SECURITIES AND EXCHANGE COMMISSION

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Exemptions From the Proxy Rules for Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to its rules governing proxy solicitations so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions, without imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice. The amendments add conditions to the availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules that are commonly used by proxy voting advice businesses. These conditions require compliance with disclosure and procedural requirements, including conflicts of interest disclosures by proxy voting advice businesses and two principles-based requirements. In addition, the amendments codify the Commission’s interpretation that proxy voting advice generally constitutes a solicitation within the meaning of the Securities Exchange Act of 1934. Finally, the amendments clarify when the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the antifraud provision of the proxy rules, depending upon the particular facts and circumstances.

DATES: Effective date: The rules are effective November 2, 2020.

Compliance dates: See Section II.E.

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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 of the United States Code, 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 240), in which these rules are published.


3 See Concept Release at 42983 ("This complexity stems, in large part, from the nature of share ownership in the United States, in which the vast majority of shares are held through securities intermediaries such as broker-dealers or banks. . . .").

6 We adopt these amendments to rule 14a–1(l).
ensuring fair, honest, and informed markets, underpinned by a properly functioning proxy system, dictates that we regularly assess whether the system is serving investors as it should. In today’s financial markets, which are characterized by significant intermediation and institutional investor participation, proxy voting advice businesses have come to play an important role in the proxy voting process by providing an array of voting services that can help investment advisers and institutional investor clients manage their substantive and procedural proxy voting needs. Investment advisers and institutional investors often retain proxy voting advice businesses to assist them in making their voting determinations on behalf of their own clients and to handle other aspects of the voting process, which for certain investment advisers has become increasingly complex and demanding over time. Investment advisers voting on behalf of clients (including retail investors) and institutional investors, by virtue of their holdings in many public companies, including as a result of indexing and other broad portfolio management strategies, must manage the logistics of voting in potentially hundreds, if not thousands, of shareholder meetings and on thousands of proposals that are presented at these meetings each year, with the significant portion of those voting decisions concentrated in a period of a few months. Proxy voting advice businesses typically provide investment advisers, institutional investors, and other clients with a variety of services that relate to the substance of voting decisions, such as: Providing research and analysis regarding the matters subject to a vote; promulgating their generally applicable benchmark voting policies (a “benchmark policy”) or specialty voting policies (a “specialty policy”), such as a socially responsible policy, a sustainability policy, or a Taft-Hartley labor policy, that their clients can use; and making specific voting recommendations to their clients on matters subject to a shareholder vote, either based on the proxy voting advice business’s benchmark or specialty policies or based on custom voting policies that are proprietary to a proxy voting advice business’s clients (“custom policy”). This advice is often an important factor in the clients’ proxy voting decisions. Clients may use the proxy voting advice business’s recommendations in a variety of ways, including as an alternative or supplement to their own internal resources in analyzing matters when deciding how to vote.

Proxy voting advice businesses may also provide services that assist clients in handling the administrative tasks of the voting process, typically through an electronic platform that enables their clients to cast votes more efficiently. In some cases, proxy voting advice businesses are given authority to execute votes on behalf of their clients in accordance with the clients’ general guidance or specific instructions.

Although estimates vary, each year proxy voting advice businesses provide voting advice to thousands of clients that exercise voting authority over a sizable number of shares. Because proxies have become the predominant means by which shareholders of publicly traded companies exercise their right to vote on corporate matters, and institutional investors hold a significant and increasing number of shares, proxy voting advice businesses have become uniquely situated in today’s market to influence, and in many cases directly execute, these investors’ voting decisions.

In recognition of the important and unique role that proxy voting advice businesses play in the proxy voting process and in the voting decisions of investment advisers and institutional investors who often vote on behalf of retail investors, the Commission proposed amendments to the Federal proxy rules in November 2019 to enhance the transparency, accuracy, and completeness of the information provided to clients of proxy voting advice businesses in connection with their voting decisions.

Specifically, the Commission proposed amendments to codify its interpretation that proxy voting advice generally constitutes a solicitation within the meaning of Exchange Act Section 14(a) and is therefore subject to the Federal proxy rules. In addition, the Commission proposed to condition the

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5 See, e.g., id. at 63020 (“The U.S. proxy system is the fundamental infrastructure of shareholder suffrage since the corporate proxy is the principal means by which shareholders exercise their voting rights. The development of issuer, securities intermediary, and shareholder practices over the years, along with technological advances, has made the system complex and, as a result, less transparent to shareholders and to issuers. It is our intention that this system operate with the reliability, accuracy, transparency, and integrity that shareholders and issuers should rightfully expect.”).

6 See Amendments to Exemptions from the Proxy Rules for Providing Voting Advice, Release No. 87457 (Nov. 5, 2019) [84 FR 66518 (Dec. 4, 2019)] (“Proposing Release”) at 66519.

7 For purposes of this release, we refer 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.” Unless otherwise indicated, the term “proxy voting advice” as used in this release refers to the voting recommendations provided by proxy voting advice businesses on specific matters presented at a registrant’s shareholder meetings for which written consents or authorizations from shareholders are sought in lieu of a meeting, and the analysis and research underlying the voting recommendations that are delivered to the voting advice business’s clients through any means, such as in a standalone written report or multiple reports, an integrated electronic voting platform established by the proxy voting advice business, or any combination thereof. The reference to “proxy voting advice,” as used in this release, is not intended to encompass (1) administrative or ministerial services, (2) data or research that is not used by a proxy voting advice business to formulate its voting recommendations, or (3) the identity of any of the proxy voting advice business’s clients that receive such advice. To the extent any data or research underlies a proxy voting advice business’s voting recommendations but is not delivered to its clients (such as internal work product such as research that would not constitute that business’s proxy voting advice. Further, we recognize that, in formulating its voting recommendations, a proxy voting advice business may use data and research that was prepared by another party, such as market intelligence and database providers. For the avoidance of doubt, the fact that a third party’s data and research is used by the proxy voting advice business would not, by itself, cause such third party to be a proxy voting advice business. However, if a proxy voting advice business uses a third party’s data and research in formulating its recommendations and delivers such data and research to its clients, then the data and research would constitute part of the proxy voting advice business’s proxy voting advice.

8 See Proposing Release at 66520, n.17.
availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules commonly used by proxy voting advice businesses upon compliance with additional disclosure and procedural requirements. Finally, the Commission proposed to amend Exchange Act Rule 14a–9, the antifraud provision of the Federal proxy rules, to clarify that, depending upon the particular facts and circumstances at issue, the failure to disclose certain information in proxy voting advice may be considered under Section 14(a) misleading within the meaning of the rule.

We received many comment letters in response to the Proposing Release. After considering the public comments, we are adopting the proposed rules with certain modifications as described, and for the reasons set forth, below. Consistent with the proposal, we are adhering to—and adopting an amendment to Rule 14a–1(l) to codify—our longstanding view that proxy voting advice generally constitutes a “solicitation” under Section 14(a).

Absent an applicable exemption, a person providing such proxy voting advice would be subject to the Federal proxy rules’ information and filing requirements, including the obligation to file and furnish definitive proxy statements. For reasons previously stated in the Proposing Release, we believe that proxy voting advice businesses should be eligible to rely on an exemption from such information and filing requirements for their proxy voting advice, but only to the extent that such exemption is appropriately tailored to their unique role in the proxy process and facilitates the transparency, accuracy, and completeness of the information available to those making voting decisions. As such, under the new rules that we are adopting, persons furnishing proxy voting advice constituting a solicitation as defined in new 17 CFR 240.14a–1(l)(1)(iii)(A) (“Rule 14a–1(l)(1)(iii)(A)”) will be eligible to rely on the exemptions in 17 CFR 240.14a–2(b)(1) (“Rule 14a–2(b)(1)”) and 17 CFR 240.14a–2(b)(3) (“Rule 14a–2(b)(3)”) only upon satisfaction of the conditions of new 17 CFR 240.14a–2(b)(9) (“Rule 14a–2(b)(9)”).

As described in more detail below, we have modified these conditions in a number of respects in response to comments received to provide appropriate flexibility to proxy voting advice businesses to meet the principles that underlie the objectives of the rule, and to avoid unnecessary potential disruptions to their ability to provide their clients with timely voting advice. In addition, consistent with the amendments to 17 CFR 240.14a–2(b) (“Rule 14a–2(b)”) and 17 CFR 240.14a–1(l)(1)(iii)(A) of the Proposing Release at 66525 and n.68. We are adopting these amendments to Rule 14a–1(l) and Rule 14a–9 substantially in the form proposed, with certain modifications as described in the discussion that follows. We recognize that for some shareholders, the services provided by proxy voting advice businesses can be an important component of the larger proxy voting process and, as such, help facilitate the participation of shareholders in corporate governance through the exercise of their voting rights. We are also mindful that the efficacy and effectiveness of the proxy voting system depend on the ability of shareholders to obtain transparent, accurate, and materially complete information from an array of relevant parties before making their proxy voting decisions. To enable shareholders to make informed voting decisions, Congress and the Commission have placed varying obligations on participants in the proxy voting process, including through Commission rulemakings pursuant to the broad authority granted by Congress to regulate proxy solicitation.27

For example, registrants and others who engage in a proxy solicitation generally must furnish shareholders with a definitive proxy statement containing numerous specified disclosures.28 They must also generally file all of their additional soliciting materials with the Commission, which ensures that all shareholders and interested parties have access to their soliciting statements and have an ability to consider such statements as part of their voting decisions and, in certain situations such as in a proxy contest, respond to them.29 The Commission, however, has recognized that these general requirements applicable to registrants and others engaged in a proxy solicitation may not be necessary under certain circumstances and, throughout the years, has tailored the application of these requirements as needed. For example, shareholders who beneficially own more than $5 million of securities and who do not seek proxy voting authority are exempt from the requirement to file a definitive proxy statement when they engage in a solicitation, but they still must publicly file with the Commission any written soliciting materials sent to security holders and are subject to the antifraud provisions of Rule 14a–9 with respect to the content of those soliciting materials.30 Parties conducting certain other solicitation activities, including the furnishing of proxy voting advice, have relied on other exemptions from the requirement to file proxy statements.31 Still other activity has


24 See infra Section II.A.3.

25 Proxy voting advice businesses have typically relied upon the exemptions in Rule 14a–2(b)(1) and (b)(3) to provide advice without complying with the filing and information requirements of the proxy rules. See Proposing Release at 66525 and n.68.

26 For example, registrants and others who engage in a proxy solicitation generally must furnish shareholders with a definitive proxy statement containing numerous specified disclosures. They must also generally file all of their additional soliciting materials with the Commission, which ensures that all shareholders and interested parties have access to their soliciting statements and have an ability to consider such statements as part of their voting decisions and, in certain situations such as in a proxy contest, respond to them. The Commission, however, has recognized that these general requirements applicable to registrants and others engaged in a proxy solicitation may not be necessary under certain circumstances and, throughout the years, has tailored the application of these requirements as needed. For example, shareholders who beneficially own more than $5 million of securities and who do not seek proxy voting authority are exempt from the requirement to file a definitive proxy statement when they engage in a solicitation, but they still must publicly file with the Commission any written soliciting materials sent to security holders and are subject to the antifraud provisions of Rule 14a–9 with respect to the content of those soliciting materials. Parties conducting certain other solicitation activities, including the furnishing of proxy voting advice, have relied on other exemptions from the requirement to file proxy statements. Still other activity has
in today’s market, often retain proxy process as institutional investors, who have become an increasingly important of current market practices and update the Commission’s rules in light concerns about the role of proxy voting and voting their shares on behalf of voting advice businesses to assist them in the context of any response from the registrant or others, before casting their votes. These concerns and changing market conditions, as discussed above, prompted the Commission to consider amendments to the exemptions commonly used by proxy voting advice businesses, which had been crafted before proxy voting advice businesses played the significant role that they now do in the proxy voting process and in the voting decisions of investment advisers and institutional investors. A number of the comment letters we received in response to the Proposing Release continue to express these concerns.

In updating our rules to facilitate better informed proxy voting, we do not believe that it is necessary to subject proxy voting advice businesses to the

Federal proxy rules’ information and filing requirements applicable to registrants and certain others, such as the filing and furnishing of definitive proxy statements, as long as they satisfy certain requirements tailored to their role in the proxy process. In particular, we believe that concerns raised regarding the increase in intermediation and complexity in the market and the increased dependence on proxy voting advice can be addressed, and the goal of ensuring that shareholders receive more transparent, accurate, and complete information can be furthered, without the full set of disclosures that would be required with a definitive proxy statement. We also recognize that a requirement to publicly file proxy voting advice with the Commission and disseminate proxy materials to the shareholders of every registrant covered by the advice could result in the addition of significant substantive and procedural changes in the current operations of proxy voting advice businesses and could adversely impact their business models. For example, such a requirement would effectively allow investment advisers, institutional investors, and other investors who do not subscribe to the services of proxy voting advice businesses to obtain certain proxy voting advice services free of charge.

For these reasons, we believe that as a general matter these businesses should continue to be eligible for the benefits of conditional, tailored exemptions from the information and filing requirements of the Federal proxy rules generally applicable to registrants and others. In light of the significant role proxy voting advice plays in the voting decisions of institutional investors and others, however, we also believe that the exemptions need to be fashioned both to elicit adequate disclosure and to enable proxy voting advice businesses’ clients to have reasonable and timely access to transparent, accurate, and complete information material to matters presented for a vote—thereby ensuring that the continued use of the exemptions facilitates informed voting decisions and does not undermine the purposes of the Federal proxy rules.

Some commenters argued that the Investment Advisers Act of 1940 (the “Advisers Act”) is the proper regulatory regime for proxy voting advice businesses, and that the Advisers Act and an investment adviser’s fiduciary duty already address the stated
objectives of the proposed rules.\textsuperscript{41} We disagree. The Advisers Act and Section 14(a) serve distinct, though overlapping, regulatory purposes. The Advisers Act is a principles-based regulatory framework, at the center of which is a federal fiduciary duty to clients that is based on equitable common law principles.\textsuperscript{42} Section 14(a) grants the Commission broad power to adopt rules to control the conditions under which proxies may be solicited in order to address a Congressional concern that the solicitation of proxy voting authority be conducted on a fair, honest, and informed basis.\textsuperscript{43}

As a preliminary matter, we note that proxy voting advice businesses differ as to whether they believe they fall within the definition of an investment adviser under the Advisers Act and should be registered as investment advisers. The Commission has stated previously that when proxy voting advice businesses provide certain services, they meet the definition of investment adviser under the Advisers Act and thus are subject to the federal fiduciary duty to clients that is based on equitable common law principles.\textsuperscript{44} Specifically, a person is an “investment adviser” if the person, for compensation, engages in the business of providing advice to others as to the value of securities, whether purchased, sold, or held in securities, or issues reports or analyses concerning securities.\textsuperscript{45} Proxy voting advice businesses provide analyses of shareholder proposals, director candidacies, or corporate actions and provide advice concerning particular votes in a manner designed to assist their institutional clients to achieve their investment goals with respect to the voting of securities they hold.\textsuperscript{46} In other words, proxy voting advice businesses, for compensation, engage in the business of issuing reports or analyses concerning securities and providing advice to others as to the value of securities and would therefore meet the definition of an investment adviser unless an exclusion applies.\textsuperscript{47}

One such exclusion from the definition of an investment adviser under the Advisers Act is the “publisher’s exclusion.” Specifically, Section 202(a)(11)(D) of the Advisers Act excludes from the definition of an investment adviser a “publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.”\textsuperscript{48} At least one large proxy voting advice business has taken the position that if it was deemed to be an investment adviser, it could rely on the exclusion for publishers contained in Section 202(a)(11)(D) of the Advisers Act.\textsuperscript{49} Regardless of the applicability of the Advisers Act, however, we believe the concerns motivating the rules we are adopting are squarely subject to, and appropriately addressed through, regulation under Section 14(a).\textsuperscript{50} As we noted in the Proposing Release, proxy voting advice businesses provide voting advice to clients that exercise voting authority over a sizable number of shares that are voted annually, and these businesses are uniquely situated in today’s market to influence investors’ voting decisions.\textsuperscript{51} This advice also implicates interests beyond those of the clients who utilize it when voting. Because these clients vote shares they hold on behalf of thousands of retail investors, this advice affects the interests of these underlying investors. For example, in light of proxy voting advice businesses’ clients’ ability to affect the outcome of the vote on a particular matter through their voting power, the proxy voting advice guiding the clients’ votes potentially affects the interests of all shareholders\textsuperscript{52} of the registrant, the registrant, and the proxy system in general.\textsuperscript{53}

In the areas of proxy voting, proxy solicitation, and related activities, the Advisers Act, Section 14(a), and various other statutes and Commission rules do not operate independently from each other and are not mutually exclusive. Rather, depending on the activity and status of the person involved, more than one statutory provision and related rules may apply, with the various provisions complementing each other. For example, Section 13(d) of the Exchange Act and the related rules\textsuperscript{54} are designed to ensure that market participants are informed when any shareholder (or group of shareholders) acquires more than five percent of a class of equity securities registered either on a national exchange or that has assumed the authority to vote proxies on behalf of clients could take to demonstrate that it is making voting determinations in a client’s best interest; see also Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA–5547 (July 22, 2020) (“Supplemental Proxy Voting Guidance”). See Proposal Release at 66520.\textsuperscript{55} Section 13(d) and the related rules generally require these holders to disclose publicly their ownership and other information mandated by the Commission, such as any plans that the holders may have to change the board of directors or management or to engage in

\textsuperscript{41} See, e.g., letter from Gary Retelny, CEO, Institutional Shareholder Services, Inc. (Jan. 31, 2020) (“ISS”).

\textsuperscript{42} See Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA–5248 at 6 (June 5, 2019), 84 FR 33669, 33670 (July 12, 2019) (“Standard of Conduct for Investment Advisers’’); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963) (noting that the Advisers Act “reflects a congressional recognition ‘of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not...”).

\textsuperscript{43} See Communications Among Shareholders Adopting Release at 48277; Proposing Release at n. 3.

\textsuperscript{44} See Concept Release at 43010.


\textsuperscript{46} See Concept Release at 43010.\textsuperscript{47}\textsuperscript{47} Id.

\textsuperscript{48} Lowe v. SEC, 472 U.S. 181 (1985). The U.S. Supreme Court has interpreted the “publisher’s exclusion” to include publications that offer impersonal investment advice to the general public on a regular basis. To qualify for the section 202(a)(11)(D) exclusion, the publication must be: (1) Of a general and impersonal nature in that the advice provided is not adapted to any specific portfolio or any client’s particular needs; (2) “bona fide” or genuine, in that it contains disinterested commentary and analysis as opposed to promotional material; and (3) of general and regular circulation, in that it is not timed to specific market activity or to events affecting, or having the ability to affect, the securities market.


\textsuperscript{50} Whether an entity meets the definition of an investment adviser or is eligible for an exclusion does not impact the analysis of whether it is engaged in “solicitation” for purposes of Section 14(a). Relatedly, the retention of a proxy voting advice business does not relieve an investment adviser of its obligations under the Advisers Act to its clients. See Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA–5325, pp. 5–6 (Aug. 21, 2018) [84 FR 47420, 42421 (Sept. 10, 2019) (“Commission Guidance on Proxy Voting Responsibilities”)]. Question No. 2 at 12, 84 FR 47423 (discussing steps that an investment adviser that has assumed the authority to vote proxies on behalf of clients could take to demonstrate that it is making voting determinations in a client’s best interest; see also Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA–5547 (July 22, 2020) (“Supplemental Proxy Voting Guidance”). See Proposal Release at 66520.\textsuperscript{51} See supra note 18.

\textsuperscript{52} Cf. J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (“The injury which a stockholder suffers results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group.”).

may be material to a voting decision and, accordingly, important to the regulation of the proxy voting process. Similarly, the Commission—noting that Section 13(d) already sets forth the circumstances for when public disclosures of such plans, proposals, or agreements are needed—adopted the Rule 14a–2(b)(1) exemption despite concerns from some commenters that proxy filings are needed for disclosure of a shareholder’s plans or proposals regarding the registrant or shareholders’ voting agreements on a particular matter. At the same time, the exemption is not available for solicitations by any person who, while not seeking proxy authority, is nevertheless required to file a Schedule 13D or has disclosed in the Schedule 13D an intent (or reserved the right) to engage in a change of control transaction or a contested director election, given the heightened need for the proxy disclosures from a person contemplating such transformative transactions or contests.

Other provisions in Section 14(a) play an important and complementary role in furthering all aspects of the Commission’s mission in the context of proxy voting and proxy solicitation include Sections 5, 11, and 12 of the Securities Act of 1933 (the “Securities Act”), in particular in circumstances where the vote being solicited is in connection with a significant transaction, such as a merger, in which new securities may be issued to the shareholders who are voting on the transaction. In such a situation, both the registration and prospectus requirements of Securities Act Section 5 and the proxy solicitation requirements of Exchange Act Section 14(a) apply, with public companies often filing a joint proxy statement/prospectus to fulfill both statutory obligations.

This framework—complementary and overlapping statutes and rules that are based on principles, facts and circumstances, and each participant’s actions as well as status—applies similarly in other key areas of the Commission’s mandate, including the offer and sale of securities in both the public and private markets, securities trading, and the provision of investment advice to retail and institutional investors. Moreover, this framework is consistent with Congressional intent as reflected in the enactment of the Securities Act, the Exchange Act, the Advisers Act, and various other key statutes, including Section 14(a), and has proven to be an effective and efficient means to regulate an important, multi-faceted and ever-evolving aspect of commerce. Accordingly, given the importance of a properly functioning proxy system to investors and the capital markets, even if other provisions of the federal securities laws may apply to certain of their activities, it is appropriate for voting advice furnished by proxy voting advice businesses to be subject to the rules under Section 14(a), which are designed specifically to enhance the transparency and integrity of the proxy voting process, with the ultimate aim of facilitating informed voting decisions.”

II. Discussion of Final Amendments

A. Codification of the Commission’s Interpretation of “Solicitation” Under Rule 14a–1(f) and Section 14(a)

Exchange Act Section 14(a) creates the unlawful for any person to “solicit” any proxy with respect to any security registered under Exchange Act Section 12 in contravention of such rules and regulations prescribed by the Commission. The purpose of Section 14(a) is to prevent “deceptive or inadequate disclosure” from being made to shareholders in a proxy solicitation.

Continued
Section 14(a) grants the Commission broad authority to establish rules and regulations to govern proxy solicitations “as necessary or appropriate in the public interest or for the protection of investors.”\(^{64}\)

The Exchange Act does not define what constitutes a “solicitation” for purposes of Section 14(a) and the Commission’s proxy rules. Accordingly, the Commission has exercised its rulemaking authority over the years to define what communications are solicitations and to prescribe rules and regulations necessary and appropriate in the public interest and to protect investors in the proxy voting process.\(^{65}\) The Commission first promulgated rules in 1935 to define a solicitation to include any request for a proxy, consent, or authorization or the furnishing of a proxy, consent, or authorization to security holders.\(^{66}\) Since then, the Commission has amended the definition as needed to respond to new and changing market practices that have raised the concerns underlying Section 14(a).\(^{67}\)

In particular, the Commission expanded the definition of a solicitation in 1956 to include not only requests for proxies, but also any “communication to security holders under circumstances reasonably calculated to result in the procurement, execution, or revocation of a proxy.”\(^{68}\) This expanded definition was prompted by recognition that some market participants were distributing written communications designed to affect shareholders’ voting decisions well in advance of any formal request for a proxy that would have triggered the filing and information requirements of the federal proxy rules.\(^{69}\)

Since 1956, the Commission has recognized that its definition of a solicitation was broad and applicable regardless of whether persons communicating with shareholders were seeking proxy authority for themselves.\(^{70}\) In light of the breadth of this definition, the Commission adopted an exemption from the information and filing requirements of the Federal proxy rules for communications by persons not seeking proxy authority, but continued to include such communications within the definition of a “solicitation.”\(^{71}\) The Commission also adopted another exemption from the information and filing requirements for proxy voting advice given by advisors to their clients under certain circumstances, but likewise continued to include such advice within the definition of “solicitation,” subject to an exception discussed below.\(^{72}\) By adopting these tailored exemptions, the Commission removed certain filing and other requirements that were considered unnecessary for such solicitations in order to facilitate shareholder access to more sources of information when voting, though the antifraud provisions of the proxy rules continued to apply.

The Commission has previously observed that the definition of a solicitation for purposes of Section 14(a) may result in proxy voting advice businesses being subject to the Federal proxy rules because they provide recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy and thus, as a general matter, the furnishing of proxy voting advice constitutes a solicitation.\(^{73}\) In 2019, the Commission issued an interpretative release regarding the application of the Federal proxy rules to proxy voting advice.\(^{74}\) As the Commission explained in that release, the determination of whether a communication is a solicitation for purposes of Section 14(a) depends upon both the specific nature, context, and timing of the communication and the circumstances under which the communication is transmitted.\(^{75}\) The Commission noted several factors that indicate proxy voting advice businesses generally engage in solicitations when they provide proxy voting advice to their clients, including:

- The proxy voting advice 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;
- Proxy voting advice businesses market their expertise in researching and analyzing matters that are subject to a proxy vote for the purpose of assisting their clients in making voting decisions;
- Many clients of proxy voting advice businesses retain and pay a fee to these firms to provide detailed analyses of various issues, including advice regarding how the clients should vote through their proxies on the proposals to be considered at the registrant’s upcoming meeting or on matters for which shareholder approval is sought; and
- Proxy voting advice businesses typically provide their recommendations shortly before a shareholder meeting or authorization vote, enhancing the likelihood that their recommendations will influence their clients’ voting determinations.\(^{76}\)

The Commission observed that where these or other significant factors (or a significant subset of these or other factors) are present,\(^{77}\) the proxy voting advice businesses’ voting advice

(“Commission Interpretation on Proxy Voting Advice”).

\(^{64}\) See generally Communications Among Shareholders Adopting Release at 48277.

\(^{65}\) See 15 U.S.C. 78n(a); see Borak, 377 U.S. at 432 (noting the “broad remedial purposes” evidenced by the language of Section 14(a)).


\(^{67}\) The Commission revised the definition in 1938 to include any request for a proxy, regardless of whether the request is accompanied by or included in a written form of proxy. See Release No. 34–1823 [Aug. 11, 1938] [3 FR 1991 (Aug. 13, 1938)], at 1992. It subsequently revised the definition in 1942 to include “any request to revoke or not execute a proxy.” See Release No. 34–3347 (Dec. 18, 1942) [7 FR 10653 (Dec. 22, 1942)], at 10656. Courts have also taken a broad view of solicitation. See infra notes 141–146 and accompanying text.

\(^{68}\) 17 CFR 240.14a–1(1)(iii); see Adoption of Amendments to Proxy Rules, Release No. 34–5276 [Jan. 17, 1956] [21 FR 577 (Jan. 26, 1956)], at 577; see also Broker-Dealer Release at 341 (“Section 14 and the proxy rules apply to any person—not just management, or the opposition. This coverage is necessary in order to assure that all materials specifically directed to stockholders and which are related to, and influence their voting will meet the standards of the rules.”).


\(^{71}\) See id.:


\(^{73}\) See Concept Release at 43009. See also Proposal Release at 66522; Broker-Dealer Release at 341.

\(^{74}\) Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Release No. 34–86721 (Aug. 21, 2019) [84 FR 47416 (Sept. 10, 2019)].
generally would constitute a solicitation subject to the Commission’s proxy rules because such advice would be “a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” 79 Furthermore, the Commission explained that such advice generally would be a solicitation even if the proxy voting advice business is providing recommendations based on the client’s own custom policies, and even if the client chooses not to follow the advice. 80 In addition, the fact that proxy voting advice businesses may provide additional services, such as consulting services to investment advisers and issuers and general market commentary, does not diminish their role in the proxy solicitation process.

1. Proposed Amendments

In the Proposing Release, the Commission proposed to amend 17 CFR 240.14a–1(l)(1)(iii) (“Rule 14a–1(l)(1)(iii)”) to add paragraph (A) to make clear that the terms “solicit” and “solicitation” include any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent, or authorization on a specific matter for which shareholder approval is solicited, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee. 81 The proposed amendment would codify the long-held Commission view that the furnishing of proxy voting advice generally constitutes a solicitation governed by the federal proxy rules.

In connection with the proposed amendment to Rule 14a–1(l)(1)(iii), the Commission recognized that the major proxy voting advice businesses may use more than one voting policy or set of guidelines in formulating their voting recommendations on a particular matter to be voted at a shareholder meeting (or for which written consents or authorizations are sought in lieu of a meeting). For example, a proxy voting advice business may offer differing voting recommendations on a matter based on the application of its benchmark policy or various specialty policies. Under the proposal, the voting recommendations formulated under the benchmark policy and each of the specialty policies would be considered to be a separate communication of proxy voting advice under proposed Rule 14a–1(l)(1)(iii)(A). In addition to voting recommendations formulated pursuant to a proxy voting advice business’s benchmark and specialty policies, the Commission also proposed to include voting recommendations formulated pursuant to a proxy voting advice business’s client’s own custom policies within the scope of the term “solicitation,” consistent with its prior interpretation. 82

Lastly, the Commission proposed to amend Rule 14a–1(l)(2), which currently lists activities and communications that do not constitute a solicitation, to add paragraph (v) to make clear that the terms “solicit” and “solicitation” exclude any proxy voting advice furnished by a person who furnishes such advice only in response to an unprompted request. 83 Doing so would codify the Commission’s historical view that such a communication should not be regarded as a solicitation subject to the proxy rules. 84

2. Comments Received

Commenters expressed a mix of views on the Commission’s proposed amendments to the definitions of “solicit” and “solicitation” in 17 CFR 240.14a–1(l)(1) (“Rule 14a–1(l)(1)”). A number of commenters supported codifying the Commission’s interpretation of those definitions as proposed. 85 Some of these commenters described the proposed amendments as consistent with the Commission’s existing interpretation of the term “solicitation” 86 and noted that the advice provided by proxy voting advice businesses is the kind of information that Congress intended Section 14(a) to address. 87 Two commenters agreed with the Commission’s position that the definition of “solicitation” should not be limited to a request to obtain proxy authority or to obtain shareholder support for a preferred outcome. 88 Those two commenters also agreed with the Commission’s view that each voting recommendation formulated pursuant to a benchmark policy or a specialty policy should be considered a separate solicitation. 89 Other commenters added that the analysis of what constitutes a “solicitation” should not turn on whether the proxy voting advice business’s voting recommendations are based on an investor’s custom policy or the proxy voting advice business’s benchmark policy. 90 Finally, a few commenters that supported the proposed amendments recommended that the Commission include in the definition of “solicitation” any reports and ratings by environmental, social, and governance ratings firms or environmental and sustainability rating firms. 91

Other commenters opposed codifying the Commission’s interpretation of “solicit” and “solicitation.” 92 Some

commenters asserted that the Commission does not have the authority to regulate proxy voting advice businesses under Section 14(a) or other provisions of the Exchange Act. Some described the proposal as inconsistent with the Commission’s historical treatment of Section 14(a). Some commenters added that proxy voting advice differs from proxy solicitation and should not be treated as such under the proxy rules. Specifically, these commenters asserted that proxy solicitation differs from proxy advice businesses are independent third parties, hired by shareholders to provide advice businesses are independent third parties, hired by shareholders to provide objective advice that the recipients are not required to follow. One commenter also asserted that the proposal incorrectly equates proxy voting advice with the right to vote on another’s behalf and in a manner that would benefit a particular party. Two other commenters, which were identified as proxy voting advice businesses,103 asserted that even if the Commission amends the definition of “solicitation” as proposed, their activities will not constitute “solicitations” under the revised definition because they vote on behalf of their clients rather than providing them with research reports and voting recommendations.100

In addition, some commenters stated that the proposed codification of “solicitation” would increase proxy voting advice businesses’ costs101 and interfere with their ability to provide services to their clients. Specifically, these commenters asserted that the proposed amendments would increase litigation risks facing proxy voting advice businesses102 and interfere with the relationship between investors and proxy voting advice businesses in a way that would increase costs and complexity and bias voting recommendations in favor of corporate management. Two commenters further expressed concern that treating proxy advice as a solicitation could have a chilling effect on shareholder communication. Some commenters asserted that the Commission has not provided reliable evidence that existing communications between proxy voting advice businesses and their institutional investor clients present a significant risk to investor protection to justify the proposed amendment. Several commenters expressed concern that the Commission disregarded the findings and views of its 2018 Roundtable on the Proxy Process, the Office of Investor Advocate, and the Investor Advisory Committee and called into question the legitimacy of other comment letters. One commenter requested that the Commission clarify the benefits of treating proxy advice as a solicitation. Two commenters also expressed concern that the proposal would overlap with regulations that proxy voting advice businesses are already subject to, including as “investment advisers” under the Advisers Act and as fiduciaries under the Employee Retirement Income Security Act of 1974. Finally, some commenters that generally opposed the proposal recommended that, if the Commission ultimately decides to amend Rule 14a–11(l), it should make the following revisions to narrow the scope of the proposals:

- Clarify whether “proxy voting advice” under Rule 14a–11(l)(1)(iii)(A) would include data and research that may inform a proxy analysis or be described in a proxy research report but that is marketed separately to investors;
- Exclude advice based on investors’ custom policies from the definition of “solicitation”;
- Modify the proposal to recognize the difference between proxy voting advice businesses and proxy voting agent businesses, the latter of which “vote solely on behalf of clients, in accordance with such clients’ preset voting guidelines, based upon third-party research” and should not be subject to regulation as a proxy voting advice business;
- Clarify that the reference to “other forms of investment advice” in Proposed Rule 14a–11(l)(1)(iii)(A) is not intended to exclude only advice from an “investment adviser” and thereby sweep into the scope of the term “solicitation” communications made in the normal course of business by other professionals (e.g., management-consulting firms, lawyers, accountants, broker-dealers, etc.).

With respect to the proposed amendment to Rule 14a–11(l), some commenters supported the proposal to exclude from the definition of a “solicitation” any proxy voting advice furnished by a person only in response to an unprompted request.


100 See letters from ProxyVote II; Segal Marco II. Similarly, another commenter noted that it executes votes directly on behalf of—but does not provide voting recommendations to—its clients. See letter from Mary Beth Gallagher, Executive Director, Investor Advocates for Social Justice (Feb. 3, 2020) ("IASJ"). See also letters from Sean P. Bannon, Chief Financial Officer, Felician Sisters of North America (Feb. 3, 2020) ("Felician Sisters II"); Toni Palamar, Business Administrator, Sisters of the Good Shepherd (Feb. 3, 2020) ("Good Shepherd"); Interfaith Center II; Patricia A. Daly, Corporate Responsibility Representative, Sisters of St. Dominic of Caldwell (Feb. 3, 2020) ("St. Dominic of Caldwell").

101 See letters from 62 Professors; CalSTRS; Elliott I; Interfaith Center II; New York Comptroller II; Public Retirement Systems; Washington State Investment.

102 See letters from CalSTRS; CirCA; Elliott I; Interfaith Center II; New York Comptroller II; Ohio Public Retirement; Prof. Sergakis; Public Retirement Systems.

103 See letters from CirCA; Elliott I; New York Comptroller II; Ohio Public Retirement; PRI II.

104 See letters from New York Comptroller II; PRI II.

105 See letters from CalPERS; Washington State Investment.

106 See letters from CII IV; Elliott I.

107 See letters from CII IV; Elliott I; Glass Lewis II; ISS.

108 See letter from CalPERS.

109 See letters from ISS; ProxyVote II.

110 See letters from CII IV; ISS; New York Comptroller II; PRI II; ProxyVote II; Segal Marco II.

111 See letter from ISS. The commenter further opined that the inclusion of such data and research in the scope of “proxy voting advice” would be “highly inappropriate.” Id.

112 See letters from ISS; New York Comptroller II; Matthew DiGuiseppe, Head of Asset Stewardship, Americas, and Benjamin Colton, Head of Asset Stewardship, Asia Pacific, State Street Global Advisors (Feb. 3, 2020) ("State Street").

113 See letter from Segal Marco II.

114 See letter from Hermes.

115 See letters from Andrew Cave, Head of Governance and Sustainability, Baillie Gifford & Co.
commenter, however, opposed the proposal, asserting that it would be unworkable because investment advisers and broker-dealers may be hesitant to announce a willingness to provide voting advice out of concern that the Commission would determine they had “invited and encouraged” their clients to ask for advice. This commenter added that the proposed amendment would be counterproductive to investor protection goals because the Commission would be regulating experts with proxy advice-related skills and resources (i.e., proxy voting advice businesses), but would not regulate parties with no relevant expertise who engage in the same activities (i.e., anyone that furnishes proxy voting advice in response to an unprompted request). Finally, one commenter recommended that the Commission narrow the proposed exclusion to cover only proxy voting advice provided pursuant to an unprompted request “and not for compensation.”

3. Final Amendments

We are adopting the amendments to Rule 14a–1(l)(1)(iii) and 17 CFR 240.14a–1(l)(2) ("Rule 14a–1(l)(2)") as proposed, with some minor changes to the proposed amendment to Rule 14a–1(l)(1)(iii).

With respect to Rule 14a–1(l)(1)(iii), consistent with the Proposing Release, we are adding paragraph (A) to make clear that the terms “solicit” and “solicitation” include any proxy voting advice that makes a recommendation to a shareholder as to how to vote, or to evaluate, or to authorize on a specific matter for which shareholder approval is solicited, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee.

As noted above, the determination of whether a communication is a solicitation ultimately depends on the specific nature, content, and timing of the communication and the circumstances under which the communication is transmitted. A number of factors illuminate that determination, and, as set forth above, application of those factors indicate that the advice that proxy voting advice businesses provide to their clients generally constitutes a “solicitation.” This amendment, therefore, codifies the Commission’s interpretation that proxy voting advice generally constitutes a “solicitation” under Rule 14a–1(l). As we noted in the Proposing Release, we believe the furnishing of proxy voting advice by a person who has decided to offer such advice, separately from other forms of investment advice, to shareholders for a fee, with the expectation that its advice will be part of the shareholders’ voting decision-making process, is conducting the type of activity that raises the concerns about inadequate or materially misleading disclosures that Section 14(a) and the Commission’s proxy rules are intended to address. We also believe that the regulatory framework of Section 14(a) and the Commission’s proxy rules, with their focus on the information received by shareholders as part of the voting process, are well-suited to enhancing the quality and availability of the information that clients of proxy voting advice businesses are likely to consider as part of their voting determinations.

In addition, we are aware of at least two proxy voting advice businesses, ISS and Egan-Jones, that use more than one proprietary voting policy or set of guidelines—oftentimes, a benchmark policy (e.g., those of ISS and Egan-Jones) and certain custom policies—in formulating proxy voting advice as to a particular matter to be voted on at a shareholder meeting (or for which written consents or authorizations are sought in lieu of a meeting). Consistent with the Proposing Release, we view the proxy voting advice formulated pursuant to each separate policy or set of guidelines as distinct solicitations under Rule 14a–1(l)(1)(iii)(A). Similarly, as discussed in more detail below, proxy voting advice formulated pursuant to a custom policy constitutes a distinct solicitation under the final rule as well.

We recognize that some commenters opposed our amendments to Rule 14a–1(l)(1)(iii) as unprompted or prompted (such as in the case of a client or prospective client that has asked the adviser for its views on a particular transaction). For example, a mutual fund board may request that a prospective subadviser discuss its views on proxy voting, including votes on particular types of transactions such as mergers or corporate governance. As noted in the Proposing Release, the amendment is not intended to include these types of communications as solicitations for purposes of Section 14(a). In response to certain comments we received, we also clarify the amendment is not intended to include communications made in the normal course of business by other professionals to their clients that may relate to proxy voting. Instead, the amendment is intended to apply to entities that market their proxy voting advice as a service that is separate from other forms of investment advice to clients or prospective clients and sell such advice for a fee.
Furthermore, rather than defining what constitutes a proxy solicitation, the Exchange Act leaves those terms undefined, while at the same time specifically empowering the Commission to define such terms consistent with the Act’s “provisions and purposes” and, more broadly, to make rules and regulations, including rules that classify “transactions, statements, applications, reports, and other materials.”

In light of that context, the phrase “solicit any proxy” is not as narrow or mechanical as some commenters have claimed. Citing a dictionary definition, one commenter suggested that the ordinary meaning of the term “solicit” is “to endeavor to obtain.” Under this definition, what matters is the subjective intent of the person engaging in the solicitation, and thus no person would be soliciting a proxy unless they intend to obtain proxy authority. Some commenters likewise claimed that no person would be soliciting a proxy unless they intend to obtain a shareholder’s support for a preferred outcome. However, dictionaries at the time Section 14(a) was enacted indicate that the term “solicit” had other meanings that did not depend on the interest or subjective intent of the person engaging in the solicitation. The term “solicit” also meant “[t]o move to action.” Under this definition, what matters is not the subjective intent to obtain a proxy, but rather the effect on a recipient’s proxy vote. A person solicits a proxy by influencing a shareholder to act. As between these two meanings, we view the latter as more consistent with Section 14(a)’s provisions and purposes, as any inducement that may move a shareholder to vote a proxy in a certain way implicates the Commission’s charge to ensure that necessary and appropriate regulations are in place for the protection of investors. That is why the Commission has recognized since 1956 that persons who do not seek proxy authority themselves nevertheless engage in solicitation when they communicate with shareholders in a manner reasonably calculated to “result” in a proxy vote.

The context and history of Section 14(a) accord with this conclusion. Congress considered different versions of the Exchange Act that set forth the applicable proxy standards with more specificity in the analog to Section 14(a) and rejected them in favor of the broad authority granted to the Commission in Section 14(a), as enacted. While Congress may have been motivated to enact Section 14(a) in 1934 due to the particular abuses by corporate insiders or dissident shareholders that occurred during that time, nothing in either the text or legislative history of Section 14(a) indicates that Congress intended to limit its scope to solicitations conducted by those parties. Rather, where Congress intended to exempt certain classes of market participants, transactions, or activities from the statutory provisions of the Securities Act and the Exchange Act (as enacted in 1933 and 1934, respectively) or limit the Commission’s rulemaking authority with regard to those market participants, transactions or activities, it generally did so by expressly including language in the relevant statutory provision.
Indeed, Section 14(a) itself excludes any “exempted security” from its scope, but otherwise facially applies to “any person” without carving out any class of market participants. 140

Nor does the case law construing Section 14(a) mandate that a party must have an “interest” in the outcome of a shareholder vote in order for a solicitation to occur, as certain commentators contended. 141 Courts have articulated a broad definition of the term “solicit” such that 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 the chain of communications ultimately designed to accomplish such a result.” 142 Moreover, relying on the “subjective intent of the person furnishing the communication” to determine whether a particular communication constitutes a solicitation “is at odds with the plain Act (as enacted in 1933) § 2(a)(3) (carving out from the statutory definition of the terms “sale”, “sell”, “offer to sell”, and “offer for sale” “preliminary negotiations or agreements between an issuer and any underwriter”).


