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The SEC's Evolving Posture Toward Proxy Advisors: What It Will Mean for the Upcoming Proxy Season

Overview

On August 21, 2019, the US Securities and Exchange Commission (SEC) issued new guidance regarding the role of proxy advisors in the proxy voting process. This guidance is expected to play an important role in the upcoming 2020 proxy season, as the SEC seeks to further define the proxy voting obligations of registered investment advisors while promoting greater accountability on the part of the proxy advisory firms.

The SEC's August guidance was followed by an announcement on November 5, 2019 of proposed rules governing proxy advisors and their investment advisor clients. These rules are, in the words of the SEC, intended to "improve [the] accuracy and transparency of proxy voting advice." If adopted, the proposed rules would significantly alter the manner in which proxy advisors interact with both issuers and investment advisors.

The August 2019 Guidance

On August 21, 2019 the SEC issued two new releases regarding the proxy process. In the first of these releases, the SEC stated that proxy advisor recommendations constituted solicitations under the Commission's proxy rules. While the release did not seek to limit the proxy advisory firms' ability to rely on certain exemptions to the information and filing requirements of the proxy rules, it did make clear that proxy advisor recommendations are subject to the antifraud provisions of Rule 14a-9 of the Securities Exchange Act of 1934 (Exchange Act). The release also recommends that proxy advisory firms disclose additional information regarding the proxy advisor's methodology, information sources and conflicts of interest.

In the second release, the SEC discussed the obligations of investment advisors, particularly in connection with their retention and use of proxy advisory firms. The SEC emphasized the need for investment advisors to have policies and procedures in place to adequately oversee proxy advisory firms and ensure that the needs of each individual issuer are taken into account.

While the SEC's releases stated that the Commission did not consider its August 2019 guidance to represent a substantive change in policy, the largest proxy advisory firm, Institutional Shareholder Services, Inc. (ISS), has taken a decidedly contrary position. ISS commenced litigation against the SEC on October 31, 2019 in the federal District Court for the District of Columbia. In that case, ISS is seeking to set aside the SEC's August 2019 guidance as a fundamental change in law that exceeds the SEC's jurisdiction and violates the federal Administrative Procedures Act. The outcome of this litigation will likely affect the impact of the August 2019 guidance and may influence further SEC regulation of proxy advisors.

The Proposed New Rules

On November 5, 2019, the SEC voted 3-2 to propose additional rules for the regulation of the proxy voting process. If adopted, these additional rules would increase regulation of proxy and increase the ability of public companies to monitor and respond to the advisors' voting recommendations.

In light of these SEC actions, investment advisors should perform a review of their policies, procedures and practices on a client-by-client basis before the start of the 2020 proxy season. Proxy advisory firms should establish detailed policies to ensure that their recommendations are materially accurate to avoid liability under Rule 14a-9, and to assure investment advisors that proxy advisor recommendations are in the best interests of the client.

For their part, public companies should take note of the SEC guidance, as it provides a greater opportunity for issuers to dispute adverse voting recommendations that can be challenged as factually or analytically flawed.

While the outcome of the ISS challenge to the SEC's guidance and the ultimate outcome of the proposed new rules remains to be seen, the SEC has clearly signaled its intention to take action to curb the outsized influence of proxy advisory firms.

Background and History of the Proxy Advisory Process

Under Rule 206(4)-6 of the Investment Advisor's Act of 1940 (Advisor's Act), investment advisors must adopt policies and procedures reasonably designed to ensure that proxies are voted in the best interests of their clients.[1] However, the perceived requirement to adopt policies to vote every share with respect to every shareholder vote imposes significant economic burdens on investment advisors who do not wish to maintain the staffing levels or resources that would be needed to evaluate all management and shareholder proposals.

Outsourcing this work to third party proxy advisory firms has been seen as the most convenient way to minimize this economic burden.

Further, investment advisors have a fiduciary duty to develop proxy voting guidelines that are free from conflicts of interest that often occur when the advisor is voting on matters affecting an issuer in which the advisor's clients hold an economic interest or where the advisor provides consulting services to that same issuer. The SEC had issued guidance allowing investment advisors to fulfill their duties to avoid conflicts by relying on the voting guidelines of a third party proxy advisor.

