July 26, 2022

SEC Reverses its 2020 Amendments to the Proxy Rules Governing Proxy Voting Advice; Rescinds Supplemental Guidance on the Proxy Voting Responsibilities of Advisers

As described in this Ropes & Gray Alert, on July 22, 2020, the SEC adopted amendments to its rules governing proxy solicitations and the filing exemptions for proxy voting advice (the "2020 Amendments"). With Democratic Commissioner Lee dissenting, then-Chairman Clayton and the two Republican commissioners closed the initial chapter in a more than decade-long attempt to rein in the influence of "proxy voting advice businesses" ("Proxy Advisers"). The 2020 Amendments conditioned the exemptions for reports issued by Proxy Advisers from the filing and information requirements of the federal proxy rules on compliance with disclosure and procedural requirements. In addition, the 2020 Amendments codified in Rule 14a-1(l)'s definition of "solicitation" the SEC's long-standing view that Proxy Advisers' reports are solicitations subject to the anti-fraud provisions of the federal proxy rules.

On November 17, 2021, as described in this Ropes & Gray Investment Management Update, Chair Gensler, joined by the two Democratic SEC commissioners, voted to propose changes to the 2020 Amendments, and the SEC issued a release containing rule amendments (the "2021 Proposals") that, if adopted, would eliminate some of the 2020 Amendments' requirements, while leaving others unchanged. On July 13, 2022, Chair Gensler, joined by the Democratic SEC commissioners, voted to adopt the 2021 Proposals, as described in the final rule release published that day (the "Release"). The changes are effective September 19, 2022.[1]

Summary

- The Release does not affect the 2020 Amendments' Rule 14a-1(l) codification, within the definition of "solicitation," that Proxy Advisers' reports are solicitations subject to the anti-fraud provisions of the federal proxy rules.

- The Release does not affect the 2020 Amendments' enhanced conflicts of interest disclosure requirements, or the requirements regarding adoption and public disclosure of written policies and procedures used to identify, and steps taken to address, any such material conflicts of interest.

- The Release **eliminates** the 2020 Amendments' requirement that a Proxy Adviser adopt and publicly disclose written policies and procedures reasonably designed to ensure that (i) registrants that are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the Proxy Adviser's clients and (ii) the Proxy Adviser provides its clients with a mechanism by which they can be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the security holder meeting.

- The Release **eliminates** the 2020 Amendments' Note (e) to Rule 14a-9, the general antifraud rule, applicable to proxy statements.

- The Release **rescinds** the SEC's July 2020 supplemental guidance that it issued to investment advisers about their proxy voting obligations, titled *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers* (the "Supplement"),[2] on the same day that it published the release adopting the 2020 Amendments.

The Release, which tracks the 2021 Proposals, is discussed in detail below.

Rule 14a-2(b)(9)

Current Rule 14a-2(b)(9).[3] The 2020 Amendments amended Rule 14a-2(b) by adding paragraph (9), which added new conditions to two exemptions from the proxy rules' information and filing requirements (set forth in Rule 14a-2(b)(1) and (3)) that Proxy Advisers[4] must satisfy to rely on those exemptions. Those conditions include:

- Rule 14a-2(b)(9)(i)'s requirement that Proxy Advisers provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice; and

- Rule 14a-2(b)(9)(ii)'s requirement that Proxy Advisers adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants that are the subject of their proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the Proxy Adviser's clients and (B) each Proxy Adviser provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the security holder meeting (the "Rule 14a-2(b)(9)(ii) Conditions").

Rule 14a-2(b)(9), as added by the 2020 Amendments, sets forth two non-exclusive safe harbor provisions in paragraphs (iii) and (iv) that, if their conditions are satisfied, give assurance to Proxy Advisers that they have met the Rule 14a-2(b)(9)(ii) Conditions. The 2020 Amendments also added paragraphs (v) and (vi), which contain exclusions from the Rule 14a-2(b)(9)(ii) Conditions. Specifically, paragraphs (v) and (vi) provide that Proxy Advisers need not comply with Rule 14a-2(b)(9)(ii) where their proxy voting advice is based on a client's custom voting policy, or where Proxy Advisers provide proxy voting advice concerning non-exempt solicitations with respect to certain mergers and acquisitions or contested matters.

Amendments to Rule 14a-2(b)(9). The Release adopts the 2021 Proposals relating to Rule 14a-2(b)(9). The Appendix to this Alert contains a marked version of Rule 14a-2(b)(9) to show the revisions to the rule. Specifically, the Release:

- Amends Rule 14a-2(b)(9) by rescinding the Rule 14a-2(b)(9)(ii) Conditions; and

- Deletes paragraphs (iii), (iv), (v) and (vi) of Rule 14a- 2(b)(9), which contain safe harbors and exclusions from the Rule 14a-2(b)(9)(ii) Conditions.

