

Via Email

October 24, 2019 (*incorporating October 25, 2019, correctionsⁱ*)

The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
c/o Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. 4-725 Proxy Advisor Regulation

Dear Commissioners:

This letter follows up on October 15, 2019, correspondence from the Council of Institutional Investors (CII) to you concerning regulation of proxy advisory firms.ⁱⁱ We are writing today to more specifically discuss the lack of evidence of pervasive factual inaccuracies in proxy advisors' reports.

CII is a nonprofit, nonpartisan association of U.S. asset owners, primarily pension funds, state and local entities charged with investing public assets and endowments and foundations, with combined assets of \$4 trillion. Our associate members include non-U.S. asset owners with more than \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management. CII members share a commitment to healthy public capital markets and strong corporate governance.ⁱⁱⁱ

Evidence on Pervasive Errors is Lacking

As we indicated in our October 15 letter, the Commission appears to be acting to create new regulatory requirements for proxy advisory firms based in significant part on the view that there is a market failure as evidenced by claims of pervasive (or endemic or systematic) factual inaccuracies in proxy advisors' reports. However, as we wrote in our earlier letter, "the paucity of evidence of systematic factual errors by proxy advisors suggests that, in fact, the opposite is true."

While most assertions of pervasive proxy advisor inaccuracy are mere assertions and entirely undocumented^{iv}, we have seen some attempts to provide evidence. But that **evidence on accuracy is extraordinarily weak, and clearly an insufficient basis for rulemaking**. We believe that the SEC should not regulate proxy advisors in the absence of good evidence. **The**

SEC itself should develop reliable, meaningful evidence on this question before moving forward with any additional new regulation.

We submit that advocates of proxy advisor regulation base their case importantly on allegations of pervasive inaccuracy in proxy advisor reports. But they have not provided evidence that stands up to any scrutiny, as we detail below. Before the SEC proposes further rulemaking, it should do its homework to establish the predicates for regulation.

Groups representing corporate CEOs and other executives have used the drumbeat of allegations of pervasive inaccuracies in particular to persuade the SEC to require pre-clearance of reports with company executives, and to require proxy advisors to hand over a portion of their reports or web sites to management of the companies subject to their reports.

Like other humans, proxy advisory firm employees do make errors. Some of those errors derive from mistakes by companies in their own public documents (and of course it is to be expected that company managers also will make mistakes). ISS and Glass Lewis aggressively seek to correct errors, and the actual error rates, at least in recent years, appear to be low. In saying this, we observe that most allegations of proxy advisor “error” made from subjects of the reports actually appear to be analytical disagreements. Many of those involve difficult analysis of executive pay, a challenging subject given complexity of U.S. executive pay structures.

Misinformation from American Council on Capital Formation Study

An October 2018 study by the American Council on Capital Formation (ACCF) is the only study on alleged inaccuracies we see cited in recent letters to the SEC.^v We believe the ACCF study is highly inaccurate and otherwise flawed, and is not a reliable basis on which to impose new regulation. The study summarized 139 purported “proxy advisor errors” as documented in 107 supplemental proxy filings by U.S. companies in 2016, 2017 and most of 2018.

The ACCF study cited supplemental proxy filings challenging ISS and Glass Lewis; there were no references to Egan-Jones or other proxy advisors. ACCF says it identified 39 “factual errors,” 51 “analytical errors,” and 49 “material disputes,” the latter defined as disputes “over the appropriateness of ‘one-size-fits-all’ and other methodologies used by the proxy advisor.”

For perspective, during this period, ISS reported on 15,646 shareholder meetings at U.S. operating companies, and Glass Lewis reported on 16,184 U.S. company shareholder meetings. All or virtually all reports involved multiple issues, and some are fairly detailed and lengthy. So even if the claim that 139 reports (0.4%) contained one or even a handful of errors was accurate, the number is small.

And from our review of the filings that ACCF references, **it is clear that most of the claimed “errors” actually are disagreements on analysis and methodologies, and that some other alleged proxy advisory firm errors derive from errors in the company proxy statements. Finally, in some cases, ACCF simply misstates what the company said.** We think ACCF has documented no more than 18 reports with factual inaccuracies that can be blamed on proxy advisory firms, not the 39 that it claims.^{vi}

The ACCF research is based on public filings by companies, and we would expect that there are other undocumented errors. But for the SEC to impose a costly new regulatory structure that will constrain competition based either on (1) claims of error utterly lacking in documentation; or (2) a factual error rate on a report basis of 0.057% to 0.123% (18 to 39 reports with one or more factual errors in 31,830 reports) is completely unsupportable.^{vii}

ACCF is overstating the proxy advisor “error” rate due to its own mistakes and those of companies alleging proxy advisor errors. We should note that while ACCF characterizes its report as summarizing and counting proxy advisor errors, the report actually counts reports with errors, and then counts whether there are any “factual errors” and/or “analytical errors” and/or “material disputes”. One report then can count as many as three times.

