

Via Hand Delivery

November 14, 2019

The Honorable Jay Clayton  
Chairman  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: File No. S7-22-19**

Dear Mr. Chairman:

Thank you for arranging for members of your staff, together with staff of the Divisions of Corporation Finance, Investment Management and Economic and Risk Analysis, to meet with members and staff of the Council of Institutional Investors (CII) and other interested investors on November 7 to discuss the proposed rulemaking, “Amendments to Exemptions from the Proxy Voting Rules for Proxy Voting Advice” (PA Proposal). We also thank you for agreeing to meet with us on December 10.

The purpose of this letter is twofold: (1) to reiterate our request for the underlying data and analysis for “Table 2: Registrant Concerns Identified in Additional Definitive Proxy Material” on page 96 of the PA Proposal (Table 2); and (2) a related request that the Securities and Exchange Commission (SEC or Commission) staff add supplemental, clarifying information to the rulemaking record to allow commentators to have a meaningful opportunity to provide useful input on the PA Proposal.

Table 2 Data Request

As requested via email on November 7 and later in person at the November 7 meeting, we seek the underlying white paper or other SEC staff study (with data and analysis, including presumably a spreadsheet) for the results that are summarized in Table 2. We also would request that the staff define more specifically the categories the staff used for Table 2. We are referring here to definitions used to classify concerns as “factual errors,” “analytical errors,” “general or policy dispute,” “amended or modified proposal” and “other.”

We also are not entirely certain from the discussion at the November 7 meeting whether the SEC staff considered the merits of issuer claims tabulated in Table 2, and whether the staff checked claims against reports from the relevant proxy advisory firms. If provided with the underlying data and analysis, we plan to perform our own analysis and provide the results in a comment letter to the Commission.

### Supplemental Information Request

More broadly, the novel and highly prescriptive issuer review and publication requirements contemplated in the PA Proposal, combined with the very general description of those requirements in the release, makes it difficult to provide meaningful comments on a number of critical issues. Unless a reproposal is planned, we would request the SEC staff to add supplemental, clarifying information to the rulemaking record to allow commentators to have a meaningful opportunity to comment on the new proxy advice review regime the Commission proposes to create.

Other aspects of the PA Proposal on which we seek supplemental, clarifying information include the following:

1. It is not clear if the proxy advisor would be permitted to respond to its clients about a claim or argument made by a registrant or other soliciting person in the registrant's or other soliciting person's hyperlinked statement (that is, the statement that the PA Proposal would mandate the proxy advisor provide as an opportunity for a registrant or other soliciting person). And if a response is permitted, would that response itself be "proxy advice," and therefore subject to the five-day review and "final notice" periods.
2. It is CII's understanding that ISS produces a number of custom reports. It is not clear whether the SEC would require ISS to provide registrants with all of these draft reports. And whether all of the draft reports would be required to be provided only once or at least twice—for the five-day review and "final notice" periods.
3. The PA Proposal "would allow" a proxy voting advice business "to require that registrants and certain other soliciting persons, as applicable, agree to keep the information confidential, and refrain from commenting publicly on the information, as a condition of receiving the proxy voting advice. The terms of such agreement would apply until the proxy voting advice business disseminates its proxy voting advice to one or more clients and could be no more restrictive than similar types of confidentiality agreements the proxy voting advice business uses with its clients." (page 49) (footnotes omitted).
  - a. The PA Proposal is not clear what is being proposed regarding confidentiality agreements.
    - i. The PA Proposal indicates "the terms of such agreement" only apply until the proxy advisor distributes the advice to even one client. After that period, would the registrant and certain other soliciting persons be free to provide the report to whomever they wished? Or does the Commission mean to say that the proxy advisor has a right to protect its intellectual property after this period in the same manner as it does with its paying clients?
    - ii. What is permitted recourse for a proxy advisor for a violation of the confidentiality agreement on the part of the registrant or other soliciting persons?

