion was generated using the robust methodologies otherwise described by [PVABs], and the implicit representation that the [PVAB's] opinion is not the result of a conflict of interest."[237] However, *Omnicare* and *Virginia Bankshares* recognize that statements of opinion can, in some circumstances, carry such implicit factual representations as to the basis for the opinion. Further, we do not believe that the commenter has offered any basis to conclude that the principles set forth in those cases should or would apply differently to proxy voting advice.

The same commenter also asserted that the discussion in the 2021 Proposing Release will not receive judicial deference.[238] That assertion misunderstands the purpose of that discussion, which is to summarize our understanding of the applicable case law to help clarify for market participants the limited circumstances in which a PVAB's statement of opinion may be subject to liability under Rule 14a-9. To the extent this discussion does provide such clarity, we believe it may help mitigate the concerns regarding uncertainty as to the application of Rule 14a-9 to PVABs' statements of opinion that could impair the independence of their proxy voting advice.

In addition, while one commenter recommended that, rather than delete Note (e), we should amend it to include our view that Rule 14a-9 liability does not extend to mere differences of opinion regarding proxy voting advice,[239] we decline to do so. Amending Note (e) as that commenter suggested would not address our reasons for deleting it. For example, even with the commenter's suggested change, Note (e) would continue to raise a risk of confusion regarding the application of Rule 14a-9 to proxy voting advice because it would continue to single out proxy voting advice and its methodology, its sources of information, and any conflicts of

[237] *See* letter from Prof. Verret.

[238] *Id.*

[239] *See supra* note 217 and accompanying text.

interest.

Although some commenters that generally supported the 2021 Proposed Amendments recommended that we exempt all or portions of proxy voting advice from Rule 14a-9 liability,[240] we are not doing so. We believe that the law we have summarized above regarding the application of Rule 14a-9 to statements of opinion adequately addresses the concerns that PVABs, their clients, and others have expressed regarding the potential for perceived litigation risks to impair the independence of proxy voting advice, particularly in conjunction with our deletion of Note (e). Exempting all or parts of proxy voting advice from Rule 14a-9 liability entirely could eliminate liability even in the narrow circumstances considered in *Omnicare* and *Virginia Bankshares*, in which statements of opinion in such advice contain a material misstatement or omission. We believe that it is appropriate to continue to subject proxy voting advice to Rule 14a-9 liability for material misstatements or omissions to help ensure that PVABs' clients are provided with the information they need to make fully informed voting decisions and to mitigate some of the concerns that opposing commenters raised in their comment letters.[241]

Finally, we note that several commenters expressed similar process-based concerns regarding the proposed deletion of Note (e) as they expressed with respect to the proposed

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[240] *See supra* notes 205-209 and accompanying text.

[241] *See, e.g.*, *supra* notes 102-105 and accompanying text (expressing concern that, without the Rule 14a-2(b)(9)(ii) conditions, PVABs will be exempt from the proxy rules' information and filing requirements without sufficient alternative investor protection mechanisms, the transparency of proxy voting advice could suffer, and the conflicts of interest disclosure requirement in Rule 14a-2(b)(9)(i) will be hollow); *supra* notes 192-193 and accompanying text (expressing concern that the deletion of Note (e) will weaken antifraud provisions that were intended to protect investors against PVABs' false or misleading statements and reduce transparency in the public markets); *supra* note 196 and accompanying text (expressing concern regarding the prevalence of errors in proxy voting advice); *supra* note 216 and accompanying text (expressing concern about any efforts to exempt all or parts of proxy voting advice from Rule 14a-9 liability).

amendments to Rule 14a-2(b)(9).[242] However, for the reasons discussed in Section II.A.3 and above, we believe that deleting Note (e) is appropriate.[243]

III. OTHER MATTERS

If any of the provisions of these amendments, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or the application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application. In particular, the amendments to Rule 14a-2(b)(9) operate independently from the amendments to Rule 14a-9.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these amendments a "major rule," as defined by 5 U.S.C. 804(2).

IV. ECONOMIC ANALYSIS

As discussed above, the purpose of these amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of proxy voting advice and avoid misperceptions regarding the application of Rule 14a-9 liability to proxy voting advice, while also preserving investors' confidence in the integrity of such advice. Specifically, we are amending Rule 14a-2(b)(9) to rescind the Rule 14a-2(b)(9)(ii) conditions (as well as the related safe harbors and exclusions set forth in Rules 14a-2(b)(9)(iii) through (vi)) to address the risks that these conditions pose to the cost, timeliness, and independence of proxy voting advice on which many investors rely. We also are amending Rule 14a-9 to delete paragraph (e) of the Note to that rule because Note (e) appears not to have achieved—and, instead, appears to have

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[242] *See supra* note 191 and accompanying text.

[243] *See supra* note 155 and accompanying text. Further, the timing-based concerns that opposing commenters expressed with respect to the 2021 Proposed Amendments are less relevant with respect to Note (e) given that Note (e) became effective on Nov. 2, 2020, before we issued the 2021 Proposed Amendments. 2020 Adopting Release at 55082, 55122.

undermined—its stated goal.

The discussion below addresses the economic effects of the amendments, including their anticipated costs and benefits, as well as the likely effects of the amendments on efficiency, competition and capital formation.[244] We also analyze the potential costs and benefits of reasonable alternatives to these amendments. Where practicable, we have attempted to quantify the economic effects of the amendments; however, in most cases, we are unable to do so because either the necessary data is unavailable or certain effects are not quantifiable.

A. Economic Baseline

The baseline against which the costs, benefits, and the impact on efficiency, competition, and capital formation of the amendments are measured consists of the current regulatory requirements applicable to registrants, PVABs, investment advisers, and other clients 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 2020 Adopting Release provided an overview of the role of PVABs in the proxy process, including a discussion of existing economic research on PVABs and the nature of proxy voting advice they provide.[245]

1. Affected Parties and Current Market Practices

a. Proxy Voting Advice Businesses

[244] 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.

[245] *See* 2020 Adopting Release at 55122-32.

As of November 2021, 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.[246] 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).[247] As of May 2022, ISS had nearly 2,600 employees in 29 locations, and covers approximately 48,000 shareholder meetings in 115 countries, annually.[248] ISS states that it executes more than 12.8 million ballots annually on behalf of its clients representing 5.4 trillion shares.[249] ISS is registered with the Commission as an investment adviser and identifies itself as a pension consultant providing advice to plans with more than $200 million as the basis for registering as an adviser.[250]
- Glass Lewis, established in 2003, is a privately held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote

[246] *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").

[247] *Id*.