ACCF says that the filings by company management alleging proxy advisor errors are “reliable,” which seems to presume accuracy in the allegations without exploring the claims, even though the subjects include executive pay, on which the executives who control the company filings might be thought to have some bias.

Arguably, there may be particular reasons to indicate potential for management bias where ACCF discusses disagreements over methodology and analysis, as opposed to factual errors.

The very first citation in ACCF’s list is misguided in its claims of analytical error: Kirby Corporation argued that ISS and Glass Lewis findings in 2016 that director nominee William Waterman was not independent was unwarranted, because he was classified by the company as independent under NYSE standards. ACCF labeled this as an “analytical error.” ACCF’s claim is itself simply inaccurate with regard to Glass Lewis, which got no complaint from Kirby. ACCF is correct that ISS opposed Mr. Waterman, but ISS did so, given his independent committee membership, under its own, clearly articulated standard for director independence, and indicated clearly that the board considered Waterman independent under stock exchange standards. (Investors have varying views on appropriate standards for director independence, but most do not feel under any requirement to defer to stock exchange standards when deciding how to vote on a nominee.) Mr. Waterman had been CEO of an entity acquired by Kirby four years earlier; ISS policy provides a five-year look-back period before it considers a former officer, including of an acquired entity, to be independent. In line with ISS policy, ISS did not regard Waterman as independent in light of his prior role. On this item, ACCF could be said to have made a factual mistake on the Glass Lewis recommendation, and an analytical mistake in characterizing the ISS report as an error.

Most or all of the other “analytical errors” and “material disputes” cited by ACCF similarly are debates about analysis and conclusions. Management at all the companies cited responded to the proxy advisory services and debated the points. In truth, there is little debate on most proxy voting items. But **where there are differences of opinion, it is not clear why debate should be suppressed or analysis bottlenecked or proxy advisors pressured by government regulation to render a default judgment in favor of management views.**

Let's turn to factual errors. Advocates of government regulation of proxy advisory firms tend to realize that it is problematic for government to dictate methodologies, and so focus their rhetoric on alleged endemic factual errors by proxy advisors. But based on CII review of all the alleged errors, the evidence is just not there. Overall, ACCF asserts that companies have filed supplemental proxy materials documenting 39 reports with factual errors. However, **by our count ACCF alleges that 44 proxy reports have factual errors (34 by ISS and 10 by Glass Lewis).**^{viii} **Of these, no more than 17 of the ACCF claims appear to have merit.**

Of these purported factual errors, the ACCF analysis is incorrect, on our analysis, on at least 17 of the alleged reports.^{ix} In an additional eight cases, factual errors in proxy advisor reports appear to be the result of mistakes or very confusing disclosure in company proxy filings.^x With regard to the latter, we would make a point that may be obvious but that unfortunately apparently needs to be stated: Investors anticipate that they and their advisors should be able to rely on company SEC disclosures. It is unreasonable for ACCF and other groups representing company executives to criticize proxy advisors for relying on corporate SEC reporting.

Other Allegations of Endemic Inaccuracy on the Part of Proxy Advisors

We reviewed the 290 letters to the SEC as of October 17, 2019, in File No. 4-725, "Comments on Statement Announcing SEC Staff Roundtable on the Proxy Process."^{xi} Many letters concern other elements of proxy voting, and do not comment on proxy advisors. Among letters from company managers and their advocacy groups, we found a number that asserted pervasive inaccuracy by proxy advisory firms, but with little in the way of evidence. The most prevalent evidence offered is the ACCF report, described above. Other letters in which we identified assertions that could be construed as evidence are discussed below.

In a June 3, 2019, letter, Business Roundtable (BRT) Senior Vice President and Counsel Maria Ghazal alleged inaccuracy in proxy advisor reports based on surveys of BRT's CEO members.^{xii} However, unlike ACCF, the BRT does not provide any transparency on its members' allegations, so we cannot verify or challenge them. We think it is likely that methodological differences are characterized as "errors," particularly as many of the complaints relate to proxy advisor analysis on executive pay, and the BRT letter indicates that, "Executive compensation, in particular, is an area in which proxy advisory firms' analysis often falls short." Investor clients retain proxy advisors in part to report critically on executive compensation plan design, practices and outcomes, and we would anticipate that CEOs would not always welcome analytical frameworks or criticism of their pay.

National Investor Relations Institute (NIRI) President Gary A. LaBranche sent a letter to the SEC on April 30, 2019, indicating that 66% of respondents in a NIRI August 2018 member survey "said they had noticed factual errors or misunderstandings in their company's (or client's) proxy reports since June 2014." NIRI provides no more information on the criticisms in its letter.^{xiii}

J.W. Verret, Professor of Law at George Mason Law School, submitted a letter on April 13, 2019. The letter includes an appendix by Spectrem Group that among other things discusses aspects of proxy advisory firm accuracy. This commentary begins by citing the flawed ACCF

study. The Spectrem study claims that 36% of retail investors surveyed “were familiar with proxy advisor report errors prior to the survey.” Spectrem finds that 82% of retail investors responding to a survey expressed concern on errors in proxy advisor recommendation reports. Some 31% were “very concerned,” 31% were “moderately concerned,” and 20% were “slightly concerned.” Other than the ACCF report, there is no actual documentation of errors, and little indication of how retail investors surveyed (who generally are not clients of proxy advisory firms) had sufficient knowledge to allege report errors.

