



Investment Management Client Alert |  
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## Proxy Voting Advice Rule: Fifth Circuit Sends SEC Back to the Drawing Board

The U.S. Court of Appeals for the Fifth Circuit vacated and remanded portions of the proxy voting advice rule on June 26 that had been adopted by the U.S. Securities and Exchange Commission in 2020 ([2020 rule](#)) and then rescinded by Chair Gary Gensler's administration in 2022 ([2022 rule](#)).<sup>1</sup> The court held in [National Association of Manufacturers v. SEC](#) that the SEC's rulemaking process to rescind portions of its proxy voting advice rule was arbitrary and capricious and in violation of the Administrative Procedure Act of 1946.

### What Was Vacated

The court vacated and remanded portions of the 2022 rule as they apply to what the court termed the "notice-and-awareness conditions."<sup>2</sup> In particular, the 2020 rule had required that proxy advisory firms provide their voting advice reports to public company issuers at the same time they provided the reports to their clients and also required proxy advisory firms to provide clients access to what public company issuers said about the reports. In adopting the 2022 rule,<sup>3</sup> the SEC [rescinded this portion of the 2020 rule](#) on the basis that it would have adverse effects on the cost, timeliness and independence of proxy voting advice.

### Fifth Circuit Rejects SEC's Rationale for Its Rescission

The court held that, in promulgating the 2022 rule, the SEC failed to explain its decision to disregard prior factual findings and failed to provide a reasonable explanation justifying its reversal. In particular, the Fifth Circuit found that, in reversing its decision two years after the 2020 rule, the SEC was required to provide a more detailed explanation of its decision to disregard its prior findings. Moreover, the court found that the SEC did not adequately explain its concerns about timeliness and independence of proxy advice.

### Key Takeaways

The Fifth Circuit's remand gives the SEC an opportunity to justify its rescission of the notice-and-awareness conditions of the rule. The SEC also could consider requesting an en banc hearing in the Fifth Circuit or an appeal to the U.S. Supreme Court, but both options involve an increasingly hostile environment for the SEC. A [similar challenge to the 2022 rule](#) by the U.S. Chamber of Commerce is also currently on appeal in the Sixth Circuit.<sup>4</sup>

The 2022 rule did not rescind the 2020 codification of proxy voting advice as a form of solicitation within the meaning of the Securities Exchange Act of 1934.<sup>5</sup> However, proxy advisory firm Institutional Shareholder Services [challenged this aspect of the 2020 rule](#), and the U.S. District Court for the District of Columbia held earlier this year that the SEC "acted contrary to law and in excess of statutory

authority when it amended the proxy rules' definition of 'solicit' and 'solicitation' to include proxy voting advice for a fee."<sup>6</sup> The definitions form the basis for the notice-and-awareness conditions of the 2020 rule. The district court's decision is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit.

Practically, it is still unclear whether proxy advisory firms will be required to comply with the notice-and-awareness conditions of the 2020 rule during the 2025 proxy season. The SEC has not yet announced how it plans to proceed and whether it intends to offer additional justifications for the 2022 rule. Moreover, should the D.C. Circuit affirm the district court's determination that "solicit" and "solicitation" do not include proxy voting advice for a fee, it may create a circuit split. In other words, the D.C. Circuit's determination would overturn the definitional rules that require proxy advisory firms, absent an exemption, to comply with the notice-and-awareness conditions that the Fifth Circuit's holding could resurrect. Such a split would be ripe for potential resolution at the U.S. Supreme Court.

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<sup>1</sup> *National Association of Manufacturers v. SEC*, No. 22-51069 (5th Cir. 2024). For more background on the procedural history of the rulemaking, see our [Bloomberg Law article](#) and prior client alerts from [2020](#) and [2022](#).

<sup>2</sup> The court, in reliance on the severability clause included in the proxy voting advice rule, did not vacate and remand the rescission of certain other parts of the 2022 rule. In particular, the court let stand the rescission of the explanatory note to the 2022 rule and supplemental proxy voting guidance.

<sup>3</sup> Proxy Voting Advice, 87 Fed. Reg. 43,168 (July 19, 2022).

<sup>4</sup> *U.S. Chamber of Commerce v. SEC*, No. 23-5409, on appeal from the U.S. District Court for the Middle District of Tennessee.

<sup>5</sup> *National Association of Manufacturers*, No. 22-51069, at n. 3.

<sup>6</sup> *Institutional Shareholder Services v. SEC*, No. 19-cv-3275 (February 23, 2024).