141 See, e.g., letter from ISS. Although we do not believe that Section 14(a) requires that a party have an interest in the outcome of a vote, we also do not accept the position that, as a matter of fact, proxy voting advice businesses necessarily do not have an interest in the outcome of matters being voted upon at shareholder meetings or do not seek proxy authority for themselves. While this may be true in many instances, we do not think this is always the case. See U.S. Gov’t Accountability Office, GAO-17-47, Report to the Chairman, Subcommittee on Economic Policy, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Corporate Shareholder Meetings: Proxy Advisory Firms’ Role in Voting and Corporate Governance Practices, 18 (2016), available at https://www.gao.gov/assets/690/681050.pdf (“2016 GAO Report”) (“Officials from one proxy advisory firm with whom we spoke stated that they agree that proxy advisory firms have influence on corporate governance practices. . . . They noted that such influence is good and ultimately they want to have a positive influence on their clients because they view that as part of their responsibility—to promote good governance.”); Kevin E. McManus, CEO Compensation was a Joke Before Covid–19, Now It Is Just Obnoxious, Egan-Jones Proxy Services (June 11, 2020), available at https://www.eproxy.com/weekly-wreck/36/ceo-compensation-was-joke-covid-19-now-it-is-just-obnoxious/ (criticizing executive compensation at certain registrants and making policy-based recommendations to regulate executive compensation). See also infra Section I.B.1. (noting examples of circumstances where the interests of a proxy voting advice business may diverge materially from the interests of the clients who utilize their advice, including a proxy voting advice business providing advice on a matter in which both the issuer of the security and the client has a material interest, such as a business transaction or a shareholder proposal put forward by or actively supported by that client).

142 Long Island Lighting Co. v. Barbash, 779 F.2d 793, 796 (2d Cir. 1985) (emphasis added); see also Capital Real Estate Inv’rs Tax Exempt Fund Ltd. v. P’ship v. Schwartzberg, 917 F.Supp. 1050, 1059 (S.D.N.Y. 1996) and unambiguous meaning of the regulation.” 143 Instead, the phrase “reasonably calculated to result in the procurement, withholding or revocation of a proxy” in Rule 14a–1–1(1)(1)(iii) requires an objective inquiry that focuses “on the manner in which the communicator attempted to influence a shareholder’s proxy decision from the perspective of the shareholder who received the material.” 144 Courts also have broadly understood a “solicitation” to encompass “communications which may indirectly (result in a proxy being furnished, revoked or withheld),” 145 an interpretation that does not, by its terms, require inquiry into the speakers’ interest or subjective intention. To inject a subjective inquiry into the test of whether a communication is a “solicitation” under Rule 14a–1–1(1)(1)(iii) as argued by one commenter (i.e., determining whether the speaker is “completely indifferent to the outcome of the matter as to which shareholder approval was sought”) 146 runs counter to this case law.


144 Id. (citing Broker-Dealer Release at 342 (noting that communications from broker-dealers to shareholders “may constitute a solicitation requiring compliance with the proxy rules” depending “upon the content of the material, upon the conditions under which it is transmitted, and upon surrounding circumstances”)). See also Long Island Lighting Co., 779 F.2d at 796 (“Determining the purpose of the communication depends upon the nature of the communication and the circumstances under which it was distributed.”); Sargent v. Genesco, Inc., 492 F.2d 750, 767 (5th Cir. 1974) (“Whether or not a particular communication is a solicitation within the meaning of 14a(1) is a question of fact dependent upon the nature of the communication and the circumstances under which it is transmitted.”); Dyer v. SEC, 291 F.2d 774, 777–78 (8th Cir. 1961) (indicating that the determination of whether a communication constitutes a solicitation depends on the “nature and circumstances of a communication and whether it can be rationally inferred that the speaker ‘knew or could be expected to foresee that the things which he said might have an influence and inaudibly affect the action of a stockholder in his granting of proxy authority,’ regardless of ‘whether the speaker may have had in his mind’: Schwartzberg, 929 F.Supp. at 113–14 (quoting the statement “presents the transaction in a manner objectively likely to predispose security holders toward or against it . . . it must comply with the proxy rules”). Among the factors relevant to the objective inquiry into whether a communication constitutes a “solicitation” are (1) “the contents of the communication,” (2) “the conditions under which the communication was made,” and (3) “the timing of the communication in relation to the relevant surrounding circumstances.” Gas Nat’l Inc., 624 Fed. Appx. at 950. As described above, the proxy voting advice under proxy voting advice businesses send their clients generally constitutes “solicitations” under each of those three factors. See supra notes 75–79 and accompanying text.

145 Long Island Lighting Co., 779 F.2d at 796.

146 See letter from ISS.

147 Relying on its broad rulemaking authority, the Commission has since 1956 defined a solicitation to include any “communication to security holders under circumstances reasonably calculated to result in the procurement, execution, or revocation of a proxy.” 147 This definition advances Section 14(a)’s overarching purpose of ensuring that communications to shareholders about their proxy voting decisions contain materially complete and accurate information. 148 It would be inconsistent with that goal if a person whose business is to offer and sell voting advice broadly to large numbers of shareholders, with the expectation that their advice will factor into shareholders’ voting decisions, were beyond the reach of Section 14(a). The fact that shareholders may retain providers of proxy voting advice to advance their own interests does not obviate these concerns.

As described above, some commentators also asserted that the proposed amendment to Rule 14a–1–1(1)(1)(iii) conflicts with well-established practice in the proxy voting advice business industry and the Commission’s historical treatment thereof. 149 As an initial matter, and as noted in the Interpretive Release and the Proposing Release, the amendment to Rule 14a–1–1(1)(1)(iii) is in accordance with, and represents a codification of, the Commission’s longstanding view that proxy voting advice generally constitutes a “solicitation.” This view was originally set forth in a 1964 release 150 and reiterated by the Commission in 1979 151 and 2010. 152 The cited releases did not limit the scope of the term “solicitation” so as to


148 Borak, 377 U.S. at 432; see also S. Rep. No. 1455, 73d Cong., 2d Sess., 74 (1934) (“In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders’ meetings.”); H.R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934) (explaining the need for “adequate disclosure” and “explanation”); Communications Among Shareholders Adopting Release at 48277.

149 See supra note 95 and accompanying text.

150 See Broker-Dealer Release at 341 (“Material distributed during a period while proxy solicitation is in progress, which comments upon the issues to be voted on or which suggests how the stockholder should vote, would constitute soliciting material.”). See supra note 151 and accompanying text.

151 See Concept Release at 43009 (“As a general matter, the furnishing of proxy voting advice constitutes a ‘solicitation’ subject to the information and filing requirements in the proxy rules.”).
exclude proxy voting advice provided by “disinterested persons.” Instead, the Commission articulated its view that proxy voting advice generally constitutes a “solicitation,” without reference to a particular class of market participants that must be providing such advice. Any suggestion otherwise requires reading into the releases an additional qualification that the Commission did not articulate.

We further note that these commenters’ position is inconsistent with the treatment of other disinterested parties under the current proxy regulatory scheme. Shareholders today exercise their voting rights through an intricate proxy process involving numerous intermediaries, such as broker-dealers, that each play an important role. Most shareholders own their securities in “street name,” with their broker-dealers and banks generally holding the securities in their name on behalf of their customers and possessing the legal authority to vote those shares. Under the current proxy process and rules, these broker-dealers and banks must forward a company’s proxy materials to their customers and seek voting instructions (often called “voting instruction forms”) from the customers on whose behalf they hold those shares. These activities are currently treated as solicitations under the proxy rules, with the Commission generally exempting them from the informational and filing requirements, despite the fact that the broker-dealers and banks have no interest in the outcome of the matters being presented for a vote and no involvement in the vesting of the materials being sent to the customers.

Those who have considered the issue, including at least one court, have recognized that the forwarding of a company’s proxy materials and requests for voting instructions by broker-dealers constitute a form of soliciting activity subject to the Commission’s rules. In addition, market observers, including proxy voting advice businesses themselves, have long recognized that the provision of proxy voting advice constitutes a “solicitation” subject to the proxy rules. Notably, one proxy voting advice business that now argues that the Commission lacks authority to regulate proxy voting advice as a “solicitation” submitted a letter to the Division of Corporation Finance in 1988 requesting no-action relief from the Commission’s proxy filing rules. The proxy voting advice business did not request relief on the basis that its proxy voting advice should not be considered a “solicitation.” Instead, the letter appears to implicitly assume that such advice could be a “solicitation” by requesting relief from the proxy filing rules under the predecessor exemption to current Rule 14a–2(b)(3) on the basis that its proxy voting advice was provided to persons with whom it had a business relationship. Further, as recently as 2016, the CEO of another proxy voting advice business testified that “[p]roxy advisory firms also are subject to the Securities and Exchange Commission’s proxy solicitation rules under the [Exchange Act].” The CEO further testified that “[p]roxy voting advisors operating today . . . are generally deemed by the SEC as qualifying for the exemptions based on rules 14a–2(b)(1) and 14a–2(b)(3).” These statements suggest that the proxy voting advice business industry has understood for over 30 years that its proxy voting advice constitutes a “solicitation” under Rule 14a–1(1), or at least that the Commission may consider their proxy voting advice to constitute a “solicitation.” Some commenters also asserted that our amendments to Rule 14a–1(1)(iii) will increase proxy voting advice businesses’ costs or interfere with their analysis.


See also infra notes 158–161 and accompanying text.

155. Although the Commission’s view was originally articulated in the context of an opinion by its General Counsel regarding participation by broker-dealer firms in proxy solicitations, nothing in the language of that release indicates that its position would be extended to other independent, disinterested parties engaged in the same activity. See Broker-Dealer Release.

156. The commenters also cite the 1979 and 1992 releases as evidence that the Commission intended to narrow the scope of the term “solicitation” so as to avoid including communications by disinterested fiduciaries. See, e.g., letter from ISS (citing Communications Among Shareholders Adopting Rule 1979 Adopting Release). However, those releases reinforced the Commission’s view of the breadth of the term by creating additional exemptions for filing rules. See Communications Among Shareholders Adopting Release at 48278 (creating an exemption from the proxy filing rules for solicitations by persons not seeking proxy authority who do not have a substantial interest in the matter subject to a vote); 1979 Adopting Release at 68766–67 (creating an exemption from the proxy filing rules for voting advice provided to persons with whom a financial advisor has a business relationship). In other words, the Commission recognized that certain classes of market participants were conducting activities that constituted “solicitations,” but sought to grant them relief from the proxy filing rules by adopting applicable exemptions. Had the Commission interpreted the term “solicitation” as not applying to those market participants’ activities, no such exemption from the proxy filing rules would have been necessary in the first place. Also, the Commission intended to narrow the scope of the term “solicitation” as application to those classes of market participants, it would have amended the definition thereof in Rule 14a–1(1) appropriately. In fact, in the 1992 release, the Commission explicitly stated that even though it considered (but did not ultimately adopt) proposed amendments exempting from the proxy filing rules all communications by “disinterested persons” who are not seeking proxy authority, “such communications under that proposal would still have constituted “solicitations” and “remained subject to antifraud standards.” Communications Among Shareholders Adopting Release at 48278.

157. See 17 CFR 240.14a–2(a)(1); see also Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 120 Minn. L. Rev. 11, 40–41 (2017) (market observers request for voting instructions from their customers “fall[ing] within the SEC’s definition of a proxy solicitation” and that Rule 14a–2(b)(1) “exempts the broker from the filing requirements and the obligation to furnish a proxy statement”).

158. See, e.g., Walsh & Levine v. The Poria & E. R Co., 222 F. Supp. 516, 516–19 (S.D.N.Y. 1963) (“If brokers transmit some but not all proxy solicitations to those for whose benefit they hold in street name, they are acting in contravention of the Commission rules if they fail to fulfill the duties required of active solicitors.”); Broker-Dealer Release at 342 (“It is quite clear . . . that the transmission to customers of proxy material furnished by the issuer or any other person who is soliciting a proxy constitutes the solicitation of a proxy, since the material is transmitted under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.”); Fisch, supra note 155 at 40; Council of Institutional Investors, *Client Directed Voting: Selected Issues and Design Perspectives* (August 2010) (“Rule 14a–1(1) under the Exchange Act defines solicitation to include 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,’ subject to certain exceptions. Communications sent by brokers to encourage participation in a [client directed voting] model would appear to fall within this definition absent an exemption, and the SEC staff agrees with this conclusion. As such, brokers would have to comply with the proxy solicitation rules, including the filing requirements applicable to proxy materials.”).

159. See id. Note, however, that Rule 14a–2(b)(3) provides no relief from the Commission’s rules if they fail to fulfill the duties required of active solicitors.

160. See id.
ability to provide services to their clients. Specifically, commenters indicated that the amendments could increase litigation risks for proxy voting advice businesses or have a chilling effect on shareholder communications.\textsuperscript{162} Although we acknowledge that compliance with the new conditions we are adopting to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3) may increase the resources that proxy voting advice businesses apply to ensuring compliance with applicable law and regulation,\textsuperscript{163} we disagree that our amendments to Rule 14a–1(l)(1)(ii) taken, in isolation, will have a material impact on the operation of a proxy voting advice business.\textsuperscript{164} To the contrary, the fact that both the Commission and the market generally, including proxy voting advice businesses, have long recognized that proxy voting advice generally constitutes a “solicitation” indicates that any impact from codifying this aspect of the definition of a solicitation likely is already reflected in the manner in which proxy voting advice businesses provide their services and the pricing thereof.

Finally, in the Interpretive Release, we stated our view that proxy voting advice based on a proxy voting advice business’s application of custom policies generally should be considered a “solicitation” under Rule 14a–1(l).\textsuperscript{165} We continue to hold that view for the reasons stated in the Interpretive Release. As a result, such proxy voting advice is subject to Rule 14a–9, and persons who provide such advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must comply with the conflicts of interest disclosure requirements set forth in new 17 CFR 240.14a–2(b)(9)(i) (“Rule 14a–2(b)(9)(i)”).\textsuperscript{166} Some commenters recommended that we amend Rule 14a–1(l) to exclude from the definitions of “solicit” and “solicitation” proxy voting advice that is based on investors’ custom policies.\textsuperscript{167} These commenters’ concerns, however, focused largely on subjecting investors’ custom policies, and the proxy voting advice that is based thereon, to the proposed review and response mechanism outlined in the Proposing Release.\textsuperscript{168} As discussed in more detail below, new 17 CFR 240.14a–2(b)(9)(v) (“Rule 14a–2(b)(9)(v)”) excludes from the notice requirement of new 17 CFR 240.14a–2(b)(9)(ii) (“Rule 14a–2(b)(9)(ii)”) proxy voting advice to the extent such advice is based on custom policies.\textsuperscript{169} As such, notwithstanding the fact that we are not excluding from the definitions of “solicit” and “solicitation” proxy voting advice that is based on custom policies, we believe that we have appropriately taken into account the substance of these commenters’ concerns. As noted above, one commenter asserted that proxy voting agent businesses should not be subject to the same regulations as proxy voting advice businesses.\textsuperscript{170} The commenter’s position that its services differ from a proxy voting advice business’s and should not be considered a “solicitation” appears to be based, in part, on the fact that it only votes its clients’ shares in accordance with its clients’ custom policies.\textsuperscript{171} As with any other person, including any proxy voting advice business, to the extent a business is providing proxy voting advice to a client—regardless of whether such advice is based on its proprietary benchmark or specialty policies or its clients’ custom policies—such advice will constitute a “solicitation” under Rule 14a–1(l)(1)(iii)(A).\textsuperscript{172} However, the commenter and another commenter—both of which are investment advisers and were identified as proxy voting advice businesses in the Proposing Release—also asserted that their activities do not constitute “solicitations” because they vote their clients’ shares on behalf of their clients rather than providing them with voting recommendations.\textsuperscript{173} We agree that to the extent a business that provides proxy voting advice is not providing any voting recommendations and is instead exercising delegated voting authority on behalf of its clients, such services generally will not constitute “proxy voting advice”—and, therefore, not be a “solicitation”—under Rule 14a–1(l)(1)(iii)(A).\textsuperscript{174}

With respect to Rule 14a–1(l)(2), we are also amending this provision as proposed to add paragraph (v) to make clear that the terms “solicit” and “solicitation” do not include any proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request. This amendment codifies the Commission’s historical view that such a communication should not be regarded as a solicitation subject to the proxy rules.\textsuperscript{175} As we explained in the Proposing Release, we believe that a proxy voting advice business providing voting advice to a client where the client’s request for the advice has been invited and encouraged by such business’s marketing, offering, and selling, such advice should be distinguished from advice provided by a person only in response to an unprompted request from its client. In our view, the information and filing requirements of the proxy rules (including the filing and furnishing of a proxy statement with information about the registrant and proxy cards with means for casting votes) or compliance with the new conditions we are adopting to the exemptions described below, are appropriate for a person who chooses to actively market and sell its proxy voting advice as that person’s actions are reasonably designed to result in the procurement, withholding, or revocation of a proxy. Those requirements, however, are ill-suited for a person who receives an unprompted request from a client for its views on an upcoming matter to be presented for shareholder approval. For example, a person who does not sell voting advice as a business and who provides such advice only in response to an unprompted request from its client is unlikely to anticipate the need to establish the internal processes necessary to comply with the new conditions we are adopting to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3).

We also believe, based on our understanding of the dynamics of the proxy voting advice market as it currently operates, that a person that provides proxy voting advice only in

\textsuperscript{162} See infra Section IV.

\textsuperscript{163} To the extent that some proxy voting advice businesses did not previously understand their responsibility to the extent a business that provides proxy voting advice is not providing any voting recommendations and is instead exercising delegated voting authority on behalf of its clients, such services generally will not constitute “proxy voting advice”—and, therefore, not be a “solicitation”—under Rule 14a–1(l)(1)(iii)(A).\textsuperscript{174}

With respect to Rule 14a–1(l)(2), we are also amending this provision as proposed to add paragraph (v) to make clear that the terms “solicit” and “solicitation” do not include any proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request. This amendment codifies the Commission’s historical view that such a communication should not be regarded as a solicitation subject to the proxy rules.\textsuperscript{175} As we explained in the Proposing Release, we believe that a proxy voting advice business providing voting advice to a client where the client’s request for the advice has been invited and encouraged by such business’s marketing, offering, and selling, such advice should be distinguished from advice provided by a person only in response to an unprompted request from its client. In our view, the information and filing requirements of the proxy rules (including the filing and furnishing of a proxy statement with information about the registrant and proxy cards with means for casting votes) or compliance with the new conditions we are adopting to the exemptions described below, are appropriate for a person who chooses to actively market and sell its proxy voting advice as that person’s actions are reasonably designed to result in the procurement, withholding, or revocation of a proxy. Those requirements, however, are ill-suited for a person who receives an unprompted request from a client for its views on an upcoming matter to be presented for shareholder approval. For example, a person who does not sell voting advice as a business and who provides such advice only in response to an unprompted request from its client is unlikely to anticipate the need to establish the internal processes necessary to comply with the new conditions we are adopting to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3).

We also believe, based on our understanding of the dynamics of the proxy voting advice market as it currently operates, that a person that provides proxy voting advice only in
response to unprompted requests and does not market its expertise in such services is less likely to present an investor protection or market integrity concern. For example, we believe such one-off advice to individual clients lacks the system-wide significance of advice provided by proxy voting advice businesses who, as described above, have come to occupy a unique and important position in that process. Although one commenter recommended that 17 CFR 240.14a–1(l)(2)(v) (“Rule 14a–1(l)(2)(v)”) be narrowed to exclude only proxy voting advice furnished pursuant to an unprompted request if such advice is also provided “not for compensation,” we consider that amendment unnecessary. In our view, any compensation that may be received for such unprompted proxy voting advice does not present the same investor protection or regulatory concerns because such persons are less likely to engage in widespread marketing of their expertise in providing proxy voting advice.

As noted above, one commenter opposed the amendment to Rule 14a–1(l)(2) on the basis that investment advisers and broker-dealers may avoid announcing their willingness to provide voting advice on Forms ADV and CRS out of concern that they would fall outside the scope of new Rule 14a–1(l)(2)(v) and be deemed to be outside the scope of new Rule 14a–1(l)(2)(vi) to be prompted a request for proxy voting advice. We believe, however, that the text of new Rule 14a–1(l)(2)(v) is sufficiently precise to avoid this concern. Where an investment adviser or broker-dealer is describing the services it provides to its clients or customers, which may include proxy voting advice, we believe that such investment adviser or broker-dealer should not be deemed to “market[ing] its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sell[ing] such proxy voting advice for a fee.” This same commenter also expressed concern that the amendment to Rule 14a–1(l)(2) could be counterproductive from an investor protection standpoint as the proxy rules are designed to "protect investors of registrants' corporate governance policies; [A]n investment adviser's decision regarding whether to retain a proxy voting advice business hold a significant ownership interest in the registrant, sit on the registrant's board of directors, or have relationships with a shareholder presenting a proposal covered by the proxy voting advice; and
• A proxy voting advice business providing voting advice on a matter on which it or its affiliates have provided advice to a registrant, an applicant, or other party regarding how to structure or present the matter or the business terms to be offered in such matter.

These and similar types of circumstances create a risk that the proxy voting advice business's voting advice could be influenced by the business's own interests, which may call into question the objectivity and independence of its advice. The clients of the proxy voting advice business would generally need to be informed of such activities and relationships in order to be in a position to reasonably assess the impact and materiality of any actual or potential conflicts of interest with respect to the proxy voting advice they receive. If they do not have access to sufficiently detailed disclosure about the full extent and nature of any conflicts that are relevant to the voting advice, and any measures taken to mitigate such conflicts, these clients may not have sufficient information to reasonably understand and adequately assess these potential conflicts and remedial measures when they evaluate the voting advice and make their voting determinations.

In light of these concerns, the Commission proposed amendments to further ensure that sufficient information about material conflicts of interest would be provided consistently across proxy voting advice businesses and in a manner readily accessible to the clients of the proxy voting advice businesses. Accordingly, the proposed amendments included a requirement that persons who provide proxy voting advice, in order to rely on the

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180 See Proposing Release at 66523.
181 See supra text accompanying note 176.
182 See Proposing Release at 66525 n.73.
183 See id. at n.74.
184 See id. at n.75.
185 See id. at n.72.
186 See id. at 66526 n.78 and infra note 193.
187 Commission Guidance on Proxy Voting Responsibilities at 47425 ("[A]n investment adviser's decision regarding whether to retain a proxy advisory firm should also include a reasonable review of the proxy advisory firm's policies and procedures regarding how it identifies and addresses conflicts of interest.").
188 Consistent with the Commission's proposed amendments to the definition of solicitation under the proxy rules, the requirement would apply only to proxy voting advice falling within the scope of
exemptions contained in Rule 14a–2(b)(1) and (b)(3), must include in such advice (and in any electronic medium used to deliver the advice) the following disclosures specifically tailored to proxy voting advice businesses and the nature of their conflicts of interest:

- Any material interests, direct or indirect, of the proxy voting advice business (or its affiliates) in the matter or parties concerning which it is providing the advice;
- Any material transaction or relationship between the proxy voting advice business (or its affiliates) and (i) the registrant (or any of the registrant’s affiliates), (ii) another soliciting person (or its affiliates), or (iii) a shareholder proponent (or its affiliates), in connection with the matter covered by the proxy voting advice;
- Any other information regarding the 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 and includes the circumstances of the particular interest, transaction, or relationship; and
- 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.191

In the Proposing Release, the Commission stated that the disclosures provided under these provisions should be sufficiently detailed so that clients of proxy voting advice businesses could understand the nature and scope of the interest, transaction, or relationship to appropriately assess the objectivity and reliability of the proxy voting advice they receive.192 This might include, for example, the identities of the parties or affiliates involved in the interest, transaction, or relationship triggering the proposed disclosure requirement.


190 The term “affiliate,” as used in proposed Rule 14a–2(b)(1) and (b)(3), would have the meaning specified in Exchange Act Rule 12b–2.

191 The Commission recognized that proxy voting advice businesses may not necessarily have access to the information needed to determine whether an entity is an affiliate of a registrant, another soliciting person, or the shareholder proponent. Therefore, as proposed, proxy voting advice businesses would only be required to use publicly-available information to determine whether an entity is an affiliate of a registrant, other soliciting persons, or shareholder proponents.

192 This would include a description of the material features of the policies and procedures that are necessary to understand and evaluate them. Examples include the types of transactions or relationships covered by the policies and procedures and the persons responsible for administering these policies and procedures.

193 Proposing Release at 66526.

and, when necessary for the client to adequately assess the potential effects of the conflict of interest, the approximate dollar amount involved in the interest, transaction, or relationship. Boilerplate language, including language stating that “such relationships or interests may or may not exist,” would be insufficient for purposes of satisfying this condition to the exemptions.

2. Comments Received

Many commenters agreed with the general principle that providing clients of proxy voting advice businesses with adequate conflicts of interest disclosure helps to ensure transparency and fairness in the voting process and is vital to the clients’ ability to make informed voting decisions.193 Some commenters expressed the view that proxy voting advice businesses currently do not satisfactorily mitigate the risk that conflicts of interest may impair their objectivity and, consequently, that their ability to provide impartial voting advice is often undermined by the prevalence of conflicts.194

193 See letters from commenters generally opposed to the proposals, e.g., CalSTRS (“We agree that conflict of interest disclosure is important for a well-functioning and unbiased proxy voting system. Investors should be informed when there may be potential conflicts of interest that could affect proxy advisor recommendations. Investors need confidence that the research being considered when voting is unbiased and fact based. . . .”); CFA Institute I; CII IV; ISS; and the IAC Recommendation. See also letters from commenters generally supporting the proposals, e.g., ACCF (“Investors need to be fully informed of the biases and conflicts inherent in [the] powerful vote recommendations [of proxy voting advice businesses].”); IFRT (“. . . conflicts of interest that may arise for proxy advisors should be disclosed in order for their clients to assess for themselves the effect and materiality of any actual or potential conflicts of interest with respect to a voting recommendation . . . We agree with the Commission’s assessment that institutional investors and investment advisers who rely on proxy advisors for voting guidance cannot identify potential risks if they do not have access to sufficiently detailed disclosure about the full extent and nature of any conflicts that are relevant to the voting advice they receive.”); ExxonMobil Corp. (Feb. 3, 2020) (“ExxonMobil”); Tao Li, Ph.D., Assistant Professor of Finance, University of Florida (Jan. 30, 2020) (“Prof. Li”) (“. . . it remains imperative that market participants are aware of any potential conflicts of interest within the industry and whether those conflicts are impeding the role of proxy advisors as independent providers of information and recommendations.”); NAM; Nareit; Nasdaq; SCG; CCBC; NAREIT; CalPERS; CII; CEM; 195 See, e.g., letters from CalPERS (“We see no evidence that conflicts of interest with proxy advisors have led to voting advice that conflicts with our voting policies . . .”); CalPERS (“we do not believe the SEC needs to create a new regulatory structure to enforce such [conflict of interest] disclosure”); and its general belief “that proxy advisors are currently providing adequate disclosures that meet the needs of investors, and any modifications to disclosures can be enforced through existing SEC authority.”); ISS; Glass Lewis II; CalPERS; New York Comptroller II.

Some commenters opposed the proposed amendments,196 asserting that additional conflict disclosure requirements were not justified196 and, therefore, would impose unnecessary additional costs and burdens on proxy voting advice businesses and their clients.197 These commenters challenged, among other things, the claims that proxy voting advice businesses’ conflicts of interest disclosures were materially deficient,198 and contended that the businesses’ existing policies and procedures (such as their disclosure practices and maintenance of internal firewalls to guard against conflicts) adequately addressed the risk of conflicts.199 In support of this view, commenters noted that the predominant opinion among the CCMC; Ashley Baker, Director of Public Policy, The Committee for Justice (Feb. 3, 2020) (“Committee for Justice”); J. Ward; Nasady; Perkins; P. Mahoney and J.W. Verret; SSG; Seven Corners Capital Management, LLC (Apr. 8, 2020) (“Seven Corners”).


196 See, e.g., letters from Colorado PERA (“PERA utilizes research reports from Glass Lewis and ISS to assist with its evaluation of items on a proxy ballot. PERA has analyzed each firm’s disclosures and has concluded that potential conflicts are harmless to the independence of the research, would not sway an investor’s opinion, and the voting firewalls to prevent contamination of objectivity—where applicable to specific proxy advisors—are sufficient”); CalSTRS; Glass Lewis II; ISS.

197 See, e.g., letters from CalPERS (“We see no evidence that conflicts of interest with proxy advisors have led to voting advice that conflicts with our voting policies . . .”); CalPERS (“we do not believe the SEC needs to create a new regulatory structure to enforce such [conflict of interest] disclosure”); and its general belief “that proxy advisors are currently providing adequate disclosures that meet the needs of investors, and any modifications to disclosures can be enforced through existing SEC authority.”); ISS; Glass Lewis II; CalPERS; New York Comptroller II.
Both those supporting and those opposing the proposed Rule 14a–2(b)(9)(i) recommended modifications to the proposed new disclosure requirements,204 ranging from very specific suggestions intended to standardize the presentation of conflicts disclosures,205 expand the breadth of required disclosure,206 and capture certain detailed information,207 to those that were less prescriptive and leaned toward a more principles-based approach,208 with an emphasis on materiality.209 Other commenters recommended procedural changes that would have widened the scope of the proposed amendments beyond conflicts disclosure.210

204 See, e.g., letters from Lynette C. Fallon, EVP HR/Legal and General Counsel, Axcelis Technologies, Inc. (Jan. 20, 2020) ("Axcelis"); Baillie Gifford; BRT; CII IV; CIRCA; Exxomobil; Garmin; Glass Lewis II; ISS; Jonathan Chanis, New Tide Asset Management, LLC (Jan. 30, 2020) ("(J. Chanis)"); Mylan; Ann McGinnis, Co-President et al., Los Angeles Chapter, National Investor Relations Institute, Los Angeles Chapter (Feb. 3, 2020) ("NIRI–LA"); David Erickson, President, et. al., Corporate Relations Institute, Orange County Chapter (Feb. 4, 2020) ("NIRI–OC"); June M. Vecelio, President, and James B. Bragg, Advocacy Ambassador, National Investor Relations Institute, Connecticut/Westchester County Chapter (Feb. 6, 2020) ("NIRI–Westchester"); Nasdaq; Prof. Li; SGC; Seven Corners; SES; Linda Moore, President and CEO, TechNet, (Feb. 13, 2020) ("TechNet");

205 See, e.g., letters from Nasdaq; NIRI–LA; NIRI–OC; NIRI–WC; TechNet (calling for conflicts of interest to be disclosed on the front page of proxy voting advice).

206 See, e.g., letters from ExxonMobil (supporting a requirement for specific disclosures about proxy voting advice businesses’ specialty reports that are driven by goals other than maximizing shareholder value); SEC (requiring proxy voting advice businesses to be required to disclose “any interest, transaction or relationship that may present a conflict of interest, and the dollar amount thereof”);

207 See, e.g., letters from ExxonMobil (recommending that required conflict disclosures cover details similar to the requirements of Item 404(a) of Regulation S–K and enumerating a list of specific items that should be addressed by disclosure); PIRC (suggesting that disclosure of specific amounts of compensation received from various clients could be helpful).

208 See, e.g., letters from Baillie Gifford (cautioning that requiring disclosure of policies and procedures would lead to boilerplate disclosure); CII IV (asserting that allowing proxy voting advice businesses to choose the vehicle by which they disclose conflicts of interest would mitigate the widespread distribution of information that could affect competition or other concerns); CIRCA (stating that a principles-based approach “would prevent proxy advisors from giving boilerplate disclosures . . . without creating unprecedented and excessive burdens.”); ISS (stating that “there is no reason to treat conflict disclosure by proxy advisers any differently from the way conflict disclosure by portfolio managers or any other type of investment advisor occurs”);

209 See, e.g., letter from Baillie Gifford.

210 See, e.g., letters from Garmin (recommending that the Commission require proxy voting advice businesses to separate their proxy advisory businesses from their consulting businesses); J.

3. Final Amendments

We are adopting amendments to Rule 14a–2(b) to require that persons who provide proxy voting advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must disclose to clients the conflicts of interest disclosed in new Rule 14a–2(b)(9)(i). The Commission is adopting these amendments substantially as proposed, but with certain modifications as discussed below, to clarify and streamline the rule in response to commenters’ concerns and suggestions.

As adopted, Rule 14a–2(b)(9)(i) establishes a principles-based requirement, based on a standard of materiality, that will apply to all proxy voting advice that is provided in reliance on the exemptions in Rules 14a–2(b)(1) and (b)(3). Contrary to the views of some commenters, we do not see this requirement as imposing an entirely new regulatory regime or structure.211 Rather, we view Rule 14a–2(b)(9)(i) as enhancing the existing conflicts of interest disclosures that proxy voting advice businesses currently provide in order to rely on the exemptions from the proxy rules’ information and filing requirements. By articulating a standard for disclosure that focuses on information that would be material to assessing the objectivity of the proxy voting advice, the new rule is expected to result in disclosure that is more tailored and comprehensive than would be required under either Rule 14a–2(b)(1) or (b)(3).212 Given the significant role played by proxy voting advice businesses in the voting process, we believe that the articulation of clear minimum disclosure standards is appropriate to better ensure transparency and avoid distortion of the information provided, as well as the integrity of the proxy voting process. Rule 14a–2(b)(9)(i)
is intended to harmonize the conflicts of interest disclosure that proxy voting advice businesses provide to their clients, helping to ensure that sufficient information about material conflicts of interest is disclosed more consistently across proxy voting advice businesses and in a manner readily accessible to the clients of such businesses. As a consequence, we believe the rule will enable clients of proxy voting advice businesses to make more informed voting decisions, including with regard to how proxy voting advice businesses identify and address conflicts of interest on a business-specific and relative basis and help in Commission oversight of the proxy voting process.213

Although some proxy voting advice businesses and others have asserted that the businesses’ existing practices and procedures adequately address conflicts of interest concerns,214 we believe that the absence of a disclosure requirement specifically contemplating the conflicts of interest that can arise for proxy voting advice businesses in relation to proxy voting advice means that there has not been a sufficient standard against which clients may assess the quality of the conflicts disclosures they receive. Conditioning the exemptions in Rules 14a–2(b)(1) and (3) for proxy voting advice on the proxy voting advice business’s adherence to a set of minimum, principles-based disclosure standards will make clear what constitutes basic information regarding conflicts of interest that all parties can expect when receiving voting advice and will bolster the completeness and consistency of such disclosure by making it a regulatory requirement. This should in turn foster greater confidence in the services proxy voting advice businesses offer to their clients and provide greater assurance to market participants that shareholders’ interests are being properly considered through a well-functioning proxy system.215

To that end, Rule 14a–2(b)(9)(i) sets forth a concise framework that applies advice within the scope of proposed Rule 14a–1(d)(1)(i)(A) who wishes to utilize the exemption in either Rule 14a–2(b)(1) or (b)(3). Such persons must include in their voting advice (or in any electronic medium used to deliver the advice) prominent disclosure of:

- Any information regarding an interest, transaction, or relationship 216 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;217 and
- 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.218

The rule, as adopted, reflects our intent to avoid an overly prescriptive disclosure requirement with specific monetary thresholds, in favor of a more principles-based rule that is sufficiently flexible to encompass a wide variety of circumstances that may not fall within pre-determined parameters but nevertheless could materially impact a client’s assessment of the proxy voting advice business’s objectivity. This approach also is consistent with the views of several commenters who favored a principles-based disclosure requirement that could more easily accommodate a variety of different facts and circumstances.219 As such, Rule 14a–2(b)(9)(i) establishes a general standard for conflicts of interest disclosure, but allows the proxy voting advice business to apply its judgment and unique knowledge of the facts to determine the materiality of conflicts that might pose a risk to the objectivity of its advice.

The final rule also gives the proxy voting advice business flexibility to determine the precise level of detail needed about any identified conflicts of interest,220 or whether a relationship or interest that has been terminated should nevertheless be disclosed.221 In each particular case, the rule gives the proxy voting advice business the discretion to determine which situations merit disclosure and the specific details to provide to its clients about any conflicts of interest identified. The key determinant will be whether the information is material to an evaluation of the proxy voting advice business’s objectivity.

A more prescriptive disclosure requirement, while relying less on the proxy voting advice business’s judgment, risks being either under- or over-inclusive. For instance, there may be scenarios or relationships of which we are not aware or that, at this point in time, do not exist that present or would present material conflicts.222

213 Currently, proxy voting advice businesses should in turn foster greater confidence in the services proxy voting advice businesses offer to their clients and provide greater assurance to market participants that shareholders’ interests are being properly considered through a well-functioning proxy system.215

214 For example, ISS discloses the details of its potential conflicts of interest, such as the identities of the parties and the amounts involved, through its ProxyExchange platform, while Glass Lewis states that its disclosures appear on the front cover of the report with its proxy voting advice. See ISS, FAQ Regarding Recent Guidance from the U.S. Securities and Exchange Commission Regarding Proxy Voting Responsibilities of Investment Advisers (2019) (“ISS FAQs”), available at https://www.issgovernance.com/file/faq/ISS_Guidance_FAQ_Document.pdf. See also Proposing Release at 66527, n. 90; letter from Glass Lewis II. 216 Such information may include disclosure about certain individuals in the proxy voting advice business who favored a principles-based disclosure requirement that could more easily accommodate a variety of different facts and circumstances. 219 As such, Rule 14a–2(b)(9)(i) establishes a general standard for conflicts of interest disclosure, but allows the proxy voting advice business to apply its judgment and unique knowledge of the facts to determine which situations merit disclosure and the specific details to provide to its clients about any conflicts of interest identified. The key determinant will be whether the information is material to an evaluation of the proxy voting advice business’s objectivity. A more prescriptive disclosure requirement, while relying less on the proxy voting advice business’s judgment, risks being either under- or over-inclusive. For instance, there may be scenarios or relationships of which we are not aware or that, at this point in time, do not exist that present or would present material conflicts. 222 For example, the proxy voting advice business would have the discretion, on a case-by-case basis, to determine whether specific monetary amounts related to any potential and/or actual conflicts identified should be disclosed. See letter from CII IV (“We do not believe that proxy voting advice businesses should be required to disclose the specific amounts that they receive from the relationships or interests covered by the proposed conflicts of interest disclosures . . . there is no reliable evidence indicating that institutional investor clients believe that level of detail is necessary in all circumstances. To the extent that investors want this information, they should be able to seek it from the proxy advisory firm(s) they hire, and make it a condition for hiring a proxy advisor.”). We note, however, that Rule 14a–2(b)(9)(i) should not be interpreted to mean that disclosure of specific amounts would never be necessary. There may be situations, depending on the particular facts and circumstances, in which this information would be material to assessing the objectivity of the proxy voting advice and therefore should be disclosed. Similarly, the proxy voting advice business would have the discretion to determine whether the number of instances of substantive engagement it has had with existing clients as well as any other third parties providing substantive input to the proxy voting advice business as it develops its advice may have created a material conflict of interest that should be disclosed. 223 See, e.g., letter from Baillie Gifford (“A more principles-based requirement is preferable because whether a matter is material to the proxy advice will depend on the facts and circumstances. For example, in some situations it may be relevant that a proxy advisor had an historical relationship with a registrant, albeit that the relationship is no longer live, if the relationship were very significant in terms of duration or value. In other cases, less significant relationships will cease to be relevant as soon as they come to an end. It should be for the proxy advisors to make the assessment and for their clients to understand how the advisor makes this determination as part of regular due diligence.”). 224 See discussion supra pp. 51–52.
Instead, by adopting a rule with materiality as its focus, we have opted for an approach that is more adaptable to varied circumstances. The concept of materiality is at the core of our disclosure framework and has served our markets and investors well. Therefore, we believe that requiring proxy voting advice businesses to base their conflicts of interest disclosures on assessments of materiality is a more effective way to ensure that their clients have sufficient information to weigh the voting advice they are given.

Substantively, Rule 14a–2(b)(9)(i) is consistent with the Commission’s proposal, but we have modified the wording in an effort to further simplify the requirement. We agree with a commenter who suggested that the proposed regulatory text could be streamlined to both capture the full scope of conflicts-related disclosure and retain the focus on principles of materiality.

Therefore, consistent with the suggestions of these commenters, the rule condenses proposed subsections (A), (B), and (C) of paragraph (b)(9)(i) into a single subsection (A) that requires disclosure of “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.”

We note that some commenters recommended ways to improve the proposed additional substantive requirements or specific parameters designed to more clearly indicate the disclosure obligations of proxy voting advice businesses under the rule. For example, one commenter suggested that more guidance was needed regarding the timeframe for which the disclosure of conflicts should be provided. As discussed above, however, we believe that a more principles-based approach will best serve to provide the clients of proxy voting advice businesses with adequate disclosure regarding conflicts while balancing the varied and unique circumstances of such businesses. We are therefore not persuaded that more prescriptive modifications are necessary or preferable to the rule, as adopted, which describes a general principle rather than delineating particular disclosure items.

Because our concern is with ensuring that proxy voting advice business clients have the ability to assess the objectivity, and ultimately the reliability, of proxy voting advice, we believe it would not serve the interests of those who depend on voting advice to place precise limits on what would be considered material information. For example, if a proxy voting advice business has been retained by a shareholder to provide voting advice regarding a registrant for which the business once provided consulting services, and if it has had no business relationship with the registrant for some years and is not seeking a business relationship with the registrant, it may be unlikely that the nature of its relationships with the registrant would be deemed material to an assessment of the business’s ability to objectively advise its client. In that circumstance, the proxy voting advice business, which is in the best position to make such a judgment, would need to consider, based on the relevant facts and circumstances, whether that prior engagement is currently material and should be disclosed to clients.

Another benefit of the principles-based nature of Rule 14a–2(b)(9)(i) is that it will provide proxy voting advice businesses significant flexibility over the manner in which conflicts information is disclosed, so long as the basic requirements are met. The rule requires that prominent disclosure of material conflicts of interest be included in the voting advice to ensure that this information is readily accessible to clients and facilitates their ability to consider such disclosure together with the proxy voting advice at the time they make their voting decisions. It does not, however, dictate the particular location or presentation of the disclosure in the advice or the manner of its conveyance as some commenters recommended. Doing so would undermine our intent to give latitude to proxy voting businesses to fashion their disclosure in the best judgment, in recognition of the varied circumstances in which they provide their services.

Along these lines, the final rule differs from the proposal regarding the conveyance of conflicts disclosure. As proposed, the rule would have required a proxy voting advice business to include conflicts of interest disclosure “in its proxy voting advice and in any electronic medium used to deliver the advice.” To ensure that the information is prominently disclosed regardless of the means by which the advice is delivered. However, some commenters were concerned that this was overly prescriptive and would interfere with proxy voting advice businesses’ existing conflict management policies and procedures designed to safeguard information and prevent it from undermining the objectivity and independence of the businesses’ voting advice. These commenters pointed out that displaying conflict disclosures in every piece of proxy advice, including written proxy research reports, would compromise the ability of proxy voting advice businesses to place precise limits on what would be considered material information to their clients.

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223 See letter from ISS.

224 Rule 14a–2(b)(9)(i), as adopted, substantially resembles proposed subsection (C) that was designed as a catch-all to elicit disclosure of any information not otherwise captured by the other provisions of the rule regarding an interest, transaction, or relationship that would be material to a reasonable investor’s assessment of the objectivity of the proxy voting advice. In addition, we note that the final amendment does not retain the concept of subsection (B) providing that required disclosures would be determined using publicly available information. Although this provision was intended to limit the scope of a proxy voting advice business’s disclosure obligation, we agree with commenters that any interest, transaction or relationship of which a proxy voting advice business is not already aware logically could not bias the business’s recommendations. See letter from ISS (“If such a search of publicly available information uncovers a possible affiliation ISS was not otherwise aware of, there would be no benefit to offset the costs involved in discovering such relationship could not have compromised the integrity of the proxy advice in the first place.”).

