



December 27, 2021

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

VIA ELECTRONIC MAIL
rule-comments@sec.gov

Subject: Proposed Rule: Proxy Voting Advice
File No. S7-17-21

Dear Ms. Countryman:

The National Investor Relations Institute (“NIRI”)¹ appreciates the opportunity to provide comments on the proposal by the Securities and Exchange Commission (“SEC”) to amend its 2020 Final Rule on Proxy Voting Advice.²

The SEC’s Proposed Rule would: (1) restrict the ability of a public company to comment on reports drafted by proxy advisory firms, as a part of the proxy voting process; and (2) eliminate a provision that clarified the responsibilities of proxy advisory firms in avoiding material misstatements or omissions in rendering proxy voting advice.³

NIRI offers the following specific comments regarding the SEC’s Proposed Rule:

1. **The 30-Day Comment Period Is Too Compressed.** NIRI and its members are disappointed that the SEC chose to provide only a 30-day comment period for this rulemaking, and especially a comment period that is taking place over several holidays.

NIRI’s membership comprises more than 2,800 investor relations professionals representing over 1,350 public companies. A 30-day comment period does not allow our association adequate time to conduct any type of survey, study, or analysis involving NIRI members and the companies they represent about this Proposed Rule.

Except for emergency circumstances, the SEC typically provides a minimum of sixty

¹ Founded in 1969, the National Investor Relations Institute (“NIRI”) is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. The largest professional investor relations association in the world, NIRI’s more than 2,800 members represent over 1,350 publicly held companies with more than \$7 trillion in stock market capitalization.

² See Proxy Voting Advice, 86 Fed. Reg. 67,383 (Nov. 26, 2021) (hereinafter “Proxy Voting Advice”). The Final Rule was issued on July 22, 2020. See also Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55,082 (Sept. 3, 2020) (hereinafter “2020 Final Rule”).

³ *Id.*

(60) days for public comment on a rule proposal. As noted recently by Commissioner Peirce, a 60-day comment period is the recommended minimum amount of time articulated in at least two Executive Orders issued in 1993 and 2011, and a Presidential Memorandum issued by President Biden in January 2021.⁴

The Commission would enhance the dialogue among market participants in the notice and comment process for this rulemaking and receive more detailed and substantive analyses of its Proposed Rule by providing for a longer period for public input. Requiring such a short comment period only creates the perception that the Commission is rushing this rulemaking and has pre-determined the outcome.

2. **This Rulemaking Is Premature.** NIRI and its members are also disappointed that this Final Rule is being re-opened after a very thorough, decade-long examination of the issues involving proxy advisory firms. Before the Proposed Rule was issued in 2019, the regulatory oversight issues involving these firms were discussed in numerous SEC releases and events, including a 2010 Concept Release on the U.S. Proxy System, two SEC Roundtables in 2013 and 2018, and a Staff Legal Bulletin issued in 2014.⁵

Remarkably, the Final Rule that the SEC seeks to amend was only adopted in the summer of 2020 and has not yet even taken effect. A more normalized approach would be to let the Final Rule take effect and then review its effectiveness after at least three (3) or more proxy seasons have elapsed.

Additionally, in NIRI's opinion, the evidence for amending the SEC's Final Rule is missing the rigorous analysis that was the hallmark of the Commission's 2019 rulemaking process. The Proposed Rule is lacking in justification, relying heavily on several media articles critical of the Final Rule and a private meeting organized by a select group of opponents of the Final Rule with the SEC Chair in June 2021.⁶

3. **The Draft Review and Comment Process for Corporate Reports Should Not Be Eliminated.** For many years, NIRI and others within the issuer community have advocated that proxy advisory firms should be required to provide each public company with a copy of its draft reports, in advance of dissemination to their clients. This "advance review and comment" process would permit a company to review and correct any inaccurate factual information and remark on any incorrect methodologies contained in these reports.

⁴ See SEC Commissioner Hester M. Peirce, "Rat Farms and Rule Comments – Statement on Comment Period Lengths," at footnote 1 (Dec. 10, 2021) (citing Executive Order 13563 (Jan. 18, 2011), Executive Order 12866 (Sept. 30, 1993), and Presidential Memorandum: Modernizing Regulatory Review (Jan. 26, 2021)).

