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SEC adopts final rules governing proxy voting advice and issues supplemental guidance regarding proxy voting responsibilities of investment advisers

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At an open meeting held last week, the Securities and Exchange Commission ("SEC" or the "Commission") adopted amendments to the proxy rules (the "Amendments") subjecting proxy advisory firms to proxy solicitation rules under the Securities Exchange Act of 1934 (the "Exchange Act") and providing conditions for the availability of certain related exemptions from the filing and information requirements of the federal proxy rules relied upon by proxy advisors. Additionally, the Commission adopted amendments to the antifraud provision of the federal proxy rules intended to clarify the application of the antifraud provisions of the proxy rules to voting advice provided by proxy advisory firms. In conjunction with the Amendments, the Commission also issued supplemental guidance to investment advisers on proxy voting responsibilities (the "Supplemental Guidance"). The Amendments and Supplemental Guidance follow Commission guidance issued in August 2019 regarding the applicability of the federal proxy rules to proxy voting advice and the proxy voting responsibilities of investment advisers (the "Prior Guidance"), which is summarized in our prior alert, and are the latest step in the Commission's ongoing initiatives to reform the proxy process.

Specifically, the Amendments codify the Commission's longstanding view that proxy voting advice generally constitutes a solicitation within the meaning of Section 14(a) of the Exchange Act and therefore is subject to the federal proxy rules. The Amendments further provide several conditions that a proxy advisor must satisfy in order to rely on existing commonly used exemptions from the information and filing requirements of the proxy rules, including: (1) publicly disclosing material conflicts of interest and (2) adopting and publicly disclosing written policies and procedures reasonably designed to ensure that (a) the proxy voting advice is available to the subject company (or other soliciting persons) at or before the time when the proxy advisor's clients receive such advice and (b) the proxy advisor's clients can reasonably be expected to become aware of any written statements from the subject company responding to such advice in a timely manner and before the applicable shareholder meeting. The Amendments provide two non-exclusive safe harbors to give assurance to a proxy advisory firm its written policies and procedures are in compliance with these requirements. The Amendments do not, however, require that companies be provided a preview of a proxy advisor's voting recommendations and an opportunity to provide

feedback prior to issuance to the advisor's clients as initially proposed. In adopting the Amendments, the Commission emphasized the principles-based nature of the new requirements and the flexibility afforded to proxy voting advisors to tailor disclosures and internal policies and procedures based on their specific individual facts and circumstances.

The Commission Chairman Jay Clayton noted in the press release announcing the Amendment and the Supplemental Guidance that the Amendments will ensure that professional market participants utilizing the services of proxy voting advisors "have the accurate and decision useful information necessary to make an informed voting decision" on behalf of the Main Street investors who participate in public markets through ownership of mutual funds and ETFs managed by such professionals.

The Supplemental Guidance expands upon the Prior Guidance and assists an investment adviser, as a client of the proxy advisory firm, in assessing how to consider company responses to the proxy voting advice that may become more readily available to the investment adviser as a result of the Amendments.

The Amendments

The following table describes the adopted Amendments governing proxy solicitation:

