Securities and Exchange Commission Issues Supplemental Guidance Concerning Proxy Voting Responsibilities of Investment Advisers

July 24, 2020

In a July 22, 2020 release (the "**Release**"), the Securities and Exchange Commission (the "**SEC**") provided guidance ("**Guidance**") that supplements prior guidance (the "**Prior Guidance**") regarding the proxy voting responsibilities of investment advisers under the Investment Advisers Act of 1940 (the "**Advisers Act**"). The SEC published this Guidance in conjunction with its amendments (the "**Amendments**") to the rules governing proxy solicitations under the Securities Exchange Act of 1934 (the "**Exchange Act**"), which were also referenced in the Release.[1] The Guidance is structured in a question and answer format that resembles the Prior Guidance and will be effective upon publication in the Federal Register.

The Prior Guidance provided additional clarification on the manner in which an investment adviser's fiduciary duty and Rule 206(4)-6 under the Advisers Act apply to an investment adviser's proxy voting on behalf of clients, with a particular focus on where the investment adviser retains a proxy advisory firm. The SEC expects that the Amendments will improve the "mix of information that is available to investors" by providing issuers with access to proxy advisory firm recommendations within a time frame in which such issuers can provide shareholders with additional information that may be material to a voting decision. As such, the Guidance is meant to supplement the Prior Guidance to assist investment advisers in how to consider this additional information in light of their proxy voting responsibilities.

Specifically, the Guidance discusses situations where an investment adviser uses a proxy advisory firm's electronic vote management system to (1) populate its votes on an electronic voting platform with the proxy firm's advisory recommendations based on the investment adviser's voting instructions ("**Pre-Population**") and/or (2) automatically submit the investment adviser's votes to be counted ("**Automated Voting**"). Since Pre-Population and Automated Voting generally occur before submission deadlines for proxy votes, an investment adviser may become aware that an issuer that is the subject of a voting recommendation intends to file additional soliciting materials with the SEC, which set forth the issuer's views regarding the voting recommendation. These updated materials are likely to become available after the adviser has submitted its electronic voting instructions and the voting submission deadline and could have an effect on the investment adviser's voting determinations.

The Prior Guidance discussed how an investment adviser could demonstrate it is making voting determinations in a client's best interest, including steps to take when the investment adviser utilizes the Pre-Population and Automated Voting services of a proxy advisory firm.

In light of the Amendments, the Guidance provides that an investment adviser using Pre-Population and Automated Voting should consider disclosing "(1) the extent of that use and under what circumstances it uses [Pre-Population and A]utomated [V]oting; and (2) how its policies and procedures address the use of [Pre-Population and A]utomated [V]oting" in instances where the investment adviser becomes aware in

[1] Davis Polk is preparing a separate Client Alert discussing the Amendments, which will be published shortly.

the interim period between the Pre-Population and proxy voting submission deadline that an issuer intends to file soliciting materials with the SEC that would be material to a particular matter on which the investment adviser will be voting. Without this disclosure, according to the Release, the client may not have sufficient information to provide informed consent "with respect to the use of [A]utomated [V]oting as a means of exercising voting authority either (a) for purposes of agreeing to the scope of the relationship or (b) as it relates to the investment adviser's obligation, under its duty of loyalty, to provide full and fair disclosure relating to the advisory relationship." With respect to an investment adviser's policies and procedures, the Guidance further notes that an investment adviser should assess its obligations under Rule 206(4)-6 and Form ADV, which require a description of such policies and procedures. Thus, as was the case in the Prior Guidance, the Guidance indicates that the SEC expects investment advisers to review their disclosures and policies and procedures with respect to these matters.

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

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