

⁸See, e.g., Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75414, 75418 (Dec. 1, 2000).

⁹See, e.g., FINRA Rule 5310.

¹⁰See supra note 8.

¹¹See, e.g., Regulation NMS Adopting Release at 37537, note 336.

¹²See Regulation NMS Adopting Release at 37538. “At the same time, however, the Commission recognizes the validity of concerns expressed by commenters with respect to the need for guidance concerning their best execution responsibilities after implementation of Regulation NMS.” See also Regulation NMS Adopting Release at 37538, note 340.

¹³See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018-2022 (Oct. 11, 2018), available at https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf.

¹⁴See Securities Exchange Act Release No. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019).

¹⁵See, e.g., <https://www.prnewswire.com/news-releases/group-of-leading-retail-brokers-financial-services-firms-banks-and-global-market-makers-plan-to-launch-the-only-member-owned-equities-exchange-memx-members-exchange-300773713.html>; <https://www.marketsmedia.com/miax-parent-to-launch-equities-exchange/>.

¹⁶See, e.g., https://markets.cboe.com/us/equities/market_statistics.

¹⁷https://markets.cboe.com/us/equities/market_statistics.

¹⁸https://markets.cboe.com/us/equities/market_statistics.

¹⁹See, e.g., Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019), 84 FR 33669 (July 12, 2019).

SEC/SRO UPDATE: SEC PROPOSES AMENDMENTS TO MODERNIZE BUSINESS, LEGAL PROCEEDINGS & RISK FACTOR DISCLOSURES UNDER REGULATION S-K; SEC CLARIFIES INVESTMENT ADVISERS' PROXY VOTING RESPONSIBILITIES & APPLICATION OF PROXY RULES TO VOTING ADVICE; SEC INCREASES FEE RATES FOR FISCAL YEAR 2020

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SEC Proposes Amendments to Modernize Business, Legal Proceedings & Risk Factor Disclosures Under Regulation S-K

On August 8, the Securities and Exchange Commission (SEC) proposed rule amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosures that

companies are required to make pursuant to Regulation S-K.¹

The proposed amendments would revise Items 101(a), 101(c), and 105 to emphasize a more principles-based approach to disclosure by focusing on information that is material to an investor's understanding of a company's business. The proposed amendment to Item 103 would continue the existing prescriptive approach to disclosure since such disclosure depends less on specific characteristics of companies.

A summary of these proposed amendments is provided below:²

Description of Business—General Development (Item 101(a))

The proposed amendments would:

- provide a non-exclusive list of the types of information that a company may need to disclose to the extent such information is material to understanding the general development of a company's business (including three topics currently covered by Item 101(a)(1)—material bankruptcy proceedings, the nature and effects of any material merger or consolidation of the company, and the acquisition or disposition of any material amounts of a company's assets—and a new topic, disclosure of transactions and events that affect or may affect the company's operations, including material changes to its previously disclosed business strategy);
- eliminate the five-year disclosure timeframe and focus instead on material developments of a company's business, regardless of a specific timeframe; and
- permit a company, after the filing of its initial registration statement, to provide only updated disclosures of material developments of the business in a given reporting period, along with an active hyperlink to the company's most recent filing that would, together with the update, seek to provide a full discussion of the general development of the business.

Description of Business—Narrative Description (Item 101(c))

The proposed amendments would:

- provide disclosure topics drawn from a subset of the topics currently contained in Item 101(c) (*e.g.*, revenue-generating activities, products and/or services, and dependence on key products, services, product families or customers) and new disclosure topics, and clarify that disclosure of such topics would only be required if the information is material to an understanding of the general development of the company's business;
- require, to the extent material, new disclosures regarding "human capital resources," including any human capital measures or objectives that a company's management team focuses on in managing the business, such as, depending on the nature of the company's business and workforce, measures or objectives that address the attraction, development, and retention of personnel; and
- expand the current requirement to disclose the impact of environmental regulations to cover all material government regulations.

Legal Proceedings (Item 103)

The proposed amendments would, among other changes:

- clarify that required information about material legal proceedings may be provided by including hyperlinks or cross-references to legal proceedings disclosure elsewhere in the document (*e.g.*, notes to the financial statements) to avoid repetitive disclosure; and
- increase the threshold for environmental proceedings involving governmental parties from \$100,000 to \$300,000 to adjust for inflation.

Risk Factors (Item 105)

The proposed amendments would, among other changes:

- require a summary of the risk factor section if it exceeds 15 pages;
- replace the requirement to disclose the “most significant” risk factors with “material” risk factors to focus on risk that are important to investors in making an investment decision; and
- require risk factors to be organized under relevant headings, with any risk factors generally applicable to an investment in securities disclosed at the end of the risk factor section under a separate caption, to help investors better understand lengthy risk factor disclosures.

The full proposed rule amendments will be subject to a 60-day public comment period.