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

[249] *See id.*

[250] *See* ISS, Form ADV (Mar. 31, 2022), *available at* https://reports.adviserinfo.sec.gov/reports/ADV/111940/PDF/111940.pdf ("ISS Form ADV filing"); *see also* 2016 GAO Report, *supra* note 246, at 9.

execution, and reporting and regulatory disclosure services to institutional investors.[251] As of May 2022, Glass Lewis had more than 380 employees worldwide that provide services to more than 1,300 clients that collectively manage more than $40 trillion in assets.[252] Glass Lewis states that it covers more than 30,000 shareholder meetings across approximately 100 global markets annually.[253] 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.[254] 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.[255] As of September 2016, Egan-Jones' proxy research or voting clients mostly consisted of mid- to large-sized mutual funds,[256] and the firm covered approximately 40,000 companies.[257] Egan-Jones Ratings Company (Egan-Jones' parent company) is registered with the Commission as a Nationally Recognized Statistical Ratings Organization.[258]

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[251] 2016 GAO Report, *supra* note 246, at 7.

[252] *See* GLASS LEWIS, *Company Overview*, *available at* https://www.glasslewis.com/company-overview/.

[253] *Id*.

[254] *See* 2016 GAO Report, *supra* note 246, at 7.

[255] *Id*.

[256] *Id*.

[257] *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.

[258] *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.

Of these PVABs, ISS and Glass Lewis are the largest and most often used for proxy voting advice.[259] We do not have access to general financial information for ISS, Glass Lewis, or 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 PVAB industry.

As part of our consideration of the baseline for the amendments, we focus on the industry practice that is particularly relevant for the amendments to Rule 14a-2(b)(9): PVABs' procedures for engaging with registrants. As mentioned above and in the 2021 Proposing Release,[260] all three major PVABs have certain policies, procedures, and disclosures in place intended to provide assurances to clients about the information used to formulate the proxy voting advice they receive.[261] In some cases, PVABs seek input from registrants to further these 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. All three PVABs also offer registrants access to proxy voting advice after it is distributed to clients, in some cases for a fee, and offer

[259] *See* 2016 GAO Report, *supra* note 246, 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. . . . .").

[260] *See* 2021 Proposing Release at 67386-87.

[261] *See id.*

mechanisms by which registrants can provide feedback on such advice. Finally, the 2021 Annual Report of the Independent Oversight Committee (the "Oversight Committee") of the Best Practice Principles Group (the "BPPG"), an industry group composed of six PVABs that includes ISS and Glass Lewis,[262] found that all member firms met the standards established in the BPPG's three Best Practices Principles for Providers of Shareholder Voting Research and Analysis,[263] which include communication with and feedback from registrants.[264] The Oversight Committee—which is composed 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 principles. This report did not include Egan-Jones because it is not a member of the BPPG.

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.[265] These notifications and links provide a means for clients to access additional definitive proxy materials that registrants may file in response to proxy voting advice.

b. Clients of Proxy Voting Advice Businesses and Underlying Investors

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[262] The BPPG was formed in 2013 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. *See* BEST PRACTICE PRINCIPLES OVERSIGHT COMMITTEE, *Annual Report 2021* at 7 (July 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"). Its six member-PVABs are Glass Lewis, ISS, Minerva, PIRC, Proxinvest, and EOS at Federated Hermes. *Id.*

[263] *See* Stephen Davis, *First Independent Report on Proxy Voting Advisory Firm Best Practices* (July 14, 2021), *available at* https://corpgov.law.harvard.edu/2021/07/14/first-independent-report-on-proxy-voting-advisory-firm-best-practices/; *see also* 2021 Annual Report, *supra* note 262.

[264] The three principles are (1) service quality; (2) conflicts-of-interest avoidance or management; and (3) communications policy. *See* 2021 Annual Report, *supra* note 262, at 33-34.

[265] 2021 Proposing Release at 67388, n.57.

Clients that use PVABs for proxy voting advice will be affected by the 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 respect to its types of clients on Form ADV. Table 1 below reports client types as disclosed by ISS.[266]

Table 1: Number of Clients by Client Type (as of March 31, 2022)

Type of Client[a]	Number of Clients[b]
Banking or thrift institutions	193
Pooled investment vehicles	317
Investment companies	37
Pension and profit sharing plans	173
Charitable organizations	48
State or municipal government entities	14
Other investment advisers	1030
Insurance companies	53
Sovereign wealth funds and foreign official institutions	11
Corporations or other businesses not listed above	79
Other	291
Total	2,246

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

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

[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) 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 clients include corporations, charitable organizations, and insurance companies.[267] Certain of these clients, such as pension plans, make voting determinations that affect the interests of a wide array of individual investors, beneficiaries, and other constituents.

c. Registrants

The amendments also will affect registrants that have a class of equity securities registered under Section 12 of the Exchange Act and non-registrant parties that conduct proxy solicitations with respect to those registrants.[268] 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.[269]

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[267] *Id.*

[268] 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. 23 asset-backed registrants obtained a class of debt securities registered under Section 12 of the Exchange Act as of December 2021. As a result, these asset-backed registrants are not subject to the Federal proxy rules.

[269] 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.

We note that because registrants are owned by investors, effects on registrants as a result of the 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 that the registrant should pursue. Those individual investors or groups of investors could be clients of PVABs. Separately, given the principal-agent relationship between shareholders and management of a corporation, there may exist conflicts between management of the registrant and investors. Some investors therefore 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.

We estimate that, as of December 31, 2021, the amendments may affect approximately 18,400 entities. Specifically, there were approximately 5,800 registrants with a class of securities registered under Section 12 of the Exchange Act[270] and approximately 30 companies without a class of securities registered under Section 12 of the Exchange Act that filed proxy materials.[271] In addition, there were 12,445 registered management investment companies that were subject to the proxy rules: (i) 11,780 open-end funds, out of which 2,398 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share

[270] We estimated 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/A filed during calendar year 2021 with the Commission. After reviewing these forms, we then counted 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. This estimate excludes: (1) foreign private issuers that filed both Forms 20-F and 40-F; (2) asset-backed registrants that filed Forms 10-D and 10-D/A; and (3) BDCs that filed Form 10-K or an amendment during calendar year 2021 with the Commission.

[271] We identified 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 2021 with the Commission. To identify registrants reporting pursuant to Section 15(d) but not registered under Section 12(b) or Section 12(g), we reviewed all Forms 10-K filed in calendar year 2020 with the Commission. We then counted the number of unique registrants that identified themselves as subject to Section 15(d) reporting obligations with no class of equity securities registered under Section 12(b) or Section 12(g).

class; (ii) 651 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies.[272] We also identified 98 Business Development Companies ("BDCs") that could be subject to the amendments.[273]

These 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 approximately 18,300 potentially affected registrants, approximately 5,565 registrants filed proxy materials with the Commission during calendar year 2021.[274] Out of the 5,565 registrants, 4,621 of these registrants (83 percent) were Section 12 or Section 15(d) registrants and the remaining 944 registrants (17 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.