⁵ See Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982 (July 22, 2010); Proxy Advisory Services Roundtable (Dec. 5, 2013), available at <https://www.sec.gov/spotlight/proxy-advisory-services.shtml>; Roundtable on the Proxy Process (Nov. 15, 2018), available at <https://www.sec.gov/proxy-roundtable-2018>; and Staff Legal Bulletin No. 20, June 30, 2014, available at <https://www.sec.gov/investment/slb20-proxy-voting-responsibilities-investment-advisers>. The 2020 rulemaking was also the subject of numerous comment letters from many different market participants and more than 80 meetings and conference calls with interested parties. See <https://www.sec.gov/comments/s7-22-19/s72219.htm>.

⁶ See *Proxy Voting Advice* at 67,385-67,386 (footnotes 23 and 24).

As proposed by the issuer community and adopted by the SEC in its 2020 Final Rule, all proxy advisory firms would retain unfettered discretion to accept or ignore such comments, thereby maintaining their independence and the integrity of their reports.

Given the more than 25,000 ballot items at companies in the Russell 3000 Index that proxy advisory firms opine on each year, it is inevitable that proxy reports will have some factual errors or misunderstandings over corporate disclosures. Compounding the problem is the compressed annual meeting schedule during the spring U.S. proxy season, the limited number of full-time research analysts at the two major proxy firms, and the complexity of executive pay practices.⁷

The Proposed Rule argues that the establishment of the Best Practice Principles Group (“BPPG”) and the subsequent adoption of industry-wide practices have addressed transparency and disclosure issues involving the six largest proxy advisory firms.⁸ However, these efforts have not adequately tackled the problem of how best to efficiently correct factual errors and methodological flaws.

As an example, a recent study by the American Council for Capital Formation (“ACCF”) examined public company filings through September 8, 2021, in the SEC’s EDGAR database.⁹ The ACCF found fifty (50) examples of public companies filing supplemental proxy materials during this proxy season to correct the record regarding a vote recommendation by a proxy advisory firm.¹⁰ This was an increase of 21% over the ACCF’s identical analysis in the 2020 proxy season.¹¹

Until recently, the largest proxy advisory firm, Institutional Shareholder Services (“ISS”), did provide draft reports (on a very short turnaround) to public companies that are members of the S&P 500 Index. While it discontinued this practice after the SEC promulgated its 2020 Final Rule, the President of ISS has expressed support in the past for extending this practice to more U.S. issuers outside of the S&P 500 Index.¹²

The SEC’s Proposed Rule would turn back the clock on what is otherwise a common sense practice supported by the largest proxy advisory firm. In fact, ISS’s own website describes

⁷ It should be noted that, in order to meet its heavy workload during proxy seasons, ISS typically hires dozens of temporary workers, including recent college graduates and contract workers in the Philippines. The sheer number of inexperienced analysts working in the compressed proxy season each year practically guarantees that mistakes will be made in some company reports.

⁸ *Proxy Voting Advice* at 67,386 (“As a part of [this SEC] reassessment, we have further considered [proxy firm] efforts to develop industry-wide practices, as well as improve their own business practices, that could address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions.”).

⁹ American Council for Capital Formation, “Proxy Advisors Are Still a Problem,” at 10 (December 2021), *available at* https://accf.ftlbcfn.net/wp-content/uploads/2021/12/ACCF_proxy_advisor_rule_report_2021-FINAL.pdf.

¹⁰ *Id.*

¹¹ ACCF found a total of 42 supplemental filings by public companies in 2020 to correct the record regarding a vote recommendation by a proxy advisory firm. *Id.* at 9.

¹² Transcript of Record at 141, SEC Proxy Advisory Services Roundtable, Dec. 5, 2013 (remarks by Gary Retelny, President, Institutional Shareholder Services) (“[W]e do it with every S&P 500 company. I wish we could do it with more, and that is something that we want to work on.”).

the draft review processes it currently offers in various markets outside the United States:

- In Canada, drafts are provided to Canadian companies in the S&P/TSX Composite Index via annual advanced registration;¹³
- In France, as recommended by France’s securities regulator, the Autorité des Marchés Financiers (“AMF”);¹⁴ and
- In other markets, ISS permits companies to make individual requests for a draft review. The requests are typically made by the earlier of the filing of their shareholder meeting materials or 30 days prior to the meeting. The request needs to be made annually and may be accommodated at ISS’ sole discretion.¹⁵

This advance review and comment process can operate very efficiently and does not impact the independence of a proxy advisory firm, as each firm retains its exclusive right to determine whether to make any changes to a company report before disseminating it to its clients. Since these reports are distributed electronically, it would be a simple additional step to add a hyperlink on the front page of a report, permitting investors with easy access—if they so choose—to any comment letter submitted by a company that is the subject of the report.

