

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA-5547]

Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Guidance.

SUMMARY: The Securities and Exchange Commission (“Commission”) is publishing supplementary guidance regarding the proxy voting responsibilities of investment advisers under its regulations issued under the Investment Advisers Act of 1940 (the “Advisers Act”) in light of the Commission’s amendments to the rules governing proxy solicitations under the Securities Exchange Act of 1934 (the “Exchange Act”).

DATES: *Effective:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The Commission is publishing supplementary guidance regarding the proxy voting responsibilities of investment advisers under 17 CFR 275.206(4)-6 [Rule 206(4)-6 under the Advisers Act [15 U.S.C. 80b]].¹

¹ Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR part 275], in which these rules are published.

I. INTRODUCTION

The Commission previously issued guidance discussing how the fiduciary duty and rule 206(4)-6 under the Advisers Act relate to an investment adviser’s exercise of voting authority on behalf of clients and also provided examples to help facilitate investment advisers’ compliance with their obligations in connection with proxy voting.² We are supplementing this guidance in light of information gained in connection with our ongoing review of the proxy voting process and our related regulations, including the amendments to the proxy solicitation rules under the Exchange Act that we are issuing at this time.³

We expect that the Exchange Act amendments adopted in Release No. 34-89372 will result in improvements in the mix of information that is available to investors and material to a voting decision. In particular, we expect issuers will have access to proxy advisory firm recommendations in a timeframe that will permit those issuers to make available to shareholders additional information that may be material to a voting decision in a more systematic and timely manner than they could previously.⁴ We also expect that the amendments will result in the availability of that additional information being made known to proxy advisory firms and their clients in a timely manner, including because proxy advisory firms, as a condition to the

² Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA-5325 (Aug. 21, 2019), 84 FR 47420 (Sept. 10, 2019) (“Commission Guidance on Proxy Voting Responsibilities”).

³ See Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-89372 (July 22, 2020) (“Amendments to Proxy Solicitation Rules”); see also 17 CFR 240.14a-2(b)(9)(iv); see also Commission Guidance on Proxy Voting Responsibilities, *supra* at n. 2. Proxy advisory firms will not be required to comply with certain of the amendments we are making to the proxy solicitation rules until December 1, 2021. This guidance addresses the application of the fiduciary duty, Form ADV, and rule 206(4)-6 under the Advisers Act to an investment adviser’s proxy voting responsibilities in connection with current practices, as well as any policies or procedures that may be implemented by proxy advisory firms under the final amendments.

⁴ See *infra* at n. 6. While 17 CFR 240.14a-2(b) uses the term “proxy voting advice business,” we use the term “proxy advisory firm” in this release. This is consistent with the Commission Guidance on Proxy Voting Responsibilities, which this release supplements.

availability of the exemptions in 17 CFR 240.14a-2(b)(1) and (b)(3), must adopt policies and procedures that are reasonably designed to provide investment advisers and other clients with a mechanism by which they can reasonably be expected to become aware of that additional information prior to making voting decisions. Accordingly, we are providing supplementary guidance to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of these amendments, including in circumstances where the investment adviser utilizes a proxy advisory firm's electronic vote management system that "pre-populates" the adviser's proxies with suggested voting recommendations and/or for voting execution services. The supplementary guidance also addresses disclosure obligations and considerations that may arise when investment advisers use such services for voting.

II. SUPPLEMENTAL GUIDANCE REGARDING INVESTMENT ADVISERS' PROXY VOTING RESPONSIBILITIES

Question 2.1: In some cases, proxy advisory firms assist clients, including investment advisers, with voting execution, including through an electronic vote management system that allows the proxy advisory firm to: (1) populate each client's votes shown on the proxy advisory firm's electronic voting platform with the proxy advisory firm's recommendations based on that client's voting instructions to the firm ("pre-population"); and/or (2) automatically submit the client's votes to be counted ("automated voting"). Pre-population and automated voting generally occur prior to the submission deadline for proxies to be voted at the shareholder meeting. In various circumstances, an investment adviser, in the course of conducting a

reasonable investigation into matters on which it votes,⁵ may become aware that an issuer that is the subject of a voting recommendation intends to file or has filed additional soliciting materials with the Commission setting forth the issuer's views regarding the voting recommendation.