Bernard S. Sharfman on March 10, 2019, submitted an article noting that “many critics of proxy advisors argue that a significant number of their voting recommendations incorporate various types of data, analytic, and methodological errors,” but it cites only to a 2011 law firm memo that does not actually provide evidence of errors.^{xiv}

National Association of Manufacturers (NAM) Vice President Chris Netram sent a letter to the SEC on Oct. 30, 2018, charging that “proxy firm reports and recommendations feature a profusion of errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company’s peer group or compensation practices.”^{xv} The only evidence Netram provided for this sweeping allegation was the flawed ACCF study. Netram wrote again to the SEC on March 5, 2019, arguing that the Commission should consider several actions, including required pre-publication review of reports by management of subject companies, “especially” in light of the ACCF study, but again providing no other evidence.^{xvi}

Braemar Hotels and Resorts Executive Vice President, General Counsel and Secretary Robert G. Haiman wrote to the SEC on Nov. 27, 2018, with specific allegations of errors in an ISS report on a proxy fight at the company. His claims appear to have merit. Haiman notes that ISS corrected the report and changed its recommendation after the company filed an 8-K providing more detail on the resignation of two directors. He criticizes ISS on multiple grounds, including that the company was not provided an opportunity to review the report.^{xvii}

NASDAQ General Counsel, North America John A. Zecca wrote to the SEC on Nov. 14, 2018, on many aspects of the proxy process. Attached to the letter is a survey sponsored by NASDAQ and the U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness, that the sponsors said had 165 company respondents.^{xviii} The survey report indicates that 39% of respondents “believed that proxy advisory firms carefully researched and took into account all relevant aspects of the particular issue on which it provided advise,” but it is not clear whether that means 61% said this was not the case, or whether some number of survey respondents did not answer pro or con to that question. In any case, it can be expected that at times company executives will hold different views on some matters – notably their own compensation, the subject of a major portion of company complaints about proxy advisors as judged by supplemental proxy filings – than an independent outside analyst. In his letter, Zecca also reports that one company claims a proxy advisor “based its recommendations on an erroneous and incomplete understanding of the relevant facts,” and that the proxy advisor responded in some part by seeking to sell advisory services to the company. But Zecca does not name the company. He did say he would make more specific information available to SEC staff on request.

U.S. Chamber of Commerce Center for Capital Markets Competitiveness Executive Vice President Tom Quaadman sent a letter to the SEC on Nov. 12, 2018, basing claims of inaccuracy at proxy advisors on the NASDAQ/Chamber report mentioned above and a compilation of supplemental proxy filings in 2016-2018 detailing alleged issues at certain companies, contained in an appendix to his letter.^{xix} The appendix does not appear with Quaadman's letter on the SEC web site; we suspect it is the same or very similar compilation as the flawed and inaccurate ACCF study.

Center on Executive Compensation Chief Operating Officer Henry Eickelberg sent a letter to the SEC on Nov. 12, 2018.^{xx} He claimed that proxy advisory firms "have a propensity for errors and inaccuracies within both draft and final reports." His only evidence for this was a 2014 survey of Center on Executive Compensation "Subscribers". He said that "of those responding" (no number provided) 55% said a proxy advisory firm had made one or more mistakes in a final published report on the company's compensation program.

Society for Corporate Governance CEO Darla Stuckey sent a letter to the SEC on Nov. 9, 2018. While implying a widespread problem of errors in proxy advisor reports, she cites just two examples involving alleged material factual errors at one unnamed small-cap company. The company is said to have claimed that ISS incorrectly reported in 2016 that a financial metric goal for 2015 was lower than actual results in 2014. The company also said that ISS in 2017 had an error regarding its perquisite program, but this is not explained. Without more information, it is not possible to evaluate the unnamed company's claims.

Luke Johnson of Risk Capital Partners wrote to the SEC on Sept. 12, 2018, asserting that ISS staff are "bungling, box-ticking hypocrites who tried to kick me off a board." He describes an ISS recommendation against him for a U.K. small-cap board that was based on a policy disagreement. He implies other reasons for ISS opposition to his election, but does not say what they were.

