SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Release No. 34–86721]

Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Guidance and interpretation.

SUMMARY: The Securities and Exchange Commission (the “SEC” or the “Commission”) is providing an interpretation and related guidance regarding the applicability of certain rules, which the Commission has promulgated under Section 14 of the Securities Exchange Act of 1934 (the “Exchange Act” and such rules the “federal proxy rules”), to proxy voting advice.


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I. Introduction

As the use of proxy advisory firms by investment advisers and other institutional investors has become more widespread and the services offered by proxy advisory firms have broadened, we and our staff have examined how proxy voting advice provided by proxy advisory firms may be solicitations under the federal proxy rules.2 In addition, we and our staff have engaged with the public through various forums and statements on a variety of issues related to the proxy voting process, including those discussed below. For example, in 2010, the Commission issued a concept release that sought public comment about, among other things, the role and legal status of proxy advisory firms within the U.S. proxy system.3 In 2013, the staff held a roundtable on the use of proxy advisory firm services by institutional investors and investment advisers.4 In 2014, the staff of the Divisions of Investment Management and Corporation Finance issued a Staff Legal Bulletin (“SLB 20”) to provide guidance about the availability and requirements of two exemptions to the federal proxy rules that are often relied upon by proxy advisory firms.5 Most recently, the staff hosted a roundtable on the proxy process in November 2018 (the “2018 Roundtable”) that included a panel on the role of proxy advisory firms and their use by investment advisers.6 In connection with the 2018 Roundtable, the public was invited to provide input on questions that arise regarding the use of proxy advisory firms and their activities.7 We have carefully considered the feedback received on these topics, and with the benefit of this extensive body of information, historical experience, and engagement, the Commission is today providing an interpretation and related guidance regarding the applicability of the federal proxy rules to proxy voting advice provided by proxy advisory firms. Specifically, in Section II below, we provide an interpretation and related guidance on whether proxy voting advice constitutes a “solicitation” under the federal proxy rules, and the application of Rule 14a–9 under the Exchange Act to proxy voting advice. The interpretation and related guidance discussed below are part of the Commission’s review of the overall proxy process. As part of this effort, the staff is also considering recommending that the Commission propose rule amendments to address proxy advisory firms’ reliance on the proxy solicitation exemptions in Exchange Act Rule 14a–2(b).#

1 Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to Title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which these rules are published.

2 The Commission today is also publishing amendments to address proxy advisory firms’ reliance on the proxy solicitation exemptions in Exchange Act Rule 14a–2(b).#

3 See SEC Staff Legal Bulletin No. 20, Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms [June 30, 2014]. SLB 20 represents the views of the staff of the Divisions of Investment Management and Corporation Finance. It is not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved its content. SLB 20, like all staff guidance, has no legal force or effect: it does not alter or amend its content. SLB 20, like all staff guidance, has no legal force or effect: it does not alter or amend its content. SLB 20, like all staff guidance, has no legal force or effect: it does not alter or amend its content. SLB 20, like all staff guidance, has no legal force or effect: it does not alter or amend its content.


8 17 CFR 240.14a–2(b).
II. Interpretation and Guidance Regarding Applicability of Certain Federal Proxy Rules to Proxy Voting Advice

Question 1: Does proxy voting advice provided by a proxy advisory firm constitute a solicitation under the federal proxy rules? 
Response: Generally, yes. Exchange Act Section 14(a) requires any solicitation to include the text "unlawful for any person . . . in contravention of any proxy or consent or authorization in respect of any security . . . registered pursuant to section [12] of the Act." Thus, the rules governing such solicitations as necessary or appropriate in the public interest or for the protection of investors. The Commission has defined the term "solicitation" in Rule 14a–1(1) under the Exchange Act. The Commission’s definition is broad and includes, among other things, a “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.”

