



8011-01P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Release No. 34-86721]

Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Guidance and interpretation.

SUMMARY: The Securities and Exchange Commission (the “SEC” or the “Commission”) is providing an interpretation and related guidance regarding the applicability of certain rules, which the Commission has promulgated under Section 14 of the Securities Exchange Act of 1934 (the “Exchange Act” and such rules the “federal proxy rules”), to proxy voting advice.

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

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SUPPLEMENTARY INFORMATION: The Commission is providing an interpretation and related guidance regarding the applicability of 17 CFR 240.14-1 and 240.14a-9 [Rules 14a-1 and 14a-9] under the Exchange Act [15 U.S.C. 78a *et seq.*] to proxy voting advice.¹

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¹ Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to Title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which these rules are published.

- I. INTRODUCTION
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I. INTRODUCTION

As the use of proxy advisory firms by investment advisers and other institutional investors has become more widespread and the services offered by proxy advisory firms have broadened, we and our staff have examined how proxy voting advice provided by proxy advisory firms may be solicitations under the federal proxy rules.² In addition, we and our staff have engaged with the public through various forums and statements on a variety of issues related to the proxy voting process, including those discussed below. For example, in 2010, the Commission issued a concept release that sought public comment about, among other things, the role and legal status of proxy advisory firms within the U.S. proxy system.³ In 2013, the staff held a roundtable on the use of proxy advisory firm services by institutional investors and investment advisers.⁴ In 2014, the staff of the Divisions of Investment Management and Corporation Finance issued a Staff Legal Bulletin (“SLB 20”) to provide guidance about the availability and requirements of two exemptions to the federal proxy rules that are often relied

² The Commission today is also publishing guidance regarding the proxy voting responsibilities of investment advisers under Rule 206(4)-6 under the Investment Advisers Act of 1940, Form N-1A, Form N-2, Form N-3, and Form N-CSR under the Investment Company Act of 1940. *See Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Release No. IA-5325 (August 21, 2019) [FR] (“*Investment Adviser Proxy Voting Guidance*”).

³ *Concept Release on the U.S. Proxy System*, Release No. 34-62495 (July 14, 2010) [75 FR 42982 (July 22, 2010)] (“*Concept Release*”). The comment letters received in response to the *Concept Release* are available at <https://www.sec.gov/comments/s7-14-10/s71410.shtml>.

⁴ *See SEC Announces Agenda, Panelists for Roundtable on Proxy Advisory Services*, available at <https://www.sec.gov/news/press-release/2013-253>. The letters received in response to the announcement are available at <https://www.sec.gov/comments/4-670/4-670.shtml>.

upon by proxy advisory firms.⁵ Most recently, the staff hosted a roundtable on the proxy process in November 2018 (the “2018 Roundtable”) that included a panel on the role of proxy advisory firms and their use by investment advisers.⁶ In connection with the 2018 Roundtable, the public was invited to provide input on questions that arise regarding the use of proxy advisory firms and their activities.⁷ We have carefully considered the feedback received on these topics, and with the benefit of this extensive body of information, historical experience, and engagement, the Commission is today providing an interpretation and related guidance regarding the applicability of the federal proxy rules to proxy voting advice provided by proxy advisory firms.

Specifically, in Section II below, we provide an interpretation and related guidance on whether proxy voting advice constitutes a “solicitation” under the federal proxy rules, and the application of Rule 14a-9 under the Exchange Act to proxy voting advice. The interpretation and related guidance discussed below are part of the Commission’s review of the overall proxy process. As part of this effort, the staff is also considering recommending that the Commission propose rule amendments to address proxy advisory firms’ reliance on the proxy solicitation exemptions in Exchange Act Rule 14a-2(b).⁸

⁵ SEC Staff Legal Bulletin No. 20, Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms (June 30, 2014). SLB 20 represents the views of the staff of the Divisions of Investment Management and Corporation Finance. It is not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved its content. SLB 20, like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

⁶ See Chairman Jay Clayton, Statement Announcing SEC Staff Roundtable on the Proxy Process, *available at* <https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process>.

⁷ See Comments on Statement Announcing SEC Staff Roundtable on the Proxy Process; File No. 4-725, *available at* <https://www.sec.gov/comments/4-725/4-725.htm>.

⁸ 17 CFR 240.14a-2(b).

