

Investment Management Alert | July 20, 2022

## SEC Adopts Amendments to Rules Governing Proxy Voting Advice and Proposes Amendments to Bases for Excluding Shareholder Proposals From



At an open meeting on July 13, 2022, the Securities and Exchange Commission (SEC) voted 3-2 to adopt amendments to proxy rules governing proxy voting advice, specifically by proxy voting advice businesses (PVABs).<sup>1</sup> The Final Rule represents a partial reversal of the rule adopted in 2020 (2020 Rule), most notably to no longer require PVABs to make their reports available to issuers at or before the time that they make those reports available to their clients, and to no longer require PVABs to provide their clients with a mechanism by which they could reasonably be expected to become aware on a timely basis of any written responses from issuers. In a separate rulemaking, the SEC voted 3-2 to propose updates to the proxy rules that generally would narrow the substantial implementation, duplication, and resubmission bases for excluding shareholder proposals from an issuer proxy.<sup>2</sup>

### KEY TAKEAWAYS

- The Final Rule rescinds the 2020 SEC guidance issued in conjunction with the 2020 Rule - which suggested how investment advisers should consider issuer comments received through a PVAB's mechanism.
- The Final Rule leaves in place certain provisions of the 2020 Rule,<sup>3</sup> which currently are subject to an ongoing legal challenge by one of the two primary PVABs.<sup>4</sup>
- While the SEC stated that the Proposed Rule is intended to provide greater clarity and transparency to shareholders and companies as they evaluate the bases for exclusions to proposals, the proposed amendments generally would narrow the bases upon which issuers have excluded shareholder proposals.

### Proxy Voting Advice

- As noted above, the Final Rule rescinds the requirement that a PVAB provide issuers its reports and a mechanism by which a PVAB's clients can reasonably be expected to become aware of an issuer's responses to such reports. The SEC based its decision in part on concerns about the cost, timeliness, and independence of proxy voting advice, as well as the fact that some PVABs voluntarily have adopted practices that provide issuers with opportunities to review and comment on reports.
- The 2020 Rule deemed a PVAB's advice to generally constitute a solicitation, and such advice is subject to a prohibition on false and misleading statements. The Final Rule deletes Note (e) of Rule 14a-9 under the Exchange Act of 1934, which was added under the 2020 Rule, and which provides examples of material misstatements related to proxy voting advice. The SEC based its deletion of Note (e) on comments by PVABs, their clients, and other investors, who "asserted that, instead of clarifying the application of Rule 14a-9 to proxy

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voting advice, Note (e) has in fact heightened legal uncertainty, particularly with respect to PVABs' statements of opinion, and that such uncertainty unnecessarily increases the litigation risk to PVABs and threatens the independence of their advice."<sup>5</sup>

### Shareholder Proposals – Bases for Exclusion

An issuer generally must include shareholder proposals in its proxy statement unless a proposal is eligible for exclusion. An issuer wishing to exclude a shareholder proposal must "file its reasons" for doing so with the SEC.<sup>6</sup> Comments on the Proposed Rule will be due the later of 30 days after publication in the Federal Register or Sept. 12, 2022.

The Proposed Rule would revise three of the substantive bases for excluding a shareholder proposal. In particular, it would amend the substantial implementation exclusion to specify that a proposal may be excluded if the company has already implemented the essential elements of the proposal; amend the duplication exclusion to clarify that a proposal substantially duplicates another proposal if it addresses the same subject matter and seeks the same objective by the same means and amend the resubmission exclusion to provide that a proposal constitutes a resubmission if it substantially duplicates a prior proposal. These amendments generally would narrow the scope of the exclusions, making it more likely that shareholder proposals will be included in issuer proxy statements.<sup>7</sup>

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<sup>1</sup> Proxy Voting Advice (<https://www.sec.gov/rules/final/2022/34-95266.pdf>), Release No. 34-95266 (July 13, 2022) ("Final Rule").

<sup>2</sup> Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8 (<https://www.sec.gov/rules/proposed/2022/34-95267.pdf>), Release No. 34-95267 (July 13, 2022) ("Proposed Rule").

<sup>3</sup> In particular, the Final Rule retains from the 2020 Rule conflicts of interest disclosure requirements, and proxy voting advice would remain a solicitation subject to the federal proxy rules.

<sup>4</sup> Oral arguments are scheduled for July 29 on the suit by International Shareholder Services Inc. challenging the 2020 Rule in the U.S. District Court for the District of Columbia. Meanwhile, the National Association of Manufacturers has threatened to file suit in the coming weeks to preserve the 2020 Rule.

<sup>5</sup> Final Rule at 52.

<sup>6</sup> The Divisions of Corporation Finance and Investment Management review over 200 such no-action letters every year.

<sup>7</sup> This is consistent with amended Staff guidance issued late in 2021 that narrowed other exclusions. See Shareholder Proposals: Staff Legal Bulletin No. 14L (CF) (<https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>) (Nov. 3, 2021).

### For more information, contact:



[Sara P. Crovitz](#)

Partner

202.507.6414 | [scrovitz@stradley.com](mailto:scrovitz@stradley.com)