Opportunity for Public Comment is Important

The Commission did not believe it was necessary to provide evidence on market practices in issuing its August 15, 2019, "Interpretation and Guidance Regarding the Applicability of the Proxy Rules" (Interpretation and Guidance), which was done without benefit of any public comment period or any analysis of economic impact.^{xxi} We understand the Commission understood that document as mere interpretation of existing rules. However, in our view the Interpretation and Guidance plowed new ground (which we imagine is part of the reason the SEC put the label "guidance" on the document). Even without further rulemaking, the Interpretation and Guidance shifts the landscape, as it puts a bullseye on the backs of proxy advisory firms for litigation threats. We think a final Interpretation and Guidance would have benefited from likely input the SEC would have received (e.g., is non-recommendation advice covered?; should there be a small firm exemption?). And impact of the Interpretation and Guidance itself on competition should have been evaluated. As proxy advisor Egan-Jones pointed out in a comment letter, a regulatory apparatus may put smaller providers out of business; we would add that it will be a formidable barrier for entry to new entrants.^{xxii}

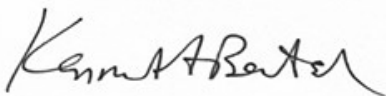
Within a plain English meaning of “solicitation,” of course, the clients of proxy advisory firms are soliciting research and, in some cases voting recommendations, from the proxy advisory firms, whereas the SEC analysis is based on the presumption that the firms are soliciting voting outcomes from their clients. That alone would be reason for some caution and for at least minimal economic analysis and a comment period before the Commission precipitously moved ahead with its “Interpretation.” The 2010 SEC Concept Release on proxy plumbing arguably came close to the new Commission Interpretation, in asserting that “some of the activities of a proxy advisory firm can constitute a solicitation, which is governed by our proxy rules.”^{xxiii} But that was in a concept release, not an interpretation, and is less definitive than the Interpretation and Guidance. We believe proxy advisory firm work can be distinguished from broker proxy voting recommendations to clients, the closest analogy cited by the Commission in taking the new step of the Commission definitively slapping the “solicitation” label on proxy voting research and recommendations. At a minimum, the SEC should have given the public an opportunity to make that case.

We are confident that should the Commission propose rule amendments related to proxy advisory firms’ reliance on proxy solicitation exemptions, a generous period and framework for comment on the new rules will be provided. But, in addition, the Commission clearly should base any such proposal on real evidence as well as careful analysis of costs and benefits.

To summarize, evidence of pervasive proxy advisor inaccuracy is extraordinarily weak. Executives who see negative recommendations on their pay or other matters can be expected to be unhappy, and in that context it is surprising that company managers and their lobbyists have produced so little evidence of inaccuracy. **If the SEC intends to impose a new regulatory structure on proxy advisory firms, it needs to develop evidence, not just leave it to assertions by the subjects of proxy advisor analysis.**

If you have any questions on this letter or need additional information, please do not hesitate to contact me at [REDACTED] or [REDACTED].

Sincerely,



Kenneth A. Bertsch
Executive Director

CC: Dalia Osman Blass, *Director, Division of Investment Management*
William H. Hinman, *Director, Division of Corporation Finance*
Rick Fleming, *Investor Advocate*

ⁱ The original version of this letter had its own errors, incorrectly including (1) one company in footnote ix that we believe should be in footnote x; and (2) a miscount on CII analysis of ACCF factual errors. We found the errors on October 25 and corrected them in this version.

ⁱⁱ Letter from Kenneth A. Bertsch, on behalf of CII, and representatives of 60 other investors and investor organizations, October 15, 2019, available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/201910015proxy_advisor_sign_on_final.pdf.

ⁱⁱⁱ For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at https://www.cii.org/about_us. We note that the two largest U.S. proxy advisory firms, Glass Lewis & Co. and Institutional Shareholder Services Inc. (ISS), are non-voting associate members of CII, paid an aggregate of \$37,000 to CII in 2019, less than 1% of CII’s revenues. In addition, CII is a client of ISS, paying approximately \$19,600 annually to ISS for its proxy research.

^{iv} See, e.g., letter from the U.S. Chamber of Commerce Center for Capital Markets Competitiveness (the “Center”) to the U.S. Department of Labor, September 19, 2019, at http://www.centerforcapitalmarkets.com/wp-content/uploads/2019/09/9.20.19-CCMC_ProxyAdvisors_DOL.pdf?# (referencing unnamed “reports” that “proxy firms...often use inaccurate information when making voting recommendations”). The only citation that may support this allegation comes later in the letter, when the Center cites to a source that it says has documented “concerns about competency” at Institutional Shareholder Services (ISS) and Glass Lewis. But the study referenced – a 2013 report by the Mercatus Center at George Mason University – makes assertions but does not actually document errors, and was co-authored by an individual who according to LinkedIn now chairs Egan-Jones, another proxy advisory firm that competes with ISS and Glass Lewis and escapes criticism in the Center’s letter.

^v Frank M. Placenti, “Are Proxy Advisors Really A Problem?”, American Council for Capital Formation, October 2018, at http://accfcorgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf. In this letter, we examine the detailed ACCF information on which Placenti’s report is based, which is available at http://accfcorgov.org/wp-content/uploads/2018/10/Analysis-of-Proxy-Advisor-Factual-and-Analytical-Errors_October-2018.pdf.

^{vi} The proxy advisor corrected most of the bona fide errors described after the company filed supplemental proxy materials.

