Alert

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COZEN O'CONNOR

SEC Issues Final Rules Regarding Proxy Solicitations

On July 22, 2020, during an open meeting, the Securities and Exchange Commission (SEC) voted 3 to 1 to adopt amendments to the securities rules governing proxy solicitations. The amendments are designed to increase transparency and accountability between Main Street investors, investment advisers, and organizations that provide proxy voting advice. According to SEC Chairman Jay Clayton, the actions of the SEC will "ensure that those who take on the responsibility of investing and voting on behalf of our Main Street investors have the accurate and … useful information necessary to make an informed voting decision for the benefit of those investors."

The final rules, which were issued on July 22 pursuant to an SEC Release, Exemptions from the Proxy Rules for Proxy Voting Advice, amend the proxy solicitation rules of the Securities Exchange Act of 1934 and clarify the exemptions available to persons furnishing proxy voting advice. The SEC solicited and received a substantial number of comments to the proposed rules, many of which are referenced or addressed in the release. The SEC also provided supplemental guidance on the same day, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, which attempts to assist investment advisers in fulfilling their responsibilities in light of the newly adopted amendments to the proxy solicitation rules.

The release states that the amendments for proxy voting advice strive to improve the accuracy, transparency and completeness of information provided by proxy advisory firms, or what the SEC terms "proxy voting advice businesses," through a multi-pronged approach.

The amendments to Rule 14a-1(l) codify the SEC's prior interpretation that the definition of solicitation generally includes proxy voting advice provided by proxy advisory firms. It is also clear from the release that if proxy advisory firms do not disclose certain required material information about their advice, they could be violating the antifraud provisions of the proxy rules.

The amendments to Rules 14a-2(b)(1) and 14a-2(b)(3) modify the rules that provide exemptions from the information and filing requirements of the proxy rules of which proxy advisory firms may avail themselves: In order for proxy adviser firms to take advantage of such exemptions, they must: (i) disclose specified conflicts of interest in their proxy voting advice and (ii) maintain and disclose written policies and procedures designed to facilitate the flow of information between parties, in particular ensuring that registrants have advice from the proxy advisory firms available to them at the same time or prior to the dissemination of such advice to the firms' clients and that the firms' clients become aware of written statements by registrants regarding such advice in a timely manner prior to voting. As indicated in the release, this requirement is intended to provide registrants the opportunity to set forth their own view of voting recommendation prior to the deadline for voting.

The amendments provide for certain non-exclusive safe harbors to facilitate compliance with the requirements set forth above. For example, so long as proxy advisory firms have written policies and procedures reasonably designed to provide registrants with a copy of their proxy voting advice at no charge and no later than the time they have disseminated such advice to their clients, they will be deemed to have satisfied the rules for the exemptions.

The amendments to Rule 14a-9 include new examples of when a failure to disclose material information in proxy voting can be misleading within the meaning of the rule, without creating a new or additional source of liability under Rule 14a-9.

These changes, in the eyes of the approving commissioners, strike the appropriate balance between standardizing previously disparate practice of proxy advisory firms, while preserving such firms' flexibility to exercise judgment informed by their experiences and expertise.

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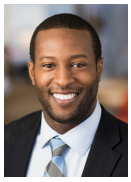

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The SEC also supplemented its prior guidance on the fiduciary duty of investment advisers and Rule 206(4)-6 under the Investment Advisers Act of 1940. The SEC guidance reiterates that an investment adviser's fiduciary duty cannot be outsourced to a proxy advisory firm or otherwise. The guidance highlights the use of automated voting features, which prepopulate voting recommendations and automatically submit ballots, noting that even though an investment adviser may rely on these automated voting features, it remains obligated to exercise the voting authority of its client, in the client's best interest and on an informed basis. The guidance urges investment advisers to carefully consider whether their use of automated voting features and their relationship with proxy advisory firms warrants further disclosure to their clients. In addition, the guidance indicates that investment adviser's policies and procedures should address circumstances where the investment adviser has become aware that a registrant intends to respond or has respond to a proxy advisory firm's voting recommendation before the voting deadline.

As a matter of note, Commissioner Lee, in a dissenting statement, asserted that the final rules were "unwarranted, unwanted, and unworkable." In addition, the Council of Institutional Investors (CII) released a statement indicating that while it was relieved certain provisions from the proposed rules were not included in the final rules, it was critical of the rules noting that they could increase costs for investors and cause delays in the dissemination of proxy advice, among other things.

The compliance date for the final rules is not until December 1, 2021. Therefore, the rules will not generally be in effect until the 2022 proxy season and it remains to be seen how such rules will actually play out. In the meantime, ISS's pending lawsuit against the SEC challenging the SEC's ability to regulate ISS which the parties agreed to stay until the SEC adopted the final rules, will now become active.

To discuss any questions you may have regarding this Alert, or how it may apply to your particular circumstances, please contact a member of Cozen O'Connor's Corporate Governance & Securities