

Recommendations of the Investor Advisory Committee:

Impartiality in the Disclosure of Preliminary Voting Results (October 9, 2014)

Preliminary Observations:

The Investor as Owner Subcommittee (“Subcommittee”) has engaged in considerable analysis of proxy plumbing issues. In connection with issues raised by members of the Subcommittee and through the comment process, the Subcommittee has discussed the role of brokers and banks in the proxy distribution process, as well as their agent, Broadridge Financial Solutions (“Broadridge”).

Aspects of the process have been discussed on numerous occasions with the staff of the Securities and Exchange Commission. In addition, Broadridge received drafts of these recommendations and has had an opportunity to give comments orally and in writing. Broadridge was also invited to, and did appear before, the Subcommittee to discuss these recommendations. Subcommittee members also spoke with staff at Broadridge on numerous occasions. In addition, the Subcommittee heard a presentation from one exempt solicitor. The two recommendations arise out of these efforts.

A. Overview

Most owners of public companies hold their shares through street name accounts.¹ The shares in these accounts are typically registered in the name of a broker, bank, or depository. State law extends voting rights to the registered owner.² Nonetheless, the federal securities laws, in conjunction with the requirements of the stock exchanges, have in place a complex system that guarantees street name owners the right to vote their shares.

Issuers are required to provide brokers and banks with copies of the relevant proxy materials for distribution to beneficial owners.³ Brokers and banks must forward the materials to

¹ Exchange Act Release No. 69622 (May 23, 2013) (“According to the Exchange, over 80% of publicly held securities are in street name today, and NYSE member organizations have contracted with Broadridge, a third-party service provider, to handle almost all proxy processing in the U.S.”). This has been the case at last since the early 1990s. *See* Exchange Act Release No. 45644 (March 25, 2002) (“Since 1993, Automatic Data Processing, Inc. (“ADP”) has distributed close to 100 percent of all proxies sent to beneficial owners holding shares in street name.”).

² Most brokers and banks deposit the shares with the Depository Trust Company and are registered in the name of DTC’s nominee, Cede & Co. DTC, however, typically executes an omnibus proxy in advance of any meeting of shareholders, transferring voting rights to participating brokers and banks. As a result, brokers and banks retain voting rights under state law. *See generally* J. Robert Brown, Jr., *The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility?*, 13 J. of Corp. Law 683 (1988), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=993866

³ 17 CFR §240.14a-13. Alternatively, they must provide the information needed to prepare a notice of Internet availability.

beneficial owners.⁴ The NYSE mandates that brokers include in the materials either an executed proxy card or a voting instruction form (VIF).⁵ Brokers routinely provide the latter.

The VIF is prepared by the broker (or the broker's intermediary)⁶ and is expected to generally duplicate the information contained in the proxy card.⁷ The instructions are returned to the broker and reflected on the proxy card provided to the issuer.⁸ In the event street name owners fail to return the VIF, brokers may vote the shares. The NYSE, however, limits the right to vote uninstructed shares to "routine" matters. Routine matters exclude the election of directors.⁹

In meeting these obligations, brokers almost universally contract out the tasks to a single intermediary, Broadridge.¹⁰ Broadridge prepares the VIF, distributes the proxy materials, and collects the voting instructions.¹¹ Broadridge also executes the proxy as attorney in fact on behalf of brokers.¹²

In uncontested solicitations, issuers and their agents can acquire from Broadridge cumulative voting status information (i.e. voting instructions returned to date) through ICS Online beginning the day after the first distribution of proxy materials.¹³ The service provides

⁴ Rules 14b-1 & 14b-2, 17 CFR §240.14b-1 & .14b-2.

⁵ NYSE Rule 451, available at <http://rules.nyse.com/NYSE/Help/Map/rules-sys471.html>. Rule 14b-2 requires banks to do the same. 17 CFR §240.14b-2.

⁶ See Exchange Act Release No. 55146 (Jan. 22, 2007) ("The request for voting instructions is similar to the proxy card, but is prepared by the intermediary instead of the issuer and the beneficial owner returns his or her voting instructions to the intermediary rather than to the issuer or independent vote tabulator.").

⁷ See Exchange Act Release No. 43487 n. 24 (Oct. 27, 2000) ("The voting instruction form contains the same information as the proxy card with respect to the items presented for security holder vote."). Broadridge notes this fact. See

https://materials.proxyvote.com/Approved/EPLST1/20090501/OTHER_40342/images/Broadridge_Corporate_Issue_r.pdf ("A VIF or 'Voting Instruction Form' is an equivalent of your company's proxy card which is sent to the beneficial shareholders for voting purposes.").

⁸ Exchange Act Release No. 62495 n. 57 (July 14, 2010) ("The securities intermediary, or its proxy service provider, tallies the voting instructions that it receives from its customers. . . the securities intermediary, or its proxy service provider, then executes and submits to the vote tabulator a proxy card for all securities held by the securities intermediary's customers.").

