Public Statement

Statement at the Open Meeting on Commission Guidance and Interpretation Regarding Proxy Voting and Proxy Voting Advice

Commissioner Elad L. Roisman

Aug. 21, 2019

Thank you, Chairman Clayton. I would like to take this opportunity to welcome Commissioner Lee to her first open meeting. I look forward to working with you and am happy that we will all benefit from your insight and passion for this agency and its mission.

As with most of our meetings, there are many "Thank Yous" to go around because so many people worked hard to get us to where we are today. Before discussing the substance of the releases the Commission will vote on this morning, I would like to make sure that I recognize each of you individually.

I would like to begin by thanking Chairman Jay Clayton. Since his earliest days leading the SEC, he has prioritized the interests of Main Street investors and improving our capital markets for all Americans.[1] I am honored that he has entrusted me with leading the Commission's wholesale evaluation[2] of the proxy process,[3] a topic that I have been passionate about for many years.
I would also like to thank Director Dalia Blass of the Division of Investment Management, Deputy Director and Chief Counsel Paul Cellupica, David Bartels, Holly Hunter-Ceci, Tara Varghese, Sarah ten Siethoff, and Jennifer Songer who worked on today's recommendation for Commission-level guidance for investment advisers. Further thanks go to Director Bill Hinman of the Division of Corporation Finance, Michele Anderson, David Fredrickson, Tamara Brightwell, Luna Bloom, Ted Yu, Lisa Kohl, Coy Garrison, Dan Greenspan, David Plattner, and Adam Turk for their work on the recommendation for the Commission to offer an interpretation and guidance regarding the applicability of the federal proxy rules to proxy voting advice. Thank you also to Bob Stebbins, the Commission's General Counsel, and Meridith Mitchell, Michael Conley, Jeff Berger, Dan Matro, Lori Price, Malou Huth, Cathy Ahn, Mykaila DeLesDernier, Bryant Morris, Dorothy McCuaig, Conner Raso, and Brooks Shirey in his office. I am impressed by how well you all coordinated and informed each other's work. I am particularly impressed by how hard you worked to try and address the feedback of all five members of the Commission.

Finally, I would like to thank all of those who submitted comments to us—not only in response to our 2018 Roundtable on the Proxy Process,[4] but also over at least the last decade.[5] Recognizing that our markets and market participants are dynamic, seeing the evolution of comments, and receiving updated information has been critical to helping us see the many sides of these complex issues as they have changed and exist today. This enables us to identify where Commission action would be most helpful to investors and our markets, and calibrate what that action should be.

With regard to the recommendations before us today, the topic of investment advisers' proxy voting obligations is not new. It has been a subject of SEC rulemaking, staff action, and considerable comment since 2002. Similarly, the Commission over the past several decades has addressed the application of the definition of "solicitation" promulgated under the Exchange Act in a number of ways to ensure that the definition is consistent with the SEC's mission to protect investors and to provide clarity to market participants. In each case, in light of various significant developments, including the absolute and relative increase in assets held in mutual funds and exchange traded products,[6] updating our guidance and providing additional interpretive clarity to address the realities of today's markets is appropriate and many would say overdue.

I. The Importance of Proxy Voting

I have spoken previously about how I view the proxy process as a fundamental aspect of our capital markets.[7] Proxy voting was designed to be one of the primary ways for shareholders to engage with corporate management, including holding them accountable for delivering value from their companies. This shareholder-company dynamic drives productivity in our economy and allows investors to share in the growth and success of a company. Indeed, much of our current public company disclosure regime is designed to inform investors not only so that they can make investment choices, but voting choices as well.

The interpretation and guidance that we vote on today will be the first of several matters that I hope the Commission will consider relating to our proxy voting rules.[8] As our Regulatory Flexibility Agenda notes, in the near future the Commission expects to consider (1) proposed rules to amend the submission and resubmission thresholds for shareholder proposals under Rule 14a-8 under the Exchange Act[9] and (2) proposed rule amendments to address proxy advisory firms' reliance on the proxy solicitation exemptions in Exchange Act Rule 14a-2(b).[10] Additionally, in the longer-term, I hope the Commission will consider actions to modernize the proxy system generally to promote greater efficiency and accuracy in shareholder voting. As I have stated before, I believe the Commission needs to consider not only "quick-fixes" that could marginally improve some aspects of the so-called "proxy plumbing," but also comprehensive solutions based on modern technology.[11]