II. INTERPRETATION AND GUIDANCE REGARDING APPLICABILITY OF CERTAIN FEDERAL PROXY RULES TO PROXY VOTING ADVICE

Question 1: Does proxy voting advice provided by a proxy advisory firm constitute a solicitation under the federal proxy rules?

Response: Generally, yes. Exchange Act Section 14(a)⁹ applies to any solicitation for a proxy with respect to any security registered under Exchange Act Section 12 and authorizes the Commission to establish rules and regulations governing such solicitations as necessary or appropriate in the public interest or for the protection of investors.¹⁰ The Commission defined the term “solicitation” in Rule 14a-1(l) under the Exchange Act.¹¹ The Commission’s definition is broad and includes, among other things, a “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.”¹²

⁹ 15 U.S.C. 78n(a). Section 14(a) makes it “unlawful for any person...in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security...registered pursuant to section [12] of [the Act].”

¹⁰ Foreign private issuers, however, are exempt from the requirements of Section 14(a). 17 CFR.240.3a12-3(b). In addition, registrants only reporting pursuant to Exchange Act Section 15(d) are not subject to the federal proxy rules.

¹¹ 17 CFR 240.14a-1(l).

¹² 17 CFR 240.14a-1(l)(iii). We note that, over the years, the Commission has broadened the definition of “solicitation” in the context of what was needed or appropriate in the public interest or for the protection of investors, consistent with the purposes of the Exchange Act. *See, e.g., Amended Proxy Rules*, Release No. 1823 (Aug. 11, 1938) [3 FR 1991 (Aug. 13, 1938)]; *Amendment of Regulation X-14*, Release No. 2376 (Jan. 12, 1940) [5 FR 174 (Jan. 12, 1940)] (making clear in each case that any communication by a person soliciting proxy authority, not just the communication delivered with the form of proxy, is a solicitation); *Solicitation of Proxies Under the Act*, Release No. 3347 (Dec. 18, 1942) [7 FR 10655 (Dec. 22, 1942)] (amending the definition of “solicitation” of a proxy to include “any request to revoke a proxy or not to execute a proxy”); *Adoption of Amendments to Proxy Rules*, Release No. 34-5276 (Jan. 17, 1956) [21 FR 577 (Jan. 26, 1956)] (“Amendments to Proxy Rules Release”) (defining a “solicitation” to include a “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy”). The Commission has noted that this definition potentially applies to, among other things, communications by those who may not be seeking proxy authority for themselves or who may be indifferent to the outcome of a vote. *See Regulation of Communications Among Shareholders*, Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276 (Oct. 22, 1992)] (“Regulation of

Consistent with the Commission’s broad definition of solicitation and the case law construing that term,¹³ the Commission has previously stated that the federal proxy rules apply to any person seeking to influence the voting of proxies by shareholders, regardless of whether the person itself is seeking authorization to act as a proxy.¹⁴ As a result, a person may be engaged in a solicitation in cases where that person is not seeking the procurement, withholding, or revocation of a proxy for itself. In addition, the Commission has indicated that this analysis

Communications Release”). In addressing communications by those who may not be seeking proxy authority for themselves or who may be indifferent to the outcome of a vote, the Commission did not narrow the definition of solicitation to exclude these communications, but instead enacted rules to exempt them from the information and filing requirements of the federal proxy rules while preserving the application of the proxy anti-fraud provision, Rule 14a-9. *See, e.g., Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, Release No. 34-16356 (Nov. 21, 1979) [44 FR 68764 (Nov. 29, 1979)] (“Shareholder Participation Adopting Release”)(exempting the furnishing of proxy voting advice by any advisor to any other person with whom the advisor has a business relationship); Regulation of Communications Release (exempting communications among shareholders who are not seeking proxy authority and do not have a substantial interest in the matter subject to a vote).

¹³ In considering what constitutes a “solicitation,” courts have similarly taken a broad, but flexible, view. *See, e.g., Union Pacific Railroad Co. v. Chicago and North Western Railroad Co.*, 226 F. Supp. 400, 408 (N. D. Ill. 1964) (holding that a report provided by a broker-dealer to shareholders of the target company in a contested merger constituted a solicitation because it advised the shareholders that one bidder’s offer was “far more attractive” than the other and therefore was a communication reasonably calculated to affect the shareholders’ voting decisions). *See also SEC v. Okin*, 132 F.2d 784 (2d Cir. 1943) (holding that the defendant shareholder who sent a letter to fellow shareholders in connection with an annual meeting asking them not to sign any proxies for the company was engaged in a solicitation); *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974) (holding that a management letter explaining the corporation’s recent financial difficulties and endorsing the terms of a refinancing plan was a solicitation because its purpose was to forestall the shareholders from blocking that plan, notwithstanding that the letter did not expressly call for any shareholder action); *Reserve Life Ins. Co. v. Provident Life Insurance Co.*, 499 F.2d 715 (8th Cir. 1974) (holding that letters sent to voting trust certificate holders to extend the term of a voting trust were solicitations of proxies).