[1] The Department of Labor's 1988 Avon letter also played a large role in establishing a fiduciary duty for proxy voting. The letter specified that ". . . the fiduciary act of managing [investing] plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock."

However, as the influence of proxy advisory firms has increased, so has controversy surrounding their increasingly large role in the proxy voting process. This controversy has been fueled by the fact that opinions regarding proxy advisory firms have often tended to fall along party lines, with proponents of proxy advisory firms leaning left and critics in the business community leaning right. For a discussion of the problems relating to proxy advisory firms, see Frank M. Placenti, "Are Proxy Advisors Really a Problem."

Detractors of the role that proxy advisors play in the proxy voting process often cite concerns about investment advisors' near slavish reliance on voting advice from proxy advisory firms. Others charge that proxy advisors do not devote sufficient resources to creating their voting advice and that they use erroneous or misleading information as a basis for their opinions. Still others have raised concerns that proxy advisors often have conflicts of interest, undermining the fiduciary duties that investment advisors owe to their clients. The fact that two proxy advisory firms, ISS and Glass Lewis & Co. (Glass Lewis), dominate the industry with a 97% market share exacerbates these alarms. In response to these concerns, the SEC has been conducting an overall review over the past several years, examining how federal proxy rules apply to proxy voting advice.

The Noose Begins to Tighten on Proxy Advisors: The SEC's 2004 No Action Letters and Their 2018 Withdrawal

In 2004, the SEC issued two no action letters regarding proxy advisory firms that greatly enabled the growth and power of proxy advisory firms.

The first letter was issued to Egan-Jones Proxy Services (Egan-Jones) on May 27, 2004, and the second letter was issued to ISS on September 15, 2004. Taken together, these letters stated that an investment advisor could fulfill its fiduciary duties to its clients to vote in an informed manner and without an impermissible conflict of interest by relying on the opinion of an independent third party proxy advisory firm.

The May 2004 Egan-Jones letter posited that a third party proxy advisory firm could be considered independent even though it receives compensation from an issuer for separately providing advice to the issuer on corporate governance issues. The letter also listed additional requirements for investment advisors relying on such proxy advisory firms, such as obtaining ongoing information from any proxy advisory firm to determine that the proxy advisor is, in fact, independent and impartial.

In the September 2004 letter to ISS, the SEC further stated that, rather than a case by case evaluation of a proxy advisory's firm's potential conflicts, investment advisors could fulfill their fiduciary duties if they, among other things, examine the proxy advisory firm's conflict procedures and the effectiveness of their implementation.

In June 2014, the Divisions of Investment Management and Corporation Finance also issued Staff Legal Bulletin (SLB) No. 20, which was based on these two no action letters and provided guidance on investment advisor's fiduciary duties in connection with retaining proxy advisors. SLB No. 20 was widely interpreted as a signal from the SEC that investment advisors should refrain from uncritical reliance on the recommendations of proxy advisory firms. Nevertheless, data continued to show that many investment advisors voted in accordance with the advice of proxy advisory firms in an alarming percentage of cases – often approaching 100%. See, *The Realities of Robo-Voting*, The American Council for Capital Formation, November 2018.

In response to these growing complaints, on November 2018 the SEC held a roundtable to allow corporations and institutional investors to express their concerns about the conduct of proxy advisors. As a prelude to this roundtable, on September 13, 2018, the SEC withdrew the 2004 Egan Jones and ISS no action letters, indicating an intent to reevaluate the standards currently in place to police proxy advisors. The SEC's withdrawal of the Egan Jones and ISS letters placed into question the extent to which an investment advisor could depend on the advice of proxy advisory firms and signaled a sea change in the attitude of the SEC toward proxy advisors.

The SEC's August 2019 Guidance

On August 21, 2019, the SEC issued long-awaited guidance regarding the applicability of proxy rules to proxy voting advice and the responsibilities of investment advisors. This guidance was approved by a 3-2 vote, largely along party lines. In his August 21 remarks, Commissioner Elad Roisman insisted that the SEC was not engaged in new rulemaking, but instead just clarifying and elaborating on its existing interpretations. As a result, the SEC's announced view was that it was not required to seek public comment before issuing the guidance, allowing the guidance to take effect immediately after publication in the Federal Register.