But today marks an important first step. The Commission will vote on two separate releases, drafted by two different divisions within the agency, that relate to the role of proxy advisory firms in the proxy voting process. I am aware that, for some, this is a controversial topic. I have heard the warnings that any action, regulation, or oversight that directly or indirectly constrains proxy advisory firms will be viewed by some as a gift to the management and directors of public companies, resulting in harm to investors. For example, I have heard that the Commission should not take any action related to proxy voting advice provided by proxy advisory firms because "…the investors themselves…the ones paying for proxy advice…are not asking for protection."[12] To be clear, in this context, I do not consider asset managers to be the "investors" that the SEC is charged to protect. Rather, the investors that I believe today's recommendations aim to protect are the ultimate retail investors, who may have their life savings invested in our stock markets. These Main Street investors who invest their money in funds are the ones who will benefit from (or bear the cost of) these advisers' voting decisions. In essence, I believe it is our job as regulators to help ensure that such advisers vote proxies in a manner consistent with their fiduciary obligations and that the proxy voting advice upon which they rely is complete and based on accurate information.

I encourage everyone to look at the public comments received in connection with the Staff Roundtable on the Proxy Process last year.[13] We have heard not only from hundreds of public companies,[14] but

from investor groups and individual investors.[15] These commenters have expressed varying concerns relating to the influence that proxy advisory firms appear to have over proxy voting decisions in our markets. I also want to acknowledge Congress's interest in this matter over several sessions, including hearings, bipartisan legislation, and requested GAO reports.[16]

The SEC is not in the business of picking winners and losers. We have a three-part mission that informs every action we take: Protect investors. Maintain fair, orderly, and efficient markets. Facilitate capital formation. I appreciate the efforts of our dedicated SEC staff who worked hard to further this mission by addressing the various perspectives and concerns noted in the comment file. They have prepared recommendations that would not change the law or create a new regulatory regime for proxy advisory firms, but reiterate longstanding Commission rules and positions that remain applicable and very relevant in today's marketplace. I believe this approach embodies the long-standing commitment of the SEC staff and the Commission to avoid tipping the scales in favor of any one party in the shareholder-company dynamic.

II. Guidance for Investment Advisers

Our first vote today recognizes the pivotal role that investment advisers play in proxy voting. They vote proxies for an increasing number of retail investors every year.[17] This is a huge responsibility, not only in its importance, but in its magnitude. Investment advisers could be asked to cast a vote on multiple matters of critical importance to many public companies in a matter of days or weeks.[18]

A. Investment Advisers' Proxy Voting Rule of 2003

This is demanding and important work, and advisers should view it as such. The Commission stated as much when adopting the proxy voting rule for advisers in 2003.[19] The rule itself states "it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the [Advisers Act] for [an investment adviser] to exercise voting authority with respect to client securities, unless" the adviser follows the specific requirements of that rule.[20] These are strong words, stressing how important the Commission viewed investment advisers' proxy voting obligations to their clients.

With that backdrop, the rest of the Proxy Voting Rule is principles-based and disclosure-based in its requirements. For example, the rule requires investment advisers to adopt and implement policies and procedures that are reasonably designed to ensure that the adviser votes clients' proxies in the clients' best interests.[21] That approach was based on the fact that the Advisers Act imposes upon investment advisers a fiduciary duty to serve their clients best interests.

Ten years after the Commission adopted the Proxy Voting Rule, the SEC staff issued Staff Legal Bulletin 20 ("SLB 20") to discuss ways advisers could comply with the rule, including through the use of proxy advisory firms, where the adviser also adopted measures to conduct diligence and supervise those firms, such as with respect to their conflicts of interest.[22] The substance of SLB 20 was tethered closely to the Proxy Voting Rule, staying true to its flexible, principles-based approach and reliance on fiduciary duty.

B. Fiduciary Duty

In the last few years, the Commission has underscored the importance of investment advisers' fiduciary duty outside the context of voting proxies. We recently adopted an interpretation of the Advisers Act fiduciary standard that reaffirmed, and, in some cases, clarified components of advisers' duties of care and loyalty when serving their clients.[23] In this Fiduciary Interpretation, we stated that investment advisers owe each of their clients a fiduciary duty, which "must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client."[24] In other words, while an investment adviser and client can, through contract, shape the services that the adviser performs for the client, the adviser must perform any services it undertakes with care and loyalty—duties that the adviser cannot disclaim, and the client cannot waive.

