

Via Email

January 30, 2020

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

Re: File No. S7-22-19

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to proposed amendments to the federal proxy rules published on December 4, 2019, in SEC Release No. 34-87457, *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice* (Release).¹

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

CII strongly opposes the Release in its entirety. We present a general summary of key issues in the Release (page 2), and then responses to the specific questions the SEC poses in the Release (page 6).

We sought to provide as much response to the SEC’s questions as we could within the limited time provided for comments on the Release and the SEC’s proposal to limit shareholder

¹ Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 87,457, 84 Fed. Reg. 66,518 (proposed rule December 4, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf> (Release).

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>. We note that the two largest U.S. proxy advisory firms, Glass Lewis & Co. (Glass Lewis) and Institutional Shareholder Services (ISS), are non-voting associate members of CII, paying an aggregate of \$18,000 in annual dues—less than 1.0 percent of CII’s membership revenues. In addition, CII is a client of ISS, paying approximately \$19,600 annually to ISS for its proxy research. In this letter, the terms “shareowner” and “shareholder” are used interchangeably.

proposals. (Both proposals were announced the same day and have the same limited comment period). We believe the two proposals together (1) are the most significant SEC attempt to limit shareholder rights since the Commission was created; (2) are fundamentally flawed and should be withdrawn so that the SEC can re-think key elements of the proposals and also spend time on credible cost-benefit analysis, should the Commission decide to re-propose changes; and (3) introduce substantial new complexity and micromanagement to proxy voting, while not addressing the major problems in the system.

The SEC poses a total of 345 questions in the two releases. We and 90 investors and investor organizations requested longer comment periods, but never received any response to these requests from the SEC.³ Therefore, we submit these comments now in anticipation of the February 3 comment deadline. We would note that SEC staff has told us they would welcome comments after February 3 but were equivocal about when might be too late; we may offer further comment at a later date.

In addition to this letter, we anticipate filing an additional letter in coming days focused particularly on unsubstantiated claims of errors by proxy advisors.⁴

The following is a brief summary of our responses to some of the key issues raised in the Release.

Proposed Codification of the Commission’s Interpretation of “Solicitation” Under Rule 14a-1(1) and Section 14(a)

We do not support the proposed codification of the Commission’s interpretation of “solicitation.” It is unclear to us and many legal experts that the SEC has the authority to regulate proxy advisors as solicitors under Section 14(a) of the Exchange Act. We believe this issue ultimately will be decided by the courts.

We also note that the proposed codification undergirds a new proposed regulatory framework that disrupts the existing proxy advisory business model. Most institutional investor clients of proxy advisors do not support the framework; the framework is not based on reliable evidence; and its implementation would not benefit investors generally, including Main Street investors.

³ Letter from CII and 74 investors and investor organizations, Nov. 15, 2019, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/11_15_19_SEC_request_for_comment_period_extension_final.pdf; and letter from CII and 16 additional investors and investor organizations, Nov. 22, 2019, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/11_22_19_SEC_request_for_comment_period_extension_final.pdf.

⁴ Related to this effort: On Nov. 7, 2019, CII requested that Securities and Exchange Commission (SEC) staff provide its underlying data used for Table 2 in the Release. In Table 2, the SEC staff described and categorized company claims of proxy advisor report errors. CII repeatedly re-requested this information after November 7, including through filing a Freedom of Information Act (FOIA) request. On Jan. 16, 2019 (70 days after our initial request and only 18 days before the end of the comment period for this proposal), SEC staff published a Memorandum with limited additional information. However, the SEC staff did not provide the key data sought by CII. See SEC Division of Economic and Risk Analysis, Memorandum Regarding Data Analysis of Additional Definitive Proxy Materials Filed by Registrants in Response to Proxy Voting Advice at <https://www.sec.gov/comments/s7-22-19/s72219-6660914-203861.pdf>.

Conflicts of Interest

We generally support the proposed requirements to elicit disclosure of proxy voting advice businesses' conflicts of interest to its clients. We agree that conflict of interest disclosure is important for all major participants in the securities markets, including proxy advisors' businesses. We do not believe, however, that the SEC needs to create an elaborate and expensive (at least for investors) new regulatory structure to accomplish this.

We do not believe the Release provides reliable evidence indicating that the conflict of interest disclosures currently provided by proxy advisors are inadequate to meet the information needs of their institutional investor clients. Despite the lack of reliable evidence in the Release, we have historically supported and continue to support requiring proxy advisors to disclose details of potential conflicts in their research reports to clients. We generally believe the proposed requirements, subject to some modifications and enforced through existing SEC authority over registered investment advisors, could provide clients of proxy voting advice businesses with adequate and appropriate information about the proxy advisors' conflicts of interest when making their voting determinations.

Registrants' and Other Soliciting Persons' Review of Proxy Voting Advice and Response

We oppose the proposed required review and notice periods of proxy voting advice and response. We believe the proposed requirements would significantly and negatively impact the ability of institutional investors to obtain independent, timely, and cost-effective research and advice from our proxy advisors.

We also believe the proposed requirements are largely premised on the incidence of factual errors and methodical weaknesses in proxy voting advice businesses' analyses. The Release, however, fails to provide reliable evidence to support that premise.

Setting aside our strong principles-based objections, the rules as proposed are simply unworkable. If, despite our strong opposition, the Commission insists on a government-mandated review of proxy voting advice and response, we believe any requirements should include the following:

- To be eligible for review of draft proxy voting advice and response an issuer shall:
 - File the definitive proxy statement at least 50 calendar days before the shareholder meeting
 - Reimburse the proxy advisor for reasonable expenses associated with the required review and response
- The government mandate for the issuer management review and response period be limited to a maximum of two business days, with no "final notice" period (a proxy advisor could provide more time if it chooses)
- The government mandate for provision in advance of draft reports to subject issuer management be limited to factual information and data only (a proxy advisor could provide more if it chooses, notwithstanding that doing so would be contrary to the FINRA rules for analysts)

- The proxy advisor be permitted (if it chooses) to provide any such draft data report to clients at the same time it is provided to the issuer for review, as long as it is labeled a draft and as long as the proxy advisor and its clients subject to the SEC's jurisdiction do not execute votes during the draft review period
- The proxy advisor is eligible for a safe harbor from liability under Rule 14a-9 if it complies with the proposed requirements.

We believe a rule based on the stipulations above would produce far better outcomes than the rule as proposed in the Release. It would not worsen the very substantial time crunch challenges faced by our members and other investors in voting proxies (particularly during the spring proxy season), and would set a baseline for issuer review (as the Commission seeks in the Release), but leave room for firms to go beyond that baseline if there is market demand.

Proposed Amendments to Rule 14a-9

We do not support the proposed amendments to Rule 14a-9. We do not believe the Release provides a reliable basis for the assertion that proxy advice business reports lack clear disclosure when they use criteria that differs from the criteria approved or set by the Commission. We include three examples as appendices to this letter that support our view.

Transition Period

We support revising the proposed "one-year transition period after the publication of a final rule in the Federal Register" to at least an 18-month transition period after the publication of a final rule in the Federal Register. The proposed revision is intended to address concerns about limited time and resources for transition during the spring proxy season.

General Considerations

We support permitting, but not requiring, smaller proxy voting advice businesses from complying with the proposed amendments. More specifically, we would propose that proxy advisors that have annual gross receipts in an amount that is not more than \$5,000,000, and/or that are 501(c)(3) organizations, be exempt from the proposed additional conditions to the exemptions.

Economic Analysis

We believe the provisions of the Release are anti-market, and would damage integrity and quality of proxy voting and impose a potentially substantial net cost on investors for at least four reasons.

First, CII staff performed a detailed review of the alleged errors in proxy voting advice business research reports and found a factual error rate on a report basis of 0.057 to 0.123%. We believe an error rate of that magnitude does not provide a reliable basis for imposing a costly new regulatory framework that will constrain competition.

We note that the only quantitative evidence presented in the Release on the reliability of voting advice is a table that provides data of registrant allegations of errors. SEC staff members told us that they made no effort to verify the company assertions. Even assuming the accuracy of company assertions and the SEC's classification of complaints (about which the SEC declined to show its work), the number of possible factual errors identified by companies in their proxy supplements amounted to 0.3% of proxy reports. Despite repeated CII staff requests, the SEC declined to provide us and other market participants with all of the underlying information the SEC used to generate the table. Thus, we and other commentators are unable to judge the accuracy of the allegations as classified by the SEC (although we anticipate submitting a supplemental letter doing our best, with the limited information provided by the SEC, to examine SEC claims about issuer claims in 2018).

Second, even assuming the Commission believes a 0.3% error rate for proxy voting advice business research reports is too high and should be reduced, the proposed timeframe available for the proxy voting advice businesses to undertake their research and draft their recommendations, and, importantly, for institutional investor clients to review the advice, would generally decrease. Institutional Shareholder Services (ISS) estimates a decrease of nine to 13 calendar days; it says that on average it currently delivers reports just under 20 days in advance of meetings. We believe this shorter timeframe would reduce the reliability and completeness of voting advice, and substantially damage the ability of investors to consider proxy voting issues with the benefit of proxy voting advice that they pay for. The SEC also is proposing requirements for early filing of proxy statements ostensibly to create more time for review of proxy voting issues, but the SEC did not provide adequate justification for the dates it chose, and we believe this "incentive" will be ineffective as proposed by the Commission.

Third, the SEC rules will damage the independence of proxy voting advice. We note that the shorter time frame is largely created by the proposed requirements for proxy voting advice businesses to share draft research reports with companies for a review and feedback period. We believe that those requirements likely violate the First Amendment of the U.S. Constitution (the First Amendment). The requirements impair the independence of the proxy advisor research for at least two reasons: (1) the proxy advisor is required to seek review and receive feedback from the self-interested company *before* sharing the draft report with their own paying institutional investors clients; and (2) the proxy advisor advice to clients is subject to heightened liability to the issuer under SEC Rule 14a-9. We believe the impairment of the independence of the proxy advisor would reduce the reliability and completeness of voting advice.

Fourth, the highly prescriptive and expensive regulatory approach taken by the Commission is almost certain to damage the market for proxy voting advice, serving as a formidable barrier to entry and potentially putting out of business some firms identified by the SEC as existing proxy advisors. The market itself is an important source of pressure for accuracy and quality in proxy advisor reports. Our members generally would like to have more than two dominant providers, not fewer. The Release seems to entirely ignore the value of market-based solutions, and overvalues highly prescriptive regulation.

We do not possess the data necessary to determine all of the costs resulting from the proposed requirements of the Release. However, we understand that at least two of the proxy voting advice

businesses have indicated that the SEC has substantially understated the costs. One of those businesses estimated that the burden imposed by the provisions would be 240x the Commission's estimate.

The direct costs borne by proxy voting advice businesses resulting from the provisions of the Release would inevitably have to be passed on to their institutional investor clients and the beneficiaries of those client's funds, including pension fund beneficiaries and other Main Street investors.

For those proxy voting advice businesses that do not currently have any issuer review procedures and processes in place, it is understandable that those businesses would be disproportionately affected by the provisions of the Release. We support measures to mitigate the effects on those businesses. For example, we would exempt businesses that do not routinely issue research reports to clients in advance of shareholder meetings.

Initial Regulatory Flexibility Analysis

We believe that there are a number of small proxy voting agents and research providers that have not been identified in the Release, but are likely to come within the broad sweep of the proposal. We also believe the cost to those firms as a result of the provisions of the Release will likely be significant and potentially cause some or all to exit the business. The SEC should have done additional analysis on smaller firms before making the proposal, including engaging with them about their business models and the impact on their business of potential regulatory schemes (which we understand the SEC did not do at all).

Our detailed responses to the requests for comment in the Release are set forth below. The SEC questions to which we are responding appear in italics.

I. Proposed Codification of the Commission's Interpretation of "Solicitation" Under Rule 14a-1(1) and Section 14(a)

SEC Request for Comment 1. *Should we codify the Commission interpretation on proxy voting advice and the Commission view about unprompted requests for proxy voting advice? Would the proposed codification (adding paragraph (A) to Rule 14a-1(1)(iii) and paragraph (v) to Rule 14a-1(1)(2)) provide market participants with better notice as to the applicability of the federal proxy rules?*

CII Response. CII does not believe that the SEC should codify the Commission interpretation on proxy voting advice. Codifying the Commission's interpretation creates a new proxy voting advice regulatory framework that (1) most of the institutional investor clients of proxy voting advice businesses do not want and have not asked for,⁵ and (2) is based on a questionable

⁵ See, e.g., Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission 3 (Oct. 15, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/201910015proxy_advisor_sign_on_final.pdf

interpretation about the SEC's authority to regulate proxy advisors as solicitors under the federal proxy rules.⁶

The SEC Lacks the Authority to Regulate Proxy Advisors as Solicitors

Proxy solicitation is different than proxy advice. Proxy solicitors generally play an advocacy role, requesting proxies as, or on behalf of, an interested party, the company or a shareholder proponent. In contrast, proxy advisors have no stake in the outcome and are hired by shareholders to give objective advice as a disinterested party.

