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# SEC Issues Guidance on Investment Advisers' Use of Proxy Firms and Application of Proxy Rules to Voting Recommendations; Proposes to Narrow Certain Exemptions to Proxy Rules—Part 2

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In August 2019 the Securities and Exchange Commission (SEC) voted to issue two guidance statements in connection with its review of the role of proxy advisory firms in the proxy process: (1) the IA Release, which primarily interprets the Investment Advisers Act of 1940; and (2) the Exchange Act Release, which interprets the proxy provisions of the Securities Exchange oct of 1934. Part 1 of this article, which appeared in the July issue of *The Investment Lawyer*, reviewed certain background law, guidance, and policy concerns regarding the use of proxy advisory firms. This final Part 2 continues the review, and discusses potential legal and practical consequences of the two Releases.

## Summary of Questions and Answers in IA Release

The IA Release adopts the question-and-answer format of the Proxy Bulletin. The six questions and answers included in the IA Release are summarized immediately below. A more detailed analysis of the IA Release, considered as a whole, follows with respect to certain key issues.

• ***Question 1*: How may an investment adviser and its client, in establishing their relationship, agree upon the scope of the investment adviser's authority and responsibilities to vote proxies on behalf of that client?**

The IA Release provides that an investment adviser and its client can establish their relationship in any way, as long as there is full and fair disclosure and informed consent. Therefore, an investment adviser and its client may agree that the client will delegate all of its proxy voting authority to the investment adviser, or only do so in limited circumstances or not at all, provided that this agreement is supported by full and fair disclosure and informed consent. The guidance includes a non-exhaustive list of examples of possible arrangements, including that the client and the investment adviser may agree that the investment adviser would not vote in circumstances that would impose costs on the client. The guidance stresses, however, that no matter what arrangement is agreed upon regarding voting, the investment adviser generally may not waive its fiduciary duty to its clients in the context of proxy voting.

• ***Question 2*: What steps could an investment adviser that has assumed the authority to vote proxies on behalf of a client take to demonstrate that it is making voting determinations in a client's best interest and in accordance with the investment adviser's proxy voting policies and procedures?**

The IA Release provides that an investment adviser's fiduciary duty creates certain obligations with respect to its voting activity. These obligations include: investigating matters on which the investment adviser will vote; and voting in the client's best interests. The guidance notes that an investment adviser should consider adopting measures to verify that it is voting consistently with its policies and procedures. The guidance suggests that investment advisers that have multiple clients with differing investment objectives and strategies may not have aligned interests, and it states that such investment advisers should consider whether they should have different voting policies for some or all of these clients. The guidance also provides examples of when an investment adviser should consider conducting a heightened issuer- or matter-specific analysis regarding certain proxy proposals (including corporate events such as mergers and acquisitions), as well as contested elections for directors. Further, the guidance states that an investment adviser must review and document, no less frequently than annually, the adequacy of its voting policies and procedures "to ensure that they have been formulated reasonably and implemented effectively."

• ***Question 3*: What are some of the considerations that an investment adviser should take into account if it retains a proxy advisory firm to assist it in discharging its proxy voting duties?**

The IA Release provides that an investment adviser should consider, among other matters, the proxy advisory firm's capacity and competency to analyze the relevant voting decisions, including the adequacy and quality of its staffing, personnel and technology. Additionally, the guidance states that an investment adviser should consider: whether the proxy advisory firm has an effective process for seeking timely and relevant input from issuers and proxy advisory firm clients; whether the proxy advisory firm has adequately disclosed its voting recommendation methodologies; and what steps the investment adviser should take to understand when and how the proxy advisory firm engages with issuers and third parties. The guidance also includes a non-exhaustive list of examples of how an investment adviser might conduct a reasonable review of the proxy advisory firm's policies and procedures regarding how the latter identifies and addresses conflicts of interest, including conflicts that may arise from providing consulting services to issuers or from the proxy advisory firm's affiliates or other clients. Importantly, the guidance states that the extent to which an investment adviser must take steps to address these matters could vary with the scope of the investment adviser's voting authority and the type of services that the investment adviser has retained the proxy advisory firm to perform.

