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# SEC Backtracks on Significant Portions of its 2020 Proxy Voting Advice Rules

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## I. Overview

On July 13, 2022, the Securities and Exchange Commission (the “SEC”) voted to [adopt amendments](#) (the “2022 Final Rule”) to its rules governing proxy voting advice. The final amendments rescind significant portions of the rules applicable to proxy voting advice businesses (“PVABs”) that the SEC had adopted in July 2020 (the “[2020 Rule](#)”). With the 2020 Rule, the SEC (1) codified its long standing position that proxy voting advice constitutes a solicitation within the meaning of Section 14(a) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), (2) adopted rules that conditioned the availability of two exemptions from the proxy rules’ information and filing requirements on which PVABs often rely, (3) added a note explaining when the failure to disclose proxy advice could be considered misleading under Rule 14a-9, and (4) provided supplemental guidance to investment advisers on how to use the advice of PVABs while satisfying their duties to their clients. The 2020 Rule was intended “to enhance the transparency, accuracy, and completeness” of proxy voting advice and is explained in detail in our memorandum found [here](#). Although the 2022 Final Rule rescinds much of the 2020 Rule, it leaves intact both the codification that proxy voting advice constitutes a solicitation under the Exchange Act and the requirement that PVABs must disclose any conflicts of interest to avail themselves of the filing exemption. With the 2022 Final Rule, the SEC is striking a different balance, reasoning that PVABs have already implemented policies that are aimed at the same goals, which makes it unnecessary for the PVABs to incur the additional cost, time delay, and uncertainty that these 2020 Rule provisions may have imposed.

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## II. Rescission of Rule 14a-2(b)(9)(ii)

The 2022 Final Rule rescinds two provisions of the 2020 Rule that conditioned the availability of certain exemptions from the information and filing requirements relied on by proxy advisors. Specifically, Rule 14a-2(b)(9)(ii) of the 2020 Rule required PVABs to (1) provide companies covered by its proxy voting advice time to review and provide feedback on the advice before it is disseminated to the firm’s clients, and (2) provide clients with a means to become aware of a company’s statement in response before the client votes.

In explaining its change of view, the SEC referred to the continuing concerns of PVAB clients originally expressed at the time the 2020 Rule was adopted that the conditions could cause them to receive proxy voting advice in a less than timely manner given the rule’s requirements. The SEC also recognized that PVABs have continued to improve their best practices to address the concerns underlying Rule 14a-2(b)(9)(ii). Therefore, the SEC reasoned that the informational benefit the rule aimed to address did not justify the risks posed to the cost, timeliness, and independence of proxy voting advice.

Rules 14a-2(b)(9)(iii)-(vi), which included safe harbors and exclusions from Rule 14a-2(b)(9)(ii), have also been removed.

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### III. Rescission of Note (e) to Rule 14a-9 and Supplemental Guidance

The 2022 Final Rule also rescinds Note (e) to Rule 14a-9, which provided that failure to disclose material information regarding proxy voting advice, such as a PVAB's methodology, source of information, or conflicts of interest, may be misleading. The rescission is based on the SEC's conclusion that Note (e) has exacerbated legal uncertainty and confusion. However, the 2022 Final Rule adopting release makes clear that the rescission of Note (e) does not change the fact that material misstatements of fact and omissions in proxy voting advice remain subject to liability under Rule 14a-9. Further, by adopting the 2022 Final Rule, the SEC has rescinded the supplemental guidance it had provided to investment advisors in connection with Rule 14a-2(b)(9)(ii), preferring to eliminate any confusion caused by the supplemental guidance and relying instead on earlier issued guidance.

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### IV. Proxy Voting Advice is Still a Solicitation

The 2022 Final Rule leaves intact the 2020 Rule codification that proxy voting advice is a form of solicitation within the meaning of Section 14(a) of the Exchange Act. In light of this, Institutional Shareholder Services, Inc., which previously filed a lawsuit against the SEC after the adoption of the 2020 Rule, has [said](#) it is pressing ahead with its lawsuit to have the entire 2020 Rule rescinded. In addition, two business groups, the National Association of Manufacturers and Natural Gas Services Group Inc., who oppose the rescissions, recently filed a [complaint](#) in a Texas district court against the SEC, alleging that its rescission of parts of the 2020 Rule failed to follow the Administrative Procedure Act and constitutes an arbitrary and capricious violation of federal law.

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### V. Conclusion

The SEC adopted the 2022 Final Rule to “preserve the independence of proxy voting advice and ensure that PVABs can deliver advice in a timely manner without passing on higher costs to their clients.” Although the 2022 Final Rule is intended to alleviate some of the burdens for PVABs, it is not a complete reversal of the 2020 Rule. Proxy voting advice remains a solicitation under the Exchange Act. Further, PVABs must still comply with Rule 14a-2(b)(9)'s conflict of interest disclosure requirement to be exempt from the proxy rule's information and filing requirements. The 2022 Final Rule becomes effective on September 19, 2022.

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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 authors Helene R. Banks (partner) at 212.701.3439 or [hbanks@cahill.com](mailto:hbanks@cahill.com); Geoffrey E. Liebmann (partner) at 212.701.3313 or [gliebmann@cahill.com](mailto:gliebmann@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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