

**MEMO# 34223**

July 14, 2022

# SEC Amends its 2020 Proxy Advice Amendments

[34223]

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TO: ICI Members

Investment Company Directors SUBJECTS: Compliance

Disclosure

ESG

Fund Governance

Intermediary Oversight

Investment Advisers

Operations

Transfer Agency RE: SEC Amends its 2020 Proxy Advice Amendments

Yesterday, the SEC adopted changes to its 2020 proxy advice amendments by a 3-2 vote.[\[1\]](#) The final amendments are identical to those that the SEC proposed in November 2021. The adopting release also rescinds the 2020 guidance that the SEC issued to investment advisers about their proxy voting obligations,[\[2\]](#) consistent with ICI's recommendation.[\[3\]](#)

Most notably, the amendments 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.[\[4\]](#)

## Background and Summary of the 2020 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."[\[5\]](#)

The 2020 amendments:

- Codified the SEC's interpretation that proxy voting advice generally constitutes a "solicitation" within the meaning of the Exchange Act;
- Conditioned the availability of certain existing exemptions from federal proxy rule requirements for PVABs upon compliance with additional disclosure and procedural requirements (including the company review/client alert framework); and
- Amended the proxy antifraud rule to clarify when the failure to disclose certain information in proxy voting advice may be considered misleading.

## **Summary of the 2022 Amendments**

The 2022 amendments do not fully unwind the 2020 amendments. Proxy voting advice remains a solicitation subject to the proxy rules.<sup>[6]</sup> 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 remain subject to the conflicts of interest disclosure requirements added in 2020.<sup>[7]</sup>

Most notably, the final amendments rescind the company review/client alert framework and its related provisions. In explaining this change, the SEC states that "we are no longer persuaded that the potential benefits of those conditions [i.e., the 2020 amendments' company review/client alert framework] sufficiently justify the risks they pose to the cost, timeliness, and independence of proxy voting advice and believe that the final amendments strike a better policy balance."<sup>[8]</sup> The adopting release also notes that the company review/client alert framework was subject to "continued, strong opposition... from many institutional investors and other PVAB clients."

The SEC also has amended the proxy antifraud rule (Rule 14a-9) by deleting Note (e).<sup>[9]</sup> However, the SEC stresses that "to the extent that a PVAB's proxy voting advice constitutes a 'solicitation'..., it is

subject to liability under Rule 14a-9 to the same extent that any other solicitation is, or would

have been, prior to the 2020 Final Rules."<sup>[10]</sup> The adopting release then provides guidance on the circumstances in which a PVAB's statements may be subject to liability under the antifraud rule.<sup>[11]</sup>

## **Rescission of the 2020 Guidance**

The adopting release states that the 2020 guidance "was intended to assist investment advisers in assessing how to consider registrant responses to proxy voting advice that may become more readily available as a result of the 2020 Final Rules" and "specifically addressed situations in which advisers use a PVAB's electronic vote management system and related disclosure obligations...".<sup>[12]</sup> In explaining its rescission of this guidance, the SEC points to comments it received supporting rescission and also notes that its 2019 proxy voting guidance to investment advisers<sup>[13]</sup> "will serve to assist investment advisers in carrying out their obligations under rule 206(4)-6 under the Investment Advisers Act of 1940 and their fiduciary duty in such situations."<sup>[14]</sup>

The 2022 amendments and the rescission of the 2020 guidance are effective 60 days after publication of the adopting release in the Federal Register.

Matthew Thornton  
Associate General Counsel

#### endnotes

[1] Proxy Voting Advice, SEC Release Nos. 34-95266; IA-6068 (July 13, 2022) (the "adopting release"), available at [www.sec.gov/rules/final/2022/34-95266.pdf](https://www.sec.gov/rules/final/2022/34-95266.pdf). Chair Gensler and Commissioners Lee and Crenshaw voted in favor of the amendments, and Commissioners Peirce and Uyeda voted against them.

[2] Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, SEC Release No. IA-5547 (July 22, 2020) ("2020 guidance"), available at [www.sec.gov/rules/policy/2020/ia-5547.pdf](https://www.sec.gov/rules/policy/2020/ia-5547.pdf).

[3] See Letter from Susan Olson, General Counsel, and Matthew Thornton, Associate General Counsel, ICI, to Mr. J. Matthew DeLesDernier, Assistant Secretary, SEC, dated December 23, 2021, available at [www.sec.gov/comments/s7-17-21/s71721-20110281-264530.pdf](https://www.sec.gov/comments/s7-17-21/s71721-20110281-264530.pdf). ICI generally supported the 2021 proposal, stating, "ICI members do not believe that the 2020 amendments would meaningfully improve the quality of proxy advice—rather, those amendments likely would negatively impact the timeliness and cost of that advice."

[4] We refer to these conditions as the "company review/client alert framework."

[5] 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](https://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.

[6] As amended in 2020, Rule 14a-1(l) makes clear that the term "solicitation" includes any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent, or authorization on a specific matter for which shareholder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such advice, and sells such advice for a fee.

[7] 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.

[8] Adopting release at 10.

[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. 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. Note (e) listed failure to disclose material information regarding proxy voting advice, such as the PVAB's methodology, sources of

information, or conflicts of interest.

[\[10\]](#) Adopting release at 51.

[\[11\]](#) Adopting release at 52-59.

[\[12\]](#) Adopting release at 40-41.

[\[13\]](#) 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](http://www.sec.gov/rules/interp/2019/ia-5325.pdf).

[\[14\]](#) Adopting release at 41-42.

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