

# Proxy Voting and Voting Advice: SEC Provides Guidance for Investment Advisers and Proxy Advisory Firms

## WRITTEN BY

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On August 21, 2019, the SEC provided guidance (available [here](#)) to investment advisers, such as fund managers, regarding their proxy voting responsibilities. The SEC also concurrently issued an interpretative release (available [here](#)) regarding the applicability of the SEC's proxy rules to proxy voting advice provided by proxy advisory firms, such as ISS and Glass Lewis. The releases are based upon previous staff guidance highlighting for investment advisers and proxy advisory firms the existing regulatory frameworks to which they are subject and setting forth the SEC's expectations on how they should perform their services for their clients in light of those existing obligations.

### *Proxy Voting Responsibilities of Investment Advisers*

An investment adviser owes its clients a duty of care and loyalty with respect to services they provide, including proxy voting, and is required to adopt and implement policies and procedures to ensure that the investment adviser votes proxies in the best interest of its clients. The SEC's guidance focuses on these proxy voting responsibilities and related fiduciary duties, especially if the investment adviser is relying on a proxy advisory firm.

The guidance discusses, among other things (i) how an investment adviser and its client may clearly define the scope of the investment adviser's voting authority; (ii) what steps an investment adviser could take to demonstrate it is making voting determinations in a client's best interest, including considering the advisability of uniform voting policies; (iii) 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, including proxy advisor disclosures about voting recommendation methodologies and conflicts of interest and how a proxy advisor takes into account factors unique to particular issuers or proposals; and (iv) 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 and voting recommendation.

### *Applicability of the Federal Proxy Rules to Proxy Voting Advice*

The SEC's interpretation confirms that proxy voting advice provided by proxy advisory firms will generally constitute a solicitation subject to the federal proxy rules. The interpretation does not affect the ability of proxy advisory firms to continue to rely on the exemptions from the federal proxy rules' filing requirements (although the SEC noted that the staff is considering recommending rule amendments that would address proxy advisor's reliance on such exemptions). However, the SEC also makes it clear that such solicitations, even if they are

exempt from the filing requirements, remain subject to Rule 14a-9's anti-fraud provisions, which prohibits any solicitation from containing false or misleading statements.

The interpretation provides proxy advisory firms with disclosures they should consider to avoid potential violations of Rule 14a-9, including disclosures regarding (i) the methodology used to formulate their voting advice on a matter (including any material deviations from their publicly announced voting guidelines or policies); (ii) information about any third-party sources underlying their voting advice, including the extent to which the information differs from the public disclosures provided by the registrant; and (iii) material conflicts of interest.

### *Takeaway*

We think investment advisers should carefully consider the SEC's discussion regarding their duties to clients and conflicts of interest of advisers and of proxy advisory firms. The new guidance and the interpretive release provide some helpful suggestions regarding how such duties may be met and conflicts may be mitigated and, although much of the discussion is not new, these now represent statements by the Commission.

The guidance and interpretation will be effective upon publication in the Federal Register.

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