• ***Question 4*: When retaining a proxy advisory firm for research or voting recommendations as an input to its voting determinations, what steps should an investment adviser consider taking when it becomes aware of potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy advisory firm's analysis that may materially affect one or more of the investment adviser's voting determinations?**

The IA Release provides that an investment adviser should have policies and procedures in place that are reasonably designed to ensure that the proxy advisory firm's recommendations are not based on materially inaccurate or incomplete information. For example, an investment adviser's

policies can include procedures for a periodic review of its use of a proxy advisory firm, including an assessment of the impact of any errors or deficiencies on the proxy advisory firm's research or recommendations.

The guidance states that an investment adviser also should consider whether the proxy advisory firm has effective internal policies and procedures to obtain accurate information on which to base its recommendations. As examples, the guidance indicates that an investment adviser should consider, among other matters, the proxy advisory firm's level of engagement with issuers and its efforts to identify and correct any material errors in its analysis.

**• *Question 5*: How can an investment adviser evaluate the services of a proxy advisory firm that it retains, including evaluating any material changes in services or operations by the proxy advisory firm?**

The IA Release states that an investment adviser should adopt policies and procedures that are reasonably designed to sufficiently evaluate whether a proxy advisory firm's services are performed consistently with the investment adviser's fiduciary duty to act in the best interests of its clients in voting proxies. According to the guidance, such policies and procedures should provide for the ongoing identification of the proxy advisory firm's conflicts of interest and the assessment of its capacity and competency to provide appropriate voting recommendations (and execution of votes, if applicable). To this end, the guidance indicates that an investment adviser should consider: requiring a proxy advisory firm to update the investment adviser of any business changes the proxy advisory firm undergoes that could potentially impact its services; whether the proxy advisory firm appropriately updates its methodologies, guidelines and voting recommendations, including in response to feedback from issuers and their shareholders.

**• *Question 6*: If an investment adviser has assumed voting authority on behalf of a client, is it required to exercise every opportunity to vote a proxy for that client?**

The IA Release provides that an investment adviser that has assumed voting authority on behalf of a client is not required to vote a proxy for that client in every opportunity, if either: (i) the investment adviser and the client have agreed in advance to limit the scope of the investment adviser's voting authority (as discussed above regarding the SEC's response to Question 1) or (ii) the investment adviser has determined, consistent with its fiduciary duty, that not voting under the circumstances would be in the client's best interest (for example, if the investment adviser determines that the costs to the client from voting a matter would exceed the expected benefits to the client). The guidance indicates that an investment adviser cannot fulfill its fiduciary duties by merely refraining from voting proxies.

## IA Release Guidance as to the Role of Corporate Issuers

Several statements in the IA Release express the SEC's view that an investment adviser's fiduciary duties should lead an investment adviser that engages a proxy advisory firm to consider certain factors relating to the role of corporate issuers in the proxy advisory firm's recommendation process. Even considering that, according to each Commissioner who voted to publish the IA Release, these statements are not intended to alter the law applicable to the role of proxy advisory firms in the proxy process,[1] the statements nevertheless reasonably may be understood to represent a policy decision by the SEC to encourage a greater level of issuer involvement in proxy advisory firms' recommendation processes.[2]

The statements pointing toward issuer engagement are general, and the guidance sticks to a pattern of following such general guidance with more specific considerations, without making clear how or when the more specific considerations might

apply. These statements are analyzed below in order to assess the potential scope of issuer involvement contemplated by the IA Release:

**• An investment adviser should consider a proxy advisory firm's process for seeking timely input from issuers.**

The IA Release states that, when engaging a proxy advisory firm, an investment adviser should consider whether the "firm has an effective process for seeking timely input from issuers and proxy advisory firm clients with respect to, for example, its proxy voting policies, methodologies, and peer group constructions, including for 'say-on-pay' votes." The statements in the IA Release following this guidance are that an investment adviser should consider "whether a proxy advisory firm has adequately disclosed ... its methodologies in formulating voting recommendations" to the investment adviser, "such that the investment adviser can understand the factors underlying the proxy advisory firm's recommendations," and "what steps [the investment adviser] should take to develop a reasonable understanding of when and how the proxy advisory firm would expect to engage with issuers and third parties." These statements may be expressing the view that an investment adviser should consider whether certain analyses by a proxy advisory firm warrant a level of issuer input or confirmation (including in the context of peer group or other forms of modeling dependent on data or assumptions about an issuer), without necessarily suggesting that issuer involvement in developing a proxy advisory firm's methodologies would be appropriate for an investment adviser to consider as a general matter.

