

SEC ADOPTS FINAL RULES ON PROXY VOTING ADVICE

Date: 27 July 2020

By: Ali U. Nardali, Sean M. Jones

INTRODUCTION

On 22 July 2020, the Securities and Exchange Commission (the SEC) adopted amendments to the rules governing proxy solicitations (the Amendments) designed to regulate voting advice provided by firms such as Institutional Shareholder Services Inc., Glass, Lewis & Co., LLC, and Egan-Jones Proxy Services (Proxy Advisors). Proposed amendments were originally issued by the SEC in November 2019. As we discuss in more detail below, the Amendments generally require a Proxy Advisor to:

- Disclose conflicts of interests to the Proxy Advisor's clients,
- Provide issuers with access to the Proxy Advisor's voting advice related to those issuers no later than when the Proxy Advisor distributes the advice to its clients, and
- Notify the Proxy Advisor's clients of any responses from issuers to the Proxy Advisor's voting advice related to those issuers.

In a significant departure from the proposed amendments, the Amendments do not require Proxy Advisors to submit their voting advice to issuers before distributing them to the Proxy Advisors' clients, thus making it more difficult for issuers to identify and attempt to correct errors in the voting advice.

THE AMENDMENTS

The Amendments codify the SEC's "longstanding view" that Proxy Advisor voting advice is intended to influence shareholder decision-making and generally constitutes a "solicitation" under the federal proxy rules. A person providing advice that constitutes a "solicitation" under the federal proxy rules, including a Proxy Advisor, must comply with filing and information requirements, which may include preparing a proxy statement containing extensive information that must be distributed to shareholders and filed with the SEC.

The Amendments provide that a Proxy Advisor will be exempt from these filing and information requirements if the Proxy Advisor:

1. Prominently provides its clients with specified conflicts-of-interest disclosure in its voting advice or in an electronic medium used to deliver the advice, and
2. Implements and publicly discloses policies and procedures reasonably designed to ensure that:
 - a. The Proxy Advisor's voting advice is made available to the relevant issuer no later than the time the advice is provided to the Proxy Advisor's clients, and
 - b. The Proxy Advisor provides its clients with a mechanism by which the clients can reasonably be

expected to become aware, in a timely manner prior to the relevant shareholder meeting (or, if there is no meeting, the relevant vote), of written responses to the Proxy Advisor's voting advice from the relevant issuer.

With respect to the requirement in numbered paragraph 2(a) above regarding issuer access to Proxy Advisor voting advice, the Amendments include a non-exclusive safe harbor that will be met if the Proxy Advisor provides issuers with a copy of its voting advice, free of charge, no later than when that advice is provided to the Proxy Advisor's clients. Under this safe harbor, a Proxy Advisor may condition its obligation to provide access to its voting advice on the relevant issuer (i) agreeing to file its definitive proxy statement at least 40 calendar days before the relevant shareholder meeting and (ii) expressly acknowledging that it will use the voting advice only for internal purposes and share the advice only with its employees and advisors. An issuer that does not comply with such conditions would not receive a copy of the Proxy Advisor's voting advice at or prior to the time that advice is distributed to the Proxy Advisor's clients.

With respect to the requirement in numbered paragraph 2(b) above regarding Proxy Advisor client access to written responses from issuers, the Amendments also include a non-exclusive safe harbor, which will be met if the Proxy Advisor provides notice to the clients, on the Proxy Advisor's electronic client platform or through email or other electronic means, that an issuer has filed, or has informed the Proxy Advisor of its intention to file, a written response. When available, the Proxy Advisor's notice must include an active hyperlink to the written response on EDGAR. Because written responses from issuers are intended to influence shareholder decision-making, the written responses generally must be filed with the SEC.

Finally, the Amendments provide that if a Proxy Advisor fails to disclose to its clients the specified conflicts-of-interest disclosure discussed above, or the methodologies and sources of information it uses in rendering its voting advice, such failure could be considered materially misleading under the antifraud provisions of the federal proxy rules.

The Amendments are effective 60 days after publication in the Federal Register, but Proxy Advisors are not required to comply with the requirements of numbered paragraphs 1 and 2 above until 1 December 2021. Our public company clients and others are encouraged to contact us with questions or for more guidance.

KEY CONTACTS



ALI U. NARDALI
PARTNER
SAN FRANCISCO
+1.415.882.8088
ALI.NARDALI@KLGATES.COM



SEAN M. JONES
PARTNER
CHARLOTTE
+1.704.331.7406
SEAN.JONES@KLGATES.COM

K&L GATES HUB

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.