

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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SEC Partially Rescinds Its Rules Relating to the Provision of Proxy Voting Advice

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The U.S. Securities and Exchange Commission (SEC) has approved amendments to the federal proxy rules governing the provision to institutional investors and other clients of voting advice by proxy voting advisory firms or businesses such as Institutional Shareholder Services (ISS) and Glass Lewis, referred to by the SEC in the adopting release as “PVABs” (the “[2022 Amendments](#)”). The 2022 Amendments become effective on September 19, 2022. They rescind most – but not all – of the changes made to rules adopted by the SEC in 2020 (the “[2020 Amendments](#)”).

As a majority of the SEC Commissioners explained in the 2022 adopting release, the decision was made to revisit the 2020 Amendments based on continued expressions of investor concern regarding their chilling effect. The SEC majority opted for a partial reversal to avoid imposing “burdens on proxy voting advice businesses that may impair the timeliness and independence of their advice” to investor clients. From the perspective of the two dissenting Commissioners, however, the SEC was altering its regulatory course dramatically with little or no justification.¹

- As outlined in our [prior alert](#) in 2020, among other things, the 2020 Amendments:
 - Codified the SEC’s interpretation that the provision of proxy voting advice by PVABs is a “solicitation” subject to the federal proxy rules;
 - Amended Rule 14a-2(b) to add two new conditions (in subsection (b)(9)) that each PVAB would generally need to satisfy to rely on an exemption from certain proxy filing and disclosure requirements (together, the “Rule 14a-2(b)(9) Conditions”). The conditions to be satisfied included the following:
 - a conflicts-of-interest disclosure obligation; and
 - an obligation to adopt and disclose written policies reasonably designed to ensure that (1) each issuer covered by a voting report and/or recommendations has the proxy voting advice of the relevant PVAB available to it at the same time, or prior to the time, such advice is disseminated to clients of that PVAB; and (2) the PVAB provides its clients with a mechanism (such as a hyperlink) by which they can be expected to become aware of any written statements by the covered issuer regarding the proxy voting advice before the shareholders’ meeting;

- Added a new Note (e) to Exchange Act Rule 14a-9, which prohibits false and misleading statements, to include specific examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the proxy rules; and
- Issued [supplemental interpretive guidance](#) intended to help investment advisers fulfill their proxy voting responsibilities in connection with retaining the services of PVABs.
- The 2022 Amendments partially rescind the 2020 Amendments by:
 - Removing the Rule 14a-2(b)(9) Conditions
 - Upon further analysis in light of continued concerns expressed by investors and others commenters, the SEC concluded that the potential informational benefits of the conditions do not sufficiently justify the risks they pose to the cost, timeliness and independence of proxy voting advice.
 - Removing Note (e) to Rule 14a-9
 - The SEC pointed out that Note (e) created a risk of confusion regarding its application to proxy voting advice, thereby undermining the goal of the 2020 Amendments.

The 2022 Amendments do not impact other aspects of the 2020 Amendments. As a result, proxy voting advice remains a solicitation subject to the federal proxy rules, and PVABs would still be subject to the conflicts-of-interest disclosure requirements adopted in 2020.

Practice Tips – What to Do Now:

We recommend companies take the following actions:

- Review your company’s program for engaging in dialogue with investors and PVABs to maintain awareness of shareholder sentiment. In this regard, comply with Regulation FD’s ban on selective disclosure as you listen and learn what they are thinking.
- Keep the board of directors informed on a regular basis of what you learn through your shareholder engagement program.
- Monitor the status of pending litigation challenging the validity of the 2020 Amendments and 2022 Amendments. ISS challenged the 2020 Amendments in federal court for the District of Columbia, and the National Association of Manufacturers and Natural Gas Services Group, Inc. have challenged the 2022 Amendments in federal court for the Western District of Texas.²

¹ See Statement of Commissioner Hester Peirce, U-Turn: Comments on Proxy Voting Advice (July 13, 2022), [available here](#); accord Statement of Commissioner Mark T. Uyeda on Final Rule Amendments on Proxy Voting Advice (July 13, 2022), [available here](#).

² See Notes 4, 18 and 278 of the 2022 Amendments; see also *National Association of Manufacturers et al. v. SEC*, No. 7:22-cv-163 (W.D. Tex.) (complaint [available here](#)).

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