The SEC's guidance was reflected in two releases. In the first, Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules, clarified that the SEC considers a proxy advisor's recommendation to be a solicitation under the federal proxy rules. In the second, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisors, the Commission clarified its view of the policies and procedures investment advisors should adopt to better fulfill their fiduciary duties to clients.

Importantly, in its guidance, the SEC explained that it considers proxy advisory opinions to be solicitations under Rule 14a-1(l) of the Exchange Act and, therefore, subject to the federal proxy rules. Under Rule 14a-1(l), a solicitation includes a "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." The SEC release stated that when proxy advisory firms market their expertise in researching and analyzing proxy issues, and proceed to give a voting recommendation, this advice is "reasonably calculated" to affect proxy votes, even in cases where the proxy advisor bases its recommendations on the client's own, tailored voting criteria or when the investment advisor chooses not to follow the recommendation.

The fact that proxy advisors make their recommendations shortly before the shareholder meetings further shows that the advice is designed to, and does, influence an investment advisor's voting. This interpretation does not affect proxy advisory firms' ability to rely on the Exchange Act Rule 14a-2(b) exemptions from the information and filing requirements of the proxy rules. 14a-2(b)(1) exempts persons who do not seek to act as a proxy for a security holder or otherwise furnish or request a proxy, and rule 14a-2(b)(3) exempts advisors furnishing proxy advice to another person if they meet stated criteria, including the disclosure of significant relationships with the registrant or proponent of the proposal, and the receipt of compensation only from clients receiving the advice. However, the SEC has indicated that these exemptions will be subject to future scrutiny in furtherance of the SEC's general examination of proxy advisors.

While the SEC guidance does not remove exemptions from information and filing requirements, this release does make clear that proxy advisory opinions are subject to the antifraud provisions in Exchange Act Rule 14a-9, which extends to "opinions, reasons, recommendations or beliefs." Rule 14a-9 prohibits a solicitation from containing any statement that is false or misleading with respect to any material fact or omitting to state any material fact necessary to make the statements therein not false or misleading. This conclusion was intended to motivate greater care and accountability with respect to proxy advisor recommendations.

The SEC release also recommends that proxy advisors consider adding additional disclosures to their voting advice to avoid liability under 14a-9. These additional disclosures include (a) the methodology used to formulate any voting advice, including material deviations from publicly announced policies; (b) any material differences between information derived from third party sources and information derived from public disclosures provided by companies; and (c) information regarding material conflicts of interest. Additionally, to the extent that proxy advisors' methodologies are derived from an analysis of a group of peer companies, the disclosure may need to include the identities of the peer group members and the reasons for selecting them. These additional disclosures will provide some level of insight into the otherwise opaque process through which proxy recommendations are usually issued. While the SEC insists that this guidance does not change any of the current obligations of a proxy advisory firm, it does clarify the scope of their existing duties.

SEC Guidance Regarding Proxy Voting Responsibilities of Investment Advisors

The SEC's August 2019 pronouncements also offered guidance intended to require investment advisors to comply with their fiduciary duties to vote proxies in the best interests of their clients, particularly if they use a proxy advisory firm. In releasing this guidance, the SEC specifically highlighted that "[i]nvestment advisors are fiduciaries that owe each of their clients duties of care and loyalty with respect to services undertaken on the client's behalf, including voting." The release was organized into six questions and answers, and discussed the following topics:

1. Proxy Voting Arrangements. An investment advisor and its client may agree to a wide variety of different proxy voting arrangements that have varying degrees of authority vested in the investment advisor. The investment advisor and its client may shape their relationship by agreement, so long as there is "full and fair disclosure and informed consent." However, while an investment advisor's fiduciary duty may vary depending on the arrangement with the client, the fiduciary duty may never be waived and will apply depending on the scope of the investment advisor's authority. The SEC also stated that investment advisor responsibility for making voting determinations is implied, absent "full and fair disclosure and informed consent." The burden is, therefore, on the investment advisor to completely clarify the scope of its responsibilities, and investment advisors should be careful in narrowing their obligations.

2. Compliance With Fiduciary Duties when Voting Proxies. Investment advisors must undertake a reasonable investigation into matters upon which they are voting to ensure that they vote the proxies in the client's best interest. The release suggests that investment advisors should consider whether voting all of their clients' shares according to a uniform voting policy is in their clients' best interests, and that they should take reasonable measures to ensure that they are voting their proxies in a manner consistent with their voting policies. Finally, investment advisors should also review and document, no less frequently than annually, the adequacy of voting policies and procedures to ensure that they are formulated and implemented effectively.

