SEC Issues Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

September 18, 2019

On August 21, 2019, the Securities and Exchange Commission (the "**SEC**") published (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** relates to the proxy voting responsibilities of investment advisers under Rule 206(4)-6 under the Investment Advisers Act of 1940, and Form N-1A, Form N-2, Form N-3 and Form N-CSR under the Investment Company Act of 1940. Rule 206(4)-6, which was adopted in 2003, requires investment advisers to adopt and implement written policies and procedures to ensure that client proxies are voted in the client's best interests, as well as to describe the policies and procedures to clients and to provide them to clients upon request.

The Guidance and the **Interpretation** are part of the SEC's review of the overall proxy process, and the SEC states that the staff is also considering recommending that the SEC propose rule amendments to address proxy advisory firms' reliance on the proxy solicitation exemptions in Rule 14a-2(b).

History

According to the Guidance, the SEC has provided previous guidance in various forms regarding the methods investment advisers can employ to meet their proxy voting responsibilities under Rule 206(4)-6, "including the retention and use of proxy advisory firms." In the adopting release for Rule 206(4)-6, the SEC noted that an investment adviser could demonstrate that it did not have a conflict of interest in voting on behalf of a client if it voted in accordance with a pre-established policy based on recommendations from an independent third party. In 2004, SEC staff issued two interpretive letters relating to the proxy voting process. The letters, issued to Egan-Jones Proxy Services (the "**Egan-Jones Letter**") and Institutional Shareholder Services, Inc. (the "**ISS Letter**," and together with the Egan-Jones Letter, the "**Letters**"), clarified SEC staff's position on investment advisers' reliance on proxy voting services provided by third parties. In the Egan-Jones Letter, SEC staff confirmed that a proxy voting firm could be considered independent for purposes of Rule 206(4)-6 even if the firm received compensation from an issuer for advising on corporate governance issues. In the ISS Letter, the SEC staff confirmed that a case-by-case evaluation of a proxy firm's potential conflicts of interest was not the only means by which an investment adviser could fulfill its fiduciary duty of care to its clients.

In June 2014, staff in the Divisions of Investment Management and Corporation Finance issued Staff Legal Bulletin No. 20 (Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms) (the "**2014 Bulletin**"), which provided "the staff's views regarding an investment adviser's responsibilities in voting client proxies and retaining proxy advisory firms…[and] guidance about the availability and requirements of…[certain] exemptions to the federal proxy rules that are often relied upon by proxy advisory firms." The 2014 Bulletin stated, among other things, that "[w]hen considering whether to retain or continue retaining any particular proxy advisory firm to provide proxy voting recommendations, the staff believes that an investment adviser should ascertain, among other things, whether the proxy advisory firm has the capacity and competency to adequately analyze proxy issues."

According to the Guidance, the SEC also provided prior guidance in the form of a concept release and roundtables. In July 2010, the SEC issued a concept release, which solicited public comment on, "among other things, the role and legal status of proxy advisory firms within the U.S. proxy system." In November

2013, the SEC hosted a roundtable "on the use of proxy advisory firm services by institutional investors and investment advisers." In July 2018, Chairman Clayton announced that SEC staff would hold an additional roundtable on the proxy process (the "**2018 Roundtable**").

In September 2018, SEC staff withdrew the Letters, but did not withdraw the 2014 Bulletin. The SEC staff indicated that it withdrew the letters "in order to facilitate the discussion at the [2018] Roundtable."[1] For further information regarding the withdrawal of the Letters, please see the September 28, 2018 **Davis Polk Investment Management Regulatory Update**.

The 2018 Roundtable, held on November 15, featured three panels that considered proxy voting mechanics and technology, shareholder proposals and the role of proxy advisory firms and their use by investment advisers. In connection with the 2018 Roundtable, the SEC solicited public feedback on the use of proxy advisory firms and their services through an open public comment file, which appears to have informed the content of the Guidance. Indeed, the Guidance noted that the SEC "carefully considered the feedback" and issued the Guidance "with the benefit of this extensive body of information, historical experience, and engagement."

