July 22, 2020

Guidance on Investment Adviser Voting Responsibilities

Today, the Securities and Exchange Commission voted 3-1 to adopt final rule changes and related guidance on proxy voting advice. In a move welcomed by companies, but strongly opposed by proxy advisory firms and their investor clients, the final rules take a "principles-based" approach to the regulation of proxy voting advice.

Final Proxy Rule Amendments

The amendments, among other things:

- codify the SEC's longstanding view that proxy voting advice generally constitutes a solicitation for purposes of the proxy rules; but
- provide that a proxy advisory firm may avail itself of exemptions from certain information and filing requirements of the proxy rules if it:
    - provides specified conflicts of interest disclosure in its proxy voting advice or in electronic medium used to deliver the advice (failure to disclose such conflicts and the methodologies and sources of information used could be considered materially misleading in violation of Rule 14a-9's antifraud provisions); and
    - adopts and publicly discloses written policies and procedures reasonably designed to ensure that (i) companies that are the subject of proxy voting advice have access to the advice prior to or at the time the advice is disseminated to the proxy advisory firm's clients and (ii) its clients have a mechanism by which they can reasonably expect to become aware of any written statements regarding the proxy voting advice from companies that are the subject of such advice, in a timely manner before the applicable shareholder meeting.

With respect to this last requirement, the amendments establish a non-exclusive "safe harbor" that would satisfy this condition, namely that the proxy advisory firm provide:

- subject companies with its voting advice, free of charge, no later than when it is sent to its clients, but may condition this obligation on the requirements that companies (i) file their definitive proxy statement at least 40 calendar days before the applicable shareholder meeting and (ii) use such advice only for their "internal purposes and/or in connection with the solicitation" and will not publish or otherwise share the advice except with the companies' employees or advisers; and
- notice to its clients on its electronic client platform or through email or other electronic means that a company has filed, or informed the proxy advisory firm of its intention to file, additional

solicitation materials setting forth the company's response to the advice (and hyperlink to these materials if filed on EDGAR).

While the amendments do not require a mandatory, pre-issuance review process for companies as had been proposed, the safe harbor providing for prior or concurrent review of proxy voting advice could be helpful to companies able to meet the potentially tighter 40-calendar day definitive proxy filing schedule. Currently, companies have to pay for their Glass Lewis reports or proactively sign up to access their ISS reports in some instances (with only S&P 500 companies able to review their ISS reports in draft form).

Proxy advisory firms have until December 1, 2021 to implement these new procedures.

Supplemental Guidance

Going hand-in-hand with the new rules on proxy voting advice, the SEC also supplemented prior guidance on how investment advisers should use the advice in their voting decisions. The guidance is an attempt to rein in the practice of some investment advisers relying on proxy advisory firms to prepopulate ballots based on their voting policies and automatically vote their shares in what Commissioner Roisman termed a "set it and forget it" approach. Commissioner Roisman stated that there is doubt as to whether this type of automated voting is consistent with an investment adviser's fiduciary duties to vote on an "informed basis." To address this practice of "robovoting," the guidance reiterates, among other things, that investment advisers owe a fiduciary duty to disclose all material facts of the investment advisory relationship between the advisers and their clients, and should consider whether the use of automated voting features is a material fact that should be disclosed. In addition, the guidance states that an investment adviser should consider whether its policies and procedures address circumstances where it becomes aware that a company intends to file or has filed additional soliciting materials with the SEC after the investment adviser has received the proxy advisory firm's voting recommendation but before the submission deadline for proxies to be voted at a shareholder meeting.

The supplemental guidance is effective upon publication in the Federal Register.

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The foregoing is a summary based on the discussion of certain key provisions at today's open meeting and in the related SEC fact sheet (available here) and will be updated with a more detailed client alert on the final rules shortly.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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