⁹ NYSE Rule 452, available at http://nyserules.nyse.com/NYSETools/PlatformViewer.asp?selectednode=chp_1_5_12_3&manual=%2Fnyse%2Frules%2Fnyse-rules%2F.

¹⁰ Exchange Act Release No. 70720 (Oct. 18, 2013) ("At the present time, a single intermediary, Broadridge Financial Solutions, Inc. . . . handles almost all proxy processing and distribution to beneficial owners holding shares in street name in the United States."). Only one broker apparently distributes proxy materials without the assistance of Broadridge. See Exchange Act Release No. 68936 n. 8. (Feb. 15, 2013) ("The Exchange is aware of one broker-dealer, FOLIOfn Investments, Inc., that provides proxy distribution to its accounts itself, without using the services of an intermediary.").

¹¹ See Exchange Act Release No. 60825 (Oct. 14, 2009) ("The request for voting instructions is prepared by the intermediary and the beneficial owner returns the voting instructions to the intermediary. Broadridge prepares the voting instruction form.").

¹² See *Crown EMAK Partners v. Katz*, 992 A.2d 377 (Del. 2010) ("The banks and brokers then transfer the voting authority to Broadridge, which votes the shares held at DTC by each bank and broker in proportion to the aggregate voting instructions received from the ultimate beneficial owners.").

¹³ Conference Call with Broadridge Officials, March 20, 2014.

“real-time” access to voting results.¹⁴ Broadridge imposes no obligations of confidentiality on issuers with respect to this information. The decision to provide preliminary proxy results is discretionary on the part of Broadridge. Disclosure of the information was designed to “help issuers determine whether they have a quorum. . .”¹⁵

Ten to 15 days before the meeting, Broadridge delivers to issuers an executed proxy card as attorney in fact for each nominee that is a client.¹⁶ Each day thereafter a supplemental vote is provided to the issuer.¹⁷ Two, and sometimes three, votes are issued on the day of the meeting.¹⁸

In contested solicitations, Broadridge provides both sides a contest status report (CSR).¹⁹ The CSR is distributed twice daily. The CSR is not an official vote but contains a spreadsheet that shows the returns for all matters at the meeting.²⁰ Management and challengers both receive identical information, including tallies returned for the other side’s candidates.²¹ In these solicitations, Broadridge as attorney in fact issues official votes for each nominee the day before the meeting, with supplemental votes issued through the closing of the polls.

Exempt solicitations are those where a solicitor sends solicitation materials advocating a position on a shareholder matter but does not distribute its own proxy card. Issuers receive preliminary voting results in the same manner as an uncontested solicitation. As a result, they can obtain real time access through ICS to the information beginning the day after their proxy materials are distributed.

¹⁴ See <http://www.broadridge.com/client-login> (“Secure and convenient access to real-time information such as proxy voting results.”).

¹⁵ Exchange Act Release No. 38406 (March 14, 1997) (“To help issuers determine whether they have a quorum, many brokers currently report a discretionary vote 10 or 15 days before a meeting in accordance with NYSE Rule 451(b)(1), and again at the time of the meeting.”). See also Exchange Act Release No. 38058 (Dec. 18, 1996) (“Without this service, many issuers would need to hire a proxy solicitor to obtain voting estimates. Obtaining the vote from a single source for hundreds of nominees can save the issuer substantial expense, and daily voting updates provide comfort to the issuer as the meeting date approaches.”).

¹⁶ The card can be delivered by fax, mail or over the Internet. Conference Call with Broadridge Officials, March 20, 2014. Internet delivery is through Post-Edge. *Id.* For a description of the service, see <http://www.broadridge.com/advisor-wealth-solutions/practice-management/productivity-tools/postedge-edelivery-archival>

¹⁷ *Broadridge Financial Solutions, Inc. Frequently Asked Questions Regarding the Preparation and Distribution of “Interim Voting Reports”* (“For uncontested solicitations, these reports are typically given beginning 15 days before the meeting that is the subject of the solicitation, with updated reports provided each day up to and including the day of the meeting.”) (Broadridge FAQs).

¹⁸ Exchange Act Release No. 43603 n. 15 (Nov. 21, 2000) (“Finally, on the day of the shareholder meeting, the intermediary must provide a final vote report consolidated across multiple nominee clients.”). Issuers can pay to receive the data on a “real time” basis. <http://www.broadridge.com/corporate-issuer-solutions/registered-beneficial-proxy/voting/vote-reporting> (“Access your mailing and tabulation information in real-time, online at broadridge.com. Our easy-to-use client portal gives you access to your shareowner information through a secure log-in 24 hours a day, 7 days a week.”).