Guidance

The Guidance is structured in a question and answer format that resembles the format for guidance set forth in the 2014 Bulletin; however, unlike the 2014 Bulletin, the Guidance has been formally approved by the SEC through Commission action.

The Guidance confirmed that investment advisers' fiduciary duties of care and loyalty to their clients apply to "services undertaken on the client's behalf, including voting." The Guidance noted that investment advisers that have agreed to assume proxy voting authority on behalf of their clients must make voting determinations on a variety of matters submitted to shareholders for a vote. According to the Guidance, "in the context of voting, the specific obligations that flow from the investment adviser's fiduciary duty depend upon the scope of voting authority assumed by the adviser." The Guidance further noted that in order "[t]o satisfy its fiduciary duty in making any voting determination, the investment adviser must make the determination in the best interest of the client and must not place the investment adviser's own interests ahead of the interests of the client." The Guidance stated that in order for an investment adviser with voting authority to satisfy its duty of care, the investment adviser "among other things, must have a reasonable understanding of the client's objectives and must make voting determinations that are in the best interest of the client." The Guidance also noted that Rule 206(4)-6 requires an investment adviser with voting authority to, among other things, "[adopt] and [implement] written policies and procedures that are reasonably designed to ensure that the investment adviser votes proxies in the best interest of its clients."

Importantly, the SEC encouraged investment advisers to review their policies and procedures in light of the Guidance in advance of next year's proxy season. Presumably, many investment advisers have structured their existing policies and procedures under Rule 206(4)-6 based on existing staff guidance, such as the 2014 Bulletin.

The following is a summary of the questions and answers provided in the Guidance:

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[1] *See* Statement Regarding Staff Proxy Advisory Letters, IM Information Update, IM-INFO-2018-02 (September 2018). https://www.sec.gov/divisions/investment/imannouncements/im-info-2018-02.pdf.

Question 1: "How may an investment adviser and its client, in establishing their relationship, agree upon the scope of the investment adviser's authority and responsibilities to vote proxies on behalf of that client?"

Response: According to the Guidance, and as recently stated by the SEC in its Interpretive Release Related to an Investment Adviser's Fiduciary Duty, an investment adviser's "fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." For further information regarding the Interpretive Release Related to an Investment Adviser's Fiduciary Duty, please see the June 19, 2019 **Davis Polk Investment Management Regulatory Update**. The Guidance also noted that an investment adviser is not required to accept voting authority from a client; furthermore, if an investment adviser does accept such authority, "it may agree with its client, subject to full and fair disclosure and informed consent, on the scope of voting arrangements, including the types of matters for which it will exercise proxy voting authority." The Guidance further stated that "[w]hile the application of the investment adviser's fiduciary duty in the context of proxy voting will vary with the scope of the voting authority assumed by the investment adviser, the relationship in all cases remains that of a fiduciary to the client." The Guidance also made clear that "to the extent that an investment adviser has discretionary authority to manage the client's portfolio and has not agreed…to a narrower scope of voting authority…the adviser's responsibility for making voting determinations is implied."

The Guidance noted that due to differences in advisory agreements regarding the scope of the advisory relationship, there are a variety of potential arrangements for voting client securities, including the client delegating all of its proxy voting authority to its investment adviser, or alternative arrangements in which the investment adviser would only assume voting authority in limited circumstances or not at all.

The Guidance provided non-exhaustive examples of permissible voting arrangements, "subject to full and fair disclosure and informed consent," including an agreement where: (i) the investment adviser would exercise voting authority "pursuant to specific parameters designed to serve the client's best interest"; (ii) the investment adviser would not exercise voting authority where "voting would impose costs on the client, such as opportunity costs for the client resulting from restricting the use of securities for lending in order to preserve the right to vote"; (iii) the investment adviser would only vote on particular types of proposals based on the client's preferences; or (iv) the investment adviser would not exercise voting authority on matters "where the cost of voting would be high, or the benefit to the client would be low."