In that release, we excluded specific discussion about the application of the fiduciary duty in the context of proxy voting, reserving space for ourselves to more specifically discuss advisers' responsibilities in

this area, including when they retain proxy advisory firms for help with voting, a topic of considerable Commission and SEC staff engagement over the last decade.[25]

C. Today's Commission Guidance

Today's guidance does just that. It starts from the unassailable premise stated in 2003: "[a]n investment adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting."[26] It then continues on to offer guidance to investment advisers, consistent with the Fiduciary Interpretation, in two main areas: (1) the ability for an adviser and client to shape the adviser's authority to vote proxies on the client's behalf, including whether and when the adviser must vote; and (2) the responsibilities of investment advisers when utilizing the services of proxy advisory firms to assist with voting, consistent with their fiduciary duties.

In the first area, this guidance recognizes that the adviser-client relationship is not one-size-fits-all and focuses on the client's objectives when discussing how advisers serve their clients' best interest when making voting determinations. The guidance describes ways investment advisers and clients may scope the adviser's authority to vote proxies on their client's behalf[27] and discusses whether an investment adviser is required to exercise every opportunity to vote a proxy for a client where it has assumed voting authority on behalf of the client.[28]

In the second area, this guidance recognizes the wide scope of services that proxy advisory firms offer investment advisers in today's marketplace, as well as the variety of ways investment advisers can utilize those offerings while maintaining their accountability as fiduciaries for their clients. As when an adviser relies on any third party for services, including assistance with compliance, the adviser remains on the hook for its fiduciary obligations. I cannot think of any context when the Commission has spoken to the contrary. This guidance discusses ways advisers can use the services of proxy advisory firms responsibly, including considerations relevant to: deciding whether or not to retain a proxy advisory firm to assist with proxy voting;[29] addressing potential errors or incompleteness in a proxy advisory firm's analysis;[30] and evaluating the services of a proxy advisory firm on an ongoing basis.[31]

In summary, the staff's recommendation for Commission guidance stays true to the Proxy Voting Rule's flexible, principles-based approach in discussing investment advisers' proxy voting responsibilities, updates and elevates the portions of SLB 20 that may be relevant for investment advisers today, and underscores the importance of the adviser serving its clients' best interest, as discussed in our recent Fiduciary Interpretation.

D. Should we do more?

Some have called for the Commission to impose new obligations on investment advisers with respect to their proxy voting, such as requiring them to conduct pass-through voting or restricting their use of proxy advisory firms. But, after thoroughly considering the reasons behind such requests—namely, the desire to make sure advisers serve clients' best interests and maintain accountability for voting their proxies—I am not convinced such new prescriptive requirements would best achieve these objectives.

I believe that most investment advisers today recognize that they are already subject to a robust regulatory framework, designed to ensure that advisers vote proxies in the best interest of their clients and conduct appropriate due diligence on third-party providers.[32] For any adviser that does not, I am hopeful that today's guidance will serve as a reminder of how seriously the Commission views proxy voting and will provide a helpful tool for considering how to fulfill the existing obligations under our rules and the Advisers Act.

I have always said to investment advisers: I do not care how you vote. But I care that you fulfill your fiduciary duty when doing so. Today, I am happy to vote on a recommendation from the SEC staff for the Commission itself to deliver this message.

III. Interpretation and Guidance Regarding the Applicability of the Proxy Rules To Proxy Voting Advice

Our second vote today relates to the proxy solicitation rules that the Commission has promulgated under Section 14 of the Exchange Act. Specifically, the release provides an interpretation and related guidance regarding the applicability of Rules 14a-1 and 14a-9 under the Exchange Act to proxy voting advice.

In response to the question of whether proxy voting advice provided by a proxy advisory firm constitutes a solicitation under the federal proxy rules, the release reiterates prior Commission statements that, generally, the furnishing of proxy voting advice does constitute a "solicitation" within the meaning of Exchange Act Rule 14a-1.[33] Although today's interpretation is not new, the release provides a robust explanation of our reasoning, applying the facts and circumstances surrounding the provision of proxy voting advice by proxy advisory firms to our rules, given prior Commission actions as well as relevant court decisions. Our interpretation will not affect proxy advisory firms' ability to rely on the exemptions from the information and filing requirements of the federal proxy rules.[34]

The release also provides helpful guidance with respect to the application of Rule 14a-9 to proxy voting advice. For instance, the release includes examples of information that proxy advisors should consider disclosing that is specific to the types of information we see provided in proxy advisor reports. As the Supreme Court has stated: "The purpose of [Section] 14(a) [of the Exchange Act] is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation."[35] The guidance and interpretation we are voting on today will serve to further that purpose and, I hope, help ensure that those who make voting decisions are doing so based on complete and accurate information.