225 See, e.g., letters from CEC (recommending that the rule include examples of per se conflicts of interest and illustrations of compliant disclosures); Mylan (recommending that disclosure be required for “every instance of substantive engagement” between a proxy voting advice business and existing clients, as well as any other third party providing substantive input regarding the proxy voting advice business’s recommendations); PIRC; Prof. Li; SCC (recommending that disclosure of the dollar amount of any interest, transaction, or relationship that may present a conflict of interest for the proxy voting advice business should be required); and Prickly Rose (supporting the ability of a business owner to conclude that a relationship constitutes a “material” interest, transaction, or relationship (e.g., revenue, terms of the contracts, etc.).

226 See, e.g., letter from Prof. Li.
to mitigate their risk of conflicts and expressed concern that the proposal would increase compliance costs for proxy voting advice businesses. 232 233

We agree that proxy voting advice businesses should have the latitude to convey their conflict disclosures to clients in a manner that does not run afoul of the businesses’ own mechanisms for mitigating the risk of biased advice, such as establishing internal firewalls to maintain the objectivity of the advice, so long as their conflict disclosures are readily accessible to their clients and provided as part of the proxy voting advice they receive. Accordingly, the rule we are adopting gives a proxy voting advice business the option to include the required disclosure either in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice, such as a client voting platform, which allows the business to segregate the information, as necessary, to limit access exclusively to the parties for which it is intended. 234 Similarly, 17 CFR 240.14a–2(b)(9)(i)(B) (“Rule 14a–2(b)(9)(i)(B)”) 235 which requires proxy voting advice businesses to disclose “any policies and procedures used to identify, as well as the steps taken to address,” any material conflicts of interest identified pursuant to subsection (A), does not specify the extent to or manner in which the required disclosure must be presented. As with the disclosures required by subsection (A), proxy voting advice businesses are given wide latitude to determine what information would best serve their clients’ interests. Moreover, Rule 14a–2(b)(9)(i) is not intended to supplant or interfere with a business’s course of practice and standard operating procedures if it is already providing disclosure to its clients sufficient to enable them to understand the business’s processes and methodology for identifying and addressing material conflicts, as well as any measures taken in light of specific

conflicts identified. In addition, by giving proxy voting advice businesses the flexibility to satisfy the principle–based requirement with their existing methods of disclosure, we believe the costs of implementation should not be unduly burdensome. 236 Similarly, while the adoption of Rule 14a–2(b)(9)(i)(B) will create an expanded compliance obligation, we do not believe it will have a detrimental effect on competition as the flexibility afforded under the final rule should allow new businesses to adapt the required disclosures to their specific business models and thus avoid imposing a significant new barrier to entry for the proxy voting advice business market. 237

Contrary to the concerns expressed by some commentators about certain implications of the proposed amendments, 238 we note that Rule 14a–2(b)(9)(i)(B) does not require proxy voting advice businesses to include detailed compliance manuals in their proxy advice 239 or duplicative disclosures in both their proxy voting advice and in the electronic medium used to deliver such advice regarding the businesses’ policies and procedures describing how they identify and address conflicts. 240 Provided the disclosure is conveyed either in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice (such as a client voting platform), such that its client is able to readily access the information as it reviews and considers the voting advice, a proxy voting advice business has the discretion under the rule to choose the solution it deems suitable for each particular client. This may include, for example, a proxy voting advice business providing an active hyperlink or “click–through” feature on its platform allowing clients to quickly refer from the voting advice to a more comprehensive description of the business’s general policies and procedures governing conflicts of interest. 241

More generally, we believe that increased transparency regarding a proxy voting advice business’s conflicts of interest may prompt a more informed dialogue between such businesses and their clients. For example, as a result of the increased transparency of a proxy voting advice business’s conflicts of interest, clients of the business, including investment advisers, would be in a better position to understand these conflicts and how they may affect the business’s proxy voting advice and other services. If this information improves the ability of the proxy voting advice business’s clients to identify the kinds of information and details that would be valuable to them in assessing the business’s conflicts, this dialogue may also result in a proxy voting advice business enhancing its approach to disclosure of conflicts of interest in response. Such a dynamic regarding conflict disclosure among investors (those who ultimately bear the costs and benefits of voting), clients of proxy voting advice businesses, and proxy voting advice businesses, each of which have different incentives, may increase the benefits of the rule to the shareholder voting process more generally.

C. Amendments to Rule 14a–2(b): Notice of Proxy Voting Advice and Response

The ability of investors to make informed decisions, on the basis of disclosure of material information, is a bedrock tenet on which the federal securities laws were founded. This principle informs not only our consideration of this rulemaking, but also, more broadly, the proxy rules we administer 242 and, as a more general matter, the Commission’s interest in the continued vitality, fairness, and efficiency of our capital markets. 243 Given the importance of the shareholder proxy in today’s markets, 244 it is imperative that proxy solicitations be conducted on a fair, honest, and informed basis. Consistent with these

example, be maintained on the business’s publicly available website. See id. (“Glass Lewis has one set of policies and procedures that describes how it identifies and addresses conflicts, which it makes available on its website.”).

235 See supra note 197.

236 See supra note 203 and accompanying text.

237 See, e.g., IAC Recommendation.

238 See, e.g., letter from Glass Lewis (expressing concern that the rule as ultimately adopted may also result in a proxy voting advice business having to maintain a separate website).

239 See supra note 2–5 and accompanying text.

241 See supra note 203 and accompanying text.

242 Id.
aims, and in light of the unique role played by proxy voting advice businesses in many investors’ voting decisions, it is important that clients of these businesses, when making their voting decisions, have access to transparent, accurate, and materially complete information. We believe proxy voting is improved by robust discussion among parties in advance of the voting decision, similar to the vigorous engagement that may occur if all parties attended an annual or special meeting in person.

As the Commission has noted, however, a number of commenters, particularly within the registrant community, have expressed concern about the current system for providing proxy voting advice under the Commission’s rules, and the resulting effect on the mix of information available to shareholders, including the ability of shareholders to benefit from robust discussion. While proxy voting advice businesses can play an influential role in shareholders’ proxy voting decisions, the present proxy rules exempt them from the requirement to publicly file their recommendations with the Commission, as registrants and certain other soliciting parties must do for their own solicitations. As a result, some commenters have expressed concern that registrants lack an adequate opportunity to engage with and respond to influential proxy voting advice before shareholders vote, potentially inhibiting the accuracy, transparency, and completeness of the information available to those making voting determinations. They also highlight what they characterize as the limited ability to address any deficiencies in proxy voting advice such as factual errors, incompleteness, or methodological weaknesses that could materially affect the reliability of proxy voting advice businesses’ voting recommendations and adversely impact voting outcomes.

1. Proposed Amendments

With the foregoing background in mind, the Commission proposed review and response mechanisms for proxy voting advice, as discussed below, that would apply any time proxy voting advice businesses provide voting advice to their clients in reliance on either the Rule 14a–2(b)(1) or (b)(3) exemptions from the proxy rules. By conditioning the availability of these proposed exemptions in this way, the Commission intended to (1) facilitate dialogue between proxy voting advice businesses and registrants (and certain other soliciting persons, such as dissident shareholders engaged in a proxy contest) before the dissemination of proxy voting advice to clients of the proxy voting advice business, when most shareholder votes have yet to be cast, and (2) provide a means for registrants and certain other soliciting persons to timely communicate their views about the advice to shareholders, thereby assuring that the proxy voting advice businesses’ clients could consider this information along with any other data and analysis they use to make their voting decisions. More generally, these actions were intended to enhance transparency, accuracy, and completeness.

a. Review of Proxy Voting Advice by Registrants and Other Soliciting Persons

The Commission proposed new Rule 14a–2(b)(9)(ii) to require, as a condition to the exemptions in Rules 14a–2(b)(1) and (b)(3), that a proxy voting advice business provide registrants and certain other soliciting persons covered by its proxy voting advice a limited amount of time to review and provide feedback on the advice before it is disseminated to the business’s clients, with the length of time provided depending on how far in advance of the shareholder meeting the registrant or other soliciting person has filed its definitive proxy statement. This review and feedback period would be followed by a final notice of voting advice, which would include any revisions to such advice made by the proxy voting advice business as a result of the review and feedback period, thereby allowing the registrant and/or soliciting person time to determine whether to respond to the advice before it is delivered to clients of the proxy voting advice business. By providing a standardized opportunity for registrants and other soliciting persons to review proxy voting advice before it is finalized and delivered to clients of proxy voting advice businesses, the Commission believed that these proposed amendments had the potential to greatly improve the overall mix of information available to the businesses’ clients, who use proxy voting advice as an important, often critical, element in formulating their voting decisions.

To address concerns that allowing registrants or other soliciting persons advance access to the proxy voting advice could result in premature release of the advice to unauthorized and unintended parties, the proposed rules specified that proxy voting advice businesses could require that registrants and other soliciting persons agree to keep the information confidential, and refrain from commenting publicly on it, as a condition of receiving the proxy voting advice.

b. Response to Proxy Voting Advice by Registrants and Other Soliciting Persons

In addition to the review and feedback mechanism, the Commission proposed that registrants and certain other soliciting persons also be given the option to request that proxy voting advice businesses include in their proxy voting advice (and on any electronic medium used to distribute the advice) a hyperlink or other analogous electronic medium directing the recipient of the advice to a written statement prepared by the registrant (or other soliciting person, as applicable) that sets forth its views on the advice. As proposed, registrants and other eligible soliciting persons would be able to exercise this right by notifying the proxy voting advice business no later than the expiration of the minimum two-business day period corresponding to the final notice of voting advice. If so requested, the proxy voting advice business would then be required to include in its proxy voting advice the relevant hyperlink or analogous electronic medium directing the client to the registrant’s or other soliciting person’s respective statement regarding the voting advice.

In addition to the other proposed amendments to Rule 14a–2, proposed 17 CFR 240.14a–2(b)(9)(iii) (“Rule 14a–2(b)(9)(iii)”’) was intended to enable those who rely on proxy voting advice,
whether for their own interests or on behalf of shareholders who have entrusted them with proxy voting authority, to have information available to them to effectively assess the recommendations provided by proxy voting advice businesses and thereby make more informed voting decisions.

2. Comments Received

a. Comments on Proposed Review of Proxy Voting Advice by Registrants and Other Soliciting Persons

A number of commentators supported the proposed amendments and asserted that the changes would improve the completeness, accuracy, and reliability of the information underlying the voting advice provided by proxy voting advice businesses. The ability to identify and correct errors has been identified by 95% of Business Advisory Council, Main Street Investors Coalition, Mylan; SCG; Bernard S. Sharfman, Chairman, Advisory Council, and Main Street Investors Coalition (Dec. 20, 2019) ("B. Sharfman I") (asserting that the proposed review process “should be a good thing for shareholders because the back and forth between the company and the proxy advisor . . . should make each party better informed, allowing them to make sure that factual errors and inadequate analytics are not tainting their respective analysis and conclusions in company reports prepared by proxy voting advice businesses.

Several commentators also expressed the opinion that registrants and other soliciting persons had been disadvantaged under the existing system because very few were afforded the opportunity to review proxy voting advice in advance and were given meaningful opportunities to engage with proxy voting advice businesses to remedy any perceived deficiencies they identified in voting advice. Commenters supporting the proposal also stated that even when registrants do receive draft voting advice from proxy voting advice businesses in advance of its publication, they typically are not given sufficient time for a thorough review and response.

In many cases, commenters who supported the opportunity for advance provided by proposed Rule 14a–2(b)(9)(ii) disagreed with the suggestion of other commenters that the proposal would compromise the independence of proxy voting advice businesses, with some pointing to the fact that a number of registrants were already participating in advance review of draft proxy advisors offered by proxy voting advice businesses.

Several commentators were in favor of the proposal offered suggested modifications intended to increase the rule’s efficacy, such as giving registrants more time to review reports than was proposed; explicitly including within the scope of the advanced review process proxy voting advice based on custom policies and mandating that proxy voting advice businesses make certain public disclosures to enhance transparency (e.g., publishing proxy voting advice following shareholder meetings).

While many commentators supported the proposed review and feedback provisions, a substantial number of commentators were opposed.

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255 See, e.g., letters from BIO; BRT; CCMC; CEC; CII IV; Heidrick & Struggles; MFS Investment Management (Feb. 3, 2020) (“MFS Investment”) (stating that publication would facilitate and encourage more public discussions about corporate governance standards and permit more informed feedback about the analyses and conclusions in company reports prepared by proxy voting advice businesses).


257 See, e.g., letters from ACCF (referring to its 2018 paper exploring the analytical and methodological errors in proxy advisors’ recommendations: Are Proxy Advisors Really a Problem?); ACCF II (referring to its 2020 paper, Are Proxy Advisors Still a Problem?); BIO; BRT (“Business Roundtable has long been concerned that proxy advisors produce reports that frequently include errors, factually inaccurate information and incomplete analysis.”); CCMC (citing “frequent and significant errors in analysis and methodology” and a “high incidence of factual and analytical errors in proxy advisor reports.”); CEC; CII IV ("The proposed rule to allow review of proxy voting advice would help address one of the biggest flaws of the current proxy advice system, which is the tendency of proxy advisory firms to make egregious errors in vote recommendations.”); ExconMobil; Garmin; NAM (asserting that “Proxy firm reports and recommendation process of errors and misleading statements”); NAREIT; Nasdaq; ("Factual errors have . . . been identified by 95% of Business Roundtable members and ‘all raise concerns regarding the integrity of the proxy advice firms internal fact-collection and analysis processes’ . . . The ability to identify and correct errors is crucial for accuracy and accountability.”); NIRI; SCG;
such commenters argued that there was an absence of compelling evidence of
frequent errors or significant
deficiencies in proxy voting advice to
warrant such a requirement.265
Moreover, commenters emphasized that the clients of proxy voting advice
businesses generally have been satisfied
with the quality of the advice they
receive.266 In support of this view,
commenters pointed to the absence of
complaints from clients of proxy voting
advice businesses, as distinguished from
the large volume of complaints from
registrants and their advocates.267

Commenters opposing the proposal also expressed their concern
that requiring advance review of proxy
voting advice by registrants would confer
an unfair advantage to company
management in disputed proxy
matters268 and would compromise the
ability of proxy voting advice businesses
to provide disinterested, independent advice.269 Several such commenters
stated that giving registrants the priority
to review voting advice before the
clients of proxy voting advice
businesses was incompatible with the
Commission’s own published views,270
as well as the principle behind FINRA
Rule 2241, which governs conflicts of
interest in connection with the
publication of equity research reports
and public appearances by research
analysts.271

Some commenters were also
concerned that the right of advance
review would increase the risk of
insider trading of material, non-public
information272 and, more generally,
expressed doubts about the effectiveness
of the proposal’s framework for
safeguarding the confidentiality of
materials provided by proxy voting
advice businesses to registrants.273

Along these lines, some commenters
asked for clarification about how the
proposed confidentiality provision
would work in practice,274 and others
suggested ways the provision and its
implementation could be improved,
including by reconsidering the duration
of confidentiality and setting specific
standardized terms.275

A substantial number of commenters
opposed the proposed review and
feedback process on the grounds that it
would significantly impede the ability
of proxy voting advice businesses to
deliver timely and confidential advice
to their clients276 and, as a
consequence, would weaken the ability
of their clients to thoughtfully consider
the advice and make informed
decisions.277 Many such commenters
were doubtful that the proposed rules
governing the advance review and
feedback of proxy advice was a viable
framework278 and expressed concern

268 See, e.g., letters from Olshan LLP; PRII (asserting that the proposal “biases advice towards favoring managers, reducing the accuracy and independence of proxy voting advice,” because it imposes costs on those who oppose management opposers); SES (expressing concern regarding the possibility that the right of advance review creates information asymmetries favoring registrants).

269 See, e.g., letters from AFL-CIO II; AllianceBernstein; As You Sow II ("The Commission has failed to evidence any problem with the current state of affairs."); Better Markets; BMO; Bricklayers; CalPERS; CalSTRS; CFA Institute I; CII II (“The paucity of evidence of pervasive factual errors by proxy advisors suggests that, in fact, no regulatory intervention is necessary…IAIA; Glass Lewis II; Michael W. Frerichs, Illinois State Treasurer (Jan. 16, 2020) (“Illinois Treasurer”); ISS; NYC Comptroller II; Paulding; Securities

270 See, e.g., letters from BMO; New York Comptroller II; Sanford Lewis, Director, Shareholder Rights Group (Feb. 3, 2020) (“Shareholder Rights II”), referring to Communications Among Shareholders Adopting
Release at 48279. In that release, the Commission stated: “A regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment, particularly where no proxy authority is being solicited by such persons. This is especially true where such intrusion is not necessary to achieve the goals of the federal securities laws.” [48279]

271 See, e.g., letters from AFL-CIO II; As You Sow II; BMO; Boston Trust; CII IV; NYC Comptroller; New York Comptroller II; PIAC II; TRP.

272 See, e.g., letters from CII IV; ISS, New York Comptroller II; Sanford Lewis, Director, Shareholder Rights Group (Feb. 3, 2020) (“Shareholder Rights II”), referring to Communications Among Shareholders Adopting
Release at 48279. In that release, the Commission stated: “A regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment, particularly where no proxy authority is being solicited by such persons. This is especially true where such intrusion is not necessary to achieve the goals of the federal securities laws.” [48279]

273 See, e.g., letters from AFL-CIO II; As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

274 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

275 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

276 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

277 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

278 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

279 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

280 See, e.g., letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

281 See, e.g., letters from CII IV; ISS.
that it would create numerous logistical and practical challenges that would be highly disruptive to the proxy voting system.\textsuperscript{279} Commenters also noted the likelihood of significant costs associated with the proposal that would be incurred by proxy voting advice businesses, which many asserted would ultimately be borne by the businesses’ clients.\textsuperscript{280}

In addition to addressing practical challenges of the review and feedback process, commenters identified a number of potential unintended consequences that might result,\textsuperscript{281} including diminished competition among proxy voting advice businesses,\textsuperscript{282} limitation of market choice for consumers of proxy voting advice,\textsuperscript{283} reduction in shareholder advisory firms’ advice, and thus its overall value to funds and their shareholders’); Interfaith Center II; TRP (among other criticisms, that the review and feedback process would be logistically impracticable and “unworkable within the current time constraints of the intensely seasonal proxy voting cycle”); CFA Institute I; CII IV; ISS; MFA & AIMA; New York Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark B. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jeff Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) (“MFA & AIMA”).

\textsuperscript{280} See, e.g., letters from 62 Professors; AFL-CIO II, Baillie Gifford; BMO; Bricklayers; CalPERS; CFA Institute I; CII IV; ISS; ICI; MFS Investment; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark B. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jeff Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) (“MFA & AIMA”).

\textsuperscript{281} See, e.g., letters from 62 Professors; AFL-CIO II, Frans Steegull (Feb. 2, 2020) (“Alliance”); As You Sow II; BMO, Bricklayers; CalPERS, CFA Institute I; CII IV; Shaw; S&P; Prof. Sergakis; TIAA.

\textsuperscript{282} See, e.g., letters from 62 Professors; AFL-CIO II, Frans Steegull (Feb. 2, 2020) (“Alliance”); As You Sow II; BMO, Bricklayers; CalPERS, CFA Institute I; CII IV; Shaw; S&P; Prof. Sergakis; TIAA.

\textsuperscript{283} See, e.g., letters from 62 Professors; AFL-CIO II, Baillie Gifford; BMO; Bricklayers; CalPERS; CFA Institute I; CII IV; ISS; ICI; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark B. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jeff Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) (“MFA & AIMA”).

\textsuperscript{284} See, e.g., letters from 62 Professors; AFL-CIO II, Baillie Gifford; BMO; Bricklayers; CalPERS, CFA Institute I; CII IV; ISS; ICI; MFS Investment; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark B. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jeff Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) (“MFA & AIMA”).

\textsuperscript{285} See, e.g., letters from CII IV; Olshan LLP (providing detailed reasons why the proposals would be challenging in proxy contests).

\textsuperscript{286} See, e.g., letters from 62 Professors; AFL-CIO II, Baillie Gifford; BMO; Bricklayers; CalPERS, CFA Institute I; CII IV; ISS; ICI; MFS Investment; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark B. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jeff Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) (“MFA & AIMA”).

\textsuperscript{287} See, e.g., letters from CII IV; Olshan LLP (providing detailed reasons why the proposals would be challenging in proxy contests).

\textsuperscript{288} See, e.g., letters from 62 Professors; AFL-CIO II, Baillie Gifford; BMO; Bricklayers; CalPERS, CFA Institute I; CII IV; ISS; ICI; MFS Investment; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark B. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jeff Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) (“MFA & AIMA”).
precise understanding of which persons would be subject to the rule.297 As an alternative to the proposed framework for review and feedback, which they viewed as too rigid and prescriptive, some commenters urged the Commission to consider a more flexible, principles-based, and less intrusive solution.298 One commenter noted that many of the practical concerns it expressed in its letter regarding the proposed review and feedback mechanism “could be addressed by moving to a principles-based rule and using Commission or Staff guidance to ensure that the mechanisms are being administered in a fair and efficient manner.”299 Several commenters also pointed out that there already were existing mechanisms in place sufficient to address the concerns raised in the Proposing Release, including existing proxy voting advice business programs and policies for registrants to provide feedback,300 antifraud liability under Rule 14a–9,301 and “counter-speech” measures for registrants (such as filing additional proxy soliciting materials).302

b. Comments on Proposed Response to Proxy Voting Advice by Registrants and Other Soliciting Persons

A number of commenters supported the proposal as a means to improve the overall mix of information available to investors.303 Commenters argued that registrants do not have an effective and timely method for conveying their views and assessments about proxy voting advice to clients of proxy voting advice businesses before many clients vote in reliance on such advice.304 Other commenters, however, opposed the proposal.305 A number of these commenters raised concerns about costs their clients’ views via proxy statements and other communications with registrants that are easily accessible should they be needed. Giving companies the opportunity for additional participation in the recommendations of proxy advisors would detract rather than contribute to, the objectivity of those recommendations.”; Segal Marco II; Seven Corners; Shareholder Rights II. See also IAC Recommendation.

303 See, e.g., letters from AFL–CIO; BIO; Michele Neillandbach, Director of Strategic Initiatives, Bipartisan Policy Center (Feb. 3, 2020) (“BPC”) (stating that the hyperlink is a cost-effective way to provide more information to investors), BRT; CEC (“The Commission’s proposed changes ensure investors will have a full picture of the information from which they can then make an informed, properly-specific voting decision.”); CCMC; CEC; GPC; Ken Anaya (noting that “timely access to both of these viewpoints [in the proxy voting advice and the registrant’s response to the advice] each proxy season is essential to make informed decisions at minimal cost.”); FedEx; GM; Nam; Nareit; Nasdaq (noting its belief that the hyperlink would improve the accuracy of proxy voting advice and the overall mix of information available to investors, particularly in light of the lack of a requirement in the proposed rules that proxy voting advice businesses revise their recommendations (based on registrant feedback)); NIRI (“Shareholders will be better informed as a result of the inclusion of [the registrant’s] response. Doing so will result in greater transparency in the proxy voting process in the following investor voting to see both sides of the issue . . .”). SCG (asserting that “factual errors have frequently been found after the voting recommendation has been disseminated” and that “the impact of additional proxy materials can be limited”); TechNet.

304 See, e.g., letters from BRT; CEC (“The problems facing issuers and the wider market occur due to the extreme difficulty in engaging with proxy advisory firms during the proxy season and the immediate and near irrecoverable impact the issuance of the proxy report has on voting results”); Charter; Exxomob (“Timely access to both of these viewpoints during the proxy season is critical for investors to make informed decisions at minimal cost. Our experience is that supplemental proxy materials filed with the SEC after the release of the proxy advisors’ reports, which are intended to supplement such reports, are ineffective.”). See, e.g., letters from AFL–CIO; CII IV; Elliott I; Glass Lewis II; ISS; Lars Dijkstra, Chief Investment Officer, Investment Governance, Responsible Investment Advisor, Kempen Capital Management (Jan. 6, 2020) (“Kempen”) (asserting that such requirement would be duplicative of the information already provided in company proxy statements and meeting notices, adding burden without additional value); New York Comptroller II; Ohio Public Retirement; PERA; PRI II; Public Retirement Systems; ValueEdge III.

305 See, e.g., letter from CII IV (arguing that the proposed requirement would delay the timely receipt of proxy voting advice because proxy voting advice businesses will need to coordination timing of the filing of supplementary proxy materials with registrants and that it would increase the issuers’ direct costs (e.g., costs to include a hyperlink in reports), which would likely be passed on to clients and their beneficiaries).

306 See, e.g., letter from AFL–CIO II; CII IV; CIRCA; Elliott I; Glass Lewis II (characterizing the proposed requirement for a proxy voting advice business to publish a registrant’s response to proxy voting advice in the form of a hyperlink as compelled speech and citing to legal precedent for the proposition that compelling a party to publish or otherwise provide access to speech with which the party may disagree violates the First Amendment); ISS (“Supreme Court precedent is clear that the government may not ‘co-opt’ a person’s speech ‘to deliver [a] message’ from someone else.”); New York Comptroller II. We discuss our response to certain Constitutional objections to the proposed amendments in Section II.C.3.d. infra

307 See, e.g., letters from BIO; Exxomob; Nasdaq; CII IV; CFA Institute II; Hermes; ISS.

308 See, e.g., letter from BIO.
submission of votes in instances where companies respond to a proxy voting advice business’s adverse voting recommendation, along the lines of the alternative described in the Proposal.314

Some commenters who objected to the proposal nevertheless recommended changes should the Commission adopt a response mechanism. Several such commenters encouraged the Commission to codify the view that a proxy voting advice business will not be held liable for the content of a registrant’s response, whether provided as a hyperlink or included in the proxy statement in its entirety.315 Additional suggestions included setting reasonable guidelines and limitations on the content of a registrant’s response,316 requiring that registrants provide their hyperlink to the proxy voting advice business before the end of the review period (not just request that it be included) to ensure that the hyperlink is included in a timely manner,317 requiring that the hyperlink be active when provided,318 and permitting proxy voting advice businesses to require registrants to indemnify them for any loss or claim arising out of the hyperlinked content, its transmission, or use.319

3. Final Amendments

a. Overview

Based on commenter feedback, we are adopting amendments to Rule 14a–2(b) that we believe achieve the important objectives of the proposal but are modified in a number of respects to do so in a less prescriptive, more principles-based manner. We recognize the practical challenges faced by market participants—investors, registrants, investment advisers, proxy voting advice businesses, and others—to participate in, and fulfill their respective obligations in respect of, the proxy process. To varying extents, market participants must convey, assimilate, and give thoughtful consideration to relevant information from various parties on a potentially wide range of topics in what is generally viewed as a short time frame. In light of this, we believe a more principles-based approach is appropriate.

As reflected in the large number of public comments received, there is a wide range of opinions and competing views about the most effective way to ensure that market participants, including users of proxy voting advice, have access to adequate information when making their voting decisions. Although some commenters argued that there was insufficient evidence of inaccuracies or other problems with proxy voting advice to justify regulation, and asserted that clients of proxy voting advice businesses are satisfied with the quality of the advice they receive, the proposed amendments were not motivated solely by the Commission’s interest in the factual accuracy of proxy voting advice. As we explained in the Proposing Release, even where proxy voting advice is not adverse to the registrant’s recommendation or where there are no errors in the advice, facilitating investor access to enhanced discussion of proxy voting matters contributes to more informed proxy voting decisions.320 Indeed, the principle that more complete and robust information and discussion leads to more informed investor decision-making, and therefore results in choices more closely aligned with investors’ interests, has shaped our federal securities laws since their inception and is a principal factor in the Commission’s adoption of these amendments. Regardless of the incidence of errors in proxy voting advice, we believe it is appropriate to adopt reasonable measures designed to promote the reliability and completeness of information available to investors and those acting on their behalf at the time they make voting determinations. In particular, we reiterate the far-reaching implications that proxy voting advice can have in the market 321 and accordingly continue to believe that measured changes designed to facilitate more complete dialogue and information sharing among proxy voting advice businesses, their clients, and registrants would improve the proxy voting system, and ultimately lead to more informed decision-making, to the benefit of all participants, including shareholders that do not use proxy voting advice and yet may be affected by the recommendations of proxy voting advice businesses. We also believe that such measured changes, while not an exact substitution, would more closely approximate the discussion that could occur at a meeting with physical attendance and participation by shareholders and other parties. We therefore believe that ensuring that registrants have timely notice of proxy voting advice and that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of any written response by registrants to that advice—in a timely manner—will increase confidence across participants in the proxy system that clients of proxy voting advice businesses, whether those clients are investors or are acting on behalf of investors, have timely access to transparent, accurate, and complete information material to their voting decisions.

The Commission is aware of the risk that introducing new rules into a complex system like proxy voting, which has evolved over many years in response to changes in the marketplace as well as the interests and needs of market participants, could inadvertently disrupt the system and impose unnecessary costs if not carefully calibrated. For example, we understand the timing pressures and logistical challenges faced by shareholders, investment advisers, registrants, and, as a result, proxy voting advice businesses and their clients, particularly during the peak of proxy season.322 We also acknowledge the concerns expressed by a number of commenters that the adoption of an overly prescriptive framework governing aspects of the proxy voting advice system could, depending on various facts and circumstances, impede the ability of proxy voting advice businesses to provide their clients with timely voting advice.323 Ultimately, we are guided by the principle that informed decision-making by shareholders is the foundation on which the legitimacy of the proxy voting system rests324 and believe that a well-functioning proxy system benefits from the ability of clients of proxy voting advice businesses to obtain more complete information on which to base their voting decisions.325

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314 See, e.g., letters from BFO (“Accordingly, [we] support measures that would increase the likelihood that the registrant’s statement is taken into account, such as disabling the auto-submission of votes when a registrant has submitted a response, or disabling auto-submission unless the client accesses the registrant’s response or otherwise confirms the pre-populated voting choices.”); BRT: CGC; ExxonMobil (asserting that the failure to address automatic submissions would render the proposed rules ineffective, with “limited practical impact.”); NAM; Nareit; SCC II.

315 See, e.g., letters from Baillie Gifford; CII IV; Glass Lewis II; ISS.

316 See, e.g., letter from Glass Lewis II.

317 Id.

318 Id.

319 Id.

320 See Proposing Release at 66530.

321 See supra notes 51–53 and accompanying text.

322 See Proposing Release at 52, n. 134.

323 See, e.g., letters from Baillie Gifford; Canadian Gov. Coal; CII IV; Glass Lewis II; ISS; Prof. Sergakis.

324 See supra note 2–5 and accompanying text.

325 This is consistent with the Commission’s views regarding steps an investment adviser could take when it retains a proxy voting advice business and it becomes aware of potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy voting advice business’s analysis that may materially affect one or more of the investment adviser’s voting
As noted above, some commenters asserted that certain existing mechanisms in the proxy system suffice to address the concerns raised in the Proposing Release and obviate the need for the proposed rules. Those mechanisms include proxy voting advice businesses’ existing programs and policies for registrants to provide feedback, “counter-speech” measures already available to registrants (e.g., filing supplemental proxy materials), and antifraud liability under Rule 14a–9. Contrary to the views of those commenters, we do not believe that those mechanisms, as currently implemented, suffice to achieve our goal of ensuring that clients of proxy voting advice businesses have timely access to a more complete mix of relevant information and exchange of views. Although it is encouraging that some proxy voting advice businesses have programs in place pursuant to which some registrants have the opportunity to review and provide feedback on or responses to proxy voting advice, those programs have not been universally adopted by proxy voting advice businesses and do not uniformly provide registrants (and their investors) with the same opportunities for (and benefits of) review, feedback, and response.

As to “counter-speech” measures, under current market practices registrants are not systematically informed of proxy voting advice in a timely manner such that they can provide investors a response to such advice, let alone a response sufficiently in advance of the relevant meeting to allow investors to consider the response prior to casting their vote. In addition, while the potential for liability under Rule 14a–9 helps to ensure that proxy voting advice is not materially false or misleading, it does not address the need for investors to have timely access to transparent, accurate, and complete information—including any written response by the registrant to the advice—that is material to their voting determinations.

As we explained in the Proposing Release, existing mechanisms, it can be difficult to ensure that those making voting decisions have timely access to materially complete information prior to voting. Without notice of the proxy voting advice business’s recommendations, registrants are often unable to provide a response prior to votes being cast. Also, given the high incidence of voting that takes place very shortly after a proxy voting advice business’s advice is distributed to its clients, without a mechanism by which clients can reasonably be expected to become aware of any response in a timely manner (as they and other investors would if the discussion were taking place at a meeting where shareholders are physically attending and participating), votes may be cast on less complete information. Because proxy voting advice businesses have control over the timing of the dissemination of their proxy voting advice, we believe they are the best-positioned parties in the proxy system to both (1) make their proxy voting advice available to registrants and (2) provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written response to their proxy voting advice in a timely manner.

Although we do not believe the existing voluntary forms of outreach to registrants and other market participants discussed above are alone sufficient, we have carefully considered the views of a number of commenters, including the two largest proxy voting advice businesses. Those commenters indicated that a more principles-based approach would be appropriate and one of whom specifically indicated that such an approach would achieve the Commission’s goals while avoiding many of the complexities and practical concerns arising from the approach taken in the proposal. We agree and are therefore adopting amendments that articulate a set of principles, distilled from the proposed rules, upon which a proxy voting advice business may design its own policies and procedures.

We believe this approach will provide proxy voting advice businesses the flexibility to satisfy their compliance obligations in a customized and cost-effective manner and avoid exacerbating the challenges posed by timing and logistical constraints, while achieving the objective of ensuring that proxy voting advice businesses’ clients have timely access to more transparent, accurate, and complete information upon which to base voting decisions. We believe such an approach addresses a number of concerns raised by commenters, is better equipped to fit the needs of participants in the proxy voting process, and will be adaptable as circumstances change.

b. Policies and Procedures To Facilitate Informed Decision-Making By Clients of Proxy Voting Advice Businesses [Rule 14a–2(b)(9)(ii)]

Consistent with the discussion above, we are adopting new Rule 14a–2(b)(9)(ii) to require, as a separate condition to the availability of the exemptions in Rules 14a–2(b)(1) and (b)(3), that a proxy voting advice business adopt and publicly disclose

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9.327 Contrary to the views of those commenters, we believe that it is appropriate to clarify the type of proxy voting advice that the new rules are intended to address and accordingly scope in businesses that provide such advice, rather than basing application of the rules on the types of proxy voting advice businesses that currently provide such services. We believe this avoids inadvertently scoping in other services that such businesses may provide, and also provides flexibility for the rule to address future
written policies and procedures reasonably designed to ensure that:
(A) 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 voting advice business’s clients; 335

(B) The proxy voting advice business 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 that are the subject of such advice, in a timely manner before the shareholder meeting (or, if no meeting, before the votes, consents, or authorizations may be used to effect the proposed action). 336

While we appreciate the input of commenters that recommended we adopt the more prescriptive requirements of the proposed rule with modifications, 337 we believe that the objectives of the rule are better achieved through a principles-based requirement that is firmly rooted in our historic and proven disclosure framework and will provide proxy voting advice businesses with the ability to tailor their policies and procedures to ensure compliance with the requirements on a basis that is efficient and best serves the evolving needs of their clients and the practical realities of their individual business models.

i. Notice to Registrants and Safe Harbor

Paragraph (A) of Rule 14a–2(b)(9)(ii) reflects the Commission’s judgment that effective engagement between proxy voting advice businesses and registrants, in which registrants are timely informed of proxy voting advice that bears on the solicitation of their shareholders, will further the goal of ensuring that proxy voting advice businesses’ clients have more complete, accurate, and transparent information to consider when making their voting decisions. This will, by extension, benefit the shareholders on whose behalf those clients may be voting.

As adopted, 17 CFR 240.a–2(b)(9)(ii)(A) (“Rule 14a–2(b)(9)(ii)(A)” does not dictate the manner or specific timing in which proxy voting advice businesses interact with registrants, and instead leaves it within the discretion of the proxy voting advice business to choose how best to implement the principles embodied in the rule and incorporate them into the business’s policies and procedures. The rule does not require that proxy voting advice businesses provide registrants or other soliciting persons with the opportunity to review proxy voting advice in advance of its dissemination to the businesses’ clients, although providing registrants with the opportunity to review their proxy voting advice in advance would satisfy the principle and is encouraged to the extent feasible. 339 The rule requires that proxy voting advice businesses must

337 See infra Section II.C.3.c. for a discussion of Rules 14a–2(b)(9)(v) and (vi), which exclude certain types of proxy voting advice from the application of Rule 14a–2(b)(9)(ii).
339 See supra note 7 for the definition of “proxy voting advice” as used in this release.
340 The requirement that such policies and procedures be “publicly” disclosed would be satisfied if, for example, they were publicly available on a proxy voting advice business’s website. This is consistent with the approach that at least some proxy voting advice businesses are currently taking with respect to the opportunities they provide registrants to review their proxy voting advice. See, e.g., Glass Lewis’ Report Feedback Statement (last visited June 11, 2020), available at https://www.glasslewis.com/report-feedback-statement/; ISS, ISS Draft Review Process for U.S. Issuers (last visited June 11, 2020), available at https://www.issgovernance.com/iss-draft-review-process-u-s-issuers/.
341 See supra note 7 for the definition of “proxy voting advice” as used in this release.
342 Rule 14a–2(b)(9)(ii)(A). The goal of the principle is to provide registrants with enough time to respond to the proxy voting advice, should they choose to, sufficiently in advance of investors casting their final votes. Practically speaking, the most efficient way for proxy voting advice businesses to achieve this goal is to disseminate the relevant proxy voting advice to shareholders, who are then free to respond to the proxy voting advice at their convenience (rather than providing proxy voting advice businesses the opportunity to respond to such reports) either at the same time or before they disseminate such reports to their clients. We recognize that such flexibilities, including the assurance of compliance by proxy voting advice businesses with Rule 14a–2(b)(9)(ii).
such a requirement could be unduly burdensome given the timing constraints of the proxy process. We believe the final rules continue to advance the Commission’s interest in improving the mix of information available to shareholders in a manner that is compatible with the complex and time-sensitive proxy voting advice infrastructure that currently exists and, in particular, the proxy voting advice businesses that many shareholders or those acting on their behalf use in connection with proxy voting, including meeting their voting obligations to investors.

In addition, paragraph (iii) of Rule 14a-2(b)(9) includes a non-exclusive safe harbor provision that, if followed, will give assurance to a proxy voting advice business that it has met the principles-based requirement of new Rule 14a-2(b)(9)(iii)(A). In accordance with this safe harbor, a proxy voting advice business will be deemed to satisfy Rule 14a-2(b)(9)(iii)(A) if it has written policies and procedures that are reasonably designed to provide registrants with a copy of its proxy voting advice, at no charge, no later than the time it is disseminated to the business’s clients. Such policies and procedures may include conditions requiring that such registrants have:

(A) Filed a definitive proxy statement at least 40 calendar days before the shareholder meeting; and

(B) Expressedly acknowledged that they will only use the proxy voting advice for their internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant’s employees or advisers.

Under this safe harbor, the proxy voting advice business may structure its written policy however it wishes so long as the policy has been reasonably designed to provide any registrant that meets the conditions of (A) and (B) above with a copy of the business’s proxy voting advice with respect to that registrant at least concurrently with the delivery of such advice to its clients.

We believe the 40 calendar-day aspect of the safe harbor affords the proxy voting advice business a reasonable amount of time to provide the advisory materials to registrants, without adversely affecting the business’s ability to provide timely voting advice to its clients. Proxy voting advice businesses perform much of the work related to their voting advice only after the filing of the definitive proxy statements describing the matters presented for a proxy vote and are subject to time pressure to deliver their research and analysis to their clients sufficiently in advance of the shareholder meeting.

Accordingly, we do not believe that it would be practicable to impose additional administrative and logistical burdens on proxy voting advice businesses in cases in which registrants’ definitive proxy statements are filed closer to the date of the shareholder meeting. However, if they wish to do so, proxy voting advice businesses may structure their policies to accommodate registrants that may file less than 40 calendar days before the shareholder meeting and remain within the safe harbor.

The concurrent dissemination of proxy voting advice to clients and registrants specified in the safe harbor addresses concerns expressed by commenters that the proposed review mechanism, which would have allowed registrants to review and provide feedback on voting advice before distribution to the clients of their proxy voting advice businesses, could have undermined the ability of proxy voting advice businesses to provide impartial advice to their clients, increased the risk of insider trading of material non-public information, and impinged on proxy voting advice businesses’ rights of free speech.

As discussed above, several commenters objected on the grounds that permitting registrants to review and comment on draft proxy voting advice in advance of a proxy voting advice business’s distribution to clients would interfere in shareholders’ communications with their advisors on matters subject to a vote.

In particular, some commenters argued that the review process, as proposed, gave preferential treatment to registrants over a proxy voting advice business’s

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347 Under the terms of the safe harbor, registrants are not required to reimburse proxy voting advice businesses for the cost of providing a copy of the proxy voting advice. See Rule 14a-2(b)(9)(iii). While some commenters favored a requirement that registrants reimburse proxy voting advice businesses for reasonable expenses associated with the proposed review and feedback period (see letters from CII IV; New York Comptroller II), others asserted that proxy voting advice businesses should not be able to seek reimbursement from registrants for the costs to provide their reports (see letters from Exxon Mobil; GM; NAM; SCG). For purposes of the safe harbor, we believe that the benefit to investors of more timely, complete, and reliable information upon which to make informed voting decisions should not be lessened by making registrants’ ability to provide voting advice dependent on the registrant’s willingness to pay for it. See infra note 412 for our discussion of how the final rules address certain comments we received on the proposed requirement concerning the taking of payments in excess of the customary range.

348 Rule 14a-2(b)(9)(iii)(A).

349 See e.g., letters from CII IV; Glass Lewis II; ISS (describing the timing and processes involved in the preparation and delivery of their proxy voting advice to clients). See also Proposing Release at 66531, n. 119.

350 Based on the information we received from commenters, it is our understanding that 40 calendar days prior to the shareholder meeting is well within the customary range when definitive proxy statements are filed. See e.g., letters from CII IV; Glass Lewis II; ISS. By comparison, we note that the Commission’s proposal would have required proxy voting advice businesses to provide registrants with an opportunity for advance review and feedback of the proxy voting advice if the registrant filed its definitive proxy statement at least 25 calendar days before the shareholder meeting. See proposed Rule 14a-2(b)(9)(iii)(A); Proposing Release at 66531. We also note that such a period would exceed the minimum number of days that some proxy voting advice businesses currently require that registrants file their definitive proxy statements prior to the shareholder meeting in order to review at least a portion of their proxy voting advice in advance of its dissemination. See, e.g., Glass Lewis, Issuer Data Report (last visited June 11, 2020), available at https://www.glasslewis.com/issuer-data-report/ (noting that in order for a registrant to review an issuer data report in advance of the proxy voting advice being disseminated to clients, registrants must “disclose their meeting documents at least 30 days in advance of their meeting date”); ISS, ISS Draft Review Process for U.S. Issuers (last visited June 11, 2020), available at www.issgovernance.com/iss-draft-review-process-u-s-issuers/ (“To ensure timely delivery of our analyses to our clients, we cannot provide a draft to any company that files its definitive proxy less than 30 days before its meeting.”).