The proposal depends on treating proxy advisors as if they were engaged in proxy solicitation and then, because they are not, affording them an exemption if they satisfy conditions that would impair their independence and harm investors. In our view, there is no economic or legal basis for this approach.

Institutional investors solicit research, analysis and recommendations from proxy advisors, and pay for those services. The SEC believes that because proxy advisors market their services to institutional investors, "solicitation" of business somehow makes their work product proxy solicitation. In competitive free markets, firms do market their services; this is a key element in how most markets work.

We believe from our members that there is clear market demand for proxy advisory services even beyond vote execution, as the cost of proxy voting analysis would be vastly more expensive if done from scratch by each investor individually. Proxy advisors make efforts to sell their service offerings mainly because they are competing with each other.⁷

As Nell Minow, an expert on corporate governance and the proxy advisor industry, has commented.

The reference to proxy solicitation rules is so inapposite as to be absurd. The proxy solicitation rules are a safeguard against the advocacy of parties with a clear incentive to provide only one side of the story on matters that are fundamental to a company's continuing operations and structure. Proxy advisors are independent third parties who sell a product no one has to buy with recommendations no one has to follow.⁸

(letter signed by a coalition of investors confirming that "[t]he experience of the investor community with proxy advisors has developed over decades and has been positive[] [and] there is no current call from the investment community for regulatory intrusion on proxy advisors' business.") (CII October 15 Letter).

⁶ See, e.g., Richard A. Kirby et al., A Step Too Far: The SEC's Attempt to Regulate Proxy Advisory Services Violates the First Amendment, R|K Invest Law, PBC 1 (Jan. 2020) (on file with CII) (commenting that the interpretation "reverses years of interpretation and industry understanding, and conflicts with the regulatory exemption for proxy advisory firms imbedded into the proxy rules themselves.")

⁷⁷ Ironically, if new SEC regulations create a monopoly provider, as we think is possible, it may no longer be necessary for that monopoly provider to market its services, and the SEC would lose a key linchpin for its attempt to define proxy advice as "solicitation."

⁸ Ted Allen & Gary LaBranche, A "Draft Review" as a Safeguard on Proxy Advisors, Harv. L. Sch. F. on Corp. Governance (May 18, 2019), <https://corpgov.law.harvard.edu/2019/05/18/roundtable-on-proxy-voting-process/> (comment by Nell Minow posted June 3, 2019).

A letter endorsed by 62 prominent academics, led by Stanford Graduate School of Business Professor Anat Admati and University of Chicago Booth School of Business Professor Luigi Zingales (Admati Letter), states that they believe the Commission should not “treat[] opinions on proxies as proxy solicitations.”⁹

The Release acknowledges that the “breadth of the Commission’s definition of a solicitation could raise questions.”¹⁰ The Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC) recommendation addressing the Release (IAC Recommendation) indicates that it not only raises questions but raises “confusion among many investors.”¹¹

In addition to questions and confusion, the SEC’s overly broad interpretation of solicitation is an element of litigation against the SEC in the United States District Court for the District of Columbia (Federal Court).¹² The complaint, filed by Institutional Shareholder Services (ISS), alleges, among other claims, that “SEC’s Historic Interpretation of ‘Solicit’ Under Section 14(a)[¹³] Of The Exchange Act Has Never Applied To Proxy Vote Recommendations and Analysis Furnished in The Course Of A Fiduciary Relationship.”¹⁴ While the litigation is currently in abeyance,¹⁵ it is unclear to us whether the Federal Court ultimately will agree with the Commission that Section 14(a) applies to proxy advisors whose activities are not intended to solicit proxies and who do not solicit proxies, but instead provide advice requested and contracted for by institutional investor clients.

⁹ Letter from Anat Admati, George G.C. Parker Professor of Finance and Economics, Stanford Graduate School of Business et al. to Chairman, Jay Clayton, Securities and Exchange Commission et al. at 1 (Jan. 15, 2020) <https://www.sec.gov/comments/s7-22-19/s72219-6668185-203962.pdf>.

¹⁰ Release at 66,518.

¹¹ See, e.g., Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC), Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals 2 (Jan. 16, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-advisors-shareholder-proposals.pdf>.

¹² Complaint for Institutional Shareholder Services at 10-14, ISS v. SEC (Case 1:19-cv.-03275) (filed Oct. 31, 2019), <https://www.issgovernance.com/file/duediligence/iss-oct-31-2019-complaint.pdf> (“The SEC’s Historic Interpretation Of “Solicit” Under Section 14(a) Of The Exchange Act Has Never Applied To Proxy Vote Recommendations And Analysis Furnished In The Course Of A Fiduciary Relationship. The complaint also includes three counts of claims for relief under the Administrative Procedure Act. *Id.* at 19-24.

¹³ Proxies, 15 U.S.C. § 78n(a) (1934), available at <https://www.law.cornell.edu/uscode/text/15/78n>.

¹⁴ Complaint for Institutional Shareholder Services at 10; see Letter from Lorraine Kelly, Head of Governance Business, ISS to Valued Client (Jan. 16, 2020) (on file with CII) (“ISS will be submitting its own comments on the proposed rule and a key point we will be making is that there is no legal basis for any aspect of the rulemaking because Congress never authorized the SEC to regulate proxy advisors as solicitors under the proxy rules.”).

¹⁵ See Letter from Gary Retelny, President & CEO, Institutional Shareholder Services to Valued Client (Jan. 20, 2020), <http://app.info.issgovernance.com/e/es?s=575090836&e=46591&elqTrackId=8e31b9354d51459d861cf78d47de138a&elq=49cebd6329f74d3886b099241bfa1804&elqaid=2709&elqat=1> (“ISS . . . agreed to a temporary stay in this case in light of the SEC’s representations that the guidance does not have the force and effect of law and will not be invoked while the litigation is stayed.”); see also Cydney Posner, SEC Calls “TimeOut” on Proxy Advisor Guidance and ISS Litigation, CooleyPubCo (Jan. 30, 2020), <https://cooleypubco.com/2020/01/30/time-out-on-proxy-advisor-guidance-iss-litigation/> (“the SEC has now filed an Unopposed Motion to Hold Case in Abeyance, which would stay the litigation until the earlier of January 1, 2021 or the promulgation of final rules in the SEC’s proxy advisor rulemaking [and] . . . companies should *not* expect proxy advisory firms to feel compelled to comply with the SEC interpretation and guidance, including advice to proxy advisors to provide certain disclosures . . .”).

In commenting on the lawsuit, one prominent corporate law firm recently has opined that: “The Commission surely expects that any final rule is destined for the U.S. Court of Appeals for the D.C. Circuit, a venue that has not always been receptive to Commission rulemakings. Expect this rulemaking to be a difficult one.”¹⁶

Most Institutional Investor Clients of Proxy Advisors Do Not Support the Proposed New Regulatory Framework

As indicated, most of the paying customers of proxy voting advice businesses—institutional investors—have not asked for and do not support the SEC establishing a new regulatory framework and forcing a significant change to the industry’s business model.¹⁷ While omitted from the Release, we believe it is highly relevant that at the end of the SEC’s November 15, 2018, public roundtable on the proxy process (Roundtable) when the SEC staff asked: “Is there anyone on the panel that thinks there should be additional regulation?”¹⁸ No panelist—including those speaking on behalf of the corporate community—voiced any need for new regulations of proxy advisory firms.¹⁹

One of the panelists at the Roundtable was Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System (OPERS) and a current CII board member.²⁰ Consistent with her comments at the Roundtable,²¹ an OPERS letter in response to the Release (OPERS Letter) stated:

¹⁶ Ropes & Gray, Alert, SEC Proposes Amendments to Regulate Proxy Voting Advice and Modernize the Shareholder Proposal Rules (Nov. 11, 2019), https://www.ropesgray.com/en/newsroom/alerts/2019/11/SEC-Proposes-Amendments-to-Regulate-Proxy-Voting-Advice-and-Modernize-the-Shareholder-Proposal-Rule?utm_source=alert&utm_medium=email&utm_campaign=SEC-Proposes-Amendments-to-Regulate-Proxy-Voting-Advice-and-Modernize-the-Shareholder-Proposal-Rule.

¹⁷ See, e.g., CII October 15 Letter at 3.

¹⁸ U.S. Securities and Exchange Commission, Roundtable on the Proxy Process Transcript 250 (Nov. 15, 2018), <https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf> (SEC Staff Michelle Anderson).

¹⁹ See *id.* at 250-57; see generally Securities Exchange Board of India, Report of Working Group on Issues Concerning Proxy Advisors-Seeking Public Comment 17 (July 29, 2019), https://www.sebi.gov.in/reports/reports/jul-2019/report-of-working-group-on-issues-concerning-proxy-advisors-seeking-public-comments_43710.html (“It is difficult to justify taking [regulatory] action to limit . . . [proxy advisory firm] influence if that influence exists mostly in the mind of companies.”); Matt Egan, Corporate America Loves Deregulation. Then Why Is It Pushing For These Rules?, CNN Bus., Mar. 29, 2019, <https://www.cnn.com/2019/03/29/investing/regulation-proxy-advisory-reform-sec/index.html> (commenting that some “say business groups are going after proxy advisors to silence shareholders by cutting them off from rigorous research needed to scrutinize gaudy pay packages and evaluate complicated proposals on topics such as climate change and minimum wage hikes”). Notably, the SEC release for its proposal to amend Rule 14a-8 prominently describes (in a labeled subsection) the November 2018 roundtable discussion on shareholder proposals. In that roundtable panel on shareholder proposals, some participants articulated views that could be seen as broadly consistent with the SEC’s subsequent November 5, 2019, proposals on that issue. None of the participants in the separate roundtable panel on proxy advisors supported additional regulation of proxy advisors, as the SEC has proposed in the Release. It is striking that the Release consigns the roundtable panel discussion to indirect (at most) reference in a footnote, suggesting bias in the Release presentation.

²⁰ U.S. Securities and Exchange Commission, Roundtable on the Proxy Process Transcript at 8.

²¹ *Id.* at 238 (“In terms of whether additional regulation is needed, I would just offer, it has not been our experience that there's a compelling need for additional regulation.”).

In spite of . . . pleas from institutional investors, the Commission has chosen to release a proposed rule. . . . [T]here is at least a threat that the Commission’s proposal and preceding guidance “opens the door to . . . potential claims by issuers who disagree with the client voting guidelines...”

. . . Frustratingly, the SEC has proposed these sweeping changes to the business relationships between PAFs and their clients based on a minimal amount of evidence, and instead has relied on speculation and anecdotes to draw and support its conclusions.²²

Another of the Roundtable panelists was former Committee on Banking, Housing, and Urban Affairs (Banking Committee) Chairman, and current Visiting Scholar at the American Enterprise Institute, Phil Gramm.²³ In testimony at a post-Roundtable Banking Committee hearing, Senator Gramm said:

[M]y dealings with proxy advisors basically have been good. I think they listen [and] . . . the problem is not proxy advisors.²⁴

Moreover, additional regulation of proxy advisory firms appears to be in direct conflict with the views and priorities of the SEC’s own Investor Advocate Rick Fleming.²⁵ In an April speech, Mr. Fleming stated:

In my view . . . the simple fact of the matter seems to be that proxy advisors have given asset managers an efficient way to exercise much closer oversight of the companies in their portfolios, and those companies don’t like it. That’s understandable, and it is also understandable that companies, rather than directly asking the SEC to suppress shareholder voting . . . would try to cloak their arguments under the mantle of investor protection. But the investors themselves—again, the ones paying for proxy advice—are not asking for protection. In fact, I keep hearing opposition from investors to proposals that might lead to interference in the proxy voting process.

. . . .

Again, no one is claiming that proxy advisors are perfect, but in light of all the important things that the Commission could spend its time on . . . I would

²² Letter from Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System et al. to The Honorable Michael Crapo, Chairman, Committee on Banking, Housing, and Urban Affairs et al. 2 (Dec. 10, 2019) (on file with CII).

²³ U.S. Securities and Exchange Commission, Roundtable on the Proxy Process Transcript at 8.

²⁴ Transcript of Senate Banking, Housing and Urban Affairs Committee, hearing on The Application of Environmental, Social, and Governance Principles in Investing and the Role of Asset Managers, Proxy Advisors, and Other Intermediaries, Bloomberg Gov’t 14 (Apr. 2, 2019) (registration required & on file with CII).