¹⁹ Broadridge distributes the information to anyone identified by the participants in the contest. Conference Call with Broadridge Officials, March 20, 2014.

²⁰ *Broadridge FAQs, supra* note 17 (“For contested solicitations, these reports are typically given beginning on the date of the third party’s distribution of its proxy materials, with updated reports provided to each side twice daily.”).

²¹ Conference Call with Broadridge Officials, March 20, 2014. This is the exclusive source of information during a contested solicitation. ICS Online, which provides issuers with online access to tallies, is unavailable during contested solicitations. *Id.*

Until recently, exempt solicitors (those distributing proxy solicitation materials but not distributing their own proxy card) received the vote status information on the matter or matters subject to the solicitation. The information was provided as an aggregate total, not broken down by nominee. In May 2013, however, Broadridge ceased providing vote status information upon the request of the exempt solicitor. Instead, the information was only provided where authorized by the relevant issuer and subjected to a three party confidentiality agreement (issuer, Broadridge and exempt solicitor) with respect to the information.²²

B. Impartiality

In general, brokers forwarding materials to street name owners are exempt from the proxy rules. Rule 14a-2(a)(1) exempts the behavior so long as certain conditions are met.²³ To qualify for the exemption, a broker cannot be paid a commission and must “promptly” furnish the soliciting materials to the street name owners. In addition, a broker cannot do more than:

impartially instruct the person solicited to forward a proxy to the person, if any, to whom the person solicited desires to give a proxy, or **impartially** request from the person solicited instructions as to the authority to be conferred by the proxy and state that a proxy will be given if no instructions are received by a certain date.²⁴

Examples of behavior not deemed impartial include the transmission of materials promptly for one side and not the other, the selective distribution of proxy materials, and the transmission of the broker’s “own literature” that “relates to the merits of the solicitation. . . .”²⁵ The examples collectively prohibit a broker from engaging in behavior that benefits one side over the other in a proxy solicitation.

The exemption, therefore, contemplates that brokers are exempt from the proxy rules or otherwise not deemed participants where they play only a ministerial²⁶ and impartial²⁷ role in the solicitation process. Moreover, with respect to voting instructions, Rule 14a-2(a)(1) expressly limits brokers to “impartial[] request[s]”. The collection of instructions with an intent to use the information in a partial manner would not qualify as an “impartial request.”

²² Although executed by three parties, the agreement imposes only on the exempt solicitor an obligation to “hold the Vote Information confidential” and to disclose the information to agents only on a “need to know” basis. Public statements “relating” to the information are prohibited.

²³ The requirement has been in place since at least since 1952. See Exchange Act Release No. 4668 (1952).

²⁴ Rule 14a-2(a)(1), 17 CFR §240.14a-2(a)(1) (emphasis added).

²⁵ See Exchange Act Release No. 7208 (Jan. 7, 1964).

²⁶ See Exchange Act Release No. 7208 (Jan. 7, 1964) (“This exemption was based . . . ‘on the assumption that the banker, broker or other person is acting in a ministerial capacity and is not making an independent solicitation from the beneficial owner’”) (quoting Exchange Act Release No. 4668 (Jan. 31, 1952)).

²⁷ See Exchange Act Release No. 7208 (Jan. 7, 1964) (“the exemption will be lost if the firm does not act in an ‘impartial’ manner”).

C. Concerns

Concerns have been raised over the lack of impartiality and the failure to act in a ministerial fashion in connection with disclosure of voting results during an exempt solicitation. In addition, concerns have arisen over possible conflicts of interest in connection with the validation of voting results that could affect the obligation of impartiality.

1. Concerns over the Lack of Impartiality

Selective Disclosure of Preliminary Voting Results. In contested solicitations, Broadridge distributes preliminary voting results to issuers. Likewise, Broadridge distributes the same information to challengers running a competing slate of directors. Neither the issuer nor the challenger is subject to obligations of confidentiality with respect to the information.

In exempt solicitations (those distributing solicitation materials without soliciting a proxy), Broadridge distributes preliminary voting results to the issuer and, until recently, to any exempt solicitor who requested the information.²⁸ Exempt solicitors received results only with respect to the matter subject to the solicitation. Disclosure to the exempt solicitor was informal (sometimes in an email), provided as an aggregate total (not broken down by nominee), and subject to periodic updates.²⁹ Neither the issuer nor the challenger was subject to obligations of confidentiality with respect to the information.

In 2011, Broadridge altered existing practices by conditioning the disclosure of preliminary results to exempt solicitors upon the execution of a two-party confidentiality agreement.³⁰ The same restriction did not apply to issuers or to challengers in a contested solicitation, i.e., to those that furnished a proxy card. As a result, exempt solicitors were subjected to obligations that differed from issuers and other persons who solicited proxies.

