

July 21, 2022

# SEC Reverses Aspects of Proxy Voting Advice Regulations

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## The Final Rule Rescinds Conditions from Former Proxy Rule Exemptions for Proxy Voting Advice and Related Guidance for Investment Advisers

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### SUMMARY

On July 13, the SEC voted 3 to 2 (Commissioners Peirce and Uyeda dissenting) to adopt amendments to the rules governing proxy voting advice provided by proxy advisory firms. The 2022 Final Rule rescinds two sections of the rules governing proxy voting advice adopted by the SEC in July 2020. The 2022 Final Rule rescinds Rule 14a-2(b)(9)(ii) and includes conditions to exemptions from the proxy rules' information and filing requirements that required proxy advisory firms to (1) make their advice available to the companies subject to their advice at or before the time that they made the advice available to the proxy advisory firm's clients and (2) provide their clients with a mechanism by which they could reasonably have been expected to become aware of any written statements regarding the proxy advisory firm's proxy voting advice by registrants subject of the advice. The 2022 Final Rule also rescinds Note (e) to Rule 14a-9, which set forth examples of material misstatements or omissions related to proxy voting advice, specifically providing that failure to disclose material information regarding proxy voting advice could be misleading. The SEC has also rescinded certain supplemental guidance released in 2020, which was prompted, in part, by the adoption of the rescinded rules.

The 2022 Final Rule will be effective on September 19, 2022.

### BACKGROUND

In July 2020, the SEC adopted final rules regarding proxy voting advice provided by proxy advisory firms or proxy voting advice businesses ("PVABs") (the "2020 Rules").<sup>1</sup> The 2020 Rules comprised the following:

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- Rule 14a-2, which required PVABs to:
  - disclose conflicts of interest;
  - adopt and publicly disclose policies and procedures to provide proxy voting advice to registrants at or prior to dissemination to clients and to provide timely notice to clients of registrants' responses;
- Note (e) to Rule 14a-9, which clarified the applicability of the proxy rules' antifraud provisions to proxy advice and added examples of when failure to disclose material information (*i.e.*, the proxy advisor's methodology, sources of information or conflicts of interest) regarding proxy voting advice could be considered misleading under Rule 14a-9; and
- The definition of "solicitation," which was amended to expressly include proxy voting advice and conditioned the availability of exemptions from the proxy rules' information and filing requirements on proxy advisors meeting the above requirements.

The 2020 Rules came into full effect on December 1, 2021.

On June 1, 2021, Chair Gensler announced that the SEC was revisiting the agency's regulation of proxy voting advice, including the 2020 Rules,<sup>2</sup> and the Division of Corporation Finance issued a statement that it would not recommend enforcement action with respect to the 2020 Rules while the SEC considered further regulatory action.<sup>3</sup>

On November 17, 2021, the SEC proposed amendments to the 2020 Rules that would rescind Rule 14a-2(b)(9)(ii) and Note (e) to Rule 14a-9, while leaving the remaining sections of the 2020 Rules intact (the "2021 Proposing Release").<sup>4</sup> In the 2021 Proposing Release, the SEC stated that, following the adoption of the 2020 Rules, institutional investors and other clients of PVABs had expressed concerns about the rules' impact on their ability to receive independent proxy voting advice in a timely matter.<sup>5</sup> Further, the SEC stated that, since the 2020 Rules were adopted, PVABs have continued to develop industry-wide best practices to address the concerns underlying the adoption of the 2020 Rules.

In the 2022 Final Rule, the SEC adopted the rules as proposed in the 2021 Proposing Release.<sup>6</sup> In Chair Gensler's statement on the 2022 Final Rule, he noted that SEC had "determined that the risks [the 2020 Rules] impose to the independence and timeliness of proxy voting advice are not justified by their informational benefits."<sup>7</sup> Commissioner Peirce, in dissenting from the adoption of the 2022 Final Rule, raised concerns that the frequent rule changes in this space was leading to "regulatory whiplash" for participants.<sup>8</sup>

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### AMENDMENTS TO RULE 14A-2(B)(9)

The 2022 Final Rule removes Rule 14a-2(b)(9)(ii) (the "Information Availability Rule") (as well as the related safe harbors and exclusions in Rules 14a-2(b)(9)(iii)-(vi)),<sup>9</sup> which required proxy advisor firms to both make their advice available to the company subject to that advice by the time it is disseminated to clients and provide clients with a mechanism by which they can become aware of a company's statement in response before they vote.<sup>10</sup> The Information Availability Rule was intended to benefit shareholders by improving

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information availability so they could make more informed voting decisions. However, the SEC states in the Adopting Release that, since the enactment of the 2020 Rules, investors had expressed concerns about the rule's impact on the cost, timeliness and transparency of the voting process. In rescinding the Information Availability Rule, the SEC concluded that, upon reevaluation, the benefits of the rule did not outweigh the costs.<sup>11</sup> While the 2022 Final Rule removes portions of Rule 14a-2(b)(9), some parts of the rule, including the conflicts of interest disclosure requirements promulgated in the 2020 Rules, remain in place.<sup>12</sup>