²⁵ Rick Fleming, Speech at The SEC Speaks in 2019: Important Issues for Investors in 2019 (Apr. 8, 2019), <https://www.sec.gov/news/speech/fleming-important-issues-investors-2019>.

respectfully suggest that imposing new regulations on proxy advisers should be given a low priority.²⁶

Proposed New Regulatory Framework Would Likely Harm Main Street Investors

We believe the Release, if adopted, would harm Main Street investors because it would likely increase litigation, staffing and insurance and other costs of proxy advisers. These costs are almost certainly going to be passed on to institutional investors and ultimately their underlying beneficiaries – who, by definition, are at least indirect Main Street investors through pension funds, mutual funds and ETFs in which they are invested.²⁷

Request for Comment 2. *Does the proposed amendment inadvertently include certain communications made by proxy voting advice businesses or other parties, such as investment advisers, that should not fall within the definition of “solicitation”? If so, which communications, and how? Are there any revisions that we should consider that would better address these concerns or provide greater clarity?*

CII Response. As indicated in our response to Request for Comment 1 (Response #1), the proposed amendment depends on collapsing the distinction between proxy solicitors and proxy advisers and essentially treating proxy advice as a proxy solicitation. We believe the breadth of the proposed definition of “solicitation,” combined with the lack of a conceptual underpinning, makes it likely that the proposed amendment will inadvertently include a broad range of communications made by proxy voting advice businesses or other parties.

In our view, the attempt to distinguish whether communications fall within the definition of solicitation based on whether the communications “present significantly less risk to investor protection”²⁸ appears to be unworkable. But even accepting the distinction, the Commission has failed to provide reliable evidence indicating that the existing proxy advisor communications with their institutional investor clients presents a significant risk to investor protection to justify the proposed amendment.

Request for Comment 3. *For example, the proposed amendment seeks to distinguish proxy voting advice businesses from investment advisers who provide voting advice as part of a broader advisory business that already is subject to an array of investor protection regulations by referring to proxy voting advice that is marketed and sold separately from other forms of investment advice. Instead of the proposed approach, should we refer to proxy voting advice that*

²⁶ *Id.*

²⁷ See Letter from Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis to Mr. Alex Goodenough, Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management (Jan. 7, 2019), https://www.sec.gov/comments/s7-22-19/s72219-6617071-202957.pdf?utm_source=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_campaign=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_medium=email (“The costs of these excessive paperwork burdens would be borne by proxy advisers and would inevitably have to be passed on to their institutional investor clients, who, in turn, may have to pass these costs on to their individual investor participants and beneficiaries.”); CII October 15 Letter at 2 (“increased litigation, staffing and insurance costs that are almost certainly going to be passed on to institutional investors and their underlying retail clients”).

²⁸ Release at 66,523.

is marketed as a “standalone service”? What would be the advantages and disadvantages of this approach? Would any further clarification of “standalone services” be required?

CII Response. We have no response on this request for comment, except to note that commentators would be in a better position to comment if the SEC defined “standalone services” in the Release. We do not believe this term is used except in this request for comment.

Request for Comment 4. *Is there a different, more appropriate way of distinguishing proxy voting advice from other forms of investment advice?*

CII Response. As indicated in Response #1 and Response #2, we do not believe there is an appropriate way to distinguish proxy voting advice from other forms of investment advice as a result of the breadth of the proposed solicitation definition.

Request for Comment 5. *Should the proposed amendment be expanded to specify any other type of activity as constituting a solicitation?*

CII Response. We do not believe the proposed amendment should be expanded. See Response #1 and Response #2.

Request for Comment 6. *Should the proposed amendment clarifying that proxy voting advice provided by a person only in response to an unprompted request from his or her client be limited to persons who are registered broker-dealers or investment advisers? Should there be other limits on the types of persons who should fall outside the definition of a solicitation?*

CII Response. As indicated in Response #1, the proposed amendment should be limited to persons who solicit proxies. Those who provide proxy voting advice should fall outside the definition of a solicitation.

II. Conflicts of Interest

Request for Comment 7. *Is the text of proposed Rule 14a–2(b)(9)(i) sufficient to elicit appropriate disclosure of a proxy voting advice business’s conflicts of interest to its clients? Are there other examples of conflicts of interest that the Commission should take into account in considering the text of proposed Rule 14a–2(b)(9)(i)? Is the principles-based requirement in Rule 14a–2(b)(9)(i)(C) sufficient to capture material information about conflicts of interest not otherwise included within the scope of paragraphs (9)(i)(A) and (B)? Is there additional material information that should be required?*

CII Response. We support the intent of the text of proposed Rule 14a–2(b)(9)(i) to elicit disclosure of proxy voting advice business’s conflicts of interest to its clients (which we believe is sufficient). We agree that conflict of interest disclosure is important for all major participants in the securities markets, including proxy voting advice businesses.²⁹

²⁹ See Recommendation of the Investor-as-Owner Subcommittee of the IAC, Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 3 (“We agree that conflict of interest disclosure is important for all major participants in the securities markets, including proxy advisors”).

At the outset, we believe the Release does not provide reliable evidence indicating that the conflict of interest disclosures currently provided by proxy voting advice businesses are inadequate to meet the information needs of the primary customer of proxy advisors— institutional investors. For example, Patti Brammer of OPERS stated at the Roundtable that:

[O]ur experience has been that yes, the conflict disclosure is very easy to understand. It's not boilerplate language. It does provide sufficient detail, and it is an element that we use and consider. But again, ultimately our own guidelines and policy are going to be what drives our voting decision.³⁰

We also generally agree with the Roundtable comments of Adam Kokas, Executive Vice President, General Counsel, and Secretary, Atlas Air World, who as an issuer representative said:

I think the disclosure in the reports has gotten a lot better. . . . For a company like ours, while it is somewhat of an issue for us, things like voting recommendations . . . are a lot more important to us.³¹

Despite the lack of reliable evidence in the Release that the proxy advice business's conflicts of interest disclosure needs to be improved, we have historically supported and continue to support requiring proxy advisors to disclose details of potential conflicts in the applicable research reports.³²

We note that ISS does not disclose details of potential conflicts in its research reports because of concerns about its potential impact on the firewalls it uses to prevent conflicts of interest with its consulting business.³³ We understand and appreciate ISS's concern, but on balance continue to support the transparency resulting from requiring proxy advisory firms to disclose details of potential conflicts in their research reports.

We do not believe that the SEC needs to create an elaborate and expensive (for investors) new regulatory structure to accomplish this. This issue appears to apply only or mainly to ISS, which already is regulated as a registered investment advisor.

In response to the last question on additional material information that the SEC should require: If the SEC mandates that proxy advisors provide issuer management with the opportunity to pre-

³⁰ U.S. Securities and Exchange Commission, Roundtable on the Proxy Process Transcript at 212.

³¹ *Id.* at 214.

³² *See, e.g.*, Examining the Market Power and Impact of Proxy Advisory Firms; Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the Comm. on Fin. Servs., 113th Cong. (June 5, 2013) (Statement of Ann Yerger, Exec. Dir., CII at 4), https://www.cii.org/files/publications/misc/06_05_13_cii_proxy_advisor_hearing_submission_ann_yerger.pdf (“CII believes that proxy advisory firms should . . . disclose details of potential conflicts, including those involving companies or resolution sponsors, in the applicable meeting report”).

³³ *See* Release at 66,527 n.91 (“ISS has stated that it maintains a strict firewall between itself and its subsidiary, ICS, in order to control the risk that a conflict of interest might jeopardize the independence of its proxy voting advice business.”); Recommendation of the Investor-as-Owner Subcommittee of the SEC, Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 10 (“For example, their staff may be better prevented from engaging in conflicted behavior if the policies and procedures were not widely available.”).

review reports, analysis and recommendations, it is essential that the Commission consider principles-based or prescriptive rules governing how the proxy advisor manages the conflict of interest created by such review by the subjects of the reports, analysis and recommendations.

Issuer executives have substantial interests at stake in shareholder meeting agenda items, such as votes on executive compensation and on equity compensation plans, and on election of directors. It is imperative that proxy advisors carefully manage conflicts of interest that arise from pre-publication review by the subjects of the research. The issues would be less severe if drafts are concurrently provided to clients (so changes resulting from pressure from issuer management are transparent), and/or if the review is of facts only. We discuss this further in Response #22.

Request for Comment 8. *Would the proposed disclosures provide clients of proxy voting advice businesses with adequate and appropriate information about the businesses' conflicts of interest when making their voting determinations?*

CII Response. We generally believe the proposed disclosures, subject to the modifications described below, could provide clients of proxy voting advice businesses with adequate and appropriate information about the businesses' conflicts of interest when making their voting determinations.

We believe at least two modifications to the proposed requirements are necessary. First, we would not require that every research report include a disclosure of “[a]ny policies and procedures used to identify, . . . any such material conflicts of interest arising from such interest, transaction, or relationship.”³⁴ We believe such a provision is overly broad and may in fact detract from the more important conflict information currently provided by proxy advisors.

Second, we have some concerns about the overly broad language for determining whether an entity is a “registrant, another soliciting person, shareholder proponent, or affiliates” of the proxy voting advice business.³⁵ We believe the cost of this provision may exceed the benefits of any resulting disclosure.³⁶ We, therefore, believe the Commission should work with the affected proxy voting advice businesses to develop a narrower, more cost-effective, definition of affiliates for purposes of the proposed requirements.

Request for Comment 9. *To what extent do existing disclosures address the concerns discussed in this release? What additional information may be required to ensure that they provide clients with the information clients need?*

³⁴ Release at 66,526 (emphasis added).

³⁵ *Id.* at 66,558.

³⁶ See Letter from Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis to Mr. Alex Goodenough, Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget (Jan. 7, 2019), https://www.sec.gov/comments/s7-22-19/s72219-6617071-202957.pdf?utm_source=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_campaign=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_medium=email (Glass Lewis commenting that the Securities and Exchange Commission Paperwork Reduction Act analysis “contains no discussion or estimates of basic elements of how the proposed rules would affect proxy advisors, such as - 1. How many conflict disclosures would have to be made a year and how many burden hours it would take proxy advisors to identify and disclose those conflicts in accordance with the rules”).

CII Response. As indicated in Response #7, while we believe the existing disclosures generally address the concerns discussed in the release, we generally support the proposed disclosures.

Request for Comment 10. *Is there specific information, whether qualitative or quantitative, about proxy voting advice businesses' conflicts of interest that they should be required to disclose? For example, should proxy voting advice businesses be required to disclose the specific amounts that they receive from the relationships or interests covered by the proposed conflicts of interests disclosures?*

CII Response. We do not believe that proxy voting advice businesses should be required to disclose the specific amounts that they receive from the relationships or interests covered by the proposed conflicts of interest disclosures. As indicated in Response #7, there is no reliable evidence indicating that institutional investor clients believe that level of detail is necessary in all circumstances. To the extent that investors want this information, they are at liberty to seek it from the proxy advisory firm(s) they hire, and make it a condition for hiring a proxy advisor.

Request for Comment 11. *Would requiring specific disclosure of this sort raise competitive or other concerns for proxy voting advice businesses? For example, would the proposed disclosures be incompatible with firewalls or other mechanisms used by proxy voting advice businesses to prevent conflicts of interest from affecting the advice these businesses provide?*

We generally agree with the Commission that “some proxy voting advice businesses may have compelling and legitimate reasons for limiting the dissemination” of disclosure of conflicts of interest.³⁷ This is particularly true for the argument that this disclosure will compromise the firewall to prevent conflicts of interest. However, we believe this valid concern and cost is outweighed by benefit to readers of proxy advisor reports having easy and immediate access to information on conflicts of interest.

Some concerns on these disclosures may be heightened to the extent the requirements mandate the widespread distribution of the specific disclosures to thousands of clients “in its proxy voting advice.”³⁸ Again, though, on balance we support requiring proxy advisors to disclose details of potential conflicts in their research reports to clients. However, we would not object to the SEC permitting the proxy voting advice businesses flexibility in the vehicle used to disseminate the disclosures to clients if the Commission believes such flexibility is appropriate to limit the competitive or other concerns that could accompany the widespread distribution of the information.

Request for Comment 12. *What information would be most relevant to an investment adviser or other client of a proxy voting advice business in seeking to understand how the proxy voting advice business identifies and addresses conflicts of interest?*

CII Response. See Response #8.

³⁷ Release at 66,527 n.91.

³⁸ *Id.* at 66,558.

Request for Comment 13. *Do proxy voting advice businesses consult on particular matters where their input influences the substance of the matter to be voted on (e.g., providing consulting services to a hedge fund with respect to transformative transactions, such as a proxy contest where the fund is presenting a competing slate of directors)? If so, what type of disclosure would help investors to understand the proxy voting advice business's role and potential conflicts of interest regarding these situations? Is the text of proposed Rule 14a-2(b)(9)(i) sufficient to elicit disclosure of material conflicts of interest of this type?*

CII Response. We are not aware of proxy voting advice businesses providing consulting services to a hedge fund, or other institutional investors, with respect to transformative transactions or similar matters, such as a proxy contest where the fund or other investor is presenting a competing slate of directors. However, we generally believe that if such a relationship did exist at a proxy voting advice business, proposed Rule 14a-2(b)(9)(i) would elicit sufficient disclosure about potential conflicts of interest regarding this type of matter.