In May 2013, Broadridge announced another change in practice following concerns expressed by brokers. Broadridge determined that preliminary results would no longer be provided upon request to any shareholder engaged in an exempt solicitation.³¹ Instead, the information would be provided only upon instructions from the issuer and only after the execution of a three-party confidentiality agreement (among the issuer, Broadridge, and the

²⁸ See *Broadridge FAQs*, *supra* note 17 (defining exempt solicitation as “those solicitations generally not involving the solicitation of a proxy card or otherwise requiring the preparation of a proxy statement, such as a ‘just vote no’ campaign”).

²⁹ Presentation by Michael Garland Assistant Comptroller for Environmental, Social and Governance at New York City Office of the Comptroller, before the Investor as Owners Subcommittee of the IAC, July 10, 2014

³⁰ *Broadridge FAQs*, *supra* note 17 (“Beginning in November 2011, Broadridge began to require that third parties conducting exempt solicitations execute an agreement to maintain the confidentiality of non-public interim voting reports as a condition to receiving such information.”). This apparently occurred as a result of objections from an issuer. Conference Call with Broadridge Officials, March 20, 2014.

³¹ Broadridge has indicated that this change arose as a result of “push back from the brokerage community.” Conference Call with Broadridge Officials, March 20, 2014.

exempt solicitor).³² To date, only one issuer has instructed Broadridge to disclose preliminary voting information to an exempt solicitor.³³

In February 2014, Broadridge released to the media a statement indicating another change in reporting procedures for preliminary voting results, this time in contested solicitations. Under the reported change, Broadridge was to cease providing each side in a contest with the voting results for the other side's candidates. According to the press, Broadridge was "reversing a long-standing policy of sharing information with both sides."³⁴ The policy was not, however, implemented. Broadridge has taken the position with the Subcommittee that the reported change was communicated to the public in error.

Vote with Management Button. Concerns have also arisen with respect to the online platforms used to facilitate the return of instructions by street name and other beneficial owners. Broadridge had in the past included on its voting platforms a button that allowed investors to "Vote with the Board's Recommendations." Rather than vote on each matter individually, investors could simply select this option. Broadridge did not provide a button that would allow owners to vote against the recommendations of the board, viewing the approach as impractical.

After receiving comments from the staff of the Commission, the button was removed from at least one voting platform.³⁵ Broadridge informed clients that it was doing so after being "informed of a new interpretive position taken" by the staff of the Commission that the button could only be included if accompanied by a "Vote Against the Board's Recommendation" button.³⁶ Broadridge removed the option only from ProxyVote.com, the online voting platform used by retail investors, and Mobile ProxyVote.

Observations. These matters illustrate that policies with respect to the collection of voting instructions and the disclosure of preliminary voting information can be applied in a manner that is not impartial. Moreover, the information has strategic value to both sides in an exempt solicitation.³⁷ They also illustrate that existing policies can be imposed for the convenience of, or changed unilaterally following complaints by, particular participants or intermediaries involved in the proxy process. The practices illustrate the need for guiding legal

³² Broadridge views the disclosure issue as a matter between the issuer and the third party and describes its role as "facilitator." Conference Call with Broadridge Officials, March 20, 2014. As a result, Broadridge indicated that it would disclose the preliminary voting information to any person designated by the issuer, whether or not an exempt solicitor. *Id.*

³³ Conference Call with Broadridge Officials, March 20, 2014.

³⁴ See <http://blogs.wsj.com/cfo/2014/02/10/broadridge-backpedals-on-proxy-voting-policy/>

³⁵ The staff raised concerns with the practice after the matter was addressed by the Subcommittee. The guidance was given to all providers of voting platforms.

³⁶ See Keir D. Gumbs, Todd Hamblet, and Kristin Stortini, *Debunking the Myths Behind Voting Instruction Forms and Vote Reporting*, 21 Corp. Gov. 1 (July/August 2013), available at http://www.cov.com/files/Publication/87c02cb1-d867-42d4-ad05-121f1ba7c86b/Presentation/PublicationAttachment/b51c699e-b1a6-4126-91d6-1a882cd4e985/Corp_Gov_Advisor_Article-Voting_Instruction_Forms_and_VIF_Reporting.pdf (stating that position was made by SEC staff member at a conference).

³⁷ Presentation by Michael Garland, *supra* note 29 (representing that preliminary voting tallies useful information in determining whether to allocate additional resources to an exempt solicitation).

principles applicable to these matters that are designed to ensure that policies and practices are applied on an impartial and neutral basis.³⁸

2. Possible Conflicts of Interest

In addition to collecting voting instructions and submitting proxies, Broadridge provides services directly to issuers.³⁹ Moreover, some of these services are connected to the shareholder voting process. These include serving as the tabulator⁴⁰ and the inspector of elections.⁴¹

In addressing the Subcommittee, Broadridge indicated that it serves as tabulator for approximately 1800 public companies. In approximately 15% of those cases, Broadridge also indicated that it serves as inspector of elections.⁴² In a number of cases, issuers describe Broadridge as an “independent” inspector.⁴³ Broadridge represents that it does not serve as tabulator or inspector in contested elections.