^{vii} By way of comparison, *The Wall Street Journal* noted 17 factual corrections in the *Journal* in one week, which appears typical. *The Wall Street Journal*, “Corrections and Amplifications” for the editions of Oct. 10, 2019 through Oct. 18, 2019.

^{viii} A few companies in a single filing are alleged to criticize both ISS and Glass Lewis.

^{ix} The initial version of this letter presented a slightly different count, due to an error by CII on one company and difficult assessing in some cases which firm (ISS or GL) was ACCF thought made a factual error. ACCF reports company-by-company, but for many examples it is not clear what ACCF regards to be a “factual error.” For purposes of this footnote, we tried to focus on what appears the best basis for a claim of factual error by ACCF on a given company report, and a given case may or may not include both ISS and Glass Lewis. We believe that ACCF was incorrect in asserting factual errors in the following proxy advisor reports: **(1) Gulfport Energy, 2016:** ACCF reported that ISS was factually incorrect in stating that the company used discretionary bonuses for named executive officers, when the company only said it did not use discretionary bonuses for three of the five named executive officers. The ISS report was accurate; ACCF was not. **(2) FBR & Co., 2016:** ACCF classifies an FBR filing as asserting factual inaccuracies in the Glass Lewis report, but FBR did not make any such allegation. **(3) Omega Protein:** ACCF says the company claimed factual inaccuracies in ISS and Glass Lewis reports on multiple items in a proxy fight. However, the Omega Protein filing mainly focuses on analytical differences. The only clear factual claim involves ISS, which the company said reports inaccurate ROIC data generated by the dissident. We are unsure if that claim is correct. However, there is no clear factual claim of inaccuracy in the Glass Lewis report. **(4) Carmike Cinemas, 2016:** The company had differences with both ISS and Glass Lewis on analyses regarding sale of the company to AMC, mainly with regard to adequacy of the offer for Carmike shareholders. But the company

provided specific criticism only of the ISS analysis, and none of the criticism alleges factual inaccuracies. (Subsequent to the analysis, AMC increased its offer from \$30 a share to \$33.06 a share, and ISS recommended in favor of the higher offer.) **(5) CRA International, 2016:** CRA disagreed with ISS recommendations to withhold votes for incumbent directors Paul Maleh and William Schleyer based on material weaknesses in internal controls for fiscal years 2014 and 2015, but CRA did not allege inaccuracies by ISS. Both nominees were re-elected, one with 56% support and one with 61% support. **(6) Thor Industries, 2016:** ISS opposed an equity incentive plan because it would allow transfer of stock options to a third-party financial institution. The company did not claim error, but simply said that no holders of non-statutory stock options had ever transferred any option to a financial institution, and moreover that no non-statutory options were outstanding and the company had no plan to grant additional options. Nevertheless, Thor amended the plan to delete the provision of concern to ISS, and ISS reversed its recommendation to support the plan. Shareholders cast 94% of votes in favor of Thor's proposal. **(7) Immunomedics, 2017:** The company said that ISS and Glass Lewis "reached the wrong conclusion" on recommendations against incumbent directors in a proxy fight "by over-focusing on the past"; "disregarded" the dissident's "numerous blatantly false and misleading statements" about director nominee qualifications, and, in ISS's case, "chose to ignore" various items that management thought should have led ISS to support the incumbents. We believe that ACCF mischaracterized these as claims of "factual errors." Shareholders elected three company and four dissident nominees. **(8) Praxair, 2017:** ISS concluded that CEO Stephen Angel's "fixed pay and cash opportunities increased and his pay package remains high despite long-term lagging TSR results." Praxair acknowledged an increase in fixed pay in 2016, but argued that "cash opportunities" went down. The term "cash opportunities" may be confusing, but the difference between the company and ISS appears to relate to different grant-date valuation methodologies for stock option compensation. If so, this is a disagreement over methodology, not a factual error. Praxair made a number of other complaints under the category of "inaccurate or do not fully represent the facts," but they all appear at best to be analytical disagreements. Shareholders cast 79% of votes for the Praxair proposal. **(9) Newmont Mining, 2017:** ACCF apparently believes the "factual inaccuracy" claim by Newmont relates to this comment on the say-on-pay proposal by the company: "We respectfully disagree with the perspectives of ISS in their report. They expressed concern regarding the performance rigor of the equity incentives noting that the plan could provide for vesting at target where stock price remains flat over the performance term" (emphasis added). Newmont presents good reasons for why that outcome is unlikely, but does not contest that for two-thirds of the equity program based on a mix of performance metrics, there could be vesting notwithstanding flat share price performance. This, again, is an analytical difference, on which company management was well able to articulate its point of view, not a factual error. Shareholders cast 67% of votes for the Newmont proposal. **(10) Union Pacific, 2017:** ACCF incorrectly reports that Union Pacific argued that "ISS incorrectly considered a 2014 pension accrual for the former CEO which is inapplicable for the current CEO's compensation." Union Pacific did not allege that ISS in any way assigned the former CEO's 2014 pension accrual to the new CEO's 2016 pay. That said, the Union Pacific supplemental filing itself seems slightly misleading, indicating that the pension accrual was a factor in ISS's evaluation of CEO pay. ISS merely noted the earlier accrual, accurately describing the reason for the eye-popping number, and said that ISS "has not identified any problematic features with respect to the company's Supplemental Pension Plan," although "some shareholders may question the need for such benefits." ISS makes very clear that its opposition to management on say-on-pay was based on other factors. In our view, it is a good thing for ISS to flag matters that it believes may be of concern to clients of ISS even when ISS does not see a problem under ISS policy. **(11) TheStreet, 2017:** ISS criticized lack of disclosed outreach by the company to shareholders on executive compensation after a poor vote on the previous year say-on-pay proposal. In fact, the company disclosed outreach to shareholders on corporate governance matters not including executive compensation, and also separately reported on changes in executive compensation, but it did not link the two. ISS was looking for a clear indication of shareholder feedback on compensation that affected changes in the program, and TheStreet did not provide that. ACCF committed an analytical error in reporting that ISS made a factual error. **(12) Pacific Premier Bancorp, 2017:** ACCF claims that ISS and Glass Lewis classification of a director as not independent were factual errors. ACCF is incorrect. The ISS and Glass Lewis descriptions were accurate, including that the director was not independent under their standards. **(13) Affiliated Managers Group, 2017:** The company incorrectly labeled as "factual errors" differences of opinion and methodology. These include: ISS said "year-over-year financial performance generally declined with decreasing GAAP revenue, net income, EBITDA and EPS." AMG said its preferred non-GAAP metrics increased year-over-year, and that its calculation of EBITDA increased. There is no requirement that proxy advisors or other outside analysts or investors rely on a company's non-GAAP claims to assess performance. ISS relies on Compustat's calculation of EBITDA, which decreased. ISS points out that Compustat standardizes financial data and fiscal year designations to allow for meaningful comparison across companies, and Compustat data may differ from companies' disclosed financials. AMG said ISS was incorrect in