¹⁴ *See* Amendments to Proxy Rules Release (in amending the definition of a “solicitation” to include any communications to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy, the Commission explained that this definition may include any statements “made for the purpose of inducing security holders to give, revoke, or withhold a proxy... by any person who has solicited or intends to solicit proxies, whether or not such statements are accompanied by an express request to give, revoke, or withhold a proxy...”); *Electronic Shareholder Forums*, Release No. 34-57172 (Jan. 18, 2008) [73 FR 4450 (Jan. 25, 2008)]. *See also, Long Island Lighting Co. v. Barbash*, 779 F.2d 793 (2d Cir. 1985) (finding newspaper and radio advertisements that encouraged citizens to advocate for a state-run utility company to be solicitations made in connection with an upcoming director election because such advertisements could have indirectly resulted in the furnishing, revocation, or withholding of proxies) and Brief of the Securities and Exchange Commission, Amicus Curiae, at p. 7, filed therein (“SEC LILCO Brief”) (“Accordingly, the proxy rules apply not only to direct requests to furnish, revoke or withhold proxies, but also to communications which may indirectly accomplish such a result or constitute a step in a chain of communications designed ultimately to accomplish such a result.”).

applies even where the person seeking to influence the vote may be indifferent to its ultimate outcome.¹⁵ Consistent with these statements, the Commission has observed that the breadth of the definition of “solicitation” may result in proxy advisory firms being subject to the proxy rules because they provide recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy.¹⁶ In expressing this view, the Commission stated that, as a general matter, the furnishing of proxy voting advice constitutes a “solicitation” within the meaning of Exchange Act Rule 14a-1.¹⁷

Whether a particular communication is a solicitation often turns on “the purpose for which the communication was published – *i.e.*, whether the purpose was to influence the shareholders’ decisions,” as evidenced by the substance of the communication and the circumstances under which it was transmitted.¹⁸ With respect to the substance of the communications, the proxy voting advice provided by proxy advisory firms to their clients generally describes the specific proposals that will be presented at the registrant’s upcoming meeting and presents a “vote recommendation” for each proposal that indicates how the client should vote.¹⁹ These firms often also present their vote recommendations through online

¹⁵ *See id.*

¹⁶ *See* Concept Release, 75 FR 43009.

¹⁷ *See id.* *See also* *Broker-Dealer Participation in Proxy Solicitations*, Release No. 7208 (Jan. 7, 1964) [29 FR 341 (Jan. 15, 1964)] (“Broker-Dealer Release”). For a discussion of whether proxy voting advice should be viewed as “unsolicited” proxy advice, *see infra* text accompanying notes 26-27.

¹⁸ *See* SEC LILCO Brief (describing the factors that should be considered in determining whether an advertisement published in a major newspaper was reasonably calculated to result in the procurement, withholding, or revocation of a proxy and therefore a solicitation).

¹⁹ Examples include:

- one proxy advisory firm’s report for a contested election of directors included a detailed evaluation of the candidates presented by the dissident shareholders and management, concluded that management’s candidate “appear[ed] to have more relevant experience than the dissident nominee as a public company director” and recommended that “[t]herefore a vote FOR the nominee [] on the management (Blue) card is warranted”;

platforms established by the firms to facilitate their clients' proxy voting activities. With respect to the circumstances under which this voting advice is provided, proxy advisory firms market their expertise in researching and analyzing matters submitted to a shareholder vote for the purpose of assisting their clients in making voting decisions at shareholder meetings.²⁰ Many investment advisers retain and pay a fee to proxy advisory firms to provide detailed analyses of various issues, including advice regarding how the investment adviser should vote on the proposals at the registrant's upcoming meeting.²¹ In many cases, as discussed below, the proxy advisory firms make recommendations for a particular investment adviser based on the advisory firms' application of the investment adviser's voting criteria.²²

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- another proxy advisory report analyzed the registrant's executive compensation practices and presented a recommendation to vote "AGAINST [the registrant's advisory vote to ratify named executive officers' compensation]" for various reasons; and
 - one proxy advisory firm evaluated a proposal submitted by a dissident shareholder group to repeal certain board-adopted bylaw amendments and recommended that a "vote AGAINST this shareholder proposal is warranted as there appears to be no merit to the dissident campaign."