³⁸ Concerns have also been raised about Broadridge’s policy of voting the blank portions of partially executed proxies in a manner consistent with management’s recommendations. Letter from James McRitchie, Publisher, Corp. Governance, to Elizabeth M. Murphy, Sec’y, SEC 2 (May 15, 2009), *available at* <http://www.sec.gov/rules/petitions/2009/petn4-583.pdf> (requesting rulemaking to amend Rule 14a-4(b)(1) under Securities Exchange Act of 1934 to prohibit conferring discretionary authority to issuers with respect to nonvotes on the voter information form or proxy). *See also* Christie Nicks, *Voting of Partially Instructed Shares by Brokers*, DU Online Law Rev. (April 2014), *available at* <http://www.denverlawreview.org/online-articles/2014/4/19/voting-of-partially-instructed-shares-by-brokers.html>. Our recommendation does not address this issue.

³⁹ A section of its web site advertises “corporate issuer solutions.” *See* <http://www.broadridge.com/corporate-issuer-solutions>

⁴⁰ As Broadridge describes: “For those Issuers utilizing Broadridge for both the registered and the beneficial portions of their proxy mailings, we provide complete vote tabulation and reporting services. Using Broadridge as your tabulator will ensure that you have fully reconciled and audited vote reports delivered on time on a daily basis covering the registered, beneficial and employee shareholder segments.” Broadridge, Corporate Issuer Services, *available at* https://materials.proxyvote.com/Approved/EPLST1/20090501/OTHER_40342/images/Broadridge_Corporate_Issue_r.pdf. Broadridge indicated that it subjects its tabulation process to a review of a big four accounting firm. Conference Call with Broadridge Officials, March 20, 2014.

⁴¹ As Broadridge describes: “Most states require that a shareholder meeting be attended by an Inspector of Election. Should you require an Inspector, Broadridge can supply an experienced Inspector to attend your meeting.” Corporate Issuer Services, *supra* note 40.

⁴² Broadridge indicated that in approximately 55% of the cases, the issuer serves as the inspector. In the remaining 30%, issuers rely on a third party inspector other than Broadridge. Meeting before the Investor as Owner Subcommittee, IAC, April 10, 2014.

⁴³ McDonalds Proxy Statement, April 11, 2014, at 59, *available at* <http://www.sec.gov/Archives/edgar/data/63908/000119312514140308/d666434ddef14a.htm> (“Our independent inspector of election, Broadridge Financial Solutions, Inc. (Broadridge), will determine whether or not a quorum is present.”); Intel Proxy Statement, April 3, 2014, at 73, *available at* <http://www.sec.gov/Archives/edgar/data/50863/000119312514128308/d673385ddef14a.htm> (“Broadridge Financial Solutions, Inc. has been engaged as our independent inspector of elections to tabulate stockholder votes for the 2014 Annual Stockholders’ Meeting.”); NasdaqOMX Proxy Statement, March 27, 2014, at 9, *available at* <http://www.sec.gov/Archives/edgar/data/1120193/000119312514118705/d657860ddef14a.htm> (“Votes will be tabulated by Broadridge Financial Solutions, Inc., the independent inspector of elections appointed for the meeting.”).

According to the Commission, the “vote tabulator is ultimately responsible for determining that the correct number of votes has been submitted by each registered owner.”⁴⁴ Under Delaware law, inspectors are assigned the responsibility for, among other things, determining the “validity of proxies and ballots,” counting “all votes and ballots,” and certifying the “count of all votes and ballots.”⁴⁵

When serving as an Inspector and perhaps as tabulator, therefore, Broadridge is in a position to determine the validity of proxies from the very same brokers and banks on whose behalf Broadridge submitted proxies. In effect, Broadridge is in the position of examining its own work.⁴⁶

IAC Recommendations:

Recommendation 1⁴⁷

That the staff of the Commission take the steps necessary to ensure that the exemption in Rule 14a-2(a)(1) is conditioned upon the broker (and any intermediary designated by the broker) acting in an impartial and ministerial fashion throughout the proxy process, including the disclosure of preliminary voting information.

Rule 14a-2(a)(1) provides an exemption from the proxy rules for brokers that forward materials to their street name owners. The exemption is premised on an obligation of brokers to act in an impartial and ministerial fashion. In those circumstances, investors do not need the protections of the proxy rules.

