

Legal Update

SEC Revisiting Applicability of Proxy Rules to Proxy Voting Advice by Advisory Firms

The US Securities and Exchange Commission (SEC) is actively reconsidering its position on the applicability of its proxy rules to proxy voting advice.

Background

In July 2020, the SEC adopted amendments to its proxy solicitation rules in order to enhance the transparency, accuracy and completeness of the information that proxy advisors, such as Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co., provide to investors and others who vote on behalf of investors (Amendments). The Amendments codified the SEC's 2019 guidance and interpretation that voting advice produced by proxy advisors generally constitutes a solicitation under the proxy rules and that the failure to disclose material information regarding proxy voting advice could cause such advice to be misleading in violation of the proxy rules (Guidance). These provisions of the Amendments became effective on November 2, 2020. As a transition period, proxy advisors were given until December 1, 2021, to comply with new conditions to exemptions from the proxy rules' information and filing requirements that were adopted as part of the Amendments. (For more information about the Amendments, see our Legal Update, "SEC Adopts Proxy Voting Advice Rule Amendments," dated July 28, 2020.¹)

Statements Issued June 1, 2021

On June 1, 2021, SEC Chair Gary Gensler issued a public statement directing the staff "to consider whether to recommend further regulatory action regarding proxy voting advice."² In particular, Chair Gensler instructed the staff to consider, among other matters, whether to recommend that the SEC revisit (1) the definition of solicitation as encompassing proxy voting advice, including the Guidance relating to that definition, and (2) the conditions on exemptions from the information and filing requirements that were contained in the Amendments.

In light of the direction from Chair Gensler, the SEC's Division of Corporation Finance issued a public statement, indicating that it will not recommend enforcement action based on the Amendments or the Guidance during the period in which the SEC is considering further regulatory action with respect to proxy voting advice.³ In addition, if the SEC retains the exemption conditions contained in the

Amendments that currently have a December 1, 2021, compliance date, the Division of Corporation Finance will not recommend any enforcement action based on those conditions for a “reasonable period of time” after any resumption by ISS of its litigation challenging the Amendments and Guidance.

In response to the statements from Chair Gensler and the Division of Corporation Finance, SEC Commissioners Hester Peirce and Elad Roisman, each of whom voted in favor of the Amendments, issued a joint statement indicating that with the compliance date for the exemption conditions still being months away, it is “challenging, if not impossible, for us to know how these requirements will work in practice” and questioning what would justify a departure from the SEC’s “longstanding legal interpretation about proxy solicitation.”⁴ While open to seeing what, if any, changes the staff recommends and to working with their colleagues to consider such recommendations, Commissioners Peirce and Roisman hope that SEC actions with respect to the Amendments “will not deprive users of proxy voting advice of information they need to properly consider such advice or lead them to make decisions based on misinformation.”

Practical Considerations

The treatment of proxy voting advice for the purposes of proxy rules is a complex issue with divergent, and often competing, views coming from various perspectives. However, proxy voting advice can influence proxy voting outcomes. Therefore, companies and other participants in the proxy process should monitor this regulatory development closely.

For more information about the topics raised in this Legal Update, please contact the author of this Legal Update, Laura D. Richman, at +1 312 701 7304, any of the following lawyers, or any other member of our Corporate & Securities practice.

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Endnotes

¹ Available at <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/07/sec-adopts-proxy-voting-advice-rule-amendments.pdf>

² Available at <https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01>

³ Available at <https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01>

⁴ Available at https://www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121?utm_medium=email&utm_source=govdelivery

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