

SEC Weighs In on Proxy Voting Advice

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On July 22, 2020, the Securities and Exchange Commission (SEC) adopted [amendments](#) to its [rules governing proxy solicitations](#) and issued [new supplemental guidance](#) on proxy voting responsibilities for investment advisers.

Proxy Solicitation Rule Amendments

RULE	DESCRIPTION
Rule 14a-1(l)	<ul style="list-style-type: none"> • Rule 14a-1(l) is amended to redefine the terms “solicit” and “solicitation” to include proxy voting advice. • A new paragraph (A) will be inserted to Rule 14a-1(l)(iii) to specify the circumstances in which a person who furnishes proxy advice will be deemed to be engaged in a “solicitation” subject to the proxy rule. • A new paragraph (v) will be added to Rule 14a-1(l)(2) to codify that proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request will not be deemed to be a “solicitation.”

RULE	DESCRIPTION
<p>Rule 14a-2(b)(1); Rule 14a-2(b)(3)</p>	<p>Under amendments to Rule 14a-2(b)(1) and Rule 14a-2(b)(3), in order for proxy voting advice businesses to rely on the exemption to the information and filing requirements of the proxy rules, they must satisfy additional conditions of a new Rule 14a-2(b)(9), including:</p> <ul style="list-style-type: none"> • Providing specified conflicts of interest disclosure in their proxy voting advice or in an electronic medium used to deliver the proxy voting advice; and • Adopting and publicly disclosing written policies and procedures reasonably designed to ensure that: <ul style="list-style-type: none"> • 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 the proxy voting advice business's client; and • The proxy voting advice business 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 registrants who are the subject of such advice, in a timely manner before the security holder meeting. <p>The amendments also created new, non-exclusive safe harbors to give assurance to a proxy voting advice business that its written policies and procedures satisfy the requirements, including:</p> <ul style="list-style-type: none"> • A proxy voting advice business will be deemed to satisfy the requirements if its written policies and procedures 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. The safe harbor also specifies that such policies and procedures may include conditions requiring registrants to (i) file their definitive proxy statement at least 40 calendar days before the security holder meeting and (ii) expressly acknowledge that they will only use the proxy voting advice for their internal purposes and/or in connection with the solicitation and will not publish or otherwise share the proxy voting advice except with the registrant's employees or advisers. • A proxy voting advice business will be deemed to satisfy the requirements if its written policies and procedures are reasonably designed to provide notice on its electronic client platform or through email or other electronic means that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials setting forth the registrant's statement regarding the advice (and includes an active hyperlink to those materials on EDGAR when available).
<p>Rule 14a-9</p>	<p>Rule 14a-9 is amended to include new examples of when failure to disclose certain material information in proxy voting advice could be considered misleading within the meaning of the Rule, including hypotheticals relating to methodology, sources of information, and conflicts of interest.</p>

Supplemental Guidance

In addition to its new rules, the SEC issued new supplemental guidance on the responsibilities of investment advisers in regards to proxy voting. The guidance focuses on how investment advisers should consider issuer responses to recommendations by proxy advisory firms that may become more readily available (as a result of the amendments to the solicitation rules listed above). In particular, the guidance discusses the circumstances in which investment advisers utilize a proxy advisory firm's electronic vote management system that "pre-populates" an adviser's ballots with suggested voting recommendations.

Conclusion

The amendments to the proxy rules will be effective 60 days after publication in the Federal Register, but affected proxy voting businesses subject to the final rules are not required to comply with the Rule 14a-2(b)(9) amendments until December 31, 2021. As Chairman Jay Clayton noted in his [remarks](#), these rule changes and new guidance are particularly important as a large number of investors participate in the marketplace through intermediaries, who oftentimes retain proxy voting advice businesses for advice on the substance and process of voting. For more information on how these changes could impact executive compensation issues, please see Mike Melbinger's [post](#) on Winston's Executive Compensation Blog. Capital Markets & Securities Law Watch will continue to monitor the reaction to the SEC's new rules and guidance and will provide updates as they become available.

4 Min Read

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