

SEC Adopts Final Rules Regarding Proxy Advisors

Alert

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Proxy voting advice businesses, or PVABs, have come to play an important role in the proxy voting process by providing an array of voting services that can help investment advisers and institutional investor clients manage their substantive and procedural proxy voting needs. ISS and Glass Lewis are the two most well-known PVABs.

In recent years, public companies, (which the SEC often refers to as registrants) investors and others have expressed concerns about PVABs. These concerns have focused on the accuracy and soundness of the information and methodologies used to formulate PVABs' recommendations, as well as potential conflicts of interest that may affect those recommendations. Given PVABs' potential to influence the voting decisions of investment advisers and other institutional investors, who often vote on behalf of others, the SEC has expressed concern about the risk of PVABs providing inaccurate or incomplete voting advice (including the failure to disclose material conflicts of interest) that could be relied upon to the detriment of investors. In light of these concerns, the SEC proposed amendments to the federal proxy rules in November 2019.

INITIAL PROPOSAL

As discussed in a previous [Dodd-Frank.com blog post](#), the SEC initially proposed, amongst other things, that a PVAB would provide registrants a limited amount of time to review and provide feedback on the PVAB's proposed advice before it was disseminated to the PVAB's clients. This review and feedback period was to be followed by a final notice of voting advice, which would include any revisions to the advice made by the PVAB as a result of the review and feedback period. Finally, the SEC proposed that registrants also be given the option to request that the PVAB include in their proxy voting advice a hyperlink or other analogous electronic medium directing the recipient of the advice to a written statement prepared by the registrant that sets forth its views on the advice.

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FINAL RULES

The [final rules adopted by the SEC](#) take a different approach. The SEC gave great weight to the comments of the two largest PVABs—ISS and Glass Lewis. The PVABs argued the SEC proposal was too complex and there would be many practical hurdles to implement the proposal and suggested the SEC adopt a principles-based rule instead.

The final principle-based rules adopted by the SEC require PVABs to take certain actions to maintain a statutory exemption from the information and filing requirements of the federal proxy rules. Specifically, PVABs must comply with certain disclosure and procedural requirements, including disclosure of material conflicts of interest in their proxy advice, and adopt and publicly disclose certain written policies and procedures.

Any PVAB seeking to rely on the applicable exemptions to the proxy rules under the SEC's newly adopted rules must include in their voting advice prominent disclosure of:

- Any information regarding an interest, transaction or relationship of the PVAB that is material to assessing the objectivity of the proxy voting advice
- Any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction or relationship

The “materiality” threshold under the conflict of interest requirements are intended to provide a PVAB with the ability to apply its judgment and knowledge of facts to determine the materiality of conflicts that might pose a risk to the objectivity of its advice.

Under the final rules, PVABs are also required to publicly disclose written policies and procedures reasonably designed to ensure that:

- Registrants that are the subject of proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the PVAB's clients
- The PVAB provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the shareholder meeting (or, if no meeting, before the votes, consents or authorizations may be used to effect the proposed action)

IMPLEMENTATION

The final rules do not dictate the manner or specific timing in which PVABs interact with registrants, and instead leave it within the discretion of the PVAB to choose how best to implement the principles embodied in the rule and incorporate them into the business's policies and procedures. The rules do not require that the PVAB provide registrants or other soliciting persons with the opportunity to review proxy

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voting advice in advance of its dissemination to the businesses' clients, although providing registrants with the opportunity to review their proxy voting advice in advance would satisfy the rules' principle and is encouraged to the extent feasible.

SAFE HARBORS

The final rules include a non-exclusive safe harbor provision that, if followed, will give assurance to a PVAB that it has met the principles-based requirements of the new rules set forth in the first bullet point immediately above. In accordance with this safe harbor, a PVAB will be deemed to satisfy the final rules discussed above if it has written policies and procedures that are reasonably designed to provide registrants with a copy of its proxy voting advice, at no charge, no later than the time it is disseminated to the business's clients. Such policies and procedures may include conditions requiring that such registrants have (i) filed their definitive proxy statement at least 40 calendar days before the shareholder meeting, and (ii) expressly acknowledged that they will only use the proxy voting advice for their internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant's employees or advisers.

The final rules also include a safe harbor with respect to the requirements of the second bullet point immediately above. To satisfy this safe harbor, a PVAB must have written policies and procedures reasonably designed to inform clients who have received 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 setting forth its views regarding such advice. The safe harbor sets forth two methods by which the PVAB may provide such notice to its clients. It may either:

- Provide notice on its electronic client platform that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available)
- Provide notice through email or other electronic means that the registrant has filed, or has informed the PVAB that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available)

PVABs are not required to comply with the final rules for solicitations regarding certain M&A transactions or contested matters.

PVABs are not required to comply with the final rules discussed above until December 1, 2021.

For more information on the amendments to the proxy rules for proxy voting advice, please contact one of the members of the [Corporate Finance](#) division or the Stinson LLP contact with whom you regularly work.

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