



The U.S. Securities and Exchange Commission on July 22, 2020, adopted [final amendments](#) to its proxy solicitation rules to codify the SEC's longstanding view that proxy voting advice generally constitutes a solicitation within the meaning of the federal proxy rules and is subject to anti-fraud rules.

The new rules add disclosure and procedural conditions that proxy advisers like Institutional Shareholder Services (ISS) and Glass Lewis must satisfy in order to rely on existing exemptions from the information and filing requirements of the proxy solicitation rules.

The SEC concurrently issued [supplemental guidance](#) on the proxy voting responsibilities of investment advisers in light of the amended proxy solicitation rules. This guidance supplements the SEC's [prior guidance](#) issued in August 2019.

## Implementation Dates

The new rules provide proxy advisers with a transition period until December 1, 2021. This means that for calendar year companies the new rules will first apply to the 2022 proxy season. The supplemental guidance for investment advisers is effective upon publication in the Federal Register.

## Key Takeaways

- **All Companies Will Receive Copies of Proxy Adviser's Report.** Generally, *all* companies will now receive, without charge, a copy of the proxy adviser's report relating to annual shareholder meetings at or prior to the time the report is initially provided to the proxy adviser's clients. Unlike the SEC's [proposed rules](#) issued in November 2019, companies will not have a right to review and respond to the report before it is given to the proxy adviser's clients. Currently ISS gives only S&P 500 companies the opportunity to review their reports in draft form in a 48-hour timeframe and Glass Lewis limits pre-publication review to key data underlying the report. The SEC encourages proxy advisers that are currently providing companies with this opportunity to continue doing so.
- **Proxy Advisers Must Notify Clients of Company's Response to Report.** Proxy advisers will have to provide their investment adviser clients with a mechanism by which they can reasonably be expected to become aware in a timely manner that a company has filed or intends to file a response to the report, if the company provides such notification to the proxy adviser.
- **Supplemental Guidance for Investment Advisers.** The supplemental guidance discusses how an investment adviser can demonstrate that it is making voting decisions in a client's best interest when it utilizes a proxy adviser's automated voting system and becomes aware that a company has filed additional soliciting materials regarding the voting recommendations.

## Definition of Proxy Advice as a "Solicitation"

The new rules amend Rule 14a-1(l)(1) to make clear that the term "solicit" or "solicitation" includes any proxy voting advice that (a) makes a recommendation to a shareholder as to its vote, consent, or authorization on a specific matter for which shareholder approval is solicited and (b) is furnished by a person who markets its expertise as a provider of such advice and sells such advice for a fee. In addition, the new rules amend Rule 14a-1(l)(2) to codify the SEC's view that any proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request will not be deemed a solicitation subject to the proxy rules.

## **New Conditions to Exemptions for Proxy Advice**

Voting recommendations of proxy advisers have generally been considered exempt from the filing and disclosure requirements of the proxy rules under Rule 14a-2(b)(1). This exemption is available for solicitations by persons who do not seek the power to act as a proxy for a shareholder and do not have substantial interest in the subject matter of the communication beyond their interest as a shareholder, and Rule 14a-2(b)(3), which exempts proxy voting advice furnished by an adviser to any other person with whom the adviser has a business relationship.

The new rules provide that proxy advisers cannot rely on these exemptions unless they comply with the disclosure and procedural requirements set forth in new Rule 14a-2(b)(9). These new conditions are as follows:

### **1. Enhanced Conflicts of Interest Disclosure**

The first condition to the exemption requires proxy advisers to disclose in their proxy voting advice any material conflicts of interest, including prominent disclosure of any information regarding an interest, transaction, or relationship that is material to assessing the objectivity of the proxy voting advice. They must also disclose any policies and procedures used to identify, as well as the steps taken to address, any such conflicts.

### **2. Access by Companies to Proxy Voting Advice; Safe Harbor**

The second condition to the exemption requires proxy advisers to adopt and publicly disclose policies and procedures reasonably designed to ensure that companies have proxy advice made available to them at or prior to the time when their reports are disseminated to the clients of the proxy adviser. The final rules note that if the proxy advice is subsequently revised, the proxy adviser is not required to make subsequent versions available to the company.

A nonexclusive safe harbor provides that a proxy adviser will be deemed to satisfy the new rule if its policies and procedures are reasonably designed to provide companies with a copy of the proxy advice, at no charge, no later than when the advice is provided to the proxy adviser's clients. The policies and procedures may include conditions requiring that the company:

- Files its definitive proxy statement at least 40 calendar days before the shareholder meeting (the same deadline for companies using notice and access proxy delivery).
- Expressly acknowledges that it will only use the proxy voting advice for its own internal purposes and will not publish or share the proxy voting advice except with the company's own employees or advisers, including its attorneys and proxy solicitors.

### **3. Access by Investment Adviser Clients to the Company Response; Safe Harbor**

The third condition to the exemption requires proxy advisers to adopt and publicly 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 company's written response about the proxy voting advice in a "timely manner" before the meeting.

A nonexclusive safe harbor provides that a proxy adviser will be deemed to satisfy the new rule if its policies and procedures are reasonably designed to provide its clients with notice that the company has notified the proxy adviser that it has filed or intends to file, additional soliciting material with the SEC. The proxy adviser may

provide such notice either through its electronic client platform or through email or other electronic means. The notice must include an active hyperlink to the additional soliciting filed by the company on EDGAR when available.

## **Application of Anti-Fraud Rules to Proxy Advice**

Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact or omitting to state any material fact necessary in order to make the statements not false or misleading. Proxy voting advice that is exempt from the filing and information requirements of the federal proxy rules is not exempt from Rule 14a-9. The new rules add to the list of examples of potentially misleading statements in the note to Rule 14a-9 the failure to disclose material information regarding proxy voting advice, such as the firm's methodology, sources of information, or conflicts of interest.

## **Exclusions From New Rules**

The requirements of the new rules regarding company access to proxy voting advice and client access to the company's response do not apply to mergers and acquisitions transactions or contested matters, such as contested director elections. The new rules also do not apply to proxy voting advice provided pursuant to custom policies that are proprietary to a proxy adviser's client.

## **Investment Adviser Supplemental Guidance**

The SEC's supplemental guidance is intended to assist investment advisers in assessing how to consider additional information that may result from the new proxy rule requirement that a proxy adviser notify its clients that a company has filed or intends to file additional soliciting material with the SEC. Specifically, the guidance focuses on situations where an investment adviser utilizes a proxy adviser's electronic vote management system to prepopulate the client's ballots with the proxy adviser's voting recommendations and/or automatically submit the votes for the client (automated voting, sometimes called "robo-voting").

The supplemental guidance provides that an investment adviser that uses automated voting "should consider disclosing: (1) the extent of that use and under what circumstances it uses automated voting; and (2) how its policies and procedures address the use of automated voting in cases where it becomes aware before the submission deadline for proxies to be voted at the shareholder meeting that an issuer intends to file or has filed additional soliciting materials with the Commission regarding a matter to be voted upon." The guidance states that to demonstrate that an investment adviser is voting in its client's best interest, it would likely need to consider a company's response that is filed sufficiently in advance and that would reasonably be expected to affect the investment adviser's voting determination.

## Steps to Prepare for the 2022 Proxy Season

- Confirm with proxy advisers that they have the correct contact information for the person in the company to receive the proxy adviser's report.
- Have processes in place for employees and advisers to quickly analyze the proxy adviser's report.
- If applicable, promptly notify the proxy adviser that the company intends to file or has filed additional soliciting materials with the SEC.

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