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02 January 2020
Hon. Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Chairman Clayton:

Re: Rule 14a-8 S7-22-19 Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice and S7-23-19 Procedural Requirements and Resubmission Thresholds under Exchange Act

On behalf of Minerva Analytics Ltd I am writing to object to the SEC's recent proposals which if passed, will have significant, far-reaching and harmful impacts on the proxy landscape in the USA. We believe that the proposals will be harmful not only for investors and their service providers, but also for issuers.

By way of background Minerva and its subsidiary, The Manifest Voting Agency Ltd, have been established in the UK since December 1995. Although initially focussed as a UK service provider, following the acquisition of our US partners, the Investor Responsibility Research Council in 2005, our coverage scope has been fully global, including US securities. Our clients are a mixture of asset owners, managers, academics, regulators, and various consultants. Minerva exists to make proxy voting straightforward, transparent and fully informed. This is achieved through a combination of advanced technologies and superior data which is objective, independent and conflict-free.

Following the passage of the Shareholders' Rights Directive into UK law, Minerva is subject to oversight by the Financial Conduct Authority (FCA) under the Proxy Advisors (Shareholders' Rights) Regulations 2019 (the Regulations)¹ which require us to follow a Code of Conduct. We have adopted "The Best Practice Principles for Shareholder Voting Research"² developed by the Best Practice Principles Group (BPPG).

The BPPG came into existence following the analysis of the European Securities Markets Authority (ESMA) of the proxy industry. ESMA found that while there was no market failure³, the industry and wider stakeholders would benefit from greater understanding about the work of so-called proxy advisors and the responsibilities of asset owners and managers in the stewardship and voting process.

¹ <https://www.fca.org.uk/publications/policy-statements/ps19-28-proxy-advisors-shareholders-rights-regulations-implementation-depp-and-eg>

² <https://bppgrp.info>

³ <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-240.pdf>

Minerva has been closely involved with the development of the Principles as one of the five founder signatories⁴ and now as an ongoing committee member. As you may be aware, the BPP Group has recently created an independent oversight committee and will shortly be announcing the appointment of its first chair.⁵

In respect of the SEC's proposals, our reasons for opposing the proposed regulations that they will:

- Severely limit shareholders' property rights;
- Interfere with investors' commercial and contractual rights to receive research, which they have paid for, and which is untampered by third party interference;
- Put service providers in breach of fiduciary responsibilities to clients;
- Breach fundamental analyst objectivity principles supported by professional bodies such as CFA⁶ and contradict the SEC's previous commitment to analyst objectivity as exemplified by the Spitzer Settlement⁷;
- Breach proxy research service providers' fundamental rights to free commercial speech which are not only enshrined in the US constitution but numerous examples of case law;
- Damage much-needed competition and unfairly prejudice the business chances of challenger service providers like Minerva and present impossible competition hurdles;
- Risk breaching other global market regulations such as MIFID, MIFIR and various insider trading laws; and
- Have a profoundly chilling effect on asset owner/manager and issuer engagement.

Furthermore, we believe that the highly-charged and well-funded political campaign that has been waged against proxy advisors (and by extension, their clients) is based not just on low-quality "academic research" but on a deliberately ill-conceived understanding of the role of service providers in the stewardship process. Most egregiously, it appears that the emails and letters sent to the SEC allegedly supporting the proposed regulations are works of fiction⁸. The irony of this falsification is not lost on those of us who stand accused of providing research that is, allegedly "full of errors".

Chairman Clayton, and with all due respect to your hard-working SEC colleagues, if the evidence put forward in support of proxy advisor regulation were to be presented in any court of law, we contend that the judge would have no hesitation in terminating the proceedings on the grounds that the action is nothing less than vexatious litigation brought by a very powerful constituency designed solely to harass and intimidate a small handful of hard-working analysts rather than to address a fundamental legal failing.

