

MEMO# 33912

November 22, 2021

SEC Proposes Changes to its 2020 Proxy Advice Amendments

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TO: ICI Members

Investment Company Directors SUBJECTS: Compliance

Disclosure

Fund Governance

Intermediary Oversight

Investment Advisers

Operations

Transfer Agency RE: SEC Proposes Changes to its 2020 Proxy Advice Amendments

On November 17, the SEC proposed changes to its 2020 proxy advice amendments by a 3-2 vote. [\[1\]](#) Most notably, the proposal would rescind provisions in the 2020 amendments that would require proxy firms to:

- make their advice available to the companies that are the subject of the advice at or before the time that they make the advice available to clients (e.g., funds and investment advisers); and
- provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding the advice by companies.

Comments are due to the SEC 30 days after the proposal's publication in the *Federal Register*.

Summary of the 2020 Proxy Advice Amendments

Proxy advisory firms (called "proxy voting advice businesses" in the proxy rules) ("PVABs") provide proxy voting advice to institutional investors, including investment advisers and funds. The SEC adopted the 2020 amendments "so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions, without imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice." [\[2\]](#)

The 2020 amendments:

- Codified the SEC's interpretation that proxy voting advice generally constitutes a "solicitation" within the meaning of the Securities Exchange Act of 1934;
- Conditioned the availability of certain existing exemptions from federal proxy rule requirements for PVABs 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.

The amendments to the "solicitation" definition and the antifraud rule became effective on November 2, 2020. The conditions set forth in new Rule 14a-2(b)(9) (generally summarized in the second bullet above) are set to become effective on December 1, 2021, but they are currently subject to litigation.[\[3\]](#)

Summary of the 2021 Proposal

The proposal would not fully unwind the 2020 amendments. The proposal frames its changes as

tailored adjustments in response to concerns and developments related to particular aspects of the 2020 Final Rules. The goal of the proposed amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of their proxy voting advice and subject them to undue litigation risks and compliance costs, while simultaneously preserving investors' confidence in the integrity of such advice.[\[4\]](#)

Under the proposal, proxy voting advice would remain a solicitation subject to the proxy rules. And in order to rely on the exemptions from the proxy rules' information and filing requirements set forth in Rules 14a-2(b)(1) and (3), PVABs would continue to be subject to the conflicts of interest disclosure requirements added in 2020.[\[5\]](#)

Most notably, the proposal would rescind the condition that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that:

- 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 PVAB's clients;[\[6\]](#) and
- Clients have a mechanism by which they can reasonably be expected to become aware of any written statements regarding the PVAB's proxy voting advice by registrants, in a timely manner before the shareholder meeting.[\[7\]](#)

The proposal also would rescind the provisions related to this condition. The SEC bases its decision to rescind these provisions in part on its observations that "the largest PVABs have current practices that could address some of the concerns underlying [these] conditions."[\[8\]](#)

Finally, the proposal would amend the proxy antifraud rule (Rule 14a-9) by deleting Note (e). In 2020, the SEC added Note (e) to include examples of when a PVAB's failure to disclose certain information in proxy voting advice could be considered misleading.[\[9\]](#) The proposed deletion is "intended to address that misperception [i.e., that the addition of Note (e) purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion] and thereby reduce any resulting uncertainty that could lead to increased litigation risks or the threat of litigation and impaired independence of proxy voting advice"[\[10\]](#) However, the proposal also provides guidance on the limited circumstances in which a PVAB's statement of opinion may be

subject to liability under the antifraud rule.^[11]

Matthew Thornton
Associate General Counsel

endnotes

[1] Proxy Voting Advice, SEC Release No. 34-93595 (Nov. 17, 2021) (the "proposal"), available at www.sec.gov/rules/proposed/2021/34-93595.pdf. Chair Gensler and Commissioners Lee and Crenshaw supported the proposal; Commissioners Peirce and Roisman opposed it. In support of the proposal, Commissioner Lee stated that it was "important that our rules do not interfere with the independence of proxy voting advice, introduce unnecessary cost and complexity into an already compressed proxy voting process, or otherwise burden the free and full exercise of shareholder voting rights." Statement on Proposed Amendments Related to Proxy Voting Advice, Commissioner Allison Herren Lee (Nov. 17, 2021), available at www.sec.gov/news/statement/lee-proxy-advice-20211117. In opposing the proposal, Commissioner Roisman stated that the 2020 amendments "still offer the important investor protections the Commission aimed to achieve when they were adopted, and they would level the playing field for proxy advisory firms to compete in a transparent and improved manner." Too Important to Regulate? Rolling Back Investor Protections on Proxy Voting Advice, Commissioner Elad Roisman (Nov. 17, 2021), available at www.sec.gov/news/statement/roisman-proxy-advice-20211117.

[2] Exemptions from the Proxy Rules for Proxy Voting Advice, SEC Release No. 34-89372 (July 22, 2020) at 1, available at www.sec.gov/rules/final/2020/34-89372.pdf. For a more detailed summary of the 2020 amendments, see Institute Memorandum [No. 32636](#), dated July 24, 2020.

[3] Proposal at n.3.

[4] Proposal at 9.

[5] This requires disclosure of: (i) any information regarding an interest, transaction, or relationship of the PVAB (or its affiliates) that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction, or relationship; and (ii) any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest.

[6] This 2020 requirement has a related safe harbor. Specifically, a PVAB would be deemed to satisfy this requirement if it has written policies and procedures that are reasonably designed to provide a registrant with a copy of its proxy voting advice, at no charge, no later than the time such advice is disseminated to the PVAB's clients. Such policies and procedures may include conditions requiring that the registrant: (i) file its definitive proxy statement at least 40 calendar days before the security holder meeting date; and (ii) acknowledge that it will only use the copy of the proxy voting advice for its internal purposes and/or in connection with the solicitation and such copy will not be published or otherwise shared except with the registrant's employees or advisers.

[\[7\]](#) This 2020 requirement also has a related safe harbor. Specifically, a PVAB would be deemed to satisfy this requirement if it has written policies and procedures that are reasonably designed to inform clients who receive proxy voting advice when a registrant that is the subject of such advice notifies the PVAB that it intends to file or has filed additional soliciting materials with the SEC addressing the advice, by providing notice to its clients: (i) on its electronic platform that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available; or (ii) through email or other electronic means that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available.

[\[8\]](#) Proposal at 14.

[\[9\]](#) Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made. As examples of what may be misleading within the meaning of the rule, Note (e) lists failure to disclose material information regarding proxy voting advice, such as the PVAB's methodology, sources of information, and conflicts of interest.

[\[10\]](#) Proposal at 28.

[\[11\]](#) Proposal at 29-31.