Question 2: "What steps could an investment adviser that has assumed the authority to vote proxies on behalf of a client take to demonstrate that it is making voting determinations in a client's best interest and in accordance with the investment adviser's proxy voting policies and procedures?"

Response: According to the Guidance, as part of an investment adviser's fiduciary duty to its clients, investment advisers must "conduct a reasonable investigation into matters on which the adviser votes and to vote in the best interest of the client." The Guidance noted that investment advisers should consider how their fiduciary duties and obligations under Rule 206(4)-6 apply in the context of advising multiple clients, who may have "differing investment objectives and strategies." The Guidance stated that an investment adviser "should consider whether voting all of its clients' shares in accordance with a uniform voting policy would be in the best interest of each of its clients." The Guidance further noted that "where an investment adviser undertakes proxy voting responsibilities on behalf of multiple funds, pooled investment vehicles, or other clients, it should consider whether it should have different voting policies for some or all of these different funds, vehicles, or other clients, depending on the investment strategy and objectives of each."

The Guidance also noted that registered funds that invest in voting securities are required to disclose their proxy voting policies and procedures relating to securities in their portfolios in their statements of additional information ("**SAI**") or on Form N-CSR, as applicable. The Guidance stated that if such funds

"have different voting policies and procedures, these should be reflected in the SAI or on Form N-CSR, as applicable."

The Guidance also discussed that investment advisers should consider whether certain circumstances may require the investment adviser to "conduct a more detailed analysis than what may be entailed by application of its general voting guidelines, to consider factors particular to the issuer or the voting matter under consideration." The Guidance noted that such matters might include, but are not limited to: (i) corporate events (e.g., mergers or acquisitions, dissolutions, conversions, or consolidations) or (ii) contested elections for directors. The Guidance further noted that when determining whether a more fulsome analysis is required, "an investment adviser should consider the potential effect of the vote on the value of a client's investments." According to the Guidance, investment advisers should consider specifying in their voting policies the factors they will consider in determining whether a "company-specific evaluation" is necessary.

In addition, the Guidance noted that an investment adviser should consider "reasonable measures" to ensure that it is casting proxy votes on behalf of clients "consistently with its voting policies and procedures." As an example, the Guidance stated that an investment adviser could review a sample of the votes it cast on behalf of clients as part of its annual review under Rule 206(4)-7(b) of its compliance policies and procedures. The Guidance also stated that an investment adviser "that retains a proxy advisory firm to provide voting recommendations or voting execution services also should consider additional steps to evaluate whether the investment adviser's voting determinations are consistent with its voting policies and procedures and in the client's best interest before the votes are cast." The Guidance identified several examples of methods an investment adviser could use to evaluate compliance, including assessing "'pre-populated' votes shown on the proxy advisory firm's electronic voting platform before such votes are cast," policies and procedures that provide for consideration of additional information that may become available for a proposal (such as an issuer's or a shareholder proponent's subsequently filed additional definitive proxy materials or other information), or where an investment adviser utilizes a proxy advisory firm for either voting recommendations or voting execution (or both), whether certain matters may require a higher degree of analysis.

The Guidance stated that, at least annually, an investment adviser must review and document "the adequacy of its voting policies and procedures to ensure that they have been formulated reasonably and implemented effectively, including whether the applicable policies and procedures continue to be reasonably designed to ensure that the adviser casts votes on behalf of its clients in the best interest of such clients."

Question 3: "What are some of the 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?"

Response: The Guidance discussed a variety of factors that an investment adviser should consider when deciding whether to hire or continue to retain a proxy advisory firm to provide research or voting recommendations. According to the Guidance, an investment adviser should consider "whether the proxy advisory firm has the capacity and competency to adequately analyze the matters for which the investment adviser is responsible for voting."

The Guidance further stated that "investment advisers could consider, among other things, the adequacy and quality of the proxy advisory firm's staffing, personnel, and/or technology."

