Statement

Statement on Final Rule Amendments on Proxy Voting Advice

Commissioner Mark T. Uyeda

July 13, 2022

Thank you, Chair Gensler. Today, we are considering an amendment to the rules governing the practices of businesses providing proxy voting advice.

I want to acknowledge the efforts of the staff in the Divisions of Corporation Finance, Investment Management, and Economic and Risk Analysis and the Office of the General Counsel. I appreciate the briefings and assistance during the past two weeks to ensure that my office had the resources and materials required to evaluate the rule and its corresponding impacts in a short amount of time.

However, I remain perplexed as to why the Commission is taking this action and what changed during the roughly ten months between the adoption of the 2020 amendments to the proxy rules[1] and the subsequent announcement that the SEC would be revisiting these rules.[2] I have concerns that this regulatory seesaw does not reflect administrative "best practices" that promote long term reliance and confidence by market participants in the stability of important areas of securities regulation.

For this and other reasons, I am unable to support today's recommendation.

Proxy Voting Advice is Largely Driven by Compliance Needs

Before discussing my substantive and procedural concerns with this rule, it is worth considering why the business of proxy voting advice came about. Its origins lie in concerns among asset managers, starting in the 1980s, that they had a fiduciary obligation to vote every proxy.

Part of this belief can be traced to guidance from a mid-level Department of Labor official in a 1988 letter about proxy voting rights being a "plan asset" to which fiduciary duties attached under the Employee Retirement Income Security Act.[3] This guidance was not subject to notice or public comment. Similar views with respect to proxy voting were subsequently expressed for fiduciary duties under the Investment Advisers Act.[4]

While the Commission has never taken the position that a fiduciary must vote every proxy – indeed, it has repeatedly stated that there may be times when an investment adviser may refrain from voting a proxy if it determines that refraining is in the best interest of the client[5] – there remains a sense within the asset management industry that the safest course is simply to vote all proxies.

In this respect, proxy voting by asset managers has been largely transformed into a compliance process – not only for the proxy vote itself but also the mechanics of submitting the vote and the compilation and reporting of proxy votes, such as on Form N-PX. As noted in the release, proxy voting advice businesses are often retained not only to provide vote recommendations, but also to assist with "other aspects of the voting process, which for certain investment advisers has become increasingly complex and demanding over time."[6]

Asset managers – recognizing proxy voting as a compliance risk – have sought to address these obligations by hiring proxy voting advice businesses[7] to conduct the analysis and provide voting recommendations. Some asset managers have functionally outsourced these responsibilities, as reviewing potentially hundreds or more proxy statements during a compressed timeframe known as "proxy season" is costly and impracticable. Proxy voting advice businesses are designed to provide a solution to this problem at a lower cost.

Because of the seasonal nature of the business, I have concerns about the quality of proxy voting recommendations as they pertain to small- and mid-size issuers that are outside the Standard & Poor's 500 Index. While on the Senate Banking Committee staff, I was part of conversations with these companies in which they complained that proxy voting advisory firms often make recommendations based off a checklist implemented by relatively inexperienced workers who do not fully understand complex corporate matters subject to proxy votes, and who cannot adequately focus on the circumstances of a specific company because "there are so many of them and so little time."

The Deletion of Note (e) in Rule 14a-9 Creates Unnecessary Confusion

This brings me to my first substantive concern about the rule. The SEC rulebook should say what the Commission means. The amendments would delete Note (e) in Rule 14a-9. Note (e) explains that, depending upon the particular facts and circumstances, the failure to disclose material information regarding proxy voting advice, such as the proxy voting advice business' methodology, sources of information, or conflicts of interest, may be misleading.

However, the deletion of Note (e) fails to provide regulatory clarity. To the contrary, the language from former Note (e) is now included in the preamble of the adopting release.

What is the purpose of deleting Note (e) and what is the Commission attempting to convey by placing it in the preamble? I can think of at least four possible answers:

- Answer 1: Note (e) applies – in which case the language should remain in the rule text where it currently is.
- Answer 2: Note (e) does not apply – in which case the language should be removed completely.
- Answer 3: Note (e) does not apply, but to avoid suggesting that potentially false and misleading statements are permissible, a largely unenforceable explanation in the preamble will state that nothing has changed.
- Answer 4: None of the above.

It is unclear to me which answer is the correct one. Promoting a transparent and straightforward regulatory standard is particularly important given the complexities surrounding the subject matter. Key standards underpinning an area of regulation should be, to the extent practical, placed in the rule text. Accordingly, if the framework and substance of Note (e) is affirmed by the Commission, it should be placed in the plain text of the rule, rather than in the accompanying preamble.