I am happy to support both of these recommendations. Chairman Clayton, I will now turn it back to you. Thank you.

[1] *See* Chairman Jay Clayton, "Remarks at the Economic Club of New York" (Jul. 12, 2017), https://www.sec.gov/news/speech/remarks-economic-club-new-york.

[2] *See* Chairman Jay Clayton, "Statement Announcing SEC Staff Roundtable on the Proxy Process" (Jul. 30, 2018), https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process.

[3] *See* Chairman Jay Clayton, "Remarks for Telephone Call with SEC Investor Advisory Committee Members" (Feb. 6, 2019), https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-call-020619; Commissioner Elad L. Roisman, "Brief Statement on Proxy Voting Process: Call with the SEC Investor Advisory Committee" (Feb. 6, 2019), https://www.sec.gov/news/public-statement/statement-roisman-020619.

[4] *See* Chairman Jay Clayton, Statement Announcing SEC Staff Roundtable on the Proxy Process (the "2018 Roundtable"), https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process.

[5] For example, in 2010, the Commission issued a concept release that sought public comment about, among other things, the role and legal status of proxy advisory firms within the U.S. proxy system. (The comment letters received in response to the Concept Release are available at https://www.sec.gov/comments/s7-14-10/s71410.shtml.) Also, in 2013, the staff held a roundtable on the use of proxy advisory firm services by institutional investors and investment advisers. The letters received in response to the announcement are available at https://www.sec.gov/comments/4-670/4-670.shtml.

[6] Between 2010 and 2018, the total net assets held in open-end funds increased by over $9 trillion USD. *See* 2019 Investment Company Fact Book (59th ed. 2019), at Table 1, https://www.icifactbook.org/deployedfiles/FactBook/Site%20Properties/pdf/2019/2019_factbook.pdf;

2016 Investment Company Fact Book (56th ed. 2016), at Table 1 and Table 11, https://www.ici.org/pdf/2016_factbook.pdf.

[7] Commissioner Elad L. Roisman, "Keynote Remarks: ICI Mutual Funds and Investment Management Conference" (Mar. 18, 2019), https://www.sec.gov/news/speech/speech-roisman-031819.

[8] The SEC's short-term and long-term rulemaking agendas, respectively, are available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&Image58.x=45&Image58.y=10&Image58=Submit.
and https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=201904&showStage=longterm&agencyCd=3235&Image58.x=34&Image58.y=15&Image58=Submit.

[9] 17 CFR 240.14a-8.

[10] 17 CFR 240.14a-2(b).

[11]; *See* Commissioner Elad L. Roisman, "Keynote Remarks: ICI Mutual Funds and Investment Management Conference" (Mar. 18, 2019), https://www.sec.gov/news/speech/speech-roisman-031819.

[12]*See*, *e.g.*, Investor Advocate Rick Fleming, "Important Issues for Investors in 2019" (Apr. 8, 2019), https://www.sec.gov/news/speech/fleming-important-issues-investors-2019.

[13] Public comments related to the 2018 Roundtable are available at https://www.sec.gov/comments/4-725/4-725.htm. *See also* public comments submitted in 2010 and 2013, as noted above in note 5.

[14] *See*, *e.g.*, Letter dated Feb. 4, 2019 from Nasdaq, Inc., et al.; Letter dated Jul. 12, 2019 from Avrohom J. Kess, Vice Chairman and Chief Legal Officer, The Travelers Companies, Inc.; Letter dated Jul. 26, 2019 from Neil A. Hansen, Vice President, Investor Relations and Corporate Secretary, Exxon Mobil Corporation. *See also* Letter dated Nov. 15, 2010 from John F. Coyne, President and Chief Executive Officer, Western Digital Corporation; Letter dated Jul. 19, 2013 from Lynnette C. Fallon, Esq., General Counsel, Axcelis Technologies, Inc.