Request for Comment 14. *Currently, Rule 14a-2(b)(3) requires disclosure to the recipient of the voting advice of "any significant relationship" with the registrants and other parties as well as "any material interests" of the advisor in the matter. By contrast, disclosure under proposed Rule 14a-2(b)(9)(i) would be required only to the extent that the information would be material to assessing the objectivity of the proxy voting advice. Is the terminology in each provision sufficiently clear with respect to the types of relationships or interests that are covered by each requirement? For example, is there sufficient clarity on how to assess whether a relationship is "material," or is additional guidance needed? Should we consider alternative thresholds or language for the proposed conflicts of interests disclosure requirement of Rule 14a-2(b)(9)(i)? If so, what language should we consider? As an alternative, should we use the same terminology as Rule 14a-2(b)(3)? Should we look instead to Item 404 of Regulation S-K, which requires disclosure of a "direct or indirect material interest"? Is Item 5 of Schedule 14A, which requires disclosures of "any substantial interest" of the covered persons, an alternative that we should consider?*

CII Response. We generally believe the Commission should use the same terminology for disclosure thresholds as contained in current Rule 14a-2(b)(3). As indicated in Response #7, there is no reliable evidence in the Release indicating that institutional investor clients believe that the current terminology needs to be revised.

Request for Comment 15. *Should proposed Rule 14a-2(b)(9)(i) limit the matters which a proxy voting advice business must disclose to those that occurred on or after a certain date, or is a more principles-based disclosure requirement preferable?*

CII Response. We generally believe a more principles-based disclosure requirement is preferable. As indicated in Response #7 there is no reliable evidence in the Release indicating that institutional investor clients believe the proposed Rule 14a-2(b)(9)(i) should explicitly limit the matters which a proxy voting advice business must disclose to those that occurred on or after a certain date.

Request for Comment 16. *Proposed Rule 14a-2(b)(9)(i) is a principles-based requirement that does not specify the manner in which conflicts of interest should be disclosed, so long as the disclosure is included in the proxy voting advice business's voting advice and, if applicable, conveyed through any electronic medium that the proxy voting advice business uses in lieu of or in addition to a written report. Should proposed Rule 14a-2(b)(9)(i) be more prescriptive regarding the presentation of conflicts of interest disclosure, or is it preferable to let the proxy voting advice business and its client determine how this information will be presented to the client?*

CII Response. We generally do not support a more prescriptive requirement regarding the presentation of conflicts of interest disclosure. See Response #15.

Request for Comment 17. *Is it important that the conflicts of interest disclosure required by proposed Rule 14a-2(b)(9)(i) be included in the proxy voting advice, or would providing it separately suffice?*

CII Response. See Response #11.

Request for Comment 18. *To the extent that a proxy voting advice business uses a voting platform or other electronic medium to convey its voting advice, should we require that the conflicts of interest disclosure be conveyed in the same manner?*

CII Response. We believe that to the extent that a proxy voting advice business uses a voting platform or other electronic medium to convey its voting advice, the SEC should permit the conflicts of interest disclosure be conveyed in the same manner. See Response #11.

Request for Comment 19. *Should we require the conflicts of interest disclosure that a proxy voting advice business provides to its clients be made public? If public disclosure were required, when and in what manner should the disclosures be released to the public? Would this raise competitive or other concerns for proxy voting advice businesses?*

CII Response. We believe requiring the conflicts of interest disclosure that a proxy voting advice business provides to its clients be made public is unnecessary and may increase the competitive or other concerns that could accompany the widespread distribution of the information. See Response #11.

Request for Comment 20. *The proposed amendments are intended to promote consistency in the disclosures proxy voting advice businesses make about their conflicts of interest. Is the consistency of this information an important consideration?*

CII Response. We believe there may be some benefit to promoting consistency in the disclosures that proxy voting advice businesses make about their conflicts of interests. As noted in response #7, we have historically and continue to support disclosure in the research reports, in part, to provide some consistency in the location of the disclosures. However, as also indicated in Response #7 and Response #15, we believe that the conflict of interest disclosures that are

currently provided are generally meeting the information needs of institutional investor clients and, therefore, a principle-based approach to the proposed amendments is appropriate.

Request for Comment 21. *Should we require proxy voting advice businesses to include in their disclosure to clients a discussion of the policies and procedures used to identify, as well as the steps taken to address, any conflicts of interest, as proposed? Do proxy voting advice businesses have sufficient incentive to include this disclosure on their own?*

See Response #8.

Request for Comment 22. *What are the anticipated costs to proxy voting advice businesses and their clients associated with requiring additional conflicts of interest disclosure, as proposed? For example, what are the costs for proxy voting advice businesses to determine whether an entity is an affiliate of a registrant, another soliciting person, or shareholder proponent? Should we impose structural requirements (e.g., like the structural reforms in the global analyst research settlements) in addition to disclosure requirements?*

CII Response. See Response #8. In addition, we are struck by the reference in this request to the “structural reforms in the global analyst research settlements” (“Settlements”). As the Commission is aware, one result of the Settlements³⁹ was the subsequent enactment of FINRA Rule 2241, Research Analysts and Research Reports (FINRA Rule 2241). FINRA Rule 2241, which became effective in 2016 and “prohibits review of [an analyst’s] research report by a subject company for purposes other than factual verification.”⁴⁰

We note that FINRA Rule 2241 appears to be in direct conflict with the Release’s proposed requirement that the proxy adviser provide company management with a “copy of its proxy voting advice . . . for a review and feedback period” prior to the distribution of the final research report to its paying clients.⁴¹ As SEC Commissioner Allison Herren Lee explained in her dissent to the Release:

FINRA Rule 2241 promotes objective and reliable research by, among other things, seeking to limit any prepublication review by issuers to a verification of facts.

By contrast, today’s proposal isn’t limited to a review of just the facts, and it doesn’t just permit issuer review of proxy advisors’ recommendations; it requires it. Issuers are given not one, but two opportunities to review each recommendation. We do this without even addressing the concerns expressed by investment advisers that

³⁹ See Ze’-ev Eiger & Anna T. Pinedo, Partners, Morrison & Foerster LLP, Teleconference Presenters: Final FINRA Research Rules 2-6 (Feb. 9, 2016), <https://media2.mofo.com/documents/160202finraresearchrules.pdf> (providing information demonstrating the relationship between the global analyst research settlements and FINRA Rule 2241, Research Analysts and Research Report.).

⁴⁰ Ze’-ev Eiger & Anna T. Pinedo at 19; See FINRA, 2241. Research Analysts and Research Reports §.05 (Dec. 24, 2015), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2241> (supplementary materials describing requirements for “**Submission of Sections of a Draft Research Reports for Factual Review.**”).

⁴¹ Release at 66,558 (§ 240.14a-2(9)(ii)(A)(1)).

greater issuer involvement would undermine the reliability and independence of voting recommendations.⁴²

We believe this question is apt in discussing conflicts of interest, as the proposed requirement for a period for management review and feedback clearly will greatly expand a conflict of interest that to our knowledge is a problem now only for one proxy advisor (ISS), which voluntary provides some companies the opportunity to pre-review reports. We address this in Response #25 (page 24), but also comment here.

Inexplicably, the Release fails to request comment on whether the proposed requirement for registrants to review the proxy voting advice businesses' research reports should be subject to the reforms, including FINRA Rule 2241, resulting from the Settlements.⁴³ The omission is even more striking given SEC Chairman Jay Clayton's statement at the open meeting announcing the Release where he compared the services of proxy voting advice businesses to that of "research analysts."⁴⁴ We believe that before enacting a requirement for management pre-review of reports, the SEC should consider and explain how this requirement squares with a prohibition on the same thing by analysts under Rule 2241.

We would note also that credit rating agencies may provide precedents for how to handle conflicts of interest on pre-review from management of subject company reporting and analysis. We would note for SEC consideration a policy that has been enunciated, at least in the past, by Moody's Investors Service (MIS):

Although Credit Rating Announcements may be provided to Issuers for such review, MIS retains ultimate editorial control over the form and content of all of its publications. As a result, Analysts may not accept changes from the Issuer that would alter the meaning or tone of the MIS opinion or the Credit Rating Announcement, except where such changes are necessary to correct factual errors or prevent the disclosure of confidential information. The Lead Analyst should inform the Issuer that the Issuer will only have a very limited amount of time for such review.⁴⁵

⁴² Commissioner Allison Herren Lee, Statement on Shareholder Rights (Nov. 5, 2019), <https://www.sec.gov/news/public-statement/statement-lee-2019-11-05-shareholder-rights>.

⁴³ Ze'-ev Eiger & Anna T. Pinedo at 19; See FINRA, 2241 at §.05 (supplementary materials describing requirements for "Submission of Sections of a Draft Research Reports for Factual Review.").

⁴⁴ Chairman Jay Clayton, Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System (Nov. 5, 2018), <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting>.

⁴⁵ Moody's Investors Service, Moody's Investors Service Best Practices Guidance for the Credit Rating Process, Oct. 29, 2010, at https://www.moodys.com/uploadpage/MiscAnon/best_practice_guidance.pdf. We also would note this Moody's policy statement:

As a matter of policy, and in keeping with its role as an independent and objective publisher of opinions, MIS retains complete editorial control over the content of its Credit Ratings, credit opinions, commentary, and all related publications. MIS reserves the right at any time to suspend, modify, lower, raise or withdraw a Credit Rating, or place a rating on review in accordance with MIS policies and procedures. MIS editorial control includes its right to decide whether, and when, to issue a Credit Rating or publish any information or commentary, except in those rare instances where the public disclosure of a Credit Rating has been contractually limited (see Provision 3.4 below) or limited by applicable laws and regulations.

We are uncertain whether this policy in fact prevents management of issuers from inappropriate pressure to “alter the meaning or tone” of an opinion or announcement (if in practice issuer management is able to do so if such issuer efforts are elevated to a credit rating committee). But in any case, we believe the credit rating agency experience and precedents are important for the SEC to consider with reference to proxy advisor management of this conflict of interest.

Request for Comment 23. *Are there existing regulatory models of conflicts of interest disclosure that would be useful for us to consider? If so, what are the alternatives that we should consider in lieu of proposed Rule 14a–2(b)(9)(i)? For example, should we require all proxy voting advice businesses to disclose conflicts to the same extent that their clients (e.g., an investment adviser) would be reasonably expected to disclose such conflicts to their own clients (e.g., the funds or retail investor clients to whom the investment adviser provides advice)?*

CII Response. See Response #8 and Response #22.

III. Registrants’ and Other Soliciting Persons’ Review of Proxy Voting Advice and Response

Request for Comment 24. *How prevalent are factual errors or methodological weaknesses in proxy voting advice businesses’ analyses? To what extent do those errors or weaknesses materially affect a proxy voting advice business’s voting recommendations? To what extent are disputes between proxy voting advice businesses and registrants about issues that are factual in nature versus differences of opinion about methodology, assumptions, or analytical approaches?*

CII Response. We do not believe factual errors or methodological weaknesses in proxy voting advice businesses’ analyses are prevalent or that they materially affect proxy voting advice businesses voting recommendations. The Release’s footnote citations to sources asserting otherwise are, at best, misleading.⁴⁶ We discuss the cited sources in the order in which they appear in the Release (with the discussion of the last two related sources combined).⁴⁷ As noted above, we also expect to submit a separate letter addressing this topic.

*Letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (Nov. 9, 2018) (BRT Letter)*⁴⁸

The Release states that the BRT Letter discusses “examples of errors in voting advice and registrants’ interactions with proxy advisory firms to address perceived errors.”⁴⁹ The BRT Letter, however, does not provide a single example of an alleged error in a proxy advisory firm recommendation. Instead, it relies on member survey results indicating “factual errors in

Moody’s Investors Service, Code of Professional Conduct, Exhibit 2 Procedures and Methodologies Used to Determine Credit Ratings, page 18, at <https://www.moodys.com/sites/products/ProductAttachments/Exhibit2.pdf>.

⁴⁶ Release at 66,528 n.94.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

reports.”⁵⁰ Neither examples of the factual errors nor the member survey results are provided in, or are accessible from, the BRT Letter.

The BRT Letter does provide two specific situations that members “express concern” about proxy advisor recommendations: (1) “proxy advisory firms have their own guidelines for determining independence of directors . . . [resulting] in situations where the proxy advisory firm recommends against the election of a director because it has determined that the director is not independent under its standards, despite that the fact that the company’s board of directors, carrying out its fiduciary duties, determined that the director in question was independent under the requirements of the Commission and the company’s stock exchange listing rules and corporate governance guidelines;”⁵¹ and (2) “Glass Lewis . . . may recommend a vote against members of a company’s governance committee if the company excludes shareholder proposals through a valid use of the no-action process.”⁵²

Institutional investor clients retain proxy advisors, in part, to report critically on the independence of corporate board members when they fail to meet high standards of independence and when board members oppose certain shareholder proposals. We are unaware of any institutional investor customers of proxy advisors that would view the two instances described in the BRT Letter as “factual errors” or “methodological weaknesses.”

