

# SEC Adopts Final Rules on Proxy Voting Advice

July 28, 2020

On July 22, 2020, the SEC adopted final amendments to its rules governing proxy voting advice.<sup>1</sup> Key aspects of the final amendments take a more “principles-based” approach than the proposed rules. In connection with the release of the new rules, the SEC noted that “the amendments aim to facilitate the ability of those who use proxy voting advice — investors and others who vote on investors’ behalf — to make informed voting decisions without imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice.” Highlighted below are the key takeaways from the final rule amendments, as well as the primary differences as compared with the rules as proposed on November 5, 2019.<sup>2</sup>

## SOLICITATION AND MATERIALLY MISLEADING STATEMENTS

### Takeaways

The final rule amends Rule 14a-1(1) under the Securities Exchange Act of 1934 (the “Exchange Act”) to codify the SEC’s longstanding view that proxy voting advice generally constitutes a “solicitation” under the federal proxy rules. The final amendment to Rule 14a-1(1) also adds an exception to the revised definition of solicitation, such that proxy voting advice provided only in response to an unprompted request is not considered a solicitation.

The final rule also amends Rule 14a-9 to provide additional specific examples of disclosure omissions in proxy voting advice that could be deemed misleading within the meaning of Rule 14a-9 of the Exchange Act.

### Final versus Proposed Rule

As compared to the proposed amendments, the SEC has, among other things, clarified that proxy voting advice based on the application of custom policies is considered a solicitation under the amended rule. With respect to guidance on materially misleading

---

<sup>1</sup> Final Rule available [here](#); SEC Release available [here](#).

<sup>2</sup> Prior Client Alert on proposed amendments available [here](#).

---

statements, there were no significant changes from those outlined in the proposed amendment.

## NEW EXEMPTION REQUIREMENTS

### Takeaways

The final amendments to Rules 14a-2(b)(1) and 14a-2(b)(3) under the Exchange Act allow a proxy advisory firm to rely on exemptions from certain information and filing requirements only upon the satisfaction of the following disclosure and procedural requirements set forth in new Rule 14a-2(b)(9).

- *Conflicts of Interest Disclosure.* Proxy advisory firms must include in their voting advice (or in any electronic medium used to deliver the advice) prominent disclosure of: (i) any information regarding an interest, transaction or relationship of the proxy voting advice business (or its affiliates) that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction or relationship and (ii) any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction or relationship.
- *Notice of Proxy Voting Advice and Response Policies and Procedures.* Proxy advisory firms must have adopted and publicly disclosed written policies and procedures reasonably designed to ensure that (i) 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 advisory firm's client and (ii) the proxy advisory firm provides its 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 who are the subject of such advice, in a timely manner before the shareholder meeting. Subsequent revisions to a proxy advisory firm's advice with respect to the same meeting, consent or authorization are not subject to the requirement in (i).
- *Safe Harbors.* The final amendments also provide two new non-exclusive safe harbors for proxy advisory firms to satisfy the conditions to the exemptions. A proxy advisory firm will be deemed to satisfy the written policies and procedures requirement outlined above if the proxy advisory firm's written policies and procedures are reasonably designed to provide (i) registrants with its voting advice, at no charge, no later than the time it is disseminated to the proxy advisory firm's clients (such policies and procedures may include conditions requiring registrants to (a) file their proxy statement at least 40 calendar days before the meeting or vote

---

described therein and (b) expressly acknowledge that they will only use the proxy advice for internal purposes and not share it except with the registrant's employees or advisers) and (ii) timely<sup>3</sup> notice to its clients through electronic means that the registrant has filed, or has informed the proxy advisory firm that it intends to file, additional solicitation materials setting forth the registrant's statement regarding the voting advice (and include an active hyperlink to those materials on EDGAR when available).

- *Exclusions.* Proxy voting advice businesses need not comply with conflict disclosure or the written policies and procedures requirements outlined above (i) to the extent that their proxy voting advice is based on custom voting policies that are proprietary to a proxy advisory firm's client or (ii) when they provide proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.

#### **Final versus Proposed Rule**

The final rule amendments eliminate the more prescriptive conflict disclosure and prior notice and response process requirements as originally proposed in favor of simplified and "principles-based" conflicts of interest disclosure and written policies and procedures requirements. Further, the inclusion of the safe harbor concepts outlined above was a further deviation from the approach set forth in the proposed amendments.

#### **EFFECTIVE DATES**

The amendments will be effective 60 days after publication in the Federal Register, with the exception of the new procedures outlined in Rule 14a-2(b)(9), which proxy advisory firms have until December 1, 2021 to implement.

The SEC also supplemented its prior guidance with respect to the proxy voting responsibilities of investment advisers in light of the new amendments<sup>4</sup>, discussion of which will be reflected in a separate client update.

\* \* \*

Please do not hesitate to contact us with any questions.

---

<sup>3</sup> I.e., before the shareholder meeting (or if no meeting, before the vote, consent or authorization may be used to effect the proposed action).

<sup>4</sup> Available [here](#).



**Matthew E. Kaplan**  
Partner, New York  
+1 212 909 7334  
mekaplan@debevoise.com



**Paul M. Rodel**  
Partner, New York  
+1 212 909 6478  
pmrodel@debevoise.com



**Joshua M. Samit**  
Counsel, New York  
+1 212 909 6414  
jmsamit@debevoise.com



**Priya Soni**  
Associate, New York  
+1 212 909 6681  
pbsoni@debevoise.com