

SEC Reporting & Compliance Alert

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SEC Rescinds Certain 2020 Amendments to Rules Governing Proxy Advisors

On July 13, 2022, the U.S. Securities and Exchange Commission (SEC), by a 3-2 vote, adopted amendments to the rules governing proxy voting advice businesses (proxy advisors), rescinding two components of the proxy rules adopted in 2020 (2020 Amendments). The amendments rescind (i) certain conditions that proxy advisors would have to satisfy for their voting recommendations to be exempt from proxy information and filing requirements and (ii) an explanatory note illustrating instances in which proxy advisor voting recommendations may run afoul of the anti-fraud provisions of the proxy rules. (See our July 27, 2020, client alert, "[SEC Adopts Proxy Rule Amendments Relating to Proxy Voting Advice Businesses](#).”)

In the adopting release, the SEC cited, among other matters, concerns about the impact of the 2020 Amendments on the ability of clients of proxy advisors to receive independent proxy voting advice in a timely and cost-effective manner. From a practical perspective, the amendments preserve the status quo and companies may not experience any changes in their interactions with proxy advisors as a result of these amendments.¹

Conditions for Exemptions From the Proxy Information and Filing Requirements

Proxy voting advice provided by a proxy advisor generally constitutes a “solicitation” under the proxy rules. This long-standing SEC position was codified by the 2020 Amendments and remains in place.² A solicitation under the proxy rules is subject to information and filing requirements unless an exemption applies. Under the 2020 Amendments, to qualify for such an exemption, proxy advisors were required to, among other things, adopt and disclose written policies and procedures reasonably designed to ensure that:

- the proxy advisor’s voting advice is made available to the subject company at or before the time such advice is disseminated to the proxy advisor’s clients; and
- the proxy advisor provides a mechanism by which its clients can reasonably be expected to become aware of the subject company’s written responses to such voting advice.

¹ The conditions for proxy voting advice to qualify for an exemption from the proxy solicitation rules became effective on December 1, 2021. However, on June 1, 2021, the Division of Corporation Finance of the SEC issued guidance that it would not recommend enforcement action to the SEC based on the 2020 Amendments while the SEC considered whether to take further regulatory action regarding the 2020 Amendments.

² ISS has brought a lawsuit against the SEC challenging this position, which remains pending.

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- The amendments rescind those requirements, as well as related safe harbors and exclusions. The requirement that proxy advisors disclose material conflicts of interest and steps taken to address them, added by the 2020 Amendments, remains in place.

Anti-Fraud Provisions

All soliciting material — including proxy voting advice — is subject to the proxy rules' anti-fraud provisions, which prohibit false or misleading soliciting material. The 2020 Amendments added to the proxy rules' anti-fraud provisions a note setting forth non-exclusive examples of cases where failing to disclose certain information in proxy voting advice may be considered misleading. The amendments rescind that note.

The adopting release states that, even with the rescission of the note, proxy advisors remain subject to liability for material misstatements and omissions of fact. However, the adopting release emphasizes that liability under the proxy rules does not extend to differences of opinion in making voting recommendations, including a proxy advisor exercising its discretion to rely on a particular analysis, methodology or data set rather than alternatives advanced by companies or other parties.

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More information on the amendments is available in the SEC's [adopting release](#) and accompanying [press release](#).

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