**• An investment adviser should consider whether a proxy advisory firm updates its processes or recommendations based on issuer feedback.**

The IA Release states that, when evaluating a proxy advisory firm's services, "[a]n investment adviser should also consider whether the proxy advisory firm appropriately updates its methodologies, guidelines, and voting recommendations on an ongoing basis, including in response to feedback from issuers and their shareholders." The scope or nature of the feedback contemplated by this statement is not specified. Thus, this statement could be viewed as effectively providing that an investment adviser should consider the adequacy of a proxy advisory firm's policies and procedures for responding to issuer feedback. It also could be viewed as providing that an investment adviser should consider whether the proxy advisory firm has responded to issuer feedback in more specific ways (including issuer feedback received during the recommendation process), as well as the adequacy of the implementation of the proxy advisory firm's feedback response policies and procedures.

**• An investment adviser should consider a proxy advisory firm's engagement with issuers on the accuracy of information, as well as the proxy advisory firm's process for the investment adviser to access issuer views.**

The IA Release states that, when assessing "the effectiveness of [a] proxy firm's policies and procedures for obtaining current and accurate information relevant to matters" subject to a vote, an investment adviser "should consider, and in certain cases may wish to communicate with proxy advisory firms, regarding ... the proxy advisory firm's engagement with issuers, including the firm's process for ensuring that it has complete and accurate information about the issuer and each particular matter, and the firm's process, if any, for investment advisers to access the issuer's views about the firm's voting recommendations in a timely and efficient manner."[3] Importantly, this statement appears in a discussion of practices an investment adviser should consider in connection with its obligation to have policies and procedures "reasonably designed to ensure that its voting determinations are not based on materially inaccurate or incomplete information." In this

context, this statement may be reasonably understood to indicate that the baseline requirement is that an investment adviser should consider whether a proxy advisory firm's processes reasonably ensure the accuracy of the information underlying its voting recommendations. The extent to which the investment adviser should consider the proxy advisory firm's engagement with issuers regarding the accuracy of this information could be driven by the nature and quality of the information, or by the proxy advisory firm's policies and procedures regarding engagement.

**• An investment adviser could consider whether it adequately considers information from an issuer after the receipt of a voting recommendation.**

The IA Release states that an investment adviser that retains a proxy advisory firm "should consider additional steps to evaluate whether the investment adviser's voting determinations are consistent with its voting policies and procedures and in the client's best interest." According to the IA Release, these steps could include adopting "policies and procedures that provide for [the] consideration of additional information that may become available regarding a particular proposal" after the receipt of a voting recommendation, such as "an issuer's or a shareholder proponent's subsequently filed additional definitive proxy materials[,] or other information conveyed by an issuer or shareholder proponent to the investment adviser that would reasonably be expected to affect the investment adviser's voting determination." These statements do not provide any specific circumstances under which an investment adviser may want to consider adopting such policies and procedures, or the types of additional information that would warrant an evaluation. Thus, these statements appear to give investment advisers considerable discretion in determining whether and how to address situations where additional information arises.

In sum, the IA Release clearly contemplates that investment advisers should consider a proxy advisory firm's responsiveness to issuer feedback as a general matter, and indicates that investment advisers should accordingly take steps to understand and review a proxy advisory firm's approach to responding to issuer feedback. However, the IA Release does not provide much clarity as to whether specific policies and procedures adequately provide for the consideration of issuer views.

