

## Statement

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# Statement on Proposed Amendments Related to Proxy Voting Advice



**Commissioner Allison Herren Lee**

**Nov. 17, 2021**

Proxy advisors play a unique and important role in helping shareholders vote to protect their investments and ensure their interests are being served. It is therefore important that our rules do not interfere with the independence of proxy voting advice, introduce unnecessary cost and complexity into an already compressed proxy voting process, or otherwise burden the free and full exercise of shareholder voting rights. For this reason, I'm pleased that we are revisiting certain aspects of the amendments governing proxy voting advice adopted last year so that our rules are appropriately tailored to the needs of investors and other market participants.

Today's proposal represents a targeted reappraisal of only certain aspects of those amendments that generated substantial concern, particularly among investors (the intended beneficiaries of the changes), that we didn't get the balance right in last year's final rules. Specifically, last year's amendments included mechanisms to enhance management's influence over proxy voting advice by effectively requiring that issuers be given access to and an opportunity to respond to such advice, and that proxy advisors separately notify their clients of those responses despite the fact that they are publicly filed.<sup>[1]</sup> Last year's rules also amended a note to the proxy-related anti-fraud provisions to add examples of material misstatements or omissions related to proxy voting advice, creating uncertainty regarding the scope of liability for such advice.<sup>[2]</sup> These features of last year's rules prompted considerable concern.<sup>[3]</sup> Today's proposal responds to those concerns by proposing to eliminate the issuer access and response provisions, and clarify the scope of fraud liability for proxy advisors.

Although we issued rules in this space last year, that does not mean that we got the balance right. Nor, as I observed at the time, does it mean that the Commission met its obligation to establish that there was any need for those features of the rulemaking to begin with.<sup>[4]</sup> In fact, it was quite clear then and now that the so-called "error rate" with respect to proxy voting advice is vanishing to none.<sup>[5]</sup>

In addition, the fact that the Commission made fairly substantial modifications to the amendments from proposal to adoption meant that commenters did not have an opportunity to weigh in on certain features of the rules in their final form until *after* adoption. But now they have. And investors in particular have explained that certain features of the final rules still include the same infirmities they had identified in the proposal, namely increased risk of impaired independence and significant new costs and delays.

It is appropriate for the Commission to consider and respond to that feedback. It is also entirely in keeping with Commission precedent to review recent rules (sometimes even before their compliance date) in response to feedback from market participants.<sup>[6]</sup> Thus, today's proposal takes another look at certain aspects of last year's amendments, while leaving in place others – such as provisions that increase needed transparency

around conflicts of interest – so that our rules may better facilitate the provision of timely and independent proxy voting advice.

I'm pleased to support the proposal, and I want to thank the staff for their hard work and the thoughtfulness of their approach. I look forward to reviewing comments on how we can better calibrate our rules to facilitate robust and informed shareholder voting.

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[1] Last year's amendments added a new condition to the availability of an exemption from the information and filing requirements of the proxy rules for proxy voting advice. Specifically, the new condition required that proxy advisors adopt and publicly disclose policies and procedures reasonably designed to ensure that (1) registrants that are the subject of proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy advisor's clients; and (2) proxy advisors provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice. In addition, the amendments set forth safe harbors for satisfying this new condition, including requirements that the proxy advisor make its advice available to registrants at no charge and that the proxy advisor provide a hyperlink to any registrant response. See [Exemption from Proxy Rules for Proxy Voting Advice](#), Final Rule, Release No. 34-89372 (July 22, 2020).

[2] See Proxy Voting Advice, Proposed Rule, Release No. [], 22 (Nov 17, 2021) ("PVABs [proxy advisors], their clients and other investors continue to express concerns and uncertainty regarding the extent of PVABs' liability under Rule 14a-9.") [hereinafter Proposing Release].

[3] Proposing Release at 12-13 ("Notwithstanding our efforts to adopt somewhat more limited and principles-based requirements in the 2020 Final Rules, investors have asserted that the Rule 14a-2(b)(9)(ii) conditions nevertheless will impose increased compliance costs on PVABs and impair the independence and timeliness of their proxy voting advice and that such effects are not justified or balanced by corresponding investor protection benefits.").

[4] See Allison Herren Lee, [Paying More For Less: Higher Costs for Shareholders, Less Accountability for Management](#) (July 22, 2020) ("It's true that the final rules have been adjusted from the proposal in response to public outcry. While I appreciate the thought and effort by my colleagues that went into some of the changes, making the final rules less objectionable than the proposal does not relieve the Commission of its fundamental obligation to identify the need for this rulemaking and to explain how the rules we are adopting will meet this need.").

[5] See *id.* ("The final rules will still add significant complexity and cost into a system that just isn't broken, as we still have not produced any objective evidence of a problem with proxy advisory firms' voting recommendations. No lawsuits, no enforcement cases, no exam findings, and no objective evidence of material error—in nature or number. Nothing."); see also [Recommendation of the SEC Investor Advisory Committee \(IAC\) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals](#) (Jan. 24, 2020) ("From over 17,000 shareholder votes over three years, the number of possible factual errors identified by companies themselves in their proxy supplements amounts to **0.3%** of proxy statements – and **none** of those is shown to be material or to have affected the outcome of the related vote.").

[6] See, e.g., [Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements](#), Proposed Rule, Release No. 34-85823 (May 10, 2019) (proposing to amend recently adopted provisions relating to the cross border application of certain security based swap requirements prior to their compliance date in response to "market participants and other commenters [who] have raised concerns regarding possible disruptive effects of the above requirements, suggesting that the requirements would create significant operational burdens and impose unwarranted costs"); [Investment Company Liquidity Disclosure](#), Proposed Rule, Release No. IC-33046 (Mar. 14, 2018) (proposing to amend recently adopted provisions governing fund liquidity disclosure prior to their compliance date, noting that "we have received letters raising concerns that the public disclosure of a fund's aggregate liquidity classification

information on Form N-PORT may not achieve our intended purpose and may confuse and mislead investors” and that “these letters have caused us to question whether the current approach of disclosing aggregate liquidity fund profiles through Form N-PORT is the most accessible or useful way to facilitate public understanding of fund liquidity”).