Rule	Amendments
Rule 14a-1(l)	Rule 14a-1(l)(1)(iii) makes clear that the terms "solicit" and "solicitation" 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, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee. — The Commission views the proxy voting advice formulated pursuant to a custom policy or each separate policy or set of guidelines as distinct solicitations under the Amendments. Rule 14a-1(l)(2) makes clear that the terms "solicit" and "solicitation" do not include any proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request.
Rule 14a-2(b)	In order to be exempted from the information and filing requirements pursuant to either Rule 14a-2(b)(1) or (b)(3), a proxy advisory firm: — must include in its proxy voting advice or in an electronic medium used to deliver the voting advice to clients the conflicts of interest disclosure specified in new Rule 14a-2(b)(9)(i); and — must adopt and publicly disclose written policies and procedures reasonably designed to ensure, as required by new Rule 14a-2(b)(9)(ii)(A) and (B), respectively, that — Companies 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 the proxy advisory firm's clients; and — The proxy advisory firm provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by companies that are the subject of such 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). Generally excluded from these notice requirements are (1) advice based on custom voting policies that are proprietary to the proxy advisory firm's client and (2) recommendations relating to M&A transactions or contested matters subject to Rule 14a-3 requirements. The Amendments provide the following two non-exclusive safe harbors that give assurance to a proxy advisory firm that it has met the requirement of new Rule 14a-2(b)(9)(ii)(A) and (B), respectively: — has written policies and procedures that are reasonably designed to provide registrants with a copy of its proxy voting advice, at no charge, no later than the time it is disseminated to the business's clients. Such policies and procedures may include conditions requiring that such registrants have (1) filed their definite proxy statement at least 40 calendar days before the shareholder meeting; and (2) expressly acknowledged that they will only use the proxy voting advice for their 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. — Provides notice either (1) on its electronic client platform that the registrant has filed, or has informed the proxy advisory firm that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available), or (2) through email or other electronic means that the registrant has filed, or has informed the proxy advisory firm that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available).
Rule 14a-9	Consistent with the Prior Guidance, amended Rule 14a-9 provides several new illustrative examples highlighting certain types of information that a proxy advisory firm may need to disclose based on established materiality standards, including its methodology, sources of information, and conflicts of interest, to the extent that, under the particular facts and circumstances, the omission of such information could be considered misleading.

The Amendments will become effective 60 days after publication in the *Federal Register*, but proxy advisory firms subject to the Amendments are not required to comply with the amended Rule 14a-2(b)(9) until December 1, 2021.

The Supplemental Guidance

The Prior Guidance made clear that the investment adviser's fiduciary duties extend to proxy voting and in that regard are proportional to the scope of voting authority granted to and accepted by the investment adviser. The Prior Guidance is explicit that the investment adviser's duties as a fiduciary cannot be waived by a client or delegated to a third party, and thus the onus remains squarely on the investment adviser to exercise due diligence and oversight with respect to the quality of services provided by any proxy advisory firm.

As described above, the Amendments will allow registrants to have access to proxy advisory firm recommendations and respond to such recommendations with additional information that may be material to a voting decision in a more systematic and timely manner; responses from subject companies will also become more readily available to investment advisers as the Amendments require proxy advisory firms to adopt policies and mechanisms to ensure such result. The Supplemental Guidance, in the same question-and-answer format as in the Prior Guidance, assists investment advisors to comply with their fiduciary duties in connection with proxy voting, in light of the expectation that the Amendments will increase the availability of information that is material to a voting decision.

More specifically, the Supplemental Guidance addresses the situation where an investment adviser receives additional information in response to the voting recommendation of a proxy advisory firm after or around the same time that the investment adviser's votes have been pre-populated or automatically submitted but before the submission deadline for proxies to be voted at the shareholder meeting. In these circumstances, together with the steps discussed in the Prior Guidance, an investment adviser should consider whether its policies and procedures address the need to consider such additional information prior to exercising voting authority in order to demonstrate that it is voting in its client's best interest. The investment adviser should also consider whether its agreements with any proxy advisory firms would permit them to utilize non-public information in a manner that would not be in the best interest of the investment adviser's client.

The Supplemental Guidance also provides that an investment adviser that uses automated voting should consider disclosing (1) the extent of that use and under what circumstances it uses automated voting; and (2) how its policies and procedures address the use of automated voting in cases where additional information regarding a voting matter from the subject company becomes available before the proxy vote submission deadline. An investment adviser should review its disclosure with respect to these matters in order to make sure that it has provided the necessary disclosures for its clients to provide informed consent with respect to the use of automated voting and for the investment adviser to satisfy its obligations under Rule 206(4)-6 of the Investment Advisers Act of 1940, as amended, and Form ADV.

The Supplemental Guidance will become effective upon publication in the *Federal Register*.

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