Currently, preliminary voting results are selectively disclosed in exempt solicitations. Broadridge provides the information to issuers and only provides the information to exempt solicitors if the issuer consents. Selective disclosure to one side in an exempt solicitation

⁴⁴ Proxy Plumbing Release, Exchange Act Release No. 62495, at 24 (July 10, 2010).

⁴⁵ 8 Del.C. § 231.

⁴⁶ See http://media.broadridge.com/documents/E-webrootprod_pdfs_whitepapers_UniversityDelaware_Report.pdf at 10 (“An inspector of election then certifies the final meeting tally of the tabulator.”).

⁴⁷ The members of the Investor as Owner Subcommittee unanimously supported this proposal; however, some members of the subcommittee expressed concern regarding potential unintended consequences, particularly in light of the shifting governance landscape. By way of example, one subcommittee member raised the possibility that in today's climate of more shareholders running "hard" exempt (e.g., 14a-8) solicitations, disclosing preliminary voting results to shareholder proponents could escalate what were historically ordinary shareholder proposals into mini "proxy contests," perhaps beyond the original intent of 14a-8 and potentially straining corporate resources and occupying managements' time and attention to the detriment of shareholders. The subcommittee member was not proposing to address this or any other potential unintended consequence by opposing the disclosure of preliminary voting results to shareholder proponents. Rather, the subcommittee member would encourage the Commission to consider the recommendations and the potential for unintended consequences in the broader context of proxy plumbing.

provides advantages. The information can influence strategy and effect the allocation of resources.⁴⁸

Even where disclosure may occur, exempt solicitors are subject to restrictions not imposed on issuers. Disclosure to issuers in uncontested solicitations is not conditioned upon an obligation of confidentiality. Exempt solicitors are, however, subject to such an obligation. As a result, issuers can engage in their own “selective” disclosure in order to potentially influence voting. This can include public disclosure or disclosure to particular investors or other participants in the solicitation.⁴⁹

The obligation of “impartiality” set out in the Rule expressly applies to any “request” for voting instructions. Although Rule 14a-2(a)(1) does not expressly reference the disclosure of preliminary voting results, the logic of the exemption dictates that disclosure of the information be subjected to an obligation of impartiality.

First, the entire exemption is based upon the passive and impartial role played by brokers (and their intermediaries) in the solicitation process. Brokers are given an exemption from the proxy rules because their actions do not raise investor concerns. To the extent that they fail to act in an impartial and ministerial manner and engage in activities that benefit only one side in a solicitation, an exemption from the proxy rules is no longer appropriate. In those circumstances, investors need the protections of the proxy rules, including the prohibition on false and misleading statements contained in Rule 14a-9.⁵⁰

Second, Rule 14a-2(a) specifically provides that brokers may only “impartially request from the person solicited instructions as to the authority to be conferred by the proxy and state that a proxy. . .” To the extent that a broker collecting instructions intends to use the information to favor one side over another in a solicitation (whether an exempt solicitation or a contested solicitation), the “request” cannot be viewed as impartial. At a minimum, street name owners would need to know that this would occur and would presumably need to be given the right to

⁴⁸ See Susanne Craig & Jessica Silver-Greenberg, *Shareholders Denied Access to JPMorgan Vote Results*, DealBook, May 15, 2013, available at http://dealbook.nytimes.com/2013/05/15/jpmorgan-voters-are-denied-access-to-results/?_r=0 (“Broadly speaking, the ability to get real-time voting information is crucial for both Wall Street firms and the shareholders sponsoring proposals. A losing side may decide to pour more resources into its campaign, making additional calls or send additional correspondence to shareholders.”). One commenter represented that the exclusive value of preliminary voting information is strategic. See Presentation of Michael Garland, *supra* note 29. According to this speaker, other purposes such as quorum determinations, could be accomplished without a breakdown on individual items. *Id.*

⁴⁹ See *Red Oak Fund, LP v. Digirad Corp.*, CA No. 8559-VCN (Del. Ch. Oct. 23, 2013) (allegations of disclosure of preliminary voting data to a sell-side stock research analyst). Broadridge terminated access by exempt solicitors on May 8, 2013. See Presentation of Michael Garland, *supra* note 29. Press reports after that date indicated that the market was informed of vote tallies. See JP Morgan’s Jamie Dimon in shareholder revolt over role, BBC News, May 20, 2013 (“Support for the proposal is running at just over 40%, according to Dow Jones.”), available at <http://www.bbc.com/news/business-22594796>

⁵⁰ 17 CFR §240.14a-9. In *Red Oak Fund, LP v. Digirad Corp.*, CA No. 8559-VCN (Del. Ch. Oct. 23, 2013), the preliminary voting information circulated by Broadridge incorrectly (although through no fault of Broadridge) reported votes for treasury shares held by the company. To the extent that anti-fraud provisions in the proxy rules were applicable to the preliminary voting information, an obligation to ensure that the information was complete and accurate could be applicable in certain circumstances.