Moreover, we have reviewed a number of reports from two proxy advisors – ISS and Glass Lewis & Co. (Glass Lewis) – with reference to item (1) above. In our view, the reports and related policies are crystal clear that the opinions on independence are those of the advisor (and both clearly present how the board views its own members’ independence under relevant stock exchange standards). Seemingly, BRT members simply want to suppress views on director independence that differ in any way from a board’s view. We think there is zero merit in that idea for suppression of speech.

In any event, the BRT Letter does not provide any transparency on its members’ allegations of “factual errors in reports” so we cannot verify or challenge them.⁵³ On this point, we agree with SEC Commissioner Lee who observed:

Further, the proposal relies in large part not on specific instances of material factual inaccuracies, but on generalized, unsubstantiated allegations of inaccuracies. For example, footnote 94 in today’s proposal describes a letter from Business

⁵⁰ Letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission 11 (Nov. 9, 2018), <https://s3.amazonaws.com/brt.org/2018.11.09-BRT.SECProxyRoundtableCommentLetter.pdf>.

⁵¹ *Id.* at 12.

⁵² We found the same lack of transparency in the June 3, 2019 letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable to the Ms. Vanessa Countryman, Acting Secretary, Securities and Exchange Commission on the same topic. *See* Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission et al. 4 (Oct. 24, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191024%20SEC%20comment%20letter%20proxy%20advisor%20accuracy.pdf (Noting that in the June 3, 2019 letter the “BRT does not provide any transparency on its members’ allegations, so we cannot verify or challenge them.”) (CII October 24 Letter).

⁵³ Letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission at 12.

Roundtable as “discussing *examples* of errors in voting advice and registrants’ interactions with proxy advisory firms to address perceived errors” (emphasis added). But a review of the letter shows that, in fact, it provides no such examples and contains only generalized allegations. . . . Business Roundtable’s only source for those allegations appears to be a 2013 survey of its own members, to which they received only 20 responses.⁵⁴

Letter from Neil Hansen, Vice President, Investor Relations and Corporate Secretary, Exxon Mobil Corporation (Exxon)(June 26, 2019) (Exxon Letter)⁵⁵

The Release states that the Exxon Letter discusses “perceived methodological limitations of proxy advisory firms’ evaluation of executive compensation structures.”⁵⁶ In our view, the Exxon Letter does not support a conclusion that there are prevalent factual errors or methodological weaknesses in proxy voting advice businesses’ analyses in proxy advisor reports.

With respect to “factual errors,” the Exxon Letter appears to concede that to the extent that ISS reports contain factual errors, their prompt correction supports “client confidence in the quality control applied to ISS reports”⁵⁷ In that regard, we would observe that we have been told by a CII member that if the member did not have an alternative proxy advice firm to which they could go (if there was only one provider), lack of confidence in reports from one or the other dominant proxy advice firms would mean less; the investor would have limited leverage, other than dropping proxy advice altogether, at considerable expense. That is one concern we have on likely damage from the SEC proposal to the market for proxy advisory services.

With respect to “methodological weaknesses,” the Exxon Letter criticizes “Proxy Advisor Analysis [as a] . . . One-Size-Fits All Compensation Model for All Companies That is Inadequate for Multifaceted Shareholder Decisions Like the Say-On-Pay Vote.”⁵⁸ That criticism is, at best, an overstatement, and ignores the view of many institutional investor clients of the proxy voting advice businesses who believe that proxy advisors have generally adopted thoughtful and relatively detailed approaches to assessing compensation issues at subject companies.⁵⁹ Simply put, Exxon has a different perspective from that of the largest proxy advisors and many of their institutional investor clients on how executive pay should be analyzed.⁶⁰

⁵⁴ Commissioner Allison Herren Lee, Statement on Shareholder Rights at n.4.

⁵⁵ Release at 66,528-29 n.94.

⁵⁶ *Id.* at 66,529 n.94.

⁵⁷ Letter from Neil A. Hansen, Vice President, Investor Relations and Corporate Secretary, ExxonMobil to Vanessa Countryman, Acting Secretary, U.S. Securities and Exchange Commission 6 (July 26, 2019), <https://www.sec.gov/comments/4-725/4725-5879063-188728.pdf>.

⁵⁸ *Id.* at 4.

⁵⁹ See ISS, U.S. Compensation Policies, Frequently Asked Questions (updated Dec. 20, 2018), <https://www.issgovernance.com/file/policy/active/americas/US-Compensation-Policies-FAQ.pdf>; Glass Lewis, Understanding Glass Lewis’ Approach to Say on Pay Analysis (last visited Dec. 30, 2019), <https://www.glasslewis.com/say-on-pay/>.

⁶⁰ For the record, CII’s policies on executive compensation (encompassed within CII Policies on Corporate Governance) are open to Exxon-type compensation programs. See Section 5 of CII Policies on Corporate Governance, available at https://www.cii.org/corp_gov_policies. It could be argued that CII’s position on the specific compensation practice issues that Exxon Letter appears to be concerned about is closer to Exxon than to

If Exxon's board and/or management ultimately does not agree with the perspective of the proxy voting advice businesses on the CEO's pay or other matters, they can engage with their shareowners on the issue. In addition, if proxy voting advice businesses' customers— institutional investors—do not agree with the proxy advisors' perspective, they can ignore it. At the end of the day, Exxon's shareholders, not Exxon's board or management, or the proxy advisors, are going to vote on Exxon's non-binding say-on-pay proposal by applying their own proxy voting guidelines.

Finally, it should be noted that institutional investors retain proxy advisors, in part, to report critically on executive compensation plan design, practices, and outcomes, and we would anticipate that companies, particularly the CEOs of those companies, would not always welcome analytical frameworks that are different than their own and that might result in criticism of their pay. And if a proxy advisor were to agree with and endorse every CEO's compensation package, without critical comments in any case, it is not clear that the advisor would be providing any value. Critical analysis does not automatically equal "error."

*Richard Levick, 'Vinny' and the Proxy Advisors: A Five Trillion Dollar Debate, Forbes.com (Dec. 17, 2018) (Levick Article) & Frank Placenti, Are Proxy Advisors Really A Problem?, American Council for Capital Formation (ACCF) (Oct. 2018) (ACCF Study).*⁶¹

The Levick Article repeats the allegation that "advisors' reports can be factually inaccurate and analytically flawed."⁶² The only evidence that the Levick Article cites in support of the allegation is the October 2018 ACCF Study.⁶³

As you are aware, CII performed a detailed analysis of the data underlying the ACCF Study and provided the results to the Commission on October 24, 2019 (CII October 24 Letter).⁶⁴ That analysis concludes:

The ACCF study is highly inaccurate and otherwise flawed, and is not a reliable basis on which to impose new regulation.

....

[F]or 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

ISS, to the extent there are differences between Exxon and ISS. Nonetheless, we do not think ISS is obligated to agree with either Exxon or CII. ISS is paid by its investor clients for independent advice.

⁶¹ Release at 66,528 n.94.

⁶² Richard Levick, "Vinny' And The Proxy Advisors: A Five Trillion Dollar Debate, Forbes, Dec. 17, 2018, <https://www.forbes.com/sites/richardlevick/2018/12/17/vinny-and-the-proxy-advisors-a-five-trillion-dollar-debate/#4e2834882f4b>.

⁶³ Frank Placenti, Are Proxy Advisors Really A Problem?, American Council for Capital Formation (Oct. 2018), https://accfcorgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf.

⁶⁴ CII October 24 at 2-4.

one or more factual errors in 31,830 reports [over three years]) is completely unsupportable.⁶⁵

To our knowledge, neither ACCF, Frank Placenti, Richard Levick, nor the SEC staff has successfully challenged CII's analysis.⁶⁶

Request for Comment 25. *As a condition to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3), should registrants and certain other soliciting persons be permitted an opportunity to review proxy voting advice and provide feedback to the proxy voting advice businesses before the businesses provide the advice to clients, as proposed? If yes, how much time should be given to review and provide feedback on proxy voting advice? Are the timeframes set forth in proposed Rule 14a–2(b)(9)(ii) appropriate? What would the impact of those proposed timeframes be on registrants, proxy voting advice businesses, and their clients? Are there alternative timeframes that would be more appropriate? Should we allow a proxy voting advice business to provide its final notice of voting advice to the registrant at any time after the registrant has provided its comments during the review and feedback period, regardless of whether the review and feedback period has expired? Are there alternative conditions to the exemptions that the Commission should consider to address the concerns regarding inaccuracies and the ability for investors to get information that is accurate and complete in all material respects?*

CII Response. We do not believe that government should mandate that registrants receive an opportunity to review proxy voting advice and provide feedback to the proxy voting advice businesses before the clients get that advice, as proposed. The basis for our view was aptly summarized in the OPERS Letter:

We have communicated this information to the SEC on several occasions, including as a participant in the Commission's recent Roundtable on the Proxy Process. In each instance, our request has been respectful and consistent: *that the SEC preserve our access to independent timely, and cost-effective research and advice from our PAF.*⁶⁷

Independence

The proposed provisions of the Release requiring proxy voting advice businesses to share draft research reports with registrants is not limited to a review and feedback of the underlying facts contained in the research.⁶⁸ As a result, we believe the proposed requirement will be reasonably perceived as impairing the independence of the proxy advisor research, particularly since the

⁶⁵ *Id.* at 2-3.

⁶⁶ Commissioner Allison Herren Lee, Statement on Shareholder Rights (“as the comment file shows, assertions of widespread factual errors have been methodically analyzed and largely disproven.”).

⁶⁷ Letter from Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System et al. at 2 (emphasis added).

⁶⁸ See Release at 66,534 (“Proxy voting advice business provides the registrant . . . with the voting advice that the business intends to deliver to its clients”).

proxy advisor is required to seek review and receive feedback from self-interested companies *before* sharing the draft report with their own paying clients.⁶⁹

As indicated in Response #22, the Commission inexplicitly fails to even consider whether any of the requirements of FINRA Rule 2241 should be applicable to the proposed requirement for company review and feedback of the research reports of proxy advisors. FINRA Rule 2241, which was intended to prevent the impairment of the independence of analyst research reports, establishes specific procedures for providing “sections of a draft research report . . . to the subject company for factual review”⁷⁰

The Release also inexplicitly fails to even consider the potential implications of the First Amendment on the independence of the research reports of proxy advisors if subject to required company review and feedback.⁷¹ In fact, so far as we can see, the Release never even mentions the First Amendment. The omission of any discussion of the First Amendment in this context is particularly surprising given the following discussion of the issue by the Commission in its 1992 release entitled “Regulation of Communications Among Shareholders” (1992 Release): “[a] regulatory scheme that inserted . . . corporate management into every exchange and conversation among shareholders [and] their advisors . . . on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment”⁷²

As the Commission is aware, First Amendment concerns are an element of litigation against the SEC in Federal Court.⁷³ In the complaint, ISS alleges among its “Claims for Relief” that:

The SEC’s Proxy Adviser Release raises serious First Amendment concerns to the extent it opens firms providing proxy advice to liability under Rule 14a-9 based on the opinions or recommendations they provide to their clients. Imposing Rule 14a-9 liability on an investment adviser’s mere opinions, reasons, recommendations, and beliefs would have the effect of encouraging investment advisers to insert content that advances management’s interests into fiduciary communications between the proxy adviser and its shareholder clients in order to minimize litigation risk, thereby undermining the credibility of the proxy adviser’s work product. Accordingly, *the Proxy Adviser Release would chill—and potentially alter the content of—investment advisers’ protected speech, thereby threatening the*

⁶⁹ See Recommendation of the Investor-as-Owner Subcommittee of the IAC, Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 7 (“The requirement to share all opinions with one side of a debate in secret creates the obvious one-sided risk that proxy advisors will lose their independence (or be reasonably perceived to do so) by virtue of their routinely hearing directly from the patently self-interested and conflicted company directors before hearing from other market participants, including their own clients.”).

⁷⁰ See FINRA, 2241 at §.05.

⁷¹ See, e.g., Richard A. Kirby et al., A Step Too Far: The SEC’s Attempt to Regulate Proxy Advisory Services Violates the First Amendment, R|K Invest Law, PBC at 2 (“It is the free speech issue that we believe merits further analysis and is missing from the SEC’s reasoning in support of its proposed rulemaking.”).

⁷² Regulation of Communications Among Shareholders, Exchange Act Release No. 31,326, 57 Fed. Reg. 48,276, 48,279 (Oct. 22, 1992) (on file with CII).

⁷³ See Complaint for Institutional Shareholder Services at 20-21.

*independence of the advice that shareholders rely on to ensure they have an effective voice in corporate governance.*⁷⁴

As indicated in Response #1, the litigation is currently in abeyance. It is, however, currently unclear to us whether the Federal Court would find that the provisions of the Release (1) granting registrants the right to review proxy voting advice and provide feedback, and (2) subjecting proxy advisors to Rule 14a-9 liability for such advice is unconstitutional, since it appears to infringe on proxy advisors' First Amendment rights of free speech.