## IA Release Guidance as to Heightened Issuer- and Matter-Specific Analyses

The IA Release provides examples of when an investment adviser should consider conducting a heightened issuer- or matter-specific analysis regarding certain proxy proposals. In particular, the IA Release identifies "corporate events (mergers and acquisitions transactions, dissolutions, conversions or consolidations) or contested elections of directors" as matters that should be considered for heightened analysis by an investment adviser. More generally, the IA Release suggests that an investment adviser determining whether to conduct an issuer- or matter-specific analysis "should consider the potential effect of the vote on the value of a client's investments."

For an investment adviser that retains a proxy advisory firm, the IA Release indicates that the investment adviser "could consider whether a higher degree of analysis may be necessary or appropriate" where "the investment adviser's voting policies and procedures do not address how it should vote on a particular matter, or where the matter is highly contested or controversial." Relatedly, when assessing the adequacy of a proxy advisory firm's policies and procedures, an investment adviser "should consider ... [t]he proxy firm's consideration of factors unique to a specific issuer or proposal."

These statements may be viewed as a development of prior guidance in the Proxy Bulletin that "certain proposals ... may require more analysis" in order for an investment adviser to demonstrate that its votes are cast in accordance with

clients' best interests, as well as the investment adviser's proxy voting policies and procedures. The statements also can be seen as building on the SEC Staff's withdrawal of the ISS no-action letter, which took the position that a case-by-case evaluation was not necessary. Nevertheless, the IA Release does not provide clear guidance as to whether specific proxy voting policies and procedures adequately provide for heightened issuer- or matter-specific analysis.

## IA Release Guidance as to Conflicts of Interest of the Investment Adviser and the Proxy Advisory Firm

As summarized above, the IA Release challenges the notion that an investment adviser may categorically "cleanse" its conflicts of interest by basing its proxy voting determinations on the recommendations of an independent third party, such as a proxy advisory firm. Instead, the IA Release indicates that an investment adviser's use of a proxy advisory firm may serve only to "mitigate" the investment adviser's conflicts of interest. In this regard, the IA Release characterizes "looking to the voting recommendations of a proxy advisory firm" as only one of "various means of ensuring that proxy votes are voted in [a] client's best interest and [are] not affected by the investment adviser's conflicts of interest," and states moreover that the effectiveness of any such means "will turn on how well they insulate the decision on how to vote client proxies from the conflict." Accordingly, the IA Release emphasizes that an investment adviser should qualitatively assess whether it has sufficiently mitigated its conflicts of interest, as opposed to presuming that it has done so by virtue of simply retaining, and relying on the voting recommendations of, a proxy advisory firm.

In addressing proxy advisory firms' conflicts of interest, the IA Release generally reaffirms prior guidance in the Proxy Bulletin that investment advisers should: (i) implement policies and procedures "to identify and evaluate a proxy advisory firm's conflicts of interest on an ongoing basis"; and (ii) perform reasonable due diligence when engaging a proxy advisory firm, "includ[ing] a reasonable review of the proxy advisory firm's policies and procedures regarding how it identifies and addresses conflicts of interest." The IA Release indicates that an investment adviser could conduct this review by assessing "whether the proxy firm has adequate policies and procedures to identify, disclose, and address actual and potential conflicts of interest, including (1) conflicts relating to the provision of proxy voting recommendations and proxy voting services generally [(for example, conflicts arising from a proxy advisory firm's provision of voting recommendations to investors and corporate governance consulting to issuers)], (2) conflicts relating to activities other than providing proxy voting recommendations and proxy voting services, and (3) conflicts presented by certain affiliations" of the proxy advisory firm, such as significant affiliations with third parties that have "taken a position on a particular voting issue or issues more generally." Although this conflicts framework is generally aligned at a high level with the Proxy Bulletin, the guidance set forth in the IA Release states or implies that in certain instances, the investment adviser may need to consider the proxy advisory firm's conflicts in the context of "a particular voting issue" or "matters that may be the subject of a vote." However, continuing the pattern of ambiguity, the IA Release does not provide clear guidance as to which particular voting issues or matters require additional analysis or procedures.