object to the disclosure of their preliminary voting information on a selective basis.⁵¹ Moreover, awareness could affect the decision to vote or the timing of a beneficial owner's voting decision.⁵²

The failure to act in an impartial manner with respect to the disclosure of preliminary voting results cannot be justified based upon a need for confidentiality.⁵³ Voting instructions entail an exchange of information between brokers (or their designated intermediary) and street name or other account holders. They do not, therefore, implicate any confidentiality rights of issuers. With respect to the privacy of brokers and beneficial owners, Broadridge discloses voting tallies in exempt solicitations only in an aggregate form. The information does not, therefore, identify the relevant broker or include personally identifiable information of beneficial owners.⁵⁴

The alleged need for confidentiality is also inconsistent with the actual practices of Broadridge in other circumstances. Issuers receiving preliminary voting results are not subject to confidentiality obligations. In contested solicitations, Broadridge discloses to challengers the tallies received by issuers and to issuers the tallies received by challengers. Broadridge, therefore, does not treat responses to the issuer or challengers as confidential in these circumstances.⁵⁵

⁵¹ This is analogous to the rights of beneficial owners in the shareholder communication rules. See Rule 14b-1(b), 17 CFR 240.14b-1(b) (brokers may disclose the identity of beneficial owners “who have not objected to disclosure of such information”).

⁵² The staff has taken the position that “impartiality” applies only to the forwarding. See Letter from Keith L. Higgins, Director, Division of Corporation Finance, SEC, to Jeff Mahoney, General Counsel, CII, June 25, 2014 (“The staff believes that the rule’s impartiality requirement is intended to govern only the way that brokers instruct solicited persons to forward a proxy or request from the solicited persons their voting instructions.”), available at http://www.cii.org/files/issues_and_advocacy/correspondence/2014/06_25_14_SEC_response.PDF. Thus, extending the requirement of impartiality to “disclosure of preliminary voting information” would require rulemaking. The position taken by the staff did not, however, discuss whether brokers have a duty at the time of the solicitation of instructions to inform shareholders about the possibility of selective disclosure and obtain from those shareholders a right to object to the disclosure of the information. The position taken by the staff likewise did not discuss whether, to the extent disclosure was not subject to the exemption, the act was, as a result, subject to the requirements of the proxy rules.

⁵³ Broadridge has indicated that it ceased disclosing information to third parties in exempt solicitations “after learning that the confidentiality of this information was of concern to its broker-dealer and bank clients and because the provision of interim voting reports is not otherwise required by any applicable regulatory obligation.” *Broadridge FAQs*, *supra* note 17.

⁵⁴ At the time the Commission proposed to require the disclosure of “preliminary voting results,” a number of commentators objected. None of them appear to have based their opposition on the need for confidentiality. See Exchange Act Release No. 61175 (Dec. 16, 2009) (noting concerns that disclosure of preliminary voting results “could mislead investors if the definitive results reflect a different outcome than what was disclosed initially” and could “inadvertently influence voting if the disclosure is made at a time when the opportunity remains open for additional votes to be cast”).

⁵⁵ Brokers (and their intermediaries) have also effectively waived any confidentiality concerns. The rules of the NYSE compensate brokers for the disclosure of preliminary voting results. Exchange Act Release No. 41177 (March 16, 1999) (nominee coordination fee provides compensation for, among other things, the “tabulation and dissemination of preliminary voting information”). The acceptance of the fees, therefore, amounts to an acknowledgement that preliminary voting information will be disclosed. This can be seen from the decision to selectively disclose preliminary voting results to issuers without any accompanying obligation to maintain the confidentiality of the information.

To the extent any residual concern over confidentiality exists, they do not justify the selective disclosure of preliminary voting results to issuers. Instead, impartiality and any need for confidentiality can be addressed by requiring disclosure to all persons undertaking a solicitation and conditioning disclosure on the execution of a confidentiality agreement.⁵⁶ Alternatively, impartiality can be guaranteed by denying access to preliminary voting results for all persons distributing solicitation materials or by requiring public disclosure of the information.

The staff of the Commission should, as has been requested, provide “clear rules of the road”⁵⁷ specifying that the obligation of impartiality in Rule 14a-2(a) extends not only to the distribution of proxy materials and the request for voting instructions, but also to the disclosure of preliminary voting information.