saying that executive compensation change did not align with drops in financial performance and TSR. In fact, the company did have negative TSR in the year, and ISS made a different judgment on company performance than did company management. AMG disagreed with the ISS definition of “retesting” of performance-based stock awards, which is an analytical disagreement, not a factual error. AMG disagreed with the ISS definition of “realizable pay,” which is an analytical disagreement, not a factual error. **(14) UMH Properties, 2017:** ACCF incorrectly claims that the company cites factual error in the ISS report. The closest the company gets to an assertion of factual error is that ISS presents a misleading comparison by use of its standard chart comparing stock price performance to an industry index and the Russell 3000. UMH says this is misleading because it is a high-dividend-paying stock, and total shareholder returns are the correct comparison. However, ISS presents total shareholder returns right next to the stock price performance chart, as it always does. **(15) The Finish Line, 2017:** ACCF classifies a company filing as asserting factual inaccuracies in the ISS report, but there is no such allegation. The company says that its failure to provide for shareholder amendment of bylaws should not be faulted because that is the default standard under Indiana law. However, Indiana law does permit companies to expressly authorize that shareholders may adopt or amend a bylaw, which is the preferred ISS policy. The company disagrees with the ISS policy. **(16) FMC, 2018:** In our view, a letter from the company’s CEO regarding the say-on-pay vote materially misstated ISS’s objection to reduced short-term incentive targets, pointing to reduction of an EBITDA target not specifically discussed by ISS. As ISS states more than once, its relevant objection was that payout opportunities were not reduced when performance goals were lowered. It is true that the business was shrinking due to the expected sale of the company’s Health and Nutrition business, but it is not clear to us why it is not a legitimate question to ask why that would not reduce pay opportunities. The company argues with other aspects of the ISS analysis, which from FMC’s standpoint made analytical errors, but these were not factual errors. **(17) Abbott Laboratories, 2018:** Of its own volition, ISS shared a pre-publication draft report to Abbott, which is its usual practice with larger U.S. companies. Abbott, unhappy with recommendations against its say-on-pay proposal and for a shareholder proposal requesting an independent board chair, asserted that the ISS draft report had various flaws and inaccuracies. ISS agreed there were two factual inaccuracies in the draft and corrected them in the published report. Subsequently, Abbott filed supplemental proxy materials that made a number of assertions that we believe were inaccurate. The Abbott filing, featuring a letter from Abbott Compensation Committee Chair Roxanne Austin, was rebutted by ISS in a response letter dated April 16, 2018, which is on file with CII and available on request. We find the ISS rebuttal entirely persuasive. A few of the reasons the Abbott filing fails to show factual error by ISS: (a) Ms. Austin got off on the wrong foot almost immediately with a charge that ISS “disregarded” management attempts to correct alleged inaccuracies and flaws in the report, which is flatly false on the face of it; and (b) Ms. Austin’s letter was, in our view, extraordinarily heated and misleading, incorrectly calling standard ISS analysis conducted in accordance with clearly described ISS methodologies as “manipulation” and “distorted”; (c) Ms. Austin ignored the stated grounds on which ISS opposed the company’s say-on-pay proposal, saying that the ISS vote recommendation was “absurd”; (d) Ms. Austin alleged that ISS did not follow its own criteria for selecting peer companies (which substantially overlapped management’s preferred peer group), “purposely manipulating the outcome,” an ad hominem attack delivered wholly without basis; (e) Ms. Austin asserted that ISS was selective in use of performance metrics that “falsely asserts operating performance is lower” than the performance claimed by Abbott; (f) Ms. Austin charged that ISS’s standard valuation model for stock options led to an “incorrect” calculation of CEO pay (an argument over methodology that ACCF may believe is a factual dispute); and (g) Ms. Austin describes ISS criticisms of aspects of disclosure as “false,” while not confronting specific criticisms made by ISS.