4. It is not clear whether the PA Proposal creates the potential for insider trading on certain market-moving recommendations and related analysis, particularly in connection with mergers and acquisitions (M&A), and how the SEC staff thought about such a risk in proposing the five-day review and “final notice” periods.
5. The PA Proposal defines “proxy voting advice” as “voting recommendations provided by proxy voting advice businesses on specific matters presented at a registrant’s shareholder meeting..., along with the analysis and research underlying the voting recommendations” (page 8). We presume that a firm that offered a “research-only” service, with no voting recommendations – such as the main products provided by the Investor Responsibility Research Center Inc. (IRRC) from 1972 to 2005 – would not be covered by the proposed new exemptive conditions and therefore entitled to the exemptions as they exist today. It is not clear, however, if our presumption is correct. And it is not clear whether the same presumption would hold for an IRRC “SmartVoter”-type product, in which the advisory firm implements a client’s proxy voting policy in a voting agency business. On the latter question, it is also not clear whether it makes a difference if the voting firm advises the investor client on forming the voting guidelines.
6. It is not clear how often, if at all, registrants would take advantage of the purported incentive to move up filing dates. Footnote 114 (page 46) cites “Broadridge Financial Solutions, Inc.” and “Ernest (sic) & Young LLP” to support the conclusion that registrants customarily file their definitive proxy materials “35-40” or “30 to 50” days before the shareholder meeting. The PA Proposal appears to contain no original information about the timing of these filings with the SEC or any estimate of how often registrants would file earlier.
7. We appreciate that the PA Proposal raises questions about an exemption for small providers. However, it is not clear how the proposed regulation would impact the Segal Marco or ProxyVote Plus business models. As indicated at the November 7 meeting, Segal Marco, ProxyVote Plus and other smaller proxy voting agents and research providers may exit the voting advice business if they come within the sweep of the new regulation. We also know of at least one provider that is (or was) contemplating entering the U.S. market for proxy advice; even if as a mature business it could be profitable in the proposed new regulatory structure, we believe that structure would make it particularly challenging to weather a start-up period. We would be interested in obtaining supplemental information on whether the SEC staff considered a carve out for smaller providers and potential new entrants. We would also be interested in obtaining supplemental information about relevant factors that might assist commentators in developing an appropriate proposed approach to mitigating the negative effects on competition that are likely to result from the proposed regulatory requirements.
8. We assume proxy advisory firms are expected to correct errors whenever they become aware of them. However, it is not clear from the PA Proposal whether the five-day review and “final notice” periods are restarted each time a proxy advisory firm changes its report in any way.

9. It is not clear whether the registrant missing a mistake or issue in the two-stage review process – or just opportunistically does not raise it for correction at that time – would waive any future legal claim company management may have against the proxy advisor. Or in those circumstances, would the registrant still be permitted to bring a legal claim against the proxy advisor under Rule 14a-9 for a false or misleading “solicitation”?
10. We are interested in obtaining supplemental information on the expectations an investor client should have with regard to proxy advice if there are material new developments during or after the five-day review and “final notice” periods. For example, if the proxy advisor’s advice relates to a bid to acquire a company, and the buyer raises the offer price, we presume there must be a way for a proxy advisor to revise its analysis to note the increased offer and potentially to make a different voting recommendation. But that is not clear from the PA Proposal. Similarly, if there is a change in the slate of candidates for election or an agreement between contending parties in a proxy fight, there must be a way for the proxy advisor to provide relevant advice in the altered situation without putting at risk the exemptions the PA Proposal requires for the proxy advisor to operate under the proposed regulatory scheme. Another example: sometimes a registrant or other soliciting person modifies a proposal or provides clarifying information late in the solicitation process. It is not clear how that could be handled from the standpoint of a proxy advisor, including if it comes during the five-day review or “final notice” periods, or sometime later.
11. It would be helpful for commentators to obtain supplemental information about any SEC staff analysis on vote cutoff deadlines (which vary by company and advisor), as well as analysis of how long it takes a proxy advisory firm to create a report, and the basis for any such estimate. It also would be helpful to obtain supplemental information about the staff analysis (and the basis for such analysis) on how long it takes investors to analyze the research (in combination with their internal processes) and develop voting decisions.
12. The PA Proposal is not clear about whether its provisions make a distinction between an annual meeting and a special meeting, with the latter often on different timelines. With regard to special meetings on M&A-related proposals, sometimes registrants will release materials, but with critical details provided in later supplemental information. It would be helpful if the SEC staff would provide clarity on how the five-day review and “final notice” periods apply to special meetings.

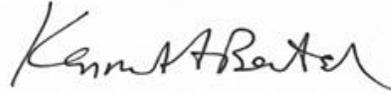
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We look forward to a follow-up meeting with the SEC staff where we can continue a productive dialogue on whether and how the PA Proposal could be improved so that it may benefit all market participants and the capital markets generally. We also look forward to discussing these issues with you on December 10. In the meantime, if you have any questions regarding this letter, please do not hesitate to contact us at [REDACTED], or [REDACTED] or [REDACTED].

Sincerely,



Jeffrey P. Mahoney  
General Counsel



Kenneth A. Bertsch  
Executive Director

CC: 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  
Dalia Osman Blass, Director, Division of Investment Management  
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Rick Fleming, Investor Advocate