

SEC Interprets Proxy Voting Advice To Constitute Solicitation Subject to Federal Proxy Rules

On August 21, 2019, the Securities and Exchange Commission (“SEC” or “Commission”) issued an interpretation that proxy voting advice provided by proxy advisory firms such as Institutional Shareholder Services Inc. and Glass Lewis & Co. generally constitutes a solicitation subject to the federal proxy rules.¹ The Commission also explained that solicitations that are exempt from the federal proxy rules’ information and filing requirements remain subject to Securities Exchange Act (“Act”) Rule 14a-9.

I. Introduction: Section 14(a) of the Exchange Act

Section 14(a) of the Act applies to any solicitation for a proxy with respect to securities registered under Section 12 of the Act. Solicitation is defined in Rule 14a-1(1) as a “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” A communication found to be a solicitation under the rule is subject to the information and filing requirements under Rule 14a-6 of the Act. In order to avoid these requirements, a solicitation must satisfy one of the exemptions under Rule 14a-2(b). However, even if a communication satisfies one of the exemptions under 14a-2(b), it still will be subject to the anti-fraud provisions under Rule 14a-9 of the Act.

II. Applicability of Section 14(a) of the Exchange Act to Proxy Advisory Firms

According to the SEC, the determination of whether a communication is a solicitation turns on the purpose for which the communication was published and is evidenced by the substance of the communication and the circumstances under which it was transmitted. Advice provided by proxy advisory firms generally describes the proposals and contains a “vote recommendation” for each proposal that indicates how the shareholder should vote. The voting advice is intended to assist in making voting decisions. Additionally, these firms typically provide their recommendations shortly before the shareholder meetings, making it more likely that their recommendations will influence the shareholders’ decisions on voting determinations. Even if a proxy advisory firm’s advice is implementing the voter criteria of its clients, it still is designed to influence the voting determination and is a solicitation. Although these firms are reportedly indifferent to the outcome of the votes and they are not themselves soliciting votes, their advice is considered to be solicitation because they are influencing shareholders with their advice and it is their stated intention to do so as a result of the expertise they market. Disclosure examples provided by the SEC are methodology used to formulate its advice, disclosure about information sources other than the registered information and disclosure about material conflicts of interests.

III. What Does this Mean for Advisory Firms?

In their interpretation, the SEC clearly has stated that advice from advisory firms falls within the meaning of solicitation and that the advice is subject to the anti-fraud provisions under Rule 14a-9 of the Act. Rule 14a-9 prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact. In addition, such solicitation must

¹ Interpretation available at <https://www.sec.gov/rules/interp/2019/34-86721.pdf>.

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not omit to state any material facts necessary to make the statements therein not false or misleading. Accordingly, advisory firms should consider whether they may need to disclose the underlying facts, assumptions, limitations, and other information on which they base their advice in order to ensure they are not in violation of Rule 14a-9.

IV. Conclusion

The SEC's interpretation that proxy voting advice provided by proxy advisory firms constitutes a solicitation subject to the federal proxy rules may affect the information that advisory firms disclose in connection with their advice so as to avoid violations of the anti-fraud provisions of the Act. As a result, the influence of the proxy advisory firms to shape governance may be impacted, although much depends on how aggressively the SEC ultimately decides to enforce the rules in light of this new interpretation.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Bruna Amaral at 212.701.3389 or bamaral@cahill.com.