[272] We estimated the number of unique registered management investment companies based on Forms N-CEN filed between Dec. 2020 and Dec. 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.

[273] 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] and have been issued an 814-reporting number. Our estimate includes 82 BDCs that filed a Form 10-K in 2021, as well as 16 BDCs that were not traded.

[274] We considered 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 reviewed all Forms N-14 filed during calendar year 2021 with the Commission, excluding any Forms N-14 that are exclusively registration statements from our estimates.

- 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) became effective on 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. This staff statement did not alter the compliance date for the Rule 14a-2(b)(9)(ii) conditions.

B. Benefits and Costs

In the following sections, we discuss the economic effects of the amendments in terms of the specific benefits and costs of the final amendments.

Several commenters raised broader concerns with how the Commission conducted its economic analysis in the 2021 Proposing Release. One commenter asserted the Commission did not conduct appropriate due diligence in issuing the 2021 Proposing Release and instead relied

solely on statements made by market participants in private meetings.[275] This commenter also contended that, because the Commission did not "possess any financial or cost information to support" its economic analysis, the Commission "lacks evidence to support the fundamental assumptions that underpin the Proposed Rule."[276] We rely on a number of sources of information to inform our economic analysis, including publicly available data. And our decision to adopt the amendments does not rest on any statements made by market participants in private meetings. Moreover, for reasons the Commission explained at the time, the analysis of the economic effects of adopting Rule 14a-2(b)(9)(ii) was primarily qualitative in nature. In the 2021 Proposing Release, and for the same reasons, the Commission provided a qualitative discussion of the economic effects of rescinding the Rule 14a-2(b)(9)(ii) conditions. The Commission noted where it lacked data and solicited feedback and additional data from commenters. Having not received information or data that would permit a quantitative analysis, we again engage in a qualitative analysis of the costs and benefits of rescinding the conditions.

Another commenter expressed concern that the economic analysis in the 2021 Proposing Release "makes passing reference to impacts on issuers and investors" and "focused almost entirely on the costs borne and benefits received by the PVABs."[277] We disagree, however, as, both in the 2021 Proposing Release and in our discussion below, we have substantively discussed and weighed the potential effects of the amendments on both registrants and investors, such as the potential impact of the rescission of the notice requirement on registrants.

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[275] *See* letter from BIO.

[276] *Id.*

[277] *See* letter from CCMC II.

1. Benefits

In this section, we discuss benefits of the amendments that accrue to PVABs, their clients, registrants, and investors. The main benefit for PVABs from our rescission of the Rule 14a-2(b)(9)(ii) conditions would be the reduction of any initial or ongoing[278] direct costs associated with modifying their current systems and methods, or developing and maintaining new systems and methods. Those costs have been and/or will be incurred 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 when such advice is disseminated to PVABs' clients. Additionally, the amendments will 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 or, if no meeting, before the votes, consents, or authorizations may be used to effect the proposed action. Under the safe harbor in Rule 14a-2(b)(9)(iv), a PVAB could satisfy this requirement by providing notice to its clients that the registrant has filed or has informed the PVAB that it

[278] The compliance date for the Rule 14a-2(b)(9)(ii) conditions was Dec. 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-statement/corp-fin-proxy-rules-2021-06-01. This staff statement did not alter the Dec. 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 will 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 amendments will eliminate or avoid potential future costs.

intends to file additional soliciting materials and include an active hyperlink to those materials on EDGAR when available either: (i) on its electronic client platform; or (ii) through email or other electronic means. Both mechanisms for informing clients could involve initial set-up costs as well as ongoing costs.

One commenter asserted that it is speculative to assume that PVABs would realize cost savings as a result of the proposed amendments.[279] According to this commenter, because PVABs have voluntarily adopted practices regarding registrant interaction, they likely have already absorbed any such costs. The same commenter also expressed concern that the Commission could not quantify these costs. We acknowledge, as the Commission did in the 2021 Proposing Release, that any benefits from the amendments in the form of savings in initial set-up costs may be limited to the extent that PVABs either already had similar systems in place to meet the requirements of the Rules 14a-2(b)(9)(ii) conditions or have made changes to come into compliance with those conditions.[280] Similarly, ongoing cost savings may be limited to the extent PVABs retain similar systems. We also acknowledge that we are unable to quantify the full range of PVABs' costs resulting from the 2020 Final Rules, which would vary depending on each PVAB's current practices and how they implement the new conditions.[281] In the 2020 Adopting Release, for purposes of the Paperwork Reduction Act of 1995 ("PRA"),[282] the Commission estimated that each PVAB would incur 2,845 burden hours to satisfy Rule 14a-

[279] *See* letter from BIO.

[280] *See* 2021 Proposing Release at 67386-87.

[281] While some commenters on the 2021 Proposed Rules provided cost estimates (*e.g.*, letter from ISS), we do not find those estimates persuasive because they were based on the 2019 Proposed Rules, which were different than the 2020 Final Rules.

[282] 44 U.S.C. 3501 *et seq*.

2(b)(9)(ii)(A) and 2,845 burden hours to satisfy Rule 14a-2(b)(9)(ii)(B).[283] The Commission also 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 would not be disclosed.[284] We believe that the amendments will, at a minimum, eliminate these estimated PRA burdens, which took into consideration that some PVABs may have systems and practices in place that could substantially mitigate any overall burden increases.

While there could be various ways a PVAB could comply with the Rule 14a-2(b)(9)(ii) conditions currently, 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. By eliminating the Rule 14a-2(b)(9)(ii) conditions (and, by extension, the Rule 14a-2(b)(9)(iii) safe harbor), the amendments could lead to an increase in PVABs choosing to charge registrants for access to their proxy voting advice, potentially leading to increased revenues for PVABs.

Some commenters expressed concern that the Commission's discussion of the benefits and costs of the proposed amendments focused primarily on the impact on PVABs, ignoring the impact of the amendments on the market more broadly.[285] Contrary to the commenter's suggestion, we have considered the impact of the amendments on other parties, including registrants and investors generally.[286] For example, below, we discuss the potential effects of the amendments on registrants, clients of PVABs, and the investors whose interests these clients represent.

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

[284] *See id.*

[285] *See* letters from CCMC II; Prof. Verret.

[286] *See infra* Section IV.B.2.