3. Investment Advisor Considerations When Hiring a Proxy Advisory Firm. Before hiring a proxy advisor, investment advisors should consider (a) whether the proxy advisor has the capacity and competency to analyze the matters voted, (b) whether the proxy advisor has an effective process to seek timely input from issuers and proxy advisory firm clients, (c) whether a proxy advisor has disclosed to the investment advisor how it arrives at voting recommendations, (d) the nature of any third party information sources that the proxy advisory firm uses as the basis for its voting recommendations, and (e) whether it has policies and procedures available to identify and address conflicts of interest.

4. How to Address Proxy Advisory Firm Weaknesses. If an investment advisor identifies potential factual errors, incompleteness or methodological weaknesses that may materially affect a voting determination, it should, among other things, consider (a) efforts by the proxy advisor to rectify the identified deficiencies, (b) the proxy advisor's disclosure of the sources and methods used to develop its recommendations, and (c) whether the proxy advisor has considered facts unique to the issuer or proposal for which it is issuing a recommendation. Review is limited to errors that the investment advisor "becomes aware of and deems credible and relevant to its voting determinations." This guidance seems to extend liability to potential, rather than merely actual errors, and seems to impose higher standards of oversight than previously believed.

5. Investment Advisor Evaluation of Proxy Advisory Firms. Investment advisors should adopt and implement policies and procedures reasonably designed to evaluate the proxy advisory firm. These policies should detect and asses the proxy advisor's conflicts of interest and contain updated information regarding the proxy advisory firm's ability to provide recommendations consistent with the investment advisor's voting instructions. Investment advisors should also consider how well the proxy advisor updates its procedures and how responsive it is to feedback. The release further directs investment advisors to consider requiring the proxy advisory firm to update the investment advisor of any business changes relevant to its ability to provide services.

6. Investment Advisors' Obligation to Exercise every Opportunity to Vote a Proxy for a Client. An investment advisor is not obligated to vote every proxy for a client in two situations: (1) when an advisor and client have an arrangement to limit the circumstances in which the advisor will exercise voting authority, and (2) when the investment advisor determines that refraining from voting is in the best interests of the client.

The new SEC guidance appears to set a high bar for investment advisors to comply with their fiduciary duties and an intention that they not rely uncritically on third party advice. The guidance reminds registered investment advisors to execute policies and procedures for greater oversight of proxy advisory firms, in order to ensure that all proxies are voted in the best interests of the client.

Public Reactions to the SEC Releases

Many proxy advisory firm critics have welcomed the SEC's guidance as a way to diminish the enormous influence that proxy advisory firms have developed over the voting of proxies. Jay Timmons, president and chief executive of the National Association of Manufacturers, has praised the "concrete steps that will help protect the savings of Main Street investors." However, the SEC releases are not without their detractors. Investment Advisor Association General Counsel Gail Bernstein stated that, while the SEC claims not to have created new obligations, she believes that, "as a practical matter," they will create new burdens for investment advisors. Others have expressed concern that the additional measures proxy advisory firms must adopt to ensure compliance with proxy rules may lead proxy advisors to issue voting recommendations closer to the shareholders meetings than before to avoid or frustrate issuer challenges. Should this occur, it would limit the time that public companies have available to contest any recommendation issued.

The increased obligations of proxy advisory firms could also increase barriers to entry for proxy advisory firms, enhancing the dominance of ISS and Glass Lewis. Finally, SEC Commissioner Robert Jackson, who voted against the releases, warned that the SEC guidance could be costly to smaller institutional investors, leading smaller fund managers to stop voting on corporate ballots, boosting the influence of larger investors.

Others have expressed the view that, while SEC's guidance is a step in the right direction, it does not go far enough. For example, it does nothing to address the practice of robo-voting that has drawn frequent criticism.

