

SEC Reporting & Compliance Alert

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SEC Proposes Rescinding 2020 Amendments to Rules Governing Proxy Advisors

On November 17, 2021, the U.S. Securities and Exchange Commission (SEC), by a 3-2 vote, proposed amendments to the rules governing proxy voting advice businesses (proxy advisors). The amendments would rescind two portions of the proxy rules adopted in 2020 (2020 Amendments) governing (i) the exemptions from the proxy information and filing requirements and (ii) the anti-fraud provisions. (See our July 27, 2020, client alert "[SEC Adopts Proxy Rule Amendments Relating to Proxy Voting Advice Businesses](#).”)

Although the 2020 Amendments had not yet taken effect, they had been repeatedly criticized by many institutional investors. As described in the SEC’s proposing release, the goal of the proposed amendments is to “strike a more appropriate balance,” avoid impairing the timeliness and independence of proxy advisors’ voting advice and preserve investors’ confidence in the integrity of the advice. The effect of the proposed amendments would be to preserve the current state of play for proxy advisors.

Conditions for Exemptions From the Proxy Information and Filing Requirements

Proxy voting advice provided by a proxy advisor generally is a “solicitation” under the proxy rules. This long-standing SEC position was codified by the 2020 Amendments and is not affected by the current proposal. A solicitation under the proxy rules is subject to information and filing requirements, unless an exemption applies. To qualify for such exemptions, the 2020 Amendments require, among other things, that proxy advisors adopt and disclose written policies and procedures reasonably designed to ensure that:

- the proxy advisor’s voting advice is made available to the subject company at or before the time such advice is disseminated to the proxy advisor’s clients; and
- the proxy advisor provides a mechanism by which its clients can reasonably be expected to become aware of the subject company’s written responses to such voting advice.

The proposed amendments would rescind those requirements, as well as the related safe harbors and exclusions. The requirement that the proxy advisor disclose material conflicts of interest and steps taken to address those conflicts, added by the 2020 Amendments, would remain in place.

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Anti-Fraud Provisions

All soliciting material — including proxy voting advice — is subject to the proxy rules' anti-fraud provisions, which prohibit false or misleading soliciting material. The 2020 Amendments added to the proxy rules' anti-fraud provisions a note setting forth non-exclusive examples of when failing to disclose certain information in proxy voting advice may be considered misleading.

The proposed amendments would rescind that note, although the proposing release reaffirms that proxy voting advice is subject to the prohibition on false and misleading soliciting material. That said, the proposing release notes that the formulation of proxy voting advice often requires subjective determinations and the exercise of professional judgment.

More information on the proposed amendments is available in the SEC's [proposing release](#) and accompanying [press release](#).

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