351 See supra note 269. We believe that the concurrent dissemination of proxy voting advice to clients and registrants pursuant to the safe harbor will achieve the objectives of this rulemaking and address commenters’ concerns regarding a registrant’s practical ability to review, consider, and respond to proxy voting advice. See supra note 342.

352 See supra note 272. Proxy voting advice may, depending on the facts and circumstances, constitute material, non-public information. We expect proxy voting advice businesses, their clients, and registrants receiving non-public information in this process to take reasonable measures to safeguard any material, non-public information in their possession by, for example, adopting and implementing effective policies and procedures to ensure that its use and dissemination is consistent with applicable law. See also infra note 400; Institutional S’holder Servs. Inc., Release No. IA–3611, 106 SEC. Docket 1681, 2013 WL 11113059, at *5 (May 23, 2013) (“In this case, ISS violated Section 20A of [the Advisers Act] because it failed to establish and enforce policies and procedures reasonably designed to prevent the misuse of ISS’s shareholder advisory clients’ material, nonpublic proxy voting information.”).

353 See supra note 288.

354 See supra notes 276–277.
own clients and would tend to promote management’s interests because it allowed registrants to influence the content of advice at a critical stage of its production without granting similar access to shareholders.355

Several commenters who were opposed to the concept of advance review suggested concurrent review as a preferable alternative.336 In the view of such commenters, a concurrent review would provide registrants with access to proxy voting advice, but it would be on an equal footing with the clients of proxy voting advice businesses and therefore would avoid many of the potential adverse consequences that commenters associated with mandating an opportunity for registrants’ advance review.357 We agree with this approach and believe that, for example, the receipt of a copy of proxy voting advice by a registrant who is the subject of such advice no later than the date upon which it is distributed to the proxy voting advice business’s clients would bring about many of the same benefits for which the proposed concurrent review was intended, particularly in conjunction with (1) a registrant’s ability to file additional soliciting materials to communicate their views regarding the advice to shareholders and (2) the new requirement, described below,358 that proxy voting advice businesses adopt written policies and procedures reasonably designed to ensure that they provide clients with a mechanism by which they can become aware of a registrant’s statements of its views about such advice in a timely manner.

Under the proposed rules, a proxy voting advice business would have been able to require registrants to enter into confidentiality agreements for materials provided during the proposed review and feedback period as a condition of receiving the proxy voting advice on terms “no more restrictive” than similar types of confidentiality agreements the business has with its clients, which would cease to apply once the business released its proxy reports to clients.359 Some commenters suggested this formulation would be unworkable in practice because the confidentiality agreements used with clients were not comparable and therefore would not be a suitable template.360 In addition, commenters objected to the mandated cessation of the registrant’s confidentiality agreement, as the risk of harm that would be suffered by the proxy voting advice business due to misuse of its confidential information could continue well into the future.361 Moreover, a number of commenters expressed concern that requiring confidentiality agreements between proxy voting advice businesses and registrants would necessitate the parties’ negotiation over contractual terms, an additional complication that could mire the proposed review and feedback process, and therefore the timely provision of voting advice to shareholders, in unmanageable delays.362 Some commenters also noted that such negotiation would be costly.363

We believe that shifting to a principles-based requirement, which allows the report to be provided to registrants at the same time it is provided to clients, should eliminate or mitigate many of the concerns expressed by these commenters. We believe that negotiating a formal confidentiality agreement may not be necessary in all circumstances. Therefore, it is appropriate to make clear that a proxy voting advice business may receive assurances from a registrant regarding the use of the proxy voting advice through less prescriptive means. Accordingly, paragraph (B) of the safe harbor in Rule 14a–2(b)(9)(ii) permits proxy voting advice businesses to include in their policies and procedures conditions requiring registrants to limit their use of the advice in order to receive a copy of the proxy voting advice. Such written policies and procedures may, but are not required to, specify that registrants must first acknowledge that their use of the proxy voting advice is restricted to the registrant’s own internal purposes and/or in connection with the solicitation and will not be published or otherwise shared except with the registrants’ employees or advisers.364 Such acknowledgment could take a variety of forms at the discretion of the proxy voting advice business, including with respect to the duration of the acknowledgment. For example, a policy under the safe harbor could specify that the acknowledgment can or must be in the form of a written representation or an oral acknowledgement, or the policy could prescribe that a registrant must check a box or provide another electronic means of confirming that the registrant agrees to standardized terms of service before the materials could be accessed. To qualify for the safe harbor, the terms of the acknowledgment could not be more restrictive than those set forth in paragraph (B); however, if a proxy voting advice business wishes to impose more tailored or restrictive conditions, it could do so outside of the safe harbor, provided the policies and procedures do not unreasonably inhibit timely notice to the registrant consistent with the principles-based requirements of Rule 14a–2(b)(9)(ii)(A).

We also note that, unlike the proposal, the safe harbor does not mandate the provision of draft proxy voting advice to registrants before dissemination to clients of the proxy voting advice business, which, as commenters noted, poses a higher risk of unintentional or unauthorized release of the information and its potential misuse.365 Instead, compliance with the safe harbor requires only that the proxy voting advice business provide its voting advice to registrants no later than the time it is released to the business’s clients. A proxy voting advice business that has a policy in place that satisfies the principles-based requirements of Rule 14a–2(b)(9)(ii)(A), such as a policy elucidated in, or that is consistent with, the safe harbor in Rule 14a–2(b)(9)(ii), will be under no obligation to provide its proxy voting advice to registrants that fail to file a definitive proxy statement early enough to meet the 40-day stipulation, or fail to acknowledge the limitations on its use of the voting advice. Moreover, in order to qualify for

355 See supra note 268.
356 See supra note 295.
357 Id.
358 See infra Section II.C.3.b.i.
359 See Note 2 to paragraph (b)(ii) of proposed Rule 14a–2(b)(9); Proposing Release at 66532.
360 See, e.g., letter from SES (asserting that needing to sign individual confidentiality agreements between every issuer and proxy voting advice business would be cumbersome “without any tangible benefit”).
361 See, e.g., letter from Glass Lewis II (recommending that the Commission remove the statement in the proposal that any confidentiality agreement “shall cease to apply once the proxy voting advice business provides its advice to one or more recipients”).
362 See, e.g., letter from Olshan LLP (stating that the proposal significantly underestimates the time and expense of negotiating confidentiality agreements and providing detailed reasons as to why the proposal would be so time consuming and costly).
363 See infra note 613.
364 A registrant’s advisers would include, for example, its attorneys and proxy solicitors.
the safe harbor, the proxy voting advice business’s policy is not required to contemplate that the business repeat the process of providing a copy of its proxy voting advice to registrants if its advice is later revised or updated in light of subsequent events. The safe harbor does not impose any obligation on the proxy voting advice business to provide registrants with additional opportunities to review its proxy voting advice with respect to the same shareholder meeting. In response to concerns raised by commenters, in order to limit the logistical and other burdens imposed on proxy voting advice businesses, as well as to lessen potential uncertainty over questions of compliance, proxy voting advice businesses may, but will not be required to, provide the registrant with additional materials that update or supplement proxy voting advice previously provided.

So long as the proxy voting advice business meets the conditions of the safe harbor in Rule 14a–2(b)(9)(iii), it will be deemed to satisfy Rule 14a–2(b)(9)(iii)(A). Assuming it also satisfies the principles-based requirement in new 17 CFR 240.14a–2(b)(9)(ii)(B) (“Rule 14a–2(b)(9)(ii)(B)”: discussed below and otherwise meets the requirements of Rule 14a–2(b)(9), the proxy voting advice business would be eligible to rely on the exemptions in Rules 14a–2(b)(1) or (3) (subject to the satisfaction of the other conditions of those exemptions).

By adopting this approach, as discussed above, we believe we have addressed the concerns raised by commenters regarding the potential unintended consequences of requiring a proxy voting advice business to engage with a registrant in connection with its proxy voting advice, including those related to timing and the risk of affecting the independence of the advice or diminishing competition in the proxy voting advice business industry.

Specifically, because Rule 14a–2(b)(9)(ii) does not require proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, the rule does not create the risk that such advice would be delayed or that the independence thereof would be tainted as a result of a registrant’s pre-dissemination involvement.

Similarly, because proxy voting advice businesses are not required to adopt policies that would provide notice to, or otherwise require interaction with, registrants until they disseminate advice to their clients, any concerns that commenters had regarding increased marginal costs—and, correspondingly, diminished competition—associated with preparing proxy voting advice as a result of the proposed advance review and feedback process should be alleviated. Commenters also identified potential unintended consequences that could result from a heightened litigation risk that proxy voting advice businesses could face as a result of the proposed rules, which may have been viewed as more significant in circumstances where differing views persisted following engagement with the registrant. As with the other unintended consequences discussed above, this concern is mitigated by the fact that under the principles-based approach we are adopting, proxy voting advice businesses will not be required to give registrants the opportunity to provide feedback on their proxy voting advice before it is disseminated to clients.

It is not a condition of this safe harbor, nor the principles-based requirement, that the proxy voting advice business negotiate or otherwise engage in a dialogue with the registrant, or revise its voting advice in response to any feedback. The proxy voting advice business is free to interact with the registrant to whatever extent and in whatever manner it deems appropriate, provided it has a written policy that satisfies its obligations. Although the Commission encourages cooperation and an open dialogue between the parties to the extent that it facilitates productive efforts to improve the quality of proxy voting advice for the benefit of shareholders, the rule that we are adopting does not prescribe the manner in which the parties conduct themselves in this regard, and leaves the content of proxy voting advice, as well as the specific methods and processes used to produce it, within the proxy voting advice business’s discretion.

As noted above, the safe harbor is intended to provide a proxy voting advice business with a non-exclusive means to meet the requirements of Rule 14a–2(b)(9)(iii)(A). Proxy voting advice businesses may nonetheless choose to structure a policy that, though not within the parameters of the safe harbor, is reasonably designed to ensure that proxy voting advice is made available to registrants at or prior to the time when the advice is disseminated to clients.

We acknowledge that there are different ways that a proxy voting advice business could structure such a policy consistent with the rule, and the safe harbor is not intended to become the de facto means by which by the requirement of Rule 14a–2(b)(9)(iii)(A) may be met.

ii. Mechanism To Become Aware of Registrant’s Response and Safe Harbor

The Commission’s proposal to require that proxy voting advice businesses, at the request of a registrant, include in their voting advice a hyperlink (or other analogous electronic medium) to the registrant’s statement about the voting advice was intended as an efficient and timely means of providing the businesses’ clients with additional information that would assist them in assessing and contextualizing the voting advice. In particular, the inclusion of the hyperlink with the proxy voting advice would have permitted clients, including investment advisers voting shares on behalf of other shareholders, to consider the registrants’ views at the same time as the proxy voting advice

366 For example, if proxy voting advice businesses were required under the safe harbor to redistribute proxy voting advice to registrants as a result of any updates or addenda to the advice, in many cases it might pose a difficult logistical challenge for the businesses to meet their production deadlines, satisfy rapid turn-around times and fulfill their delivery obligations to clients, thereby exacerbating the businesses’ difficulty in meeting an already aggressive timeline so close to the date of the shareholder meeting. In addition, the determination of which kinds of materials would be covered by such a rule could lead to confusion and make administration of the rule unnecessarily complex and time-consuming.

367 See supra notes 276–279 and accompanying text.

368 See supra note 287 and accompanying text. A number of commenters expressed concerns that the proposed advance review and feedback process would conflict with FINRA Rule 2241, which prohibits review of an analyst’s research report by the subject company for purposes other than factual verification. See letters from AFL–CIO II; As You See infra note 530 and accompanying text.

370 Some commenters expressed concern that the proposed advance review mechanism could compromise the ability of proxy voting advice businesses to provide disinterested, independent advice. See, e.g., letters from BIO; BRT; CEC; CCDC; J. Ward; NAM; Nareit; Nasdaq; S&G. As to commenters’ concerns that the proposed advance review mechanism could compromise the ability of proxy voting advice businesses to provide disinterested, independent advice, we note in its current procedures governing registrants’ advance review of its draft proxy analysis, rating, or other research report, ISS states that it retains sole discretion whether to recommend the registrant. See infra note 530 and accompanying text.

371 See supra notes 284, 286 and accompanying text.

372 Proposing Release at 66533.
and before making their voting determinations. As the Commission has noted, although registrants are able under the existing proxy rules to file supplemental proxy materials to respond to proxy voting recommendations that they may know about and to alert investors to any disagreements with such proxy voting advice, the efficacy of these responses may be limited, particularly given the high incidence of voting that takes place very shortly after a proxy voting advice business’s voting advice is released to clients and before such supplemental proxy materials can be filed.\(^\text{373}\)

As with the Commission’s proposed review and response mechanism, however, commenters have raised practical challenges and limitations that the parties would face in implementing processes and systems necessary to comply with the proposed rule’s prescriptive requirements.\(^\text{374}\) Accordingly, we believe that our objectives are better addressed by a principles-based requirement, particularly in light of the complexities and time pressures inherent in the proxy system. By broadly outlining the overarching principles and allowing the proxy voting advice businesses themselves to design a system of compliance best suited to their operations, our aim is to promote adherence to these principles in a flexible and minimally intrusive manner.

Consequently, paragraph (B) of Rule 14a–2(b)(9)(ii) sets forth an additional prescriptive requirement that proxy voting advice businesses must observe in order to avoid itself of the exemptions found in Rules 14a–2(b)(1) and (3). Specifically, a proxy voting advice business must adopt and publicly\(^\text{375}\) disclose written policies and procedures reasonably designed to ensure that it provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written statements about the proxy voting advice in a timely manner\(^\text{376}\) before the shareholder meeting (or, if no meeting, before the vote, consent, or authorization may be used to effect the proposed action).

By shifting to a principles-based requirement, the rule allows the proxy voting advice business to determine its specific manner of compliance, while preserving the Commission’s objective to facilitate the ability of the business’s clients to benefit from more complete information when considering how to vote their proxies. As such, it reflects the Commission’s view that shareholders should have ready access to a more complete mix of information to make informed voting decisions. Rule 14a–2(b)(9)(ii)(B) is thus intended to help ensure that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of and access more complete information, including the input and views of registrants on proxy voting advice, in the compressed time period between when they receive the advice and vote their proxies.

We believe access to the registrant’s views on proxy advice may benefit a proxy voting advice business’s clients regardless of whether the voting recommendation is adverse to the registrant’s recommendation. The registrant’s methodological approach or other perspectives that it believes are relevant to the voting advice.\(^\text{377}\) Or the registrant may wish to emphasize a particular point that the proxy voting advice business may have noted or may not have noted in its advice. In circumstances where the registrant largely or entirely agrees with the proxy voting advice business’s methodology or conclusions, that fact would likely be relevant to and enhance a client’s decision-making.

A number of commenters argued that registrants’ ability to file supplemental proxy materials is sufficient to facilitate informed shareholder voting decisions.\(^\text{378}\) Commenters have indicated, however, that the clients of proxy voting advice businesses often cast their votes before registrants can file such materials.\(^\text{379}\) Rule 14a–2(b)(9)(ii)(B) requires that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware that a registrant has filed such materials about the proxy voting advice in time to consider the materials before they cast their final vote. Due to the existing time constraints that proxy voting advice business clients have identified in their comments to the proposed rule,\(^\text{380}\) the rule will ensure that such clients have an efficient means by which they can reasonably be expected to become aware of additional information that may affect their analysis of the proxy voting advice, and thereby their voting decisions, in the manner that each proxy voting advice business determines is most cost-efficient and best serves its clients.

As with Rule 14a–2(b)(9)(ii)(A), we recognize that proxy voting advice businesses may benefit from greater legal certainty about how to satisfy this general principle. We therefore providing a non-exclusive safe harbor in new 17 CFR 240.14a–2(b)(9)(iv) ("Rule 14a–2(b)(9)(iv)") pursuant to which proxy voting advice businesses will be deemed to satisfy the principle-based requirement of paragraph (ii)(B). To satisfy this safe harbor, a proxy voting advice business must have written policies and procedures reasonably designed to inform clients who have received proxy voting advice about a particular registrant in the event that such registrant notifies the proxy voting advice business that the registrant either intends to file or has filed additional soliciting materials with the Commission setting forth its views.

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\(^\text{372}\) Id. at n.136. As we noted in the Proposing Release, although shareholders have the ability to change their vote at any time prior to a meeting—including as a result of supplemental proxy materials filed by registrants in response to proxy voting advice—to our knowledge, this seldom occurs. Id. at 66530 n.137. It is possible, however, that under the final amendments, as a result of proxy voting advice businesses’ compliance with Rule 14a–2(b)(9)(ii)(B), clients of proxy voting advice businesses will be made aware of a registrant’s response to proxy voting advice and, therefore, more likely to change votes that were cast after receiving such advice.

\(^\text{373}\) See, e.g., letters from CII IV; Glass Lewis II.

\(^\text{374}\) See supra note 340 for an example of how proxy voting advice businesses may satisfy the requirement that such policies and procedures be "publicly" disclosed by a discussion of the reasons why we believe such requirement is important in the context of paragraph (A) of Rule 14a–2(b)(9)(ii)(B). With respect to paragraph (B), it is likely that the clients of proxy voting advice businesses would be provided with such policies and procedures even absent a requirement that they be publicly disclosed. That said, in addition to the ancillary transparency-based benefits discussed

\(^\text{375}\) See supra note 340, we believe that the public disclosure of such policies and procedures will assist potential clients of proxy voting advice businesses in evaluating the service offerings that the various proxy voting advice businesses provide clients with. Similarly, such public disclosure may assist the investors on whose behalf such clients act in evaluating whether any proxy voting decisions made on their behalf are informed by both the relevant proxy voting advice and any registrant response thereto.

\(^\text{376}\) In this context, a proxy voting advice business will have become aware of a registrant’s response to the proxy voting advice in a “timely manner” if such client has sufficient time to consider such response in connection with a vote.

\(^\text{377}\) See, e.g., IAC Recommendation (“The very differences in such judgments [between corporate managers and proxy advisors] are part of the vocation of independent advisors add to the proxy system . . . By advancing their views . . . proxy advisors create meaningful public discussion of such topics. . . .”)

\(^\text{378}\) See, e.g., letters from Public Retirement System; AFL–CIO 2; CII IV; Glass Lewis II; ISS: New York Comptroller I. See also note 373.

\(^\text{379}\) See, e.g., letters from NAREIT, NAM, Exxon Mobil. See also Proposing Release at 53, n. 139.

\(^\text{380}\) See, e.g., letters from ACSLE, BMO; CII VI; Florida Board; Glass Lewis II; Hermes; ICE: New York Comptroller II; Ohio Public Retirement; Olshan LLP; PRI II; Stewart; TIAA; TRF.
regarding such advice.\textsuperscript{381} The safe harbor sets forth two methods by which the proxy voting advice business may provide such notice to its clients. It may either:

(A) Provide notice on its electronic client platform that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available);\textsuperscript{382} or

(B) Provide notice through email or other electronic means that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available).\textsuperscript{383}

The safe harbor in Rule 14a–2(b)(9)(iv) establishes a convenient mechanism by which the clients of a proxy voting advice business can stay informed of, and timely consider, additional information with respect to the proxy voting advice that the registrant believes is material to the shareholders’ voting determination. The safe harbor provides a direct and simple means of alerting clients to the availability of the views of the registrant as they consider the voting advice.

The inclusion of the hyperlink required under Rule 14a–2(b)(9)(iv) would not, by itself, make the proxy voting advice business liable for the legal certainty afforded by the safe harbor in Rule 14a–2(b)(9)(iv), these provisions are not the exclusive means by which such businesses may satisfy the principle-based requirement set forth in Rule 14a–2(b)(9)(iv). Proxy voting advice businesses may instead develop their own policies and procedures outside of the safe harbor that are reasonably designed to ensure that they provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written response to the proxy voting advice in a timely manner. We acknowledge that there are different ways that a proxy voting advice business could structure such a policy consistent with the rule, and the safe harbor is not intended to become the de facto means by which the requirement of Rule 14a–2(b)(9)(ii)(B) may be met.

The proposed rules included a provision that would have excused immaterial or unintentional failures to comply with the conditions of Rule 14a–2(b)(9).\textsuperscript{385} This provision was not included in the final rules.

\textsuperscript{381} If a registrant notifies a proxy voting advice business that the registrant intends to file additional soliciting materials setting forth its views regarding the proxy voting advice business’s advice, then the proxy voting advice business should consider whether, for purposes of complying with this safe harbor requirement, it needs to send two separate notices to the business’s clients: (1) One notice regarding the registrant’s intent to file and (2) another notice regarding the registrant’s actual filing. Depending on the particular facts and circumstances, the first notice may be needed to inform clients of the fact that the registrant may be providing views that could be material to their voting decisions and to allow the clients to determine whether they wish to await these views before submitting their votes, and with the second notice providing the clients with the hyperlink to the registrant’s soliciting material once it is filed on EDGAR. We note that Rule 14a–2(b)(9)(ii)(B), which is a principles-based requirement, gives proxy voting advice businesses the option of formulating alternatives to this approach as long as those alternatives achieve the principle set forth in the rule.

\textsuperscript{382} Rule 14a–2(b)(9)(iv)(A).

\textsuperscript{383} Rule 14a–2(b)(9)(iv)(B).

\textsuperscript{384} As we explained in the Proposing Release, we believe the view is consistent with this framework as a proxy voting advice business likely would not be involved in the preparation of the hyperlinked statement and likely would be including the hyperlink to comply with the requirements of the Rule 14a–2(b)(9)(iv) safe harbor, and not to endorse or approve the content of the statement. Our view also extends to a proxy voting advice business that chooses to satisfy the principle-based requirement of Rule 14a–2(b)(9)(ii)(B) outside of the Rule 14a–2(b)(9)(iv) safe harbor by adopting written policies and procedures that contemplate the delivery of a hyperlink to the registrant’s statement to its clients.

We note that proxy voting advice businesses will retain a significant amount of discretion to formulate their own policies and procedures and dictate the mechanics of notification in ways they believe are most suitable to meet their clients’ needs and compatible with their operations. Specifying the preferred channel by which registrants must notify the proxy voting advice business of supplemental proxy filings, provided they comply with the broad outlines of the safe harbor. As discussed above, although proxy voting advice businesses may prefer the legal certainty afforded by the safe harbor in Rule 14a–2(b)(9)(iv), these provisions are not the exclusive means by which such businesses may satisfy the principle-based requirement set forth in Rule 14a–2(b)(9)(iv)(B). Proxy voting advice businesses may instead develop their own policies and procedures outside of the safe harbor that are reasonably designed to ensure that they provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written response to the proxy voting advice in a timely manner. We acknowledge that there are different ways that a proxy voting advice business could structure such a policy consistent with the rule, and the safe harbor is not intended to become the de facto means by which the requirement of Rule 14a–2(b)(9)(ii)(B) may be met.

The proposed rules included a provision that would have excused immaterial or unintentional failures to comply with the conditions of Rule 14a–2(b)(9). This provision was not included in the final rules.

\textsuperscript{385} See Rule 14a–2(b)(9)(iv)(A).

\textsuperscript{386} See Rule 14a–2(b)(9)(iv)(B).

\textsuperscript{387} The Commission previously issued guidance discussing how the fiduciary duty and rule 206(4)–6 under the Advisers Act relate to an investment adviser’s exercise of voting authority on behalf of clients and also provided examples to help facilitate investment advisers’ compliance with their proxy voting responsibilities. See Commission Guidance on Proxy Voting Responsibilities. We expect that Rule 14a–2(b)(9)(iii)(A) will result in registrants being made aware of recommendations by proxy voting advice businesses in a timeframe that will facilitate in particular the use and review of such advice by investment advisers.\textsuperscript{388}


\textsuperscript{389} Proposing Release at 66535 ("[T]he proposed amendments provide that such failure will not result in the loss of the exemptions in Rules 14a–2(b)(1) or 14a–2(b)(3) so long as [A] the proxy voting advice business made a good faith and reasonable effort to comply and [B] to the extent that it is feasible to do so, the proxy voting advice business uses reasonable efforts to substantially comply with the condition as soon as practicable after it becomes aware of its noncompliance.").

\textsuperscript{386} Id. at n.146 ("[W]ithout such an exception, a proxy voting advice business that failed to give a registrant the full number of days for review of the proxy voting advice due to technical complications beyond its control, even if only a few hours shy of the requirement, would be unable to rely on the exemptions in Rule 14a–2(b)(1) and (b)(3). Without an applicable exemption on which to rely, the proxy voting advice business likely would be subject to the proxy filing requirements found in Regulation 14A and its proxy voting advice required to be publicly filed.").

\textsuperscript{387} The Commission previously issued guidance discussing how the fiduciary duty and rule 206(4)–6 under the Advisers Act relate to an investment adviser’s exercise of voting authority on behalf of clients and also provided examples to help facilitate investment advisers’ compliance with their proxy voting responsibilities. See Commission Guidance on Proxy Voting Responsibilities. We expect that Rule 14a–2(b)(9)(iii)(A) will result in registrants being made aware of recommendations by proxy voting advice businesses in a timeframe that will facilitate in particular the use and review of such advice by investment advisers.\textsuperscript{388}


\textsuperscript{389} Proposing Release at 66535 ("[T]he proposed amendments provide that such failure will not result in the loss of the exemptions in Rules 14a–2(b)(1) or 14a–2(b)(3) so long as [A] the proxy voting advice business made a good faith and reasonable effort to comply and [B] to the extent that it is feasible to do so, the proxy voting advice business uses reasonable efforts to substantially comply with the condition as soon as practicable after it becomes aware of its noncompliance.").
We wish to emphasize that the principles-based approach we are adopting in Rule 14a–2(b)(9)(ii) is intended to be adaptable to a variety of circumstances and business models. Various policies and procedures, beyond those in the safe harbors set forth in Rules 14a–2(b)(9)(iii) and (iv), may be used to satisfy these principles. Whether a proxy voting advice business has complied with the principles-based requirements will be determined by the particular facts and circumstances of the business’s adopted written policies and procedures and whether such facts and circumstances support the conclusion that the particular policies and procedures are reasonably designed to ensure that (1) registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business’s clients and (2) the proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware that registrants have filed additional proxy materials that are responsive to the proxy voting advice in a timely manner before the shareholder meeting. Some relevant factors to be used in the analysis include:

- The degree to which a registrant has time to respond and whether the policy ensures prompt conveyance of information to the registrant.
- The extent to which the mechanism provided to clients is an efficient means by which they can reasonably be expected to become aware of the registrant’s written response, once it is filed, such that the client has sufficient time to consider such response in connection with a vote.
- The reasonableness, based on facts and circumstances, of any fees charged by a proxy voting advice business to a registrant as a condition to receiving a copy of its proxy voting advice and the extent to which such fees may persuade a registrant to seek to review and provide a response to such proxy voting advice.

We reiterate that these factors are not exclusive and no single factor or combination of factors will control the determination of whether a proxy voting advice business has complied with the principles-based requirements.

c. Exclusions From Rule 14a–2(b)(9)(ii) [Rules 14a–2(b)(9)(v) and (vi)]

Notwithstanding the benefits that we expect will accrue to clients of proxy voting advice businesses, as well as the proxy voting system as a whole, we recognize that the requirements of Rule 14a–2(b)(9)(ii) may not be appropriate in all contexts. As such, pursuant to new Rules 14a–2(b)(9)(v) and (vi), respectively, proxy voting advice businesses need not comply with Rule 14a–2(b)(9)(ii) in order to rely on either the Rule 14a–2(b)(1) or (b)(3) exemption (1) to the extent that their proxy voting advice is based on a custom policy or (2) if they provide proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.

i. Custom Policies

As noted above, some commenters recommended—in the context of our proposed amendments to Rule 14a–1(1)—that we amend the definitions of “solicit” and “solicitation” to exclude proxy voting advice based on custom policies. Specifically, one commenter that is a proxy voting advice business noted that it “does not own, and is prohibited from disclosing, clients’ custom policies and the recommendations based thereon.” Although the commenter also expressed doubt as to the efficacy, from an investor protection standpoint, of “allowing issuers to vet the methodologies and assumptions institutional investors choose to implement for their own portfolios.” Although we reaffirm our prior interpretation of the scope of the terms “solicit” and “solicitation” and decline to amend their definitions as those commenters suggested, we find these points to be compelling with respect to the application of certain requirements of Rule 14a–2(b)(9). We also understand these commenters’ concerns regarding the potential costs that would be imposed upon investors, as well as their doubts regarding the corresponding investor protection-based benefits, if the requirements of Rule 14a–2(b)(9)(ii) were to be applied to proxy voting advice based on a custom policy.

In light of these concerns, we are adopting new Rule 14a–2(b)(9)(v), which excludes from the scope of Rule 14a–2(b)(9)(ii) proxy voting advice to the extent that such advice is based on custom policies that are proprietary to a proxy voting advice business’s client. Our adoption of new Rule 14a–2(b)(9)(v) is not only motivated by the potential costs that commenters identified, it also reflects our belief that many of the goals of this rulemaking will still be achieved with respect to proxy voting advice that is based on a custom policy, notwithstanding the fact that such advice will not be subject to Rule 14a–2(b)(9)(ii). For example, as noted above and consistent with prior Commission statements, such proxy voting advice will constitute a “solicitation” subject to Rule 14a–9, and persons who provide such advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must comply with the conflicts of interest disclosure requirements set forth in new Rule 14a–2(b)(9)(i). We further note that proxy voting advice businesses generally use substantially the same data to produce most of their voting advice (including reports containing proxy voting advice based on benchmark, specialty, or custom policies).

In addition, it is our understanding of the proxy voting advice market as it currently operates that proxy voting advice businesses’ clients that receive proxy voting advice pursuant to their custom policies generally also receive the businesses’ advice based on the businesses’ benchmark policies. Such benchmark policy proxy voting advice contains the bulk of the data, research, and analysis underlying custom policy proxy voting advice. Thus, because the proxy voting advice based on the businesses’ policies—including the data, research, and analysis therein—would be subject to Rule 14a–2(b)(9)(ii), clients that receive proxy voting advice pursuant to their custom policies generally will

394 Rule 14a–2(b)(9)(v). The term “custom policies” for purposes of Rule 14a–2(b)(9)(v) would not include a proxy voting advice business’s benchmark or specialty policies, even if those benchmark or specialty policies were to be adopted by a proxy voting advice business’s client as its own policy. See supra note 12. If, however, a proxy voting advice business’s client adopts a benchmark or specialty policy as its own policy, then the proxy voting advice business would have to satisfy the requirements of Rule 14a–2(b)(9)(ii) only with respect to the proxy voting advice that is based on the benchmark or specialty policy. For the avoidance of doubt, Rule 14a–2(b)(9)(ii)(A) does not require that the proxy voting advice business make available to the registrant multiple copies of the same voting advice, and for purposes of Rule 14a–2(b)(9)(ii)(B), the proxy voting advice business’s policies and procedures should be reasonably designed to provide such client with a mechanism by which the client could reasonably be expected to become aware of any written statement regarding the benchmark or specialty policy.

395 Rule 14a–2(b)(9)(v). See supra text accompanying note 166.

396 See letter from ISS. ("Because substantially the same data are used to produce all ISS voting reports . . . .")

397 See letter from ISS. ("Because substantially the same data are used to produce all ISS voting reports . . . .")
benefit from an awareness of any responses that the registrants may file thereto.

ii. Merger and Acquisition Transactions and Contested Solicitations

Solicitations involving merger and acquisition (“M&A”) transactions or contested matters, such as contested director elections where a dissident soliciting party proposes its own slate of director-nominees, are generally fast-moving and can be subject to frequent changes and short time windows.

This often results in proxy voting advice businesses having to deliver their advice to clients on a tighter deadline, and with less lead time before the applicable meeting, than they would under normal circumstances.

398 As noted above, some commenters expressed concerns regarding the practical challenges and potential disruptions that the proposed review and feedback mechanism, with its specified time frames for each step of the process, would have caused in the context of M&A transactions or contested solicitations. Commenters also expressed concerns about the heightened risk that the proposed review and feedback mechanism, which would involve reviews of proxy voting advice before it is disseminated to clients, could pose regarding the disclosure of market-moving or material, non-public information in the context of M&A transactions or contested solicitations.

We expect that these concerns will be significantly alleviated, if not eliminated entirely, by the fact that Rule 14a–2(b)(9)(ii), as adopted, does not include the proposed advanced review and feedback mechanism and, with its principles-based requirements, provides proxy voting advice businesses with added flexibility. For example, absent the proposed advanced review and feedback mechanism, Rule 14a–2(b)(9)(ii)(A) does not increase the risk that proxy voting advice businesses will disseminate potentially market-moving or material, non-public information selectively to registrants (or any other soliciting persons) before they otherwise would disseminate such information to their clients.

To further address concerns raised by commenters, we are also adopting new 17 CFR 240.14a–2(b)(9)(vi) (“Rule 14a–2(b)(9)(vi)”), which excludes from the requirements of Rule 14a–2(b)(9)(ii) any portion of the proxy voting advice that makes a recommendation, as well as any analysis and research underlying such recommendation that is furnished along therewith, as to a solicitation subject to Rule 14a–3(a)

(A) To approve any transaction specified in Rule 145(a) of the Securities Act; or

(B) By any person or group of persons for the purpose of opposing a solicitation subject to Regulation 14A by any other person or group of persons.

As a result of new Rule 14a–2(b)(9)(vi), proxy voting advice disclosure would necessarily increase the risk that the information will be misused or leaked, whether accidentally or deliberately. ISS (noting that it currently “safeguard[s] material, non-public information” by not pre-releasing potentially market-moving draft reports and vote recommendations and allowing soliciting persons a limited review right of draft reports only for annual meetings, not special meetings) andasserting that the proposal “rais[es] significant concerns about confidentiality” and “selective disclosure of material non-public information”; Glass Lewis II (“We note that commenters have raised significant questions about how the advance knowledge gained in the review processes could be misused in contested situations that should be addressed and resolved before adopting any rule mandating review in this context.”). As they likely are already aware of the information disclosed in the foregoing comment letters, we remind proxy voting advice businesses that they have a responsibility to safeguard any material, non-public information in their possession. Although that responsibility is heightened in the context of shareholder meetings regarding M&A transactions or contested matters, when such information is particularly sensitive and potentially market-moving, we expect proxy voting advice businesses to discharge that responsibility in all circumstances.


402 Rule 14a–2(b)(9)(vi).

403 Rule 14a–2(b)(9)(vi). (B) To be eligible to rely on Rule 14a–2(b)(9)(vi), a proxy voting advice business must be providing advice with respect to a solicitation subject to Rule 14a–3(a). This requirement is intended to limit the scope of Rule 14a–2(b)(9)(vi) to proxy voting advice with respect to solicitations that are subject to the Federal proxy rules’ information and filing requirements, including the requirement to file and furnish a definitive proxy statement. By contrast, proxy voting advice businesses providing advice with respect to any exempt solicitations (including solicitations as to M&A transactions or contested matters) would be ineligible to rely on the exception in Rule 14a–2(b)(9)(vi).

For the avoidance of doubt, this exception from the requirements of Rule 14a–2(b)(9)(ii) applies only to the portions of the proxy voting advice relating to the applicable M&A transaction or contested matters and not to proxy voting advice regarding other matters presented at the relevant meeting. If, therefore, there is a shareholder meeting at which the only items presented for approval are the applicable M&A transaction or contested matters, a proxy voting advice business could have written policies and procedures that permit the entirety of the proxy voting advice provided with respect to that meeting to be

404 We recognize that a registrant or other soliciting person may present at the shareholder meeting other matters that, while not directly approving an M&A transaction or a contested matter, are nevertheless closely related to such transaction or contested matter. For example, a registrant’s definitive proxy statement may seek approval of a proposed M&A transaction, approval of the issuance of the registrant’s securities to finance the M&A transaction, and an advisory vote on the “golden parachute” payments to be made in connection with the M&A transaction. In such a situation, the latter two matters may be sufficiently integral to the M&A transaction such that redaction of the proxy voting advice on the M&A transaction alone would render the proxy voting advice on the remaining matters to be confusing for a registrant reading such advice. In such a case, the Rule 14a–2(b)(9)(vi) exception would be available for all three matters. The determination whether a matter is sufficiently integral to an M&A transaction or contested matter to fall within the Rule 14a–2(b)(9)(vi) exception will depend on the particular facts and circumstances.
excluded from the requirements set forth in Rule 14a–2(b)(9)(ii). If, however, additional matters are presented for shareholder approval at such meeting, then only the portion of the proxy voting advice provided with respect to the applicable M&A transaction or contested matters could be excluded from the requirements set forth in Rule 14a–2(b)(9)(ii).

We understand that proxy voting advice businesses often provide their proxy voting advice on all matters for which security holders are solicited at a particular meeting (e.g., contested and uncontested matters, M&A- and non-M&A-related matters, etc.) together in a single report. If a proxy voting advice business takes this approach but wishes to avail itself of the exception set forth in Rule 14a–2(b)(9)(vi), it can do so, for example, by redacting the portion of the report that contains proxy voting advice as to the applicable M&A transaction or contested matters in the version of such report that is provided to a registrant pursuant to Rule 14a–2(b)(9)(ii)(A). We further understand that at least one proxy voting advice business currently provides its clients with a separate, standalone report that provides recommendations only with respect to the M&A transactions or contested matters presented at the meeting. If a proxy voting advice business adopts this approach with respect to M&A transactions and contested matters, then, under Rule 14a–2(b)(9)(vi), the requirements of Rule 14a–2(b)(9)(ii) would not be applicable to such a standalone report. Finally, to the extent that a proxy voting advice business finds it too burdensome to either redact or bifurcate its reports, it is not required to avail itself of the exception set forth in Rule 14a–2(b)(9)(vi). Instead, the proxy voting advice business can choose to subject all of its proxy voting advice—including its advice as to the applicable M&A transaction and contested matters—to the requirements of Rule 14a–2(b)(9)(ii), subject to the proxy voting advice business’s obligation to safeguard material, non-public information in its possession.

As with proxy voting advice that is based on a custom policy, proxy voting advice that is excluded from the scope of Rule 14a–2(b)(9)(ii) pursuant to new paragraph (vi) will constitute a “solicitation” subject to Rule 14a–9. Similarly, persons who provide such advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must comply with the conflicts of interest disclosure requirements set forth in new Rule 14a–2(b)(9)(ii).

d. Response to Constitutional Objections

Some commenters raised First Amendment objections to the proposed amendments. Their concerns focused primarily on the proposed registrant review and feedback provisions and the requirement that proxy voting advice businesses include in their advice a hyperlink to the registrant’s response. The final amendments incorporate substantial modifications that address these concerns.

As discussed above, the proposed amendments requiring that proxy voting advice businesses give registrants an opportunity to review and provide feedback on their advice before the advice is disseminated to clients have not been included in the final amendments. Under the final amendments, proxy voting advice businesses can satisfy Rule 14a–2(b)(9)(ii)(A) by ensuring that their advice is made available to registrants at or prior to the time when such advice is disseminated to the proxy voting advice business’s clients.

Some commenters also argued that requiring proxy voting advice businesses to share with registrants proxy voting advice that is based on custom policies would unconstitutionally compel them to disclose confidential client information. Our decision to exclude such advice from Rule 14a–2(b)(9)(ii) should eliminate that concern. Moreover, under the safe harbor in Rule 14a–2(b)(9)(iii), a proxy voting advice business has no obligation to provide a copy of its advice to a registrant unless such registrant acknowledges certain limits on its use of the advice. Nor must a proxy voting advice business that avails itself of such safe harbor share its proxy voting advice if the registrant files its definitive proxy statement less than 40 calendar days before the shareholder meeting.

In addition, we have replaced the proposed requirement that proxy voting advice businesses include in their proxy voting advice a hyperlink to the registrant’s response with a principles-based obligation to adopt policies and procedures reasonably designed to ensure that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of the registrant’s written response in a timely manner. Rule 14a–2(b)(9)(ii)(B) gives proxy voting advice businesses flexibility in determining how to achieve compliance with this requirement in the manner best suited to their business. They also have the option of relying on the safe harbor set forth in Rule 14a–2(b)(9)(iv), which involves adopting policies and procedures to provide clients a hyperlink to the registrant’s written response once the registrant gives notice that a response has been filed. However, Rule 14a–2(b)(9)(ii)(B) does not mandate that specific approach as a condition of the exemption.


410 See supra note 408.

411 See Rule 14a–2(b)(9)(iv).

412 We also believe that these modifications from the proposal—among others, the fact that proxy voting advice businesses are not required to give registrants an opportunity to review proxy advice before its dissemination to clients and need not share the advice at all unless registrants acknowledge restrictions on its use—address the concerns raised by some commenters under the takings clause of the Fifth Amendment. See letters from CalPERS; ISS.

For example, we understand that some proxy voting advice businesses already provide access to the registrant’s proxy filings, including any supplemental proxy materials, automatically through their electronic platform. This kind of.
We believe that the amendments, as modified from the proposal, are consistent with the First Amendment. In today’s market, the proxy process represents the primary means by which registrants and their shareholders communicate to determine how the registrant governs itself. They exchange their respective views about the registrant’s business operations and other registrant matters, and generally engage in discussions integral to the exercise of the shareholder franchise.414 The Commission has a strong interest in ensuring that investors are able to obtain and evaluate information pertinent to proxy voting decisions before the vote is held.415 The amendments are intended to facilitate the kind of robust discussion on which informed shareholder voting decisions depend in light of changing market conditions. Specifically, as discussed above, proxy voting advice businesses today are uniquely situated to influence the voting decisions of institutional investors, which hold an increasingly significant portion of shares in U.S. public companies.416 The provision of proxy voting advice by these businesses therefore implicates a fundamental concern of our proxy rules.417 Yet, because a significant percentage of proxy votes are typically cast shortly after a proxy voting advice business delivers its advice, and because currently proxy voting advice is not required to be publicly filed, many voting decisions are made before registrants have a meaningful opportunity to engage with that advice—for example, to address any material factual errors or omissions, or to offer views with respect to the proxy voting advice business’s methodologies or conclusions—and to make investors aware of their views in time for investors to benefit from such an exchange.418

As previously discussed, the Commission has occasionally adjusted the proxy rules based on market developments to promote informed approach would generally be consistent with the principle.

414 See supra note 6 and accompanying text.
415 See supra notes 373 and accompanying text.
416 The developments described above have convinced us of the need to update the application of the proxy rules to proxy voting advice businesses to facilitate the kind of robust discussion that would be possible at a meeting before a vote occurs. But at this time we do not believe it is necessary to subject proxy voting advice businesses to the full panoply of information and filing requirements that apply to registrants when seeking proxy authority. While registrants must publicly file soliciting materials and disseminate them to all shareholders, the Commission believes its objectives with respect to proxy voting advice businesses can be achieved by more tailored and far less burdensome and intrusive means.