Timeliness

We believe the proposed company review and feedback period and notice requirements⁷⁵ will substantially detract from the timeliness of the final publication of the research reports and, as a result, will likely be highly disruptive to institutional investors voting of their shares.⁷⁶

Proxy advisory firms on average deliver their proxy advice to clients approximately 20 days prior to a shareholders' meeting⁷⁷ in order to allow the institutional investor clients sufficient time to review the research reports and make informed voting decisions based on their own voting guidelines. Some reports are delivered at shorter intervals before the meeting, particularly at the peak of the highly seasonal spring proxy season. We believe the ability of institutional investors to review the research reports and determine whether they are "complete in all material respects"⁷⁸ and make well considered voting decisions would be impaired if this period of time were shortened to add the proposed company review and final notice periods prior to the delivery of research reports by the proxy advisors to their investor clients.

More specifically, as recently estimated by ISS:

In sum and if the rule is adopted as proposed, resulting delays in publication of reports to our clients would equate to between approximately 9-13 calendar days from the current timeline, which now stands at just under 20 days in advance of the meeting on average for Russell 3,000 companies. This estimation is not inclusive of the time that would be required to negotiate confidentiality agreements with all issuers and to co-ordinate issuer hyperlinks for inclusion in reports and in platform

⁷⁴ *Id.*; see Letter from Lorraine Kelly, Head of Governance Business, ISS to Valued Client ("ISS will further show that the proposal to grant public companies the right to review, comment on and insert content into our proxy advice is unconstitutional, since it infringes on proxy advisers' First Amendment rights of free speech.").

⁷⁵ Release at 66,534 (setting forth the proposed Rule 14a-2(b)(9)(i) actions and timing in a summary table).

⁷⁶ See, e.g., Letter from Lars Dijkstra, Chief Investment Officer, Kempen Capital Management et al. to the Honorable Jay Clayton, Chairman, Securities and Exchange Commission 2 (Jan. 26, 20120), https://www.sec.gov/comments/s7-22-19/s72219-6611632-202932.pdf?utm_source=1-23-20+-Weekly+Governance+Alert+Vol+25+Issue+4&utm_campaign=1-23-20+-Weekly+Governance+Alert+Vol+25+Issue+4&utm_medium=email ("The proposed right for registrants to review and provide feedback on proxy voting advice before it is issued makes the already tight deadlines practically unworkable.").

⁷⁷ See Letter from Lorraine Kelly, Head of Governance Business, ISS to Valued Client (ISS estimating that current delivery of research reports at "just under 20 days in advance of the meeting on average for Russell 3000 companies.").

⁷⁸ Release at 66,535.

delivery systems. It also does not include any estimate for the considerable additional administrative requirements to manage the various different timeframes and number of draft reviews dependent on issuer proxy filing dates under the proposed rules. These aspects will however all take substantial additional time and resources, although hard to estimate at this time.⁷⁹

Assuming ISS's current estimates are correct, we believe the result of implementing the provisions of the Release is inconsistent with the Commission's stated goal (albeit unsupported by reliable evidence) to "address the concerns regarding inaccuracies and the ability for investors to get information that is accurate and complete in all material respects."⁸⁰ In contrast, as described in a recent memorandum by PJT Camberview, the more likely result is that the implementation of the provisions:

[W]ould give investors less time to review reports prior to the vote deadline. This could limit investors' ability to engage with companies to resolve any concerns or seek additional information which would allow them to make case-by-case determinations and potentially override existing voting guidelines⁸¹

Alternative timeframes

If the Commission decides to implement some form of issuer review period, the first step should be to collect and analyze the relevant data available to the SEC before proposing a specific timeline. This includes both concentration of meetings in the proxy season (which our members universally say poses very difficult timing challenges now in voting proxies). We think the SEC also provided an only cursory look at the length of time between filing dates and meeting dates, relying on casual outside sources, rather than looking at data the SEC had easily available in-house. We formed the impression from the Release that the peak period now for proxy filings was 35 to 40 days before the annual meeting. This appears to be incorrect from data analysis we undertook.

CII staff recently requested and obtained the following information (including our comments) from Broadridge Financial Solutions about the timing of 2019 proxy statement filings. The first data set we obtained from Broadridge covered 4,190 shareholder meetings after we screened out meetings of investment companies (for which the data were problematic because the data set does not have the original meeting date, only the final meeting date, and it appeared that a significant number of investment company meetings were postponed). After our screen, we analyzed 4,190 annual meetings (including 19 with dual designation as "annual" and "special". Of these meetings, we found the following:

- Heavy concentration of meetings: 64.9% of meetings occurred from April 24 to June 18

⁷⁹ Letter from Lorraine Kelly, Head of Governance Business, ISS to Valued Client.

⁸⁰ Release at 66,535.

⁸¹ Abe Friedman, Partner and Head, PJT CamberView et al., SEC Proposed Rule Amendments on Shareholder Proposals and Proxy Advisors: Implications for Issuers, Investors and Proxy Advisors, Harv. L. Sch. F. on Corp. Governance (Dec. 9, 2019), <https://corpgov.law.harvard.edu/2019/12/09/sec-proposed-rule-amendments-on-shareholder-proposals-and-proxy-advisors-implications-for-issuers-investors-and-proxy-advisors/>.

- Median for proxy statement filing: 42 days before Annual General Meeting (AGM)
- 57.4% of registrants filed in the peak period (40 to 48 days before AGM)
- 90.2% of registrants filed in the peak or shoulder periods (28 to 56 days before AGM)
- 97.1% of registrants filed at least 25 days before AGM (so virtually all would qualify for review and the one-week-plus delay with no change in proxy publication date with no change in existing practice)
- 38.4% of registrants filed 41 to 44 days before the AGM (we think it plausible that some of these registrants would work to file several days earlier to capture the extra two days for the review and feedback period, but believe the SEC should provide some evidence that this would be the case)
- 13.3% are filed 50 or more days before AGM

We subsequently received a second data set from Broadridge, and may provide the SEC with additional information from analysis of that data set.

Based on the above data and the data from ISS described earlier, we believe that if, despite our strong objections, the Commission insists on a government-mandated issuer review period, it should require all issuers who wish to avail themselves of such review periods to file their proxy statements much further in advance of the meeting than is currently contemplated by the proposal. More time is needed to provide proxy advisory firms the ability time to undertake their analysis. And, importantly, more time is also needed to provide institutional investor clients the ability to review the research reports, determine whether they are complete, and make well considered voting decisions consistent with their fiduciary duties.

In our view, if an issuer wishes to avail itself of any review period *up to a maximum of two business days*, the issuer should be required to file its proxy statement at *least 50 days prior to the meeting*, under all circumstances. Current time constraints already limit the effectiveness of proxy advisory firms; additional review requirements within the already short time period previously discussed will prove unduly burdensome for proxy advisory firms and their institutional investor clients.

We note that our proposed review period is generally consistent with: (1) the 48-hour period Glass Lewis currently provides [certain] registrants “to review the draft analysis and provide corrections;”⁸² and (2) the “one to two business days [ISS currently provides certain registrants] to review draft proxy voting advice and provide feedback before ISS disseminates the voting advice to clients.”⁸³ In addition, we believe our proposal that requires filing at least 50 days before the meeting is not unreasonable since it is already being complied with by more than 13% of companies. The additional eight days (compared to the 42-day median) provide an offset to the low end of the ISS estimate of an approximately nine to 13 calendar day delay created by the proposed requirements.

Combined, we believe revisions we have proposed would address, at least in part, institutional investor concerns about timeliness raised by the Release.

⁸² Release at 66,545.

⁸³ *Id.*

Alternative conditions to the exemptions

If, despite our strong objections, the Commission insists on a government-mandated form of issuer review period, there are three additional conditions to the exemptions that the Commission should consider to address the aforementioned concerns regarding independence.

First, we believe the SEC should limit the required sharing of proxy advisor draft reports with subject companies to only the factual information and data used by the proxy advisor in preparing its report and recommendations.⁸⁴ We note that this proposed condition is generally consistent with a current Glass Lewis program "that allows registrants who participate to receive a data-only version of its voting advice before publication to clients [and its] . . . pilot program . . . which offers U.S. public companies and shareholder proponents the opportunity to express differences of opinion they may have with Glass Lewis' research."⁸⁵

We believe this proposed condition would limit the potential bias and related reduction in independence of proxy advisors that the proposal otherwise creates.⁸⁶ Moreover, it would be also address, in part, the FINRA Rule 2241 and related First Amendment exposure that is also created by the proposal.

If the SEC decides to move forward with an issuer review period requirement, the SEC could permit proxy advisors to provide drafts that include more than factual information and data. This still would conflict with FINRA Rule 2241 (which for good reason prohibits such advance clearance of analysis and opinion by the subjects of that analysis and opinion), but would provide some flexibility for market-based responses from proxy advisors, and in theory could permit ISS to continue to provide reports including analysis to some companies.

Second, we believe the SEC should lessen the risk of biasing proxy advice and impairing its independence by permitting (1) proxy advisors to disclose a draft of their reports to subject companies simultaneously with disclosing them to their institutional investor clients; and (2) a waiting period before proxy advisors and clients subject to the SEC's jurisdiction could act on the advice.⁸⁷ This condition would permit a proxy advisor to give company managers and institutional investors equal time to respond or correct any factual errors before investors and asset managers subject to the SEC's jurisdiction would be permitted to act on the reports.⁸⁸

⁸⁴ See, e.g., Recommendation of the Investor-as-Owner Subcommittee of the IAC, Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 8 ("A . . . example of an alternative not discussed by the SEC would be to limit the requirement to share draft reports with corporate managers to "facts" and not opinion or mixed fact/opinion statements.").

⁸⁵ Release at 66,529.

⁸⁶ See, e.g., Recommendation of the Investor-as-Owner Subcommittee of the IAC, Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 8 ("This alternative would impose fewer costs and limit the potential bias and reduction in independence of proxy advisors that the actual proposal creates").

⁸⁷ *Id.* at 9 ("A . . . example of an alternative not analyzed by the SEC that would have less risk of biasing proxy advice would be to require proxy advisors to disclose a draft of their reports or recommendations to company managers simultaneously with or somewhat after they disclose them to proxy advisor clients, and to impose a waiting period before clients subject to the SEC's jurisdiction could act on the advice or recommendations.")

⁸⁸ *Id.* ("This alternative would give company managers time to respond or correct errors, or argue for changes in opinions, before the public received the reports, and before asset managers acted on the reports.").

Third, we believe the SEC should limit impairing the independence of proxy advisor research by establishing a safe harbor for proxy advisors to shield them from liability under Rule 14a-9⁸⁹ if they comply with all of the proposed requirements. We understand the Commission has established safe harbors from liability in this manner in other contexts.

We note that the recent SEC guidance, which established at a Commission level or at least specifically underscored the applicability of Rule 14a-9 to proxy voting advice, appears intended to impose accountability of proxy voting advice businesses to company management rather than to their paying clients—institutional investors.⁹⁰ As Michael Cappucci of the Harvard Management Company observed: “[C]orporate interests have sought to make it more difficult for institutional investors to vote independently of management by urging measures that would hamstring their proxy service providers.”⁹¹ We believe a safe harbor would fairly shield proxy advisors from undue pressure to insert biased content into their research that advances the company interests in order to minimize litigation risk.⁹²

Combined, we believe the three proposed conditions would address, at least in part, institutional investor concerns about independence raised by the Release.

Request for Comment 26. *Should the number of days for the review and feedback period be contingent on the date that the registrant files its definitive proxy statement? For example, should there be a longer period (e.g., five business days instead of three) if the registrant files its definitive proxy statement some minimum number of days before the shareholder meeting at which proxies will be voted, as proposed? Would registrants and other soliciting persons be likely to take advantage of the additional time by filing their definitive proxy statements early enough to qualify for this treatment?*

CII Response. We believe the number of days for the review and feedback period should be contingent on the date that registrant files its definitive proxy statement in order to preserve institutional investor access to timely research and avoid disrupting the voting process. As indicated in Response #25, we believe the maximum number of days for the proposed review and feedback period should be two business days. In order to provide an offset to the estimated nine to 13 calendar day delay created by the proposal, we believe the issuer should be required to file its definitive proxy statement at least 50 calendar days before the shareholder meeting at which proxies will be voted.

⁸⁹ False or Misleading Statement 17 U.S.C. § 240.14a-9 (Jan. 1966), available at <https://www.law.cornell.edu/cfr/text/17/240.14a-9>.

⁹⁰ Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Exchange Act Release No. 86,721, 84 Fed. Reg. at 47,416, 47,419 (Set. 10, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18355.pdf> (“the provider of the proxy voting advice should consider whether, depending on the particular statement, it may need to disclose the following types of information in order to avoid a potential violation of Rule 14a-9”).

⁹¹ Michael Cappucci, The Proxy War on Proxy Against Proxy Advisors 1 (Nov. 16, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488427.

⁹² See, e.g., Complaint for Institutional Shareholder Services at 20 (“Imposing Rule 14a-9 liability on an investment adviser’s mere opinions, reasons, recommendations, and beliefs would have the effect of encouraging investment advisers to insert content that advances management’s interests into fiduciary communications between the proxy adviser and its shareholder clients in order to minimize litigation risk, thereby undermining the credibility of the proxy adviser’s work product.”).