In its 2020 Final Rule, the SEC provided an option for proxy advisory firms to engage in a “concurrent review” process, whereby final versions of their reports would be sent to public companies at the same time the reports are distributed to their clients.¹⁶ Companies would then have the opportunity to provide any comments on the report and each proxy advisory firm would notify its clients about such comments.¹⁷ Unfortunately, the practice of institutional investor voting immediately after a final report is issued presents significant challenges to the effective implementation of this process. For this reason, an advance review and comment process is a better policy choice and less burdensome for the proxy advisory firms, the companies, and the institutional investors receiving these reports and casting their votes shortly afterwards.

In its Proposed Rule, the SEC has completely eliminated any type of review and comment process, leaving public companies without a standardized process for engagement with ISS, Glass Lewis, and other proxy advisory firms. The Commission should consider returning to its proposal for an advance review and comment process, as outlined in its 2019 Proposed

¹³ Institutional Shareholder Services, <https://www.issgovernance.com/iss-draft-review-process-canadian-issuers/> (last visited Dec. 16, 2021).

¹⁴ Institutional Shareholder Services, <https://www.issgovernance.com/policy-gateway/french-market-engagement-disclosure/> (last visited Dec. 16, 2021) (“ISS believes that this review process helps improve the accuracy and quality of its analyses, an outcome that is in the best interests of both the institutional investors for whom the analyses are prepared, as well as for the issuers that are the subject of these reports.”).

¹⁵ Institutional Shareholder Services, <https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920> (last visited Dec. 16, 2021).

¹⁶ See 2020 Final Rule at 55,110.

¹⁷ *Id.* at 55,112-55,114.

Rule.¹⁸ This is the least costly method for all parties to ensure the accuracy of these reports.

The process outlined in the 2019 Proposed Rule was very similar to the review and comment process institutionalized by ISS; and this process can work smoothly and with a minimal burden for other proxy advisory firms and for any public companies that request such a review process.

As stated by ISS on its website, an advanced review process helps to improve “the accuracy and quality of its analyses, an outcome that is in the best interests of both the institutional investors for whom the analyses are prepared, as well as for the issuers that are the subject of these reports.”¹⁹ This process is also less complicated than a concurrent review process and it does not interfere in any way with the institutional investor voting process.

4. **The SEC Should Not Exempt Proxy Firms from Rule 14a-9 Liability.** In its Proposed Rule, the SEC seeks to amend Rule 14a-9 to eliminate paragraph (e).²⁰ This paragraph provides that a “[f]ailure to disclose material information ... such as the [proxy firm’s] methodology, sources of information, or conflicts of interest” could, depending upon particular facts and circumstances, be misleading withing the meaning of the Rule.²¹

Despite statements by the SEC in the 2020 Final Rule that this language was not intended to make a difference of opinion among the parties actionable under Rule 14a-9, the Commission now proposes to eliminate this language and weaken the liability standards for proxy advisory firms.²² In exploring alternatives, the Proposing Release also asks for comments on whether the SEC should “exempt all or parts of proxy voting advice from Rule 14a-9 liability entirely?”²³

As Commissioner Roisman asserted in his dissenting statement on this Proposed Rule:

I cannot think of any other type of market participant that is allowed such leeway in conducting proxy solicitations. The Commission must apply its rules equally to all those we regulate, and our regulation of market participants who solicit proxies is no different. A carve out from liability for making false and misleading statements is *not* aligned with our mission.²⁴

Public companies and other market participants are required to meet strict proxy solicitation requirements and face liability for any material misstatements or omissions. The

¹⁸ See Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66,518 (Dec. 4, 2019) (Proposed Rule 14a-2(b)(9)(ii)).

¹⁹ See *supra* footnote 14.

²⁰ *Proxy Voting Advice* at 67,389.

