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Use of Non-Binding SEC Staff Guidance Called Into Question

December 18, 2018

Recent moves by the SEC could signal a shift away from the use of non-binding guidance in the form of no-action letters or other types of compliance and interpretive information that the SEC staff frequently publishes. In September 2018, the SEC's Division of Investment Management issued an Information Update withdrawing two no-action letters relating to investment advisers' use of proxy advisory firms to help the advisers discharge their responsibility to vote proxies for client securities. The letters, issued in 2004 to Egan-Jones Proxy Services and Institutional Shareholder Services, Inc., assisted investment advisers in demonstrating they were acting in the best interest of their clients when voting proxies in a manner recommended by independent, third-party proxy advisory firms.

The Information Update premised the withdrawal on the SEC staff's desire to "facilitate the discussion" at a scheduled November 2018 "Roundtable on the Proxy Process." However, any such discussion could occur just as easily if the letters had not been withdrawn. The withdrawal appears to reflect some change in the staff's thinking on proxy advisory firms in light of developments during the 14 years since the letters were issued.

The Information Update emphasized that "[s]taff guidance is nonbinding and does not create enforceable legal rights or obligations." However, that point is generally well understood. This language would not have attracted attention if SEC Chairman Jay Clayton had not released a statement that same day on "SEC Staff Views," underscoring the non-binding nature of informal guidance and statements issued by the SEC staff.

Chairman Clayton listed a variety of communications in which SEC staff voice their views on relevant statutes and rules, "including written statements, compliance guides, letters, speeches, responses to frequently asked questions and responses to specific requests for assistance." In particular, he directed the agency divisions to "review whether prior staff statements and staff documents should be modified, rescinded or supplemented in light of market or other developments."

In the past, the SEC staff has not attempted such sweeping reconsiderations of its outstanding informal guidance, and it has withdrawn only a very small proportion of the many no-action letters that were issued. However, the above developments suggest that the SEC staff may, in the future, change or withdraw such non-binding guidance more frequently, which would make it prudent for companies to give less weight to such guidance.

In addition, any winnowing of the SEC staff's outstanding guidance may reduce the overall amount of guidance available. It remains to be seen whether the staff will cut back on the amount of informal guidance it issues in the future.

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