

SEC Rescinds Certain Rules and Guidance for Proxy Advisory Firms Adopted in 2020

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PRACTICES Corporate, Capital Markets and Securities

On September 19, 2022, the final rules¹ adopted this summer by the U.S. Securities and Exchange Commission (“SEC”) that rescind certain portions of its 2020 rules and guidance for proxy advisory firms will become effective.² The SEC noted that the rescission of these rules and guidance was the result of concerns expressed by institutional investors and other proxy advisory firm clients regarding their ability to receive independent proxy voting advice in a timely manner. After evaluating these concerns, in November 2021, the SEC proposed amendments rescinding portions of the previously adopted rules and guidance.³ The Final Rules adopt the Proposed Rules as proposed.

Summary of Rescissions

The Final Rules delete the following:

- Note (e) to Rule 14a-9, which gave examples of the type of information that may be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice, including the proxy advisory firm’s methodology, sources of information and conflicts of interest. Note (e) was rescinded because the SEC concluded it added confusion rather than reduced it by “creating uncertainty regarding the application of Rule 14a-9 to proxy voting advice.”
- Rule 14a-2(b)(9)(ii), which included the conditions and related safe harbors and exclusions that proxy advisory firms would be required to meet to rely on exemptions from the proxy rules’ information and filing requirements. Pursuant to the 2020 Rules, a proxy advisory firm was required to make its advice available to the registrants that were the subjects of such advice simultaneously with or in advance of the dissemination of the advice to the proxy advisory firm’s clients. In addition, a proxy advisory firm was required to provide its clients with a mechanism to notify them of written statements about proxy voting advice by registrants that are the subject of such advice in a timely manner. The SEC is no longer persuaded that the potential benefits of these conditions outweigh the potential detriments to the cost, timeliness and independence of the proxy voting advice. It noted that, following the adoption of the 2020 Rules, proxy advisory firms had made an effort to develop best practices for the industry that could address the same concerns that the conditions were meant to address. In connection with the rescission of Rule 14a-2(b)(9)(ii), the SEC also rescinded Rule 14a-2(b)(9)(iii)–(vi). These subsections contain safe harbors and exclusions from the conditions in Rule 14a-2(b)(9)(ii). As the conditions in Rule 14a-2(b)(9)(ii) will be rescinded, the related safe harbors and exemptions are no longer needed.
- Supplemental Guidance in the 2020 Rules, which was prepared, in part, to accompany the Rule 14a-2(b)(9)(ii) conditions. The 2020 Guidance was meant to assist investment

advisers in their assessment of registrant responses to proxy voting advice, as such responses were expected to become more readily available as a result of the Rule 14a-2(b)(9)(ii) conditions. Additionally, the 2020 Guidance addressed issues related to the use of an electronic vote management system. As the Rule 14a-2(b)(9)(ii) conditions have been rescinded, the SEC decided to also rescind the corresponding 2020 Guidance.

Summary of 2020 Rules that Remain Intact

The following portions of the 2020 Rules will remain:

- Conflict of Interest Disclosure under Rule 14a-2(b)(9), which is required to meet the exemptions set forth in Rules 14a-2(b)(1) and (3) that proxy advisory firms often rely on to avoid the information and filing requirements of the proxy rules. In the adopting release for the 2020 Rules, the SEC provided examples of where the business interests of a proxy advisory firm could diverge from the interests of its clients. For example, providing proxy voting advice on a proposal in which the proxy advisory firm has an interest or providing ratings to institutional investors regarding a registrant's corporate governance practices while also providing consulting services to the registrant.
- The definition of "solicitation" in Rule 14a-1(l)(1), which provides that proxy voting advice is generally a solicitation subject to the proxy rules, including liability under Rule 14a-9 for material misstatements or omissions of fact."

Combined Rule Amendments

The 2020 Rules, as amended by the Final Rules, are set forth below.

Definition of Solicitation

Rule 14a-1(l)(1). "The terms 'solicit' and 'solicitation' include: ... (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy, including: (A) Any proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee."

Rule 14a-1(l)(2). "The terms do not apply, however, to: ... (v) The furnishing of any proxy voting advice by a person who furnishes such advice only in response to an unprompted request."

Conflicts of Interest Disclosure

Rule 14a-2(b)(9). "(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."

For further information, please contact a member of the Haynes Boone [Capital Markets and Securities Practice Group](#).

¹Release No. 34-95266, Proxy Voting Advice (Jul. 13, 2022), available [here](#) (the “Final Rules”).

²In the adopting release, the SEC refers to firms that advise investment advisers and institutional investors on their voting determinations, and any person who markets and sells such advice, as “proxy voting advice businesses” or “PVABs.” We will refer to such entities as “proxy advisory firms.”

³Release No. 34-93595, Proxy Voting Advice (Nov. 17, 2021), available [here](#) (the “Proposed Rules”).