



Ball Corporation

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Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: File No. S7-14-10: Concept Release on the U.S. Proxy System

Dear Ms. Murphy:

I am writing on behalf of Ball Corporation to offer comments on the Securities and Exchange Commission's (the "Commission") concept release on the U.S. proxy system, file No. S7-14-10 (the "Concept Release"). We are pleased to see that the Commission is undertaking a review of the U.S. proxy system and are particularly happy to see that the Commission is evaluating the role that proxy advisory firms play in advising on shareholder votes. Due to the institutional investor's increasing reliance on the recommendations of proxy advisory firms and what we feel is a lack of transparency by the proxy advisory firms on how they reach voter recommendations, we support the idea of imposing a stronger regulatory framework in order to ensure that proxy advisory firms are providing shareholders with complete and accurate information and that shareholders are using such information to inform their vote while still honoring their fiduciary obligations. We are also concerned that proxy advisory firms often focus unduly on a small handful of narrow governance issues, without giving due consideration to corporations' overall governance performance as well as their financial performance and shareholder returns, and we would welcome the Commission's oversight in this area as well.

The failure of proxy advisory firms to conduct adequate research on shareholder proposals before publicly issuing reports or recommendations on such proposals often results in recommendations by proxy advisory firms that are based on erroneous or incomplete information. The result of these flawed reports is that shareholder value is undermined when shareholders vote by relying, in whole or in part, on the recommendations of a third party who has provided inaccurate or incomplete information and who has little liability for such inaccuracies. Corporate issuers face securities

liability for inaccurate or materially misleading information contained in their proxy statements. Issuers, therefore, devote substantial time and effort to prepare proxy statements with full and complete information so that shareholders can act on an informed basis. Proxy advisory firms, however, do not face the same kind of liability and therefore there is no assurance that such firms will take the time and effort needed to develop and convey a fully informed recommendation. Ball has annually encountered inaccuracies in the information produced by proxy advisory firms. Although certain firms have sometimes offered us the opportunity to comment on the factual background that they propose to disclose about us, we are generally given insufficient time to respond and are given limited opportunity to discuss or refute firms' subjective governance analysis.

We are also concerned that proxy advisory firms do not appear to evaluate each proposal from an issuer-specific perspective. Most such firms disclose that they perform analysis on shareholder proposals using a similar set of criteria for all proposals on the same subject matter, without seeking or responding to input from the specific issuers that are soliciting the shareholder vote. For example, one proxy advisory firm has a poison pill policy in which it states that it "applies a comprehensive case-by-case analysis when evaluating management proposals that seek shareholder approval of a [poison] pill," while in the next sentence the firm goes on to list a set of four criteria that a poison pill must generally have before the firm will recommend that shareholders approve the proposal: see www.riskmetrics.com/policy/2009-poisonpill FAQ. Any purported case-by-case analysis notwithstanding, we are concerned that often it is the pre-established set of criteria that carries the most weight in determining the proxy advisory firm's recommendation. Issuer input is essential to a case-by-case analysis and it is our experience that proxy advisory firms all too frequently rely on a firmly established set of criteria rather than seeking valuable issuer input. A "one size fits all" kind of approach is insufficient to protect shareholder economic interests because what may be relevant to one issuer may not be relevant to another, and may not give appropriate consideration to individual mitigating factors and other positive characteristics, such as the corporation's financial performance.

In order to ensure that proxy advisory firms produce reports and recommendations that are based on accurate and complete information backed by a true case-by-case analysis, we support the following recommendations:

- i) Proxy advisory firms should be required to permit comprehensive issuer feedback on proxy advisory reports in advance of publication to ensure the accuracy and completeness of information. Sometimes the reports and recommendations of proxy advisory firms contain factually inaccurate information. The damage caused by such inaccuracies is done the moment that they are published because shareholders may vote using the information immediately. For this reason, issuers should be given an adequate opportunity to correct factual inaccuracies before the reports are publicized.

- ii) Proxy advisory firms should be required to make additional public disclosures regarding (1) their standards and methodologies in reaching a recommendation and (2) their policies and procedures for interacting with issuers, informing issuers of their reports and recommendations, and handling appeals made by issuers. The value of this kind of disclosure is clear. If shareholders have more transparency into how a proxy advisory firm reaches its recommendation and whether the proxy advisory firm consulted the issuer, then the shareholder can ascribe the kind of weight that they feel is appropriate to such recommendation. The lack of this kind of disclosure leaves shareholders to decide for themselves what value they will assign to the recommendation without the benefit of knowing how the recommendation was reached. Without transparency into the way a recommendation was formulated, shareholders may mistakenly assume that a complete review was done on the proposal and that the issuer was consulted, when in fact the proxy advisory firm may have used a pre-determined set of criteria without much issuer-specific consideration.

The Commission has instituted requirements that mandate institutional investors to document the rationality of their voting procedures. Due to the sheer number and types of shares held by such institutional investors, this requirement has implicitly led many institutional investors to rely on proxy advisory firms to inform their vote (and in some cases to act as a proxy to vote their shares). There is, therefore, cause for concern that the fiduciary obligations of such institutional investors may be breached when they strictly rely on the recommendations of a proxy advisory firm, that has no economic stake in the issuer, without any independent analysis of their own. Therefore, there is a need to institute greater regulatory protection to ensure that institutional investors are honoring their fiduciary obligations and not strictly relying on the recommendations of proxy advisory firms.

To further the objective of having proxy advisory firms serve in a true advisory capacity rather than a decision making capacity, we support the following recommendations:

- i) If institutional investors rely on another party to vote their shares for them, the institutional investor should be required to provide the Commission with a certification that they have been furnished all relevant proxy materials, have reviewed the voting decisions, and agree with the voting decisions as being consistent with their fiduciary obligations. This will provide greater protection to ensure that the institutional investor is acting in accordance with its fiduciary obligations to its beneficiaries rather than blindly adhering to a pre-determined voting policy.
- ii) Proxy advisory firms should be prohibited from acting as proxies for institutional investors in order to ensure that the institutional investors do not strictly rely on the recommendation of such proxy advisory firms, but rather

use such recommendations as a tool to inform and educate them on the matters that they are being asked to vote on.

- iii) Proxy advisory firms should be required to disclose relationships with, and compensation from, institutional investors and others, just as corporations are required to disclose relationships with related persons.

The role of proxy advisory firms is now broad and pervasive and may continue to increase, in particular with votes on proposals such as say on pay. This makes it even more important to institute regulations to ensure that recommendations from proxy advisory firms contain complete and accurate information, that such recommendations are made using a case-by-case analysis, and that the reports are used as a tool for advising the shareholder vote rather than serving as an absolute determinative factor as to how shares will be voted. Thank you again for the opportunity to allow our input on this important Concept Release.

Respectfully,



Charles Baker
Vice President and General Counsel
Ball Corporation