Has the proxy market failed? Yes, but not for the reasons outlined by the industry's antagonists. We believe that there are three failures:

1. **Failure of Competition:** we agree that the market is skewed and that the size and share of the largest vendor probably meets the definition of "dominant" in terms of anti-trust regulations. Clearly it is unhealthy for the market to be dominated by one vendor as is currently the case. However, the proposed regulations will not create competition. As things stand, the proposed regulations will create an even more hostile and lop-sided operating environment for proxy research. That issuers will be able to sue proxy analysts for "errors" but issuers face no similar

⁴ The BPP Founders were: Glass Lewis, ISS, IVOX (now owned by GlassLewis), Manifest (now Minerva), PIRC, and ProxInvest

⁵ <https://bppgrp.info/bpp-independent-oversight-committee-chair/>

⁶ <https://www.cfainstitute.org/-/media/documents/code/other-codes-standards/read-research-objectivity-standards.ashx>

⁷ <https://www.sec.gov/news/press/2003-54.htm>

⁸ <https://www.manifest.co.uk/sec-falls-foul-of-proxy-astroturf/>

recourse for either “little r” restatements or “Big R Restatements”⁹, the legal risks for analysts far outweigh the commercial benefit. As such it is highly unlikely that Minerva will establish a presence in the US to create a challenger vendor. If, as is stated, competition is the primary concern, then application of anti-trust laws would seem more logical than creating new regulations whose outcome is would exacerbate an existing problem.

2. **Failure of Regulatory Enforcement:** It is said that asset managers are “zombie voting” or voting on “auto-pilot”. These are serious allegations against regulated fiduciaries. What does the evidence show? What inspections have been undertaken by the SEC to determine the extent of the allegations at a regulated-firm level? Have existing regulations been enforced and found wanting? Contrary to the allegations that proxy advisors are not regulated, it is well-known that ISS is a registered investment advisor – what inspection or enforcement has been undertaken in respect of the allegations made against them? Indeed, have there been any formal complaints made against ISS at all?
3. **Failure to Fix the Proxy Plumbing:** Many of the concerns aired about the proxy process would, we believe, be better addressed by fixing the real problem in the US proxy system – the dysfunctional plumbing¹⁰ which creates unnecessary and artificial barriers between issuers and their providers of capital – the shareholders. Issuers waste inordinate amounts of shareholder funds on identifying owners, communicating with them (or seemingly not communicating with them), being hostile towards them, whilst simultaneously courting them when fund raising is required.

We agree that the proxy system is broken. That is to say, the proxy plumbing is broken, not research. Issuers and shareholders collectively pay far too much for inefficiency; there are multiple layers of obscure and opaque fees; confidentiality is not assured, and the market is currently monopolised by a dominant intermediary which prevents freedom of choice. The SEC is presented once more with an historic opportunity to bring the US proxy plumbing into the 21st century and once more it has been misdirected.

In the following pages we have added some additional and specific commentary on some of the allegations made against proxy analysts which we hope you and colleagues will find helpful in your forthcoming deliberations. Please do not hesitate to contact me if you would find it helpful to discuss any of the points raised.

Yours sincerely

Sarah Wilson
Chief Executive

⁹ “Little r” restatements occur when a firm’s immaterial errors accumulate to a material error in a given year. Unlike “Big R” restatements, which must be reported through an SEC 8-K material event filing, little r restatements do not require an 8-K form or a withdrawal of the auditor opinion. See, for example, <https://blog.auditanalytics.com/error-corrections-a-look-at-adjustment-and-restatement-trends/> and Tan, Christine E. L. and Young, Susan M., An Analysis of 'Little r' Restatements (November 1, 2014). Fordham University Schools of Business Research Paper No. 2407659. Available at SSRN: <https://ssrn.com/abstract=2407659> or <http://dx.doi.org/10.2139/ssrn.2407659>

¹⁰ Concept Release on the U.S. Proxy System (July 14, 2010). Securities and Exchange Commission. [online] Available at: <<https://www.sec.gov/rules/concept/2010/34-62495.pdf>>.