Doing so would not only ensure a basic fairness with respect to the proxy process but would also promote the integrity of the voting process. Disclosure of preliminary voting information can provide a mechanism to help ensure the accuracy of the tabulation process.⁵⁸ In at least one example provided to the Subcommittee, an investor conducting an exempt solicitation raised with the SEC “substantial and difficult to explain discrepancies between preliminary and final vote tallies” in a contested election for directors.⁵⁹ The company subsequently filed an amended report containing updated tallies that were less favorable to the elected directors.⁶⁰

The staff should specifically state that the obligation to solicit instructions on an impartial basis does not allow brokers (or their intermediaries) to do so with the awareness or expectation that the voting information will be provided to only to one side in a contested or exempt solicitation. Impartiality could be met through the denial of such information to all parties in a contested or exempt solicitation. The Subcommittee believes, however, that the staff should express a preference for disclosure on identical terms to all parties who distribute proxy materials.

⁵⁶ Any such confidentiality agreement should treat all parties equally, including both restrictions on disclosure and rights to enforcement.

⁵⁷ Letter from Senator Schumer to Chair Mary Jo White, May 23, 2013, *available at* <http://www.sec.gov/comments/sr-nyse-2013-07/nyse201307-32.pdf> (calling for the Commission “to take any necessary action to ensure that proxy services providers such as Broadridge have clear rules of the road with respect to the dissemination of voting tallies and other material disclosures in connection with proxy solicitations.”).

⁵⁸ To the extent that preliminary and final results differ in any significant manner, they may illustrate problems in the collection or tabulation of voting instructions. In *Red Oak Fund, LP v. Digirad Corp.*, CA No. 8559-VCN (Del. Ch. Oct. 23, 2013), the final vote totals differed from preliminary voting data because of the erroneous inclusion of treasury shares. In 2009, a significant error was made with respect to the tabulation of voting instructions with respect to the election of directors at Yahoo. Published reports indicated that the matter came to the attention of Broadridge after a large shareholder suggested that the tallies did not include his results. See Kara Swisher, *Broadridge to Yahoo: Oops, We Added Wrong (and Shareholders Like you Lots Less)!*, August 5, 2008, *available at* <http://allthingsd.com/20080805/broadridge-to-yahoo-oops-we-added-wrong-and-shareholders-like-you-lots-less/>

⁵⁹ A copy of the letter was distributed at a meeting of the Subcommittee held on July 10, 2014.

⁶⁰ In the original report, for example, one director was shown as having 37,772,632 votes for and 30,453,413 against. In the amended report, these tallies were changed to 36,864,752 for and 33,360,699 against. See Current Report on Form 8-K filed by Massey Energy, May 21, 2010, *available at* <http://www.sec.gov/Archives/edgar/data/37748/000119312510126329/d8k.htm>; Amended Current Report on Form 8-K filed by Massey Energy, Nov. 5, 2010, *available at* <http://www.sec.gov/Archives/edgar/data/37748/000119312510249789/d8ka.htm>.

Recommendation 2

That the staff of the Commission take the position that any broker relying on the exemption from the proxy rules in Rule 14a-2(a)(1) that uses an intermediary to fulfill the requirements of impartiality under Rule 14a-2(a)(1) take reasonable steps to verify, based upon all the relevant facts and circumstances, that the intermediary will act in an impartial fashion and is not subject to impermissible conflicts of interest that impair the ability of the intermediary to act in an impartial manner.

Brokers seeking to remain exempt from the proxy rules during a solicitation have an obligation to act in an impartial manner. Brokers collectively rely on a single intermediary to forward proxy materials to street name owners, collect voting instructions, and disclose preliminary results. As an agent, the intermediary is subject to the same obligations of impartiality imposed on brokers. In order to ensure that this obligation is met, the staff should clarify that brokers must take reasonable steps to ensure that the designated intermediary will act in an impartial fashion.

Steps taken by the brokers should include consideration of any conflicts of interest by the intermediary that may impair impartiality. Conflicts can arise where the intermediary has a business relationship with an issuer soliciting proxies. Conflicts can also arise where the intermediary is paid by the issuer to tabulate and certify proxies, including proxies submitted by the intermediary.

Brokers can presumably fulfill these responsibilities on a case-by-case basis. In addition, the staff should consider whether brokers can address the issue through a “thorough review” of the intermediary’s “conflict procedures and the effectiveness of their implementation . . .”⁶¹ Appropriate procedures and policies can include firewalls that separate relevant functions and prevent specified employees “from obtaining access to information about the firm’s business relationships with Issuers” and “insulate those persons from direct or indirect influence by the firm’s employees who know of those relationships.”⁶²

⁶¹ See Institutional Shareholder Services, Inc. (Sept. 15, 2004) (ISS Letter), available at <http://www.sec.gov/divisions/investment/noaction/iss091504.htm>

⁶² ISS Letter, *supra* note 61 (“when assessing a proxy voting firm’s conflict procedures, an investment adviser should consider whether the procedures effectively (a) preclude the natural persons who make the firm’s proxy voting recommendations from obtaining access to information about the firm’s business relationships with Issuers and (b) insulate those persons from direct or indirect influence by the firm’s employees who know of those relationships.”).