²¹ See 17 C.F.R. § 240.14a-9(e) (False or misleading statements).

²² See *2020 Final Rule* at 55,121.

²³ *Proxy Voting Advice* at 67,391.

²⁴ SEC Commissioner Elad L. Roisman, “Too Important to Regulate? Rolling Back Investor Protections on Proxy Voting Advice” (Nov. 17, 2021).

SEC should avoid establishing a regulatory exemption from any liability for false and misleading statements by proxy advisory firms. Instead, the SEC should refrain from eliminating paragraph (e) to Rule 14a-9. NIRI agrees with Commissioner Roisman that all market participants soliciting proxies should be treated equally.

5. **The SEC Should Address the Robo-Voting Problem**. As the SEC moves forward with reconsidering its 2020 Final Rule, the Commission should also consider additional steps to address the “robo-voting” problem.

Information about the automated operation of the ISS and Glass Lewis voting platforms—often called robo-voting—was first brought to the SEC’s attention by NIRI in an August 2017 letter to the SEC.²⁵ NIRI’s research determined that both ISS and Glass Lewis were automatically submitting client votes using pre-established default positions, without any affirmative consent, or real-time voting decisions, by their clients.²⁶

This automated process is easy to understand. Before proxy season begins, each ISS and Glass Lewis client establishes general voting guidelines and policies in advance of voting on actual proposals and other matters at individual shareholder meetings. As shareholder meetings are scheduled and proxy materials are distributed, each proxy firm generates an electronic ballot for each client. Using algorithmically generated instructions, each ballot is pre-populated with voting decisions based on each client’s pre-established guidelines and policies.

When proxy advisory firm reports are disseminated, the shares of all clients are voted as this computerized system has mechanically instructed, without the need for any review or approval by an investor client of ISS or Glass Lewis. Typically, these votes are submitted within 24-48 hours after the final version of a company report is distributed.

This voting system works without a human interface and a client only needs to interact with the ISS or Glass Lewis voting platform if it wants to change a vote from its general guidelines and policies, or if it disagrees with an ISS or Glass Lewis recommendation.

In a comment letter on the SEC’s 2019 Proposed Rule, the Shareholder Communications Coalition presented recent research indicating that many mid-sized and smaller investment advisers have chosen to outsource their voting decisions to ISS and Glass Lewis.²⁷ A number of these firms have adopted policies that mirror ISS or Glass Lewis guidelines, and the firms agree to follow ISS or Glass Lewis recommendations on individual management or shareholder proposals. This approach to proxy voting reduces costs to these investment advisers and helps

²⁵ Letter from Gary LaBranche, President and CEO, National Investor Relations Institute, to the Honorable Jay Clayton, Chairman, Securities and Exchange Commission (Aug. 3, 2017), *available at* <https://www.niri.org/NIRI/media/NIRI-Resources/NIRI-SEC-Letter-PA-Firms-August-2017.pdf> (hereinafter “2017 NIRI Letter”)

²⁶ *Id.*

²⁷ *See* Letter from Niels Holch, Executive Director, Shareholder Communications Coalition, to Vanessa A, Countryman, Secretary, Securities and Exchange Commission, at 9-10 (Feb. 3, 2020), *available at* <https://www.sec.gov/comments/s7-22-19/s72219-6744360-207909.pdf>.

them avoid hiring and maintaining an in-house staff to analyze and vote on proxy items.

To document these outsourcing practices, the Shareholder Communications Coalition examined hundreds of investment adviser disclosures and presented excerpts from more than 35 of them in its comment letter on the 2019 Proposed Rule.²⁸ These disclosures clearly establish that numerous investment advisers have chosen to adopt ISS and Glass Lewis guidelines and policies on proxy matters, without developing their own guidelines and policies.

These disclosures also identify a substantial number of investment advisers that are pre-authorizing ISS and Glass Lewis—without further client review—to cast votes using ISS and Glass Lewis recommendations on shareholder proposals and other matters considered at shareholder meetings.