The ISS Legal Challenge to the August Guidance

Despite the pains to which the SEC went to position its guidance as an interpretation of existing regulation, ISS has commenced litigation in the District Court for the District of Columbia to set aside the SEC's action. In a public statement, ISS CEO Gary Retelny said, "We believe litigation to be necessary to prevent the chill of proxy advisers' protected speech and to ensure the timeliness and independence of the advice that shareholders rely on to make decisions with regards to the governance of their publicly traded portfolio companies." ISS's complaint alleges three reasons that the new SEC guidance should be set aside. First, ISS alleges that the SEC's guidance exceeds its statutory authority under section 14(a) of the Exchange Act. ISS contends that proxy advisory opinions are not solicitations because solicitations urge proxies to vote in order to obtain a specific outcome. If, as ISS contends, proxy advisory opinions are not solicitations, ISS asserts that it is beyond the SEC's authority to regulate them as such.

Second, ISS argues that the SEC guidance is a substantive rule and, therefore, should have been subject to the notice-and-comment procedures of the Administrative Procedure Act. Finally, ISS alleges that the SEC's actions were arbitrary and capricious because the guidance promulgates a substantial change of stance, while purporting not to have changed its position. The outcome of this case will likely determine the extent to which the SEC's guidance will be implemented, the extent to which it will continue its review of the proxy voting process and what changes can still be expected in the coming months.

The SEC's November 5, 2019 Proposed Rules

On November 5, 2019, the SEC increased its pressure on proxy advisory firms by voting to propose rules tightening the regulation of proxy advisors and modernizing the process through which shareholder proposals are submitted.

The proposed amendments would amend Exchange Act Rule 14a-1(l) to make clear that a solicitation includes any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent or authorization, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee. However, voting advice provided in response to an unprompted request would not constitute a solicitation.

The definition of proxy voting advice as a solicitation makes proxy voting advice subject to the anti-fraud provisions of Rule 14a-9. The SEC further emphasizes this through a proposed amendment to the list of examples in Rule 14a-9 of materials that may be misleading. The 14a-9 amendment would highlight the types of information that a proxy advisory firm may need to disclose to avoid potential liability. The amended rule would list, among other things, the failure to disclose information such as (a) the business's methodology, (b) sources of information, (c) conflicts of interest, and (d) the use of standards or requirements that materially differ from relevant standards or requirements that the SEC sets or approves.

The SEC's proposed rules would also revise the exemptions to the information and filing requirements of the proxy rules under Rule 14a-2(b). Proxy advisory firms relying on these exemptions would be required to (a) disclose material conflicts of interest in their proxy voting advice; (b) give registrants and certain other soliciting persons an opportunity to review and provide feedback on proxy voting advice before it is issued; and (c) on request, include in proxy voting advice a hyperlink or analogous electronic medium directing the recipient to a written statement that sets forth the registrant's or soliciting person's views on the proxy voting advice. The proposed amendments would permit proxy advisors to require confidentiality agreements for materials exchanged during the review and feedback period. It would also allow proxy advisory firms to rely on the exemptions where failure to comply with the new conditions was immaterial or unintentional. These new amendments would further increase the scrutiny of proxy advisory firm recommendations and give public companies a greater opportunity to challenge adverse advice.

Separately, on November 5, the SEC also proposed rules to update the shareholder proposal process. The proposed rules would increase the minimum thresholds for shareholders to submit and resubmit proposals on corporate ballots. Critics have argued for years that the thresholds required to submit proposals are too low, encouraging frivolous proposals or proposals that only pertain to a small subset of the shareholders. However, others warn against raising the thresholds, worrying that this would silence the voices of small investors. Currently, to get an item on the ballot, an investor must own at least US$2,000 of stock for at least one year. This figure was created in 1998 and has not been adjusted for inflation. The proposed rules would eliminate this threshold and replace it with three potential thresholds: (a) continuous ownership of at least US$2,000 of the company's securities for at least three years; (b) continuous ownership of at least US$15,000 of the company's securities for at least two years; or (c) continuous ownership of at least US$25,000 of the company's securities for at least one year. The proposed amendments would require that a shareholder-proponent using a representative for the purpose of submitting a shareholder proposal provide documentation to make clear that the representative is authorized to act on the shareholder-proponent's behalf. The shareholder-proponent would also need to provide a meaningful degree of assurance as to the shareholder-proponent's identity, role and interest in a proposal that is submitted for inclusion in a company's proxy statement. Additionally, the shareholder-proponent would be required to state that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. The shareholder-proponent would also have to provide contact information and specific business days and times that the shareholder-proponent is available to discuss the proposal with the company.

