

MEMO# 32689

August 20, 2020

Compliance Considerations Related to SEC's Supplemental Proxy Voting Guidance for Investment Advisers

[32689]

August 20, 2020 TO: Chief Compliance Officer Committee
Closed-End Investment Company Committee
Compliance Advisory Committee
Investment Advisers Committee
Operations Committee
Proxy Working Group
SEC Rules Committee
Small Funds Committee RE: Compliance Considerations Related to SEC's Supplemental Proxy Voting Guidance for Investment Advisers

On July 22, the SEC adopted: (i) amendments to its proxy rules related to proxy voting advice (the “proxy advice amendments”);[\[1\]](#) and (ii) supplemental proxy voting guidance for investment advisers (the “2020 guidance”).[\[2\]](#) This 2020 guidance supplements the proxy voting guidance that the SEC provided to investment advisers in 2019 (the “2019 guidance”).[\[3\]](#)

ICI members have raised questions regarding when investment advisers should consider updating their proxy voting policies, practices, and disclosures in response to the 2020 guidance, given its connection to the proxy advice amendments (the compliance date for certain of those new requirements for proxy advisory firms is December 1, 2021).[\[4\]](#) This memorandum provides our understanding of when investment advisers may consider making any updates in light of the 2020 guidance and proxy advice amendments.[\[5\]](#)

Generally speaking, the 2020 guidance addresses investment advisers’ (i) use of proxy advisory firms’ electronic voting platforms[\[6\]](#) and consideration of additional information that issuers may provide about the proxy voting advice to which they are subject,[\[7\]](#) and (ii) disclosures about these matters.[\[8\]](#) The 2019 guidance stated generally that an investment adviser that retains a proxy advisory firm to provide voting recommendations or voting execution services also should consider additional steps to evaluate whether the investment adviser’s voting determinations are consistent with its voting policies and procedures and in the client’s best interest before the votes are cast. The 2019 guidance further stated that one such step could be considering policies and procedures that provide

for consideration of additional information that may become available on a proxy proposal (e.g., an issuer's or shareholder proponent's subsequently filed additional proxy materials or other information conveyed by such parties to the investment adviser that would reasonably be expected to affect the adviser's vote).

With respect to electronic voting platform usage and consideration of additional information, an investment adviser's changes to its policies and practices may, to some extent, be contingent upon its proxy advisory firm's changes to its policies and practices, which could occur over the next fifteen months. Accordingly, it is our understanding that, depending on the circumstances and in response to the 2019 guidance, the 2020 guidance, and the proxy advice amendments, an investment adviser could modify its policies and practices in stages. For example, an investment adviser could make changes in response to the SEC guidance directed to investment advisers, and then make further changes if and when its proxy advisory firm changes its policies and practices (e.g., in response to the proxy advice amendments).

With respect to disclosure, an investment adviser should consider whether changes to its disclosures are warranted in light of the guidance directed to investment advisers and its policies and practices. Once again, depending on the circumstances, such disclosure changes may be made in stages following changes to underlying policies and practices. For example, if an investment adviser determines that disclosure changes are warranted following its review of the 2020 guidance, the adviser would amend its Form ADV.^[9] But the investment adviser's proxy advisory firm may not have completed all necessary changes to its policies, practices, and services as of that time. In that case, if the investment adviser modifies its policies and practices in response to future proxy advisory firm changes,^[10] then the investment adviser should consider whether additional disclosure changes are warranted. If so, the adviser would amend further its Form ADV.

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endnotes

^[1] *Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Release No. 34-89372 (July 22, 2020), available at www.sec.gov/rules/final/2020/34-89372.pdf. Most notably, the amendments to Rule 14a-2 will require proxy advisory firms to adopt and publicly disclose written policies and procedures reasonably designed to ensure that: (i) 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 advisory firms' clients; and (ii) clients have a mechanism by which they can reasonably be expected to become aware of any written statements regarding the proxy firms' advice by registrants, in a timely manner before the shareholder meeting.

^[2] *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Release No. IA-5547 (July 22, 2020), available at

www.sec.gov/rules/policy/2020/ia-5547.pdf. See ICI Memorandum to Members [No. 32636](#), dated July 24, 2020, for a detailed summary of these proxy advice amendments and the guidance.

[3] *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Release No. IA-5325 (Aug. 21, 2019), available at www.sec.gov/rules/interp/2019/ia-5325.pdf. See ICI Memorandum to Members [No. 31916](#), dated August 22, 2019, for a detailed summary of this 2019 guidance.

[4] The 2020 guidance will be effective upon publication in the *Federal Register*. The 2020 guidance also states, “Proxy advisory firms will not be required to comply with certain of the amendments we are making to the proxy solicitation rules until December 1, 2021. This guidance addresses the application of the fiduciary duty, Form ADV, and rule 206(4)-6 under the Advisers Act to an investment adviser’s proxy voting responsibilities in connection with current practices, as well as any policies or procedures that may be implemented by proxy advisory firms under the final amendments.” 2020 guidance at n.3.

[5] Nothing contained in this memorandum is intended to serve as legal advice. Each fund, fund board, and investment adviser should seek the advice of counsel for issues related to its individual circumstances.

[6] The SEC explains in the 2020 guidance that such an electronic platform may provide for: (i) “pre-population” of the investment adviser’s proxies with suggested voting recommendations based on the investment adviser’s instructions, and/or (ii) automatic submission of the investment adviser’s votes. These actions generally occur following the release of the proxy advisory firm’s recommendation and before the deadline for submitting votes for a shareholder meeting.

[7] With respect to these matters, the SEC states that “if an issuer files such additional information sufficiently in advance of the submission deadline and such information would reasonably be expected to affect the investment adviser’s voting determination, the investment adviser would likely need to consider such information prior to exercising voting authority in order to demonstrate that it is voting in its client’s best interest.” *Id.* at 5.

[8] The guidance states 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 it becomes aware before the submission deadline ... that an issuer intends to file or has filed additional soliciting materials with the Commission regarding a matter to be voted upon.” *Id.* at 6-7.

[9] Form ADV, Part 2A, Item 17 requires an investment adviser to briefly describe voting policies and procedures where it has, or will accept, authority to vote client securities. An investment adviser files Form ADV annually, no later than 90 days after the end of its fiscal year, to amend its registration or its report. The Form is also filed during the year to reflect material changes.

[10] For instance, an investment adviser’s use of electronic voting platforms and its policies and practices related to considering additional information from issuers may change following the changes that its proxy advisory firm makes.

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