Request for Comment 27. *What impact would the proposed review and feedback period and final notice of voting advice have on the ability of proxy voting advice businesses to complete the formulation of their voting advice and deliver such advice to their clients in a timely manner? Are there additional timing considerations or logistical challenges that we should take into account?*

CII Response. As indicated in Response #25, we believe that the proposed review and feedback period, particularly as combined with the second proposed “final notice” period, would adversely affect (and possibly destroy at least in some cases) the ability of the proxy voting advice businesses to complete the formulation of their voting advice and deliver such advice to their institutional investor clients in a timely manner. This is the single concern we hear expressed most broadly by our investor members, including both asset owner members of CII and asset manager associate members.

The SEC should take into account any delays from proxy intermediaries such that proxy voting deadlines are earlier than the day before the shareholder meeting. This may particularly impact shareholders outside the United States.

The SEC also should evaluate to what extent its proposal may reduce shareholder voting, and whether in some cases (particularly at smaller companies with more limited solicitation budgets, for companies with annual meetings at the peak of proxy season and for special meetings) this may lead to challenges to companies in getting quorum for meetings. We see no analysis of this possibility whatsoever in the Release.

Request for Comment 28. *Should there generally be a review and feedback period and a final notice of voting advice, as proposed? Should we allow registrants (and certain other soliciting persons) more or fewer opportunities to review the voting advice than proposed? Should a proxy voting advice business be required to provide the final notice of voting advice only if the registrant (or certain other soliciting person) provides comments to the proxy voting advice business during the review and feedback period and the proxy voting advice business’s revisions are pertinent to such comments? Should the period allotted for the final notice of voting advice be two business days, as proposed? Should it be longer or shorter?*

CII Response. We oppose regulatory requirements for review and feedback and final notice periods, for reasons discussed above. If the SEC decides to move forward despite concerns from CII and many investors, as discussed in Response #25, we believe any such period should be a one-time opportunity of up to a maximum of two business days. A one-time, two-business-day review period (with no final notice period) would be less destructive to investors’ proxy voting processes, and lessen the Commission’s valid concerns about the “potential disruptions and costs that the proposed review . . . could have imposed on the current practices of proxy voting advice businesses and their [institutional investor] clients.”⁹³

Request for Comment 29. *Are there specific ways in which, if we allow the opportunity for registrants and certain other soliciting persons to review and provide feedback on the proxy voting advice, questions may arise about possible influencing of the proxy voting advice by the*

⁹³ *Id.* at 66,532.

reviewing parties? How, if at all, could the independence of the advice be called into question if other parties reviewed and commented on it? How could we address such concerns? For example, would disclosure of the specific comments raised by the reviewing party and the proxy voting advice businesses' responses to this feedback help alleviate concerns about the independence of the advice?

CII Response. Yes, we expect the SEC's proposed government-mandated pre-review requirements would potentially compromise the independence of proxy voting advice.

In fact, a significant reason some of our members switched from ISS to Glass Lewis once Glass Lewis began offering a competitive choice is because they believed ISS's practice of providing management of some companies (essentially the 500 largest U.S. public companies) the right to pre-review reports, including analysis and recommendations, compromised the independence of the ISS analysis. The SEC proposal will eliminate this market choice, forcing all investors who wish to avail themselves of outside proxy advice no choice – if they want it, they must pay for what they view as inferior, conflicted advice.

We believe competition and free markets are useful, including in promoting quality and accuracy of analysis. The SEC regulatory scheme as proposed will force all market participants into the same business model with regard to pre-publication review. We think it could go further. The pre-review requirements clearly will be costly for proxy advice firms – entailing much more time than three minutes for reports, as implicitly the SEC assumed for purposes of its cost/benefit analysis. As discussed in Response #30, these costs are likely to preclude new entrants, eliminate one or more incumbents, and potentially lead any survivor to follow a business model that includes providing consulting services to issuers, compounding concerns on influencing of proxy advisor reports (which has been another reason some of our members and other investors have chosen Glass Lewis, which does not provide consulting services, over ISS.)

We believe this dynamic of undue influence by issuer management and reduced market competition may be particularly pronounced because the proposal both requires the opportunity for management pre-review, and codifies that the research product is subject to Rule 14a-9 liability. We believe the Commission should address those concerns by revising the proposal to (1) limit the required sharing of proxy advisor draft reports with issuers to only the factual data used by the proxy advisor in preparing its report and recommendations, (2) disclose the draft reports to subject companies simultaneously with disclosing the report to the institutional investor clients, and (3) establish a safe harbor for proxy advisors to shield them from liability under Rule 14a-9 if they comply with all of the proposed requirements.

Request for Comment 30. *What effect will the proposals, if adopted, have on proxy voting advice businesses' ability to provide timely voting advice to their clients? What are the anticipated compliance burdens and corresponding costs that proxy voting advice businesses are expected to incur as a result of the proposed new conditions? What impact will these burdens and costs have on proxy voting advice businesses' clients?*

CII Response. We believe the burdens and costs imposed as a result of the proposed new conditions would likely lead to one or more of the five proxy voting advice businesses identified

in the Release⁹⁴ to exit the industry, along with others that the SEC does not identify and about which it seems unaware.⁹⁵ We also believe the new burdens and corresponding costs would discourage new entry into the proxy advisory market and exacerbate the problem of market concentration in the industry.⁹⁶ Those who remain would likely be forced to hire more staff, including in-house or external lawyers, to handle the increased regulatory burden imposed by the Releases' provisions. Those additional costs would almost certainly be passed on to their institutional investor clients and those funds' underlying beneficiaries, including pension beneficiaries and other Main Street investors.⁹⁷ As Euan Stirling, head of stewardship at Aberdeen Standard Investments recently stated:

“We think [the Release] is not helpful to us as institutional investors when holding companies to account It will make the job more difficult and add costs. It will be the ordinary savers who have to pay the costs.”⁹⁸

Moreover, as noted above, the new regulation may lead to one-size-fits-all results, with all firms pushed toward the same economic model, potentially involving more conflicts of interest. The

⁹⁴ See Release at 66,542 n.190 (The five firms identified are “(1) Institutional Shareholder Services (“ISS”), (2) Glass Lewis & Co. (“Glass Lewis”), (3) Egan-Jones Proxy Services (“Egan-Jones”), (4) Segal Marco Advisors, and (5) ProxyVote Plus.”).

⁹⁵ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors et al. to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission 3 (Nov. 14, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/November%2014%202019%20letter%20to%20SEC%20Chairman.pdf (“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.”) (CII November 14 Letter); see also Letter from Craig Rosenberg, Pres., ProxyVote Plus, LLC to Office of Management and Budget 1 (Jan. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6608625-202800.pdf?utm_source=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_campaign=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_medium=email (commenting that the proposal “will result in significant increases in costs that ProxyVote will incur; an increase in client fees that we may unfortunately be forced to implement; and, ironically, may compel us to seek a sale to one of the dominant firms in the field.”).

⁹⁶ See Letter from Anat Admati, George G.C. Parker Professor of Finance and Economics, Stanford Graduate School of Business et al. to Chairman, Jay Clayton, Securities and Exchange Commission et al. 1 (“By increasing the cost of opining on proxy statements such proposals will only discourage new entry into the proxy advisory market and exacerbate the problem of market concentration in this sector.”); Letter from Sarah Wilson, Chief Executive, Minerva Analytics to Hon. Jay Clayton, Chairman, U.S. Securities and Exchange Commission 2 (Jan. 2, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6615792-202950.pdf?utm_source=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_campaign=1-23-20+-+Weekly+Governance+Alert+Vol+25+Issue+4&utm_medium=email (“In respect of the SEC’s proposals, our reasons for opposing the proposed regulations that they will: . . . • Damage much-needed competition and unfairly prejudice the business chances of challenger service providers like Minerva and present impossible competition hurdles”); Commissioner Robert J. Jackson Jr., Statement on Proposals to Restrict Shareholder Voting (Nov. 5, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting> (noting that the proposals “will have consequences—including reducing the already-scant competition among proxy advisors”).

⁹⁷ *Id.*; see Letter from Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis to Mr. Alex Goodenough, Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget (“The costs . . . would be borne by proxy advisors and would inevitably have to be passed on to their institutional investor clients, who, in turn, may have to pass these costs on to their individual investor participants and beneficiaries.”).

⁹⁸ Attracta Mooney & Patrick Temple-West, Battle Royale, SEC Locks Horns with Investors Over Proxy Advisors, Financial Times, Dec. 9, 2019, <https://www.ft.com/content/d1a88874-1686-11ea-8d73-6303645ac406> (registration required & on file with CII).

direct financial and time burdens also are likely to lead to lower quality reports and, potentially, less accuracy. If we eventually end up with a monopoly on proxy advice, we would expect the quality, accuracy and timeliness of advice to decline further.

Of particular concern, as indicated in Response #25, the timeframe available under the proposal for the firms to undertake research and draft their recommendations and for their institutional investor clients to responsibly vote their shares would decrease by an ISS estimate of approximately nine to 13 calendar days. (The SEC did not do analysis on this before proposing the new regulations, which is a lapse of major concern to CII and our members.) The resulting shorter timeline for providing proxy voting advice would undermine the Commission's stated goal of addressing concerns about the accuracy of the work of the proxy advisory firms⁹⁹ (albeit unsupported by reliable evidence), and it runs counter to the Commission's mandate to protect (and not harm) investors.¹⁰⁰

Request for Comment 31. *Should the proposed amendments allow a proxy voting advice business to seek reimbursement from registrants and other soliciting persons of reasonable expenses associated with the review and feedback period and final notice of voting advice in proposed Rule 14a-2(b)(9)(ii)? If so, what would constitute reasonable expenses and how should these amounts be calculated? Should the calculation of these amounts be dependent on the size or other attributes of the proxy voting advice business, or on the size of the registrant, or number of recommendations? Should there be limits on the amount beyond reasonable expenses for which a proxy voting advice business can seek to be reimbursed?*

CII Response. Yes, we believe the proposed amendments should include a provision that allows a proxy voting advice business to seek reimbursement from registrants and other soliciting persons of the reasonable expenses associated with any required review and feedback period. The potential costs of the proposed amendments are one of the primary concerns for many institutional investor clients of proxy voting advice businesses.¹⁰¹

Request for Comment 32. *We proposed to limit the review and feedback period and final notice of voting advice requirements to only registrants and soliciting persons conducting non-exempt solicitations. Should the opportunity to review and provide feedback and receive final notice of voting advice also be given to other parties, such as shareholder proponents or persons engaged in exempt solicitations, such as in "vote no" or withhold campaigns?*

CII Response. We believe that, if despite our strong objections the Commission insists on a government-mandated review and feedback and final notice periods, those requirements should be applied on an even-handed basis with, equal treatment between soliciting persons conducting non-exempt solicitations and those engaged in exempt solicitations. CII believes it is a first principle that regulatory rules provide an even playing field with regard to items contested at

⁹⁹ See Release at 66,518 (indicating that purpose of proposed new conditions is to "help ensure that investors who use proxy voting advice receive more accurate, transparent, and complete information").

¹⁰⁰ U.S. Securities and Exchange Commission, About the SEC (last visited Dec. 28, 2019) <https://www.sec.gov/about.shtml> ("The mission of the SEC is to protect investors").

¹⁰¹ See, e.g., Letter from Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System et al. to The Honorable Michael Crapo, Chairman, Committee on Banking, Housing, and Urban Affairs at al. 3 ("We humbly ask that you encourage the Commission to not take actions that will increase our costs . . .").

shareholder meetings. We recognize that keeping the process fair adds to the complexity of the SEC's mandated review process, which is one reason why the government mandate is a bad idea.

Request for Comment 33. *Should the voting advice formulated under the custom policies established by clients whose specialized needs are not addressed by a proxy voting advice business's benchmark or specialty policies be subject to the proposed review and feedback period and final notice of voting advice requirements? Are there any confidentiality concerns, such as the revelation of the client's investment strategies, which would arise from the ability of registrants or others to review the advice formulated under these customized policies? If so, is there a need for a method for distinguishing voting advice formulated under a proxy voting advice business's benchmark or specialty policy from advice formulated under a client's custom policy, and what would be the appropriate method for making this distinction? We note, for example, at least one major proxy voting advice business asserts that it is not the "norm" for its clients to adopt all or some of the business's benchmark policy, with the "vast majority of institutional investors" opting for "increasingly more detailed policies with specific views" on the issues presented for a vote in the proxy materials.*

CII Response. We do not believe voting advice formulated under the custom policies established by clients should be subject to the proposed review and feedback and final notice periods. It is our understanding that many of the larger clients of ISS and Glass Lewis pay for custom policies. It also is our understanding that clients of custom reports have confidentiality concerns with respect to those reports. Those concerns include that sharing those reports with unauthorized third parties would reveal confidential investment strategies and voting information before the votes are cast. As a result, neither ISS nor Glass Lewis currently provide drafts of custom policies to the subject companies.