Currently, shareholder proposals also must win support from 3% of a company's shareholders the first year they are submitted, 6% the second year and 10% the third year they are submitted, all within a five year period. The new SEC proposed amendments would increase these thresholds to 5%, 15% and 25%, respectively. Additionally, a proposal could be barred if it was voted on three or more times in the last five years. This would be despite having received at least 25% of the votes cast on its most recent submission, if the proposal (a) received less than 50% of the votes cast and (b) experienced a decline in shareholder support of 10% or more compared to the immediately preceding vote.

Finally, the SEC's proposed amendments would prevent a shareholder-proponent from submitting more than one proposal at the same meeting. For example, a shareholder-proponent would not be able to submit a proposal on his or her own behalf, as well as on behalf of another shareholder. Likewise, a representative would not be able to submit more than one proposal per meeting, even if he or she were technically submitting a proposal on behalf of multiple different shareholders.

These proposed amendments would add significant accountability and transparency to proxy advisory firms and increase the ability of public companies to monitor and react to the proxy process. Both proposed amendments were passed by a 3-2 vote, with the SEC's two Republican commissioners and one Independent commissioner voting for the proposal, and the commission's two Democratic commissioners voting against. The proposal will now be subject to public comment for 60 days. If enacted, the proposed rules contain a one year transition period to permit proxy advisors to implement the administrative measures needed to comply with the rules.

Key Takeaways

- **Investment Advisors, Proxy Advisory Firms and Public Companies Should Examine Their Policies and Procedures in Advance of the 2020 Proxy Season**

  In light of the increased standards reflected in the SEC release, investment advisors should perform a review of their policies, procedures and practices on a client-by-client basis before the start of the 2020 proxy season. Advisors who only maintain one set of proxy voting policies should consider the ways in which client needs may differ and adjust policies accordingly. While one set of policies is adequate under the SEC release, advisors who wish to maintain only one set should document why the uniform policies are in the best interests of each client. Investment advisors should also create procedures for investigating the proxy advisory firm's policies, their processes for issuing recommendations and the sources of the information used in issuing recommendations. Finally, investment advisors will have to increase their oversight of proxy advisory firms in order to comply with the higher standard of care set forth in the SEC release.

  Proxy advisory firms will also need to establish detailed policies to ensure that their recommendations are materially accurate to avoid liability under Rule 14a-9. They should build policies to ensure that they thoroughly disclose any conflicts of interest. Additionally, proxy advisors will need to develop procedures to ensure that they are adequately disclosing their methodology, sources of information and their standards and requirements in order to comply with the SEC's proposed rules under Rule 14a-9. Proxy advisory firms will also need to create policies allowing time for registrants and others to provide feedback and give their opinions on proxy advice. Finally, proxy advisory firms should consider putting policies in place to satisfy their clients as to the methodologies and information used to develop recommendations.

  Public companies should also take note of the SEC guidance and the effects it may have on the policies of investment advisors and proxy advisory firms. The SEC's assertion that proxy advisory firms may have Rule 14a-9 liability could provide an avenue through which public companies may challenge proxy advisor recommendations it believes are based on inaccurate data or faulty methodologies. The releases and the November 5 vote may also lead to additional disclosure by proxy advisors to issuers and a greater chance for issuers to respond to proxy advice. The new developments in proxy regulations may well lead to greater transparency on the part of the proxy advisory firms, allowing public companies to better analyze the process through which the proxy advisors issue recommendations.

- **The Outcome of ISS's Current Lawsuit Against the SEC Will Affect the Impact of Any New Changes in the Proxy Voting Process**

  It is currently unclear the extent to which ISS's lawsuit against the SEC will impact the effect of its guidance. However, investment advisors, proxy advisory firms and public companies should all monitor the impact of this litigation to determine their proxy obligations in the coming years.

Conclusion

In preparation for the 2020 proxy season, proxy advisory firms will have to take steps to ensure greater clarity in the process through which they issue recommendations and ensure that their procedures are free from material errors. Investment advisors will also need to implement policies ensuring clients that their use of proxy advisory firms are justified, and every vote is being cast in the clients' best interest. The degree to which the SEC guidance will change voting policies or voting recommendations remains to be seen, particularly in light of ISS's pending lawsuit. However, these releases, along with the new November 5 proposed rules, represent a considerable step towards the greater regulation of proxy advisory firms.

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36301/11/19