

Securities and Exchange Commission Clarifies Investment Advisers' Proxy Voting Responsibilities

August 22, 2019

At an Open Meeting on August 21, 2019, the Securities and Exchange Commission (the "**Commission**") approved: (1) guidance to "assist investment advisers in fulfilling their proxy voting responsibilities" (the "**Guidance**"); and (2) an interpretation that proxy voting advice provided by proxy advisory firms generally constitutes a "solicitation" subject to the federal proxy rules (the "**Interpretation**"). The **Guidance** and **Interpretation** are structured in a question and answer format that resembles the format for guidance set forth in Staff Legal Bulletin No. 20 on the Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms, issued in 2014 by the Divisions of Investment Management and Corporation Finance. However, unlike Staff Legal Bulletin No. 20, the Guidance and the Interpretation have been approved by the Commission.

As noted in the Commission's **press release** and fact sheet released in connection with the Open Meeting (the "**Press Release**"), the Guidance is intended to "assist investment advisers in fulfilling their proxy voting responsibilities, particularly where they use the services of a proxy advisory firm...." The Guidance also provides investment advisers assistance with proxy voting disclosures under Forms N-1A, N-2, N-3 and N-CSR under the Investment Company Act of 1940, as amended.

According to the Press Release, "Investment advisers owe each of their clients a duty of care and loyalty with respect to services undertaken on the clients' behalf, including proxy voting." Further, under Rule 206(4)-6 under the Investment Advisers Act of 1940 (the "**Advisers Act**"), "it is a fraudulent, deceptive, or manipulative act, practice or course of business...for [a registered investment adviser] to exercise voting authority with respect to client securities, unless [the registered investment adviser] has, among other things, "[a]dopt[ed] and implement[ed] written policies and procedures that are reasonably designed to ensure that [the registered investment adviser] vote[s] client securities in the best interest of clients...." The Guidance discusses how an investment adviser's fiduciary duty and Rule 206(4)-6 under the Advisers Act "relate to an adviser's proxy voting on behalf of clients, particularly if the investment adviser retains a proxy advisory firm."

The Guidance discusses, among other things:

- (1) "How an investment adviser and its client, in establishing their relationship, may agree upon the scope of the investment adviser's authority and responsibilities to vote proxies on behalf of that client";
- (2) "What steps an investment adviser, who has assumed voting authority on behalf of clients, could take to demonstrate it is making voting determinations in a client's best interest and in accordance with the investment adviser's proxy voting policies and procedures";
- (3) "Considerations that an investment adviser should take into account if it retains a proxy advisory firm to assist it in discharging its proxy voting duties";
- (4) "Steps for an investment adviser to consider if it becomes aware of potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy advisory firm's analysis that may materially affect one or more of the investment adviser's voting determinations";
- (5) "How an investment adviser could evaluate the services of a proxy advisory firm that it retains, including evaluating any material changes in services or operations by the proxy advisory firm"; and

- (6) “Whether an investment adviser who has assumed voting authority on behalf of a client is required to exercise every opportunity to vote a proxy for that client.”

In each of the preceding topics, the Guidance provides examples intended to assist investment advisers with compliance. In light of the Guidance, the Commission has encouraged investment advisers to review their policies and procedures in advance of next year’s proxy season.

According to the Interpretation, proxy advisory firms can continue to rely on the exemptions from the filing requirements under Rule 14a-2(b) under the Securities Exchange Act of 1934 (the “**Exchange Act**”), which are expected to be reconsidered in a future rule proposal. The Interpretation notes that solicitations that are exempt from the filing requirements remain subject to the anti-fraud provisions under Rule 14a-9 under the Exchange Act, and discusses the additional information that proxy advisory firms may want to provide to avoid running afoul of the rule.

Davis Polk is currently preparing a client memorandum that will more fully describe the Guidance, as well as a separate memorandum that will more fully describe the Interpretation.

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