The amendments may also benefit other parties. PVABs may pass through a portion of the costs of modifying, developing, or maintaining systems to satisfy the Rule 14a-2(b)(9)(ii) conditions to their clients through higher fees for proxy voting advice. To the extent that rescinding the Rule 14a-2(b)(9)(ii) conditions also eliminates such costs, the cost savings could be passed on to, and therefore could benefit, clients of PVABs. One commenter, however, stated that it is speculative to assume that PVABs' costs would be passed on to clients given the duopolistic nature of the PVAB market.[287]

PVABs, their clients, and investors in general could also benefit to the extent that the final amendments eliminate the possible adverse effects of the Rule 14a-2(b)(9)(ii) conditions on the independence of proxy voting advice.[288] Proxy voting advice that is independent may provide clients of PVABs and other investors, who become aware of such recommendations, with information that would not otherwise have appeared in the proxy or information statement. This could help clients of PVABs and other investors make better voting and investment decisions. One commenter expressed the view that the proposed amendments would strengthen the independence of PVABs.[289] Another commenter, however, stated that the 2021 Proposing Release did not provide evidence that the 2020 Final Rules negatively affected the independence of proxy voting advice.[290] While we are unable to quantify such negative effects for the reasons discussed in more detail above, we believe that the risks posed by the Rule 14a-2(b)(9)(ii) conditions to the cost, timeliness, and independence of proxy voting advice are sufficiently

[287] *See* letter from BIO.

[288] *See supra* note 118.

[289] *See* letter from CII.

[290] *See* letter from BIO.

significant such that it is appropriate to rescind the conditions now to limit any burdens that PVABs and their clients may experience.[291] In making this judgment, we have considered that the vast majority of PVABs' clients and investors that expressed views on the Rule 14a-2(b)(9)(ii) conditions continue to be concerned about the risks those conditions pose.

Finally, one commenter asserted that the Commission did not articulate any real benefits of deleting Note (e).[292] As stated in the 2021 Proposing Release, we do not expect that the deletion of Note (e) will generate any significant benefits other than avoiding any misperception that its adoption purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion. Deleting Note (e) may reduce any increased litigation risk or costs to PVABs that such a misperception may have caused. Notwithstanding this deletion, a PVAB may, depending on the particular facts and circumstances, be subject to liability under Rule 14a-9 for a material misstatement in, or an omission of material fact from, proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A), including with regard to its methodology, sources of information, or conflicts of interest.[293] Thus, we expect that this amendment will not have any significant economic effect.

2. Costs

The 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 their votes. Requiring PVABs to provide registrants with proxy voting advice no later than the time

[291] *See supra* Section II.A.3.

[292] *See* letter from BIO.

[293] *See supra* Section II.B.3.

that they disseminate such information to their clients could allow registrants to more effectively determine whether they wish to respond to a 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 may identify what they perceive to be factual errors or methodological weaknesses in a PVAB's analysis or have a different or additional perspective with respect to the advice. In either case, clients of PVABs, and registrants' investors in general, might have benefited from the availability of additional information on 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 amendments reduce this type of information and it is valuable to investors, the amendments may make it more costly for investors to obtain such information and make timely voting decisions. One commenter took the position that eliminating the Rule 14a-2(b)(9)(ii) conditions would create a substantial risk to registrants that they would be unable to timely correct errors and mischaracterizations in PVABs' proxy voting advice before the annual meeting.[294] According to this commenter, companies must pay close attention to proxy voting advice and address any errors before investors have completed voting because, once investors have voted, it is often too late to make changes. The longer the time period between when a registrant identifies an error and responds to it, the commenter maintained, the less likely the error is to receive the investor's full attention. The same commenter also argued that the costs of correcting errors creates disincentives for PVABs to acknowledge them. To the extent that the

[294] *See* letter from CEC.

rescission of the Rule 14a-2(b)(9)(ii) conditions limit a registrant's ability to timely identify errors and mischaracterizations in proxy voting advice, the rescission could increase costs to investors and registrants. We note, however, that the error rate in proxy voting advice appears to be low. For example, the commenter cites the ACCF study that identified instances during 2021 in which registrants filed supplemental proxy materials to dispute the data or analysis in proxy voting advice that represented less than one percent of the proxy materials filed by registrants that year.[295] Additionally, as mentioned above, we believe that the perpetuation of material errors in proxy voting advice would reduce the quality and usefulness of such advice, which, in the long-term, would reduce a PVAB's credibility in the market and its competitiveness. As such, we believe that PVABs are financially motivated to address errors in their advice.

Additionally, to the extent that a PVAB might have relied on the safe harbor of Rule 14a-2(b)(9)(iii), which requires PVABs to provide registrants with their proxy voting advice for no charge, the 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. Investors ultimately will bear any such costs.

The potential cost associated with the amendments may be mitigated, however, by the practices and standards that PVABs have voluntarily adopted to help improve the basis of their proxy voting advice. For example, some PVABs have voluntarily adopted practices aimed at enabling feedback from certain registrants before and after they disseminate proxy voting advice to their clients.[296] Additionally, the BPPG's principles and the Oversight Committee's role in assessing compliance with those principles could address some of the concerns underlying the

[295] As noted in Section IV.A.1.c, approximately 5,565 registrants filed proxy materials with the Commission during calendar year 2021.

[296] *See* 2021 Proposing Release at 67386-87.

Rule 14a-2(b)(9)(ii) conditions. Moreover, because PVABs voluntarily adopted these practices, we believe that they are less likely to adversely affect the independence, cost, and timeliness of proxy voting advice than any additional measures that PVABs may have needed to implement to satisfy the Rule 14a-2(b)(9)(ii) conditions. One commenter noted that the Commission's analysis assumed that such voluntary practices would remain in place even if the Rule 14a-2(b)(9)(ii) conditions are rescinded.[297] While we cannot know for sure whether these voluntary practices will continue, we agree with the commenters that asserted that PVABs have market-based incentives to maintain these practices, and we also believe the industry-wide standards of BPPG's principles and the role of the Oversight Committee provide further incentives for PVABs to do so. Moreover, as noted above, we will continue to monitor the PVAB market to help ensure that investors are adequately protected and have ready access to information that allows them to make informed voting decisions.

One commenter asserted that registrants and clients of PVABs may have incurred costs in preparing for the 2020 Final Rules, such as amending proxy voting back-office functions for shareholder engagement, designing new bylaws or charter provisions that govern relationships with shareholders, or amending proxy voting policies.[298] To the extent that registrants and PVABs' clients have taken such steps, rescinding the Rule 14a-2(b)(9)(ii) conditions would render them unnecessary and may lead to their reversal, resulting in costs for both registrants and PVABs' clients. But commenters have presented no specific examples of entities that have actually taken action or incurred costs in reliance on the Rule 14a-2(b)(9)(ii) conditions, nor have commenters provided evidence that would allow us to quantify those costs or that give reason to

[297] *See* letter from Prof. Verret.