In connection with the adoption of the Information Availability Rule, the SEC had also released supplemental guidance to investment advisors about their proxy voting obligations (the "2020 Supplemental Guidance").<sup>13</sup> The 2020 Supplemental Guidance was issued in part to address so-called "robo-voting," or situations where advisers use a PVAB's electronic vote management system, as well as client consent concerns related to the use of automated voting services. In an effort to limit such automated voting, the 2020 Supplemental Guidance recommended that an investment adviser consider disclosing (1) the extent of, and circumstances under which, 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 that an issuer intends to file or has filed additional soliciting materials regarding a matter to be voted upon.<sup>14</sup> The 2022 Final Rule rescinds the 2020 Supplemental Guidance in connection with the removal of the Information Availability Rule.<sup>15</sup>

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### AMENDMENTS TO RULE 14A-9

The 2020 Rules added Note (e) to Rule 14a-9, which provided that the failure to disclose material information regarding proxy voting advice, such as a PVAB's methodology, sources of information, or conflicts of interest, may, depending on the particular facts and circumstances, be misleading within the meaning of the rule.<sup>16</sup> Originally intended to clarify the application of Rule 14a-9 to proxy voting advice, the SEC concluded in the Adopting Release that they now believe Note (e) unnecessarily exacerbated legal uncertainty by creating a risk of confusion regarding the application of Rule 14a-9.<sup>17</sup> In the Adopting Release, the SEC provided two reasons why Note (e) could cause confusion. First, Note (e) concerns a particular type of solicitation, in contrast to the other paragraphs of the note that apply to all solicitations, which the SEC now believes could unintentionally suggest that proxy voting advice poses heightened concerns and should be treated differently than other types of solicitations under Rule 14a-9. Second, the SEC now reasons that identifying a PVAB's methodology, sources of information and conflicts of interest as examples of material information could suggest PVABs have a unique obligation to disclose that information. In the Adopting Release, the SEC further clarified that, although the 2022 Final Rule would remove Note (e), material misstatements of fact in, and omissions of material fact from, proxy voting advice remain subject to liability under Rule 14a-9.<sup>18</sup>

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The Adopting Release also reiterated that (1) PVABs are not liable for statements of opinion and (2) proxy voting advice requires subjective determinations and the exercise of professional judgment.<sup>19</sup>

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## ENDNOTES

<sup>1</sup> *Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Release No. 34-89372 (July 22, 2020) [85 FR 55082 (Sept. 3, 2020)].

<sup>2</sup> Chair Gary Gensler, Statement on the Application of the Proxy Rules to Proxy Voting Advice (June 1, 2021), available at <https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01>.

<sup>3</sup> SEC Division of Corporation Finance, Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9 (June 1, 2021), available at <https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01>.

<sup>4</sup> See *Proxy Voting Advice*, Release No. 34-93595 (Nov. 17, 2021) [86 FR 67383 (Nov. 26, 2021)] (the "Proposing Release").

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Proxy Voting Advice*, SEC Release Nos. 34-95266; IA-6068 (July 13, 2022) ("Adopting Release").

<sup>7</sup> Chair Gary Gensler, Statement on Adoption of Amendments to the Rules Governing Proxy Voting Advice (July 13, 2021), available at <https://www.sec.gov/news/statement/gensler-statement-proxy-voting-071322>.

<sup>8</sup> Commissioner Hester Peirce, U-Turn: Comments on Proxy Voting Advice (July 13, 2021), available at <https://www.sec.gov/news/statement/peirce-statement-proxy-voting-advice-071322>.

<sup>9</sup> Rule 14a-2(b)(9) set forth two non-exclusive safe harbor provisions in paragraphs (iii) and (iv) intended to give assurance to PVABs that they have satisfied the conditions in Rules 14a-2(b)(9)(ii)(A) and (B). Rule 14a-2(b)(9)(iii) provided that a PVAB would be deemed to satisfy the requirement in paragraph (b)(9)(ii)(A) if it had written policies and procedures that were reasonably designed to provide a registrant with a copy of its proxy voting advice, at no charge, no later than the time such advice is disseminated to the proxy voting advice business's clients. Rule 14a-2(b)(9)(iv) provided that a PVAB would be deemed to satisfy the condition in paragraph (b)(9)(ii)(B) if it had written policies and procedures that were reasonably designed to inform clients who receive proxy voting advice about a particular registrant in the event that such registrant notifies the PVAB that the registrant either intends to file or has filed additional soliciting materials with the SEC pursuant to § 240.14a-6 setting forth the registrant's views regarding the advice.

ENDNOTES (CONTINUED)

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<sup>10</sup> Adopting Release, *supra* note 1, at 29.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Release No. IA-5547 (July 22, 2020) [85 FR 55155 (Sept. 3, 2020)].

<sup>14</sup> *Id.* at 6-7.

<sup>15</sup> Adopting Release, *supra* note 1, at 41.

<sup>16</sup> 17 CFR 240.14a-9, Note (e).

<sup>17</sup> Adopting Release, *supra* note 1, at 44.

<sup>18</sup> *Id.* at 51.

<sup>19</sup> *Id.* at 8, 54.