Cooley

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On July 13, 2022, the Securities and Exchange Commission held a lively meeting at which it **voted to adopt final amendments** regarding the applicability of the proxy rules to proxy advisory firms, which are also known as proxy voting advice businesses (PVABs). The amendments relating to PVABs, such as ISS and Glass Lewis, remove certain conditions to the availability of exemptions from the information and filing requirements of the proxy rules for PVABs; these conditions were only recently added as part of rules adopted by the previous presidential administration in 2020. The key reversal from 2020 is the rescission of the conditions that:

1. Companies that are the subject of proxy voting advice have such advice made available to them before or at the same time PVABs make it available to their clients.
2. Clients of PVABs are notified of any written responses by companies to such proxy voting advice.

The amendments also reversed course from the 2020 rules by rescinding a note to Rule 14a-9 under the Securities Exchange Act of 1934 that provided examples of situations when the failure to disclose material information regarding proxy voting advice may be misleading and discussed the limited circumstances under which statements of opinion would subject PVABs to liability under Rule 14a-9. Finally, the amendments rescinded the 2020 supplemental guidance regarding the proxy voting obligations of investment advisers. The amendments leave intact the determination that proxy voting advice is a solicitation subject to the proxy rules – including liability under Rule 14a-9 for material misstatements or omissions of fact – and the conflicts of interest disclosure requirements that were memorialized in the 2020 rules.

The amendments, which passed by SEC commissioner votes of 3 to 2 along party lines, will become effective 60 days after publication in the Federal Register. For information on the SEC commissioners' views and statements regarding the amendments, refer to our **Cooley PubCo blog post**.

Background

In 2020, the SEC adopted **final rules regarding proxy voting advice provided by PVABs**. The 2020 rules, among other things:

1. Codified the SEC's interpretation that proxy voting advice is generally a "solicitation" subject to the proxy rules.
2. Added new conditions to exemptions that PVABs generally rely on to avoid the proxy rules' information and filing requirements, including:
   a. New conflicts of interest disclosure requirements.
   b. A requirement that PVABs adopt and disclose policies and procedures designed to ensure that companies that are the subject of proxy voting advice have such advice made available to them in a timely manner, as well as a requirement that clients of PVABs are provided with a means of becoming aware of any written responses by companies to proxy voting advice.
3. Added Note (e) to Rule 14a-9, the anti-fraud provision for proxy materials, to include examples of material misstatements or omissions related to proxy voting advice.

The amendments adopted by the SEC reversed the additions of items 2(b) and 3 in the 2020 rules, which never actually went into effect, as discussed in greater detail below.

Final amendments

The 2020 rules added paragraph (9) to Rule 14a-2(b), which specifies certain conditions that a PVAB must satisfy in order to rely on the exemptions from the proxy rules' information and filing requirements. The just-adopted amendments remove the conditions that:

1. Companies that are the subject of proxy voting advice have such advice made available to them in a timely manner.
2. Clients of PVABs are provided with a means of becoming aware of any written responses by companies to proxy voting advice.

These conditions were adopted in 2020 in response to concerns by companies that the analyses by PVABs contained errors and methodological weaknesses that could affect the reliability of their voting recommendations, and that companies did not have adequate opportunities to engage with the PVABs regarding their advice to correct errors on a timely basis. The rescission of these conditions will reignite these concerns for companies, with companies continuing to only have the option of filing supplemental proxy materials to respond to proxy voting advice they know about and disagree with. In addition to the rescission of the conditions themselves, the amendments remove accompanying safe harbors and exclusions that relate to these conditions. However, the other condition added in the 2020 rules for reliance on the exemptions – that PVABs provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice – remains in place.

The 2020 rules also codified that PVABs' proxy voting advice generally constitute a solicitation subject to the proxy rules, including Rule 14a-9, which "prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact." Rule 14a-9 also requires that solicitations "must not omit to state any material fact necessary in order to make the statements therein not false or misleading."

As part of the 2020 rules, Rule 14a-9 was amended to add Note (e) to provide examples of proxy voting advice that may, depending on the facts and circumstances, be misleading within the meaning of the rule, specifically citing as a potential example the failure of a PVAB to disclose its "methodology, sources of information, or conflicts of interest." The amendments delete Note (e) from Rule 14a-9, removing the specific examples of proxy voting advice that may be subject to the rule. However, the SEC was intentional in stating that this deletion does not alter the scope of Rule 14a-9 or its application to proxy voting advice – the deletion instead is purportedly aimed at removing the "risk of confusion" created by Note (e). The SEC also reiterated its position included in the proposing release that Rule 14a-9 liability does not extend to mere differences of opinion between PVABs and companies, subject to certain limited circumstances in which a statement of opinion contains a material misstatement or omission of fact.

Finally, the amendments rescinded supplemental guidance the SEC issued to investment advisers in 2020 about their proxy voting obligations. The 2020 supplemental guidance addressed investment advisers' use of automated proxy voting systems hosted by PVABs, which have amounted to "robo-voting" in the views of many companies. The 2020 supplemental guidance was primarily intended to assist investment advisers in considering company responses to proxy voting advice that would have been more readily available as a result of the 2020 rules – given the rescission of the conditions discussed above, the SEC determined this guidance also should be removed.

Observations and commentary

Engagement with proxy advisory firms will continue on their terms. Under the final proxy advisor rules, proxy advisory firms

will be left with broad discretion in determining when and how to engage with companies relating to their voting advice. With the rescission of the conditions in the 2020 rules aimed at fostering engagement, there is no regulatory impetus for proxy advisory firms, including ISS and Glass Lewis, to engage with companies or to ensure that company responses to voting advice are received by shareholder clients. While market forces have led to engagement with companies through voluntary procedures, the timing and nature of this engagement will continue to rest with these proxy advisory firms – and there is no guarantee the current practices will be maintained.

The larger trend of reversing the prior administration continues. In a **November 2021 client alert**, we had noted the possibility of a larger trend at the SEC under the current presidential administration to reverse course on some of the work done under the previous administration – and the amendments covered in this alert do little to dispel this notion. As Commissioner Hester Peirce notes in **her statement regarding the amendments**: "[T]he request made of the staff was a difficult and pointless one – find a way to redo a freshly adopted rule without any new information to suggest that such a rewrite is warranted." The SEC's **most recent rulemaking agenda** suggests that this trend may continue, with the potential revisiting of recently adopted SEC guidance and rules relating to human capital disclosure, disclosure of payments by resource extraction issuers, and the whistleblower program.

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