We are therefore adopting amendments that allow proxy voting advice businesses to continue to be exempt from the filing and information requirements of the proxy rules, conditioned on their inclusion in the proxy voting advice of the conflicts of interest disclosure specified in Rule 14a–2(b)(9)(i) and their adoption and public disclosure of policies and procedures specified in Rule 14a–2(b)(9)(ii).420 These principles-based requirements are tailored to minimize the burden on proxy voting advice businesses, while still directly advancing the Commission’s regulatory objectives.

Although some commenters argued that the proposed amendments discriminated based on viewpoint, our decision to impose exemption conditions on proxy voting advice businesses is unrelated to their particular matter, and regardless of whether voting advice is supportive or adverse to registrants or to others. Proxy voting advice is subject to our proxy rules because it constitutes a “solicitation” under the Exchange Act. We have tailored the application of those rules to accommodate the unique business model of proxy voting advice businesses while also accounting for the consequential role those businesses have come to play in the proxy process.422 The amendments to the proxy rules that we adopt in this document—like the rules that apply to registrants and other interested parties under the comprehensive regulatory scheme governing the proxy solicitation process—are intended to facilitate investor access, in a timely manner, to more accurate, complete, and transparent information and robust debate, as would occur at a meeting where shareholders are physically attending and participating. Indeed, the exemption conditions for proxy voting advice apply regardless of the content of the advice on any matter, and far from disapproving of the speech of proxy voting advice businesses, the Commission has recognized the important function proxy voting advice businesses serve in today’s markets to some investors.423

D. Amendments to Rule 14a–9

1. Proposed Amendments

Rule 14a–9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in light of the circumstances under which the statements are made.424 In addition, such solicitation must not omit to state any material fact necessary in order to make the statements therein not false or misleading.425 Even solicitations that are exempt from the federal proxy rules’ information and filing requirements are subject to this prohibition, as “a necessary means of ensuring that the communications which may influence shareholder voting decisions are not

420 See supra notes 33–35 and accompanying text. Contrary to the suggestion of some commenters, the Commission’s amendment of a similar objective in the amendments adopted in this document does not contradict our past recognition that applying governmental filing requirements to every communication among shareholders and other parties on matters subject to a proxy vote would raise First Amendment concerns. See supra note 270 and accompanying text.
421 See supra Sections II.B.3; III.C.
422 See, e.g., letters from Better Markets (expressing concern that apprehensions regarding the accuracy of proxy voting advice businesses’ advice have been driven by potentially self-interested corporate management’s proxy voting advice businesses as adversarial); CalPERS; Florida Board; Glass Lewis II; ISS; NYC Comptroller; New York Comptroller II; Public Citizen; Segal Marco II; TRP.
423 See SEC v. Wall Street Publishing Inst., Inc., 851 F.2d 365, 372 (D.C. Cir. 1988) (“Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government, . . . and regulation of such communications has been upheld [as consistent with the First Amendment].”); cf. Full Value Advisors, LLC v. SEC, 633 F.3d 1101, 1109 (D.C. Cir. 2011) (“Securities regulation involves a different balance of concerns and calls for different applications of First Amendment principles.”) (internal quotation marks omitted).
424 See supra Section II.A.3.
425 17 CFR 240.14a–9. See also Exchange Act Release No. 34–1350, 1937 WL 29099 (Aug. 13, 1937) (“The purpose of [the Commission’s proxy rules] is to prevent the dissemination to the security holders and to the general public of untruths, half-truths, and otherwise misleading information which would stand in the way of a fair appraisal of a plan upon its merits by the security holders.”).
materially false or misleading.” This includes proxy voting advice that is exempt under Rules 14a–2(b)(1) and (b)(3). The Commission has previously stated that the furnishing of proxy voting advice, while exempt from the information and filing requirements, remains subject to the prohibition on false and misleading statements in Rule 14a–9.247 We continue to believe that subjecting proxy voting advice businesses to the same antifraud standard as registrants and other persons engaged in soliciting activities, including those engaged in exempt solicitations, is appropriate in the public interest and for the protection of investors. Indeed, the Commission recently issued guidance specifically addressing the application of Rule 14a–9 to proxy voting advice,248 stating that “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 advice or which would affect its analysis and judgments, that would be required to make the advice not misleading.”249 To illustrate this point, the Commission gave a list of examples of types of information that a provider of proxy voting advice should consider disclosing in order to avoid a potential violation of Rule 14a–9.430 This included the methodology used to formulate proxy voting advice, sources of information on which the advice is based, and material conflicts of interest that arise in connection with providing proxy voting advice, without which the advice could be misleading, depending on the specific statements at issue.431

Currently, the text of Rule 14a–9 provides four examples of things that may be misleading within the meaning of the rule, depending upon particular facts and circumstances.432 These are:

- Predictions as to specific future market values;
- Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation;
- Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter; and
- Claims made prior to a meeting regarding the results of a solicitation.

The Commission proposed to amend this list of examples in Rule 14a–9 to include certain additional types of information that a proxy voting advice business may, depending on the particular facts and circumstances, need to disclose to avoid potentially violating the rule. As proposed, and consistent with the Commission’s recent guidance, this included the proxy advice business’s methodology, sources of information and/or conflicts of interest to the extent that, under the particular facts and circumstances, the omission of such information would be materially misleading.

In addition, the Commission proposed to amend Rule 14a–9 to address concerns that have arisen when proxy voting advice businesses make negative voting recommendations based on their evaluation that a registrant’s conduct or disclosure is inadequate, notwithstanding that the conduct or disclosure meets applicable Commission requirements.

The Commission explained that, without additional context or clarification, some clients may mistakenly infer that the negative voting recommendation is based on a registrant’s failure to comply with the applicable Commission requirements when, in fact, the negative recommendation is based on the proxy voting advice business’s determination that the registrant did not satisfy the specific criteria used by the proxy voting advice business. If the use of the criteria and the material differences between the criteria and the applicable Commission requirements are not clearly conveyed to proxy voting advice businesses’ clients, there is a risk that some clients may make their voting decisions based on a misapprehension that a registrant is not in compliance with the Commission’s standards or requirements. Similar concerns exist if, due to the lack of clear disclosure, clients are led to mistakenly believe that the unique criteria used by the proxy voting advice businesses were approved or set by the Commission.

Accordingly, the Commission proposed to add as an example in Rule 14a–9 of what may be misleading within the meaning of the rule, depending upon the particular facts and circumstances, the failure to disclose the use of standards or requirements in proxy voting advice that materially differ from relevant standards or requirements that the Commission sets or approves.433

2. Comments Received

Commenters were divided in their views about the proposed amendment.434 Those in favor of the proposal thought it would have a beneficial impact, reasoning that it would tend to improve the quality of voting advice by making proxy voting advice businesses more accountable for any misleading statements in their advice and incentivizing them to provide more robust information about their methods and sources so that their clients would be in a better position to assess the businesses’ recommendations and make informed voting decisions.435

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426 See 1979 Adopting Release at 48942.
427 See Concept Release at 43010.
429 Id. at 12.
430 Id. The Commission also noted that some proxy voting advice businesses currently may be providing some of the disclosures described in the list of examples. Id. at n.33.
431 Id.
432 Rule 14a–9 provides a note preceding the list of examples that reads: “The following are some examples of things, depending upon particular facts and circumstances, may be misleading within the meaning of this section.” This note and the examples provided were adopted in their current form by the Commission in 1956. See Release No. 34–5276 (Jan. 17, 1956) [21 FR 577 (Jan. 26, 1956)], 1956 WL 7797.
433 See Proposing Release at 66538 n.160.
434 See note (e) to proposed Rule 14a–9. Examples of standards or requirements that the Commission approves are the listing standards of the national securities exchanges, such as the New York Stock Exchange (NYSE). The Commission supervises, and is authorized to approve rules promulgated by, the NYSE and other national securities exchanges pursuant to Section 19 of the Exchange Act.
435 See letters from commenters supporting the proposal, e.g., ACCF (asserting that the proposals would increase accountability); Axcelis; John D. Campbell, Vice President, Government Relations, Ball Corporation [Jan. 31, 2020] (“Ball Corp.”); BIO; BRT; CCMA; CIAC; Chartier & Foxfohl; FedEx; GM; IBC; NAS; Nareit; Nasdaq; SCG; James L. Settler, Executive Director, Shareholder Advocacy Forum [Feb. 3, 2020] (“Shareholder Advocacy”); TechNet. But see letters from commenters opposing the proposal, e.g., Baillie Gifford; CalPERS; CII IV; Circa; Elliott I; Glass Lewis II; ISS; MFA & AIMA; PLAC II (although it agreed that proxy voting advice businesses should disclose material information relating to their methodology, sources of information, and conflicts of interest, the commenter indicated that it was satisfied with the disclosures currently provided and did not believe specific regulation on this point was necessary).
436 See, e.g., letters from ExxonMobil (supporting the proposal’s clarification that Rule 14a–9 applies to material information concerning a proxy voting advice business’s methodology, sources of information, and conflicts of interest); GM.
437 See, e.g., letters from BRT (“[I]t is important that proxy advisors not omit the disclosure of information underlying the basis of their advice or which would affect its analysis and judgment”); ExxonMobil; Nasdaq (“We agree with the Commission that the amendment is one in the public interest, promote investor protection, and help ensure that investors are provided the information they need to make fully informed voting decisions.”); SG.
Several such commenters voiced concerns that proxy voting advice businesses were not sufficiently transparent about their methodologies, models, and formulas used to generate their recommendations.\textsuperscript{438} Some commenters also believed that proxy voting advice businesses do not adequately adjust their methodologies to take into account the unique circumstances of different companies and therefore more transparent disclosure of methodologies would help investors discern the extent to which voting advice may be based on a “one-size-fits-all” approach.\textsuperscript{439}

Other commenters specifically approved of the proposed amendment’s reference to a proxy voting advice business’s use of standards that materially differ from relevant Commission standards or requirements.\textsuperscript{440} These commenters were concerned that not all investors were fully aware when proxy voting advice businesses applied their own analytical standards that differed from the Commission’s or other applicable regulatory standards.\textsuperscript{441}

On the other hand, some commenters contended that, in general, the proposed amendment to Rule 14a–9 would heighten legal uncertainty and litigation risk for proxy voting advice businesses because it would broaden the concept of materiality and create a new source of liability for proxy voting advice businesses, the scope of which is not sufficiently clear.\textsuperscript{442} Two commenters also suggested that the proposed amendment may be prohibited by the First Amendment.\textsuperscript{443} Commenters that opposed the proposed amendment’s reference to a proxy voting advice business’s use of standards that materially differ from relevant Commission standards or requirements argued that it was unnecessary and based on the flawed premise that clients are either unaware of, or lack the sophistication necessary to appreciate, the distinction between a company’s failure to satisfy the particular analytical standards employed by a proxy voting advice business and a company’s failure to comply with regulatory standards.\textsuperscript{444} Commenters made the point that most clients are well aware of such differences and often maintain custom policies that are more rigorous than relevant regulatory standards and require the proxy voting advice business to apply such policies when preparing their proxy voting advice.\textsuperscript{445} Moreover, commenters stated that in many cases clients hire proxy voting advice businesses precisely because they are aware and approve of these businesses using certain standards that exceed applicable regulations.\textsuperscript{446} In addition, other commenters asserted that the proxy voting advice businesses’ disclosures about the use of differing standards were already sufficiently clear.\textsuperscript{447}

Finally, some commenters recommended modifications to the proposal that would have added a number of specific examples to the list in Rule 14a–9 of information that may be material and needs to be disclosed in certain circumstances.\textsuperscript{448} Others requested further clarification on questions related to the scope and application of the proposed amendment\textsuperscript{449} or suggested that Rule 14a–9 be modified to exclude the content of recommendations or differences of opinion between management and proxy voting advice businesses.\textsuperscript{450}

\textsuperscript{438} See, e.g., letters from BRT (“Proxy advisors offer little transparency into their internal standards, procedures, and methodologies. Neither ISS nor Glass Lewis discloses the methodologies used to develop their voting recommendations.”); CEC; FedEx; GM; NAM; Nasdaq; TechNet.

\textsuperscript{439} See, e.g., letters from CCMC (noting that proxy voting advice businesses have been criticized for “a one-size-fits-all approach of voting recommendations that ignores the unique characteristics and operations of individual companies and industries.”); FedEx; Nasdaq; NAM; Nareit; TechNet (further noting that “one-size-fits-all” methodologies across different subject areas often fail to account for unique differences between companies).

\textsuperscript{440} See, e.g., letters from BRT; CCMC; GM (“[N]egative voting recommendations from a proxy advisor not meeting the Commission’s requirements, which can mislead or cause confusion among proxy voters. We therefore believe that proxy voters should have the benefit of this additional context to ensure that they are fully informed and understand the standards employed by a proxy advisor when reviewing their voting recommendations.”); Nareit; Nasdaq (“[I]n Nasdaq’s own experience, ISS has determined that a director was not independent under its criteria even though the director was independent under Nasdaq and SEC rules.”); SCG.

\textsuperscript{441} See, e.g., letters from BIO (stating “that it is important for proxy voting advice businesses to clarify when a negative voting recommendation is based on the proxy voting advice business’s own determination that a registrant’s conduct or disclosure is inadequate, notwithstanding that the conduct or disclosure meets applicable SEC requirements.”); BRT (“Business Roundtable member companies are concerned that, when making recommendations, proxy advisors rely upon information not included in the company’s public SEC filings or on factors other than the actual regulatory requirements to which companies are subject. For instance, proxy advisors have their own guidelines for determining the independence of directors. This has resulted in situations where a proxy advisor recommends against a director’s election because it decided that the director is not independent under its standards, despite the fact that the company’s board of directors—carrying out its fiduciary duties—determined that the director in question was independent under the Commission’s requirements, the company’s stock exchange listing rules and its corporate governance guidelines.”); Charter; SCG (asserting that proxy voting advice businesses “apply standards or policies that differ from SEC rules/or stock exchange listing requirements frequently enough that it strains credulity to believe that the reasonable investor always understands whether a voting recommendation reflects (non)compliance with existing rules/requirements/standards or simply proxy advisor judgment.”).

\textsuperscript{442} See, e.g., letters from Carl C. Icahn (Feb. 7, 2020) (“[C. Icahn]”: CalPERS; CIRCA; Elliott I; Glass Lewis II (asserting that the Commission does not adequately explain how, for example, a failure to disclose information that the Commission requires to also include those set by any relevant stock exchange. As another example, we would also list a proxy advisor’s failure to disclose whether a registrant disputes any findings in the proxy advisor’s report or whether a proxy advisor diverges from its own publicly disclosed guidelines.”); ExxonMobil (suggesting that the rules should also address proxy voting advice that is “not designed to maximize shareholder value, like SRI specialty reports” and require “risk factor” style disclosures about the value of an investment when a proxy voting advisor uses standards that materially differ from relevant standards or requirements that the Commission sets or approves” could mislead shareholders); MFA & AIMA.

\textsuperscript{443} See letters from CII IV; ISS. Our clarification below that differences of opinion are not actionable under the final amendment to Rule 14a–9 resolves these constitutional concerns raised by some commenters.

\textsuperscript{444} See, e.g., letters from CalPERS (“We think it would be rare for the professionals that actually use proxy voting advice to make such a mistaken inference.”); CII IV; Glass Lewis II (“Existing clients . . . already know when proxy voting advice businesses produce their own guidance as opposed to report on the minimal requirements of the SEC.”); CII IV; Glass Lewis II.

\textsuperscript{445} See, e.g., letter from PRI II.

\textsuperscript{446} See, e.g., letter from PLAC II (“Proxy advisors are paid to make recommendations based on governance best practices rather than legal or regulatory minimums and PLAC members expect the standards of proxy advisors to exceed those minimums.”).

\textsuperscript{447} See, e.g., letters from CalPERS (“The Proposing Release) provides examples highlighting a problem that does not exist in reality because proxy voting advice businesses already distinguish their advice from SEC guidance . . . Competent lay people doing a minimal amount of research will find that proxy advisors routinely inform clients about where the standards come from because clients want to know.”); CII IV (noting that the Commission did not provide supporting research to support its assertions in the Proposing Release).

\textsuperscript{448} See, e.g., letters from BRT; CCMC (“[W]e would expand the ‘relevant statutory requirements’ to also include those set by any relevant stock exchange. As another example, we would also list a proxy advisor’s failure to disclose whether a registrant disputes any findings in the proxy advisor’s report or whether a proxy advisor diverges from its own publicly disclosed guidelines.”); ExxonMobil (suggesting that the rules should also address proxy voting advice that is “not designed to maximize shareholder value, like SRI specialty reports” and require “risk factor” style disclosures about the value of an investment when a proxy voting advisor uses standards that materially differ from relevant standards or requirements that the Commission sets or approves” could mislead shareholders); MFA & AIMA.

\textsuperscript{449} See, e.g., letters from Baillie Gifford (inquiring, among other things, whether the proposed disclosure requirements would also list a proxy advisor’s failure to disclose whether a registrant disputes any findings in the proxy advisor’s report or whether a proxy advisor diverges from its own publicly disclosed guidelines.”); ExxonMobil (suggesting that the rules should also address proxy voting advice that is “not designed to maximize shareholder value, like SRI specialty reports” and require “risk factor” style disclosures about the value of an investment when a proxy voting advisor uses standards that materially differ from relevant standards or requirements that the Commission sets or approves” could mislead shareholders); MFA & AIMA.

\textsuperscript{447} See, e.g., letter from PRI II.
3. Final Amendments

We are adopting amendments to Rule 14a–9 that will add to the examples of what may be misleading within the meaning of the rule, largely as proposed, but with one modification in response to comments received. Consistent with the Commission’s guidance on proxy voting advice, the Note to Rule 14a–9 will include new paragraph (e) to provide that the failure to disclose material information regarding proxy voting advice, “such as the proxy voting advice business’s methodology, sources of information, or conflicts of interest” could, depending upon particular facts and circumstances, be misleading within the meaning of the rule. However, for the reasons given in the discussion that follows, new paragraph (e) will not include the proposed clause “or use of standards that materially differ from relevant standards or requirements that the Commission sets or approves.”

The ability of a client of a proxy voting advice business to make voting decisions is affected by the adequacy of the information it uses to formulate such decisions. Consistent with the Commission Interpretation on Proxy Voting Advice, the final amendments are designed to further clarify the potential implications of Rule 14a–9 for proxy voting advice specifically, and to help ensure that proxy voting advice businesses’ clients are provided with the material information they need to make fully informed decisions. Although we acknowledge commenters’ concerns around the potential for heightened litigation risk associated with the proposed changes to Rule 14a–9, we reiterate that Rule 14a–9 is grounded in materiality, and amending the rule to include updated examples of potentially misleading disclosure, depending on the facts and circumstances, in no way changes its application or scope. The amendment to Rule 14a–9 does not broaden the concept of materiality or create a new cause of action, as some have suggested. As discussed above, the Commission has long taken the view that proxy voting advice generally constitutes a “solicitation.” Because Rule 14a–9 applies to all solicitations, even those made in reliance on an exemption from the information and filing requirements of the federal proxy rules, proxy voting advice businesses and other market participants should have been on notice that Rule 14a–9 applies to proxy voting advice. The amendment also does not make “mere differences of opinion” actionable under Rule 14a–9. Rather, it further clarifies what has long been true about the application of Rule 14a–9 to proxy voting advice and, more generally, proxy solicitations as a whole: No solicitation may contain any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

The addition of paragraph (e) to the Note to Rule 14a–9, the substance of which has not been updated for over six decades, to account for contemporary market practices (including the prevalent use of proxy voting advice by institutional investors and others), further clarifies that proxy voting advice is subject to Rule 14a–9. The addition of paragraph (e) also underscores that the examples are among the types of information that may provide material context without which, depending on the facts and circumstances, the proxy voting advice may run afoul of the rule. The examples are illustrative only, and are not intended to be exhaustive or absolute, or supersede the materiality principle or the facts and circumstances analysis required in each particular case. As noted above, however, we have determined not to adopt the proposed example relating to standards that materially differ from relevant standards or requirements that the Commission sets or approves. To the extent that a proxy voting advice business does not make clear to its clients that it is making a negative voting recommendation based on its own criteria, notwithstanding that the registrant has complied with the applicable standards established or approved by the Commission, there is a risk that the proxy voting advice business’s clients may misunderstand the basis for the proxy voting advice business’s recommendation. The proposed amendment regarding use of standards or requirements in proxy voting advice that materially differ from relevant standards or requirements that the Commission sets or approves was designed to help ensure that proxy voting advice businesses’ clients are provided the information they need to make a “fair appraisal” of the recommendation and to clarify the potential implications of Rule 14a–9.

Nevertheless, we understand the concerns expressed by some commenters who asserted that the perceived lack of clarity regarding the scope of the proposed clause “or use of standards that materially differ from relevant standards or requirements that the Commission sets or approves,” which was not discussed in the earlier guidance, may increase legal uncertainty and litigation risks to both proxy voting advice businesses and registrants, and that the lack of legal certainty could affect the quality of analyses provided by proxy voting advice businesses. We continue to believe that there could well be occasions where, for example, the omission or distortion of essential context from a proxy voting advice business’s explanation of its methodologies may be misleading under a materiality principle and the particular facts and circumstances, such that a shareholder’s ability to make an informed voting decision is subverted. However, we also believe that the existing principles of Rule 14a–9 are sufficiently robust to encompass such a situation, which ultimately will come down to a question of facts and circumstances. For that reason, we do not think it is necessary to memorialize this potentially nuanced situation with an illustrative example that, because it is by definition a generalization, could create more confusion than clarity.

Therefore, we are adopting the amendment to Rule 14a–9 without this example. However, this does not negate the fact that Rule 14a–9’s prohibition against materially misleading solicitations applies to proxy voting advice where the disclosures are so materially deficient that the investor could not be reasonably expected to understand that the proxy voting advice business is applying a different standard to its analysis, and therefore may vote based on such misapprehension. For similar reasons, we are also not electing to expand the list of examples beyond

\[\text{\textsuperscript{451} See supra notes 428 through 431 and accompanying text.}\]
\[\text{\textsuperscript{452} See, e.g., letters from C. Icahn; CalPERS; CIRCA; Elliott I; Glass Lewis II; MFA & AIMA; Minerva I.}\]
\[\text{\textsuperscript{453} See letter from CalPERS.}\]
\[\text{\textsuperscript{454} See supra notes 149 through 154 and accompanying text.}\]
\[\text{\textsuperscript{455} See supra note 432.}\]
\[\text{\textsuperscript{456} See supra note 432.}\]
\[\text{\textsuperscript{457} See supra note 432.}\]
\[\text{\textsuperscript{458} See supra note 424.}\]
\[\text{\textsuperscript{459} See, e.g., letters from C. Icahn; CalPERS; Glass Lewis II; MFA & AIMA.}\]
what was proposed, as suggested by some commenters.\footnote{See, e.g., letters from BRT; CCMC; CII IV; Exxon Mobil; NAM; Nareit; Nasdaq; TechNet.} E. Compliance Dates

The Commission proposed a one-year transition period after the publication of the final rule in the Federal Register to give affected parties sufficient time to comply with the proposed new requirements, including the development of any necessary processes and systems.\footnote{See Proposing Release at 66539.} As an alternative, two commenters suggested extending the transition period to eighteen months.\footnote{See letters from CalPERS; CII IV; Felician Sisters II; Glass Lewis II; Good Shepherd; IASJ; Interfaith Center II; New York Comptroller II; St. Dominic of Caldwell.} Other commenters recommended that small entities be given an extended timeframe for compliance.\footnote{See letters from CII IV; Glass Lewis II (additionally recommending that the effectiveness of final rules be delayed pending resolution of ongoing litigation that could impact the statutory and constitutional bases for the rulemaking).} One commenter also suggested that the Commission consider a phased implementation schedule that would not interfere with the peak of proxy season that typically occurs during the spring each year.\footnote{See letters from CalPERS; CII IV; Felician Sisters II; Glass Lewis II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.}

Some commenters, however, thought that a longer transition period would be necessary given their expectation that affected parties, particularly proxy voting advice businesses, would need to devote significant time and resources in order to bring their systems and processes into compliance.\footnote{See letter from Glass Lewis II.} Based on commenter feedback, as well as the Commission’s interest in limiting unnecessary disruptions during the peak proxy season, proxy voting advice businesses subject to the final rules will not be required to comply with the amendments to Rule 14a–2(b)(9) until December 1, 2021. We believe that the length of the transition period will accommodate the need of affected parties to have sufficient time to prepare for compliance with Rule 14a–2(b)(9) while also recognizing that our adoption of a principles-based framework should allow proxy voting advice businesses and other parties the flexibility to leverage their existing practices and mechanisms to more efficiently integrate their operations with the new requirements. The compliance date for Rule 14a–2(b)(9) is intended to sufficiently precede the typical commencement of the proxy season for 2022, so as to minimize disruption to the normal functioning of the proxy system. However, we welcome early compliance with the amendment. We note that the transition period only applies with respect to the amendments to Rule 14a–2(b)(9) and does not extend to the amendments to Rule 14a–1(l) and Rule 14a–9. Because these other amendments codify existing Commission interpretations and guidance, and do not impose new obligations that necessitate significant time for preparation, we do not believe the same rationale for a transition period exists.

III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provision or circumstance that can be given effect without the invalid provision or application. For example, the amendments to Rule 14a–2(b)(9)(i) operate independently from the amendments to Rule 14a–2(b)(9)(ii), and both provisions operate independently from the amendments to Rules 14a–1(l) and 14a–9.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules a “major rule,” as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

The discussion below addresses the economic effects of the amendments, including their anticipated costs and benefits, as well as the likely effects of the amendments on efficiency, competition, and capital formation.\footnote{Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] directs the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.} We are adopting amendments to Exchange Act Rule 14a–2(b) to condition the availability of existing exemptions from the information and filing requirements of the proxy rules on proxy voting advice businesses satisfying certain additional disclosure and procedural requirements. These conditions will require proxy voting advice businesses to provide enhanced conflicts of interest disclosure. They will also separately require proxy voting advice businesses to: (i) Adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business’s proxy voting advice is made available to registrants at or prior to the time when such advice is disseminated to the proxy voting advice business’s clients; and (ii) adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written statements about the proxy voting advice in a timely manner before the shareholder meeting. We also are codifying the Commission’s interpretation that, as a general matter, proxy voting advice constitutes a solicitation within the meaning of Exchange Act Rule 14a–1(l). Finally, we are amending Exchange Act Rule 14a–9 to add as an example of a potentially material misstatement or omission within the meaning of the rule, depending upon particular facts and circumstances, the failure to disclose material information related to the proxy voting advice business’s methodology, sources of information, or conflicts of interest.

We have considered the economic effects of the final amendments, including their effects on competition, efficiency, and capital formation. The purpose of the final amendments is to help ensure that investors who use proxy voting advice have access to more complete, accurate, and transparent information and are able to benefit from
a robust discussion of views—similar to what is possible at a meeting where shareholders and other parties are physically attending and participating—when making their voting decisions. We generally expect the final amendments to reduce information asymmetries between proxy voting advice businesses and their clients by eliciting more tailored and comprehensive disclosure of conflicts of interest and by facilitating client access to more complete information on matters that are the subject of proxy voting advice. We also believe the final amendments may mitigate certain agency costs associated with the clients’ use of proxy advice voting businesses and thereby facilitate more efficient use of the services provided by such businesses while preserving their economies of scale.467

As a threshold matter, the relationship between a proxy voting advice business client and a proxy voting advice business is an example of an agency relationship. As in any principal-agent relationship, the agent (the proxy voting advice business) may not always act in the best interests of the principal (the client).468 The conditions imposed on proxy voting advice businesses by the final amendments may reduce the costs that arise from this divergence of interests. For example, by requiring proxy voting advice businesses to provide clients with more tailored and comprehensive conflict of interest disclosure than is currently required, the amendments may make it possible for proxy voting advice businesses to more credibly reassure their clients that relevant conflicts have been disclosed, and potentially addressed (by reducing the ability of proxy voting advice businesses to obfuscate information about conflicts or selectively disclose conflicts), than is otherwise achieved by the current system of conflict disclosure. In addition, to the extent that relevant conflicts are better understood by a client as a result of the more tailored and comprehensive disclosure, the client will be better able to assess the objectivity of proxy voting advice against the influence of potentially competing interests and thus to monitor proxy voting advice business services. Moreover, by separately ensuring that registrants receive notice of proxy voting advice and a proxy voting advice business provides clients with a mechanism by which they can become more readily aware of registrant responses to that advice, the final amendments may reduce the costs clients might otherwise incur to acquire information relevant to assessing proxy voting advice and increase the efficiency of this segment of the proxy system. At the same time, the final amendments will likely impose certain additional direct costs on proxy voting advice businesses which may offset this reduction in agency costs. However, as we detail in later sections, we expect the flexibility afforded by the final amendments and current practices of at least the three major proxy voting advice businesses in the United States will serve to limit those direct costs.

As explained in more detail below, many of the economic effects of the amendments cannot be reliably quantified. Consequently, while we have attempted to quantify the economic effects expected from the amendments wherever practicable, much of the discussion remains qualitative in nature. Where we are unable to quantify the potential economic effects of the final amendments, we provide a qualitative assessment of these effects as well as the potential impacts of the amendments on efficiency, competition, and capital formation.

1. Overview of Proxy Voting Advice Businesses’ Role in the Proxy Process

Every year, retail investors, institutional investors, and investment advisors face decisions on whether and how to vote on a significant number of matters that are subject to a proxy vote.469 These matters range from the election of directors and the approval of equity compensation plans to shareholder proposals submitted under Exchange Act Rule 14a–8. In addition to matters presented at a company’s annual shareholder meeting, investors and investment advisers also make voting determinations when a matter is presented to shareholders for approval at a special meeting, such as a merger or acquisition or a sale of all or substantially all of the assets of the company. As described above, investment advisers and institutional investors play a large role in proxy voting for various reasons, including because institutional investors and clients of investment advisers individually or collectively own a large aggregate fraction of many U.S. public companies.470 We understand that voting can be resource intensive for investors that hold or investment advisers that manage diversified portfolios. It involves organizing proxy materials, performing due diligence on portfolio companies and matters to be voted on, determining whether and how votes should be cast, and submitting proxy cards to be counted. Proxy voting advice businesses offer to perform a variety of tasks related to voting, including the following:

- Analyze and make voting recommendations on the matters presented for shareholder vote and included in the registrants’ proxy statements;
- Execute proxy votes (or voting instruction forms) in accordance with their benchmark policy, a specialty policy, or a custom policy; 471
- Assist with the administrative tasks associated with voting and keep track of the large number of voting determinations; and
- Provide research and identify potential risk factors related to corporate governance.

We also understand that, in the absence of the services offered by proxy voting advice businesses, investment advisers and other clients of these businesses may expend considerable resources to independently conduct the work necessary to analyze, recommend, and make voting determinations. As a consequence, we understand that some

467 Researchers define a contract under which one or more persons (the principals) engage another person (the agent) to perform some service on their behalf as an agency relationship. “Agency costs” in the principal-agent relationship consist of: The cost to the principal of monitoring the agent to limit aberrant activities; “bonding” costs to the agent to reassure the client that the agent will not take certain actions that would harm the principal or that the principal will be compensated if the agent takes such actions; and the “residual loss,” or the loss of welfare to the principal from the divergence of activities by the agent from the interests of the principal. See Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, J. Fin. Econ. 305 (1976).

468 For example, agents may benefit by enhancing revenues, decreasing costs, both, or by taking actions other than those that are in the principals’ best interest. Id.

469 17 CFR 240.14a–8; see, e.g., letters from Barbara Novick, Vice Chairman, BlackRock, Inc. (Feb. 3, 2020) (“BlackRock”); (“BlackRock acts as a fiduciary for its clients. In this capacity, we engage with thousands of companies globally and we vote in proxies at over 16,000 company meetings annually.”); (“In the year ending June 30, 2019, my office voted on 126,775 individual ballot items at 13,122 shareholder meetings in 86 markets around the world. . . .”); see also letter in response to the SEC Staff Roundtable on the Proxy Process from Ohio Public Retirement (Dec. 18, 2018) (“OPERS receives in excess of 10,000 proxies in any given proxy season.”).


471 See letter from ISS.
investment advisers and institutional investors find it efficient to hire proxy voting advice businesses to perform various voting and voting-related services, rather than performing them in-house.472 Proxy voting advice businesses generally are able to capture significant economies of scale that are not available to many investment advisers and institutional investors on an individual basis.473

In 2007, the U.S. Government Accountability Office (“GAO”) found that among 31 institutions, including mutual funds, pension funds, and asset managers, large institutions relied less than small institutions on the research and recommendations offered by proxy voting advice businesses. Large institutions indicated that their reliance on proxy voting advice businesses was limited because they: (i) Conduct their own research and analyses to make voting determinations and use the research and recommendations offered by proxy voting advice businesses only to supplement such analyses; (ii) develop their own voting policies, which the proxy voting advice businesses are responsible for executing; and (iii) contract with more than one proxy voting advice business to gain a broader range of information on proxy issues.474 In contrast, small institutions said they had limited resources to conduct their own research and tended to rely more heavily on the research and recommendations offered by proxy voting advice businesses.475 The findings of a 2016 GAO study that surveyed 13 institutional investors were similar.476

As discussed in Section I above, proxy voting advice businesses have the potential to influence many investors’ voting decisions and, as a result, the overall vote. Clients of proxy voting advice businesses number in the thousands, and they exercise voting authority or influence over a sizable number of shares that are voted annually. Commenters described the informational benefits that clients derive from proxy voting advice477 and how proxy voting advice businesses enable them to make informed voting determinations on behalf of investors and beneficiaries.478

To the extent that proxy voting advice businesses influence voting decisions, they also may indirectly impose certain costs on shareholders. Recent theoretical research on the role of proxy voting advice suggests that the presence of proxy voting advice businesses may induce investors to over-rely on information produced by these businesses to make voting decisions. This over-reliance arises because shareholders do not internalize the benefits for other shareholders of their own independent evaluation of matters put to a vote. Instead, shareholders find it privately efficient to source the analysis of voting decisions to proxy voting advice businesses.479

Additionally, if proxy voting advice businesses significantly influence voting, registrants and other market participants may seek to engage with proxy voting advice businesses rather than engaging directly with investors or registrants. Thus, the presence of proxy voting advice businesses may negatively affect the ability of certain investors to engage with and influence registrants and other investors. On the other hand, from a transactions cost perspective, being able to engage with a few large and important intermediaries, compared to engaging bi-laterally with multiple shareholders, may be more efficient for registrants and investors.

Although the economic incentives to concentrate voting power and influence in proxy voting advice businesses are strong, research on the role of proxy voting advice businesses in influencing voting, however, has produced a wide range of results. For example, a number of studies suggest that proxy voting advice has substantial influence on proxy votes,480 while others suggest a more limited influence.481 We note that existing academic studies examined the relationship between proxy votes and proxy voting advice businesses’ recommendations based on benchmark policies. The relationship between proxy votes cast and voting recommendations provided to clients using clients’ custom policies has not, to date, been the subject of academic study.482

472 See Concept Release at 42983.

473 See Chelsea Spieles, Proxy Advisory Firms, Governance, Market Failure, and Regulation 7 (2019), available at https://www.milkeninstitute.org/sites/default/files/reports/pdf/Pr...Firms%20FINAL.pdf (“Spart (2019)”). Commenters also suggest that proxy voting advice businesses are an economically efficient means of collecting information and analyzing voting issues. See, e.g., letter from CEC.

474 See U.S. Gov’t Accountability Office, GAO–07–765, Report to Congressional Requesters, Corporate Shareholder Meetings: Issues Relating to the Firms that Advise Institutional Investors on Proxy Voting, 17–18 (2007), available at https://www.gao.gov/new.items/d07765.pdf (“2007 GAO Report”); see also Letters in response to the SEC Staff Roundtable on the Proxy Process from BlackRock [Nov. 16, 2018] (“BlackRock’s Investment Stewardship team has more than 40 professionals responsible for developing independent views on various matters on which we should vote proxy on behalf of our clients.”); NYC Comptroller (Jan. 2, 2019) (“We have five full-time staff dedicated to proxy voting during peak season, and our least tenured analyst has 12 years’ experience applying the NYC Funds’ domestic proxy voting guidelines.”); Transcript of the Roundtable on the Proxy Process at 194 [comments of Mr. Scott Dragoon] (“If we’ve ever actually reviewed the benchmarks, whether it’s ISS or anybody else, they’re very extensive and much more detailed than small firms[like ours] could ever develop with our own independent research.”).


477 See letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Maloney, General Counsel, Council of Inst. Investors (Feb. 20, 2020) (“CII VIII”).

478 See, e.g., letters from FMA & AIMA: New York Comptroller II. See generally Andrey Malenko & Nadya Malenko, Proxy Advisory Firms: The Economics of Selling Information to Voters, 74 J. Fin. 2441 (2019).

479 See generally Stephen Choi, Jill Fisch, & Marcel Kahan, The Power of Proxy Advisors: Myth or Reality?, 59 Emory L.J. 869, 905–06 (2010). See also Brav et al. (2019), supra note 481, at 35. The authors find that larger mutual fund families vote “in ways completely independent from what are recommended by the advisors.”

480 See infra notes 481 and 482.

Research on the role of proxy voting advice businesses in proxy voting has also produced inconclusive results with respect to the quality of voting advice. For example, proxy voting advice businesses have been the subject of criticism for potentially being influenced by conflicts of interest, producing reports that contain inaccuracies, and utilizing one-size-fits-all methodologies when evaluating a diverse array of registrants or when providing services to a diverse array of clients. To assess the quality of voting advice, studies have sought to examine stock market reactions to registrants’ announcements that they will adopt policies consistent with proxy voting advice businesses’ recommendations. These studies hypothesize that the value of such policies should be impounded in stock prices, and if investors expect adoption of a particular policy to increase the value of a registrant, an announcement that the registrant plans to adopt the policy should be associated with a positive stock price reaction. This reasoning assumes clients aim to increase a registrant’s share price and that proxy voting advice businesses tailor voting recommendations to achieve this aim. Proxy voting advice businesses and certain of their clients, however, may have goals other than, or in addition to, maximizing the current value of a registrant’s shares. Furthermore, the attribution of stock price reactions to the adoption of policies by a registrant may be challenging due to multiple announcements and other information about the registrant that may be released concurrently. Together, these limitations make it difficult for researchers to conclusively infer recommendation quality from stock market reactions to implementation of proxy voting advice business recommendations.

2. Commenter Concerns Regarding the Rule’s Economic Justification

In response to the Proposing Release, commenters expressed a range of views regarding the rule’s economic justification. Some commenters asserted that there are failures in the market for proxy advice that justify the final rule. In addition to a variety of anecdotal evidence, some commenters provided surveys of registrants, corporate governance professionals, and retail investors that indicated concerns about factual inaccuracies and conflicts of interest in the proxy voting process.

Other commenters stated, generally, that there is no principal-agent problem or other market failure and that the proposed rule’s economic analysis failed to describe or provide demonstrable evidence of a problem in the market for proxy advice that cannot be solved via contractual arrangements in the private sector, other market based mechanisms, or existing Commission rules (e.g., Rule 206(4)–6 under the Investment Advisers Act). For example, one commenter disputed the claims cited in the Proposing Release that proxy voting advice contains inaccuracies or errors significant enough to require regulatory intervention, stating that proxy voting advice businesses “have every incentive to conduct credible research and provide accurate recommendations.” Another commenter provided analysis showing that two proxy voting advice businesses are more likely to recommend their clients vote with management than a typical investor is to vote with management, casting doubt on claims that proxy voting advice businesses tend to encourage shareholders to oppose management proposals. Another commenter provided independent analysis of the dynamics of proxy vote recommendations, showing that they change over time in response to events.
and new information, suggesting they are not “monolithic.”

One commenter suggested that there is a different source of market failure inherent to the proxy voting process and proxy voting advice businesses stemming from the collective action problem inherent in shareholder voting. According to the commenter, investors do not value expending resources to determine their position on a given proxy vote because, on the margin, their vote does not matter and they do not fully internalize all of the benefits associated with any resources they do expend. The commenter further asserts that proxy voting advice businesses, in turn, can therefore only charge modest fees for their services, which leads them to be resource constrained in performing their own research. Thus, according to the commenter, this arrangement leads to voting recommendations that are not adequately informed or precise, and thus imposes negative externalities on shareholders. The commenter argues that, because market forces are unable to improve the quality of voting recommendations and reduce these externalities, there is a need for regulatory action.

Another commenter offered a different perspective, arguing instead that proxy voting advice businesses represented a private market solution to shareholders’ collective action problem, rendering regulatory intervention unnecessary. Other commenters posited that the underlying concentration among proxy voting advice businesses and conflicts of interest are the result of past regulatory action that created demand for the services of proxy voting advice businesses.

We believe that the important role proxy voting advice businesses currently play in facilitating clients’ participation in the proxy process, as well as the importance of ensuring that clients have access to more complete information regarding matters to be voted on, and the material conflicts of interest proxy voting advice businesses may have, support the final amendments. As discussed in Section I above, the purpose of the amendments is to help ensure that investors who use proxy voting advice have access to more transparent, accurate, and complete information and benefit from a robust discussion of views—similar to what is possible at a meeting where shareholders are physically attending and participating—when making their voting decisions, while minimizing costs or delays that could adversely affect the timely provision of proxy voting advice. The amendments are expected to reduce the costs incurred by clients of proxy voting advice businesses in monitoring for conflicts of interest or acquiring information relevant to assessing proxy voting advice. In this way, the amendments should improve the overall efficiency associated with this segment of the proxy system. Proxy voting advice businesses often act as the intermediary for their clients’ participation in the proxy system, and the requirements of the rule will facilitate clients’ timely access to, and awareness of, more complete information prior to voting. This has the potential to benefit not just those clients and the immediate shareholders they serve but also investors in our public markets more generally.

B. Economic Baseline

The baseline against which the costs, benefits, and the impact on efficiency, competition, and capital formation of the final amendments are measured consists of the current regulatory requirements applicable to registrants, proxy voting advice businesses, investment advisers, and other clients of these businesses, as well as current industry practices used by these entities in connection with the preparation, distribution, and use of proxy voting advice.

1. Affected Parties and Current Market Practices

a. Proxy Voting Advice Businesses

Proxy voting advice businesses will be affected by the final amendments. As the Commission has previously stated, voting advice provided by a firm such as a proxy voting advice business that markets 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

496 See letter from PRI II.
497 See letter from B. Sharfman I. See also letter from Bryce C. Tingle, N. Murray Edwards Chair in Business Law, Faculty of Law, University of Calgary (Jan. 31, 2020) (“Prof. Tingle”) (similarly asserting that both fund managers and proxy voting advice business are not incentivized to expend significant resources in producing and evaluating voting advice, but without attributing this lack of incentives to a collective action problem on the part of shareholders.)
498 See academic research has shown, theoretically, that the inability of shareholders to fully internalize the benefits of developing an informed position on matters put to a shareholder vote can cause shareholders to over-rely on proxy voting advice under certain conditions. See supra note 479.
499 See letter from B. Sharfman I.
500 See letter from Glass Lewis II.
501 See, e.g., letter from P. Mahoney and J.W. Verret.
502 Specifically, commenters indicated that two additional firms included in the set of affected proxy voting advice businesses in the Proposing Release, ProxyVote Plus and Marco Consulting Group did not advise investment advisers and institutional investors on their voting determinations and would therefore not be affected by the proposed amendments. See supra note 100 and accompanying text. See also letters from Segal Marco II; ProxyVote II; CII IV.
503 See supra notes 170–173 and accompanying text.
505 Id.

services) generally constitutes a solicitation subject to 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.”