Proxy Research & Analysis – A Minerva Fact Check

Numerous arguments and claims have been made against proxy analysts in recent years, the majority of which are entirely without foundation. The following commentary discusses some of those accusations and presents alternative points of view – and importantly facts which rebut the allegations and proposes some alternative remedies to address the failings of the proxy market where they do exist.

1 The Market for Proxy Research is Uncompetitive: TRUE

We agree that the market for proxy services is lop-sided both in terms of proxy vote execution and proxy research. Has the SEC calculated the Herfindahl–Hirschman Index for the proxy industry as part of its regulatory impact assessment?

While we agree that there are significant issues about the structure of the market, we cannot agree, based on 25 years' experience in the industry that the proposed regulations will improve matters.

2 Proxy Analysts Make Recommendations: FALSE

Some proxy analysts make recommendations, others do not. Minerva does not.

Unlike other proxy research services, Minerva does not make “house recommendations”. Instead, all our clients have comprehensive and fully customised voting policies which are informed by a sophisticated data model which flags contentious issues to inform their decision. The issues are specified by our clients, academic research, international guidelines such, for example, the G20/OECD¹¹ guidelines and ICGN Principles,¹² local market principles such as the CII Corporate Governance Policies.¹³ Up to 2,000 data points are used in this process and the flagging process may produce a For/Against/Abstain or Case-by-Case guidance. A significant number of these voting guidelines, circa one third, contain optional variables or thresholds which clients may specify. These may be, for example the % of women on a board, the ratio of audit to non-audit fees, the number of outside directorships, the tenure of an auditor since last put to tender. The potential possible outcomes from the process are, as you can probably determine, almost infinite. We are therefore unclear how we could possibly show our recommendations to issuers, even if this were a desirable thing to do, as they do not exist in the sense proposed by the regulations.

How would the Commission view an AI program? Would that also be a “solicitation”? What would be the situation in respect of a consensus recommendation based on all of the voting instructions passing through a custodian voting platform? Leaving aside the fact that those of us compelled to use the broken and leaky plumbing to send votes to the tabulators/stock transfer agents when we are more than capable of using alternative secure, confidential and direct vote lodgement pathways, the fact that we and our clients have expended considerable time, effort and cost to develop research and decision support tools which are being monetized without explicit consent raises troubling questions which the proposed regulations do not answer. A feature notably missing from the SEC's proposals is the need confidentiality and assurance that client data is not being used without explicit consent. Nobody would tolerate a third party listening in on trading calls or banking transactions. Why should voting transactions be given less assurance?

¹¹ <http://www.oecd.org/corporate/principles-corporate-governance/>

¹² <https://www.icgn.org/policy/global-governance-principles>

¹³ https://www.cii.org/corp_gov_policies

3 Main Street Investors' Returns are at Risk from Better Corporate Governance: FALSE

Leaving aside the disappointing astro-turf campaign being conducted in the name of retail investors which appears to be nothing less than a vocal and well-funded issuer lobby, we agree that direct retail investors (who may also indirect savers through their pension plans) are a critical component of the financial system. It is their hard-earned capital which helps to drive innovative solutions to the world's most pressing problems and to whom the financial services industry is accountable. We also agree that retail investors views and preferences are often overlooked. However, it is false to suggest that investment fiduciaries jeopardize future returns through their active ownership and stewardship strategies envisaged by Berle and Means almost a century ago.¹⁴

Time has moved on, theories may have evolved, but what has not changed is the commitment on the part of asset managers to do the right thing for their clients. If that means intervening through a proxy vote to protect capital, to prevent pay for non-performance or encourage a more sustainable approach, then this should be applauded and encouraged. But perhaps, more importantly, retail investors should be better informed and encouraged to participate in the stewardship of their assets alongside their money managers. Unfortunately, the inherent structure and associated defects of the US proxy plumbing system¹⁵ make this less rather than more likely. In the UK and Europe sincere attempts are being made to address many of these problems through, for example, the revised Shareholders Rights Directive and associated implementing regulations now being put in place.