[298] *See id.*

believe that they are significant. At the same time, we expect that the amendments will result in costs savings for PVABs in the form of some initial costs, ongoing direct costs, and potential indirect costs they would have incurred to comply with the Rule 14a-2(b)(9)(ii) conditions.[299]

One commenter asserted that the Commission's economic analysis failed to appreciate the potential for conflicts of interest that exist between PVABs and the institutional investors that use their services, as well as between the managers of institutional investor funds and the investors whose interests they represent.[300] While we agree that potential conflicts of interest may exist between PVABs and their institutional clients, we do not believe that the Rule 14a-2(b)(9)(ii) conditions are necessary to address that concern, or that rescinding the Rule 14a-2(b)(9)(ii) conditions will exacerbate it. Rather, the 2020 Final Rules address such conflicts through Rule 14a-2(b)(9)(i), which requires PVABs to provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice. The current rulemaking does not amend Rule 14a-2(b)(9)(i). Additionally, PVABs may, depending on the particular facts and circumstances, be subject to liability under Rule 14a-9 for a material misstatement in, or omission of material fact from, proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A), including with regard to their methodology, sources of information, or conflicts of interest. As to potential conflicts between managers of institutional investor funds and the investors whose interests they represent, we believe that such conflicts are directly addressed in other regulations.[301]

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[299] Similar to registrants and PVABs' clients, PVABs may have incurred certain initial costs in preparing for compliance with the Rule 14a-2(b)(9)(ii) conditions.

[300] *See id.*

[301] *See, e.g.*, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248 (June 5, 2019) [84 FR 33669, 33671 (July 12, 2019)] (discussing how an investment adviser's duty of loyalty under its fiduciary duty requires, amongst other things, that it must eliminate or make full and fair disclosure of all

Finally, just as we do not expect the deletion of Note (e) to generate any significant benefits, we do not expect that its deletion will create any significant costs for PVABs, investors, or registrants. Given that this amendment will not alter a PVAB's potential liability under Rule 14a-9, we expect that its economic impact will be minimal. One commenter took the position that, in addition to deleting Note (e), the Commission also should exempt certain portions of proxy voting advice from Rule 14a-9 liability to provide investors with additional comfort that they will not indirectly bear the costs of litigation on the basis of mere disagreements regarding a PVAB's analysis, methodology, or sources of information.[302] We believe that this approach is not appropriate for the reasons discussed in Section IV.D.2.

C. Effects on Efficiency, Competition, and Capital Formation

As discussed above in Section IV.A, PVABs perform a variety of functions for their clients, including analyzing and making voting recommendations on matters presented for shareholder votes in registrants' proxy statements as an alternative or supplement to their clients' own internal resources. Rather than using these services, PVABs' clients could instead solely rely upon internal resources to research, analyze, and execute proxies.[303] Given the costs of researching and voting proxies, the services offered by PVABs may offer economies of scale

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conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict); *see also* Rule 206(4)–6 under the Investment Advisers Act of 1940, 17 CFR 275.206(4)–6 (prohibiting an investment adviser to exercise voting authority with respect to client securities, unless the adviser (i) has adopted and implemented written policies and procedures that are reasonably designed to ensure that the adviser votes proxies in the best interest of its clients, which procedures must include how the investment adviser addresses material conflicts that may arise between the adviser's interests and interests of their clients; (ii) discloses to clients how they may obtain information from the investment adviser about how the adviser voted with respect to their securities; and (iii) describes to clients the investment adviser's proxy voting policies and procedures and, upon request, furnishes a copy of the policies and procedures to the requesting client).

[302] *See* letter from CII.

[303] PVABs' clients may also rely on some combination of internal and external analysis.

relative to their clients performing these 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.[304] Small institutional investors surveyed in the study indicated they had limited resources to conduct their own research.[305]

To the extent that the 2020 Final Rules increase compliance costs and costs related to litigation risk for PVABs that could be passed on to clients, the amendments would reverse those increases along with any related decrease in demand for PVABs' advice. If PVABs offer economies of scale relative to their clients performing certain functions themselves, increased demand for, and reliance on, 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 proxy voting advice or reduce the diversity of thought in the market for proxy voting advice (*e.g.*, by

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[304] *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* letter in response to the 2019 Proposing Release 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); 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").

[305] *See* 2007 GAO Report, *supra* note 304, at 2; *see also* letter 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 SEC Roundtable on the Proxy Process at 194 (Nov. 15, 2018), *available at* https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf (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.").

PVABs erring on the side of caution in complex or contentious matters), eliminating those conditions could reverse those effects, resulting in advice from PVABs that contributes to more informed proxy voting decisions by their clients. If clients perceive the amendments as positively affecting PVABs' objectivity and independence, demand for proxy voting advice could increase, and the proxy voting process may become more efficient.[306]

On the other hand, the amendments could make the proxy voting process less efficient if they reduce the overall mix of information available to PVABs' clients and investors in general and the information lost is valuable to investors. For example, rescinding the Rule 14a-2(b)(9)(ii) conditions, may limit prompt registrant responses to proxy voting advice and investor access to such responses, which could make it more costly for investors to obtain such information and make timely voting decisions.

In addition, any reduction in costs for PVABs due to the rescission of the Rule 14a-2(b)(9)(ii) conditions could increase competition for proxy voting advice compared to the current baseline, which includes the effect of the 2020 Final Rules. In particular, if PVABs pass costs incurred to comply with the conditions on to their clients, the reduction of these costs due to the amendments could encourage some investors to retain the services of PVABs, which could reduce the use of internal resources for voting. Also, any improvement in the independence of proxy voting advice that preserves investors' confidence in the integrity of such advice could cause PVABs to compete more on this dimension. Finally, any reduction in compliance costs and costs related to litigation risk, if large enough, may increase competition among PVABs by

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

encouraging entry into the market for proxy voting advice.[307] However, given the fact that there are only three major PVABs in the United States, we do not expect that the amendments would significantly increase the likelihood of new entry into this market.

If the amendments facilitate the ability of PVABs' clients to make informed voting determinations, investment outcomes could improve for investors, which could lead to a greater allocation of resources to investment. To the extent that the 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, we expect any effect of the amendments on capital formation to be small.

In addition, we do not expect the deletion of Note (e) to have any significant economic effect on efficiency, competition, and capital formation.