Several commenters noted that certain firms involved in the proxy process do not supply research, analysis, and recommendations to support the voting decisions of their clients. To the extent such firms are not providing any voting recommendations and are instead exercising delegated voting authority on behalf of their clients, we agree that such services generally will not constitute “proxy voting advice” under Rule 14a–1(l)(1)(iii)(A) and have adjusted our baseline accordingly.

As of July 22, 2020, to our knowledge, the proxy voting advice industry in the United States consists of three major firms: ISS, Glass Lewis, and Egan-Jones.

• ISS, founded in 1985, is a privately-held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote execution, governance data, and related products and services. ISS also provides advisory/consulting services, analytical tools, and other products and services to corporate registrants through ISS Corporate Solutions, Inc. (a wholly owned subsidiary). As of April 2020, ISS had nearly 2,000 employees in 30 locations, and covered approximately 44,000 shareholder meetings in 115 countries, annually. ISS states that it executes about 10.2 million ballots annually on behalf of those clients representing 4.2 trillion shares. ISS is registered with the Commission as an investment adviser and identifies its...
work as pension consultant as the basis for registering as an advisor.508
  • Class Lewis, established in 2003, is a privately-held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote execution, and reporting and regulatory disclosure services to institutional investors.509
As of April 2020, Class Lewis had more than 380 employees worldwide that provide services to more than 1,300 clients that collectively manage more than $35 trillion in assets.510 Glass Lewis states that it covers more than 20,000 shareholder meetings across approximately 100 global markets annually.511 Glass Lewis is not registered with the Commission in any capacity.
  • Egan-Jones was established in 2002 as a division of Egan-Jones Ratings Company.512 Egan-Jones is a privately-held company that provides proxy services, such as notification of meetings, research and recommendations on selected matters to be voted on, voting guidelines, execution of votes, and regulatory disclosure.513 As of September 2016, Egan-Jones’ proxy research or voting clients mostly consisted of mid- to large-sized mutual funds, and the firm covered approximately 40,000 companies.514 Egan-Jones Ratings Company (Egan-Jones’ parent company) is registered with the Commission as a Nationally Recognized Statistical Ratings Organization.515

Of the three proxy voting advice businesses identified, ISS and Glass Lewis are the largest and most often used for proxy voting advice.517 We do not have access to general financial information for ISS, Glass Lewis, and Egan-Jones such as annual revenues, earnings before interest, taxes, depreciation, and amortization, and net income. We also do not have access to client-specific financial information or more general or aggregate information regarding the economics of the proxy voting advice business.

Several commenters stated that the economic analysis in the Proposing Release failed to consider effects of the proposal on smaller firms that provide proxy voting services, such as Investor Advocates for Social Justice (“IASJ”).518 Further, commenters stated that the final amendments could affect the propensity of non-U.S. firms to compete with U.S. proxy voting advice businesses.519 Based on the information available to the Commission,520 including comments on the Proposing Release, we are not aware of smaller firms that currently supply research, analysis, and recommendations in the United States to support the voting decisions of their clients that would fall within the definition of “solicitation.” We acknowledge that any smaller firms or non-U.S. proxy voting advice businesses could be affected by the final amendments to the extent they provide proxy voting advice on registrants who have filed proxy materials with the Commission, or if the final amendments affect their willingness to enter the market to supply proxy voting advice in the United States.

In a principal-agent relationship, such as the relationship between a proxy voting advice business and a client, to the extent that the principals’ and agents’ interests are not perfectly aligned, agents can expend resources to assure principals that they will act in the principals’ best interest. When agents operate in a competitive market soliciting business from principals, they have an incentive to expend resources to assure principals that they will act in the principals’ best interest, or risk putting themselves at a competitive disadvantage.521 Where the agent’s interest and the principal’s interest diverge, there can be a strong counterweight to this incentive and where a relationship is multifaceted the agent may emphasize areas of alignment and de-emphasize areas of conflict. In the proxy voting advice market, certain practices by proxy voting advice businesses serve as mechanisms to assure their clients that proxy voting advice businesses will take actions that are in clients’ best interest. All three major proxy voting advice businesses have policies, procedures, and disclosures in place that are intended to reduce clients’ costs of monitoring the businesses’ behavior.522

Proxy voting advice businesses’ reliance on information available to all shareholders is one example of how current market practices may mitigate agency costs. One commenter noted that facing the prospect of having their work checked by clients can discipline proxy voting advice businesses that might otherwise act based on conflicts of interest when developing proxy advice.523 The same commenter included use of publicly available information as a step it has taken to “ensure quality and minimize error in its published research.”524 The three major proxy voting advice businesses state that they have their recommendations exclusively on information that is publicly available. Relying on publicly available information to develop proxy advice enables clients to validate the inputs that proxy voting advice businesses provide, rather than expending effort to obtain proprietary, and potentially commercially sensitive, information.

509 Id. at 7.
511 Id.
513 Id.
514 Id.
515 Id. While ISS and Glass Lewis have published updated coverage statistics on their websites, the most recent data available for Egan-Jones was compiled in the 2016 GAO Report.
517 See 2016 GAO Report, supra note 141, at 8, 41 (“In some instances, we focused our review on Institutional Shareholder Services (ISS) and Glass Lewis and Co. (Glass Lewis) because they have the largest number of clients in the proxy advisory firm market in the United States.”); see also letters in response to the SEC Staff Roundtable on the Proxy Process from Center on Executive Compensation (Mar. 7, 2019) (noting that there are “two firms controlling roughly 97% of the market share for such services”); Society for Corporate Governance (Nov. 9, 2018) (“While there are five primary proxy advisory firms in the U.S., today the market is essentially a duopoly consisting of Institutional Shareholder Services . . . and Glass Lewis & Co. . . .”).
518 See letter from IASJ. We understand that this firm typically does not make voting recommendations to its institutional investor clients but rather assists those “who seek a partner to carry out their proxy voting.” Id. To the extent a firm does not make voting recommendations to its clients and is instead exercising delegated authority on their behalf, it would not be engaged in “solicitation” within the meaning of Rule 14a–1(l)(1)(iii)(A). See supra notes 170–173 and accompanying text. Therefore, based on our understanding of its current activities, this commenter (and others engaged in similar conduct) would not appear to be subject to compliance with Rule 14a–2(b)(9). See also letters from Felician Sisters II; Good Shepherd; Interfaith Center; ProxyVote II; Segal Marco II; St. Dominic of Caldwell.
519 See letters from Minerva I; PIRC.
520 Our awareness of providers of proxy voting services may be limited because firms that provide proxy voting services, including proxy voting advice businesses, do not always engage in activities that would require them to register with the Commission. See supra Section I.
521 Agents have an incentive to expend resources to assure principals that they will act in the principals’ best interest as long as the cost of providing the assurance is less than the value of the assurance to principals.
522 See, e.g., letter from Glass Lewis II.
523 See letter from ISS.
524 See id.
directly from registrants or other sources.

As part of our consideration of the baseline for the final rules, we focus on two industry practices that are particularly relevant for the new conditions in Rule 14a-2(b): Conflicts of interest disclosure and procedures for engagement with registrants.

i. Conflict of Interest Disclosures

While the nature of potential conflicts related to revenues might be different among the three proxy voting advice businesses, all three proxy voting advice businesses have conflicts of interest policies and make disclosures to clients disclosing the nature of potential conflicts and the steps that they have taken to address them.525 These existing policies and disclosures are part of the economic baseline for the amendments.

For example, we understand that ISS has implemented policies and procedures designed to prevent and manage conflicts that could arise from the work of ISS’ research and analytics teams (“Global Research”) and the work of ISS Corporate Solutions (“ICS”) for public companies.526 More specifically, Global Research prepares proxy voting governance research, analyzes proxy issues, and provides ratings on, and other assessments of, public companies for the benefit of institutional investors. ICS provides advisory services, analytical tools, and publications to registrants to enable registrants to improve shareholder value and reduce risk. According to ISS, one of the primary steps the firm has taken to prevent and manage this potential conflict of interest is implementing a firewall with the goal of separating ICS from ISS. ISS notes that it makes available to its institutional clients information about the relationships between ICS and its clients in a way that is intended not to alert Global Research analysts to the possible existence of such relationships. ISS also notes that it adds a legend to each global or domestic proxy analysis advising the reader of the existence of ICS and offering ISS’ clients the ability to learn more about ICS and its clients. In addition, ISS indicates that it has implemented a policy on the disclosure of significant relationships, under which ISS provides clients with “proactive visibility” regarding a range of significant relationships within the client-facing side of the ProxyExchange platform.527 ICS also discloses in all of its contracts that ISS’ status as a registered investment adviser (as well as its internal policies and procedures) may require ISS to disclose to ISS institutional clients ICS’ relationship with the registrant.

We understand the other two major proxy voting advice businesses also provide disclosure of potential conflicts of interest. Glass Lewis notes that it provides disclosure of potential conflicts on the cover of the relevant research report.528 This is intended to enable clients and any other parties with access to a Glass Lewis report (e.g., the media) to review potential conflicts at the same time they review the research, analysis, and voting recommendations contained therein. Egan-Jones also discloses its management of three categories of potential conflicts—revenue, cost, and structural—to the public.529

Thus, it appears that all three major proxy voting advice businesses have some level of conflict of interest disclosure policies in place and provide such disclosure to affected parties. These disclosure policies, which are intended to support the objectivity of voting advice and the integrity of the voting process, may overlap to a certain degree with the requirements in the final amendments. These disclosure policies, however, vary in terms of structure and coverage as well as the manner in which the information is conveyed.

ii. Engagement With Registrants

The following section discusses existing proxy voting advice business engagement with the subjects of proxy voting advice—one avenue by which such businesses may signal to their clients that the information underlying proxy voting advice is accurate, transparent, and complete.

We understand that all three major proxy voting advice businesses have certain policies, procedures, and disclosures in place intended to assure clients that the voting advice they receive will be based on accurate, transparent, and complete information. In some cases, proxy voting advice businesses seek input from registrants to further these objectives. All three of these proxy voting advice businesses offer certain registrants some form of pre-release review of at least some of their proxy voting advice reports, or the data used in their reports. Also, all three such proxy voting advice businesses offer some registrants access to proxy voting reports and offer mechanisms by which registrants can provide feedback on those reports, in some cases for a fee.

For example, ISS states that it may, in some circumstances, give registrants, whether or not they are ICS clients, the right to review draft research analyses, ratings, or other advisory research reports so that ISS may correct factual inaccuracies before delivering final voting advice. ISS acknowledges that review of draft analyses may provide an opportunity for registrants to unduly influence those analyses and reports. To avoid the appearance of impropriety, ISS states that it generally offers registrants an opportunity to review a draft proxy analysis, rating, or other research report only for the purposes of verifying the factual accuracy of information. ISS further states that it retains sole discretion whether to accept any change recommended by the registrant. ISS’s policies also govern changes to analyses based on registrant feedback. According to ISS’s Code of Ethics, if the analyst changes the proposed voting recommendation or other proposed conclusion, the proposed change must be reviewed by a senior analyst and ISS will retain in its files the documents supplied by the registrant detailing the factual inaccuracies.530

Glass Lewis introduced a “Report Feedback Statement” service in 2019 that has allowed companies to submit feedback on Glass Lewis reports and that feedback can be transmitted directly to Glass Lewis clients in the proxy research papers they receive.531 In addition to these services, beginning in 2015, Glass Lewis started providing the subjects of its research with its services.
registrants may file in response to proxy voting advice.

Non-U.S. proxy voting advice businesses that are signatories to the Best Practice Principles for Shareholder Voting Research have provided information about their engagement with registrants.536 Based on these public disclosures, we understand that levels of registrant engagement vary across non-U.S. proxy voting advice businesses. For example, the U.K.-based firm PIRC states that it provides pre-publication drafts of proxy voting advice to registrants for some jurisdictions as a courtesy, while France-based firm Proxinvest does not.537 While acknowledging the practices of these non-U.S. proxy voting advice businesses, this section focuses on the three major proxy voting advice businesses that operate in the United States.538

b. Clients of Proxy Voting Advice Businesses as Well as Underlying Investors

Clients that use proxy voting advice businesses for voting advice will be affected by the final rule amendments. In turn, investors and other groups on whose behalf these clients make voting determinations will be affected. One of the three major proxy voting advice businesses—ISS—is registered with the Commission as an investment adviser and as such, provides annually updated disclosure with respect to its types of clients on Form ADV. Table 1 below reports client types as disclosed by ISS.539

Table 1 illustrates the types of clients that utilize the services of one of the largest proxy voting advice businesses. For example, while investment advisers (“Other investment advisers” in Table 1) constitute a 46 percent plurality of clients for ISS, other types of clients include pooled investment vehicles (14 percent) and pension and profit sharing plans (eight percent). Other users of the services offered by ISS include corporations, charitable organizations, and insurance companies.540 Certain of these users of proxy voting advice business services make voting determinations that affect the interests of a wide array of individual investors, beneficiaries, and other constituents.541

c. Registrants

Registrants also will be affected by the final amendments. Registrants that have a class of equity securities registered under Section 12 of the Exchange Act as well as non-registrant parties that conduct proxy solicitations with respect to those registrants are subject to the

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532 See letter from Glass Lewis II.
535 See supra note 532.
536 See ISS Form ADV filing, supra note 508. ISS describes clients classified as “Other” as “Academic, vendor, other companies not able to identify as above.”
537 Id.
538 As noted in above, we are not aware of smaller firms that currently supply research, analysis, and recommendations to support the voting decisions of their clients that would fall within the definition of “solicitation.” Thus we do not speculate as to how smaller firms might engage with registrants.
540 One commenter argued that the economic analysis should include more data and data analysis related to senior citizens since they make up a large portion of the mainstream investor community. In particular, the commenter suggested we include more data on the proportion of total investors that are senior citizens and some demographic analysis. We are sympathetic to the commenter’s suggestion regarding the importance of senior citizens as investors, but we do not have data to perform the analysis the commenter requested and none was provided by commenters. See letter from Jim Martin, Chairman, et al., 60 Plus Association (Feb. 3, 2020) ("60 Plus"). We note that, to the extent the final rules improve the mix of information available to shareholders when voting decisions are made, they will benefit the investor community generally, including senior citizen investors.

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<table>
<thead>
<tr>
<th>Type of client</th>
<th>Number of clients</th>
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<tbody>
<tr>
<td>Insurance companies</td>
<td>40</td>
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<tr>
<td>Sovereign wealth funds and foreign official institutions</td>
<td>10</td>
</tr>
<tr>
<td>Corporations or other businesses not listed above</td>
<td>70</td>
</tr>
<tr>
<td>Other</td>
<td>225</td>
</tr>
<tr>
<td>Total</td>
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federal proxy rules. In addition, there are certain other companies that do not have a class of equity securities registered under Section 12 of the Exchange Act that file proxy materials with the Commission. Finally, Rule 20a–1 under the Investment Company Act subjects all registered management investment companies to the federal proxy rules.

As of December 31, 2018, we estimate that 5,756 registrants had a class of securities registered under Section 12 of the Exchange Act. As of the same date, there were approximately 200 companies that did not have a class of securities registered under Section 12 of the Exchange Act that filed proxy materials. As of August 31, 2019, there were 12,718 registered management investment companies that were subject to the proxy rules: (i) 12,040 open-end funds, out of which 1,910 were Exchange Traded Funds (“ETFs”) registered as open-end funds or open-end funds that had an ETF share class; (ii) 664 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies.

As of December 2018, we identified 98 Business Development Companies (“BDCs”) that could be subject to the final amendments. The summation of these estimates yields 18,594 companies that may be affected to a greater or lesser extent by the final amendments.

The above estimates are an upper bound of the number of potentially affected companies because not all of these registrants may file proxy materials related to a meeting for which a proxy voting advice business issues proxy voting advice in a given year. Out of the 18,594 potentially affected registrants mentioned above, 5,690 filed proxy materials with the Commission during calendar year 2018. Of the 5,690 registrants (4 percent) that were Section 12 or Section 15(d) registrants and the remaining 932 (16 percent) were registered management investment companies.

We estimate the number of unique registered management investment companies based on Forms N-CEN filed between June 2018 and August 2019 with the Commission. Open-end funds are registered on Form N–1A. Closed-end funds are registered on Form N–2. Variable annuity separate accounts registered as management investment companies are trusts registered on Form N–3. The number of potentially affected Section 12 and Section 15(d) registrants over a different time period (i.e., January 2018 to December 2018) than the number of potentially affected registered management investment companies (i.e., June 2018 to August 2019) because there is no complete N-CEN data for the most recent full calendar year (i.e., 2018). Registered management investment companies started submitting Form N-CEN in September 2018 for the period ended on June 30, 2018 with the Commission.

BDCs are entities that have been issued an 814-reporting number. Our estimate includes 88 BDCs that filed Form 10-K in 2018 as well as BDCs that may be delinquent or have filed extensions for their filings. Our estimate excludes six wholly-owned subsidiaries of other BDCs.

The 18,594 potentially affected registrants is the sum of: (a) 5,758 registrants with a class of securities registered under Section 12 of the Exchange Act; (ii) 20 registrants without a class of securities registered under Section 12 of the Exchange Act that file proxy materials with the Commission during calendar year 2018; (iii) 14 variable annuity separate accounts; (iv) 465 BDCs; (v) 565 registered management investment companies; and (vi) 98 BDCs.

For details on the estimation of companies that filed proxy materials with the Commission during calendar year 2018, see supra note 544.

According to data from Forms N-CEN filed with the Commission between June 2018 and August 2019, there were 965 registered management investment companies that submitted proxy voting advice for its security holders’ vote during the reporting period: (i) 729 open-end funds, out of which 86 were ETFs registered as open-end funds or open-end funds that had an ETF share class; (ii) 235 closed-end funds; and (iii) one variable annuity separate account.

Whether or not proxy voting advice businesses permit registrants to review draft proxy voting advice, all registrants are able to respond to final proxy voting advice by filing additional definitive proxy materials. However, as discussed in the Proposing Release, some registrants have asserted that a large percentage of proxies are voted within 24 to 48 hours of proxy voting advice being issued and that it can be difficult for registrants to access and analyze the proxy voting advice, formulate a response, and file the necessary materials with the Commission within that time period. This is consistent with feedback received from commenters, who also indicated that registrants face time pressure in their efforts to communicate their responses to proxy voting advice to shareholders prior to votes. The Proposing Release included an analysis that estimated the number of additional definitive proxy material filings in 2016, 2017, and 2018 and Commission staff subsequently refined the process for identifying relevant filings and published a list of the filings it identified in a memorandum to the public comment file. This list shows approximately 105, 93, and 90 filings in 2016, 2017, and 2018, respectively. Further, in the Proposing Release, the staff identified in a subset of additional definitive proxy material filings in 2018, where data were available, the number of business days between when a proxy voting advice business delivered proxy voting advice and when the registrant filed additional definitive proxy materials.

...
materials, and the number of business days until the planned shareholder meeting. Based on this sample, staff estimated a median value of three business days and an average value of 3.8 business days between when a proxy voting advice business issues proxy voting advice and when a registrant responds. Further, the median (average) number of days between the registrant response and the shareholder meeting based on the sample was 9.5 (10.3) business days.\textsuperscript{556}

A number of commenters interpreted our analysis in Table 2 of the Proposing Release to indicate that the Commission took the view that the “concerns” raised by registrants about errors or inaccuracies reflected actual factual errors.\textsuperscript{557} One commenter questioned whether Commission staff evaluated the merits of registrant claims presented in the Proposing Release\textsuperscript{558} and supplied its own estimates of actual error rates in proxy voting advice business research report based on its own research,\textsuperscript{559} as well as on supplementary information made available in the comment file.\textsuperscript{560}

In contrast, another commenter had a different critique of Table 2, arguing that estimating error rates based on filings of additional definitive proxy materials might actually underestimate the true error rate because registrants who submit filings subject themselves to potential liability under SEC Rule 14a–9.\textsuperscript{561}

The method for identifying filings that contained registrant concerns and classifying those concerns was detailed in the Proposing Release and in the subsequent staff memorandum.\textsuperscript{562} Importantly, the analysis set forth in the Proposing Release took no position on the merits of responses. The analysis was intended to present how registrants currently respond to proxy voting advice and the frequency and timing of those responses and made no judgment as to whether the concerns raised by registrants in their supplemental filings were valid. Nor was the analysis intended to provide an “error rate.”\textsuperscript{563} Although we agree that reasonable readers might disagree in their classification of registrant concerns, lack of agreement on classification of specific responses does not change our assessment, discussed below, that the final rules would benefit clients of proxy voting advice businesses, and the proxy process as a whole, by improving client access to registrant information and analysis. Indeed, the fact that reviewers of additional definitive proxy materials may differ both in how they identify registrant concerns and how they classify those concerns supports the idea that clients would benefit from having a mechanism available by which they can reasonably be expected to become aware of registrant responses so they might form their own view of the merits of those responses.

2. Current Regulatory Framework

The economic baseline includes the current regulatory framework that applies to proxy voting advice businesses. As explained in the Proposing Release, under the Commission’s proxy rules, any person engaging in a proxy solicitation, unless exempt, is generally subject to filing and information requirements designed to ensure that materially complete and accurate information is furnished to shareholders solicited by the person.\textsuperscript{564} Over the years, the Commission has recognized that these filing and information requirements may, in certain circumstances, impose burdens that deter communications useful to shareholders, and in such circumstances, may not be necessary to protect investors in the proxy voting process.\textsuperscript{565} Accordingly, the Commission has exempted certain kinds of solicitations from the filing and information requirements of the proxy rules, subject to various conditions, where such requirements are not necessary for investor protection.\textsuperscript{566}

Notwithstanding the exemptions, these solicitations remain subject to Rule 14a–9, the antifraud provisions of the federal proxy rules.\textsuperscript{567} Proxy voting advice businesses typically rely upon the exemptions in Rule 14a–2(b)(1) and (b)(3) to provide advice without complying with the filing and information requirements of the proxy rules.\textsuperscript{568} The existing conditions to these exemptions are designed to ensure that investors are protected where the Commission’s filing and information requirements do not apply. For example, any person who wishes to rely on the Rule 14a–2(b)(3) exemption may not receive special commissions or remuneration from anyone other than the recipient of the advice and must disclose any significant relationship or material interest bearing on the voting advice.\textsuperscript{569} By contrast, the exemption in Rule 14a–2(b)(1) does not currently require conflicts of interest disclosure. Both exemptions were adopted by the Commission before proxy voting advice businesses played the significant role that they now do in the proxy voting process and in the voting decisions of investment advisers and institutional investors.

Several commenters stated that the analysis in the Proposing Release did not reflect requirements to address conflicts of interest under existing law, including the regulatory scheme under the Investment Advisers Act, as well as proxy voting advice business best practices under the baseline.\textsuperscript{570} We recognize that, in addition to the rules governing proxy solicitation, some proxy voting advice businesses may be subject to other regulatory regimes.

\textsuperscript{556}See Proposing Release at 66546.
\textsuperscript{557}Id. at Table 2.
\textsuperscript{558}See letter from CII I.
\textsuperscript{559}See letter from CII IV. This commenter suggested that the error rate implied by the Commission’s classification in Table 2 of the Proposing Release was 0.5% and that after correcting for registrant assertions that appear to be in error, the rate is reduced to 0.3%. The same commenter performed a case-by-case analysis of claims they believed may have been classified as errors in the Proposing Release’s analysis, casting doubt on whether many of them were actually related to factual errors, and concluded that, after excluding analytical errors, which may just represent differences of opinion, the actual error rate is only 0.06%.
\textsuperscript{560}See letter from ACCF.
\textsuperscript{561}See Proposing Release at n.239. See also Data Analysis of Additional Definitive Proxy Materials, supra note 555.
\textsuperscript{562}See Proposing Release at 66524.
\textsuperscript{563}See, e.g., Communications Among Shareholders Adopting Release at 49278 (“[S]hareholders can be deterred from discussing proposals . . . .’’”).
\textsuperscript{564}For example, Rule 14a–2(b)(1) generally exempts solicitations by persons who do not seek the power to act as proxy for a shareholder and do not have a substantial interest in the subject matter of the communication beyond their interest as a shareholder. Another exemption, Rule 14a–2(b)(3), applies to proxy voting advice furnished by an advisor to any other person with whom the advisor has a business relationship.
\textsuperscript{565}17 CFR 240.14a–9.
\textsuperscript{566}See Commission Interpretation on Proxy Voting Advice at 47416 (discussing the “two exemptions to the federal proxy rules that are often relied upon by proxy advisory firms”).
\textsuperscript{567}The conditions to Rule 14a–2(b)(3) are: (i) The advisor renders financial advice in the ordinary course of his business; (ii) the advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter; (iii) the advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice who have received the same advice under this subsection; and (iv) the proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of § 240.14a–12(c). 17 CFR 240.14a–2(b)(3).
\textsuperscript{568}See letters from ISS; Glass Lewis II. See also IAC Recommendation.
\textsuperscript{569}See Proposing Release at 66527, n.68; 66529, n.99.
For example, one of the major proxy voting advice businesses, ISS, is also a registered investment adviser, and as such, must eliminate or make full and fair disclosure of all conflicts of interest to its clients that might cause ISS to render proxy voting advice that is not disinterested such that a client can provide informed consent to the conflict.\[576]\ In addition, ISS has noted that, as a registered investment adviser, it has a fiduciary duty of care to make a reasonable investigation to determine that it is not basing vote recommendations on materially inaccurate or incomplete information.\[572]\ Similarly, Egan-Jones is registered with the Commission as a Nationally Recognized Statistical Rating Organization (NRSRO). Registered NRSROs are required under Rule 17g–5 to disclose conflicts of interest relating to maintenance or issuance of a credit rating. However, these regulatory regimes serve distinct, though overlapping, regulatory purposes.\[573]\ One commenter also stated that the final rule’s economic effects should be measured relative to a baseline that consists of regulation in effect prior to the Commission Interpretation on Proxy Voting Advice,\[574]\ noting that no cost-benefit analysis was performed in connection with that interpretation.\[575]\ Consistent with its past practice, the Commission continues to believe that the appropriate baseline for its economic analysis consists of all existing regulatory requirements that apply to the affected parties, including the Commission Interpretation on Proxy Voting Advice, as well as industry practice in response to those requirements. Moreover, the Commission Interpretation on Proxy Voting Advice did not create any new legal obligations under the securities laws but rather articulated the Commission’s longstanding views on what constitutes “solicitation.” Indeed, as noted above, there is evidence that the proxy voting advice business industry has understood for over 30 years that its proxy voting advice constitutes a “solicitation” under Rule 14a–1(1) or at least that the Commission may consider such advice to constitute a “solicitation.”\[576]\ Even if a proxy voting advice business had believed it was not engaged in a “solicitation” prior to the interpretation, and thus newly realized it was engaged in a “solicitation” upon issuance of the interpretation, the impact of this change would have been minimal given the existing exemptions from the filing and information requirements of the proxy rules available to proxy voting advice businesses. The only thing that potentially would have changed for proxy voting advice businesses would have been heightened awareness of the application of Rule 14a–9 liability, including the examples of specific circumstances that could result in a violation of that rule. To the extent that some proxy voting advice businesses did not previously understand their voting advice to constitute solicitations and thus be subject to Rule 14a–9 liability, it is possible that this heightened awareness could cause those businesses to take more care in preparing their recommendations. It is also possible that this heightened awareness could expose proxy voting advice businesses to greater risk of litigation under Rule 14a–9. However, the Commission is not aware of evidence—including any specific information provided by commenters—that the interpretation has resulted or would result in substantial changes in proxy voting advice business practices. In any event, even if we were to consider Rule 14a–9 as though it were to apply to proxy voting advice businesses for the first time, we believe the benefits to investors of this antifraud rule insofar as it would deter proxy voting advice businesses from making materially false or misleading statements or omissions supports its application to proxy voting advice notwithstanding the costs associated with any increased risk of litigation. For all of these reasons, we do not expect that using a baseline prior to the Commission Interpretation on Proxy Voting Advice would have significantly altered our assessment of the economic effects of the proposed amendments. Finally, we note that—beyond the codification of our interpretation of solicitation—the conflicts disclosure requirements and principles-based engagement requirements in the final amendments will be new for all proxy voting advice businesses. The economic effects of these amendments are thus analyzed as new requirements for each of these businesses, regardless of whether they understood their proxy voting advice to constitute a “solicitation” prior to the interpretation. Accordingly, we believe that our economic analysis appropriately captures the anticipated economic effects of the final amendments.

C. Benefits and Costs

We discuss the economic effects of the final amendments below. For both the benefits and the costs, we consider each piece of the final amendments in turn. The final amendments include: (1) Amendments to the definition of solicitation in Rule 14a–1(l); (2) conditioning availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) on (a) proxy voting advice businesses providing disclosure regarding conflicts of interest and (b) proxy voting advice businesses adopting and publicly disclosing written policies and procedures reasonably designed to ensure that the proxy voting advice is made available to registrants at or prior to the time when such advice is disseminated to the proxy voting advice business’s clients and that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written statement about the proxy voting advice in a timely manner; and (3) an amendment to the examples in Rule 14a–9 of disclosure that, if omitted from a proxy solicitation and depending upon the particular facts and circumstances, may be misleading.

1. Overview of Benefits and Costs and Comments Received

a. Benefits

As discussed in further detail below, we expect the rule to generate benefits compared to the baseline for clients of proxy voting advice businesses and investors, and, albeit to a lesser extent, for proxy voting advice businesses and registrants. We expect that the largest benefits will come from conditioning availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) on proxy voting advice businesses providing certain disclosures and maintaining certain policies and procedures. In contrast, amendments to the definition of solicitation in Rule 14a–1(l) and to Rule 14a–9 represent less significant changes from the existing baseline and will likely result in more modest benefits for proxy voting advice businesses and their clients.

Two commenters expressed support for the general benefits that the

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\[572\] See letter from ISS; see also Standard of Conduct for Investment Advisers.

\[573\] See letter from ISS; see supra notes 41 through 53 and accompanying text.

\[574\] See supra note 74.

\[575\] See letter from ISS. Another commenter argued that under that baseline, proxy voting advice businesses were governed by the fiduciary standard of the Advisers Act, which already required proxy voting advice businesses to disclose conflicts of interest. See letter from Glass Lewis II. As noted above, the Commission acknowledges that some, but not all, proxy voting advice businesses may be subject to other regulatory regimes, including the Advisers Act.

\[576\] See supra Section II.A.3.
proposed rules would generate. Both commenters argued that the shareholder proxy voting process is beset with collective-action problems, whereby both institutional and retail investors are not motivated to incur large expenses to collect information to become better informed about a company, particularly when the company is just one of a portfolio. According to the commenters, this results in resource-constrained proxy voting advice businesses that produce voting recommendations that are not adequately informed or precise. Such voting recommendations could lead to suboptimal voting decisions by clients of the proxy voting advice businesses. As we mention above, the purpose of the final amendments is to improve the information available to shareholders when making voting decisions, which could ultimately result in more efficient investment outcomes.

In contrast, several commenters generally disputed the benefits to proxy voting advice businesses’ clients and investors resulting from the proposed amendments. One commenter argued that the general benefits of the rule are speculative at best. While two other commenters characterized them as “illusive.” One of these commenters asserted that none of the amendments would create any benefits for proxy voting advice businesses and their clients and that the only beneficiaries would be self-interested corporate insiders. Another commenter argued that the proposed rules would not improve the quality of proxy advice, asserting that the benefits are small and uncertain.

We do not agree with these assessments. While the extent of the benefits will depend on the existing practices of proxy voting advice businesses and how they choose to implement the required disclosures and procedures (as well as the existing practices of their clients and how they, in turn, adjust), we believe that the improved transparency that the final rules will generate will be beneficial for proxy voting advice businesses’ clients and will improve the overall proxy voting process. Indeed, the fact that in certain circumstances, and to varying extents, proxy voting advice businesses already incorporate practices similar to the final amendments belies the notion that these expected benefits are speculative or illusory. For example, if proxy voting advice businesses saw no benefit to providing conflicts of interest disclosure to their clients, they would not provide such disclosure currently, absent a regulatory requirement. We also note that the final amendments reflect significant changes from the proposal in light of commenter input and concerns, and we believe these changes focus on improvements to the proxy process most likely to yield benefits and result in final amendments that are less costly, when measured against the baseline, as compared to the costs of the proposal.

b. Costs

We expect that proxy voting advice businesses as well as registrants will incur direct costs as a result of the final amendments. In the following sections, we analyze the costs of the final amendments due to changes in proxy voting advice business disclosure and engagement practices relative to the baseline. Further, to the extent that any of the final amendments impose direct costs on proxy voting advice businesses that are passed along to clients, the final amendments could impose indirect costs on clients of proxy voting advice businesses, including investment advisers and institutional investors, and the underlying investors they serve, if applicable.

Some commenters expressed concern that the economic analysis in the Proposing Release was not thorough enough or that it understated the costs and other negative effects that the proposed rules would have on proxy voting advice businesses and investors. Some of these commenters also commented on the costs of specific proposed amendments, which we discuss below. One commenter stated that, with respect to the quantitative cost estimates in the Commission’s Paperwork Reduction Act (“PRA”) analysis, it believed the actual compliance costs would be 240 times those estimated in the Proposing Release. One commenter urged a more thorough cost-benefit analysis or other investigation to gather data from which reasonable cost estimates can be extrapolated.

We acknowledge, as we did in the Proposing Release, that the final amendments will likely generate direct and indirect costs for proxy voting advice businesses and potentially their clients. To the extent that a large driver of the costs discussed by commenters would have been the proposed amendment regarding registrant review and response to proxy voting advice, the flexibility afforded by the principles-based approach reflected in the final rules, particularly as it accommodates practices similar to current practices, should result in lower costs for proxy voting advice businesses and their clients as compared to the more prescriptive approach we proposed.

In the following sections, we discuss the specific costs and benefits for each aspect of the final amendments.

2. Codification of the Commission’s Interpretation of “Solicitation” Under Rule 14a–1(l) and Section 14(a)

We are codifying the Commission’s interpretation that, as a general matter, proxy voting advice constitutes a solicitation within the meaning of the Exchange Act Rule 14a–1(l). Overall, we do not expect this amendment to have a significant economic impact because it codifies an already-existing Commission interpretation. This interpretation itself did not modify existing law or reflect a change in the Commission’s position and is distinct from the amendments codifying availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) on proxy voting advice businesses providing certain disclosures and maintaining certain policies and procedures, which we acknowledge would alter the costs and benefits associated with being subject to the federal proxy rule regime and which we discuss in detail below.

Nonetheless, the final amendment to Rule 14a–1 codifying this interpretation in the Commission’s proxy rules may provide more clear notice that Section 14(a) and the proxy rules apply to proxy voting advice. Parties receiving proxy voting advice may benefit from such notice to the extent that it informs them that the

577 See letters from James R. Copland, Senior Fellow and Director, Legal Policy, Manhattan Institute for Policy Research (Feb. 3, 2020) (“Manhattan Institute”); B. Sharman I.
578 See letters from Bricklayers; CalPERS; CFA Institute I; James Barr Ames Professor (CFA Institute I; Kathryn McCluskey, Director, Social Responsibility, United Church Funds (Feb. 3, 2020) (“Church Funds”); CH IV; Glass Lewis II; Karen L. Barr, President and CEO, Investment Adviser Association (Feb. 3, 2020) (“IAA”); IC; ISS; New York Comptroller II; ProxyVote II.
579 See letter from ProxyVote II.
580 See letters from CFA Institute I; ISS.
581 See letter from ISS.
582 See letter from Bricklayers.
583 See letters from Bricklayers; CalPERS; CFA Institute I; Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis I; Glass Lewis II; ISS. We respond to these comments in supra Section IV.B.3.
584 See letter from Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis I; Glass Lewis II; ISS. We respond to these comments in supra Section IV.B.3.
585 See letter from Ohio Public Retirement.
586 Several commenters suggested that the Commission should use a baseline that does not include the August 19 interpretation. See, e.g., letters from Glass Lewis II; ISS. We respond in these comments in supra Section IV.B.2.
communication they receive from proxy voting advice businesses is subject to the protections (e.g., antifraud protections) that come from the fact that such communication is a solicitation. As discussed above, even if a proxy voting advice business had believed it was not engaged in a “solicitation” prior to the interpretation, we believe the impact of this change would be minimal given the existing exemptions from the filing and information requirements of the proxy rules available to proxy voting advice businesses. The Commission is unaware of specific evidence that the interpretation has resulted or would result in a substantial increase in costs due to the application of Rule 14a–9 to proxy voting advice.587

We also are amending Rule 14a–1(l)(2) to clarify that the furnishing of proxy voting advice by certain persons will not be deemed a solicitation. Specifically, voting advice from a person who furnishes such advice only in response to an unprompted request for the advice or a person who does not market its expertise as a provider of proxy voting advice, separately from other forms of investment advice, will not be deemed a solicitation. Again, we do not expect this adopted amendment to have a significant economic impact because it codifies the Commission’s longstanding view that such a communication should not be regarded as a solicitation subject to the proxy rules.

3. Amendments to Rule 14a–2(b)
   a. Conflicts of Interest—New Rule 14a–2(b)(9)(i)

i. Benefits
   We are amending Rule 14a–2(b) to make the availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) for proxy voting advice businesses contingent on providing enhanced disclosure of conflicts of interest specifically tailored to proxy voting advice businesses and the nature of their services.588 These conflicts of interest disclosures are intended to augment existing requirements by eliciting information that may not be captured by the current requirements of either Rule 14a–2(b)(1) and (b)(3) and that is more tailored to proxy voting advice businesses and the nature of their conflicts. The final amendments require disclosure of conflicts that is sufficiently detailed such that clients of proxy voting advice businesses can understand the nature and scope of the interest, transaction, or relationship and assess the objectivity and reliability of the proxy voting advice they receive. In addition, proxy voting advice businesses availing themselves of an exemption will be required to disclose any policies and procedures used to identify, as well as the steps taken to address, any material conflicts of interest, whether actual or potential, arising from such relationships and transactions. The final amendments also will specify that the enhanced conflicts disclosures must be provided in the proxy voting advice and in any electronic medium used to deliver the advice.

   We believe the final amendments will benefit the clients of proxy voting advice businesses by enabling them to better assess the objectivity of the proxy voting advice businesses’ advice against potentially competing interests. Under Rule 14a–2(b)(9)(i), disclosure of conflicts will be more comprehensive regardless of which exemption the proxy voting advice business relies upon for its proxy voting advice.589 Furthermore, we believe the requirement that conflicts of interest disclosures be included in the voting advice will benefit clients of proxy voting advice businesses by making more standard the time and manner in which such principles-based information is disclosed and ensuring that the required disclosures receive due prominence and can be considered together with proxy voting advice at the time clients are making voting determinations. We believe this will, in turn, make it easier or more efficient for such clients to review and analyze the conflicts disclosure, thus reducing the agency costs associated with utilizing the services of proxy voting advice businesses.

   Disclosure of material conflicts of interest can lead to more informed decision-making, and we anticipate that institutional investors and investment advisers will use information from disclosures of material conflicts of interest to make more informed voting decisions.590 Thus, to the extent they enable the clients of proxy voting advice businesses to make more informed voting decisions on investors’ behalf, these disclosure requirements will also benefit investors. Further, we believe these disclosures will make it easier and more efficient for clients that are investment advisers to conduct a reasonable review of a proxy voting advice business’s policies and procedures regarding how the proxy voting advice business identifies and addresses conflicts of interest.591

   One commenter that is a proxy voting advice business and a registered investment adviser suggested that the benefits associated with Rule 14a–2(b)(9)(i) will be marginal because of proxy voting advice businesses’ existing fiduciary duty to their clients and the disclosures they already provide.592 Relatedly, several institutional clients of proxy voting advice businesses stated that they believe existing practices provide sufficient disclosure of conflicts of interest under the baseline.593 As an initial matter, not all proxy voting advice businesses have registered as investment advisers and hence may not have the same fiduciary duty as the commenter. Moreover, even where certain proxy voting advice businesses provide detailed disclosure about conflicts of interest under existing practices or regulatory regimes, requiring tailored disclosure as a condition to the proxy rule exemptions will help to ensure that the disclosure is more consistently provided to consumers of proxy voting advice across the industry. As noted in Section IV.B.1 above, existing conflict of interest disclosure by proxy voting advice businesses differs across firms, including in structure, coverage, and manner of conveyance.

   Importantly, the final rule will provide users of proxy voting advice with timely access to such disclosure in the proxy voting advice and in any electronic medium used to deliver the advice. As a result, we believe the final rule will allow clients of proxy voting advice businesses to more efficiently access the conflicts disclosure and assess a proxy voting advice business’s potential conflicts of interest. However, we acknowledge that, to the extent that proxy voting advice businesses currently provide information that meets or exceeds the adopted disclosure requirements, and to the extent that clients of proxy voting advice businesses find current disclosure practices under the baseline to be sufficient, the benefits described above will be more limited.594

587 See discussion in supra Section IV.B.2.
588 See supra Section II.B.3.
589 See supra Section II.B.3.
590 See supra Section II.B.3.
591 See supra Section II.B.3.
592 See letter from ISS.
593 See supra notes 195–197.
594 For example, ISS and Glass Lewis are signatories to a set of voluntary industry-developed practices which state that, as a matter of principle, signatories should have processes in place to identify and disclose conflicts of interest to their clients. See BPP Group Best Practice Principles for Shareholder Voting Research, available at https://bppygr.info (last visited May 21, 2020).
iii. Costs

The new conflicts of interest disclosure requirements will impose a direct cost on proxy voting advice businesses to the extent proxy voting advice businesses are not already providing information that meets the adopted materiality-based disclosure requirements.\(^{595}\) Specifically, proxy voting advice businesses will bear direct costs associated with: (i) Reviewing and preparing disclosures describing their conflicts; (ii) developing and maintaining methods for tracking their conflicts; (iii) seeking legal or other advice; and (iv) updating their voting platforms. Proxy voting advice businesses that are investment advisers are already required to identify conflicts and to eliminate or make full and fair disclosure of those conflicts.\(^{596}\) Further, proxy voting advice businesses that are retained by investment advisers to assist them with proxy voting may already provide such conflicts disclosure in connection with the investment advisers’ evaluation of the capacity and competency of the proxy voting advice business. Additionally, as discussed above, proxy voting advice businesses who currently rely on the Rule 14a–2(b)(3) exemption already must disclose any significant relations or material interest bearing on the voting advice.

We are unable to provide quantitative estimates of these direct costs on proxy voting advice businesses because the facts and circumstances unique to each proxy voting advice business, including the disclosures it currently provides to its clients as well as the nature of its material interests, transactions, and relationships, will dictate the additional disclosure, if any, it must provide under the final rule. As discussed in Section II.B.3 above, the proposed amendments would impose compliance costs.\(^{597}\) One commenter stated that the proposed additional disclosures of conflicts of interest would generate additional paperwork burdens but no additional benefits.\(^{598}\) Another commenter that addressed the PRA burdens of the new conflicts of interest disclosure estimated that identifying and disclosing conflicts in the manner specified in the proposal would result in an additional one hour to identify conflicts at 5,565 registrants and 0.5 hours to disclose conflicts at 807 issuers, for a total of 5,969 additional hours per year.\(^{599}\) As noted in Section V.C.1.a below, in response to that commenter’s feedback, we have increased our PRA burden estimates of the enhanced conflict of interest disclosure. For PRA purposes, we estimate that the cost of the enhanced conflict of interest disclosure will be 6,000 burden hours per proxy voting advice business.

