



Securities Law ADVISORY ■

JULY 28, 2020

SEC Approves Proxy Voting Advice Amendments & Investment Adviser Guidance

On July 22, 2020, the Securities and Exchange Commission (SEC) held an open meeting and voted to approve two proposals on the continuing efforts to foster shareholder confidence in the proxy process. Specifically, the SEC voted for: (1) the adoption of certain proxy rule amendments to ensure that investors who use proxy voting advice receive more complete and accurate information to base those decisions on; and (2) the issuance of additional guidance for investment advisers' fiduciary duty and Rule 206(4)-6 of the Investment Advisers Act of 1940 as each relate to proxy voting on clients' behalf. The final proxy rule amendments include some revisions from the amendments proposed in November 2019. Both proposals passed with a 3–1 vote, with Commissioner Allison Herren Lee as the lone vote against each proposal.

Rule Amendments for Proxy Voting Advice

In September 2019, the SEC released guidance clarifying the applicability of the federal proxy rules on proxy advisory firms such as ISS and Glass Lewis. This guidance concluded that advice provided by proxy advisory firms generally constitutes a "solicitation" under Section 14(a) of the Securities Exchange Act of 1934, as amended.

Additionally, in November 2019, the SEC [proposed amendments](#) that would increase the accuracy and transparency of information investors receive from proxy advisory firms.

Increased disclosure requirements

On the first proposal, the SEC approved [amendments](#) to Rules 14a-2(b)(1) and 14a-2(b)(3) to, among other things:

- Increase material conflicts of interest disclosure requirements for proxy advisory firms to clients.
- Allow companies that are the subject of voting advice to be able to access that advice or proxy voting report *before or at the same time* as the advice is disseminated to clients.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

- Require proxy advisory firms to provide clients with access to any response a registrant provides to the voting advice in a timely manner before those clients vote.

Proxy advice is a “solicitation”

The SEC also approved amendments to the definition of the terms “solicit” and “solicitation” in Rule 14a-1(l) to codify its view that proxy voting advice generally constitutes a solicitation within the meaning of Section 14(a) of the Exchange Act.

Proxy advice and anti-fraud rules

Finally, the SEC approved an amendment to Rule 14a-9 to include examples of when the failure to disclose certain material information in proxy voting advice could, under certain circumstances, be considered misleading within the meaning of the rule. These examples include material information about the proxy voting advice business’s methodology, sources of information, or conflicts of interest.

Important changes from the SEC’s original proposal

The adopted rules do include several changes from the proposed amendments announced last November, based on industry and public feedback received by the SEC. These changes include removing the requirement that proxy advisers provide registrants five days to review their proxy voting reports before making the reports available to clients. Instead, the final rules require only that proxy advisers establish publicly disclosed policies and procedures allowing registrants to review their reports when they are distributed to institutional investors.

The final rules also contain a proposal requiring proxy advisers to include hyperlinks to written statements by registrants responding to the recommendation reports, implementing a principles-based obligation for proxy advisory firms to ensure that clients are provided an opportunity to assess a registrant’s response within a timely manner.

Finally, the SEC did not adopt a “speed bump” requirement, which would have imposed a waiting period on investors between receiving a proxy voting report and voting on a client’s behalf. This provision was intended as a safeguard against “robo-voting,” a process that allows voting forms to be pre-populated based on proxy adviser recommendations. Those in favor of such a safeguard feared that robo-voting enabled investment advisers to vote without full consideration of the issues. In eliminating this requirement, the SEC balanced the logistical and timing challenges of a busy proxy season against the fiduciary duties owed by investment advisers to their clients.

Going forward

The final rules will be effective 60 days after publication in the *Federal Register*. In an effort to limit disruptions during the 2021 proxy season, proxy advisory firms will not be required to comply with the amendments to Rule 14a-2(b)(9) until December 1, 2021.

Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

In August 2019, the SEC approved guidance clarifying how an investment adviser's fiduciary duty relates to an adviser's proxy voting on behalf of clients, particularly if the investment adviser retains a proxy advisory firm. Later, the SEC announced that it was considering additional guidance for investment advisers on Rule 206(4)-6 of the Investment Advisers Act of 1940, which is designed to ensure that investment advisers vote in their clients' best interests and inform clients of how their proxies are voted. In furtherance of this goal, Rule 206(4)-6 requires that an investment adviser voting client proxies adopt policies and procedures to ensure that the adviser votes in the clients' best interests, disclose to clients information about those policies and procedures, and disclose to clients how they may obtain information about how their proxies have been voted. The rule also requires advisers to maintain certain records relating to proxy voting.

Discussion

The SEC approved the publishing of additional guidance for investment advisers on the relationship between their fiduciary duty and Rule 206(4)-6 under the Investment Advisers Act of 1940 and voting on behalf of clients.

The finalized guidance recommends advisers consider whether their current procedures are sufficient to address scenarios when a registrant intends to file or has filed additional soliciting materials with the SEC after the adviser has received the proxy advisory firm's voting recommendation but before the vote submission deadline. Additionally, the guidance covers the disclosure obligations and client consent policies when investment advisers use automated services for voting. Commissioner Hester Peirce stated this "supplemental guidance clarifies how investment advisers, who have assumed voting authority on behalf of their clients, can take into account the enhanced information."

Going forward

This guidance will be published as a supplement to the Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA-5325 (Aug. 21, 2019), 84 FR 47420 (Sept. 10, 2019). The guidance is effective upon publication.

You can subscribe to future *Securities* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you would like more information, please feel free to contact one of the attorneys in our [Securities Group](#).

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2020

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, TX 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, CA 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333