In addition, according to the Guidance, investment advisers should consider "whether the proxy advisory firm has an effective process for seeking timely input from issuers and proxy advisory firm clients with respect to, for example, its proxy voting policies, methodologies, and peer group constructions, including for 'say-on-pay' votes." The Guidance also noted that, to the extent relevant, an investment adviser should consider whether the proxy advisory firm "takes into account the unique characteristics regarding the issuer, to the extent available, such as the issuer's size; its governance structure; its industry and any

particular practices unique to that industry; its history; and its financial performance" when constructing peer groups.

According to the Guidance, additional factors that an investment adviser should consider include whether a proxy advisory firm "has adequately disclosed to the investment adviser its methodologies in formulating voting recommendations, such that the investment adviser can understand the factors underlying the proxy advisory firm's voting recommendations" as well as "the nature of any third-party information sources that the proxy advisory firm uses as a basis for its voting recommendations." In this regard, the Guidance also noted that an investment adviser "should consider what steps it should take to develop a reasonable understanding of when and how the proxy advisory firm would expect to engage with issuers and third parties."

The Guidance also noted that an investment adviser should conduct a "reasonable review" of a proxy advisory firm's "policies and procedures regarding how it identifies and addresses conflicts of interest." The Guidance identified various methods to conduct such a review, including, but not limited to, assessing: (i) "[w]hether the proxy advisory firm has adequate policies and procedures to identify, disclose, and address actual and potential conflicts of interest, including (1) conflicts relating to the provision of proxy voting recommendations and proxy voting services generally, (2) conflicts relating to activities other than providing proxy voting recommendations and proxy voting services, and (3) conflicts presented by certain affiliations"; (ii) whether the proxy advisory firm's policies and procedures provide for sufficient "context-specific, non-boilerplate disclosure" of its "actual and potential conflicts with respect to the services the proxy advisory firm provides to the investment adviser"; and (iii) "[w]hether the proxy advisory firm's policies and procedures utilize technology in delivering conflicts disclosures that are readily accessible (for example, usage of online portals or other tools to make conflicts disclosure transparent and accessible)."

The Guidance also suggested that the methods an investment adviser uses to determine whether to retain a proxy advisory firm may vary depending on the circumstances, including "(1) the scope of the investment adviser's voting authority, and (2) the type of functions and services that the investment adviser has retained the proxy advisory firm to perform."

Question 4: "When retaining a proxy advisory firm for research or voting recommendations as an input to its voting determinations, what steps should an investment adviser consider taking when 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?"

Response: According to the Guidance, an investment adviser should "conduct a reasonable investigation into the matter." The Guidance stated that the investment adviser's "policies and procedures should be reasonably designed to ensure that its voting determinations are not based on materially inaccurate or incomplete information."

As an example, the Guidance suggested that an investment adviser that uses a proxy advisory firm for research or voting recommendations consider including "a periodic review of the investment adviser's ongoing use of the proxy advisory firm's research or voting recommendations" in its own policies and procedures. The Guidance noted that "such a review could include an assessment of the extent to which potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy advisory firm's analysis (that the investment adviser becomes aware of and deems credible and relevant to its voting determinations) materially affected the proxy advisory firm's research or recommendations that the investment adviser utilized."

In addition, the Guidance noted that an investment adviser should consider "the effectiveness of the proxy advisory firm's policies and procedures for obtaining current and accurate information relevant to matters included in its research and on which it makes voting recommendations[,]" including, but not limited to: (i) "[t]he proxy advisory firm's engagement with issuers, including the firm's process for ensuring that it has

complete and accurate information about the issuer and each particular matter, and the firm's process, if any, for investment advisers to access the issuer's views about the firm's voting recommendations in a timely and efficient manner;" (ii) what efforts the proxy advisory firm has made to correct "any identified material deficiencies in the proxy advisory firm's analysis[,]" (iii) "[t]he proxy advisory firm's disclosure to the investment adviser regarding the sources of information and methodologies used" and (iv) "[t]he proxy advisory firm's consideration of factors unique to a specific issuer or proposal."

Question 5: "How can an investment adviser 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?"

Response: According to the Guidance, an investment adviser that retains a third party, including a proxy advisory firm, to "assist substantively with its proxy voting responsibilities and carrying out its fiduciary duty" should have policies and procedures "reasonably designed to sufficiently evaluate the third party in order to ensure that the investment adviser casts votes in the best interest of its clients."