One commenter stated that the proposed amendments would compromise the firewall between its proxy voting advice business and corporate services business,\(^{600}\) presumably by revealing the clients of the corporate services arm to the research arm. We note, however, that the rule we are adopting gives a proxy voting advice business the option to include the required disclosure either in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice, such as a client voting platform, which allows the business to segregate the information, as necessary, to limit access exclusively to the parties for which it is intended.

Another commenter argued that the enhanced conflict of interest disclosure could artificially and significantly inflate the number of conflicts reported.\(^{601}\) Because proxy voting advice businesses have not been providing the level of enhanced disclosure required by the final rule, compliance with the final rules would, according to the commenter, make it appear as if proxy voting advice businesses have to date been underreporting material conflicts of interest. According to the commenter, this would result in reputational harm for proxy voting advice businesses. While we agree that an increase in the number of material conflicts reported could affect the reputation of proxy voting advice businesses, we believe it is appropriate for proxy voting advice businesses that have conflicts with the potential to influence the recommendations they provide clients to bear the reputational effects and other costs associated with disclosure of those conflicts.

As discussed in Section II.B.3 above, the final amendments have been revised to streamline the requirements and provide proxy voting advice businesses the flexibility to determine which situations merit disclosure and the specific details to provide to their clients about any conflicts of interest identified. This less prescriptive approach should help alleviate concerns that the new requirement will compel disclosure of information that may compromise existing safeguards, result in unduly lengthy disclosures, or harm proxy advice voting businesses’ reputations. In addition, the revised approach may make it easier for businesses to leverage their existing disclosures to satisfy the final rule and mitigate concerns that the rule will result in unnecessary paperwork burdens, while still providing more consistent information about conflicts of interest.


i. Benefits

In contrast to the Proposing Release, the final amendments to Rule 14a–2(b)(9) set forth a principles-based approach designed to ensure that proxy voting advice businesses’ clients have access to more transparent and complete information and benefit from a robust discussion of views when making voting decisions.\(^{602}\) The final amendments also provide non-exclusive safe harbors that the proxy voting advice businesses may use to satisfy the principles-based requirements in Rule 14a–2(b)(9)(ii).

We believe the final amendments will benefit clients of proxy voting advice businesses—and thereby ultimately benefit the investors they serve—by enhancing the overall mix of information available to those clients as they assess proxy voting advice and make determinations about how to cast votes. Providing timely notice to registrants of voting advice will allow registrants to more effectively determine...
whether they wish to respond to the recommendation by publishing additional soliciting materials and to do so in a timely manner prior to shareholders casting their votes. Registrants may wish to do so for a variety of reasons, including, for example, because they have identified what they perceive to be factual errors or methodological weaknesses in the proxy voting advice businesses’ analysis or because they have a different or additional perspective with respect to the recommendation. In either case, clients of proxy voting advice businesses may benefit from the availability of additional information upon which to base their voting decision. Registrants may also wish to respond because they agree with some or all aspects of the analysis. In that case, that fact also would likely be relevant to and enhance a client’s decision-making. Further, to the extent that proxy voting advice businesses choose to adopt policies and procedures that permit them to refine their advice based on any feedback they might receive from registrants, users of the advice and the investors they serve (if applicable) could benefit from more reliable and complete voting advice.

Ensuring that a proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of any written response by a registrant to the proxy voting advice (i.e., additional soliciting materials) will benefit users of the advice—including any underlying investors—by ensuring that they have ready and timely access to the registrant’s perspective on such advice when considering how to vote. Clients of proxy voting advice businesses often must make voting decisions in a compressed time period. Timely access to registrant responses to the advice would facilitate clients’ evaluation of the voting advice by highlighting disagreement on facts and data, differences of opinion, or additional perspectives before the client casts its vote.

One commenter questioned the benefits to clients of proxy voting advice businesses from the registrants’ ability to review the proxy voting advice.604 According to that commenter, accurate and complete advice is already being provided by proxy voting advice businesses to their clients. As we discuss in Section II.B.2 above, and as noted by several commenters,605 some proxy voting advice businesses currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue voting advice. This suggests that proxy voting advice businesses themselves recognize the potential benefit of such feedback, which could serve as a bonding mechanism for these businesses by demonstrating to clients that the proxy voting advice business believes the advice it provides is based on accurate information. Even where proxy voting advice businesses currently provide opportunities for review and feedback, however, these existing practices may be inadequate to appropriately mitigate the agency costs associated with use of proxy voting advice. Specifically, it does not appear that all proxy voting advice businesses currently provide all registrants with an opportunity to review proxy voting advice.606 Under Rule 14a–2(b)(9)(ii), proxy voting advice businesses’ policies and procedures must be reasonably designed to ensure that proxy voting advice is made available to registrants that are the subject of such advice in a timely manner prior to or at the same time when such advice is disseminated to the proxy voting advice businesses’ clients and thus will provide additional registrants with the ability to respond to that advice (if they so choose) in a timely manner, thereby enhancing the total mix of information available to proxy voting advice business clients. Rule 14a–2(b)(9)(iii) could also yield benefits to the extent that proxy voting advice businesses’ policies and procedures encourage registrants to file their definitive proxy statements earlier than they otherwise would. Earlier filing of definitive proxy statements could benefit investors generally, as they will have more time to review the materials. As discussed below, earlier filing of these materials also could help mitigate potential costs for proxy voting advice businesses stemming from Rule 14a–2(b)(9)(iii). Under the safe harbor provided by the final amendments, proxy voting advice businesses may condition dissemination of proxy voting advice to a registrant on the registrant filing its definitive proxy statement at least 40 calendar days before the annual meeting. One commenter submitted data analysis showing that, for 2018, more than 87.8 percent of registrants filed proxy materials at least 40 calendar days before an annual meeting.607 Based on these estimates, proxy voting advice businesses that choose to avail themselves of the safe harbor by implementing its terms without modification might affect the timing of up to 12.2 percent of filings.608 We note, however, that proxy voting advice businesses may structure their policies to accommodate registrants that may file less than 40 calendar days before the shareholder meeting and remain within the safe harbor.

ii. Costs

With respect to the requirement that proxy voting advice businesses adopt and publicly disclose policies and procedures reasonably designed to ensure that (i) registrants receive in a timely manner the proxy voting advice report, and (ii) proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s additional soliciting material in response to the advice in a timely manner, proxy voting advice businesses will bear direct costs. There will also be indirect costs to other parties.

(a) Direct Costs

For the principle set forth in Rule 14a–2(b)(9)(ii)(A), proxy voting advice businesses will bear direct costs associated with modifying current systems and methods, or developing and maintaining new systems and methods, to ensure the conditions of the exemption are met and with delivering the report to registrants. While some proxy voting advice businesses may already have systems in place to address some or all of these requirements,609 we do not have data that would allow us to estimate the costs associated with modifying or developing these systems and methods to encompass all registrants. To the extent proxy voting advice businesses already have similar systems in place, any additional direct cost may be limited. In addition, as we

604 See letter from ISS.
605 See, e.g., letters from Glass Lewis II; ISS.
606 See supra Section IV.A.
607 See letter from CII VIII. Calculated as (2,900 + 460)/3,828 = 0.878. The commenter stated that of 3,828 companies, 2,900 filed proxy materials between 40 and 48 calendar days in advance of annual meetings and 460 filed proxy materials 50 or more days in advance of annual meetings.
608 Under the safe harbor, a registrant may opt to forgo the benefits of receiving notice of proxy voting advice at the same time as clients if it deems accelerating the filing of its proxy materials to meet the 40-day threshold sufficiently costly.
609 See, e.g., letter in response to the SEC Staff Roundtable on the Proxy Process from Glass Lewis (Nov. 14, 2018) ("Glass Lewis has a resource center on its website designed specifically for the issuer community via which public companies, their directors and advisors can, among other things: (i) Submit company filings or supplementary publicly available information; (ii) participate in Glass Lewis’ Issuer Data Report (‘IDR’) program, prior to Glass Lewis completing and publishing its analysis to its investor clients; and (iii) report a purported factual error or omission in a research report, the receipt of which is acknowledged immediately by Glass Lewis, then reviewed, tracked and dealt with internally prior to responding to the company in a timely manner.")
discuss in more detail below, depending on how proxy voting advice businesses choose to meet the principle, they may incur direct costs associated with executing, obtaining, or modifying acknowledgments or agreements with respect to the use of any information shared with the registrant in the process of delivering the report to the registrant. A proxy voting advice business may also incur direct costs in satisfying the requirement of Rule 14a–2(b)(9)(ii)(B) that it adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written statements about the proxy voting advice in a timely manner before the shareholder meeting. For example, to be eligible for the safe harbor in the new Rule 14a–2(b)(9)(iv), a proxy voting advice business could provide: (i) Notice on its electronic client platform that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available); or (ii) notice through email or other electronic means that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available). Both mechanisms for informing clients could involve initial set-up costs as well as ongoing costs.

Since they are not required to rely on the safe harbor, proxy voting advice businesses may also put in place other mechanisms by which their clients may reasonably be expected to become aware of a registrant’s written statements about the proxy voting advice in a timely manner, which could be more or less costly than relying on the safe harbor. Under the final amendments, those mechanisms also must ensure that clients obtain the notification in a timely manner. Because the final amendments permit proxy voting advice businesses substantial flexibility in satisfying this condition, we expect proxy voting advice businesses to implement mechanisms differently depending on, among other things, their own facts and circumstances and the nature of their client bases. Thus, the overall costs of satisfying this condition are difficult to quantify. We believe, however, that the costs of implementing a mechanism by which clients may reasonably be expected to become aware of registrants’ views could involve (i) developing systems to gather information about the filing of additional soliciting materials by registrants; and (ii) modifying existing systems so that clients may reasonably be expected to become aware that registrants have filed such additional soliciting materials. To the extent proxy voting advice businesses already have similar systems in place, any additional direct cost may be limited.

Many commenters asserted that allowing registrants to review the proxy voting advice that proxy voting advice businesses have prepared for clients, as would have been required under the proposed rules, would generate significant costs for proxy voting advice businesses and their clients.610 Some commenters stated that the sheer volume of reports that proxy voting advice businesses would have to send to registrants would generate large compliance costs. For example, one commenter noted that the number of reports it alone would need to send to registrants for review would increase from 45,000 to approximately 6,500 to 25,000 post-adoption, and that it would incur costs of drafting at least 6,000 confidentiality agreements.611 Another commenter asserted that the compliance costs stemming from this amendment would be disproportionately higher for smaller proxy voting advice businesses.612 Some commenters indicated that, under the proposed rules, proxy voting advice businesses would have to negotiate and enter into confidentiality agreements with each applicable registrant to avoid the dissemination of sensitive information, and the commenters provided estimates of those burdens.613 We recognize the concerns raised by these commenters regarding compliance costs associated with the proposed registrant review and response process.

610 See, e.g., letters from CalPERS; CFA Institute I; CII IV; IAC; ISS; New York Comptroller II; Olshan LLP; Ohio Public Retirement; Prof. Bebchuk; ProxyVote II.
611 See letter from ISS.
612 See letter from CII IV.
613 See letters from CalPERS (indicating that proxy voting advice businesses would need to enter into hundreds or possibly thousands of different agreements which would be costly); ISS (stating that it would incur costs of drafting at least 6,000 confidentiality agreements); Glass Lewis I (estimating that it will incur a compliance burden of four hours per registrant to negotiate or secure confidentiality agreements with 4,912 issuers for a total of 19,648 hours); Olshan LLP (suggesting that negotiating such agreements would result in the allocation of significant time and cost by proxy voting advice businesses). Also, one commenter argued that confidentiality agreements would be ineffective at preventing leaks of proxy voting advice due to the large number of registrant employees that would have access to the information. See letter from Olshan LLP.

In response, as suggested by several commenters, we are adopting a more principles-based approach intended to achieve many of the same objectives of the proposal without unduly encumbering the ability of proxy voting advice businesses to provide their clients with timely and reliable voting advice. The final amendments will require proxy voting advice businesses to have policies and procedures reasonably designed to ensure that proxy voting advice is made available to registrants at or prior to or at the same time it is disseminated to the proxy voting advice businesses’ clients rather than within a specified period of time. Additionally, the final amendments impose only a one-time obligation with respect to notifying registrants of a given proxy voting advice. We are also adopting new Rule 14a–2(b)(9)(v), which will exclude from the scope of Rule 14a–2(b)(9)(ii) proxy voting advice to the extent that such advice is based on custom policies, and new Rule 14a–2(b)(9)(vi), which will exclude from the scope of Rule 14a–2(b)(9)(ii) proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.

We believe the significant additional flexibility in the final amendments will enable proxy voting advice businesses to design policies and procedures that satisfy the new conditions of the exemptions but are nonetheless efficiently tailored to their specific business models and practices. This more flexible approach also may permit proxy voting advice businesses to leverage their existing systems and methods to satisfy the conditions. We thus believe, when measured against the baseline, the final amendments will impose lower compliance costs and result in fewer disruptions for proxy voting advice businesses and their clients, than the more prescriptive approach set forth in the proposal. While a more principles-based approach to regulation provides additional flexibility for affected parties, it also may impose certain costs if the parties are unsure of what measures are needed to satisfy the legal requirement. For example, such an approach can entail additional judgment on the part of management or result in parties doing more than what is required in order to ensure they satisfy the applicable standard. The non-exclusive safe harbors built into the final amendments will provide legal certainty to proxy voting advice businesses that they can rely on the solicitation exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3) and therefore could further mitigate the compliance burdens associated with the
new conditions. They also may provide some guidance to proxy voting advice businesses about how they can design their own policies and procedures to satisfy the conditions.

As noted in Section V.C.1.a below, we believe that much of the burden of the final amendments would be for the proxy voting advice business to develop policies that satisfy the principles and accordingly modify or develop systems and practices to implement such policies. The principles-based approach we implement should help reduce such compliance costs significantly, which would likely result in a lower PRA burden than the commenter estimates based on the proposal. Also, our revised PRA estimates take into consideration our understanding that some proxy voting advice businesses have systems and practices in place that may complement or overlap with the new requirements, which could substantially reduce compliance costs. For PRA purposes, we estimate that each proxy voting advice business would incur 2,845 burden hours for the notice to registrants under Rule 14a–2(b)(9)(ii)(A) and 2,845 burden hours for the notice to clients under Rule 14a–2(b)(9)(ii)(B).614

In addition to these system-related costs, we expect that proxy voting advice businesses would, as a general matter, obtain acknowledgments or agreements with respect to the use of any information shared with a registrant, as we expect that the business would seek to limit disclosure of its report. Several of the changes to the final rule amendments should allow proxy voting advice businesses to take measures to reduce these compliance costs compared with the cost of the confidentiality agreements contemplated under the proposal. For example, under the principles-based approach that we are adopting, in instances where a proxy voting advice business judges the potential impact of the disclosure of information contained in the report to be high it could provide the advice to registrants at the time it is provided to their clients or it may choose to provide draft reports to registrants before making them available to clients while imposing more stringent confidentiality requirements or terms of use on registrants to prevent release of commercially sensitive information. This should reduce the risk that commercially sensitive information about proxy voting advice may be disseminated more broadly.

Moreover, as adopted, the principles-based approach does not dictate the manner in which proxy voting advice businesses provide the report to registrants, and instead gives the proxy voting advice business discretion to choose how best to implement the principle of the rule and incorporate it into the business’s policies and procedures, including by leveraging existing practices. In this regard, we note that some proxy voting advice businesses currently provide reports to registrants without requiring formal confidentiality agreements, instead requiring only an electronic acknowledgement of terms of use.615 Such an approach is likely to involve less negotiation between proxy voting advice business and registrants than formal confidentiality agreements, and thus lower compliance costs.616 Further, an acknowledgement of terms of use could be designed to apply prospectively, including for future proxy seasons, which may reduce this one-time cost when a proxy voting advice business initiates coverage of a registrant. Overall, for purposes of our PRA, we estimate that each proxy voting advice business will incur a burden of between 50 and 5,690 hours per year associated with securing an acknowledgment or other assurance that the proxy advice will not be disclosed.617 Another potential cost for proxy voting advice businesses could result from new Rule 14a–2(b)(9)(vi). When additional matters are presented for shareholder approval at meetings with applicable M&A transaction or contested matters, then the portion of the proxy voting advice provided with respect to the applicable M&A transaction or contested matters will be excluded from the scope of Rule 14a–2(b)(9)(ii). This means that in those situations, proxy voting advice businesses may choose to redact the report that they have to deliver to registrants, which will generate costs for them. It is also possible, however, that proxy voting advice businesses would choose instead to deliver an un-redacted report, in which case they will not incur the costs of redaction.618

A number of commenters raised concerns about the costs associated with the provisions in the proposed rules that would have established a formal process by which the registrant would be given the opportunity to review and provide feedback on draft voting advice.619 The principles-based approach in the final rules obviates the need for a prescribed process for engagement with the registrant and instead allows proxy voting advice businesses to decide when and how to provide notice of the proxy voting advice businesses’ voting advice to registrants. Under this approach, proxy voting advice businesses are not required to, although they may, share pre-publication drafts with registrants for their feedback. Rather, they must provide the registrant with a copy of their advice, which could be at the same time as the advice is shared with clients. Moreover, as with the proposal, nothing in the final amendments will require proxy voting advice businesses to alter their advice in response to registrant feedback. Thus, we believe the final amendments will substantially address, if not eliminate altogether, the concerns raised by commenters related to

614 See discussion in infra Section V.B.1 for the assumptions we make when estimating hours and costs associated with maintaining, disclosing, or providing the information required by the amendments that constitute paperwork burdens imposed by a collection of information.

615 For example, Glass Lewis requires a registrant to click and agree to certain “terms of use” before being able to access the notice and recommendations.

616 We recognize that some proxy voting advice businesses, irrespective of their current practices or what the final amendments envision, may nevertheless choose to enter into formal confidentiality agreements with some registrants. For such proxy voting advice businesses, the compliance costs may be closer to those estimated by the commenters.

617 See discussion in infra Section V.B.1 for the assumptions we make when estimating hours and costs associated with maintaining, disclosing, or providing the information required by the amendments that constitute paperwork burdens imposed by a collection of information.
objectivity and timing pressure associated with the proposed engagement process.

(b) Indirect Costs

The final rule may also impose indirect costs on other parties. Proxy voting advice businesses may pass through a portion of the costs of modifying or developing systems to meet the requirements to their clients through higher fees for proxy advice. Moreover, the policies and procedures proxy voting advice businesses develop under the final rule could cause registrants to incur costs. For example, a proxy voting advice business that chooses to rely on the safe harbor in Rule 14a–2(b)(9)(ii) would adopt policies and procedures that provide a registrant with a copy of the proxy voting advice business’s proxy voting advice, at no charge, no later than the time it is disseminated to the business’s clients if the registrant has filed its definitive proxy statement at least 40 calendar days before the meeting date. A registrant that wishes to review proxy advice prior to the meeting date may incur costs to accelerate the filing of its definitive proxy statement to meet the 40-day threshold. However, we expect a registrant would incur these costs only if it expected the benefits of review to be sufficiently large.

Proxy voting advice business may also bear indirect costs in the form of lost revenues. While all three major proxy voting advice businesses currently offer registrants access to proxy voting reports, in some circumstances they may charge a fee to registrants for such access, or make such access available only in connection with the purchase of consulting services from an affiliate of the proxy voting advice businesses. The requirement to share full reports with registrants under Rule 14a–2(b)(9)(ii) may result in a proxy voting advice business providing access to proxy voting reports at no charge to registrants. This would cause such proxy voting advice business to lose fees they otherwise would have earned from selling proxy voting reports to registrants. Without more detailed information about proxy voting advice businesses’ fee schedules and information about the revenues they currently generate from selling proxy voting reports to registrants, we are unable to quantify the magnitude of these revenue losses.

Several commenters expressed concern that the economic analysis in the Proposing Release understated or failed to consider the costs of the proposals on consumers of proxy voting advice. One commenter asserted that costs for customers of proxy voting advice will increase due to both the costs of reduced time to review proxy research reports and a potential increase in fees, as proxy voting advice businesses pass their increased costs on to institutional investor clients, who, in turn, would pass these costs on to their individual investor participants and beneficiaries. Another commenter argued that such costs may lead some institutional investors to forgo the benefits of using a proxy voting advice business, which could ultimately be detrimental to the effectiveness of shareholder voting and oversight. Similarly, one commenter suggested that the proposed rules, by increasing the costs of the proxy advice that opposes management, would impede investors’ ability to monitor company management. Another commenter, a proxy voting advice business, stated that the proposed changes could diminish proxy voting advice businesses’ willingness to recommend votes against management and that this “would substantially diminish the independent information available to investors and their ability to hold management accountable for their actions.”

Additionally, several commenters supplied empirical evidence suggesting that the quality of proxy voting advice depends on the time available for proxy voting advice businesses to conduct research. One commenter concluded from this research that the proposed requirements would reduce the quality of voting advice. The principles-based approach we are adopting should mitigate many of these concerns because it will impose compliance costs on proxy voting advice businesses that are lower than the compliance costs associated with the approach in the Proposing Release, and hence will limit the potential increase in the price of proxy advice services for proxy voting advice businesses’ clients. Further, because the principles-based approach does not include a registrant review and feedback process that requires pre-publication review, it should reduce concerns that registrants will lobby proxy voting advice business for changes to recommendations, and thus should not discourage proxy voting advice business from making recommendations that oppose management or impose additional timing constraints on proxy voting advice businesses.

Registrants also could incur costs associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice, and determining whether to prepare and file additional soliciting materials in response to the proxy voting advice. We expect a registrant would bear these costs only if it anticipated the benefits of such steps would exceed the costs of such a program. Similarly, because more registrants who are the subjects of proxy voting advice will have access to such proxy voting advice in advance of the shareholder vote, more registrants may file additional soliciting materials in response to proxy voting advice as a result of the rule amendments than currently do. Investment advisers, who can reasonably be expected to become aware of additional soliciting materials could incur additional costs in connection with the review of that information. Because these costs will vary depending upon the particular facts and circumstances of the proxy voting advice, any issues identified therein, the resources of the registrant or investment adviser, and in the case of an investment adviser, its policies and procedures with respect to proxy voting, it is difficult to provide a quantifiable estimate of these costs.

4. Amendments to Rule 14a–(9)

a. Benefits

Finally, we are amending Rule 14a–9 to add as an example of what could be misleading, the failure to disclose certain material information about proxy voting advice, specifically information about the proxy voting advice business’s methodology, sources of information, and conflicts of interest. We do not expect the amendment to the list of examples in Rule 14a–9 to significantly alter existing disclosure practices, as it will largely codify existing Commission guidance on the applicability of Rule 14a–9 to proxy voting advice.

620 See supra note 608.
621 See Section IV.B.1.a.i.
622 To rely on the safe harbor in Rule 14a–2(b)(9)(ii), a proxy voting advice business must provide registrants with a copy of the proxy voting advice at no charge.

623 See, e.g., letters from CII IV; ICI; ISS; New York Comptroller II; PRI II; ProxyVote II; Segal Marco II; Ohio Public Retirement; Prof. Bebchuk.
624 See letter from CII IV.
625 See letter from Prof. Bebchuk.
626 See letter from PRI II.
627 See letter from ISS.
628 See letter from Ana Albuquerque, Boston University, et al. (Feb 3, 2020) (“Prof. Albuquerque et al.”).
629 See letter from CII IV.

630 See Commission Interpretation on Proxy Voting Advice at 47419.
amendment prompts some proxy voting advice businesses to provide additional disclosure about the bases for their voting advice, the clients of these businesses—and the investors they serve—may benefit from receiving additional information that could aid in making voting determinations.

b. Costs

The final amendments to Rule 14a–9 will impose direct costs on proxy voting advice businesses to the extent the amended rule prompts some proxy voting advice businesses to provide additional disclosure about the bases for their voting advice. We expect any such costs to be minimal, especially given that the examples being codified were included in prior Commission guidance.631 Some commenters asserted that the main cost of the Rule 14a–9 amendments will be an increase in litigation risk for proxy voting advice businesses. Several commenters stated that this increased litigation risk would make it more expensive and burdensome for proxy voting advice businesses to provide their advisory services.632 One commenter asserted that the proposed changes amount to a new cause of action under Rule 14a–9.633 Two other commenters argued that the proxy voting advice businesses’ response to the threat of litigation under Rule 14a–9 would be to err on the side of caution in complex or contentious matters, thus increasing the likelihood of the proxy voting advice business issuing pro-registrant proxy voting recommendations.634 We believe several factors will serve to limit this risk. As discussed above, Rule 14a–9 liability is grounded in the concept of materiality and thus would be based on the particular facts and circumstances and assessed from the perspective of the reasonable shareholder.635 Moreover, neither our proposed amendment to Rule 14a–9 nor the other amendments we are adopting will broaden the concept of materiality or create a new cause of action, as some commenters suggested. Thus, the amendment does not change the scope or application of existing law. Therefore, we do not expect the new amendment to Rule 14a–9 to generate significant new litigation risk for proxy voting advice businesses or to result in a shift to more pro-registrant proxy voting recommendations.

5. Effect on Smaller Entities

Several commenters specifically stated that the economic analysis failed to consider the effect and cost of the proposal on smaller proxy voting advice businesses.637 One of these commenters asserted that small entities (defined by the commenter as those with up to $5 million in assets) would face significant resource and capacity burdens when complying with the proposed amendments, without improvements in the quality of voting for clients.638 Another commenter similarly stated that the proposals would be particularly burdensome for small proxy voting advice businesses.639 One commenter stated that the economic analysis failed to consider the proposal’s effect on small and medium-sized investment advisers and stated these entities would be disproportionately affected.640 As mentioned in Section IV.B.1 above, the Commission is not aware of smaller firms that currently supply research, analysis, and recommendations to support the voting decisions of their clients that would fall within the definition of “solicitation.” We therefore cannot estimate how many small proxy voting advice businesses will be affected. However, we are cognizant that any smaller proxy voting advice businesses that operate now or in the future may incur proportionally higher compliance costs even under the final amendments, especially if some of the potential costs of the amendments are fixed. For example, small proxy voting advice businesses may not have conflicts of interest disclosure policies in place, or may not have mechanisms to inform clients of registrant feedback. We believe that the new principles-based approach we are adopting should help address some of the concerns about the final rule’s disparate effect on smaller firms by providing small proxy voting advice businesses with the flexibility to design policies and procedures that are scalable to the scope of their business operations.

Further, we believe that the principles-based approach should afford existing proxy voting advice businesses flexibility to leverage their existing practices and mechanisms to efficiently comply with the new requirements, reducing the compliance burdens that they might pass through to smaller clients. Finally, we believe that because the final rules promote the availability of more complete and accurate information to proxy voting advice clients, they are responsive to calls for proxy process reform by smaller issuers to “insure confidence in the voting process, drive shareholder engagement, and bolster long-term value creation.”641 Smaller issuers may also benefit from the final amendments insofar as they will have greater opportunity to receive proxy voting advice and inform their shareholders of their views on such advice, relative to the opportunities proxy voting advice business currently offer registrants under voluntary review programs.642

D. Effects on Efficiency, Competition, and Capital Formation

1. Efficiency

As discussed in Section IV.B above, proxy voting advice businesses perform a variety of functions for their clients, including analyzing and making voting recommendations on matters presented for shareholder vote and included in registrants’ proxy statements. As an alternative to utilizing these services, clients of proxy voting advice businesses could instead conduct their own analysis and execute votes using internal resources.643 We believe that, for purposes of general analysis, it is reasonable to assume that the cost of analyzing matters presented for shareholder vote will not vary significantly with the size of the position being voted. Given the costs of analyzing and voting proxies, the services offered by proxy voting advice businesses may offer economies of scale relative to their clients performing those functions themselves. For example, a GAO study found that among 31 institutions, including mutual funds, pension funds, and asset managers, large institutions rely less than small institutions on their research and recommendations offered by proxy voting advice businesses.644 Small

631 See supra notes 46 and 67 and accompanying text.
632 See letters from IAA; ISS; Glass Lewis II; Minerva I.
633 See letters from IAA; Glass Lewis II; Minerva I.
634 See letter from C. Icahn.
635 See letters from ISS; Elliott I.
636 See discussion in supra Section II.D.3.
637 See letters from Felician Sisters II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.
638 See letter from IASJ.
639 See letter from Interfaith Center II.
640 See letter from IAA.
642 See supra Section IV.B.1.a.i.
643 Clients of proxy voting advice businesses may also rely on some combination of internal and external analysis.
644 See 2007 GAO Report, supra note 474, at 2; see also letter from BRT (stating since many institutional investors face voting on a large number of corporate matters every year but lack personnel and resources, they outsource tasks to proxy advisors); see also letters in response to the SEC Staff Roundtable on the Proxy Process from BlackRock (Nov. 13, 2018) (“BlackRock’s Investment Stewardship team has more than 40 professionals responsible for developing independent views on how we should vote proxies on behalf of our clients.”); NYC Comptroller [Jan.
institutional investors surveyed in the study indicated they had limited resources to conduct their own research. By establishing requirements that promote transparency in proxy voting advice, the final amendments could lead to an increased demand for proxy voting advice businesses’ voting advice. To the extent proxy voting advice businesses offer economies of scale relative to their clients performing certain functions themselves, increased demand for, and reliance upon, proxy voting advice business services could lead to greater efficiencies in the proxy voting process. At the same time, the final amendments will impose certain additional costs on proxy voting advice businesses, and these costs may be passed on to their clients. To the extent the costs passed on to a client are greater than the related benefits (or vice versa) to the client it could lead to decreased (or increased) demand for proxy voting advice business services by the client. As each client individually decides whether to use proxy voting advice business services, if aggregate demand for proxy voting advice business services increases (decreases), there will be more (or fewer) efficiencies in the proxy voting process.

Some commenters asserted that the ability of registrants to review the advice and the threat of litigation from registrants would result in voting advice from proxy voting advice businesses that is less accurate, useful, and valuable to their clients. If clients perceive the amendments as affecting proxy voting advice businesses’ objectivity and independence, this could lead to a decrease in demand for proxy voting advice and potentially fewer efficiencies in the proxy voting process. However, as discussed above, we have made a number of changes to the proposed amendments that we believe address these concerns and will lead to more accurate, transparent and complete information for proxy voting advice business clients.

Several commenters also stated that the proposed amendments could adversely affect the efficiency of how capital is allocated in two ways stemming from the potential threat of litigation by registrants and their ability to influence proxy voting advice under the proposed rule. First, some of these commenters expressed concern that the amendments could reduce the independence of proxy voting advice businesses and the diversity of thought in the market for proxy advice, which in turn could reduce the information investors and investment advisers have, resulting in less efficient investment decisions. Second, some of these commenters stated that the amendments would have a silencing effect on proxy voting advice businesses, resulting in value-destroying decisions by managers of registrants who are held less accountable for their actions. We believe that the principles-based approach we are adopting helps address commenter concerns about reductions in the reliability and independence of proxy voting advice. The final amendments neither require proxy voting advice businesses to share draft proxy voting advice with registrants in advance of providing advice to their clients, nor require proxy voting advice businesses to consider feedback from registrants on the proxy voting advice. In this way, the final amendments seek to limit the presence and ameliorate the possible effects of the independence-related concerns raised by commenters while preserving many of the intended benefits of the proposed engagement process, such as enhancing the accuracy, transparency and completeness of information available to clients of proxy voting advice businesses.

Other commenters disputed that the proposed amendments would bring about more accurate or transparent proxy voting advice, asserting that proxy voting advice businesses already provide adequate disclosure regarding conflicts of interest and a means for engagement with registrants because the price and quality of service for proxy advice is determined in a competitive market. In that case, the amendments may not result in an increase in demand for proxy advisory services. As discussed above, while we acknowledge that proxy voting advice businesses currently disclose conflicts of interest to clients and permit certain registrants to review proxy voting advice, the final rules could nevertheless increase demand for proxy voting advice to the extent that: (i) Clients prefer a more standardized time and means of receiving conflict disclosures, and (ii) proxy voting advice businesses expand their existing review procedures as a means of satisfying the new conditions. Overall, given the changes in the final amendments relative to the proposed amendments, we do not expect the final amendments to have a significant effect on the demand for proxy advisory services, and hence efficiency. 2. Competition

The amendments’ requirements that promote transparency and more effective evaluation of proxy voting advice could stimulate competition among proxy voting advice businesses with respect to the quality of advice. In particular, clients of proxy voting advice businesses may be better able to assess conflicts of interest (and, more broadly, alignment of interest) and the reliability of proxy voting advice, which could, in turn, cause proxy voting advice businesses to compete more on those dimensions.
As discussed above, several commenters disagreed that the proposed amendments would increase the quality or transparency of proxy advice, which they thought was sufficient under the baseline, and stated that the proposed amendments could reduce the quality of proxy advice if the rule reduces the independence and diversity of thought amongst proxy voting advice businesses. In that case, the rules may not increase competition in the proxy advice market. However, as noted above, we believe the final amendments’ principles-based approach should address many of these concerns because proxy voting advice businesses may, but will no longer be required to, preview their proxy voting advice with registrants.

The final amendments could also have certain adverse effects on competition. The final amendments will cause proxy voting advice businesses to incur certain additional compliance costs as discussed in Section II.C.2 above. How those costs will be shared between proxy voting advice businesses and their clients depends on the ability of proxy voting advice business to exercise market power in the pricing of their services. One commenter noted that, although complaints about pricing feature regularly in oligopolistic markets, proxy voting advice business generally are not criticized for their pricing. The commenter further explained that this might reflect clients’ perception that, due to the scale economies involved in proxy research, it is less costly to purchase proxy voting advice than to engage in proxy research themselves. The presence of these scale economies may provide proxy voting advice businesses with substantial market power, including the power to pass compliance costs associated with the final rules on to their clients. If, however, as other commenters argued, clients do not place a large value on proxy voting advice, then proxy voting advice businesses may face limits in their ability to pass compliance costs through to clients. In the Proposing Release, we acknowledged that if costs borne by proxy voting advice businesses are large enough to cause some businesses to exit the market or potential entrants to stay out of the market, the proposed amendments could decrease competition.

For the reasons described below, we do not believe this will be the case with the final amendments. Many commenters stated that the economic analysis in the Proposing Release did not adequately consider the effects of the rule on competition in the market for proxy advice. Some commenters asserted that the cost burdens of the amendments, particularly those associated with litigation exposure from registrants, would decrease competition in the proxy advice market, raising barriers to entry in the proxy advice market, and potentially forcing the exit of some proxy voting advice businesses from the market. Several other commenters argued that the proposed amendments would reduce competition by creating new barriers to entry in what historically has been an industry with few competitors. One commenter, a proxy voting advice business in the U.K., stated that the Proposed Rule made it highly unlikely it would enter the U.S. proxy voting advice business market. Another commenter, however, stated that increased barriers to entry would not reduce competition because, notwithstanding the rule, entry would not occur because investors place little value on proxy voting advice and financial incentives for entry are correspondingly low. The final amendments reflect a principles-based approach that is intended to limit the increased compliance costs for proxy voting advice businesses and thus should reduce the potential for significant adverse effects on competition. Additionally, given certain industry practices, the costs associated with the final amendments could affect proxy voting advice businesses differently. For example, we understand that the three existing proxy voting advice businesses that will be affected by the final amendments already have processes in place for sharing certain aspects of their analysis with certain registrants prior to making a recommendation to clients, which they may be able to leverage to comply with the new conditions. In contrast, firms considering entering the market for proxy voting advice would need to develop such processes and thus may initially experience somewhat higher costs in connection with compliance with the final rules. A differential effect on costs across proxy voting advice businesses could, in turn, affect competition within the proxy voting advice business industry. Similarly, one commenter stated that, if it were subject to the proposed amendments, it likely would have to either significantly increase its fees or sell their firm to one of the two dominant competitors. While that commenter may not be subject to the final amendments, to the extent that the costs associated with the final amendments disproportionately affect proxy voting advice businesses without existing processes that can be adapted to satisfy the new conditions, particularly smaller proxy voting advice businesses that would otherwise consider entering the market for proxy advice, the final amendments could reduce competition in the market for proxy advisory services. We expect the principles-based approach reflected in the final amendments may help to ameliorate concerns about any differential effect of the final amendments by affording proxy voting advice businesses the flexibility to design policies and procedures that are scaled to the scope of their operations and client base. Overall, we believe the benefits of improving the transparency, accuracy, and completeness of information available to shareholders when making voting decisions and enhancing the overall functioning of the proxy voting process, in furtherance of Section 14 of the Exchange Act would support adoption of the amendments notwithstanding any adverse effect on competition arising therefrom.

3. Capital Formation

By facilitating the ability of clients of proxy voting advice businesses to make informed voting determinations, the final amendments could ultimately lead to improved investment outcomes for investors. This in turn could lead to a greater allocation of resources to investment. To the extent that the final amendments lead to more investment, we could expect greater demand for securities, which could, in turn, promote capital formation. Additionally, to the extent the final amendments ameliorate frictions in the market for proxy voting advice that may currently deter private companies from...
becoming public reporting companies, the amendments could serve to encourage more companies to become public.666

Several commenters stated that the proposal to allow registrants to review draft proxy advice could lead to the misuse of material non-public information.667 This possibility is predicated on an expectation that a proxy voting advice business’s recommendation could have an influence on the outcome of a voting matter before shareholders. For example, if a proxy voting advice business’s recommendation is likely to influence the outcome of a vote that is expected to generate stock price reactions, then advance knowledge of such a recommendation would be potentially valuable to facilitate insider trading. Any such misuse of material non-public information could reduce investor confidence in the integrity of markets and lead to a reduction in capital formation. However, the final amendments do not mandate that registrants be given prior access to draft proxy voting advice. In addition, as discussed above, some form of registrant pre-review already exists at each of the three major proxy voting advice businesses, and we are not aware of any misuse of such information.

Overall, given the many factors that can influence the rate of capital formation, any effect of the final amendments on capital formation is expected to be small.

E. Reasonable Alternatives

1. Use a More Prescriptive Approach in the Final Amendments

Instead of a principles-based approach that allows proxy voting advice businesses the flexibility to design their own measures to ensure that clients have more complete and transparent information on which to base their voting decisions, we could have used a more prescriptive approach, such as the approach we proposed. For example, we could have required proxy voting advice businesses to notify registrants of their advice or provide their clients with registrants’ responses to that advice in certain specific ways and time frames. Such a prescriptive approach could have reduced legal uncertainty for proxy voting advice businesses, but it would have generated greater compliance costs for proxy voting advice businesses, some or all of which could have been passed on to their clients. The principles-based approach we are adopting provides a significant degree of flexibility to proxy voting advice businesses in deciding the best way to ensure that more complete and transparent information is available to their clients, and we expect that it will significantly reduce their compliance costs.

2. Require Proxy Voting Advice Businesses To Include Full Registrant Response in the Businesses’ Voting Advice

Rather than requiring proxy voting advice businesses to adopt and publicly disclose written policies and procedures reasonably designed to ensure that such businesses provide clients with a mechanism by which the clients can reasonably be expected to become aware of registrant responses to proxy voting advice, we could require proxy voting advice businesses to include the registrant’s full response in the proxy voting advice itself. Including the registrant’s full response in the proxy voting advice would benefit clients of proxy voting advice businesses by allowing them to avoid the additional step of accessing the response. Including a full response in the voting advice provided by proxy voting advice businesses also could benefit registrants by having their responses more prominently displayed, depending on where in the advice the response is included. Two commenters suggested this as an appropriate alternative to the proposed amendments.668

However, requiring inclusion of the registrant’s full response in the proxy voting advice provided by proxy voting advice businesses could disrupt the ability of such businesses to effectively design and prepare their reports in the manner that they and their clients prefer. Also, registrants would lose the flexibility to present their views in the manner they deem most appropriate or effective.

3. Public Disclosure of Conflicts of Interest

The final amendments require that proxy voting advice businesses include in their advice (and in any electronic medium used to deliver the advice) certain conflicts of interest disclosures. We could require that those conflicts of interest disclosures be made publicly rather than just to clients. Public disclosure of proxy voting advice businesses’ conflicts of interest could allow beneficial owners to assess the conflicts for themselves. While there may be some benefit to beneficial owners from having access to this information, this benefit may be limited given that many beneficial owners have delegated investment management functions to others in the first place and thus would not be receiving the advice. In addition, one commenter noted that publicly disclosing conflicts could undermine the information barriers put in place between the consulting and proxy advice side of a proxy voting advice business’s operations.669

4. Require Additional or Alternative Mandatory Disclosures in Proxy Voting Advice

In addition to requiring the adopted conflicts of interest disclosures, we could amend Rule 14a–2(b)(9) to require that proxy voting advice businesses include in their proxy voting advice additional disclosures, such as disclosure regarding the proxy voting advice business’s methodology, sources of information, or disclosures regarding the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves. Proxy voting advice businesses’ clients may benefit from having consistent disclosure on such matters as they assess the voting advice and make decisions regarding their utilization of the voting advice. However, such disclosures may not be material or necessary to assess proxy voting advice in all instances, and would result in increased costs to proxy voting advice businesses. Certain information may also comprise proprietary information, disclosure of which, depending on the specificity required, may result in competitive consequences to proxy voting advice businesses. In light of these considerations, the adopted rules will not require such disclosures in all instances.

One commenter noted a suggestion from the 2010 Concept Release that “proxy advisory firms could provide increased disclosure regarding the extent of research involved with a particular recommendation and the extent and/or effectiveness of its controls and procedures in ensuring the accuracy of registrant data.”670 The commenter also highlighted another suggestion from the Concept Release noting that the Commission’s rules that govern NRSROs “may be useful

666 See letters from Prof. Tingle (asserting that public capital markets have become less attractive to companies that would otherwise consider going public and that proxy voting advice businesses have been singled out as possibly complicit in this trend); TechNet (supporting the Proposed Rule as part of a commitment to “. . . make the U.S. the most attractive place in the world for anyone to start a company, grow it here, and take it public.”).
667 See letters from CII IV; Glass Lewis II; ISS.
668 See letters from NAM; BIO.
669 See letter from ISS.
670 See letter from Glass Lewis II.
templates for developing a regulatory program addressing conflicts of interest and other issues with respect to the accuracy and transparency of voting recommendations provided by proxy advisory firms.” The commenter stated that these two approaches should have been considered as alternatives to the rule. We have considered the alternative of requiring additional disclosure regarding the methods and procedures used to develop proxy voting advice, but believe it is preferable to avoid being overly prescriptive about the content of the report for a particular registrant/recommendation. Instead, for the reasons discussed throughout this release, we believe it is more appropriate to focus on principles that will allow the clients of proxy voting advice businesses to have access to more complete and transparent information upon which to make a voting decision, while providing flexibility to proxy voting advice businesses to determine the best means to satisfy those principles. Moreover, while we recognize that other regulatory regimes may take different approaches to similar issues, we note that the role of NRSROs and proxy voting advice businesses differ from one another and that following a similar regulatory approach might not be appropriate. We also recognize that the costs and benefits of NRSRO regulation differ from the costs and benefits of potential additional regulation of proxy voting advice businesses. The principles-based approach reflected in the final amendments is tailored to the unique role played by proxy voting advice businesses in the proxy process and is intended to be adaptable to existing market practices.