Finally, one commenter stated that the Commission had properly characterized the effects of the proposed amendments on efficiency, competition, and capital formation.[308] Another commenter expressed concern regarding the duopolistic nature of the PVAB market and asserted that the proposed amendments would constitute an anti-competitive stance by the Commission.[309] We disagree with such an assessment. As noted above, any reduction of compliance costs due to the amendments could encourage some investors to retain the services of PVABs, and any improvement in the independence of proxy voting advice that preserves

[307] *See* letter in response to the 2019 Proposing Release from Minerva Analytics (Feb. 22, 2020), *available at* https://www.sec.gov/comments/s7-22-19/s72219-6615792-202950.pdf. 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.*

[308] *See* letter from CII.

[309] *See* letter from BIO.

investors' confidence in the integrity of such advice could increase competition in the PVAB market.

D. Reasonable Alternatives

1. Interpretive Guidance Regarding Whether Systems and Processes Satisfy the Rule 14a-2(b)(9)(ii) Conditions

As an alternative to rescinding the Rule 14a-2(b)(9)(ii) conditions, we could issue interpretive guidance regarding whether the systems and processes that PVABs have in place satisfy the Rule 14a-2(b)(9)(ii) conditions, which could reduce compliance costs and address concerns regarding the independence of proxy voting advice. This approach could reduce PVABs' initial or ongoing costs of complying with these conditions if we determine that their current systems and processes already satisfy them to the extent that PVABs have not already modified their existing business models. Such guidance also could mitigate concerns that these conditions could impair the independence of proxy voting advice by indicating that PVABs need not modify their practices.

However, this approach would only eliminate the potential adverse effects associated with the Rule 14a-2(b)(9)(ii) conditions if we were to determine that PVABs' pre-existing systems and processes already fully satisfy the conditions. But, as discussed above, while we believe that PVABs' current practices advance a number of the goals that underlie the Rule 14a-2(b)(9)(ii) conditions and will mitigate any adverse impact from their rescission, those practices do not replicate the Rule 14a-2(b)(9)(ii) conditions in all respects. And PVABs' consistent opposition to the 2020 Final Rules further supports that conclusion.

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

Rather than, or in addition to, deleting Note (e) to Rule 14a-9, we could exempt certain portions of proxy voting advice from Rule 14a-9 liability. For example, we 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. Several commenters generally supported this alternative.[310] The benefit of this alternative could 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 a disagreement regarding their analysis, methodology or sources of information.

This alternative, however, could result in uncertainty and litigation over the scope of any exemption from Rule 14a-9 liability. Moreover, as discussed above, we believe that existing law regarding the application of Rule 14a-9 to statements of opinion adequately addresses the concerns that PVABs, their clients, and others have expressed regarding the potential for perceived litigation risks to impair the independence of proxy voting advice, particularly in conjunction with our deletion of Note (e). Exempting all or parts of proxy voting advice from Rule 14a-9 liability entirely could eliminate liability even in the narrow circumstances considered in *Omnicare* and *Virginia Bankshares* in which statements of opinion in such advice contain a material misstatement or omission. We believe that it is appropriate to continue to subject proxy voting advice to Rule 14a-9 liability for material misstatements or omissions to help ensure that PVABs' clients are provided with the information they need to make fully informed voting decisions and to mitigate some of the concerns that opposing commenters raised in their comment letters.

[310] *See* letters from ICGN; Ohio Public Retirement; CII.

V. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of our rules, schedules and forms that will be affected by the final amendments contain "collection of information" requirements within the meaning of the PRA. We published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[311] The hours and costs associated with maintaining, disclosing, or providing the information required by the final 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).

We adopted existing Regulation 14A[312] 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.[313] A detailed description of the final amendments, including the need for the information and its proposed use, as well as a description of the likely

[311] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[312] 17 CFR 240.14a-1 *et seq.*

[313] 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.

respondents, can be found in Section II above, and a discussion of the expected economic effects of the final amendments can be found in Section IV above.

B. Summary of Comment Letters on PRA Estimates

We did not receive any comment letters in response to the request for comment on the PRA estimates and analysis included in the 2021 Proposing Release. We did, however, receive one comment letter stating that "the proposal requests comments on an array of complex issues that cannot be addressed within 30 days," and noting that the 30-day comment period on the 2021 Proposed Amendments "also applies to comments on the proposed burden analysis for the information collections associated with the Proposal."[314] That commenter expressed concern that "[t]here is no guarantee" as to how quickly the Commission's Office of FOIA Services will process requests for materials submitted to OMB by the Commission regarding the collection of information required by the 2021 Proposed Amendments. For the reasons discussed above, we believe that the comment period provided adequate opportunity for interested parties to share their views.[315]

C. Burden and Cost Estimates for the Final Amendments

Below we estimate the incremental and aggregate effect on paperwork burden as a result of the final amendments, which, as discussed above in Section II, we are adopting as proposed. Most, if not all, of the effect on paperwork burden as a result of the final amendments derives from the rescission of the Rule 14a-2(b)(9)(ii) conditions and the related safe harbors set forth in Rules 14a-2(b)(9)(iii) and (iv), as we expect those amendments will reduce the paperwork burden associated with Rule 14a-2(b)(9).

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[314] *See* letter from CCMC I.

[315] *See* discussion *supra* note 71.

As discussed in Section II above, we are adopting the 2021 Proposed Amendments as proposed. Further, because we did not receive any comment letters directly addressing the PRA estimates and analysis included in the 2021 Proposing Release, we have not adjusted those estimates to account for comments. In the 2021 Proposing Release, the Commission noted that "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."[316] As such, the PRA analysis in the 2021 Proposing Release "instead set forth the estimated amount of paperwork burden that the parties affected by Rule 14a-2(b)(9) would avoid as a result of [the] proposed amendments to Rule 14a-2(b)(9)."[317] However, Rule 14a-2(b)(9) became effective on December 1, 2021, after the Commission issued the 2021 Proposing Release. We have, therefore, revised the PRA analysis to reflect our expectation that the final amendments will reduce, rather than avoid, the burdens associated with Rule 14a-2(b)(9).

1. Impact on Affected Parties

As discussed above in Section IV.A.1, the final amendments may directly or indirectly affect a variety of parties. These parties 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 will experience some reduction in paperwork

[316] 2021 Proposing Release at 67396.

[317] *Id.*

burden as a result of the final amendments.[318] As discussed further below, we believe that any incremental decrease in these burdens would be attributable to the rescission of Rule 14a-2(b)(9)(ii). We do not expect that the deletion of Note (e) to Rule 14a-9 will have a significant economic impact because it will not change existing law and, therefore, will not change respondents' legal obligations.[319] Moreover, any impact arising from this amendment should not materially change the average PRA burden hour estimates associated with Regulation 14A. Thus, we have not made any adjustments to our PRA burden estimates as a result of the deletion of Note (e).

a. Proxy Voting Advice Businesses

We expect that our amendments to Rule 14a-2(b)(9) will decrease the paperwork burden for PVABs. Rule 14a-2(b)(9) applies 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 by which a PVAB's burden will decrease depends on a number of factors that are firm-specific and highly variable, which makes it difficult to provide reliable quantitative estimates.[320]

Two components of the amendments to Rule 14a-2(b)(9) should decrease PVABs'

[318] 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 amendments. While other parties, such as the clients of PVABs, may experience benefits and costs associated with the amendments, *see supra* Section IV.B, only PVABs and registrants will avoid any additional paperwork burden as a result of the amendments.

