



## Amendments to Proxy Advisor Rules Become Effective

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As described in more detail below, the amendments rescind two rules regarding proxy voting advice provided by PVABs that the SEC adopted in July 2020 (2020 Final Rules), as well as certain guidance that the SEC issued to investment advisers about their proxy voting obligations (2020 Supplemental Proxy Voting Guidance). Specifically, the amendments rescind:

- Conditions to the availability of two exemptions from the proxy rules' informational and filing requirements on which PVABs often rely; and
- Changes made to the proxy rules' liability provision—specifically, removing a note that provides examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the federal proxy rules' prohibition on material misstatements or omissions.

### Overview

*Prior Rule*—Rule 14a-2(b)(9), which provides conditions to the availability of two exemptions from the proxy rules' informational and filing requirements on which PVABs rely, previously required that:

- (1) Companies that are the subject of proxy voting advice have such advice made available to them in a timely manner, and
- (2) Clients of PVABs be provided with a means of becoming aware of any written responses by companies to proxy voting advice.

*Adopted Amendments*—The adopted amendments rescind these conditions due to concerns about potential adverse effects on the independence, cost and timeliness of proxy

voting advice.

*Prior Rule*—Rule 14a-9, which prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made, previously included as Note (e) the following example of a potentially false and misleading statement or omission:

Failure to disclose material information regarding proxy voting advice, such as the PVABs' methodology, sources of information, or conflicts of interest.

*Adopted Amendments*—The amendments delete Note (e) to Rule 14a-9 due to concerns over increased litigation risk, which could impair the independence and quality of proxy voting advice. Despite this deletion, a PVAB, like any other person engaged in solicitation covered by the SEC's proxy rules, will continue to be subject to liability under the antifraud provisions of Rule 14a-9.<sup>1</sup>

A comparison of the prior rules to the amended rules is available in [Appendix A](#).

## **Background**

The 2020 Final Rules were intended to codify the SEC's view that proxy voting advice generally constitutes a "solicitation" as defined in Rule 14a-1(l) and help ensure that investors who use proxy voting advice receive more transparent, accurate and complete information on which to make their voting decisions. The SEC recognized the "important and prominent role" that PVABs play in the proxy voting process and adopted the 2020 Final Rules, in part, to address certain concerns that registrants, investors and others have expressed about the role of PVABs<sup>2</sup> while aiming to tailor the 2020 Final Rules to avoid imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice.

Among other things, the 2020 Final Rules amended Rule 14a-2(b) by adding paragraph (9), which sets forth two conditions that a PVAB must satisfy in order to continue to rely on two exemptions from the proxy rules' information and filing requirements commonly used by PVABs. Rule 14a-2(b)(9)(i) requires PVABs to provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice. In addition, Rule 14a-2(b)(9)(ii) requires that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that:

(1) Companies that are the subject of their proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the PVABs' clients, and

(2) PVABs provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding their proxy voting advice by companies who are the subject of such advice, in a timely manner before the relevant shareholder meeting (or, if no meeting, before the votes, consents or authorizations may be used to effect the proposed action).

The 2020 Final Rules also amended Rule 14a-9 by adding a note that provides that failure to disclose material information regarding proxy voting advice, such as a PVAB's methodology, sources of information or conflicts of interest, could be misleading under Rule 14a-9 and subject the PVAB to liability under the rule. Lastly, in connection with the 2020 Final Rules, the SEC issued the 2020 Supplemental Proxy Voting Guidance, which was prompted in part by the adoption of the Rule 14a-2(b)(9)(ii) conditions.

However, investors and others expressed concerns that these conditions will impose increased compliance costs on PVABs and impair the independence and timeliness of their proxy voting advice. Additionally, with regards to the liability provision, although the changes were intended to make clear that proxy voting advice is subject to liability under the proxy rules, investors and others expressed concerns that the 2020 changes created confusion, increased PVABs' litigation risks and potentially impaired the independence and quality of the proxy voting advice. While the amendments to Rules 14a-1(l) and 14a-9 became effective on November 2, 2020, and the conditions set forth in the new Rule 14a-2(b)(9) were to become effective on December 1, 2021, SEC Chair Gary Gensler directed the staff on June 1, 2021, to reconsider the rulemaking, and the Division of Corporation Finance issued a [statement](#) that it would not recommend enforcement action based on the [2019 Interpretation and Guidance](#) or the 2020 Final Rules during the period in which the SEC considered further regulatory action in the area. The amendments modify certain aspects of the 2020 Final Rules, while leaving in place others, such as provisions that increase needed transparency around conflicts of interest.

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<sup>1</sup>Before adopting the 2020 Final Rules, the SEC, in August 2019, stated that PVABs' proxy voting advice generally would constitute a solicitation subject to the proxy rules. As a solicitation,

proxy voting advice is subject to Rule 14a-9. *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, Release No. 34-86721 (Aug. 21, 2019) [84 FR 47416 (Sept. 10, 2019)].

<sup>2</sup> See *Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-89372 (Jul. 22, 2020) [85 FR 55082 (Sept. 3, 2020)].

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