SEC Provides New Guidance on Proxy Voting Advice

August 28, 2019

On August 21, 2019, the Securities and Exchange Commission (the "SEC") issued an interpretation and related guidance regarding the applicability of the federal proxy rules to proxy voting advice. Highlighted below are the key takeaways, with the full text of the SEC's interpretation and guidance available here. The SEC also provided guidance to investment advisers on how to fulfill their proxy voting responsibilities, which is summarized in the Debevoise In Depth article available here.

Under the new interpretation and guidance on proxy voting advice, the SEC confirmed that proxy voting advice provided by proxy advisory firms generally constitutes a "solicitation" subject to the proxy rules under the Securities Exchange Act of 1934 (the "Exchange Act"). The SEC has defined "solicitation" broadly in Rule 14a-1(a) under the Exchange Act to include, among other things, a "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy," as well communications seeking to influence the voting of proxies by shareholders, regardless of whether the person itself is seeking authorization to act as a proxy.

Proxy advisory firms may continue to rely, however, on the exemptions from the filing requirements of the federal proxy rules set forth in Rules 14a-2(b)(1) and (3) under the Exchange Act. Rule 14a-2(b)(1) provides an exemption from most provisions of the federal proxy rules for "any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as a proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization." In addition, Rule 14a-2(b)(3) under the Exchange Act exempts the furnishing of proxy voting advice by any person to another person with whom a business relationship exists, subject to certain conditions.

The SEC further clarified that proxy voting advice is subject to Rule 14a-9—the antifraud rule under the federal proxy rules—regardless of whether such advice is exempt from the filing requirements. Accordingly, proxy voting advice must not include materially false or misleading statements or omit material facts required to make the

advice not misleading. To avoid potential liability under Rule 14a-9, the guidance explains that persons providing proxy voting advice should consider disclosing the facts, assumptions and limitations that underlie their advice, as well as the following types of information:

- an explanation of the methodology underlying the voting advice, including material deviations from the proxy advisory firm's publicly announced guidelines or standard methodologies, if omitting such an explanation would make the voting advice materially false or misleading;

- to the extent the proxy voting advice is based on third-party sources or is otherwise not solely based on the issuer's public disclosures, disclosure about these sources and the extent to which the information differs from the issuer's public disclosures, if the differences are material and failure to disclose would make the voting advice false or misleading; and

- disclosure about material conflicts of interest associated with providing the proxy voting advice sufficient to enable an assessment of the conflicts.

By reiterating that proxy voting advice is subject to Rule 14a-9, the SEC has clarified the framework for those seeking to challenge the voting recommendations of a proxy advisory firm. In addition, unlike Rule 10b-5 under the Exchange Act, liability under Rule 14a-9 does not require proof of scienter under current case law; making Rule 14a-9 a potentially interesting tool for bringing these challenges.

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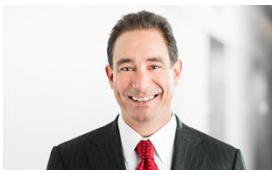

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