Consistent with the Commission’s broad definition of solicitation and the case law construing that term, the Commission has previously stated that the federal proxy rules apply to any person seeking to influence the voting of proxies by shareholders, regardless of whether the person itself is seeking authorization to act as a solicitor. As a result, a person may be engaged in a solicitation in cases where that person is not seeking the procurement, withholding, or revocation of a proxy for itself. In addition, the Commission has indicated that this analysis applies even where the person seeking to influence the vote may be indifferent to its ultimate outcome. Consistent with these statements, the Commission has observed that the breadth of the definition of “solicitation” may result in proxy advisory firms being subject to the proxy rules because they provide recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy.

In expressing this view, the Commission stated that, as a general matter, the furnishing of proxy voting advice constitutes a “solicitation” within the meaning of Exchange Act Rule 14a–1. Whether a particular communication is a solicitation often turns on “the purpose for which the communication was published”—i.e., whether the purpose was to influence the shareholders’ decision, as evidenced by the substance of the communication and the circumstances under which it was transmitted. With respect to the substance of the communications, the proxy voting advice provided by proxy advisory firms to their clients generally describes the specific proposals that will be presented at the registrant’s upcoming meeting and presents a “vote recommendation” for each proposal that indicates how the client should vote.

The proxy rules apply not only to direct requests to furnish, revoke or withhold proxies, but also to communications which may indirectly accomplish such a result or constitute a step in a chain of communications designed ultimately to accomplish such a result.”

15 U.S.C. 78n(a). Section 14(a) makes it unlawful for any person . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the solicitation of any proxy or consent or authorization in respect of any security . . . registered pursuant to section [12] of the Act.

17 C.F.R. 240.14a–1(iii).

18 See id. See also Concept Release, 75 FR 43009.

19 See id. See also Broker-Dealer Participation in Proxy Solicitations, Release No. 7208 (Jan. 7, 1964) [29 FR 341 (Jan. 15, 1964)] ("Broker-Dealer Release"). For a discussion of whether proxy voting advice should be viewed as “unsolicited” proxy advice, see infra text accompanying notes 26–27.

20 See SEC LILCO Brief (describing the factors that should be considered in determining whether an advertisement published in a major newspaper reasonably calculated to result in the procurement, withholding, or revocation of a proxy and therefore a solicitation).

21 Examples include:
• one proxy advisory firm’s report for a contested election of directors included a detailed evaluation of the candidates presented by the dissident shareholders and management, concluded that management’s candidate “appears to have more relevant experience than the dissident nominee as a public company director” and recommended that “[t]herefore a vote FOR the nominee [on] the management (Blue) card is warranted”;
• another proxy advisory report analyzed the registrant’s executive compensation practices and presented a recommendation to vote “AGAINST” [the registrant’s advisory vote to ratify named

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These firms often also present their vote recommendations through online platforms established by the firms to facilitate their clients’ proxy voting activities. With respect to the circumstances under which this voting advice is provided, proxy advisory firms market their expertise in researching and analyzing matters submitted to a shareholder vote for the purpose of assisting their clients in making voting decisions at shareholder meetings. Many investment advisers retain and pay a fee to proxy advisory firms to provide detailed analyses of various issues, including advice regarding how the investment adviser should vote on the proposals at the registrant’s upcoming meeting. In many cases, as discussed below, the proxy advisory firms make recommendations for a particular investment adviser based on the advisory firms’ application of the investment adviser’s voting criteria.

As a fiduciary, an investment adviser owes each of its clients a duty of care and loyalty with respect to services undertaken on the client’s behalf, including voting. Proxy advisory firms provide their voting recommendations to their investment adviser clients with the expectation that those recommendations will be used by their investment adviser clients to assist in fulfilling their fiduciary duties when making their voting decisions. The fact that proxy advisory firms typically provide their recommendations shortly before a shareholder meeting further enhances the likelihood that the recommendations are designed to and will influence the final stages of the investment advisers’ decision-making process on voting determinations.

