ALERTS

SEC Rescinds Certain Rules Governing Proxy Voting Advice

July 21, 2022

On July 13, 2022, the Securities and Exchange Commission (the "SEC") voted to adopt certain amendments to its rules governing proxy voting advice (the "2022 Amendments"). The 2022 Amendments aim to address concerns investors and other market participants had with the previous version of the rules, adopted in 2020 (the "2020 Rules"). Following their approval, the 2020 Rules were the subject of significant concern both from proxy voting advice businesses and their investor clients, including with regard to the potential adverse effects that the rules could have on the independence, cost and timeliness of proxy voting advice.

As discussed in more detail in an earlier *Alert* that we authored, in adopting the 2020 Rules, the SEC formally confirmed its position that proxy voting advice is considered a "solicitation" within the meaning of Section 14(a) of the Securities Exchange Act of 1934 and is subject to the federal proxy rules. The SEC also imposed certain new disclosure requirements on proxy voting advice businesses that wished to avoid the information and filing requirements applicable to participants in a traditional proxy solicitation.

Through the 2022 Amendments, the SEC reversed two portions of the 2020 Rules setting forth conditions to the availability of certain exemptions to the proxy rules' information and filing requirements. Those conditions required that:

- Companies that are the subject of proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy advisory firm's clients; and

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- Proxy voting advice businesses provide their clients with a mechanism by which they can reasonably be expected to become aware of a subject company's written statements about such advice in a timely manner before a shareholder meeting.

The SEC rescinded both of the above conditions (the "Rescinded Conditions") along with the associated safe harbors and exclusions from such conditions (previously adopted pursuant to the 2020 Rules under Rule 14a-2(b)(9)(ii)). Notably, however, proxy voting advice businesses will continue to be subject to conflicts of interest disclosure requirements under Rule 14a-2(b)(9), as contemplated by the 2020 Rules.

The 2022 Amendments also rescinded the changes made by the 2020 Rules to the proxy rules' liability provision (specifically, Note (e) to Rule 14a-9), which had been added to provide that the failure to disclose material information regarding proxy advice could be considered misleading and omissive under Rule 14a-9 (also known as the "anti-fraud rule"). The rescission was made to address investor concern that the addition of Note (e) would heighten litigation risk for proxy voting advice businesses, which, in turn, could lead to the impairment of the independence and quality of the proxy voting advice given by such firms. Notwithstanding its decision to abandon Note (e), the SEC reaffirmed its stance that proxy voting advice constitutes a "solicitation" under the proxy rules and continues to be subject to the anti-fraud provisions that prohibit false and misleading statements or omissions in soliciting material.

Further, as discussed in an earlier *Alert*, in connection with the 2020 Rules, the SEC issued supplemental guidance suggesting that investment advisers consider disclosing the circumstances surrounding their use of automated voting and how their policies address such voting when they become aware the issuer intends to make additional solicitation materials available in advance of a vote. That supplemental guidance has now been rescinded as part of the 2022 Amendments.[1]

We note that, following the rescissions discussed above, Institutional Shareholder Services stated that it would continue to pursue its litigation challenging the 2020 Rules and the guidance on which they are based, reiterating its view that the SEC's "decision to regulate a form of independent investment advice as though it were a solicitation of a specific outcome in a shareholder vote exceeds the agency's statutory authority, is contrary to law, and is arbitrary and capricious." Oral arguments in the case are scheduled for later this month.

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In conclusion, the SEC, in an effort to address market concern and "strike a more appropriate balance," has scaled back key components of the 2020 Rules. And while the effects of the surviving rules, such as those related to conflicts of interest disclosure, remain to be seen, it appears that the nature and processes by which proxy voting advice businesses dispense, and investor clients receive, proxy voting recommendations may not be materially different going forward.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] The 2020 proxy guidance was a supplement to detailed proxy voting guidance that the SEC issued in 2019, which remains in effect and is addressed in this *SRZ Memorandum.*

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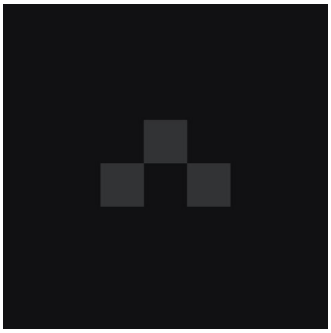

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