



Securities Law ADVISORY ■

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SEC Adopts Amendments to Proxy Adviser Rules

On July 13, 2022, the U.S. Securities and Exchange Commission (SEC) adopted [amendments](#) to some of the rules governing proxy voting advice. Specifically, the amendments (1) rescind conditions for the availability of two exemptions from the proxy rules' information and filing requirements proxy voting advice businesses often rely on; (2) rescind guidance that the SEC issued in 2020 to investment advisers regarding their proxy voting obligations; and (3) delete an explanatory note from the proxy rules' liability provision (although the explanatory note was included in the final rule release). The SEC declined to rescind the previous rules that clarified that proxy voting advice is a solicitation subject to the proxy rules (including liability under Rule 14a-9 for material misstatements or omissions of fact) and the conflicts of interest disclosure requirements that were memorialized in the July 2020 rule.

Background

In July 2020, the SEC adopted rules that established new requirements for proxy advisory firms. The 2020 amendments required proxy advisers to make their voting advice available to the companies before the shareholder holder meeting (so they could check for errors) and prohibited misleading statements and omissions related to proxy voting advice. The amendments also codified the interpretation of proxy advice as a solicitation.

While the SEC said the 2020 rule amendments were intended to increase the transparency and accuracy of proxy voting advice, institutional investors and other proxy voting advice businesses claimed that these new rules impacted proxy advisory firms' ability to deliver independent and timely proxy voting advice, thus tilting the scales in the favor of big businesses.

Under the new Administration, in November 2021 the SEC proposed amendments to the rules covering proxy voting advice.

Rescinding Conditions to Proxy Rule Exemptions for Proxy Voting Advice

Under the previous rules, proxy advisers were required to give clients conflict-of-interest disclosures, make proxy voting advice available to companies before the adviser's clients, and make their clients aware of any written statements about their proxy advice before the shareholder meeting.

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Now, the amended rules have rescinded the requirements for proxy advisory firms to (1) make their advice available to registrants when or before the advice is given to the proxy adviser's clients; and (2) provide clients with a means they could use to become aware of any written statements by registrants regarding the proxy voting advice.

Consequently, companies will have to continue their present course of doing their best to make sure the proxy advisory firms' voting recommendations do not include errors.

Rescinding 2020 Supplemental Proxy Voting Guidance

The 2020 Supplemental Proxy Voting Guidance was intended to guide investment advisers in their proxy voting obligations by issuing additional guidance on the proxy voting responsibilities under the Investment Advisers Act of 1940.

The new rules rescind this Supplemental Proxy Voting Guidance. The SEC's adopting release indicates that the SEC now believes that existing SEC guidance is sufficient to assist investment advisers in carrying out their proxy voting obligations.

Deletion of Note (e) in Liability Rule for Proxy Voting Advice

Lastly, the SEC amended Rule 14a-9 to delete Note (e), an explanatory note related to proxy voting advice liability, although included it in the final rule release. The SEC noted that the deletion is not intended to affect the scope of Rule 14a-9 or its application to proxy voting advice. The SEC claimed that it deleted this explanatory note to eliminate the risk of confusion that came along with it.

The SEC affirmed that proxy voting advice will continue to be subject to Rule 14a-9 liability for material misstatements or omissions. The SEC believes that this liability helps to ensure that clients are receiving the information necessary to make fully informed voting decisions. Along with this affirmation, the SEC also emphasizes that, although Rule 14a-9 liability still applies, liability under the proxy rules does not extend to differences of opinion about voting recommendations.

What's Next

The SEC had previously stayed the enforcement of the previous proxy advisory rules, which means the amendments preserve most of the status quo. Companies will need to continue to engage with proxy advisers and do their best to review reports to ensure that the information given to shareholders by the proxy advisers is accurate.

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