× **(1) Motorcar Parts of America, 2017:** The company wrote that “some shareholders and shareholder advisory firms have raised some potential issues, and may have misunderstood, components of MPS’s executive compensation program.” Motorcar Parts supplemented its disclosure to clarify areas of confusion. ACCF’s claims that unnamed proxy advisory firms had reports with factual errors. To the extent this is true (which is not clear), it appears to be based on poor disclosure by the company. ISS did change its report and recommendation after MPS supplemented its disclosure. **(2) Rush Enterprises, 2017:** ACCF says that company concerns relating to change of control vesting risk and excessive costs were unfounded because the concerns were based on an incorrect version of the plan, and use of outdated information in calculating potential cost of the plan. The problem here was that the company included an incorrect version of the plan, and the summary provided by the company failed to provide certain updated data. After the company corrected its errors (and also amended its plan), ISS re-analyzed the company’s say-on-pay proposal. ISS still recommended a vote against the proposal, but the company’s filed complaints relate to the original ISS analysis that was based on faulty company filings. It is reasonable for ISS to assume that a company’s proxy statement contains accurate information, and to the extent new data is not provided, it is reasonable for ISS to rely on the best information it can get, even if dated. **(3) Meritage Homes, 2017:** The

company said it believed that ISS conclusions on 2016 target goals in the annual incentive compensation program were inaccurate, “due to a misunderstanding of the level of the 2016 target award,” which was presented differently than the previous year. In the 2017 proxy statement, the company presented “actual results as measured against the intermediate ‘goal’ performance levels, whereas in the comparable table in the 2016 proxy statement...actual results were measured against the ‘target’ performance levels.” An illustration on a different page, says the company, shows that achievement of the intermediate goal resulted in a payout of only 50% of target. ISS changed its report and recommendation after Meritage clarified the information. In all due respect, we also find the company’s 2017 disclosure to be confusing, and the company subsequently provided clearer disclosure. That said, we note that proxy advisors are challenged by changing disclosures. The company altered its presentation between 2015 and 2016, and ISS clearly was looking at both proxy statements, leading it to incorrectly interpret a portion of the presentation in 2016 when ISS thought it was the same as 2015. Given complexity of executive pay design, both companies and proxy advisors struggle with clarity and year-to-year comparisons. **(4) LCI Industries, 2017:** The company said it believed a negative vote recommendation by ISS was “based on its reliance on inaccurate or incomplete information including in the [company’s] Proxy Statement regarding the Company’s change in control agreements.” When LCI corrected its information, ISS changed its recommendation. **(5) Spok Holdings, 2017:** Unusually, the company’s proxy statement disclosed that a director missed two of five board meetings in the previous year without specifying which director that was. ISS was incorrect in deducing which director failed to attend meetings. Companies are required to disclose each incumbent director who attended less than 75% of meetings, and it was not at all clear from the company’s proxy statement that the director who failed to attend meetings went off the board, and also had served on committees such that his total board + committee attendance exceeded 75% of meetings. The U.S. requirement on disclosure of director board and committee member attendance is minimal (or sub-standard) compared with some other markets, but this was a particularly glaring example of poor company disclosure. **(6) Ambarella, 2018:** Neither the company’s proxy statement nor the supplemental filing are clear to us. We are not sure whether or what the company might have factually disputed. The company appears to disagree with elements of reporting on say-on-pay proposals by Glass Lewis (which recommended clients vote for the proposal) and ISS (which recommended that clients vote against).

^{xi} See <https://www.sec.gov/comments/4-725/4-725.htm>. This excludes the 18,614 letters that the SEC says follow “Letter Type A” that urge the SEC not to revise the shareholder proposal rule.