Despite the requirements for mutual fund voting disclosure mandated by form NP-X¹⁶ which have resulted in vast quantities of data, the quality of reporting and real information for retail investors on proxy and ESG matters is generally very poor and inaccessible. It is hardly surprising, therefore, if retail investors have a skewed view of what active ownership involves. In the UK we are attempting to address this very real concern. The Financial Reporting Council's recently revised Stewardship Code¹⁷ aims to address some of these concerns by encouraging a more thoughtful and qualitative approach to reporting in order to: *"create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society"*.

It is no surprise that the rise of political populism and mistrust in capitalism have run in parallel. Since the global financial crisis, Main Street Investors have seen a diminishing pie carved into smaller pieces. However, controlling or silencing dissenting voices will do nothing to rebuild trust and will simply serve to reinforce the divisions. What is required is more discourse, more engagement and a better understanding of the purpose and rationale for investment stewardship – sustainable investment returns in a world worth living in.

4 Investors need "protecting" from their service providers: FALSE

This is probably the most extraordinary allegation of all. And let us not be squeamish about the real meaning of such statements. Who benefits from the passage of these regulations? Who is calling for an increased regulatory burden? Certainly not investors who will end up paying considerably higher fees if these rules are passed. If fund managers or institutional investors need protecting from proxy analysts, then we should be extremely worried for the rest of the investment management process for which they are responsible. Asset managers and institutional investors make many significant and demanding decisions every day – the allocation of trillions of Dollars, Pounds and Euros is their daily routine. Are issuers really

¹⁴ Berle, A.A. and Means, G.C., 1932. *The Modern Corporation and Private Property*. New Brunswick (USA) and London (UK): Transaction Publishers.

¹⁵ Donald, D.C., 2010. *Heart of Darkness: The Problem at the Core of the US Proxy System and its Solution*. *SSRN Electronic Journal*. [online] Available at: <http://www.ssrn.com/abstract=1697606>.

¹⁶ <https://www.sec.gov/reportspubs/investor-publications/investorpubsmfproxyvotinghtm.html>

¹⁷ <https://www.frc.org.uk/investors/uk-stewardship-code>

suggesting that when it comes to ownership decisions that investors suddenly become ignorant? Or is it just much easier for issuers to shoot the messengers because we are few and relatively powerless?

On balance, we believe that the critics of proxy analysts find it easier take ill-judged pot shots at analysts than to reveal their true feelings, which appears to be thinly-veiled contempt. While the CEO of JP Morgan may think that investors who use proxy research are 'lazy', 'irresponsible' and 'probably bad investors',¹⁸ that is probably not the view of his investment management division or their clients. Although with reference to Mr Dimon's 2015 comments, we note that Business Round Table, which Mr Dimon chairs¹⁹, has in recent months taken a more measured approach and now appears to embrace many of the stakeholder value and ESG concepts which institutional investors and proxy analysts have long espoused.²⁰ We welcome the BRT's new approach to ESG and look forward to seeing the effects through higher quality ESG disclosures from member corporations.

5 Correlation is Causation: FALSE

There appears to be considerable confusion about the role of proxy research and recommendations in the stewardship process. Even where analysts make recommendations, it does not follow that the recommendations are the cause of a voting decision, it also possible that the underlying data points and other associated information which coincide with the investor's own views which resulted in a particular voting decision. Indeed, comments from many investors indicate that proxy research is an input to a holistic process and that recommendations are not the final determinant.

Data is highly seductive, especially when it appears to have the imprimatur of "Academic Evidence". However, disappointing as it may be to the Main Street Investor Coalition and its (alleged) members or the Rock Center,²¹ correlation is not causation. There are so many methodological flaws in the "evidence" presented against proxy analysts that they could fill a PhD thesis, however, unless the SEC has thoroughly inspected the voting records of the (allegedly) robo-voting fund managers to determine how long they did or did not spend considering the implications of their voting, it is simply not true to say that because X says "do Y", that it was the act of saying Y that caused the action or whether it was the underlying data and arguments which crystallised the decision which coincides with the recommendation. Even so, if an asset owner or manager believes that the recommendations of their service provider represent their views, is the SEC suggesting that investors are not a liberty to have their own views, independent of issuers and their advisors who often stand to personally benefit from the meek acquiescence of shareholders? This would seem an extraordinarily authoritarian suggestion in a modern democracy.

