

MEMO# 34294

September 23, 2022

SEC Charges Adviser for Violations Related to Proxy Voting

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TO: ICI Members
Investment Company Directors
SUBJECTS: Compliance
Disclosure
Fund Governance
Intermediary Oversight
Investment Advisers
Litigation & Enforcement
Operations
Portfolio Oversight
Transfer Agency
RE: SEC Charges Adviser for Violations Related to Proxy Voting

Earlier this week the SEC charged investment adviser Toews Corporation (the "adviser") with violations of the Advisers Act and the proxy voting rule thereunder in connection with the adviser's proxy voting-related conduct.[\[1\]](#)

During the relevant period, the adviser's Form ADV Brochures stated that "[a]s an adviser to our mutual fund programs and the Fund, we act as a fiduciary. We will vote proxies in the best interests of our clients." And its policies and procedures manual stated:

As to each Fund, . . . Toews exercises its proxy voting rights with regard to the companies in that Fund's investment portfolio, with the goals of maximizing the value of the Fund's investments, promoting accountability of a company's management and board of directors to its shareholders, aligning the interest of management with those of shareholders, and increasing transparency of a company's business and operations.

. . .

Proxy voting is an important right of shareholders and reasonable care and diligence must be undertaken to ensure that such rights are properly and timely exercised.

However, the adviser directed its third-party service provider to vote all of the proxies for the funds that it managed pursuant to a standing instruction, i.e., to always vote in favor of the proposals put forth by the issuers' management and against any shareholder proposals.

The service provider did so without exception during the relevant period. The SEC also noted that the adviser did not review the proxy materials for any of the relevant shareholder meetings and did not otherwise take steps to determine whether such votes were being cast in the funds' best interests, or implement any policies and procedures reasonably designed to ensure that it did so.

The SEC found that the adviser violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-6 thereunder.^[2] The order censures the adviser. It also requires the adviser to cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-6 thereunder, and pay a civil money penalty of \$150,000. As part of the settlement offer, the adviser did not admit or deny the order's findings.

Commissioners Peirce and Uyeda dissented from this SEC action.^[3] They note that the order "does not make any findings that the adviser's clients would have been financially better off had the adviser cast any of the votes at issue in an alternative manner." They express concern that the order "might be read to imply that the adviser's prior proxy voting practices were per se improper and violate the Advisers Act and the proxy voting rule." Then, citing the SEC's 2019 proxy voting guidance to investment advisers,^[4] they state that this implication "would be at odds with the Commission's own guidance that '[a] client and its investment adviser may agree that the investment adviser should exercise voting authority pursuant to specific parameters designed to serve the client's best interest,' such as by voting in accordance with the voting recommendations of management of the issuer."

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endnotes

^[1] In the Matter of Toews Corporation, SEC Release No. IA-6139, available at www.sec.gov/litigation/admin/2022/ia-6139.pdf?utm_medium=email&utm_source=govdelivery.

^[2] Section 206(2) of the Advisers Act makes it "unlawful for any investment adviser . . . to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Section 206(4) makes it "unlawful for any investment adviser . . . to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." Rule 206(4)-6 requires registered investment advisers to "[a]dopt and implement written policies and procedures that are reasonably designed to ensure that [the adviser] vote[s] client securities in the best interest of clients."

^[3] Statement Regarding In the Matter of Toews Corporation, Commissioners Hester Peirce and Mark Uyeda (Sept. 20, 2022), available at www.sec.gov/news/statement/peirce-uyeda-statement-toews-corporation.

[4] 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.

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