^{xii} See letter from Business Roundtable Senior Vice President & Counsel Maria Ghazal to the SEC, June 3, 2019, available at <https://www.sec.gov/comments/4-725/4725-5619758-185567.pdf>, page 10. Ghazal reports that in a 2018 member survey, “95% of respondents identified factual errors in proxy advisory reports about their companies, and over 90% notified proxy advisory firms of these inaccuracies.” It is not clear from the letter how many of the BRT’s nearly 200 members responded to the survey (BRT appeared to have 193 members as of October 23, 2019). BRT had indicated earlier that 20 CEOs responded to a similar survey in 2013. Ghazal reports in the 2018 letter on a few examples but without specifying company names. One of the allegations she cites clearly concerns the stock option pricing model used by ISS, which is a question of methodology, not “inaccuracy.” One company objected to inclusion of its retired CFO’s pay in ISS’s compensation analysis. Another objected to “single trigger acceleration” of an equity award based on one legacy award. One company “has had to resort to public letters to its shareholders to defend its practices and to highlight the nuances that ISS’s analysis and recommendations glossed over.” This company “pointed out that its business model requires long-term investments beyond the typical time horizon of ISS’s evaluations, with incentive timing to match, that ISS’s one-size-fits-all approach inappropriately assessed.” It is evident from this language that these concerns relate to methodology and analysis, not factual errors. On this particular unnamed example, BRT goes on to cite company criticisms of the peer group used by ISS, and alleges understatement of realized and unrealized value in competitor CEO pay, which while self-serving for the subject company’s CEO may be about factual error, although one that we can’t investigate. To back up these vague comments, BRT then turns to the highly inaccurate ACCF report mentioned above. See also BRT’s “Letter to SEC Chairman White on Proxy Advisory Firms,” September 12, 2013, available at <https://www.businessroundtable.org/archive/resources/letter-to-chairman-white-on-proxy-advisory-firms>. In the 2013 letter, BRT to its credit does provide the number of companies that responded to its survey – 20. In this case, “almost all” of the 20 CEOs “indicated that they historically have found one or more factual errors in the reports prepared by the proxy advisory services,” but the letter provided no information on the allegations.

^{xiii} See letter from Gary A. LaBranche, April 30, 2019, available at <https://www.sec.gov/comments/4-725/4725-5436094-184708.pdf>, page 3.

^{xiv} See letter from Bernard S. Sharfman, March 10, 2019, available at <https://www.sec.gov/comments/4-725/4725-5065405-183167.pdf>. The same claim appears in a letter from Sharfman dated Oct. 12, 2018, at <https://www.sec.gov/comments/4-725/4725-4513625-175932.pdf>.

^{xv} See letter from Chris Netram, Oct. 30, 2018 at <https://www.sec.gov/comments/4-725/4725-4581799-176285.pdf>.

^{xvi} See letter from Chris Netram, March 5, 2019, at <https://www.sec.gov/comments/4-725/4725-5020171-182986.pdf>. The ACCF study also is cited in several other industry letters to the SEC.

^{xvii} While Haiman's complaints appear justified, it is not clear even if there were more than one case that the lesson should be an SEC requirement for company pre-review of reports. Haiman writes that this case was "highly contentious," and that "our relations with this particular activist had included multiple rounds of litigation and a contentious settlement." Formally, the meeting about which Haiman complains was an ordinary annual meeting, with no dissident slate up for election, but there was an on-going dispute involving another party. Sharing a report with only one side in this type of situation could lead to bias, since it clearly would disadvantage the dissident shareholder. If the SEC goes ahead with some kind of mandate for management pre-review of reports, this particular issue potentially could be addressed by explicitly permitting the proxy advisory service also to share reports pre-publication with any other parties that the advisor might choose to include in the review, including dissident shareholders at the company and proponents of shareholder proposals. In theory then the proxy advisor could be in a position to try to keep an even playing field. The complexity of proxy advisor work would be multiplied, and delays would be even greater, so it is not clear this is a good policy. But SEC action to tilt the playing field in contested situations to management seems unacceptable on its face.

^{xviii} See letter from John A. Zecca, Nov. 14, 2018, at <https://www.sec.gov/comments/4-725/4725-4649196-176472.pdf>. See also reference to same study in letter from Thomas Quaadman, Nov. 12, 2018, at <https://www.sec.gov/comments/4-725/4725-4636525-176432.pdf>.

^{xix} See letter from Tom Quaadman, Nov. 12, 2018, at <https://www.sec.gov/comments/4-725/4725-4636525-176432.pdf>.

^{xx} See letter from Henry Eickelberg, Nov. 12, 2018, at <https://www.sec.gov/comments/4-725/4725-4636523-176431.pdf>.

^{xx1} SEC, 17 CFR Part 241, Release No. 34-86721, "Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice," at <https://www.sec.gov/rules/interp/2019/34-86721.pdf>.

^{xxii} See letter from Kevin E. McManus, Director of Proxy Services, Egan-Jones Ratings Co., to SEC, July 23, 2019, at <https://www.sec.gov/comments/4-725/4725-5858827-188628.pdf>.

^{xxiii} See SEC, Concept Release on the U.S. Proxy System, July 14, 2010, at <https://www.sec.gov/rules/concept/2010/34-62495.pdf>