[319] The deletion of Note (e) may relieve PVABs of direct costs to the extent that Note (e) prompted 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 neither represented a change to existing law nor broadened the concept of materiality or created a new cause of action. *See* 2020 Adopting Release at 55146, n.685. Similarly, we expect that any avoidance of incremental burdens associated with this amendment would be minimal because our deletion of Note (e) does not alter the application of Rule 14a-9 to proxy voting advice. *See supra* Section II.B.3.

[320] *See generally supra* Section IV.B.1 (discussing the difficulty in providing quantitative estimates of the benefits to PVABs associated with the amendments).

paperwork burden. 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 shareholder meeting. The final amendments will rescind both of these rules, thereby relieving PVABs of the obligation to comply with these requirements. The final amendments will 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 Rule 14a-2(b)(9)(ii) conditions. We address each of these components in turn.

In the 2020 Adopting Release,[321] the Commission estimated that PVABs would incur an annual incremental paperwork burden to comply with Rules 14a-2(b)(9)(ii), (iii) and (iv) as follows:

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	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

[321] 2020 Adopting Release at 55148-49.

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.	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

	○ 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, the Commission estimated an annual total increase of 34,140 hours[322] 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 the final amendments will decrease PVABs' burdens by the same amount.

b. Registrants

In addition to PVABs, we anticipate that the final amendments to Rule 14a-2(b)(9) will decrease the paperwork burden for registrants. In the 2020 Adopting Release, the Commission 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 proxy voting advice, reviewing proxy voting advice, and preparing and filing supplementary proxy materials in response to

[322] 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. We are 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). The Commission 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. The Commission 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, that number was expected to be small. Accordingly, rather than increasing the estimate of the number of affected PVABs beyond the three discussed above, the Commission increased the 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 amendments. Because the Commission did not indicate, in the 2020 Adopting Release, 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 amendments.

proxy voting advice, if they choose to do so.[323] Because Rule 14a-2(b)(9) does not require registrants to engage with PVABs or take any action in response to proxy voting advice, the Commission stated that it expected a registrant would bear additional paperwork burden only if such registrant anticipated the benefits of engaging with the PVABs would exceed the costs of participation. The Commission noted that these costs would vary depending upon the particular facts and 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, the Commission estimated an average increase of 50 hours per registrant in connection with Rule 14a-2(b)(9) 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.[324] Accordingly, we expect that by rescinding the Rule 14a-2(b)(9)(ii) conditions, the final amendments will decrease registrants' paperwork burdens by the same amount.

2. Aggregate Decrease in Burden

Table 1 summarizes the calculations and assumptions used to derive our estimates of the aggregate decrease in burden for all affected parties due to our rescission of the Rule 14a-2(b)(9)(ii) conditions.

[323] 2020 Adopting Release at 55149.

[324] *Id.* at 55149-50. The Commission 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). *Id.* at 55150, n.705.

PRA Table 1. Calculation of Aggregate Decrease in Burden Hours Resulting from Rescission of the Rule 14a-2(b)(9)(ii) Conditions and Related Safe Harbors

	Affected Parties	
	Proxy Voting Advice Businesses (A)	Registrants (B)
Burden Hour Decrease	34,140	284,500
Aggregate Decrease in Burden Hours	[Column Total (A)] + [Column Total (B)] = [318,640]	

3. Decrease in Annual Responses

We believe that the final amendments will decrease the number of annual responses[325] to the existing collection of information for Regulation 14A. In the 2020 Adopting Release, the Commission stated that it did not expect registrants to file any different number of proxy statements as a result of the 2020 Final Rules. The Commission did state, however, that it 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, the Commission estimated that there would be an additional 783 annual responses to the collection of information as a result of the 2020 Final Rules.[326] Accordingly, we expect that the final

[325] 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. 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.

[326] 2020 Adopting Release at 55150, n.707.

amendments will decrease the number of annual responses to the collection of information for Regulation 14A by the same amount.

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[327] as a result of our rescission of the Rule 14a-2(b)(9)(ii) conditions. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA Table 2. Decrease in Burden Hours Resulting from the Rescission of the Rule 14a-2(b)(9)(ii) Conditions and Related Safe Harbors

Number of Estimated Responses (A)†	Total Decrease in Burden Hours (B)††	Decrease in Burden Hours Per Response (C) = (B)/(A)	Decrease in Internal Hours (D) = (B) x 0.75	Decrease in Professional Hours (E) = (B) x 0.25	Decrease in Professional Costs (F) = (E) x $400
5,586	318,640	57	238,980	79,660	$31,864,000

† This number reflects an estimated decrease of 783 annual responses to the existing Regulation 14A collection of information as a result of the rescission of the Rule 14a-2(b)(9)(ii) conditions. The current OMB inventory for Regulation 14A reflects 6,369 annual responses.

†† 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.

5. Program Change and Revised Burden Estimates

PRA Table 3 summarizes the estimated change to the total annual compliance burden of

[327] For purposes of the PRA, the paperwork burden for the information collection is to be allocated between internal burden hours and outside professional costs. The Commission's estimates in the 2020 Adopting Release assumed that 75% of the burden of Regulation 14A would be borne internally by the company and 25% would be outside professional costs. The Commission 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, the Commission 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 id.* at 55150, n.708. We use these same estimates for the final amendments.

the Regulation 14A collection of information, in hours and in costs, as a result of the rescission of the Rule 14a-2(b)(9)(ii) conditions.

PRA Table 3. Paperwork Burden as a Result of the Rescission of the Rule 14a-2(b)(9)(ii) Conditions and Related Safe Harbors

	Current Burden			Program Change			Revised Burden		
Reg. 14A	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Decrease in Responses (D)[±]	Decrease in Internal Hours (E)[±±]	Decrease in Professional Costs (F)[±±±]	Annual Responses	Burden Hours (H) = (B) - (E)	Cost Burden (I) = (C) - (F)
	6,369	778,802	$ 103,805,312	783	238,980	$31,864,000	5,586	539,822	$71,941,312

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

[±±] *See* Column (D) in PRA Table 2.