Given these changes, the 2021 Proposals also planned to redesignate the enhanced conflicts of interest disclosure conditions within Rule 14a-2(b)(9)(i) (which was added by the 2020 Amendments) as Rule 14a-2(b)(9). Other than renumbering, these enhanced conflicts of interest disclosure requirements are left unaffected by the Release. The disclosure encompasses any interest, transaction, or relationship of the Proxy Adviser (or its affiliates) that is material to assessing the objectivity of the proxy voting advice, as well as the requirements regarding adoption and public disclosure of written policies and procedures used to identify, and steps taken to address, any such material conflicts of interest.

Rescission of Note (e) to Rule 14a-9

The 2020 Amendments added Note (e) to Rule 14a-9, the general antifraud rule applicable to proxy statements, to include examples of material misstatements or omissions related to proxy voting advice. Note (e) provides that a Proxy Adviser's failure to disclose material information regarding proxy voting advice, "such as the [Proxy Adviser's] methodology, sources of information, or conflicts of interest," may, depending upon particular facts and circumstances, be misleading within the meaning of Rule 14a-9.

The Release deletes Note (2) because, according to the SEC, "rather than reducing legal uncertainty and confusion, the addition of Note (e) has unnecessarily exacerbated it by creating a risk of confusion regarding the application of Rule 14a-9 to proxy voting advice." The SEC explained that Note (e) has created this risk of confusion in at least two respects:

- Because Note (e) concerns a particular type of solicitation (unlike other paragraphs of the note), Note (e) "unintentionally could imply that proxy voting advice poses heightened concerns and should be treated differently than other types of solicitations under Rule 14a-9."

- Focusing on a Proxy Adviser's methodology, sources of information and conflicts of interest as examples of material information regarding proxy voting advice "unintentionally could suggest that [Proxy Advisers] have a unique obligation to disclose that information with their advice. Note (e), however, was not intended to impose any such affirmative requirement."

The Release reiterates, however, that if a Proxy Adviser's voting advice constitutes a "solicitation" under Rule 14a-1(l)(1)(iii)(A), "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 Amendments]."

Supplemental Proxy Voting Guidance

The Release rescinds the Supplement, described in a July 2020 Ropes & Gray Alert. The Release notes that, in the 2021 Proposals, the SEC "requested comment on whether the Commission should rescind or revise the [Supplement] because it was prompted, in part, by the adoption of the Rule 14a-2(b)(9)(ii) [C]onditions."

- The Supplement added to earlier SEC interpretive guidance, titled *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, which was published in August 2019 (the "2019 Proxy Voting Guidance," described in this Ropes & Gray Alert).

- The Supplement stated that its guidance is intended to assist investment advisers in using the additional information that may result from the 2020 Amendments, especially in situations where an investment adviser relies on a Proxy Adviser's electronic vote management system that "pre-populates" the investment adviser's proxies with voting recommendations and/or relies on a Proxy Adviser for automated proxy voting services. The Supplement also described an investment adviser's disclosure obligations arising from its use of these services.

The Release noted that most commenters on the issue recommended that the SEC rescind the Supplement, generally indicating that, because the Supplement was tied to the 2020 Amendments, any rescission of the 2020 Amendments should also include the Supplement. Some of these commenters also stated that the Supplement was too prescriptive for investment advisers.

In rescinding the Supplement, the Release states that existing SEC guidance, including the 2019 Proxy Voting Guidance, is sufficient to assist investment advisers in carrying out their obligations under Rule 206(4)-6 under the Investment Advisers Act and their existing fiduciary duties. In particular, the Release notes, an investment adviser's fiduciary duty already requires, among other things, (i) that "an adviser conduct a reasonable investigation into an investment sufficient not to base its advice on materially inaccurate or incomplete information" and (ii) "full and fair disclosure to clients about all material facts relating to the advisory relationship."

Observations

The 2020 Amendments, by imposing new disclosure and procedural requirements on Proxy Advisers, were part of a broader effort to rein in the influence of Proxy Advisers over a period of more than 10 years. The response by Chair Gensler and the Democratic SEC commissioners in the Release has eliminated a number of those requirements to "reflect the fact that [the SEC's] thinking has evolved with respect to the Rule 14a-2(b)(9)(ii) conditions and Note (e) to Rule 14a-9." However, Rule 14a-2(b)(9)(i)'s requirement that Proxy Advisers provide their clients with enhanced conflicts of interest disclosures in connection with their proxy voting advice remains in force.

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If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney contacts.

1. *See* 87 Fed. Reg. 43168 (July 19, 2022).
2. Rel. No. IA-5547 (July 22, 2020) available here.
3. On June 1, 2021, the Division of Corporation Finance issued a statement (the "Statement") that it would not recommend enforcement action based on the 2020 Amendments while the SEC was considering further regulatory action in this area. The Statement did not alter Proxy Advisers' obligation to comply with the Rule 14a–2(b)(9) conditions by Dec. 1, 2021. The Release rescinds the Statement.
4. The Release refers to persons who furnish proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A) ("Rule 14a-1(l)(1)(iii)(A)") as "proxy voting advice businesses," which the Release abbreviates as "PVABs." Rule 14a-1(l)(1)(iii)(A) provides that the terms "solicit" and "solicitation" include any proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.