²⁰ For example, one proxy advisor, Institutional Shareholder Services Inc. ("ISS"), promotes itself as "a recognized industry leader in the field of corporate governance and proxy voting" and explains to investment advisers that they should consider ISS' "proven capacity and competence in analyzing proxy issues." See ISS, *Due Diligence Compliance Package* (November 2017), available at <https://www.issgovernance.com/file/duediligence/Due-Diligence-Package-November-2017.pdf> (last accessed August 13, 2019).

Another proxy advisor, Glass, Lewis & Co., LLC ("Glass Lewis"), describes its business as "a leading, independent governance services firm that provides proxy research and vote management services to more than 1,300 clients throughout the world" and states that "[w]hile institutional investor clients use Glass Lewis research primarily to help them make proxy voting decisions, they also use Glass Lewis research when engaging with companies before and after shareholder meetings." See *Best Practice Principles for Providers of Shareholder Voting Research & Analysis, Glass Lewis Statement of Compliance for the Period of 1 January 2018 through 31 December 2018*, available at <http://www.glasslewis.com/wp-content/uploads/2019/02/GL-Compliance-Statement-2019.pdf> (last accessed August 13, 2019).

²¹ As of 2019, ISS reported that it had approximately 2,000 institutional clients. See <https://www.issgovernance.com/about/about-iss/> (last accessed August 13, 2019). Glass Lewis reported that, as of 2019, it had "1,300+ clients, including the majority of the world's largest pension plans, mutual funds, and asset managers, who collectively manage more than \$35 trillion in assets." See <https://www.glasslewis.com/company-overview/> (last accessed August 13, 2019).

²² See Letter from ISS, dated Nov. 7, 2018 ("ISS Letter") ("[a]s of January 1, 2018, approximately 85% of ISS' top 100 clients used a custom proxy voting policy."), available at <https://www.sec.gov/comments/4-725/4-725.htm>; and Letter from Glass Lewis, dated Nov. 14, 2018 ("[a]s mentioned above, the supermajority of Glass Lewis clients... vote according to a custom policy or via a custom process, in what

As a fiduciary, an investment adviser owes each of its clients a duty of care and loyalty with respect to services undertaken on the client’s behalf, including voting.²³ Proxy advisory firms provide their voting recommendations to their investment adviser clients with the expectation that those recommendations will be used by their investment adviser clients to assist in fulfilling their fiduciary duties when making their voting decisions. The fact that proxy advisory firms typically provide their recommendations shortly before a shareholder meeting further enhances the likelihood that the recommendations are designed to and will influence the final stages of the investment advisers’ decision-making process on voting determinations.²⁴ Therefore, it is our view that such voting advice provided by a firm marketing its expertise in researching and analyzing proxy issues for purposes of helping its clients make proxy voting determinations (*i.e.*, not merely performing administrative or ministerial services) should be considered a solicitation subject to the federal proxy rules because it is “a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” We believe this interpretation is consistent with the

is becoming the standard practice among institutional investors.”), *available at* <https://www.sec.gov/comments/4-725/4-725.htm>.

²³ *See Investment Adviser Proxy Voting Guidance.*

²⁴ *See* Letter from Center on Executive Compensation (Nov. 12, 2018) (“...proxy reports are released within a short window before the issuer’s annual meeting. The data within the reports is subsequently relied upon by institutional investors in fulfilling their fiduciary duties to vote proxies in the best interest of their shareholders.”).

See also, Frank M. Placenti, *Are Proxy Advisors Really A Problem?*, American Council for Capital Formation (October 2018) (in the 2016 and 2017 proxy seasons, 15.3% and 19.3%, respectively, of shareholders’ votes were cast within three days after one proxy advisory firm issued its recommendations), *available at* http://accf.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport.pdf; *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 600 (5th Cir. 1974) (stating that in determining whether a communication is a solicitation, “[i]t is important also to know whether, when the questionable statement is made, proxies have been requested or the time for soliciting proxies is near. In general, the further removed the statement is from an act of shareholder suffrage, the less likely it is that the statement will leave its imprint upon that shareholder action.”).

