

Press Release

SEC Clarifies Investment Advisers' Proxy Voting Responsibilities and Application of Proxy Rules to Voting Advice

FOR IMMEDIATE RELEASE

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Washington D.C., Aug. 21, 2019 — The Securities and Exchange Commission today provided guidance to assist investment advisers in fulfilling their proxy voting responsibilities. The guidance discusses, among other matters, the ability of investment advisers to establish a variety of different voting arrangements with their clients and matters they should consider when they use the services of a proxy advisory firm. In addition, the Commission issued an interpretation that proxy voting advice provided by proxy advisory firms generally constitutes a “solicitation” under the federal proxy rules and provided related guidance about the application of the proxy antifraud rule to proxy voting advice. Both of these actions explain the Commission’s view of various non-exclusive methods entities can use to comply with existing laws or regulations or how such laws and regulations apply.

“Voting is a key component of shareholder engagement and investing more generally,” said SEC Chairman Jay Clayton. “I’d like to thank Commissioner Elad Roisman for his leadership on our efforts to consider improvements to the proxy process, and for helping to develop this important guidance that, among other things, will provide clarity to investment advisers regarding proxy voting responsibilities, and ultimately benefit their clients.”

“Today’s releases have benefited from the substantial engagement from the public over the past decade, including last November’s Staff Roundtable on the Proxy Process and the extensive public comments the Commission has received,” said Commissioner Roisman. “The releases reiterate the Commission’s views on the importance of investment advisers’ voting responsibly on behalf of their clients and the applicability of our proxy rules to proxy voting advice. Advisers who vote proxies must do so in a manner consistent with their fiduciary obligations and, to the extent they rely on voting advice from proxy advisory firms they must take reasonable steps to ensure the use of that advice is consistent with their fiduciary duties. In addition, proxy advisory firms, to the extent they engage in solicitations, must comply with applicable law.”

FACT SHEET

SEC Open Meeting

August 21, 2019

The Commission has issued guidance to assist investment advisers in fulfilling their proxy voting responsibilities, particularly where they use the services of a proxy advisory firm, and provides guidance on proxy voting disclosures under Form N-1A, Form N-2, Form N-3, and Form N-CSR under the Investment Company Act of 1940. The Commission has also issued an interpretation of Exchange Act Rule 14a-1(l) that proxy voting advice generally constitutes a solicitation under the federal proxy rules and related guidance regarding the application of the antifraud provisions in Exchange Act Rule 14a-9 to proxy voting advice.

Proxy Voting Responsibilities of Investment Advisers

Investment advisers owe each of their clients a duty of care and loyalty with respect to services undertaken on the clients' behalf, including proxy voting. Rule 206(4)-6 under the Advisers Act requires an investment adviser who exercises voting authority with respect to client securities to adopt and implement written policies and procedures that are reasonably designed to ensure that the investment adviser votes proxies in the best interest of its clients.

The guidance clarifies how an investment adviser's fiduciary duty and Rule 206(4)-6 under the Advisers Act relate to an adviser's proxy voting on behalf of clients, particularly if the investment adviser retains a proxy advisory firm. The guidance follows a question and answer format and provides examples to help facilitate compliance.

In particular, the guidance discusses, among other things:

- How an investment adviser and its client, in establishing their relationship, may agree upon the scope of the investment adviser's authority and responsibilities to vote proxies on behalf of that client;
- What steps an investment adviser, who has assumed voting authority on behalf of clients, could take to demonstrate it is making voting determinations in a client's best interest and in accordance with the investment adviser's proxy voting policies and procedures;
- Considerations that an investment adviser should take into account if it retains a proxy advisory firm to assist it in discharging its proxy voting duties;
- Steps for an investment adviser to consider if it becomes aware of potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy advisory firm's analysis that may materially affect one or more of the investment adviser's voting determinations;
- How an investment adviser could evaluate the services of a proxy advisory firm that it retains, including evaluating any material changes in services or operations by the proxy advisory firm; and
- Whether an investment adviser who has assumed voting authority on behalf of a client is required to exercise every opportunity to vote a proxy for that client.

Applicability of the Federal Proxy Rules to Proxy Voting Advice

The federal proxy rules apply to any solicitation for a proxy with respect to any security registered under Exchange Act Section 12. Under Exchange Act Rule 14a-1(l), a solicitation includes, among other things, a "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy," and includes communications by a person seeking to influence the voting of proxies by shareholders, regardless of whether the person itself is seeking authorization to act as a proxy.

Under the Commission interpretation, proxy voting advice provided by proxy advisory firms generally constitutes a solicitation subject to the federal proxy rules. The Commission's interpretation does not affect the ability of proxy advisory firms to continue to rely on the exemptions from the federal proxy rules' filing requirements. These exemptions, found in Rule 14a-2(b), among other things, provide relief from the obligation to file a proxy statement, as long as the advisory firm complies with the exemption's conditions.

Solicitations that are exempt from the federal proxy rules' filing requirements remain subject to Exchange Act 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. The Commission guidance explains what a person providing proxy voting advice should consider when considering the information it may need to disclose in order to avoid a potential violation of Rule 14a-9 where the failure to disclose such information would render the advice materially false or misleading.

What's Next?

The guidance and interpretation will be effective upon publication in the Federal Register.

We encourage investment advisers to review their policies and procedures in light of the guidance in advance of next year's proxy season. To the extent that firms identify operational or other questions in the course of that review, we encourage them to contact the staff of the Division of Investment Management.

