

## Statement

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# Dissenting Statement on Proxy Voting Advice Proposal



**Commissioner Hester M. Peirce**

**Nov. 17, 2021**

I cannot support today's proposal. The Commission lacks a sound basis for seeking to amend a brand new rule. Nothing has changed since we adopted the rule, and we have not learned anything new. The release takes a stab at justifying the rewrite, but we might as well simply acknowledge that the political winds have shifted.

In July 2020, after a lengthy and thorough rulemaking process, the Commission adopted final rules regarding proxy voting advice.<sup>[1]</sup> Shortly thereafter, the largest U.S. proxy voting advice business ("PVAB") initiated litigation challenging the 2020 Final Rules. Fast forward to June 2021, and Chair Gensler directed the staff to reconsider the rules.<sup>[2]</sup> So here we are today.

The first proposed amendment goes to the heart of the rule. It would eliminate conditions designed to facilitate effective engagement between PVABs and companies and to ensure that PVAB clients have more transparent, accurate, and complete information to consider when making voting decisions. The release cites two justifications for running away from these common-sense reforms. First, it points to continued opposition to the 2020 Rules by PVABs and their clients. The Commission considered concerns raised by all commenters during the rulemaking process and modified the 2020 Final Rules in response to these concerns. The release fails to identify any new concerns. Perhaps we will hear them during the comment period. Second, the release points to the "PVABs' efforts to develop industry-wide practices, as well as improve their own business practices." The Commission, however, was well aware of these efforts during its last rulemaking process. The only new piece of information for the Commission to consider is that one major PVAB is engaging less with issuers.<sup>[3]</sup> That bit of news should only underscore the justification for the 2020 Final Rules.

The second proposed amendment to remove note (e) to Rule 14a-9 is also a head-scratcher. The release notes that PVABs and their clients continue to worry that mere differences of opinion regarding proxy voting advice will form the basis for liability. Never mind the Commission's explicit rejection of liability on these grounds in the 2020 Final Rules.<sup>[4]</sup> The perplexing "fix" to the non-problem is to delete note (e) from Rule 14a-9, while reaffirming in the release the substance of the note as guidance. If the Commission still believes that note (e) is true, then why does deleting the note from the rule and repeating it in the release make sense?

I appreciate the staff's efforts to make this a coherent proposal. You did the best you could since nothing has changed and we have not received any new information to warrant a new rulemaking. I simply cannot pretend that this is a normal course of action for the Commission. A more reasonable approach would be to commit to a retrospective review of the 2020 Final Rules after three or five years to evaluate their effectiveness.

[1] See Exemptions from the Proxy Rules for Proxy Voting Advice, Rel. No. 34-89372 (July 22, 2020), <https://www.sec.gov/rules/final/2020/34-89372.pdf>.

[2] Commissioner Roisman and I expressed concerns with the June 2021 actions by Chair Gensler and the SEC staff. See Response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice (June 1, 2021), <https://www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121>.

[3] See today's Proxy Voting Advice Proposing Release at note 48 and accompanying text.

[4] See note 1 at page 132.