SEC Clarifies Investment Advisers’ Proxy Voting Responsibilities & Application of Proxy Rules to Voting Advice

On August 21, the SEC provided guidance (Guidance) that seeks to assist investment advisers in fulfilling their proxy voting responsibilities particularly where the adviser uses the services of a proxy advisory firm.³ The Guidance discusses, among other matters:

- the ability of investment advisers to establish a variety of different voting arrangements with their clients;
- matters that advisers should consider when using a proxy advisory firm; and
- proxy voting disclosures under certain forms used by investment companies subject to the Investment Company Act of 1940, as amended.

The SEC also issued an interpretation (Interpretation) stating that, in the SEC’s view, proxy voting advice provided by proxy advisory firms generally constitutes a “solicitation” under the federal proxy rules. The Interpretation was accompanied by related guidance about the how proxy voting advice is subject to the “Proxy Anti-fraud Rule” codified as Rule 14a-9 under the Securities Exchange Act of 1934, as amended (the Exchange Act).

Guidance: Proxy Voting Responsibilities of Investment Advisers

The Guidance follows a question and answer format and provides examples to help facilitate compliance. Some of the questions raised in the Guidance include:

- *Allocation of Authority and Responsibilities*: How an investment adviser and its client, in establishing their relationship, may agree upon the scope of the investment adviser’s authority and responsibilities to vote proxies on behalf of that client;
- *Documentation of Voting Determinations*: What steps an investment adviser, who has assumed voting authority on behalf of clients, could take to demonstrate it is making voting determinations in a client’s best interest and in accordance with the investment adviser’s proxy voting policies and procedures;
- *Considerations When Hiring a Proxy Advisory Firm*: Considerations that an investment adviser should take into account if it retains a proxy advisory firm to assist it in discharging its proxy voting duties;
- *Awareness of Weaknesses in Proxy Advisory Firm Recommendations*: Steps for an investment adviser to consider if it becomes aware of potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy advisory firm’s analysis that may materially affect one or more of the investment adviser’s voting determinations;
- *Evaluation of Proxy Advisory Firms*: How an investment adviser could evaluate the services of a proxy advisory firm that it retains, including evaluating any material changes in services or operations by the proxy advisory firm; and
- *Scope of Adviser Voting Authority and Requirement to Vote Each Proxy*: Whether an investment adviser who has assumed voting authority on behalf of a client is required to exercise every opportunity to vote a proxy for that client.

Interpretation: Applicability of the Federal Proxy Rules to Proxy Voting Advice

In the Interpretation, the SEC noted that the federal proxy rules apply to any “solicitation” for a proxy with respect to any security registered under Section 12 of the Exchange Act. Under these rules, a “solicitation” includes, among other things, a “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy,” and includes communications by a person seeking to influence the voting of proxies by shareholders, regardless of whether the person itself is seeking authorization to act as a proxy.

Under the Interpretation, proxy voting advice provided by proxy advisory firms generally constitutes a “solicitation” subject to the federal proxy rules. The Interpretation does not affect the ability of proxy advisory firms to continue to rely on the exemptions from the federal proxy rules’ filing requirements. These exemptions, among other things, provide relief from the obligation to file a proxy statement, as long as the advisory firm complies with the exemption’s conditions.

Solicitations that are exempt from the federal proxy rules’ 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. The related guidance explained what a person providing proxy voting advice should consider when considering the information that may need to be disclosed in order to avoid a potential violation of Rule 14a-9 where the failure to disclose such information would render the advice materially false or misleading.

The Guidance and Interpretation each became effective on September 10, the day they were published in the Federal Register.

SEC Increases Fee Rates for Fiscal Year 2020

On August 23, the SEC announced that it is raising the fees it charges public companies and other issuers to

register their securities. In fiscal 2020, which began on October 1, 2019, the fee rates for the registration of securities and certain other transactions will be \$129.80 per million dollars, up from \$121.20 per million dollars last year.⁴

The SEC is required to make annual adjustments to the rates for fees paid under Section 6(b) of the Securities Act of 1933 and Sections 13(e) and 14(g) of the Exchange Act. The rates are set to levels the SEC projects will generate collections equal to annual statutory target amounts calculated using a methodology developed in consultation with the Congressional Budget Office and the Office of Management and Budget.

The projected statutory amount for fiscal year 2020 is \$705 million. Therefore, effective October 1, 2019, the Section 6(b) fee rate applicable to the registration of securities, the Section 13(e) fee rate applicable to the repurchase of securities and the Section 14(g) fee rate applicable to proxy solicitations and statements in corporate control transactions will increase to \$129.80 per million dollars.

ENDNOTES:

¹See SEC Press Rel. No. 2019-148 (Aug. 8, 2019), available at <https://www.sec.gov/news/press-release/2019-148>.

²See SEC Proposed Rule Rel No. 33-10668 (Aug. 8, 2019), available at <https://www.sec.gov/rules/proposed/2019/33-10668.pdf>.

³See SEC Press Rel. No. 2019-158 (Aug. 21, 2019), available at <https://www.sec.gov/news/press-release/2019-158>.

⁴See SEC Press Rel. No. 2019-160 (Aug. 23, 2019), available at <https://www.sec.gov/news/press-release/2019-160>.