In sum, in each of these key areas, the IA Release is ambiguous and lacks clarity. The degree to which the SEC will defer to the judgment of an investment adviser in devising reasonable policies and procedures to address the guidance in these areas will be seen through how the SEC administers the guidance in practice (for example, in the examination process). Until the SEC reveals its intentions with more clarity, it may be prudent for investment advisers that use proxy advisory firms to document the

reasons underlying their judgments on each key area that applies to them.

## IA Release Guidance as to Scope of Proxy Voting Responsibilities

Consistent with the framing of the IA Release as primarily purposed to clarify the fiduciary duties of an investment adviser, its guidance addresses how the application of an investment adviser's voting responsibilities may vary with the scope of voting authority assumed by the investment adviser, which may be tailored to its specific relationship with a client. The IA Release notes, however, the SEC's view that an "adviser's responsibility for making voting determinations is implied" where it "has discretionary authority to manage the client's portfolio and has not agreed with the client to a narrower scope of voting authority through full and fair disclosure and informed consent." As such, an investment adviser with discretionary authority over a client's portfolio (or an allocation thereof) generally may be presumed to have full voting responsibilities on behalf of its client.[4] Nonetheless, the IA Release clarifies that an investment adviser with full voting responsibilities may still "refrain from voting a proxy on behalf of a client if it has determined that refraining is in the best interest of that client," as "may be the case where the investment adviser determines that the cost to the client of voting the proxy exceeds the expected benefit to the client."

## Commission Interpretation Applying Proxy Solicitation Rules to Voting Recommendations and Proposed Amendments Narrowing Certain Exemptions to the Federal Proxy Rules

In the Exchange Act Release, the SEC stated that proxy voting advice provided by a proxy advisory firm like ISS or Glass Lewis generally qualifies as a "solicitation" for purposes of Rule 14a-1(*l*) under the Exchange Act. The SEC indicated that this conclusion holds true even if the proxy advisory firm is providing a recommendation based upon the company shareholder's "own tailored voting guidelines" and "even in circumstances where the client may not follow th[e] advice." The Exchange Act Release therefore both confirms and expands upon prior non-binding guidance issued by the SEC Staff in the Concept Release in 2010 and the Proxy Bulletin in 2014.[5] The Proposed Amendments, if adopted, would codify this interpretive guidance, as well as the SEC's view that voting advice provided in response to an unprompted request would not constitute a solicitation.

In support of its interpretation and the Proposed Amendments, the SEC cited to historical case law and SEC guidance in order to restate that "solicitation" for purposes of the federal proxy rules has been broadly defined—a communication attempting to influence a voting decision can constitute a solicitation "even where the person seeking to influence the vote may be indifferent to its ultimate outcome" and even where that person is not seeking authorization to act as proxy. The SEC also rejected the argument that the voting recommendations are "unsolicited" advice, concluding that "the communication is invited by the proxy advisory firms themselves through the marketing of their expertise in researching and analyzing proxy issues for purposes of helping clients make proxy voting determinations."

Although a communication deemed to be a Rule 14a-1(*l*) "solicitation" could trigger public disclosure obligations with the SEC, the Commission took care to clarify that the exceptions set forth in Rule 14a-2 under the Exchange Act remain unchanged by the Exchange Act Release; these exceptions can be invoked to exempt proxy advisory firms' voting recommendations from disclosure as long as certain conditions are met. However, "solicitation" status does mean that voting recommendations are subject to the antifraud provisions of Rule 14a-9, which prohibit making any statement

which is, as well as omitting to make a statement which renders another statement, "in the light of the circumstances under which it is made, … false or misleading with respect to any material fact." Imposing antifraud liability on proxy advisory firms' voting recommendations may be intended to address the expressed concern that proxy advisory firms' advice suffers from factual errors in their analytical processes. The Proposed Amendments would codify the application of "solicitation" status to proxy advisory firms' voting recommendations, as well as the application of antifraud liability to such voting recommendations. In addition, as detailed below, the Proposed Amendments would expand the conditions that must be met in order to exempt proxy advisory firms' voting recommendations from disclosure.