[±±±] From Column (F) in PRA Table 2.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act ("RFA").[328] It relates to the 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. Specifically, we are amending Rules 14a-2 and 14a-9 to rescind the Rule 14a-2(b)(9)(ii) conditions (as well as the related safe harbors and exclusions set forth in Rules 14a-2(b)(9)(iii) through (vi)) and to delete Note (e) to Rule 14a-9. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the RFA and included in the 2021 Proposing Release.

[328] 5 U.S.C. 601 *et seq.*

A. Need for, and Objectives of, the Final Amendments

The intent of the final amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of their proxy voting advice and avoid misperceptions regarding the application of Rule 14a-9 liability to proxy voting advice, while also preserving investors' confidence in the integrity of such advice. We discuss the need for, and objectives of, these amendments in more detail in Sections I and II above. We address the economic impact of these amendments in Sections IV and V above.

B. Significant Issues Raised by Public Comments

In the 2021 Proposing Release, the Commission requested comments on the IRFA, including 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). The Commission also requested comments on how the 2021 Proposed Amendments may affect PVABs, their clients, and registrants.

We did not receive comments on the IRFA or any comments that directly responded to the Commission's requests for comments in the IRFA. However, several commenters generally discussed PVABs' current internal policies and procedures and the potential impact of the amendments on PVABs, their clients, and registrants.[329] In developing the FRFA, we considered these comments as well as the other comments on the 2021 Proposed Amendments.[330]

[329] *See supra* Sections II.A.2 and II.B.2.

[330] *See supra* Sections II, III, and IV.

C. Small Entities Subject to the Final Amendments

The final amendments are likely to affect some small entities that are either: (i) PVABs; or (ii) registrants conducting solicitations that are the subject of proxy voting advice.

The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[331] 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.[332] An investment company, including a BDC, 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.[333] 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.[334] We estimate that there are 772 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.[335] In addition, we estimate that, as of December 2021,

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[331] 5 U.S.C. 601(6).

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

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

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

[335] 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 Jan. 1,

there were 80 registered investment companies that would be subject to the final amendments that may be considered small entities.[336] Finally, we estimate that, as of December 2021, there were 594 investment advisers that may be considered small entities.[337] As discussed above, one of the three major PVABs in the United States—ISS—is a registered investment adviser.[338]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

Because we are rescinding the Rule 14a-2(b)(9)(ii) conditions (as well as the related safe harbors and exemptions set forth in Rules 14a-2(b)(9)(iii) through (vi)) and deleting Note (e) to Rule 14a-9, the final amendments will not impose reporting, recordkeeping, or other compliance requirements on entities of any size, including small entities. To the contrary, the final amendments will alleviate the need for entities of any size, including small entities, to incur any costs needed to comply with the requirements of the rules that we are rescinding.[339] For example, as discussed in our PRA analysis, we expect that the rescission of the Rule 14a-2(b)(9)(ii) conditions and related safe harbors will decrease the paperwork burdens for PVABs and registrants by the amounts that the Commission estimated that PVABs and registrants would incur as a result of these rules when adopting them.[340] Accordingly, we believe that the final

2021 to Dec. 31, 2021. This analysis is based on data from XBRL filings, Compustat, Ives Group Audit Analytics, and manual review of filings submitted to the Commission.

[336] 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 last quarter of 2021.

[337] We based this estimate on registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[338] *See supra* Section IV.A.1.

[339] *See supra* Sections IV.B and V.

[340] *See supra* Section V.

amendments will reduce the reporting, recordkeeping, and other compliance requirements applicable to small entities

The amendments could have other economic effects beyond simply reducing compliance requirements. We refer to the discussion of the final amendments' economic effects on all affected parties, including small entities, in Sections IV and V above.[341] 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.[342]

As a general matter, however, we recognize that any costs of the final amendments borne by the affected entities could have a proportionally greater effect on small entities, as they may be less able to bear such costs relative to larger entities. For example, as discussed in Section IV.B.2, the final 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 IV.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 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 will be borne disproportionately by smaller institutions. That said, as discussed in Section IV.B.2, we expect that any such costs imposed on PVABs' clients would be mitigated to

[341] In particular, we discuss the estimated benefits and costs of the final amendments on affected parties in Section IV.B above. We also discuss the estimated compliance burden associated with the final amendments for purposes of the PRA in Section V above.

[342] *See supra* Section IV.C.

the extent that PVABs currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue proxy voting advice.

Although we do not expect that PVABs or registrants will incur significant costs as a result of the final amendments, compliance with the amended rules may require the use of professional skills, including legal skills.

E. Agency Action to Minimize Effect on Small Entities

As noted, the purpose of the final amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of their proxy voting advice and avoid misperceptions regarding the application of Rule 14a-9 liability to proxy voting advice, while also preserving investors' confidence in the integrity of such advice. 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 final 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.

As a primary matter, we do not expect that PVABs, investors, or registrants of any size will incur significant costs as a result of the deletion of Note (e) to Rule 14a-9. We recognize, however, that any costs of rescinding the Rule 14a-2(b)(9)(ii) conditions borne by the affected entities could have a proportionally greater effect on small entities as they may be less able to

bear such costs relative to larger entities. While we acknowledge the potential costs that small entities may bear due to the rescission of the Rule 14a-2(b)(9)(ii) conditions, neither the above alternatives nor any other alternative to rescinding the conditions would be as effective in accomplishing our objectives. As discussed in more detail above, rescinding the Rule 14a-2(b)(9)(ii) conditions is appropriate because we believe that the potential informational benefits to investors of these conditions do not sufficiently justify the risks they pose to the cost, timeliness, and independence of proxy voting advice on which many investors rely.[343] We also believe that deleting Note (e) is appropriate given our conclusion that, rather than reducing legal uncertainty and confusion, the addition of Note (e) has unnecessarily exacerbated it. We believe that rescinding these rules is the best course of action to address these concerns.

Thus, the above alternatives are not relevant because we are rescinding rules that imposed requirements (*i.e.*, the Rule 14a-2(b)(9)(ii) conditions) rather than adopting new requirements that could be modified to account for their potential impact on small entities. Our objectives, therefore, 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 final amendments do not set forth any standards, our objectives would not be served by establishing performance rather than design standards.

STATUTORY AUTHORITY

We are adopting 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

[343] *See supra* Section II.A.3.

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

List of Subjects in 17 CFR Part 276

Securities.

TEXT OF RULE AMENDMENTS

In accordance with the foregoing, we are amending 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.

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

4. The authority citation for part 276 continues to read as follows:

Authority: 15 U.S.C. 80b *et seq*.

5. Amend the table by removing Release No. IA-5547.

By the Commission.

Dated: July 13, 2022.

Vanessa A. Countryman,
Secretary.