Commission's long-held view that an advisor who approaches a customer with proxy voting advice is engaging in a solicitation subject to the federal proxy rules.²⁵

Even if the proxy advisory firm is providing recommendations based on its application of the client's own tailored voting guidelines (*i.e.*, not merely performing administrative or ministerial services), and recognizing that facts and circumstances may vary, it is our view that such analysis and advice regarding a voting determination generally should be considered a solicitation. The communication generally is in the form of a voting recommendation based on the firm's analysis of the proxy materials and whether a particular matter is consistent with, not consistent with, or not covered by client voting criteria; it is typically transmitted to the client shortly before the meeting to aid the client's voting determination; and it may be a factor in the client's voting determination. Also, as noted above, proxy advisory firms market their services based on their expertise in researching and analyzing proxy issues for purposes of helping their clients make proxy voting determinations. As a result, even when based on the client's own voting guidelines, we believe the communication, if it reflects more than administrative or

²⁵ See Broker-Dealer Release. While the Commission recognized that proxy voting advice could be beneficial to shareholders, it nevertheless did not change its view that such advice would likely fall within the definition of a solicitation and instead chose to exempt such solicitations from the information and filing requirements of the proxy rules. See, generally, Shareholder Participation Adopting Release, enacting what is now Exchange Act Rule 14a-2(b)(3) [17 CFR 240.14a-2(b)(3)] to exempt the furnishing of proxy voting advice by any advisor to any other person with whom the advisor has a business relationship from the informational and filing requirements of the federal proxy rules, provided the conditions of the rule are met. Rule 14a-2(b)(3) requires that:

- (i) the advisor renders financial advice in the ordinary course of his business;
- (ii) the advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter;
- (iii) the advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice and other persons who receive similar advice under this subsection; and
- (iv) the proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of Exchange Act Rule 14a-12(c.) [17 CFR 240.14a-12(c)].

ministerial work, should be viewed as part of a commercial service that is designed to influence the client's voting decision. We believe this to be the case even in circumstances where the client may not follow this advice.

For similar reasons, we disagree with the view that the proxy voting advice provided by proxy advisory firms falls outside the definition of a solicitation because it should not be viewed as "unsolicited" voting advice.²⁶ We view these services provided by proxy advisory firms as distinct from advice prompted by unsolicited inquiries from clients to their financial advisors or brokers on how they should vote their proxies, which remains outside the definition of a solicitation.²⁷ Rather than merely responding to client inquiries, 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.

Notwithstanding the foregoing, we note that persons engaged in a solicitation in the form of proxy voting advice, including proxy advisory firms, may avail themselves of the exemptions from the information and filing requirements of the federal proxy rules.²⁸ Nothing in this interpretation is intended to restrict or limit reliance on those exemptions.

Question 2: Does Exchange Act Rule 14a-9 apply to proxy voting advice?

²⁶ See ISS Letter (distinguishing between unsolicited and solicited proxy advice and requesting that the Commission confirm that while unsolicited proxy advice is a solicitation, a registered investment adviser who is contractually obligated to furnish vote recommendations based on client-selected guidelines does not provide "unsolicited" proxy voting advice, and therefore does not engage in a solicitation).

²⁷ See Broker-Dealer Release (setting forth the opinion of the SEC's General Counsel that a broker is not engaging in a "solicitation" if it is merely responding to his customer's request for advice and "not actively initiating the communication").

²⁸ See, e.g., 17 CFR 240.14a-2(b)(1) and 17 CFR 240.14a-2(b)(3).

Response: Yes. Solicitations that are exempt from the federal proxy rules' information and filing requirements remain subject to Exchange Act Rule 14a-9, which 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.²⁹ In addition, such solicitation must not omit to state any material fact necessary in order to make the statements therein not false or misleading.³⁰ Rule 14a-9 also extends to opinions, reasons, recommendations, or beliefs that are disclosed as part of a solicitation, which may be statements of material facts for purposes of the rule.³¹ Where such opinions, recommendations, or similar views are provided, disclosure of the underlying facts, assumptions, limitations, and other information may be needed so that these views do not raise Rule 14a-9 concerns.³² Accordingly, any person engaged in a solicitation through proxy voting advice must not make materially false or misleading statements or omit material facts, such as information underlying the basis of its

²⁹ See 17 CFR 240.14a-9. See also, Concept Release, 75 FR 43010 (“Even if exempt from the informational and filing requirements of the federal proxy rules, the furnishing of proxy voting advice remains subject to the prohibition on false and misleading statements in Rule 14a-9.”).