Commissioners Robert J. Jackson Jr. and Allison Herren Lee dissented from the interpretation in the Exchange Act Release. In his statement of dissent, Commissioner Jackson focused on the costs to institutional investors associated with monitoring public companies and voting at corporate elections, as well as the role of proxy advisory firms in mitigating those costs, remarking that he "would have considered the effects of [the] guidance on the competitive landscape more fully" before publishing the guidance.[6] Commissioner Lee noted the statement from the SEC's Division of Trading and Markets earlier this year that it was "considering recommending that the SEC propose rule amendments to address certain advisors' reliance on the proxy solicitation exemptions in Rule 14a-2(b)," and she stressed that the guidance could unduly "cause market participants to adapt to a regulatory framework that the SEC may soon change."[7] The dissenting Commissioners also objected to the informal nature of the guidance: Commissioner Jackson highlighted what he believes is the lack of evidence to back up the policy conclusions reflected in the Exchange Act Release, and Commissioner Lee highlighted that the SEC did not undergo the notice-and-comment process before issuing the Exchange Act Release.

## Proposed Amendments Would Impose Additional Requirements on Proxy Advisory Firms' Voting Recommendations

The Proposed Amendments seek to alter the exemptions in Rule 14a-2(b)(1) and Rule 14a-2(b)(3) under the Exchange Act, in addition to the reiteration of the SEC's position in the Exchange Act Release that proxy advisory firms' voting recommendations generally constitute Rule 14a-1*(l)* "solicitations" subject to the antifraud provisions of Rule 14a-9 and the codification of the SEC's position that voting advice provided in response to an unprompted request would not constitute a solicitation. If the Proposed Amendments are adopted, the revised Rule 14a-2(b)(1) and Rule 14a-2(b)(3) would impose additional disclosure requirements on proxy advisory firms seeking to rely on these exemptions in connection with their voting recommendations. Specifically:

- Their voting recommendations would need to include disclosure of the proxy advisory firm's material conflicts of interest, if any, relating to the advice provided;
- The firms would need to provide the corporate issuer of securities for which proxies are solicited with an opportunity to review and provide feedback on the advice provided prior to the firm's issuance (which ISS already does in many cases), with the length of the review period dependent on the number of days between the filing of the corporate issuer's definitive proxy statement and the date of its shareholder meeting; and
- The firms may be required, at the request of the corporate issuer of securities for which proxies are solicited, to include a hyperlink directing the recipient of the advice to a written statement

setting forth the corporate issuer's views on the advice provided.

Commissioner Roisman published a statement regarding the Proposed Amendments in which he stressed the need for an update to the SEC's solicitation rules in light of the long gap since the most recent update in 1992 and the transformational changes in the market in the intervening years (for example, the growing concentration of stock ownership among institutional investors).[8] On the other hand, Commissioner Roisman emphasized that the Proposed Amendments were crafted to "minimiz[e] changes to the highly choreographed proxy voting season."[9] Commissioner Jackson published a statement of dissent in which he expressed concern that the SEC was "interfering in decades-long relationships between investors and their advisors in a way that will significantly skew voting recommendations toward executives."[10] In addition to reiterating his prior objections to the interpretive guidance in the Exchange Act Release, Commissioner Jackson suggested that the SEC's focus on proxy advisory firms' voting recommendations, which result in potential cost savings to ordinary investors, was misplaced and that the SEC should instead work on addressing the proliferation of "gadfly" shareholder proposals (those brought by the 10 most frequent individual submitters each year), which may lead to long-run declines in value for public company shareholders.

## Conclusion

The issuance of the Releases and the Proposed Amendments reflect the current culmination of the SEC's review of the role of proxy advisory firms in the proxy process and may be viewed together to represent a policy decision by the SEC to encourage a greater level of involvement by corporate issuers in proxy advisory firms' recommendation process. As discussed above, depending on the implementation of the Releases and whether the Proposed Amendments are ultimately adopted, investment advisers that engage proxy advisory firms for assistance in fulfilling the investment advisers' proxy voting responsibilities may face significantly greater compliance difficulties, increased costs and tighter timeframes throughout the proxy process, which may lead them to reduce or more narrowly tailor their use of proxy advisory firms. Furthermore, proxy advisory firms themselves may become subject to additional regulatory and private scrutiny of their services