To that effect, the Guidance noted that investment advisers should consider, among other things, "policies and procedures to identify and evaluate a proxy advisory firm's conflicts of interest that can arise on an ongoing basis, in addition to updates regarding the proxy advisory firm's capacity and competency to provide voting recommendations or to execute votes in accordance with an investment adviser's voting instructions." The Guidance also noted that investment advisers should consider requiring its proxy advisory firm to provide updates regarding relevant business changes, and should assess "whether the proxy advisory firm appropriately updates its methodologies, guidelines, and voting recommendations on an ongoing basis, including in response to feedback from issuers and their shareholders."

Question 6: "If an investment adviser has assumed voting authority on behalf of a client, is it required to exercise every opportunity to vote a proxy for that client?"

Response: According to the Guidance, in either of two scenarios, an investment adviser that has assumed voting authority for a client is not required to exercise every opportunity to vote a proxy for such client. First, if an investment adviser and the client "have agreed in advance to limit the conditions under which the investment adviser would exercise voting authority," then "the investment adviser need not cast a vote on behalf of the client where contemplated by their agreement."

In the second scenario, an investment adviser that has voting authority may refrain from exercising such authority "if it has determined that refraining is in the best interest of that client," such as when the adviser determines that the cost of voting exceeds the anticipated benefit to the client. However, the Guidance stated that in making such a determination, "the investment adviser may not ignore or be negligent in fulfilling the obligation it has assumed to vote client proxies and cannot fulfill its fiduciary responsibilities to its clients by merely refraining from voting the proxies." The Guidance noted that in making this decision, an investment adviser "should consider whether it is fulfilling its duty of care to its client in light of the scope of services to which it and the client have agreed."

Key Takeaways From the Guidance

- In the Guidance, the SEC did not state that an investment adviser with voting authority need not vote in every instance, which may have disappointed some companies and investors hoping for the SEC to make a broader statement that voting is not always required. Instead, the SEC confirmed that the fiduciary duties of investment advisers with voting authority require such investment advisers to vote on behalf of the client and to make voting determinations in the best interest of the client, except in limited circumstances, such as when the expected costs to the client of voting outweigh the anticipated benefits to the client.
- Investment advisers with voting authority should review their policies in light of the interpretations and recommendations set forth in the Guidance. The compliance burden will be heaviest for

those investment advisers who use proxy advisory firms, either to provide voting recommendations or for voting execution services.

- The due diligence obligations outlined in the Guidance are significant for those investment advisers who retain proxy advisory firms. As a result, proxy advisory firms in the future might choose to prepare standardized due diligence packages to assist investment advisers with fulfilling their due diligence responsibilities. Those proxy advisory firms that already provide due diligence packages may need to enhance them in order to accommodate the extensive due diligence obligations set forth in the Guidance.
- In addition, because of the requirements discussed in the Guidance, investment advisers who currently have voting authority on behalf of clients may reconsider whether they want to retain such authority. In light of the significant compliance obligations imposed on investment advisers with voting authority, investment advisers may instead decide to disclaim voting authority in order to avoid the burden of compliance. Alternatively, investment advisers may also consider different arrangements with clients that would minimize their fiduciary obligations with respect to proxy voting.

Interpretation

The SEC also issued the Interpretation regarding the applicability of the proxy rules to proxy voting advice given by proxy advisory firms, namely Rules 14a-1 and 14a-9 under the Securities Exchange Act of 1934 (the "**Exchange Act**").

The Interpretation first explains why the proxy voting recommendations provided by proxy advisory firms constitute solicitations within the meaning of the proxy solicitation rules, although proxy advisory firms can avail themselves of the exemptions from information and filing requirements. Since none of this is new and instead reiterates long-standing SEC views, as would be expected since it is merely an interpretation, the more interesting part of the Interpretation may be the analysis and explanations around how the anti-fraud provisions apply to the recommendations provided by proxy advisory firms, along with suggested disclosures that the proxy advisory firms may want to consider providing to ensure adherence to those rules.