5. Require Disabling or Suspension of Pre-Populated and Automatic Submission of Votes

The final amendments do not condition the availability of the Rules 14a–2(b)(1) and 14a–2(b)(3) exemptions on a proxy voting advice business structuring its electronic voting platform to disable or suspend the automatic submission of votes in instances where a registrant indicates that it intends to file (or has filed) a response to the voting advice as additional soliciting materials. Alternatively, we could require such a condition. Another alternative would be to require that the proxy voting advice business refrain from pre-populating a client’s voting choices once a registrant indicates it intends to file a response, indefinitely or for a period of time, and subject to conditions. Several commenters supported an alternative that would generally limit or disable the automatic submission of votes, claiming it would lead to more informed proxy voting, though these commenters did not necessarily condition such limitations on the filing of a registrant response.

671 We recognize that these pre-population and automatic submission functions may enable proxy voting advice business clients to vote their proxies prior to registrants being able to provide a response to the proxy voting advice. We also recognize that disabling or suspending these functions when registrants have indicated they intend to file responses to voting advice could benefit the clients of proxy voting advice businesses to the extent that it increases the likelihood that the clients of the proxy voting advice businesses would review the registrants’ responses, and take them into consideration, before voting their proxies. At the same time, depending on how such a measure is implemented and conditioned, such an alternative could give rise to timing pressures and other logistical challenges. For example, disabling these functions permanently under certain circumstances could increase costs for clients if they need to devote greater resources to managing the voting process as a result, which may in turn also reduce the value of the services of the proxy voting advice businesses.

We have declined to adopt such a prescriptive approach at this time, but rather have focused on an incremental principles-based approach in order to see how practice develops in light of the changes being adopted. The amendments we are adopting are intended to make clients of proxy voting advice businesses aware of a registrant’s views about proxy voting advice in a timely manner, which could assist these clients in making voting determinations. Further, the Commission has provided investment advisers, who often engage proxy voting advice businesses to provide voting related services, with additional guidance regarding how they could consider their policies and procedures regarding these types of automated voting functions.672

6. Exempt Smaller Proxy Voting Advice Businesses From the Additional Conditions to the Exemptions

As discussed in Section III.C.2 above, given certain industry practices, the costs associated with the final amendments may be different for certain proxy voting advice businesses. For example, the three major proxy voting advice businesses have processes in place for sharing certain aspects of their analysis with certain registrants prior to making a recommendation to clients, which they may be able to leverage to comply with the new conditions. However, it is possible that entrants to this market (which could be smaller than the existing three major proxy voting advice businesses) would have to develop new processes to meet the conditions for exemption under the final amendments if they choose to engage in the types of activities that fall within the scope of Rule 14a–1(1)(i)(iii). Some of the costs of developing these new processes are likely fixed, and do not vary with the number of issuers a proxy voting advice business covers or the number of clients it serves. Thus, the costs associated with the final amendments could affect potential entrants into the market for proxy advice that are smaller businesses more than the existing three major proxy voting advice businesses. To the extent the costs associated with the final amendments disproportionately affect smaller proxy voting advice businesses that might consider entering the market in the future, the final amendments could reduce competition among proxy voting advice businesses.

As a means of addressing the potential adverse effect on competition among proxy voting advice businesses, we could exempt smaller proxy voting advice businesses from the additional conditions to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3). Several commenters supported such an alternative.673 Exempting smaller proxy voting advice businesses from the additional conditions would reduce the cost of the final amendments for such businesses, and could thus facilitate the entry of new proxy voting advice businesses. However, we expect the costs associated with the final amendments to be much smaller compared to the initial costs of setting up the business, including building a reputation for providing quality services, which any newcomer will have to incur. Also, such an exemption would mean that clients of these proxy voting advice businesses would not realize the same benefits as clients of incumbent firms in terms of potential improvements in the accuracy, completeness, and transparency of the information available to them when

671 See letters from BRT; NAM; BIO. But see, e.g., letters from CII IV; Dan Jamieson (Jan. 16, 2020); IAA; ISS; New York Comptroller II.

672 See Supplemental Proxy Voting Guidance.

673 See letters from SHARE II; CII IV; Manhattan Institute. One commenter more generally argued that the Commission should “adopt policies that would ease entry and participation in the market...” See letters from Elliott I, Prof. Li.
they make voting decisions.674 Moreover, as we have discussed in prior sections, we anticipate that the principles-based approach we are adopting is likely to result in more modest costs increases for proxy voting advice businesses than the more prescriptive approach we proposed, which should moderate the impact of the final amendments on smaller potential entrants.

7. Require a Narrower Scope of Registrant Notice

A number of commenters suggested that registrants should only be allowed to review the facts that a proxy voting advice business uses in determining its voting recommendation, particularly if we proceeded with a requirement that registrants review draft proxy voting reports before they are sent to clients.675 For example, rather than providing a full copy of its voting advice, a proxy voting advice business could provide a summary thereof, setting forth the facts it uses without specifying further details. We note that while the principles-based approach we are adopting does not dictate precisely how a proxy voting advice business provides notice of proxy voting advice to registrants, the final amendments require that proxy voting advice businesses share the full proxy voting report with registrants. Although we acknowledge that commenters’ suggested alternative may be less costly for proxy voting advice businesses to implement, we believe that providing registrants with the full contents of proxy voting reports is necessary to achieve the Commission’s objective of facilitating informed proxy voting decisions. Providing registrants with the full contents of the report gives registrants the opportunity to file additional soliciting materials that discuss not only the facts underlying the proxy voting advice business’s recommendations, but also the methodology and analysis the proxy voting advice business used to arrive its recommendations. In deciding how to vote on a proxy matter, clients of proxy voting advice businesses may benefit from that additional discussion. As a result, we anticipate the final amendments will more effectively facilitate clients’ assessment of proxy voting advice than this alternative. Moreover, because the final amendments do not require an opportunity for pre-publication review, we believe that the cost of sharing full reports will be more modest under the final amendments than under the proposed amendments.

VI. Paperwork Reduction Act

A. Background

Certain provisions of our rules, schedules, and forms that will be affected by the amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).676 We published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.677 The hours and costs associated with maintaining, disclosing, or providing the information required by the amendments constitute paperwork burdens imposed by such collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. The title for the affected collection of information is: “Regulation 14A (Commission Rules 14a–1 through 14a–21 and Schedule 14A)’” (OMB Control No. 3235–0059).

The Commission adopted existing Regulation 14A678 pursuant to the Exchange Act. Regulation 14A and its related schedules set forth the disclosure and other requirements for proxy statements, as well as the exemptions therefrom, filed by registrants and other soliciting persons to help investors make informed voting decisions.679

A detailed description of the amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the amendments can be found in Section IV above.

674 See letter from SES.

675 See comments from ISS at 57; MFA & AIMA at 2; State Street at 3; CFA Institute at 2, 8; CIRCA at 22; Glass Lewis II at 22–23; IAC at 8–9.

676 44 U.S.C. 3501 et seq.

677 44 U.S.C. 3507(d); 5 CFR 1320.11.

678 17 CFR 240.14a–1 et seq.

679 To the extent that a person or entity incurs a burden imposed by Regulation 14A, it is encompassed within the collection of information estimates for Regulation 14A. This includes registrants and other soliciting persons preparing, filing, processing and circulating their definitive proxy and information statements and additional soliciting materials, as well as the efforts of third parties such as proxy voting advice businesses whose voting advice falls within the ambit of the federal rules and regulations that govern proxy solicitations.

B. Summary of Comment Letters to PRA Estimates

The Commission received three comment letters in response to its request for comment on the PRA estimates and analysis included in the Proposing Release.680 These commenters expressed concern that the estimates were not representative of actual impacts and that the analysis failed to properly account for the paperwork burden that would be incurred, in particular, by proxy voting advice businesses.681 Two of the commenters asserted that the Commission’s analysis understated the magnitude of the hourly and cost burdens that the proposed amendments would impose.682 One of those commenters provided detailed estimates of its expected annual compliance burden for each of the components of the proposed amendments.683

C. Burden and Cost Estimates for the Amendments

Below we estimate the incremental and aggregate effect on paperwork burden as a result of the amendments. As discussed in Section II above, we have made a number of changes from the proposed amendments, most notably shifting to a principles-based approach in Rule 14a–2(b)(9)(ii), and we have adjusted our estimates accordingly.

The burden estimates were calculated by (i) estimating the number of parties expected to expend time, effort, and/or financial resources to generate, maintain, retain, disclose or provide information required by the amendments, and then (ii) multiplying this number by the estimated amount of time, on average, each of these parties would devote in order to comply with these new requirements over and above their existing compliance burden associated with Regulation 14A. These estimates represent the average burden for all respondents, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual respondents based on a number of factors, including the nature and conduct of their business.

1. Impact on Affected Parties

As discussed above in Section IV.B.1., there are a variety of parties that may be affected, directly or indirectly, by the amendments. These include proxy voting advice businesses; the clients to

680 See letters from IASJ; Glass Lewis I; ProxyVote I.

681 See id.

682 See letters from Glass Lewis I; ProxyVote I.

683 See letter from Glass Lewis I.
whom these businesses provide voting advice; investors and other groups on whose behalf the clients of proxy voting advice business make voting determinations; registrants who are conducting solicitations and are the subject of proxy voting advice; and the registrants’ shareholders, who ultimately bear the costs and benefits to the registrant associated with the outcome of voting matters covered by proxy voting advice. Of these parties, we expect that proxy voting advice businesses and, to a lesser extent, registrants that are the subject of the proxy voting advice, would incur some additional paperwork burden resulting from the amendments. As discussed further below, we believe that any incremental burden would be attributable primarily to new Rule 14a–2(b)(9). With respect to the amendments to Rule 14a–1(l) and Rule 14a–9, we do not expect the economic impact of these amendments will be significant because they do not change existing law and therefore do not change respondents’ legal obligations. Moreover, any impact arising from these amendments is not expected to materially change the average PRA burden hour estimates associated with Regulation 14A. We therefore have not made any adjustments to our PRA burden estimates in respect of these amendments.

a. Proxy Voting Advice Businesses

In the Proposing Release, the Commission estimated that each proxy voting advice business would incur an aggregate yearly increase in burden of 500 hours due to the proposed amendments. In recognition of the changes from the proposal as well as in consideration of the comments received regarding the paperwork burdens of the proposed amendments, we have adjusted our estimates of the burdens on proxy voting advice businesses.

Proxy voting advice businesses are expected to incur an increased burden as a result of new Rule 14a–2(b)(9), which will apply to anyone relying on the exemptions in Rule 14a–2(b)(1) or (b)(3) who furnishes proxy voting advice covered by Rule 14a–1(l)(1)(ii)(A). The amount of the burden will depend on a number of factors that are firm-specific and highly variable, which makes it difficult to provide reliable quantitative estimates.

There are three components of new Rule 14a–2(b)(9) that we expect to result in an increased burden. First, in accordance with Rule 14a–2(b)(9)(i), proxy voting advice businesses will be required to include in their proxy voting advice (or in an electronic medium used to deliver the advice) disclosure of conflicts of interest specifically tailored to proxy voting advice businesses and the nature of their services. Second, under Rule 14a–2(b)(9)(ii)(A), proxy voting advice businesses will be required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the proxy voting advice business’s clients. Third, under Rule 14a–2(b)(9)(ii)(B), the proxy voting advice business will be required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant’s written statements about the proxy voting advice in a timely manner before the shareholder meeting. The amendments also provide non-exclusive safe harbors that the proxy voting advice businesses may use to satisfy the principle-based requirements in Rule 14a–2(b)(9)(ii). We address each of these three components in turn.

With respect to the conflicts of interest disclosure in new Rule 14a–2(b)(9)(i), the facts and circumstances unique to each proxy voting advice business, including the conflicts of interest disclosures it currently provides to its clients as well. The amendments also provide non-exclusive safe harbors that the proxy voting advice businesses may use to satisfy the principle-based requirements in Rule 14a–2(b)(9)(ii). We address each of these three components in turn.

With respect to the conflicts of interest disclosure in new Rule 14a–2(b)(9)(i), the facts and circumstances unique to each proxy voting advice business, including the conflicts of interest disclosures it currently provides to its clients as well. The amendments also provide non-exclusive safe harbors that the proxy voting advice businesses may use to satisfy the principle-based requirements in Rule 14a–2(b)(9)(ii). We address each of these three components in turn.

See generally note 682. See Proposed Release, PRA Table 1

684 The PRA requires that we estimate “the total annual reporting and recordkeeping burden that will result from the collection of information.” 5 CFR 1320.3(a). “A ‘collection of information’ includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information (5 CFR 1320.3(c)). OMB’s current interest in burden for Regulation 14A, therefore, is an assessment of the paperwork burden associated with such requirements and requests under the regulation, and this PRA is an assessment of changes to such inventory expected to result from adoption of the amendments. While other parties, such as the clients of proxy voting advice businesses, may have costs associated with the amendments (see supra Section IV.C.), only proxy voting advice businesses and registrants will incur any additional paperwork burden in order to comply with these requirements in the informational requirements of the amendments.

685 The amendments to Rule 14a–1(l) codify existing Commission interpretations and views about the applicability of the Federal proxy rules to proxy voting advice and are not expected to have a significant economic impact. See supra Section IV.C.2.b. The amendments to Rule 14a–9 may impose direct costs on proxy voting advice businesses to the extent the amended rule prompts additional paperwork burden to proxy voting advice businesses to provide additional disclosure about the bases for their voting advice. However, we expect any such costs to be minimal, especially given that the examples in new paragraph (e) of the Note to Rule 14a–9 were included in prior Commission guidance. See supra Section IV.C.4.b. One commenter argued that proxy voting advice businesses and their legal counsel would devote significant time and effort to review and respond to feedback received from registrants so as to protect the business from private litigation claims stemming from Rule 14a–9, as amended. See letter from Glass Lewis I. While the commenter mentioned the proposed amendment to Rule 14a–9, we read this comment as primarily relating to the proposed review and feedback proposal, which we are not adopting. We do not believe that the amendment to Rule 14a–9 represents a change to existing law, nor does it broaden the concept of materiality or create a new cause of action, as some commenters have suggested. See discussion supra Section II.D.3.

686 See Proposed Release, PRA Table 1

687 See supra note 682.

688 See generally discussion supra in Sections IV.C.3.a.ii. and b.i. concerning the difficulty in providing quantitative estimates of the costs to proxy voting advice businesses imposed by the amendments.

689 See Rule 14a–2(b)(9)(i).
that the principles-based focus of the adopted requirement, in tandem with a proxy voting advice business’s existing conflicts disclosure systems and practices (particularly as to registrants that have been the focus of the business’s proxy coverage in prior years), could significantly mitigate any increased paperwork burden corresponding to the new rules, we think it is appropriate to increase our estimates to align more closely with this commenter’s input. Accordingly, we estimate the conflicts of interest disclosure in new Rule 14a–2(b)(9)(i) to result in 6,000 additional burden hours per proxy voting advice business.

The remainder of the additional paperwork burden associated with the amendments will derive from the requirements of Rules 14a–2(b)(9)(ii)(A) and (B). Because these rules have been designed to permit proxy voting advice businesses substantial flexibility over the manner in which they comply, we expect those businesses will implement mechanisms differently depending on, among other things, the facts and circumstances of their particular business operations and the nature of their client bases. Furthermore, some proxy voting advice businesses may already have systems sufficient to address some or all of the mechanics required to comply with Rules 14a–2(b)(9)(ii)(A) and (B), which would be expected to limit their overall burden but cannot be precisely estimated.

It appears that the more prescriptive nature of the proposed amendment regarding registrants’ and certain other soliciting persons’ advance review and response to proxy voting advice was a large driver of the hourly and cost burdens discussed by commenters. We believe the flexibility afforded by the principles-based approach reflected in the final rules should therefore result in significantly lower costs for proxy voting advice businesses and their clients than under the proposal.

We believe that much of the burden of the final amendments would be for the proxy voting advice business to develop policies that satisfy the principles and accordingly modify or develop systems and practices to implement such policies. To derive an estimate for these costs, we start with our estimated number of registrants filing proxy materials annually, which is 5,690. The burden on a proxy voting advice business in setting up, modifying, and implementing such policies and systems would involve approximately one half-hour per registrant (2,845 hours) for the notice to registrants under Rule 14a–2(b)(9)(ii)(A) and one half-hour per registrant (2,845 hours) for the notice to clients of any response by the registrants under Rule 14a–2(b)(9)(ii)(B). Our revised estimates take into consideration our understanding that some proxy voting advice businesses have systems and practices in place that may complement or overlap with the new requirements, which could substantially mitigate any increases to their overall burden. Also, these estimates represent the average annual burden increase over three years, as we assume that the burden would be greatest in the first year after adoption as proxy voting advice businesses incorporate the new requirements into

...
be disclosed. However, we recognize that proxy voting advice businesses could choose instead to negotiate individual terms of use with each registrant. As a result of modifications we have made from the proposal in response to commenters, we anticipate that the burden in those cases would nonetheless be significantly less than the four hours per issuer burden estimate provided by a commenter regarding the proposal.\(^698\) We estimate an average burden of one hour per registrant\(^699\) under those circumstances, for a total estimate of 5,690 hours per year associated with securing an acknowledgment or other assurance that the proxy advice will not be disclosed. Accordingly, depending on which approach a proxy voting advice business chooses, we expect that the burden could range from 50 hours to 5,690 hours per year per proxy voting advice business. Given current practices, we expect that proxy voting advice business would generally seek to rely on standardized terms of use. Nevertheless, for purposes of this PRA analysis, and so as to not underestimate the burden, we use an estimate of 5,690 hours per proxy voting advice business to obtain acknowledgments.

Overall, we believe that proxy voting advice businesses will incur an annual incremental paperwork burden to comply with Rule 14a-2(b)(9) as follows.

<table>
<thead>
<tr>
<th>New requirement</th>
<th>Proxy voting advice business estimated annual compliance burden</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rule 14a–2(b)(9)(i)—Conflicts Disclosure</strong></td>
<td>Increase in paperwork burden corresponding to:</td>
</tr>
<tr>
<td>Proxy voting advice business must include conflicts of interest disclosure in its proxy voting advice (or electronic medium used to deliver the advice), as well as a discussion of any policies and procedures used to identify and address conflicts, and any actual steps taken to address any conflicts.</td>
<td>To the extent that the proxy voting advice business’s current practices and procedures do not already satisfy the requirement:</td>
</tr>
<tr>
<td>* Safe Harbor—The proxy voting advice business has written policies and procedures reasonably designed to provide a registrant with a copy of the proxy voting advice business’s proxy voting advice, at no charge, no later than the time it is disseminated to the business’s clients. Such policies and procedures may include conditions requiring that:</td>
<td></td>
</tr>
<tr>
<td>(A) The registrant has filed its definitive proxy statement at least 40 calendar days before the security holder meeting date (or if no meeting is held, at least 40 calendar days before the date the votes, consents, or authorizations may be used to effect the proposed action); and</td>
<td></td>
</tr>
<tr>
<td>(B) The registrant has acknowledged that it will only use the copy of the proxy voting advice for its internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant’s employees or advisers.</td>
<td></td>
</tr>
</tbody>
</table>

\(^698\) See letter from Glass Lewis I.  
\(^699\) Out of the estimated 18,534 registrants that may be affected to a greater or lesser extent by the final amendments, 5,690 filed proxy materials with the Commission during calendar year 2018. See Section IV.B.1. and supra note 549.
Altogether, we estimate an annual total increase of 52,640 hours in compliance burden to be incurred by proxy voting advice businesses that would be subject to the amendments to Rule 14a–2(b)(9). We assume that the burden would be greatest in the first year after adoption, as proxy voting advice businesses incorporate the new requirements into their existing practices and procedures. 

b. Registrants

In addition to proxy voting advice businesses, we anticipate that registrants would incur some additional paperwork burden as a result of the amendments. Registrants could experience increased burdens associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice, and preparing and filing supplementary proxy materials in response to the proxy voting advice, if they choose to do so.

As the rules do not require registrants to engage with proxy voting advice businesses or take any action in response to proxy voting advice, we expect a registrant would bear additional paperwork burden only if it anticipated the benefits of engaging with the proxy voting advice business would exceed the costs of participation. These costs will vary depending upon the particular facts and circumstances of the proxy voting advice and any issues identified therein, as well as the resources of the registrant, which makes it difficult to provide a reliable quantifiable estimate of these costs. Nevertheless, in the Proposing Release, the Commission stated its belief that the corresponding burden on registrants would not be significant in most cases, particularly when averaged among all affected registrants. As such, the Commission estimated that registrants would each incur, on average, an increase of ten additional burden hours each year, for a total increase among all registrants of 18,970 hours annually.
registrant’s annual meeting of shareholders is covered by at least two of the three major U.S. proxy voting advice businesses, and the registrant has opted to review both sets of proxy advice and file additional soliciting materials in response, we estimate an average increase of 50 hours per registrant in connection with the amendments for a total annual increase of 284,500 hours. As discussed above, however, it is difficult to predict the effect of the amendments on a registrant’s paperwork burden with a great degree of precision.

3. Increase in Annual Responses

We believe that the amendments would increase the number of annual responses706 to the existing collection of information for Regulation 14A. Although we do not expect registrants to file any different number of proxy statements as a result of our amendments, we do anticipate that the number of additional soliciting materials filed under 17 CFR 240.14a–6 may increase in proportion to the number of times that registrants choose to provide a statement in response to a proxy voting advice business’s proxy voting advice as contemplated by Rule 14a–2(b)(9)(ii)(B) and/or the safe harbor under Rule 14a–2(b)(9)(iv). For purposes of this PRA, we estimate that there would be an additional 783 annual responses to the collection of information as a result of the amendments.707

4. Incremental Change in Compliance Burden for Collection of Information

Table 2 below illustrates the incremental change to the total annual compliance burden for the Regulation 14A collection of information in hours and in costs708 as a result of the amendments. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

705 In the Proposing Release, for purposes of its PRA analysis, the Commission assumed that, on average, one-third of the 5,690 registrants that filed proxy materials with the Commission during calendar year 2018 (1,897) would be the subject of proxy voting advice each year. See Proposing Release, note h. of PRA Table 1 at 66553. Some commenters who disagreed with this assumption stated that this figure was too low. See letter from Glass Lewis L. (suggesting that the correct number was “likely much closer to 100% of those that filed proxy materials with the Commission”) and ProxyVote 1 (“The appropriate number of registrants that should be subject to the Proposed Rulemaking’s estimates should be 5,690 registrants, not 1,897 registrants”). We also note certain statements from some proxy voting advice businesses indicating that they cover tens of thousands of shareholder consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

706 For purposes of the Regulation 14A collection of information, the number of annual responses corresponds to the estimated number of new filings that will be made each year under Regulation 14A, which includes filings such as DEF 14A; DEF14A; DEFNM14A; and DEFPC14A. When calculating PRA burden for any particular collection of information, the total number of annual burden hours estimated is divided by the total number of annual responses estimated, which provides the average estimated annual burden per response. The current inventory of approved collections of information is maintained by the Office of Information and Regulatory Affairs (OIRA), a division of OMB. The total annual burden hours and number of responses associated with Regulation 14A, as updated from time to time, can be found at https://www.reginfo.gov/public/do/PRAMain.

707 Because a registrant’s decision to review and file additional soliciting materials in response to proxy voting advice will be entirely voluntary, it is difficult to predict how frequently such parties will choose to do so. For purposes of the PRA estimate in the Proposing Release, the Commission used an estimated increase of ten times the current number. See Proposing Release at n. 260. For purposes of its PRA analysis, the Commission estimated that at least three times as many registrants would choose to prepare responses to proxy voting advice and request that their hyperlink be provided to the recipients of the advice pursuant to proposed Rule 14a–2(b)(9)(iii) than otherwise had historically chosen to file additional soliciting materials. As a result, the Commission estimated that three times as many supplemental proxy filings would be made each year, which would increase the annual responses to the Regulation 14A collection of information by the same amount. For purposes of this PRA analysis, we apply a similar methodology. To the extent that registrants believe that the efficacy of providing a response to proxy voting advice via additional soliciting materials will be enhanced by the amendments, and make registrants more likely to use this mechanism than they have in the past, we expect that the number of annual responses to the Regulation 14A collection of information will increase correspondingly. However, it is difficult to reliably predict what this overall increase would be. In light of comments we received that, as a general matter, our PRA estimates were too low, we think it is appropriate to increase our estimate of additional soliciting materials filed each year from three times the current number to ten times the current number. Taking the average of the Rule 14a–6 filings made in years 2016, 2017, 2018 (87), we multiply by ten for an estimate of 870 Rule 14a–6 filings, or an increase of 783 annual responses to the Regulation 14A collection of information.

708 Our estimates assume that 75% of the burden is borne by the company and 25% is borne by outside counsel at $400 per hour. We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

PRA TABLE 1—CALCULATION OF AGGREGATE INCREASE IN BURDEN HOURS RESULTING FROM THE AMENDMENTS

<table>
<thead>
<tr>
<th>Affected parties</th>
<th>Proxy voting advice businesses</th>
<th>Registrants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burden Hour Increase</td>
<td>52,640</td>
<td>284,500</td>
</tr>
<tr>
<td>Aggregate Increase in Burden Hours</td>
<td>[Column Total (A)] + [Column Total (B)] = [337,140]</td>
<td></td>
</tr>
</tbody>
</table>
PRA Table 2—Calculation of Increase in Burden Hours Resulting from the Amendments

<table>
<thead>
<tr>
<th>Number of estimated responses</th>
<th>Total increase</th>
<th>Increase in</th>
<th>Increase in</th>
<th>Increase in</th>
<th>Increase in professional costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) †</td>
<td>in burden hours</td>
<td>burden hours</td>
<td>internal hours</td>
<td>professional hours</td>
<td>costs</td>
</tr>
<tr>
<td>(B) ††</td>
<td>(C) = (B)/A</td>
<td>(D) = (B) x 0.75</td>
<td>(E) = (B) x 0.25</td>
<td>(F) = (E) x $400</td>
<td></td>
</tr>
<tr>
<td>6,369</td>
<td>337,140</td>
<td>↑↑↑ 50</td>
<td>252,855</td>
<td>84,285</td>
<td>$33,714,000</td>
</tr>
</tbody>
</table>

† This number reflects an estimated increase of 783 annual responses to the existing Regulation 14A collection of information. See supra note 707. The current OMB PRA inventory estimates that 5,586 responses are filed annually.
†† Calculated as the sum of annual burden increases estimated for proxy voting advice businesses (52,640 hours) and registrants (284,500 hours). See supra PRA Table 1.
††† The estimated increases in Columns (C), (D), and (E) are rounded to the nearest whole number.

5. Program Change and Revised Burden Estimates

Table 3 summarizes the estimated change to the total annual compliance burden of the Regulation 14A collection of information, in hours and in costs, as a result of the amendments.

PRA Table 3—Requested Paperwork Burden Under the Amendments

<table>
<thead>
<tr>
<th>Current burden</th>
<th>Program change</th>
<th>Revised burden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current annual responses (A)</td>
<td>Current burden hours (B)</td>
<td>Current cost burden (C)</td>
</tr>
<tr>
<td>5,586</td>
<td>551,101</td>
<td></td>
</tr>
</tbody>
</table>

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act ("RFA"). It relates to the amendments to: The definition of "solicitation" in Rule 14a–1(l); the proxy solicitation exemptions in Rule 14a–2(b); and the prohibition on false or misleading statements in solicitations in Rule 14a–9 of Regulation 14A under the Exchange Act. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the RFA and was included in the Proposing Release.

A. Need for, and Objectives of, the Final Amendments

Given the importance of a properly functioning proxy system to investors and the capital markets, the purpose of the amendments is to help ensure that investors, or those acting on their behalf, who use proxy voting advice have access to more transparent and complete information with which to make their voting decisions, while not imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice, with the ultimate aim of facilitating informed voting decisions. The need for, and objectives of, these amendments are discussed in more detail in Sections I, II, and IV above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis, and how to quantify the effects of the proposed amendments. We also requested comment on the number of proxy voting advice businesses that would be small entities subject to the proposed amendments.

We did not receive estimates from commenters on the number of small entities that would be affected by the proposed amendments or the number of proxy voting advice businesses that would be small entities subject to the proposed amendments. However, several commenters asserted that the Commission’s economic analysis failed to consider the cost and effect of the proposed amendments on smaller proxy voting advice businesses. One such commenter stated that the proposals would be particularly burdensome for small proxy voting advice businesses. Another commenter, who identified itself as a small entity (with under $5 million in assets) providing proxy voting services to institutional investor clients, asserted that small entities like itself would face significant resource and capacity burdens when complying with the proposed amendments, with no gain in the quality of voting or results for their clients. In addition, one commenter believed that small and medium-sized investment advisers would be disproportionately affected by increased costs that may result from the proposed amendments because they are less likely to be able to have staff solely dedicated to the proxy voting process, while another predicted that delays and increased costs resulting from the proposed amendments would most heavily impact smaller institutional investors, such as churches, endowments, unions, pension funds, etc.


709 5 U.S.C. 601 et seq.
710 See, e.g., letters from Felician Sisters II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.
711 See letter from Interfaith Center II.
712 See supra note 518.
713 See letter from IAA.
714 See letter from J. McRitchie I.
comply with the review and feedback process, and therefore should either be exempted from the proposals or, at a minimum, be given an extended timeframe for compliance. In developing the FRFA, we considered these comments as well as comments on the proposed amendments generally. As discussed throughout this release, including in Section VLD below, we note that the shift to a principles-based approach for the final amendment should help alleviate a number of the concerns raised by commenters about the potential impact on small entities.

C. Small Entities Subject to the Final Amendments

The amendments could affect some small entities; specifically, those small entities that are: (i) Proxy voting advice businesses (i.e., persons who provide proxy voting advice that falls within the definition of a "solicitation" under Rule 14a–1(l)(1)(iii), as amended); and (ii) registrants conducting solicitations covered by proxy voting advice. Although not directly subject to the amendments, clients of proxy voting advice businesses and the investors on whose behalf such clients vote proxies may be indirectly affected by the amendments to the extent that the costs borne by the proxy voting advice businesses result in increased fees for such services.

The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction." The definition of "small entity" does not include individuals. For purposes of the RFA, under our rules, an issuer of securities or a person, other than an investment company or an investment adviser, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. An investment company, including a business development company, is considered to be a "small business" if, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. An investment adviser generally is a small entity if it: (1) Has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.

As discussed in Section IV.B.1, we are not aware of smaller entities that currently supply research, analysis, and recommendations to support the voting decisions of their clients that would fall within the definition of "solicitation" and would therefore be directly affected by the amendments. As far as registrants that may be directly affected, we estimate that there are 1,011 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities. In addition, we estimate that, as of December 31, 2019, there were 92 registered investment companies that may be considered small entities. Finally, we estimate that, as of December 31, 2019, there were 452 investment advisers that may be considered small entities and may be indirectly affected by the amendments.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

We anticipate that any costs resulting from the amendments will primarily relate to Rule 14a–2(b)(9) and, as such, predominantly affect the proxy advice voting businesses that will be required to comply with Rule 14a–2(b)(9) in order to rely on the exemptions in Rule 14a–2(b)(1) or (b)(3). These businesses, including any affected small entities, will likely incur costs to ensure that their internal practices, procedures, and systems are sufficient to meet the conflicts of interest disclosure and notice requirements under Rule 14a–2(b)(9). As noted above, we are not aware of smaller entities that currently provide services that would cause them to be subject to the proposed amendments; nevertheless, in the interest of completeness, we have considered the potential effects of the amendments on smaller proxy voting advice businesses throughout this FRFA. Registrants of all sizes also could incur costs associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice, and determining whether to prepare and file additional soliciting materials in response to the proxy voting advice. Compliance with the amendments may require the use of professional skills, including legal skills.

The amendments apply to small entities to the same extent as other entities, irrespective of size. Therefore, we expect that the nature of any benefits and costs associated with the amendments will be similar for large and small entities. Accordingly, we refer to the discussion of the amendments’ economic effects on all affected parties, including small entities, in Section IV above.

Consistent with that discussion, to the extent that any small entities currently or in the future may provide proxy voting advice, we anticipate that the economic benefits and costs likely will vary widely among such entities based on a number of factors, including the nature and conduct of their businesses, as well as the extent to which they are already meeting or exceeding the requirements established by the amendments, which makes it difficult to project the
economic impact on small entities with precision.729

As a general matter, however, we recognize that any costs of the amendments borne by the affected entities, such as those related to compliance with the amendments, or the implementation or restructuring of internal systems needed to adjust to the amendments, could have a proportionally greater effect on small entities, as they may be less able than larger entities to bear such costs. Further, as discussed in Section IV.B.1.a., the three major proxy voting advice businesses currently operating in the U.S. have existing processes in place for identifying and disclosing conflicts of interest to their clients, as well as providing some registrants access to versions of the businesses’ proxy voting advice prior to making a voting recommendation to clients. If competing proxy voting advice businesses do not have such processes in place, they could be disproportionately affected by the amendments. Finally, the amendments may impact competition, in particular for any small entities that provide proxy voting advice services. To the extent that a proxy voting advice business’s existing practices and procedures do not satisfy the conditions of Rule 14a–2(b)(9), such entities, including any affected small entities, will incur additional compliance costs and, consequently, may be more likely to exit the market for such services or less able to enter the market in the first place.

We believe that the principles-based approach we are adopting should address many of the concerns commenters raised about the proposed amendments and their disparate effect on smaller firms. By providing proxy voting advice businesses, including those that are small entities, with the flexibility to design policies and procedures that are scaled to the scope of their business operations, we believe these entities will be able to find the most cost-effective means to comply with the requirements.

With respect to costs that may be incurred by registrants as a result of the amendments, these costs will vary depending upon the particular facts and circumstances of the proxy voting advice as well as the resources of the registrant. Consequently, as with proxy voting advice businesses, it is difficult to quantify these costs with precision, particularly since the degree to which a registrant elects to review and respond to proxy voting advice is entirely voluntary.730 As a function of their smaller size, registrants that are small entities may incur proportionally greater costs associated with amendments than larger entities, but the extent of such costs is uncertain. Importantly, while registrants of all sizes may take advantage of the ability to review proxy voting advice provided pursuant to the amendments and potentially file additional soliciting material in response, they are not required to do so; as a result, we expect that registrants would engage in the process only to the extent that they anticipate the benefits of such review to be greater than the costs.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Exempting small entities from all or part of the requirements;
- Using performance rather than design standards; and
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities.

We do not believe that establishing different compliance or reporting requirements for small entities in connection with the amendments would accomplish the objectives of this rulemaking. The amendments are intended to improve the completeness and transparency of information available to shareholders and those acting on their behalf when making voting decisions and enhance the overall functioning of the proxy voting process, in furtherance of Section 14 of the Exchange Act. These objectives would not be as effectively served if we were to establish different conditions for smaller proxy voting advice businesses that wish to rely on the solicitation exemptions in Rules 14a–2(b)(1) or (b)(3).731 For similar reasons, we do not believe that exempting smaller proxy voting advice businesses from all or part of the amendments would accomplish our objectives.732

In a change from the proposal, the amendments generally use performance standards rather than design standards. Based on commenter feedback, including that related to the potential impact on smaller entities, we believe that moving from an approach that emphasizes design standards to one that emphasizes performance standards will provide all entities, and in particular smaller entities, with sufficient flexibility to find the most cost-effective means of compliance while still achieving our objectives. We recognize that using performance standards rather than design standards may increase the degree of uncertainty that proxy voting advice businesses and their clients have regarding whether such businesses are in full compliance with the rules. However, we also are adopting certain safe harbors that we believe will help mitigate such uncertainty to the extent proxy voting advice businesses choose to rely on them.

In adopting these amendments, we have undertaken to provide rules that are clear and simple for all affected parties. We do not believe that further clarification, consolidation, or simplification for small entities is necessary.

VII. Statutory Authority

We are adopting the rule amendments contained in this release under the authority set forth in Sections 3(b), 14, 16, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are amending title 17, chapter II, of the Code of Federal Regulations as follows:

For purposes of the PRA analysis in Section V, we estimate an annual increase of 50 burden hours per registrant in connection with the amendments.733 Moreover, because the amendments reflect a principles-based, rather than a more prescriptive, framework, there is no practicable way to establish different compliance requirements for smaller proxy voting advice businesses without also compromising the principles-based nature of the requirements. Under the rules that we are adopting, proxy voting advice businesses may comply in whatever manner they choose so long as they satisfy the principles set forth.

See supra Section IV.C.5.
PART 240—GENERAL RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

§ 240.14a–2 Solicitations to which §§ 240.14a–2 to 240.14a–15 apply.

§ 240.14a–3 to § 240.14a–15 apply.

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77t–2, 77s–2, 77e, 77fff, 77ggg, 77nn, 77ssss, 77ttt, 78c—3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5521(e)(3); 18 U.S.C. 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302;

2. Amend § 240.14a–1 by:

(a) Revising paragraph (l)(1)(iii); and
(b) In paragraph (l)(2)(iii), removing the word ‘‘or’’ from the end of the paragraph;
(c) In paragraph (l)(2)(iv)(C), removing at the end of the paragraph ‘‘.’’ and adding in its place ‘‘;’’;
(d) Adding paragraph (l)(2)(v).

The revisions and additions read as follows:

§ 240.14a–1 Definitions.

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77t–2, 77s–2, 77e, 77fff, 77ggg, 77nn, 77ssss, 77ttt, 78c—3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5521(e)(3); 18 U.S.C. 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302;

2. Amend § 240.14a–1 by:

(a) Revising paragraph (l)(1)(iii); and
(b) In paragraph (l)(2)(iii), removing the word ‘‘or’’ from the end of the paragraph;
(c) In paragraph (l)(2)(iv)(C), removing at the end of the paragraph ‘‘.’’ and adding in its place ‘‘;’’;
(d) Adding paragraph (l)(2)(v).

The revisions and additions read as follows:

§ 240.14a–1 Definitions.

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77t–2, 77s–2, 77e, 77fff, 77ggg, 77nn, 77ssss, 77ttt, 78c—3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5521(e)(3); 18 U.S.C. 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302;

2. Amend § 240.14a–1 by:

(a) Revising paragraph (l)(1)(iii); and
(b) In paragraph (l)(2)(iii), removing the word ‘‘or’’ from the end of the paragraph;
(c) In paragraph (l)(2)(iv)(C), removing at the end of the paragraph ‘‘.’’ and adding in its place ‘‘;’’;
(d) Adding paragraph (l)(2)(v).

The revisions and additions read as follows:

§ 240.14a–1 Definitions.

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77t–2, 77s–2, 77e, 77fff, 77ggg, 77nn, 77ssss, 77ttt, 78c—3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5521(e)(3); 18 U.S.C. 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq., and 8302;
(A) To approve any transaction specified in §230.145(a); or
(B) By any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons.

* * * * *

4. Amend §240.14a–9 by adding paragraph e. to the Note to read as follows:

§ 240.14a–9 False or misleading statements.

* * * * *

Note: * * * *

e. Failure to disclose material information regarding proxy voting advice covered by § 240.14a–1(3)(i)(iii)(A), such as the proxy voting advice business’s methodology, sources of information, or conflicts of interest.

By the Commission.


Vanessa A. Countryman,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276
[Release No. IA–5547]

Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Guidance.

SUMMARY: The Securities and Exchange Commission ("Commission") is publishing supplementary guidance regarding the proxy voting responsibilities of investment advisers under its regulations issued under the Investment Advisers Act of 1940 (the "Advisers Act") in light of the Commission's amendments to the rules governing proxy solicitations under the Securities Exchange Act of 1934 (the "Exchange Act").


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


I. Introduction

The Commission previously issued guidance discussing how the fiduciary duty and rule 206(4)–6 under the Advisers Act relate to an investment adviser’s exercise of voting authority on behalf of clients and also provided examples to help facilitate investment advisers’ compliance with their obligations in connection with proxy voting. We are supplementing this guidance in light of information gained in connection with our ongoing review of the proxy voting process and our related regulations, including the amendments to the proxy solicitation rules under the Exchange Act that we are issuing at this time.

We expect that the Exchange Act amendments adopted in Release No. 34–89372 will result in improvements in the mix of information that is available to investors and material to a voting decision. In particular, we expect issuers will have access to proxy advisory firm recommendations in a timeframe that will permit those issuers to make available to shareholders additional information that may be material to a voting decision in a more systematic and timely manner than they could previously. We also expect that the amendments will result in the availability of that additional information being made known to proxy advisory firms and their clients in a timely manner, including because proxy advisory firms, as a condition to the availability of the exemptions in 17 CFR 240.14a–2(b)(1) and (b)(3), must adopt policies and procedures that are reasonably designed to provide investment advisers and other clients with a mechanism by which they can reasonably be expected to become aware of that additional information prior to making voting decisions. Accordingly, we are providing supplementary guidance to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of these amendments, including in circumstances where the investment adviser utilizes a proxy advisory firm’s electronic vote management system that “pre-populates” the adviser’s proxies with suggested voting recommendations and/or for voting execution services. The supplementary guidance also addresses disclosure obligations and considerations that may arise when investment advisers use such services for voting.

II. Supplemental Guidance Regarding Investment Advisers’ Proxy Voting Responsibilities

Question 2.1: In some cases, proxy advisory firms assist clients, including investment advisers, with voting execution, including through an electronic vote management system that allows the proxy advisory firm to: (1) Populate each client’s votes shown on the proxy advisory firm’s electronic voting platform with the proxy advisory firm’s recommendations based on that client’s voting instructions to the firm (“pre-population”); and/or (2) automatically submit the client’s votes to be counted (“automated voting”). Pre-population and automated voting generally occur prior to the submission deadline for proxies to be voted at the shareholder meeting. In various circumstances, an investment adviser, in the course of conducting a reasonable investigation into matters on which it votes, may become aware that an issuer that is the subject of a voting recommendation intends to file or has filed additional soliciting materials with the Commission setting forth the issuer’s views regarding the voting recommendation. These materials may or may not reasonably be expected to affect the investment adviser’s voting

3 Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations (17 CFR part 275), in which these rules are published.


3 See Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34–89372 (July 22, 2020) ("Amendments to Proxy Solicitation Rules"); see also 17 CFR 240.14a–2(b)(9)(iv); see also Commission Guidance on Proxy Voting Responsibilities, supra note 2. Proxy advisory firms will not be required to comply with certain of the amendments we are making to the proxy solicitation rules until December 1, 2021. This guidance addresses the application of the fiduciary duty, Form ADV, and rule 206(4)–6 under the Advisers Act to an investment adviser’s proxy voting responsibilities in connection with current practices, as well as any policies or procedures that may be implemented by proxy advisory firms under the final amendments.

4 See infra at n. 6. While 17 CFR 240.14a–2(b) uses the term “proxy voting advice business,” we use the term “proxy advisory firm” in this release. This is consistent with the Commission Guidance on Proxy Voting Responsibilities, which this release supplements.