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**NOTES**

1 Chairman Jay Clayton and the two Republican Commissioners, Commissioner Hester M. Peirce and Commissioner Elad L. Roisman, voted to approve each guidance statement, whereas Commissioner Robert J. Jackson Jr. and Commissioner Allison Herren Lee, the two Democratic Commissioners, dissented. Commissioner Roisman has led the SEC's overall evaluation of the proxy process. *See* Commissioner Elad L. Roisman, Statement at the Open Meeting on Commission Guidance and Interpretation Regarding Proxy Voting and Proxy Voting Advice (Aug. 21, 2019) (Statement of Commissioner Roisman) (overviewing the SEC's efforts and Commissioner Roisman's views on the impact of the new guidance statements). The public statements of the Commissioners who voted to approve the Releases express their view that the Releases represent only a limited development of the legal framework applicable to proxy advisory firms and their use by investment advisers. *See* Chairman Jay Clayton, Statement at Open Meeting on Commission Guidance and Interpretation Regarding Proxy Voting and Proxy Voting Advice (Aug, 21, 2019) ("The[] potential actions discussed

in the guidance are not new."); Commissioner Hester M. Peirce, Statement at the Open Meeting on Commission Guidance and Interpretation Regarding Proxy Voting and Proxy Voting Advice (Aug. 21, 2019) ("In issuing today's guidance, we are not building a new regulatory regime, but are explaining the contours of an existing one."); Statement of Commissioner Roisman, *supra,* ("[The] Commission guidance stays true to the [investment advisers' proxy voting rule adopted in 2003]'s flexible, principles-based approach in discussing investment advisers' proxy voting responsibilities, updates and elevates the portions of [Staff Legal Bulletin No. 20, discussed further in the text] that may be relevant for investment advisers today, and underscores the importance of the adviser serving its clients' best interest."). However, the Commissioners who voted against publishing the guidance statements disagreed. *See* Commissioner Allison Herren Lee, Statement on Proxy Voting and Proxy Solicitation Releases (Aug. 21, 2019) (Statement of Commissioner Lee) ("I understand there is a view that today's actions do not go beyond the staff guidance issued in 2014. But I do not agree. Staff views like those expressed in Staff Legal Bulletin 20 are non-binding and cannot create legal rights or obligations. Commission action, on the other hand, is different and commands attention and compliance.... It may be that some of these specific measures are warranted, but the Commission has made a substantive policy choice without formally seeking input, justifying that choice to the public, or even identifying any benefits for investors.").

2 This policy shift may also be reflected in the SEC's November 2019 Proposed Amendments, which are discussed in more detail in the text. If adopted, the Proposed Amendments would require proxy advisory firms that seek to rely on certain exemptions from the federal proxy rules in connection with their voting recommendations to, in relevant part: (i) provide corporate issuers an opportunity to review and provide feedback on their recommendations prior to issuance; and (ii) direct their clients to written responses from corporate issuers setting forth the issuers' views on the proxy advisory firms' voting recommendations.

3 Relatedly, the IA Release states that, when retaining a proxy advisory firm, an "investment adviser also should consider what steps it should take to develop a reasonable understanding of when and how the proxy advisory firm would expect to engage with issuers and third parties."

4 The IA Release makes no distinction between primary investment advisers and investment subadvisers when discussing the scope of an investment adviser's voting authority and its corresponding responsibilities.

5 *Concept Release on the U.S. Proxy System*, Rel. No. IA-3052 (July 14, 2010). Securities and Exchange Commission, Divisions of Investment Management and Corporation Finance, Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms, Staff Legal Bulletin No. 20 (June 30, 2014).

6 Commissioner Robert J. Jackson Jr., Statement on Proxy-Voting Guidance (Aug. 21, 2019).

7 Statement of Commissioner Lee, *supra* n.1.

8 Commissioner Elad L. Roisman, Statement at the Open Meeting on Modernizing SEC Rules Governing Proxy Voting Advice (Nov. 5, 2019).

9 *Id.*

10 Commissioner Robert J. Jackson Jr., Statement on Proposals to Restrict Shareholder Voting (Nov. 5, 2019).