[15] *See*, *e.g.*, Letter dated Oct. 5, 2018 from James L. Martin, 60 Plus Association; Letter dated Jan. 25, 2019 from Nan Bauroth, Member, Main Street Investors Coalition Advisory Council; Letter dated Mar. 11, 2019 from Rasa Mokhoff; Letter dated Apr. 9, 2019 from Pauline Yee; Letter dated Apr. 16, 2019 from Marie Reed; Letter dated Apr. 29, 2019 from Christopher Burnham, President, Institute for Pension Fund Integrity. *See also* Letter dated Apr. 13, 2019 from J.W. Verret, Professor of Law, Antonin Scalia Law School, George Mason University; Letters dated Oct. 12, 2018 and Nov. 27, 2018 from Bernard S. Sharfman; Letter dated Oct. 20, 2010 from Tom D. Seip.; and Letter dated Sept. 29, 2010 from Mark Latham.

[16] *See*, e.g., U.S. Government Accountability Office. (2007, June). *Corporate Shareholder Meetings: Issues Relating to Firms That Advise Institutional Investors on Proxy Voting*. (Publication No. GAO-07-765). Retrieved from https://www.gao.gov/assets/270/263233.pdf; U.S. Government Accountability Office. (2016, November). *Corporate Shareholder Meetings: Proxy Advisory Firms' Role in Voting and Corporate Governance Practices*. (Publication No. GAO-17-47). Retrieved from https://www.gao.gov/assets/690/681050.pdf; Corporate Governance Reform and Transparency Act, H.R. 5311, 114th Cong. (2016); Corporate Governance Reform and Transparency Act of 2017, H.R. 2015, 115th Cong. (2017); Corporate Governance Fairness Act, S. 3614, 115th Congress (2018); Proxy Process and Rules: Examining Current Practices and Potential Changes: Hearing before Committee on Banking, Housing, and Urban Affairs, Senate, 115th Cong. (2018).

[17] For example, over 100 million individuals, representing nearly 45% of U.S. households, own open-end funds, and over one third of the shares of U.S.-issued equities outstanding are held in funds. *See* 2018 Investment Company Fact Book (58th ed. 2018), https://www.ici.org/pdf/2018_factbook.pdf ("ICI Fact Book 2018"), at 39.

[18] For example, in 2017, the average mutual fund voted on over 1,500 matters. ICI Viewpoints, "Funds and Proxy Voting: The Mix of Proposals Matter" (Nov. 5, 2018), at 2.

[19] *See* Rule 206(4)-6 of the Investment Advisers Act of 1940 ("Advisers Act"), 17 C.F.R. 275.206(4)-6 (the "Proxy Voting Rule"); and "Proxy Voting by Investment Advisers," Release No. IA-2106 (Jan. 31, 2003) (the "Proxy Voting Rule Release").
[20] 17 C.F.R. 275.206(4)-6.
[21] *Id.*
[22] *See* SEC Staff Legal Bulletin No. 20, Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms (Jun. 30, 2014).
[23] *See* Fiduciary Interpretation.
[24] *See* Fiduciary Interpretation, at 9-10.
[25] In 2010, the Commission issued a concept release that sought public comment on the role of proxy advisory firms within the proxy system, among a number of other topics relating to the proxy process. *See* Concept Release on the U.S. Proxy System, Release No. 34-62495 (Jul. 14, 2010), 75 FR 42982 (Jul. 22, 2010). In 2013, the staff held a roundtable on the use of proxy advisory firm services by institutional investors and investment advisers. *See* SEC Announces Agenda, Panelists for Roundtable on Proxy Advisory Services, available at https://www.sec.gov/news/press-release/2013-253. In 2015, the SEC's Office of Compliance Inspections and Examinations included in its published priorities examinations of investment advisers' compliance with their fiduciary duty when voting proxies on behalf of investors. *See* OCIE 2015 Examination Priorities, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf. Most recently, the 2018 Roundtable raised these issues for public comment.
[26] Proxy Voting Rule Release, at 1.
[27] Guidance, Q/A #1
[28] Guidance, Q/A #6
[29] Guidance, Q/A #3
[30] Guidance, Q/A #4
[31] Guidance, Q/A #5
[32] *See, e.g.*, Letter dated Dec. 31, 2018 from Gail C. Bernstein, General Counsel, Investment Adviser Association, at 4.
[33] 17 CFR 240.14a-1(l).
[34] *See, e.g.*, 17 CFR 240.14a-2(b)(1) and 17 CFR 240.14a-2(b)(3).
[35] *J.I. Case v. Borak*, 377 U.S. 426, 431 (1964).