

MEMO# 33567

June 2, 2021

SEC Chair Gensler Directs SEC Staff to Consider Further Action on Regulation of Proxy Voting Advice

[33567]

June 2, 2021

TO: ICI Members

Investment Company Directors SUBJECTS: Compliance

Fund Governance

Intermediary Oversight

Investment Advisers

Operations RE: SEC Chair Gensler Directs SEC Staff to Consider Further Action on Regulation of Proxy Voting Advice

In 2019, the SEC issued guidance to proxy advisory firms stating that:

- Proxy voting advice provided by proxy advisory firms generally constitutes a solicitation subject to the proxy rules; and
- Any person engaged in a solicitation through proxy voting advice must not make materially false or misleading statements or omit material facts.[\[1\]](#)

In 2020, the SEC adopted amendments to the proxy rules related to proxy advice.[\[2\]](#) The amendments:

- Codified the SEC's interpretation that proxy voting advice generally constitutes a "solicitation" subject to the proxy rules;
- Conditioned the availability of certain existing exemptions from federal proxy rule requirements for proxy firms upon compliance with additional disclosure and procedural requirements; and
- Amended the proxy antifraud rule to clarify when the failure to disclose certain information in proxy voting advice may be considered misleading.

On June 1, SEC Chair Gensler issued a public statement on the SEC's regulation of proxy advice.[\[3\]](#) After noting these 2019 and 2020 regulatory actions, it states:

"I am now directing the staff to consider whether to recommend further regulatory action regarding proxy voting advice. In particular, the staff should

consider whether to recommend that the Commission revisit its 2020 codification of the definition of solicitation as encompassing proxy voting advice, the 2019 Interpretation and Guidance regarding that definition, and the conditions on exemptions from the information and filing requirements in the 2020 Rule Amendments, among other matters."

That same day, the SEC's Division of Corporation Finance issued a statement acknowledging this direction from Chair Gensler.^[4] With respect to the 2019 guidance and the 2020 rule amendments, the Division also announced that it would not recommend an enforcement action against a proxy firm that fails to comply with these requirements,^[5] stating:

"In light of this direction, the Division of Corporation Finance has determined that it will not recommend enforcement action to the Commission based on the 2019 Interpretation and Guidance or the 2020 Rule Amendments during the period in which the Commission is considering further regulatory action in this area. In addition, in the event that new regulatory action leaves the 2020 exemption conditions in place with the current December 1, 2021 compliance date, the staff will not recommend any enforcement action based on those conditions for a reasonable period of time after any resumption by Institutional Shareholder Services Inc. of its litigation challenging the 2020 amendments and the 2019 Interpretation and Guidance. (*ISS v. SEC*, 1:19-cv-3275 (D.D.C.)."

Finally, Commissioners Peirce and Roisman commented on the statements from Chair Gensler and the Division of Corporation Finance.^[6] The Commissioners questioned what had changed "in the roughly ten months since the SEC last considered this issue that would call into question such recently adopted requirements." They also questioned the "how the Commission would justify a departure from its longstanding legal interpretation about proxy solicitation."

Matthew Thornton
Associate General Counsel

endnotes

^[1] *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, SEC Release No. 34-86721 (Aug. 21, 2019), available at www.sec.gov/rules/interp/2019/34-86721.pdf. For a detailed summary of this guidance, see ICI Memorandum [No. 31916](#) to Members , dated August 22, 2019.

^[2] *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. For a detailed summary of these amendments, see ICI Memorandum [No. 32636](#) to Members, dated July 24, 2020.

^[3] *Statement on the application of the proxy rules to proxy voting advice*, SEC Chair Gary Gensler (June 1, 2021), available at

www.sec.gov/news/public-statement/gensler-proxy-2021-06-01?utm_medium=email&utm_source=govdelivery.

[4] *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9*, SEC Division of Corporation Finance (June 1, 2021), available at www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01?utm_medium=email&utm_source=govdelivery.

[5] The 2019 guidance became effective on September 10, 2019. The 2020 rule amendments became effective on November 2, 2020, but affected proxy firms were not required to comply with the exemptive rule amendments (i.e., the amendments to Rule 14a-2(b)(9)) until December 1, 2021.

[6] *Response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice*, Commissioners Hester M. Peirce and Elad L. Roisman (June 1, 2021), available at www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121?utm_medium=email&utm_source=govdelivery.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.