6 Proxy Research is Full of Errors: FALSE

It is alleged that proxy advisors' recommendations are "full of errors" and therefore votes are "incorrect" or "inaccurate". In the first instance, a point of view cannot be said to be either accurate or inaccurate, it is a personalised perspective. Are the SEC proposing that investors are not to be permitted to have a point of view, independent of management?

And while data can be inaccurate, if it were true that proxy advisor recommendations were "full of errors", that would mean that the 95% of votes that receive upwards of 95% support have also been made in error. How can this be? Or is it perhaps that CEOs and boards just simply don't like to hear the bad news from

¹⁸ <https://www.responsible-investor.com/articles/jd-prox>

¹⁹ <https://www.businessroundtable.org/about-us/board-of-directors>

²⁰ <https://thehill.com/policy/finance/457927-in-shift-top-ceos-say-shareholder-value-not-top-goal> and <https://opportunity.businessroundtable.org/ourcommitment/>

²¹ <https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/>

their providers of capital that their star CEO isn't worth it. In this regard Adam Neumann, the founder and lately CEO of WeWork, springs to mind.

Unfortunately, none of the naysayers against the proxy industry have come forward with data which would be considered robust to support this argument. In this regard we defer to the Council of Institutional Investors and their recent freedom of information request which makes the point extremely well.²²

7 Proxy Research Lacks Objectivity and Independence: FALSE

Various commentators have claimed that lack of objectivity and independence and so therefore issuers must have the last word. This does not make sense. If research becomes conflicted or tainted by the involvement of issuers in the research process because they are buying, receiving or commenting on research then surely there should be less involvement, not more? Calls for issuer involvement in the proxy research process are the polar opposite of the demands made of sell side analysts as evidenced by the Spitzer Settlement, MiFID and other analyst objectivity initiatives.

In order to support objectivity and independence Minerva does not circulate its research to issuers, indeed anyone, prior to publication. Our research analysts are firewalled from clients, issuers, the media and advisors in order to ensure that the analytical process is not swayed by commercial considerations. This does not preclude fact checking – which is very necessary given the level of errors and omissions we find in corporate disclosures.

8 Proxy Research is a Solicitation: FALSE

Minerva does not call itself a proxy advisor/adviser as we do not believe this accurately represents the role we fulfil and is too easily confused with the term investment advisor. Instead, we have always called ourselves a proxy voting agency. "Agency" because we act on the instructions of our clients rather than a "Principal" acting on our own account. For this reason, we cannot accept the SEC's assertion that proxy analysis is proxy solicitation. We provide research, analysis and ministerial acts for regulated entities. We provide a technology platform which takes care of the administrative burdens associated with proxy voting in much the same way that a corporate actions platform does for processing dividends or settling trades. We are entirely agnostic about how or why our clients vote as they do. Indeed, we are very concerned that defining proxy analysts as proxy solicitors would make it MORE LIKELY, not less, that organisations would create single issue platforms to gather votes.

9 Proxy Advisors are the Cause of Falling IPOs: FALSE

There is ample evidence which demonstrates that there are many meaningful reasons for the declining numbers of IPOs. macro-economic variables, such as GDP growth rates are a strong positive influence, likewise interest rate policies also influence the number of IPOs and the total amount raised through equity issues (see, for example Jovanovic & Rousseau, 2004).²³ The 1950's and early 1960's were notably periods of extremely low real interest rates; IPO investment at that time was also low, with corporations significantly delaying their IPOs.

