

[Securities Regulation Daily Wrap Up, TOP STORY—SEC issues guidance on advisers' use of proxy advisory firms, application of proxy rules to voting advice, \(Aug. 21, 2019\)](#)

Securities Regulation Daily Wrap Up

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The guidance highlights issues investment advisers should consider when working with proxy advisory firms and notes that proxy voting advice provided by these firms generally constitutes a "solicitation" under the SEC's proxy rules.

By a 3-2 vote, the SEC agreed to issue guidance to assist investment advisers working with proxy advisory firms in fulfilling their proxy voting responsibilities. Specifically, the guidance discusses particular matters advisers should consider when retaining the services of a proxy advisory firm in the voting process and provides recommendations relating to proxy voting disclosures in Investment Company Act forms. Separately, the Commission issued an interpretation stating that advice provided by a proxy advisory firm generally constitutes a "solicitation" under the federal proxy rules, and discussing the application of the proxy antifraud rule to proxy voting advice (*Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, [Release No. IA-5325](#), August 21, 2019; *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, [Release No. 34-86721](#), August 21, 2019).

"Advisers who vote proxies must do so in a manner consistent with their fiduciary obligations," [said](#) Commissioner Elad Roisman. "In addition, proxy advisory firms, to the extent they engage in solicitations, must comply with applicable law."

Advisers' proxy voting responsibilities. The guidance clarifies how an investment adviser's fiduciary duty and best interest obligation under Advisers Act Rule 206(4)-6 relate to its proxy voting on behalf of clients, particularly when the adviser is using a proxy advisory firm. Among other things, the guidance discusses how an investment adviser and a client may come to an agreement on the scope of the adviser's authority to vote proxies on behalf of that individual client and the specific measures an adviser can take to show that its voting determinations are in the client's best interest and in accordance with its policies and procedures.

The guidance also provides matters that an adviser should consider if it has retained a proxy advisory firm to assist in its proxy voting activities and notes measures to take to evaluate the services of a proxy advisory firm. In addition, the guidance lists potential steps for an adviser to take if it discovers potential errors or incompleteness in a proxy advisory firm's analysis that may materially affect the investment adviser's voting determinations.

Proxy rules and voting advice. The Commission also issued an interpretation of Exchange Act Rule 14a-1(l) specifying that proxy voting advice generally constitutes a "solicitation" under the federal proxy rules. Under Rule 14a-1(l), a solicitation includes, among other things, a communication by a person seeking to influence the voting of proxies by shareholders and, thus, according to the SEC, advice provided by proxy advisory firms generally constitutes a solicitation. The interpretation notes, however, that proxy advisory firms are still able to rely on exemptions from the federal proxy rules' filing requirements, including the requirement to file a proxy statement, so long as the firm complies with all conditions of the applicable exemption.

The interpretation also provides guidance regarding the application of the antifraud provisions of Exchange Act Rule 14a-9 to proxy voting advice. The SEC notes that exempt solicitations remain subject to the prohibition on false or misleading statements with respect to any material fact and explains the issues that a person providing

proxy advice should consider when determining the information it may need to disclose to avoid a potential violation.

Supporting statements. Commissioner Roisman [applauded](#) the changes, noting that the investors that these changes are designed to protect are the ultimate retail investors whose advisers' vote an increasing number of proxies for each year and that it is the SEC's job to ensure that advisers vote proxies consistent with their fiduciary obligations. Further, Roisman explained, the guidance allows for a focus on individual client objectives when considering a client's "best interest" in making voting determinations and discusses how advisers can use proxy advisory firm services responsibly. As to the "solicitation" guidance, he stated that the interpretation is "not new" and merely reiterates longstanding Commission positions while offering an explanation of the agency's reasoning.

Commissioner Hester Peirce [echoed](#) these sentiments, explaining that using a proxy advisory firm does not diminish the adviser's duty to serve its client's best interest and that there are measures an adviser relying on a proxy advisory firm can take to ensure that it is fulfilling its fiduciary duty. An adviser can and should ensure that the proxy advisor is following its instructions, disclosing conflicts of interest, and using sound methodologies and technologies, she said, but the guidance documents do not specifically prescribe what investment advisers and proxy advisors must do to meet their responsibilities. Further, according to Peirce, broadly applicable positions should come from the Commission, not staff guidance.

Chairman Jay Clayton [agreed](#), reiterating that while investment advisers can engage proxy advisory firms to assist them with their voting responsibilities, they retain their fiduciary obligations of care and loyalty. The guidance provides examples of how advisers could discharge their duties under different facts and circumstances, according to the chairman, and advisers—and ultimately investors—will benefit from examples of how to reasonably ensure that voting determinations are made in clients' best interest.

Dissenting statements. In opposition to the guidance, however, Commissioners Robert Jackson and Allison Lee cited potential costs and a lack of notice and public comment. Jackson [expressed](#) concern that the guidance could alter competition in the field of proxy advice without addressing concerns as to whether it would make it more difficult for investors to oversee corporate management or increase costs such as to cause smaller investors respond to vote less. The guidance also could make it more to operate a proxy advisory firm, which could further concentrate voting influence into even fewer hands, Jackson stated.

Commissioner Lee [agreed](#), noting that the guidance will introduce costs and additional pressure into the already condensed proxy season and could increase issuer involvement in the process, which could undermine the independence of voting recommendations. Further, she argued, these changes should not be made without notice and comment and weighing the costs and benefits. She contended that the releases contain new substantive requirements (including increased issuer involvement) and do not address concerns raised at the 2018 proxy roundtable regarding threats to the reliability of recommendations. Specific risks have not been identified, weighed, or analyzed, and this must be done before action is taken, she contended.

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

The releases are [No. IA-5325](#) and [No. 34-86721](#).

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