These materials may or may not reasonably be expected to affect the investment adviser's voting determination.⁶ In addition, these materials may become available after or around the same time that the investment adviser's votes have been pre-populated but before the submission deadline for proxies to be voted at the shareholder meeting.⁷ In these circumstances, what steps should an investment adviser take to demonstrate that it is making voting determinations in a client's best interest?

Response: The Commission in its prior guidance discussed a number of steps that an investment adviser could take to demonstrate that it is making voting determinations in a client's best interest.⁸ These include additional steps when an investment adviser utilizes a proxy advisory firm, such as assessing pre-populated votes shown on the proxy advisory firm's electronic voting platform and considering additional information that may become available

⁵ See Commission Guidance on Proxy Voting Responsibilities, text at notes 15 and 37 and in response to Question 4.

⁶ For example, we expect that 17 CFR 240.14a-2(b)(9)(ii)(A) will result in issuers being made aware of recommendations by proxy voting advice businesses (the term used in the rule for what we refer to here as proxy advisory firms) in a timeframe that will permit those issuers to make any views regarding those recommendations available in a more systematic and timely manner than was previously the case. 17 CFR 240.14a-2(b)(9)(ii)(B) also requires that proxy voting advice businesses adopt policies and procedures reasonably designed to provide their clients, including investment advisers, with a mechanism by which they can reasonably be expected to become aware of those views. See Amendments to Proxy Solicitation Rules, *supra* at n. 3; see also 17 CFR 240.14a-2(b)(9)(iv) (providing a non-exclusive safe harbor pursuant to which proxy voting advice businesses will be deemed to satisfy the principle-based requirement of Rule 14a-2(b)(9)(ii)(B)).

⁷ Unless otherwise indicated, our reference to the term "meeting" throughout Question 2.1 is intended to include an issuer's solicitation of written consents or authorizations in lieu of a shareholder meeting. For example, if the issuer is seeking the necessary shareholder approval for a matter through a solicitation of written consents or authorizations in lieu of a vote at a shareholder meeting, our guidance addresses the additional information that may become available after the proxy advisory firm's recommendations have been pre-populated but before the written consents or authorizations have been submitted.

⁸ See Commission Guidance on Proxy Voting Responsibilities, 84 FR 47420, at 47423 (Question No. 2).

before the relevant votes are cast. Together with those steps, an investment adviser should consider whether its policies and procedures, including any policies and procedures with respect to automated voting of proxies, are reasonably designed to ensure that it exercises voting authority in its client's best interest. An investment adviser should consider, for example, whether its policies and procedures address circumstances where the investment adviser has become aware that an issuer intends to file or has filed additional soliciting materials with the Commission after the investment adviser has received the proxy advisory firm's voting recommendation but before the submission deadline. In such cases, if an issuer files such additional information sufficiently in advance of the submission deadline and such information would reasonably be expected to affect the investment adviser's voting determination, the investment adviser would likely need to consider such information prior to exercising voting authority in order to demonstrate that it is voting in its client's best interest.⁹ In addition, because the timing of pre-population and automated voting may result in proxy advisory firms possessing non-public information regarding how an investment adviser intends to vote a client's securities, the investment adviser should also consider reviewing its agreements with any proxy advisory firms to determine whether the agreements would permit the proxy advisory firms to utilize this information in a manner that would not be in the best interest of the investment adviser's client.¹⁰

⁹ Whether such information would reasonably be expected to affect an investment adviser's voting determination for a client may depend, in part, on the agreed upon scope of the investment adviser's authority and responsibilities to vote proxies on behalf of that client, as discussed in response to Question 1 of the Commission Guidance on Proxy Voting Responsibilities. *See* Commission Guidance on Proxy Voting Responsibilities, 84 FR 47420, at 47422 (Question No. 1).

