

[Securities Regulation Daily Wrap Up, TOP STORY—SEC reexamination and enforcement pause on proxy advice rules draws praise, questions, \(Jun. 2, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Lene Powell, J.D.](#)

Investor groups are pleased that the SEC is looking to reexamine rules placing restrictions on proxy advice firms, but market-oriented commissioners and an industry group are wary of a possible rollback.

The SEC's announcement on Tuesday that it will consider revisiting rules and guidance surrounding proxy voting advice was applauded by investor groups. According to the Council of Institutional Investors (CII), the decision is "a big win" for investors and proxy advisory firms that would have been "shackled" by the regulatory regime. But SEC minority commissioners Elad Roisman and Hester Peirce questioned the decision to reconsider the rules before they become effective, saying it is not clear why the rules are being reexamined or how they will be evaluated without new data or experience.

Proxy advice guidance and rules. In August 2019, the SEC approved by a 3-to-2 vote an [interpretation](#) regarding proxy voting advisers. The interpretation states that proxy voting advice provided by proxy advisory firms generally constitutes a "solicitation" under the federal proxy rules and provides related guidance about the application of the proxy antifraud rule to proxy voting advice. Commissioner Allison Herren Lee and then-Commissioner Robert Jackson opposed the interpretation, stating it would introduce costs and additional pressure into the already compressed proxy season and could potentially undermine the independence of voting recommendations.

The SEC followed up the interpretation with [new rule amendments and supplemental guidance](#) adopted in July 2020 by a 3-to-1 vote. Rule 14a-1(l) was amended to codify the view that proxy voting advice generally constitutes a solicitation. Rules 14a-2(b)(1) and (b)(3), which provide exemptions from the information and filing requirements of the proxy rules, were amended to require more conflicts of interest disclosure. Rule 14a-9 was amended to include examples of when the failure to disclose certain material information in proxy voting advice could be considered misleading.

According to Commissioner Elad Roisman, who had been tasked by then-Chairman Jay Clayton with leading the SEC's proxy reform efforts, the new rules ensure that registrants and proxy advisers' clients will have access to proxy advice at the same time, and clients will have access to registrants' responses to such proxy advice before they vote. He also stated that the rules provide consistent standards for conflict of interest disclosure.

But the new rules met with strong opposition. The proxy advisory firm ISS sued the SEC, stating that the regulations are unduly burdensome, and was supported with an [amicus brief](#) by CII. Further, the SEC's own Investor Advisory Committee (IAC), in a [recommendation](#) on January 16, 2020, stated that the proxy system is in need of basic reform overall and there are higher priority issues such as counting votes correctly. The committee recommended that the Commission revisit priorities, revise and republish the rule proposals for balance and compliance with SEC guidance, and reconsider the guidance.

A fresh look and enforcement pause. On June 1, the Division of Corporation Finance [announced](#) that the staff, at the direction of Chair Gary Gensler, is considering revisiting its 2019 interpretive guidance and 2020 rule amendments on proxy advisory firms. Further, the Division will not recommend enforcement action to the Commission based on either the interpretive guidance or the rule amendments during this period. The Division noted that proxy advisory firms subject to the rules are not required to comply with the new conditions under Rule 14a-2(b)(9) until December 1, 2021, but in the event these conditions remain in place by that date, the staff

will not recommend any enforcement action based on those conditions for a reasonable period of time after any resumption of the ISS lawsuit.

The CorpFin announcement was accompanied by a brief [statement](#) by Gensler that he has directed staff to consider whether to recommend that the Commission revisit its 2020 codification of the definition of solicitation as encompassing proxy voting advice, the 2019 Interpretation and Guidance regarding that definition, and the conditions on exemptions from the information and filing requirements in the 2020 Rule Amendments, among other matters.

Investor groups welcome reexamination. The decision was greeted warmly by ISS, which stated that the rulemaking was ill-conceived and ISS looks forward to [participating](#) in the upcoming rulemaking process.

Amy Borrus of CII [called](#) the decision "Christmas in June" and said CII looks forward to working with Chair Gensler and the staff to improve the proxy advice rule and related interpretation and guidance. Similarly, Dennis Kelleher of Better Markets [applauded](#) the decision, saying "This is a loud and clear signal that the SEC is going to prioritize shareholder and investor rights once again, not enact management's agenda to handcuff and gag investors as Trump's SEC wrongfully attempted."

Roisman and Peirce are skeptical. Commissioners Roisman and Peirce issued a [joint statement](#) criticizing the decision, saying that while they are open to considering recommendations, they find it difficult to imagine what has changed in the roughly 10 months since the Commission last considered this issue that would call into question such recently adopted requirements. Given that the compliance date is still months away, they question how the Commission will evaluate the appropriateness of further changes without considering such new data or experience.

ISS lawsuit held in abeyance. The same day the reexamination was announced, the SEC filed an unopposed motion to [hold the ISS lawsuit in abeyance](#), pending new regulatory action that may substantially narrow or eliminate issues raised in cross-motions for summary judgment set for oral argument on June 7, 2021. The National Association of Manufacturers, which has [sought to intervene](#) in the action, did not oppose the motion, but [stated](#) that it expects the December 1, 2021 compliance date to remain in effect unless further notice-and-comment rulemaking is undertaken.

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