

July 18, 2022

SEC Rescinds Selected Proxy Voting Advice Rules and Guidance

On July 13, 2022, the SEC adopted amendments (available [here](#)) to rescind parts of its 2020 rulemaking and guidance on proxy voting advice. These amendments address the concerns of proxy advisory firms and investors regarding the adverse cost, independence, timeliness and liability impacts of certain of the 2020 proxy voting advice rules. These amendments will become effective 60 days after they are published in the Federal Register. Despite these actions, ISS's litigation related to these rules appears to be proceeding as the proxy advisor's view is that the rules should be rescinded in their entirety.

The amendments will:

- Eliminate the Rule 14a-2(b)(9)(ii) conditions to the exemption from the proxy solicitation information and filing requirements for proxy voting advice that (i) companies 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 proxy advisory firm's clients; and (ii) 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 registrants that are the subject of such advice, in a timely manner before the security holder meeting.

In adopting these changes, the SEC cited concerns that these conditions would increase compliance costs and negatively impact the independence and timeliness of proxy voting advice, and noted that many proxy advisory firms have already adopted policies and procedures that satisfy in part the eliminated conditions. The elimination of these conditions means that while companies will have access to data verification processes established by the key proxy advisory firms, they will not otherwise have access to proxy advisory firm voting recommendations other than on a post-issuance or paid basis, depending on the particular firm. Subsections (iii), (iv), (v) and (vi) of Rule 14a-2(b)(9), which addressed the conditions and exemption therefrom, will also be deleted.

- Rescind the SEC's 2020 Supplemental Proxy Voting Guidance, which was issued, in part, to accompany the adoption of Rule 14a-2(b)(9)(ii), to assist investment advisers in assessing how to consider company responses to proxy voting advice

The SEC noted that its existing 2019 Proxy Voting Guidance (available [here](#)), especially in the response to Question No. 2, would assist investment advisers in carrying out their obligations under Rule 206(4)-6 under the Investment Advisers Act of 1940 and their fiduciary duties. The SEC further noted that the investment adviser's fiduciary duty requires, among other things, that the adviser conduct a reasonable investigation into an investment sufficient to ensure that its voting determinations are not based on materially inaccurate or incomplete information, and that the duty of loyalty requires, among other things, full and fair disclosure to clients about all material facts relating to the advisory relationship.

- Amend Rule 14a-9 to remove Note (e), which identifies as examples of material misstatements or omissions "failure to disclose material information regarding proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A), such as the proxy voting advice business's methodology, sources of information, or conflicts of interest."

When it proposed this change, the SEC noted the concern that this language could expose proxy advisory firms to liability over “mere differences of opinion,” such as disagreements with the company over the substance of a recommendation, the methodology used to make a recommendation or the proxy advisory firm’s decision not to accept a company’s revisions to its proxy voting advice. The SEC very clearly stated its view that Rule 14a-9 does not subject proxy advisory firms to liability for such determinations simply because the company has a different view. The SEC further clarified that the deletion of Note (e) will not affect a proxy advisory firm’s liability under Rule 14a-9 for materially misleading statements or omissions, including those relating to its methodology, sources of information or conflicts of interest.

These amendments would not affect other aspects of the 2020 proxy voting advice rules, which remain in place and effective as to proxy advisory firms and their advice. Notably:

- proxy voting advice remains a solicitation subject to the proxy rules;
- to rely on the exemptions from the proxy rules’ information and filing requirements, proxy advisory firms will continue to be subject to the conflicts of interest disclosure requirements; and
- material misstatements or omissions of fact in proxy voting advice remain subject to liability under Rule 14a-9 (as noted above).

The amendments also will not affect the SEC’s 2019 interpretive guidance regarding the treatment of proxy voting advice as a solicitation.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Christopher J. Cummings
+1-212-373-3434
ccummings@paulweiss.com

David S. Huntington
+1-212-373-3124
dhuntington@paulweiss.com

Brian M. Janson
+1-212-373-3588
bjanson@paulweiss.com

John C. Kennedy
+1-212-373-3025
jkennedy@paulweiss.com

Raphael M. Russo
+1-212-373-3309
rrusso@paulweiss.com

Tracey A. Zaccone
+1-212-373-3085
tzaccone@paulweiss.com

Frances F. Mi
+1-212-373-3185
fmi@paulweiss.com

Practice Management Consultant Jane Danek contributed to this Client Memorandum.