¹⁰ For example, the investment adviser may want to consider the extent to which the proxy advisory firm would be permitted to share this information (including information on aggregated voting intentions of the firm's clients) with third parties.

In its prior guidance, the Commission also discussed how an investment adviser and its client may agree on the scope of the investment adviser’s authority and responsibilities to vote proxies on behalf of that client.¹¹ The Commission explained that an investment adviser may agree with its client to the scope of voting arrangements but that scoping the relationship requires the investment adviser to make full and fair disclosure and the client to provide informed consent. Differences in agreements between investment advisers and their clients as to the scope of the advisory relationship may result in a variety of arrangements for voting client securities, which may address, for example, parameters around the method of voting execution.

An investment adviser also has an obligation, as a result of its duty of loyalty to clients, to make full and fair disclosure to its clients of all material facts relating to the advisory relationship.¹² These include material facts related to the exercise of voting authority with respect to client securities. The Commission recently explained that, “[i]n order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.”¹³ Further, rule 206(4)-6 and Form ADV require an investment adviser to describe to clients its voting policies and procedures.¹⁴

In light of the above, we believe that an investment adviser that uses automated voting should consider disclosing: (1) the extent of that use and under what circumstances it uses

¹¹ See Commission Guidance on Proxy Voting Responsibilities, 84 FR 47420, at 47422 (Question No. 1).

¹² See Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248 (June 5, 2019), 84 FR 33669, at 33675 (July 12, 2019) (“[t]o meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship.”) (internal citations omitted).

¹³ See *id.*, text at note 59.

¹⁴ Rule 206(4)-6(c) requires investment advisers to describe their voting policies and procedures to clients. See also Form ADV, Part 2A, Item 17 (requiring an adviser to briefly describe voting policies and procedures where it has, or will accept, authority to vote client securities).

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 to be voted at the shareholder meeting that an issuer intends to file or has filed additional soliciting materials with the Commission regarding a matter to be voted upon. In addition, an investment adviser should also consider whether its policies and procedures are reasonably designed to address these disclosures. Depending on the facts and circumstances, these disclosures may be necessary for the investment adviser to provide sufficiently specific information so that a client is able to understand the role of automated voting in the investment adviser's exercise of voting authority. In those cases, the client may not, without this disclosure, have sufficiently specific information to provide informed consent with respect to the use of automated voting as a means of exercising voting authority either (a) for purposes of agreeing to the scope of the relationship or (b) as it relates to the investment adviser's obligation, under its duty of loyalty, to provide full and fair disclosure relating to the advisory relationship. In this regard, an investment adviser should also consider its obligations under rule 206(4)-6 and Form ADV as they relate to the investment adviser's voting policies and procedures. Accordingly, an investment adviser should carefully review its disclosures with respect to these matters in order to ascertain whether it has provided its clients with the disclosure necessary for the clients to provide informed consent with respect to the use of automated voting as a means of exercising voting authority and for the adviser to satisfy its obligations under rule 206(4)-6 and Form ADV.

III. OTHER MATTERS

Pursuant to the Congressional Review Act,¹⁵ the Office of Information and Regulatory

¹⁵ 5 U.S.C. 801 *et seq.*

Affairs has designated this guidance as not a “major rule,” as defined by 5 U.S.C. 804(2).

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending title 17, chapter II, of the Code of Federal Regulations as set forth below:

PART 276 – INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. The authority citation for part 276 continues to read as follows:

Authority: 15 U.S.C. 80b *et seq.*

2. The table is amended by adding an entry for Release No. IA-5547 at the end to read as follows:

| Subject | Release No. | Date | Fed. Reg. Vol. and Page |
|---|-------------|----------|--|
| * * * * * | | | |
| Supplement to Commission Guidance Regarding the Proxy Voting Responsibilities of Investment Advisers | IA-5547 | [INSERT] | [Insert FR citation of publication] |

By the Commission.

Dated: July 22, 2020.

Vanessa A. Countryman
Secretary