Like the Guidance, the Interpretation is structured in a question and answer format and has been formally approved by the SEC through Commission action.

Question 1: "Does proxy voting advice provided by a proxy advisory firm constitute a solicitation under the federal proxy rules?"

Response: According to the Interpretation, proxy voting recommendations by proxy solicitation firms are solicitations under federal law. The definition of "solicitation" under Rule 14a-1 is broad and includes a "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." The SEC has noted that this definition potentially applies to communications by those who may not be seeking proxy authority for themselves or where the person seeking to influence the vote may be indifferent to its ultimate outcome. As a general matter, the SEC has long stated that the furnishing of proxy voting advice constitutes a solicitation within Rule 14a-1.

According to the Interpretation, whether a particular communication is a solicitation often turns on whether the purpose was to influence shareholder decisions, viewed through the substance of the communication and the circumstances under which it was transmitted. The Interpretation noted that the proxy voting advice provided by proxy advisory firms describes the specific proposals presented at the meeting and presents a vote recommendation for each proposal that indicates how the client should vote. Proxy advisory firms provide the recommendations on platforms they established to facilitate clients' voting activities, and they market their expertise in researching and analyzing proposals submitted for votes to assist clients with voting decisions. The timing of these recommendations, made shortly before a

shareholder meeting, further enhances the likelihood that the recommendations are designed to and will influence an investment advisor's voting decisions. The SEC believes that this same analysis applies even when a proxy advisory firm's advice is based on a client's own voting guidelines.

Rather than narrow the definition of solicitation to exclude these type of communications, the SEC instead enacted rules to exempt them from the information and filing requirements of the federal proxy rules. Proxy advisory firms rely on Rule 14a-2(b)(1), available to persons who do not seek to act as a proxy for a security holder or otherwise furnish or request a proxy, and Rule 14a-2(b)(3), which applies to advisors furnishing proxy voting advice to another person if they meet the stated criteria, including disclosure of significant relationships with the registrant or proponent of the proposal, and the receipt of compensation only from the clients receiving the advice. These exemptions will be subject to future proposed rules on proxy solicitation firms.

Question 2: "Does Exchange Act Rule 14a-9 apply to proxy voting advice?"

Response: According to the Interpretation, solicitations that are exempt from certain of the federal proxy rules continue to be subject to Rule 14a-9, which prohibits any solicitation from containing any statement, which at the time and in light of the circumstances under which it is made, is false and misleading with respect to any material fact. Such solicitation also must not omit to state any material fact necessary in order to make the statements therein not false or misleading. The rule extends to "opinions, reasons, recommendations or beliefs" that are disclosed as part of a solicitation, which may all be statements of material fact for purposes of the rule.

Accordingly, proxy advisory firms must not make materially false or misleading statements or omit material facts, such as information underlying the basis of their advice or which would affect its analysis or judgements, that would be required to make the advice not misleading. The Interpretation provides three examples of the possible need to disclose the following types of information in order to "avoid a potential violation of Rule 14a-9":

- an explanation of the methodology used to formulate its voting advice on a particular matter (including any material deviations from the provider's publicly-announced guidelines, policies, or standard methodologies for analyzing such matters) where the omission of such information would render the voting advice materially false or misleading (a footnote in the Interpretation indicates that the use of a peer group may need to include the reasons for selecting those peer group members as well as, if material, why the peer group members differ from those selected by the registrants);
- to the extent that the proxy voting advice is based on information other than the registrant's public disclosures, such as third-party information sources, disclosure about these information sources and the extent to which the information from these sources differs from the public disclosures provided by the registrant if such differences are material and the failure to disclose the differences would render the voting advice false or misleading (a footnote in the Interpretation states that this includes third-party research or publications, commercial or financial information databases, or ratings and rankings published by third parties); and
- disclosure about material conflicts of interest that arise in connection with providing the proxy voting advice in reasonably sufficient detail so that the client can assess the relevance of those conflicts.

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