Therefore, it is our view that such voting advice provided by a firm marketing its expertise in researching and analyzing proxy issues for purposes of helping its clients make proxy voting determinations (i.e., not merely performing administrative or ministerial services) should be considered a solicitation subject to the federal proxy rules because it is “a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” We believe this interpretation is consistent with the Commission’s long-held view that an advisor who approaches a customer with proxy voting advice is engaging in a solicitation subject to the federal proxy rules.

Even if the proxy advisory firm is providing recommendations based on its application of the client’s own tailored voting guidelines (i.e., not merely performing administrative or ministerial services), and recognizing that facts and circumstances may vary, it is our view that such analysis and advice regarding a voting determination generally should be considered a solicitation. The communication generally is in the form of a voting recommendation based on the firm’s analysis of the proxy materials and whether a particular matter is consistent with, not consistent with, or not covered by client voting criteria; it is typically transmitted to the client shortly before the meeting to aid the client’s voting determination; and it may be a factor in the client’s voting determination. Also, as noted above, proxy advisory firms market their services based on their expertise in researching and analyzing proxy issues for purposes of helping their clients make proxy voting determinations. As a result, even when based on the client’s own voting guidelines, we believe the communication, if it reflects more than administrative or ministerial work, should be viewed as part of a commercial service that is designed to influence the client’s voting decision. We believe this to be the case even in circumstances where the client may not follow this advice.

For similar reasons, we disagree with the view that the proxy voting advice provided by proxy advisory firms is not a solicitation because it may be presented outside the definition of a solicitation because it should not be viewed as likely fall within the definition of a solicitation and instead chose to exempt such solicitations from the informational and filing requirements of the proxy rules. See, generally, Shareholder Participation in Proxy Advisory Firms in the Solicitation of Proxy Votes, 81 FR 60938, 60947 (Aug. 19, 2016). As noted above, proxy advisory firms market their services based on their expertise in researching and analyzing proxy issues for purposes of helping their clients make proxy voting determinations. As a result, even when based on the client’s own voting guidelines, we believe the communication, if it reflects more than administrative or ministerial work, should be viewed as part of a commercial service that is designed to influence the client’s voting decision. We believe this to be the case even in circumstances where the client may not follow this advice.

For similar reasons, we disagree with the view that the proxy voting advice provided by proxy advisory firms is not a solicitation because it may be presented outside the definition of a solicitation because it should not be viewed as
Where such opinions, recommendations, or similar views are provided, disclosure of the underlying facts, assumptions, limitations, and other information may be needed so that these views do not raise Rule 14a–9 concerns. Accordingly, any person engaged in a solicitation through proxy voting advice must not make materially false or misleading statements or omit material facts, such as information underlying the basis of its advice or which would affect its analysis and judgments, that would be required to make the advice not misleading. For example, the provider of the proxy voting advice should consider whether, depending on the particular statement, it may need to disclose the following types of information in order to avoid a potential violation of Rule 14a–9:

- An explanation of the methodology used to formulate its voting advice on a particular matter (including any material deviations from the provider’s publicly-announced guidelines, policies, or standard methodologies for analyzing such matters) where the omission of such information would render the voting advice materially false or misleading.

“Fair” to the minority shareholdern and the offered merger consideration as a “high” value were statements of material facts because “[s]uch statements are factual in two senses: As statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed.”

The Commission staff has previously raised questions about the appropriateness and adequacy of disclosure under Rule 14a–9 in proxy solicitations. See, e.g., Interpretative Release Relating to Proxy Rules, Release No. 34–16833 (May 23, 1980) [45 FR 36374 (May 30, 1980)] (stating the Division of Corporation Finance’s view that in proxy contests in which the disposition of a registrant’s assets and distribution of the sale proceeds to shareholders were the dissidents’ goal, the inclusion of valuations of the sale proceeds in the proxy soliciting materials was only appropriate under Rule 14a–9 when, among other things, they were “accompanied by disclosure which facilitate[d] shareholders’ understanding of the basis for and the limitations on the projected realizable values.”).

