

# SEC final rules on proxy advisory firms reverse amendments adopted in 2020

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The new rules eliminate the requirement to provide drafts to companies.

When the SEC adopted the rules governing proxy advisory firms two years ago, then-Chair Clayton emphasized that the rules were “the fruits of a rigorous and well-functioning rulemaking process where final rules reflect and benefit from the input of a wide array of market participants with a myriad of interests and perspectives.” Last Wednesday, when the SEC adopted the new rules that repealed much of the prior rulemaking, Chair Gensler stated that the changes were necessary as a result of continued investor concerns that the rules adopted in 2020 imposed risks on “the independence and timeliness of proxy voting advice,” which “are not justified by their informational benefits.”

The 2020 rules never actually went into effect due to the litigation and SEC actions described below. As a result, the 2022 rules, which will become effective 60 days after publication in the Federal Register, will not have much of an impact on the status quo – beyond disappointing companies who had long sought the reasonable reforms adopted in 2020.

## Prior requirements rescinded

**Advance notice to companies and distribution of company responses.** The 2022 rules rescind the requirements adopted in 2020 that the proxy advisory firms must (i) make proxy voting advice available to companies at or before dissemination to their clients and (ii) make available to their clients any written statements from companies in response to the proxy voting advice, such as any disagreements with the advisory firms’ recommendations.

**Note on proxy advisory firm liability.** The 2020 rules made clear that proxy voting advice constitutes proxy solicitation that is subject to liability for material misstatements or omissions. A specific note (Note (e) to Rule 14a-9, the anti-fraud provision) was also included to state that the failure to disclose material information regarding proxy voting advice, “such as the [proxy advisory firm’s] methodology, sources of information, or conflicts of interest,” may be misleading. The note was removed in the 2022 rules.

**Voting guidance to investment advisers.** The 2022 rules rescind supplemental proxy voting guidance to investment advisers that were adopted in 2020 on their use of proxy advisory firms, in particular their reliance on the advisory firms’ electronic voting platforms, which we described in this prior client update.

## Prior requirements retained

**Solicitation continues to be subject to liability.** Proxy voting advice remains subject to liability under the proxy rules. The 2022 rules state that the deletion of Note (e) is not intended to alter the scope of liability or its application to proxy voting advice.

*Conflict of interest disclosure.* Proxy advisers must continue to disclose conflicts of interest.

## **Current state of litigation**

The 2020 rules were originally slated to take effect for the 2022 proxy season. Shortly after their adoption, ISS filed suit against the SEC. In June 2021, Chair Gensler directed the Commission staff to consider revisions to the 2020 rules, and the SEC declared that it would not bring action to enforce the 2020 rules while it conducted its review. Last week, the National Association of Manufacturers publicly announced that it plans to file suit against the SEC to preserve the 2020 rules. The litigation is ongoing and additional litigation may ensue as a result of the new rules.

***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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