

SEC Investor Advisory Committee Tackles Availability of Preliminary Voting Tallies

September 23, 2014 | Client Update | 2-minute read

The SEC Dodd-Frank Investor Advisory Committee, established pursuant to Dodd-Frank, has provided notice that it will hold a public meeting on Thursday, October 9, 2014, from 10:00 a.m. until 4:00 p.m. (EDT).

The agenda includes a review of the [recommendations](#) from the Investor as Owner Subcommittee on “impartiality in the disclosure of preliminary voting results.” We have previously discussed the controversy surrounding issuers’ access to so-called interim vote tallies prior to annual meetings, including [here](#). In contested situations, both sides receive preliminary vote results. Currently, those who conduct exempt solicitations, meaning solicitations without a separate proxy card, can receive this information if the issuer agrees, and after signing a confidentiality agreement with the issuer and Broadridge.

The Subcommittee believes that this practice represents selective disclosure that can influence strategy and effect the allocation of resources that benefits only one side in a solicitation, and questions whether it is consistent with Rule 14a-2(a)(1). That rule requires brokers to act impartially when forwarding soliciting materials or requesting proxies, directly or by using intermediaries like Broadridge.

The Subcommittee argues that any confidentiality concerns regarding preliminary voting information can be addressed by requiring all parties, including issuers, to sign confidentiality agreements. Alternatively, impartiality can be maintained by providing that information to no one, or by making it public. The Subcommittee recommends that the requirement of impartiality be extended to the disclosure of preliminary voting information, which, based on the SEC staff’s interpretation of the limited scope of the rule, means that rulemaking would be needed.

The Subcommittee is also concerned that conflict of interests may be present when Broadridge serves as an independent inspector of elections for those votes it collected from brokers, when hired by issuers to validate those same votes. Its second recommendation is for brokers to ensure that conflicts do not arise when the intermediary they use has a business relationship with the issuer. Borrowing directly from conflict concerns regarding ISS, the Subcommittee suggests that the SEC staff consider whether the issue can be addressed through reviewing the intermediary’s procedures and policies.

In addition, the meeting will include a discussion of issuer adoption of fee-shifting bylaws for intra-corporate litigation (which may include presentations by outside experts and/or Commission staff), host remarks from Commissioners, a discussion of a recommendation of the Investor as Purchaser Subcommittee and Investor Education Subcommittee on the definition of accredited investor, an update on possible recommendations of the Market Structure Subcommittee on the settlement cycle and a briefing by Commission staff on municipal finance bond market transparency.

A list of the members is on the [SEC website](#).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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