A few examples from these disclosures include the following:

- “We generally follow ISS’s recommendations and do not use our discretion in voting. Since our client proxies are voted based on a pre-determined policy based upon ISS’s recommendations, they are not affected by any potential or actual conflict of interest of ours.”²⁹
- “Subject to exceptions as noted below, we vote based on the recommendations of Glass-Lewis & Co, an independent third-party research provider that issues voting recommendations based on their own internal guidelines.”³⁰
- “Institutional Shareholder Services is our proxy voting vendor. We outsource all proxy voting services to ISS and have adopted the ISS annual voting guidelines based on their research and due diligence. ISS votes the proxies, records voting decisions, keeps record of votes and reasons for voting, all on behalf of our participating clients.”³¹

Certain broker-dealers operating wrap fee and similar advisory programs are also outsourcing significant proxy voting decisions to ISS and other proxy advisory firms. Examples of their public disclosures to investors include:

- “For any Account with a Managed Strategy, a Custom Managed Strategy, a Defined Strategy or a Personalized Strategy with Advisor Discretion, you delegate voting discretion ... to ISS or its successor proxy voting service as the Proxy Delegation Vendor for your Account, voting under its Benchmark Guidelines”³²

²⁸ *Id.*

²⁹ Driehaus Capital Management LLC. Form ADV Part 2A, Item 17, at 27, March 31, 2021.

³⁰ U.S. Bancorp Investments, Inc. Wrap Fee Program Brochure, at 17, July 24, 2021.

³¹ Vision Capital Management, Form ADV Part 2A, Item 17, at 36, March 1, 2021.

³² Merrill Lynch, Wrap Fee Program Brochure, at 15, March 22, 2021.

- “With respect to (i) the Advice Portfolio Program, (ii) the Portfolios (as defined in *Item 4 Advisory Business* above) and (iii) the following ACCESS Portfolios: Tax-Optimized ETF MAPs, ETF MAPs, Systematic Allocation Portfolios, Offshore ETF MAPs and Offshore House View Portfolios, unless clients have reserved voting rights to themselves, UBS AM has engaged and has delegated proxy voting authority over these accounts to Institutional Shareholder Services Inc., a proxy voting service.”³³
- “Except where you have selected a Single Strategy managed by a Discretionary Manager, you designate proxy voting authority to a third party proxy voting service provider, currently Institutional Shareholder Services Inc. (‘ISS’), which we have engaged to vote proxies on your behalf to act (or refrain from acting) with respect to proxy information related to securities, or the issuer of securities, held or formerly held in an Account. ISS will vote proxies on your behalf in accordance with its established guidelines.”³⁴

NIRI reiterates its view that a proxy advisory firm should not be permitted to offer an automated voting service that allows the proxy firm to make and execute voting decisions on behalf of investment advisers without any ongoing oversight by these clients, except for the approval of general guidelines and policies before proxy season begins.³⁵

Additionally, NIRI strongly opposes investment adviser policies that simply adopt ISS or Glass Lewis recommendations during the proxy process, without any further actions taken by the advisers to exercise their voting responsibilities.

In advancing this position, NIRI does not oppose the use of technology to pre-populate individual ballots for ISS and Glass Lewis clients, based on a client’s general guidelines or policies. However, each investment adviser client should be required to review every pre-populated ballot and provide affirmative consent by expressly authorizing and directing its voting decisions for each individual ballot prepared by the proxy advisory firm.

Investment advisers should not be able to defer to ISS and Glass Lewis voting recommendations and then have these firms generate and vote an electronic ballot, without any subsequent client review before these votes are cast. Investment managers that do not review and specifically approve (or modify) each ballot cast on their behalf are not fulfilling the fiduciary responsibilities that they owe to their clients, investors, and beneficiaries.

* * * *

Thank you for the opportunity to present the views of the National Investor Relations

³³ UBS Asset Management (Americas) Inc. Fort ADV Part 2A, Item 17, at 56, March 31, 2021.

³⁴ Wells Fargo Advisors, Wrap Fee Brochure, at 29, December 2021.

³⁵ See 2017 NIRI Letter *supra* footnote 25.

Vanessa A. Countryman
December 27, 2021
Page 9

Institute on this proposed SEC rule. If you have questions, or need additional information, please contact me at [REDACTED], or via email at [REDACTED].

Sincerely,

A handwritten signature in cursive script that reads "Gary LaBranche".

Gary A. LaBranche, FASAE, CAE
President and CEO

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee
The Honorable Caroline A. Crenshaw
Renee Jones, Director, Division of Corporation Finance
Sarah ten Siethoff, Acting Director, Division of Investment Management