

Memorandum

SEC Amends Rules Related to Proxy Advisory Firms

July 28, 2020

After numerous years of debate over the role and influence of proxy advisory firms, on July 22, 2020, the Securities and Exchange Commission moved forward with the adoption of [final rules](#) that will impose new obligations on proxy advisory firms. While the final rules operate to the advantage of issuers in a few meaningful ways, the final rules are far less prescriptive than the originally proposed rules and do not mandate that proxy advisory firms give companies an opportunity to review and provide feedback on draft proxy voting advice.

Fundamentally, the final rules amend Rule 14a-1(l) of the Securities Exchange Act of 1934, as amended, to specify the circumstances when a person who furnishes proxy voting advice will be deemed to be engaged in a solicitation subject to the proxy rules. Pursuant to the final rules, in order for proxy advisory firms to rely on certain exemptions from the information and filing requirements of the proxy rules associated with conducting a “solicitation,” such firms must satisfy certain conditions, specifically:

- **Conflicts of interest disclosure.** Proxy advisory firms will be required to disclose specified conflicts of interest information in their proxy voting advice or in an electronic medium used to deliver the proxy voting advice; and
- **Policies and procedures regarding the dissemination of advice and registrants’ responses.** Proxy advisory firms must adopt and make public disclosure of 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 clients of the proxy advisory firm; and
 - The proxy advisory firm provides its clients with a mechanism by which clients can reasonably be expected to become aware of any written statements regarding its advice by registrants who are the subject of such advice, in a timely manner before the shareholders’ meeting.

Safe harbor. The final rules provide certain non-exclusive safe harbors upon which proxy advisory firms can rely to confirm compliance with the requirements of the foregoing exemption. Under these safe harbors, proxy advisory firms will be encouraged to design their written policies and procedures:

- to provide registrants with a copy of its proxy voting advice, at no charge, no later than the time that such advice is disseminated to the proxy advisory firm’s clients; and

- to give notice on their electronic client platforms (or through email or other electronic means) that the registrant has filed, or has informed the proxy advisory firm that it intends to file, additional soliciting materials regarding the advice (and include an active hyperlink to those materials on EDGAR when available).

In addition, the safe harbors contemplate that proxy advisory firms can design their policies and procedures to require that, in order for registrants to benefit from the new rules, registrants must (i) file their definitive proxy statement at least 40 calendar days before the applicable shareholders' meeting and (ii) expressly acknowledge that they will only use the proxy voting advice for their internal purposes and/or in connection with the solicitation and will not publish or otherwise share the proxy voting advice except with the registrant's employees or advisers.

Rule 14a-9. In addition to modifying the solicitation rules, the final rules amend Rule 14a-9 to include examples of circumstances pursuant to which the failure to disclose certain material information in proxy voting advice could be considered misleading, e.g., material information about the proxy advisory firm's methodology, sources of information or conflicts of interest.

Effective date. While the amendments will become effective 60 days after publication in the Federal Register, proxy advisory firms will not be required to comply with the new requirements until December 1, 2021.

Supplemental guidance – investment advisers. In addition to amendments to the proxy rules, the SEC also [supplemented](#) its prior guidance with respect to the proxy voting responsibilities of investment advisers. This additional guidance is meant to assist investment advisers in evaluating how to consider the additional information that may become available as a result of the rule amendment and suggests that investment advisers may need to consider additional steps, including policy updates and disclosures, if it uses automated voting or pre-populated voting platforms.

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