The Comment Period was Needlessly Compressed

Procedurally, the 30-day comment period for the proposal was insufficient under the circumstances. The proposal sought to re-visit complex questions that had been thoughtfully addressed by the Commission during an extensive rulemaking process during which the public had three months to submit comments.

The 30-day comment period also stands in contrast to executive orders issued by the administrations of President Clinton, President Obama, and President Biden, all of which recognized the importance of a 60-day comment period.[8] A 60-day comment period is also endorsed by the Administrative Conference of the United States for significant regulatory actions.[9]

The Commission proposed these amendments on November 18, 2021 and comments were due by December 27 of that year.[10] This period overlapped with major holidays, including Thanksgiving, Christmas, Hanukkah, and the beginning of Kwanzaa. More importantly, the comment deadline fell during the first holiday season since the rollout of COVID vaccines, which allowed families to gather in person safely for the first time in nearly two years.

Moreover, the 2020 amendments were intended to benefit public companies. The SEC's December 27th deadline, however, came at a time when many public companies with calendar year-end fiscal years were in the midst of preparing and auditing their financial statements. It was not an opportune time to be evaluating the proposal and drafting comment letters to the Commission.

The short comment period likely deterred some interested persons from submitting comment letters. It may have also resulted in the Commission only seeing a narrower picture of the public concerns and failing to capture relevant data and perspectives.

Voluntary Standards and Market-Based Incentives Can Be Effective

Notwithstanding these concerns, there are portions of today's release that I find agreement with. Specifically, the release acknowledges that "[t]he potential cost associated with the amendments may be mitigated, however, by the practices and standards that [proxy voting advice businesses] have voluntarily adopted to help improve the basis of their proxy voting advice."[11] The release continues by stating that "[m]oreover, because PVABs voluntarily adopted these practices, we believe that they are less likely to adversely affect the independence, cost, and timeliness of proxy voting advice than any additional measures" required by the prior SEC rules that are being rescinded.[12] Finally, the release notes that "we agree with the commenters that asserted that PVABs have market-based incentives to maintain these practices."[13]

These reasons are being used to justify the removal of conditions designed to protect investors and maintain market integrity in proxy voting. Given that the Commission believes and emphasizes that these voluntary measures and market-based incentives are effective and sufficient, I hope that moving forward the Commission will apply this reasoning and consider similar alternatives in lieu of prescriptive public company disclosure requirements.

Thank you and I have no questions.

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[1] Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-89372 (July 22, 2020) [85 FR 55082 (Sept. 3, 2020)], available at https://www.federalregister.gov/documents/2020/09/03/2020-16337/exemptions-from-the-proxy-rules-for-proxy-voting-advice.

[2] Chair Gary Gensler, *Statement on the Application of the Proxy Rules to Proxy Voting Advice* (June 1, 2021), available at https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01.

[3] Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc., 1988 WL 897696 (Feb. 23, 1988).

[4] *See generally* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA-5325 (Aug. 21, 2019) [84 FR 47420 (Sept. 10, 2019)] ("Interpretive Release"), available at https://www.federalregister.gov/documents/2019/09/10/2019-18342/commission-guidance-regarding-proxy-voting-responsibilities-of-investment-advisers.

[5] *Id.* at 47426 (Question 6).

[6] Proxy Voting Advice, Release No. 34-95266 (July 13, 2022), at 7 n. 6 (2022 Final Rule).

[7] Referred to in the 2022 Final Rule as proxy advisory firms, or proxy voting advice businesses ("PVABs"). *See* 2022 Final Rule, at 5.

[8] Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011) [76 Fed. Reg. 3821 (Jan. 21, 2011)]; see also Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993) [58 Fed. Reg. 51735 (Oct. 4, 1993)] ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days"); Memorandum for the Heads of Executive Departments and Agencies, Modernizing Regulatory Review (Jan.

20, 2021) [86 Fed. Reg. 7223 (Jan. 26, 2021)] ("This memorandum reaffirms the basic principles set forth in [Executive Order 12866] and in Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), which took important steps towards modernizing the regulatory review process. When carried out properly, that process can help to advance regulatory policies that improve the lives of the American people.").

[9] See Administrative Conference of the United States, Rulemaking Comments, Recommendation No. 2011-2 (June

16, 2011), available at https://www.acus.gov/recommendation/rulemaking-comments.

[10] See Proxy Voting Advice, Release No. 34-93595 (Nov. 17, 2021) [86 FR 67383 (Nov. 26, 2021)] ("2021 Proposing Release").

[11] 2022 Final Rule, at 77.

[12] *Id*. at 78.

[13] *Id*.