We understand that some proxy advisory firms currently may be providing some of the disclosures described in the examples listed in this section.

To the extent that the proxy voting advice is materially based on a methodology using a group of peer companies selected by the proxy advisory firm, the disclosure may need to include the identities of the peer group members used as part of its recommendation and the reasons for selecting these peer group members as well as, if material, why its peer group members differ from those selected by the registrant. For example, such disclosure may be needed for a voting recommendation on a registrant’s advisory vote on an executive compensation proposal that is based on a comparison of the registrant’s executive compensation policies to those of other companies selected by the proxy advisory firm.

Such sources could include third-party research or publications, commercial or financial information databases, or ratings or rankings published by third parties.

Relationships or interests that may create conflicts of interest are commonly found by courts as material information that should be disclosed to avoid Rule 14a–9 violations. See, e.g., Maltonado v. Flynn, 597 F.2d 790 [2d Cir. 1979] (noting that “shareholders are entitled to truthful presentation of factual information” when there is a possibility of self-dealing among directors and emphasizing the importance of Rule 14a–9 in eliciting disclosures of this material information).

1 5 U.S.C. 801 et seq.
By the Commission.
Dated: August 21, 2019.
Vanessa A. Countryman, Secretary.
[FR Doc. 2019–18355 Filed 9–9–19; 8:45 am]
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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 271 and 276

[Release Nos. IA–5325; IC–33605]
Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers
AGENCY: Securities and Exchange Commission.
ACTION: Guidance.

SUMMARY: The Securities and Exchange Commission (the “SEC” or the “Commission”) is publishing guidance regarding the proxy voting responsibilities of investment advisers under its regulations issued under the Investment Advisers Act of 1940 (the “Advisers Act”), and Form N–1A, Form N–2, Form N–3, and Form N–CSR under the Investment Company Act of 1940 (the “Investment Company Act”).


FOR FURTHER INFORMATION CONTACT: Thankam A. Varghese, Senior Counsel; or Holly Hunter-Ceci, Assistant Chief Counsel, at (202) 551–6825 or IMOC@ sec.gov, Chief Counsel’s Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTAL INFORMATION: The Commission is publishing guidance regarding the proxy voting responsibilities of investment advisers under 17 CFR 275.206(4)–6 (Rule 206(4)–6 under the Advisers Act [15 U.S.C. 80b]), Form N–1A, Form N–2, Form N–3, and Form N–CSR under the Investment Company Act of 1940 (the “Investment Company Act”).


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Investment advisers regularly are faced with an array of decisions regarding voting of equity securities on behalf of their clients, whether those clients are individual investors, funds or other institutional investors. In various contexts, and in respect of a wide range of matters submitted to shareholders for a vote, investment advisers that have agreed to take on proxy voting authority are called upon to make voting determinations.

In general, matters are put forth for a shareholder vote either by the issuer or by a shareholder or group of shareholders. The submission of matters for a vote by shareholders typically occurs in connection with a meeting of shareholders, including annual shareholder meetings and special shareholder meetings. Some matters appear regularly and consistently at each annual meeting of shareholders, such as the shareholder vote on whether to ratify the issuer’s selection of an outside auditor. Other matters, such as shareholder votes on proposed mergers, acquisitions, or other corporate actions and matters proposed by a shareholder or group of shareholders, are generally more idiosyncratic in substance and timing.

Investment advisers are fiduciaries that owe each of their clients duties of care and loyalty with respect to services undertaken on the client’s behalf, including voting. In the context of voting, the specific obligations that flow from the investment adviser’s fiduciary duty depend upon the scope of voting authority assumed by the client. To satisfy its fiduciary duty in making any voting determination, the investment adviser must make the determination in the best interest of the client and must not place the investment adviser’s own interests ahead of the interests of the client.

Specifically, an investment adviser’s duty of care includes, among other things, the duty to provide advice that...