²² Council of Institutional Investors, Freedom of Information Request (November 2019). Available at: [https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191114%20CII%20FOIA%20request%20to%20SEC\(1\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191114%20CII%20FOIA%20request%20to%20SEC(1).pdf)

²³ Jovanovic, Boyan and Rousseau, Peter L., Interest Rates and Initial Public Offerings (February 2004). NBER Working Paper No. w10298. Available at SSRN: <https://ssrn.com/abstract=502884>

10 The SEC's Rules Will Promote Competition: FALSE

Regulations, no matter how well intended, invariably have unintended consequences. What are the consequences for proxy research services that your officers have considered in the framing of these proposals? We think investors have a right to know.

The proposed rules will not, as argued by the pro-regulation lobby, enhance competition; they will kill it outright. For as much as Minerva would like to make a formal entry into the US market with a local presence, the implicit threat of expensive and burdensome litigation as proposed by the regulations for "errors" together with the mandating of free and prior distribution of our research at the expense of our clients' contractual rights renders that possibility highly unlikely for the foreseeable future. SEC officers may wish to recall that it was the move from "buy-side pays" to "issuer pays" which fundamentally altered the Credit Rating Agency industry and was the root cause problem of the objectivity issues raised by the financial crisis.

Promoting competition in the proxy space is, we agree, essential to ensure a proper market, if this is what the issuer lobby genuinely wishes to see. On the other hand, it could be that they simply wish to foreclose the entire industry. This would not serve investors, institutional or Main Street well. Efficient markets do not only depend on information for price discovery, but also for due diligence analysis which helps to crowd out bad actors and discourage long-term value (and values) destroying short-termism. By mandating the final word on proxy analysis to the issuer community, the SEC's proposals would create an unwarranted information asymmetry – or more bluntly they would introduce a regime of censorship and issuer-approved groupthink which is no more healthy than single vendor groupthink.

If competition is truly a genuine concern, an alternative approach may be to consider some of the steps being taken to promote competition in the audit and accounting space, e.g. separation of advisory services and compulsory tendering every 7-10 years. Switching is not actually as hard as is sometimes suggested, or if it is, we should get to the bottom of those problems so they can be eliminated. As has been shown in many other markets, easy switching is an important component of a healthy market.

11 Corporate Governance and ESG Theory Doesn't Work: FALSE

Possibly some of the most contentious debate around the role of proxy research is that corporate governance or ESG theory doesn't support or justify action. This is both a disturbing and complex argument and too detailed for regulatory feedback response. It would be more succinct to say that such arguments ignore the fact that Modern Portfolio Theory is just that, a theory and that the Efficient Market Hypothesis is also just a hypothesis – and one which is increasingly questioned by leading academics and practitioners such as, for example, Paul Woolley, senior fellow of the London School of Economics who said recently *"the damage caused by dysfunctional stock markets is not receiving adequate attention. Fifty years on from the publication of a landmark paper propounding the efficient markets hypothesis — that investors respond rationally to publicly available information — it is time to look again"*²⁴ (Woolley, 2020).

There are no investing certainties, past performance is not indicative of future results. Corporate governance and ESG (Environmental, Social and Governance) issues represent a market for ideas about how investors can protect themselves and there is a vast body of high quality research from leading global institutions published in peer reviewed journals (whose funding is fully declared) which supports many of the arguments which are central to shareholder voting and engagement.

²⁴ Woolley, P., 2020. *As the efficient markets hypothesis turns 50, it is time to bin it.* [online] Financial Times. Available at: <<https://www.ft.com/content/dbf88254-22af-11ea-b8a1-584213ee7b2b>> [Accessed 3 Jan. 2020].

12 Regulating Proxy Analysts Will Improve Investor/Issuer Relations: FALSE

The proposed regulations will give asset owners and managers greater moral licensing to outsource their stewardship responsibilities if they perceive that their service providers are regulated more heavily than they as the investment principles. Issuers will feel that in having dealt with proxy analysts there will be less need for them to engage directly with their shareholders. Again, respectfully, we believe that this is the opposite of what the SEC hopes to achieve, namely better issuer and shareholder relations based on mutual understanding and shared beliefs of good governance which support sustainable shareholder value.