³⁰ 17 CFR 240.14a-9.

³¹ See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092 (1991) (stating that a board’s recommendation that shareholders approve a proposed merger because it viewed the proposal as “fair” to the minority shareholders and the offered merger consideration as a “high” value were statements of material facts because “[s]uch statements are factual in two senses: as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed”).

³² See, e.g., *Dowling v. Narragansett Capital Corp.*, 735 F. Supp. 1105, 1119 (D.R.I. 1990) (denying a motion to dismiss Rule 14a-9 complaints on the basis that “allegations regarding misrepresentations as to the value of...[a corporation’s assets] and nondisclosure of the limitations on the information underlying...[a] fairness opinion implicate matters at the heart of the decision confronting shareholders.”). The Commission staff has previously raised questions about the appropriateness and adequacy of disclosure under Rule 14a-9 in proxy solicitations. See, e.g., *Interpretative Release Relating to Proxy Rules*, Release No. 34-16833 (May 23, 1980) [45 FR 36374 (May 30, 1980)] (stating the Division of Corporation Finance’s view that in proxy contests in which the disposition of a registrant’s assets and distribution of the sale proceeds to shareholders were the dissidents’ goal, the inclusion of valuations of the sale proceeds in the proxy soliciting material was only appropriate under Rule 14a-9 when, among other things, they were “accompanied by disclosure which facilitate[d] shareholders’ understanding of the basis for and the limitations on the projected realizable values.”).

advice or which would affect its analysis and judgments, that would be required to make the advice not misleading. For example, the provider of the proxy voting advice should consider whether, depending on the particular statement, it may need to disclose the following types of information in order to avoid a potential violation of Rule 14a-9:³³

- an explanation of the methodology used to formulate its voting advice on a particular matter (including any material deviations from the provider’s publicly-announced guidelines, policies, or standard methodologies for analyzing such matters) where the omission of such information would render the voting advice materially false or misleading;³⁴
- to the extent that the proxy voting advice is based on information other than the registrant’s public disclosures, such as third-party information sources,³⁵ disclosure about these information sources and the extent to which the information from these sources differs from the public disclosures provided by the registrant if such differences are material and the failure to disclose the differences would render the voting advice false or misleading; and

³³ We understand that some proxy advisory firms currently may be providing some of the disclosures described in the examples listed in this section.

³⁴ To the extent that the proxy voting advice is materially based on a methodology using a group of peer companies selected by the proxy advisory firm, the disclosure may need to include the identities of the peer group members used as part of its recommendation and the reasons for selecting these peer group members as well as, if material, why its peer group members differ from those selected by the registrant. For example, such disclosure may be needed for a voting recommendation on a registrant’s advisory vote on an executive compensation proposal that is based on a comparison of the registrant’s executive compensation policies to those of other companies selected by the proxy advisory firm.

³⁵ Such sources could include third-party research or publications, commercial or financial information databases, or ratings or rankings published by third parties.

- disclosure about material conflicts of interest that arise in connection with providing the proxy voting advice in reasonably sufficient detail so that the client can assess the relevance of those conflicts.³⁶

III. OTHER MATTERS

Pursuant to the Congressional Review Act,³⁷ the Office of Information and Regulatory Affairs has designated this guidance and interpretation as not a “major rule,” as defined by 5 U.S.C. 804(2).

List of Subjects in 17 CFR Part 241

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 241 – INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. An authority citation is added for part 241 to read as follows:

Authority: 15 U.S.C. 78a *et seq.*

³⁶ Relationships or interests that may create conflicts of interest are commonly found by courts as material information that should be disclosed to avoid Rule 14a-9 violations. *See, e.g., Maldonado v. Flynn*, 597 F.2d 789 (2d Cir. 1979) (noting that “shareholders are entitled to truthful presentation of factual information” when there is a possibility of self-dealing among directors and emphasizing the importance of Rule 14a-9 in eliciting disclosures of this material information).

³⁷ 5 U.S.C. 801 *et seq.*

2. The table is amended by adding an entry for Release No. 34-86721 at the end to read as follows:

Subject	Release No.	Date	Fed. Reg. Vol. and Page
* * Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice	* 34-86721	* * August 21, 2019	* * [Insert FR Volume Number] FR [Insert FR Page Number]

By the Commission.

Dated: August 21, 2019.

Vanessa A. Countryman,

Secretary.

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