

SEC Proposes Amendments Relating to Proxy Voting Advice

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On November 5, the Securities and Exchange Commission voted to propose amendments to the rules governing proxy solicitations to expressly apply them to proxy voting advisors. The proposed amendments would codify the SEC's position that proxy voting advice is a "solicitation" within the meaning of the proxy rules, place certain disclosure requirements on proxy voting advice and define what would be impermissible false or misleading disclosure in the context of proxy voting advice.

Proxy voting advice has been an area of recent focus and attention. The SEC's recent guidance on this subject was previously discussed in the [August 23, 2019 edition](#) of *Corporate & Finance Weekly Digest*. The previous guidance is also the subject of a lawsuit filed by Institutional Shareholder Services Inc. (ISS), which was previously discussed in the [November 1, 2019 edition](#) of *Corporate & Finance Weekly Digest*.

Solicitation

In the SEC's August 2019 release, the SEC expressed its position that proxy voting advice constitutes a "solicitation" within the meaning of the federal proxy rules and is subject to the general antifraud provisions of Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 14a-9 (False or Misleading Statements).

The proposed amendments to the proxy rules would codify this interpretation, amending the definition of the terms "solicit" and "solicitation" to include any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent or authorization on a specific matter for which shareholder approval is solicited when furnished by a person that markets its expertise as a provider of such advice (separate from other forms of investment advice) and sells such advice for a fee. Such conduct, the SEC determined, is the type of activity that raises the investor protection concerns about inadequate or materially misleading disclosures that the proxy rules are intended to address.

The proposed amendments would exclude any proxy voting advice furnished in response to an

unprompted request by someone not claiming to be an expert in proxy voting advice.

Disclosure Requirements

Generally, any person engaged in a proxy solicitation is subject to the filing and information requirements of the proxy rules, unless exempt from such requirements. Typically, proxy voting advisory firms could have relied on two exemptions from the filing and information requirements in order to provide proxy advice without being subject to the filing and information requirements: Rule 14a-2(b)(1) which exempts solicitations made by persons who do not seek the power to act as a proxy for a shareholder and do not have a substantial interest in the subject of the communication and Rule 14a-2(b)(3) which exempts proxy voting advice by an advisor to any person with whom the advisor has a business relationship.

The proposed amendments would continue to allow proxy voting advisors to rely on these exemptions from the filing and information requirements of the proxy rules only if they include disclosure on any material interests of the proxy voting advisor in the matter or parties relating to the advice, any material transaction or relationship between the proxy voting advisor and the registrant, other soliciting parties or any shareholder proponent and other material information regarding its interests in the transaction. The disclosure also would need to address any policies or procedures used by the proxy voting advisor to identify and address any material conflicts of interest.

The proposed amendments would require proxy voting advisors relying on an exemption from the filing and information requirements of the proxy rules to provide registrants with time to review and provide feedback on the proxy voting advice before it is disseminated to clients.

Under the proposed amendments, if the registrant files its definitive proxy statement less than 45 days but at least 25 days before its shareholder meeting, the proxy voting advisor would be required to provide at least three business days for the registrant to review and provide feedback. If the registrant files its definitive proxy 45 days or more before the meeting, the proxy voting advisor would be required to provide at least five business days for the registrant to review and provide feedback. These proposed review periods are designed to provide proxy voting advisors a reasonable amount of time to engage with registrants without jeopardizing their ability to provide timely advice to their clients. Once the review is complete, proxy voting advisors would be required to provide registrants a final notice of voting advice with the version of the advice to be sent to clients at least two business days in advance of delivery to clients. Registrants may request that the proxy voting advisor include a hyperlink in its voting advice that leads to a registrant's statement about the proxy advisor's voting advice.

False or Misleading Statements

Rule 14a-9 generally prohibits any proxy solicitation from containing a false or misleading statement with respect to any material fact. While solicitations made by proxy voting advisors may be exempt from the information and filing requirements of the proxy rules, they are subject to Rule 14a-9. Currently, Rule 14a-9 provides examples of certain statements that may be misleading in the context of the rule, including predictions as to specific future market values. The proposed amendments would add a new example to the rule, stating that failure by a proxy voting advisor to disclose information such as the proxy voting advisor's methodology, source of information and conflicts of interest may be misleading.

The proposed amendments have garnered significant public reaction, with the New York City

Comptroller opposing the proposed changes and industry groups like the National Association of Manufacturers coming out in favor of the proposed amendments.

The SEC's proposing release is available [here](#).

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