Public Statement

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

Chairman Jay Clayton

Aug. 21, 2019

Congress assigned to the Commission the responsibility to regulate the proxy solicitation process in 1934. Voting proxies is important. When we meet with market participants, we consistently hear about the importance of engagement, and the voting process is a key component of that engagement. This is made clear in many ways, including that our proxy rules regulate how proxies can be solicited and what information must be disclosed. Those rules impose significant anti-fraud liability on statements which, at the time and in the light of the circumstances under which they are made, are false or misleading with respect to any material fact. No other country comes close in terms of providing and enforcing this level of investor protection around the proxy voting process. Further, in the context of a share-for-share merger subject to a shareholder vote, we impose additional liability under the Securities Act of 1933 on registrants and officers and directors for the information in the associated registration statement.

In the past two decades, the proxy process has become one of increasing complexity, and also importance, to investors, issuers, and investment advisers. Commission rule changes, state law changes, corporate governance practices, technology and other factors have all increased the significance of shareholder voting in our public capital markets. This is one reason why the Commission and its staff have prioritized our work in this area. During this time, investment advisers have assumed a much greater role in our marketplace and, consequently, a greater role in the area of shareholder-company engagement. For example, there are now over 13,000 SEC-registered investment advisers with over $84 trillion in assets under management, and over 8,000 of these investment advisers provide services to retail investors.[1]

Investment advisers are fiduciaries that owe each of their clients duties of care and loyalty with respect to services undertaken on their client's behalf, including voting. These are the same duties that apply to their investment advice generally. The Advisers Act and our rules accommodate a variety of voting arrangements—for example, focusing the investment adviser's resources on voting only on certain types of proposals—as well as the ability for investment advisers to seek input and assistance from third parties, including proxy advisory firms, in fulfilling these important fiduciary duties. These are matters to be agreed upon between the investment adviser and the client, with full and fair disclosure and informed consent. However, the relationship in all cases remains that of a fiduciary to the client, and while investment advisers can engage others to assist them with their work, they retain their fiduciary obligations of care and loyalty.

I'll be more specific: bearing in mind the generally accepted importance of voting, to the extent an investment adviser assumes voting responsibilities, it must discharge those important responsibilities in accordance with its fiduciary duty. Said another way, there is not—and there never has been—a carve-out from the investment adviser fiduciary duty for proxy voting responsibilities that an investment adviser has assumed.

Our actions today are informed by years of Commission and staff engagement with the public on this topic. Commissioner Roisman provided a nice overview of our staff's recent engagement and many years of experience on a number of topics relating to the proxy process, as well as a nice overview of the guidance and interpretation we are considering today.

I'll pause here and level set, and let me say it again: First, voting is important. Second, investment advisers who assume voting authority have duties of care and loyalty to their clients in fulfilling their voting obligations. The guidance we are considering today emphasizes these fundamental truths. The guidance also provides examples of how investment advisers might discharge these duties in different contexts, and explains that these examples are not the only way that an investment adviser could comply with its fiduciary obligations under the Advisers Act.

It is clear, based on comments received from market participants as part of our staff's engagement and the staff's experience over the years, that Commission guidance in this area will be helpful to investment advisers as they consider what voting obligations to take on and how to discharge them. Particularly, I believe investment advisers, and ultimately their clients, will benefit from the examples of steps that an investment adviser can take to reasonably ensure that it is making voting determinations in its client's best interest. Similarly, the guidance should assist investment advisers that retain a proxy advisory firm by clarifying a variety of issues that they should consider, such as conflicts of interest and accuracy of information, in each case depending on the relevant circumstances. These potential actions discussed in the guidance are not new. They should be familiar to investment advisers and other market participants. They include reasonable due diligence, reasonably identifying and addressing conflicts, and full and fair disclosure. Therefore, as the powerful combination of these types of actions often does, the guidance recommended by the Division of Investment Management should help promote a transparent and robust proxy process and transparent, thoughtful and meaningful voting determinations and investment decisions.

The interpretation and related guidance recommended by the Division of Corporation Finance should be helpful to proxy advisory firms as they consider their obligations under the federal proxy rules when providing proxy voting advice. As Commissioner Roisman noted, the work of the staff in the Division of Corporation Finance that we are considering today is just a first step. The staff is also considering potential recommendations that the Commission propose rule amendments to Rule 14a-2(b), the rule which provides exemptions from the information and filing requirements of the federal proxy rules. Two of these exemptions commonly relied upon by proxy advisory firms were adopted decades ago and warrant a fresh look to determine whether changes are needed. In the context of this work, I have asked the staff to also consider whether the current rule definition of the term "solicitation" under the federal proxy rules should be amended to codify today's interpretation.

Thank you to my fellow Commissioners for their remarks. Thank you, Paul, Bill, Tara and Adam for your statements and thank you to the many dedicated staff members for their exceptional work in bringing these recommendations before us today, including:

- from the Division of Investment Management: Dalia Blass, Paul Cellupica, David Bartels, Holly Hunter-Ceci, Tara Varghese, Sarah ten Siethoff, and Jennifer;
- from the Division of Corporation Finance: Bill Hinman, Michele Anderson, David Fredrickson, Tamara Brightwell, Luna Bloom, Ted Yu, Lisa Kohl, Coy Garrison, Dan Greenspan, David Plattner, and Adam Turk; and
- from the Office of General Counsel, Bob Stebbins, 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.

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[1] As of December 2018. *See Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Exchange Act Release No. 86031 (June 5, 2019) [84 FR 33669 (July 12, 2019)].