It also is our understanding that custom reports are generated based on the institutional investor clients' policies, rather than the policies of the proxy voting advice businesses. Thus, we believe the proposed review and feedback and final notice periods would be pointless for custom reports since the report is based on the client's policies, not those of the proxy advisor.

It also is our understanding that a proposed review and feedback and final notice periods requirement that includes client custom policies would likely dramatically impact the timeliness concerns discussed in Response #25. As indicated in the Release, ISS has more than 400 custom policies for clients.¹⁰² And currently those reports are prepared after the preparation of related benchmark reports.

Finally, per discussion with SEC staff about this issue,¹⁰³ we believe there may be some confusion about the differences among voting advice formulated under a proxy voting advice businesses' benchmark, specialty and custom policies.

¹⁰² See, e.g., Release at 66,540 n.176 ("ISS implements more than 400 custom voting policies on behalf of institutional investor clients [and], approximately 87% of the total shares processed by ISS on behalf of clients globally were linked to such policies.").

¹⁰³ CII November 14 Letter at 2 ("Other aspects of the PA proposal on which we seek supplemental, clarifying information include the following: . . . It is CII's understanding that ISS produces a number of custom reports [and] [i]t is not clear whether the SEC would require ISS to provide registrants with all of these draft reports.").

For all of the above reasons, we believe there may be a legitimate need for a method distinguishing voting advice formulated under a proxy voting advice business's benchmark, or specialty, policy from advice formulated under a client's custom policy. If the SEC insists on a government mandate for issuer management pre-review of reports, we encourage the SEC staff to work with ISS, Glass Lewis and the other interested proxy voting advice businesses to determine what would be the appropriate method for making the distinction.

Request for Comment 34. *Should the review and feedback period and final notice of voting advice requirements be a condition to the exemptions in all cases, as proposed, or should they be required only where a proxy voting advice business's voting recommendations are adverse to the reviewing party? In a proxy contest, should we require the review and feedback period and final notice of voting advice requirements only if voting recommendations are adverse to the reviewing party? In the case of a split vote recommendation, who should have the right to review the voting advice?*

CII Response. We agree that if, despite our strong objections, the Commission insists on a government-mandated review and feedback and final notice periods, those requirements should be applicable even if a proxy voting advice business's voting recommendation are not adverse to the reviewing party. On this point we generally agree with the Commission's conclusion that:

For ease of administration, we do not think that our proposed requirement should put the burden on the proxy voting advice business, registrant, or certain other soliciting person to determine whether proxy voting advice is "adverse" to another person's voting recommendation. . . . Making a determination whether such advice would be adverse to the registrant or the dissident shareholder could be difficult and highly subjective. . . . Requiring the proxy voting advice business to separate its written report so that only adverse recommendations would be presented for review could require additional time, burden, and cost for the proxy voting advice business.¹⁰⁴

That said, if the SEC implements a mandated pre-review, it should clarify that this does not apply in any way to what it labels as proxy advice firms in the release that do not publish research and reports for clients. The Release does not demonstrate an understanding of the business models pursued by Segal Marco or ProxyPlus, which the Release identifies as proxy advice firms. We understand that SEC staff did not talk at all with those firms, and its research pertinent to the Release seems to have been limited to looking at their web sites, notwithstanding the fact that both are registered investment advisors. Nor does the Release indicate awareness of other firms that have similar business models. Insofar as these firms are concerned, the Release appears to have been developed completely in the dark, which is not a good basis on which to form regulations that impact not only proxy voting and corporate governance, but also small businesses and livelihoods.

Request for Comment 35. *Would the proposed review and feedback period and final notice of voting advice requirements work effectively in the context of a contested solicitation? Are there*

¹⁰⁴ Release at 66,530-31 n.112.

unique challenges or specific issues with the parties' compliance with these proposed requirements that are foreseeable in contested solicitations?

CII Response. We believe there may be unique challenges or specific issues with the parties' compliance with the proposed requirements that are foreseeable in contested solicitations and in some M&A situations. For example, we understand that the proposed requirements may be potentially unworkable in the context of a merger and acquisition because the terms of the deal often change after the first definitive proxy statement is filed and the proxy advisor either needs to hold back its advice as long as possible or amend the advice after it is first issued, making timely compliance with the proposed process challenging.

In contested and M&A situations, among others, developments at a company or otherwise can alter analysis in material ways. For example, if an acquirer increases an offer price not long before a meeting of shareholders of the target company, that can affect whether shareholders would want to support the deal, and whether a proxy advisor would recommend voting for sale of the company. We believe the intent behind the SEC proposal is to permit a proxy advisor to change its research, analysis and recommendation in any way that it chooses after providing its initial research, analysis and recommendation. In Note 1 to paragraph (b)(9)(ii), the proposed rule stipulates: "Once the two business day period specified in paragraph (B) of this section has expired, the proxy voting advice business will be under no further obligation to provide the registrant or any other soliciting person with additional opportunities to review its proxy voting advice with respect to the same meeting." The Commission should specify in the rule that this includes any changes in the advice or recommendations.

We also would note that in its highly prescriptive rule that the proxy voting advice business provide to the registrant and certain other soliciting persons "as copy of the proxy voting advice that the proxy voting advice business *will deliver* to its clients" (emphasis added), the SEC is setting up some confusing situations in which the advice and (at times) recommendation that the proxy advisor wishes to deliver to its clients will have changed by the time that it must send its (outdated) recommendations. Perhaps the original registrant-vetted report could be delivered at the same time as (and bundled with) the timely advice that actually reflects the proxy advisor's view at the time it was delivered. Would it be permissible for the advisor to watermark the version vetted by the registrant and other soliciting parties with "please disregard" or some other such notification? The SEC should explore this concern if it moves ahead with its proposed vetting and final notice requirements. Given that the SEC seeks to micro-manage the process, it is important for the Commission to clarify this and other situations, rather than rely on clarification through litigation between registrants and other soliciting parties and proxy advisory firms.

Request for Comment 36. *Should we require the entirety of the proxy voting advice, including separate specialty reports, to be provided to the reviewing party or only excerpts or certain reports? If the latter, which excerpts or reports? How should the scope of any such excerpts or reports be determined? Should only the portions of the voting advice that are adverse to the registrant or certain other soliciting persons be subject to the review and feedback period and final notice of voting advice requirements? Should we require only the factual information and/or data underlying the advice to be provided to the reviewing party?*

CII Response. As described in Response #25, we oppose the government-mandated review, but argue that if the SEC goes ahead with it, the Commission should require only factual information and data underlying the advice to be provided to the reviewing party. If the SEC goes ahead with the government-mandated review by registrants that includes analysis, opinion and recommendations, it should exclude sections of the report covering shareholder proposals unless it also provides the same factual information, data, analysis, opinion and recommendations to the proponents of a shareholder proposal.

Request for Comment 37. *Should proxy voting advice on certain topics or kinds of proposals be excluded from the proposed review and feedback period and final notice of voting advice requirements? If so, which ones? If some are excluded, are there topics or kinds of proposals for which proxy voting advice should always be subject to the proposed requirements?*

CII Response. If the SEC goes ahead with the mandated review and feedback and final notice periods, it should exclude special meetings. It is common for there to be meaningful changes to the definitive proxy statement close in time to meeting deadlines, and so that aspect of the SEC proposal is even more unworkable than the rest of the proposal.

As noted above, if the SEC goes ahead with the government-mandated review by registrants that includes analysis, opinion and recommendations, it should exclude sections of the report covering shareholder proposals unless it also provides the same factual information, data, analysis, opinion and recommendations to the proponents of a shareholder proposal. We also believe the SEC should exclude executive compensation matters from any review by company management, given strong direct financial conflicts of interest in such review of pay by the recipients of that pay.

Request for Comment 38. *Are there any risks raised by proxy voting advice businesses providing advance copies of voting advice (e.g., misuse of material, nonpublic information, or misappropriation of proprietary information), and if so, how can such risks be managed?*

CII Response. We believe there are risks raised by proxy voting advice businesses providing advance copies of voting advice. As one example, we noted in our November 14, 2019, letter to the SEC (CII November 14 Letter), the following concern about whether the proposal could elevate the risk of insider trading:

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.¹⁰⁵

We note that one way to manage the risks raised by proxy voting advice businesses providing advance copies of voting advice is by adopting our proposed revisions to limit both the time for review and feedback, and the content of the advance copies of voting advice. See Response #25.

¹⁰⁵ CII November 14 Letter at 3.

Request for Comment 39. *Should we allow proxy voting advice businesses to require registrants and other soliciting persons to enter into confidentiality agreements prior to providing their proxy voting advice? If so, should we specify any terms or parameters of the required confidentiality agreement? For example should the rule stipulate that the terms of the confidentiality agreement may be no more restrictive than similar types of confidentiality agreements the proxy voting advice business uses with its clients, as proposed? Should we stipulate in the rule that a proxy voting advice business is not required to comply with the proposed review and feedback period and final notice of voting advice requirements unless the reviewing party has entered into an agreement to keep the information received confidential? Are there similar types of confidentiality agreements between proxy voting advice businesses and their clients? If so, what are the terms of those agreements? Is it appropriate for the rule to address the nature of a private contract between two parties?*

CII Response. We support allowing proxy voting advice businesses to require registrants and other soliciting persons to enter into confidentiality agreements prior to providing their proxy voting advice. We generally agree with the Commission that such a provision may provide “a means for proxy voting advice businesses to maintain control over the dissemination of their proxy voting advice and minimize the risk of unintentional or unauthorized release, our proposed amendment 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.”¹⁰⁶

As indicated, however, in the CII November 14 Letter, we believe it may be helpful for the SEC to give more consideration to at least two issues regarding the proposed confidentiality agreements: (1) proxy voting advice businesses’ continuing rights to protect its intellectual property subsequent to providing proxy voting advice to its clients; and (2) proxy voting advice businesses’ permitted recourse when there is a violation of the agreement by the registrant or other soliciting persons.¹⁰⁷

Request for Comment 40. *Can the confidentiality of information that a proxy voting advice business would provide to registrants and other soliciting persons under the proposal be effectively safeguarded? Would it be feasible for a proxy voting advice business to obtain a confidentiality agreement from the numerous registrants or soliciting persons with whom it interacts? Could confidentiality be assured through other means?*

CII Response. As indicated in Response #39, we believe it would be helpful for the SEC to give more consideration to whether the proposed confidentiality agreement can be effectively safeguarded.

Request for Comment 41. *Should proxy voting advice businesses be required to include in their voting advice to clients a hyperlink (or other analogous electronic medium) to the response by the registrant and certain other soliciting persons, as a condition to the exemptions in Rules*

¹⁰⁶ Release at 66,532.

¹⁰⁷ See CII November 14 Letter at 2 (“The PA Proposal is not clear what is being proposed regarding confidentiality agreements.”).

14a-2(b)(1) and 14a-2(b)(3)? Are there better methods of making the response available to the clients of proxy voting advice businesses? Should the proposed rule provide certain guidelines or limitations on the responses (e.g., responses may cover only certain topics, such as disagreements on facts used to formulate the proxy voting advice?)

CII Response. We do not believe that proxy voting advice businesses should be required to include in their voting advice to clients a hyperlink (or other analogous electronic medium) to the response by the registrant and certain other soliciting persons without first evaluating whether the proposed requirement may interfere with free speech rights under the First Amendment. We understand that compelled speech is particularly problematic from a First Amendment standpoint. As indicated in Response #25, in light of the 1992 Release discussing First Amendment issues with regard to regulation that inserts companies between shareholders and their advisors, we believe it is appropriate for the SEC give some consideration of First Amendment issues before requiring the hyperlink.

As one possible alternative method for making the response available to the clients of proxy voting advice businesses, we believe the SEC should explore a less intrusive system similar to that already adopted by Glass Lewis and described in the Release as follows:

“[Glass Lewis has a resource center on its website designed specifically for the issuer community via which public companies, their directors and advisors can, among other things: (i) Submit company filings or supplementary publicly available information; (ii) participate in Glass Lewis’ Issuer Data Report (‘IDR’) program, prior to Glass Lewis completing and publishing its analysis to its investor clients; and (iii) report a purported factual error or omission in a research report, the receipt of which is acknowledged immediately by Glass Lewis, then reviewed, tracked and dealt with internally prior to responding to the company in a timely manner.”¹⁰⁸

Request for Comment 42. *Would the proposed condition that proxy voting advice businesses include a hyperlink (or other analogous electronic medium) directing their clients to the registrant’s (or certain other soliciting person’s) statement impact clients of proxy voting advice businesses, such as investment advisers? If so, how?*

CII Response. We believe the proposed condition that proxy voting advice businesses include a hyperlink directing their clients to the registrant’s statement would impact clients of proxy voting advice businesses. Setting aside the First Amendment issues discussed in Response #41, we note that the Commission appears to acknowledge that the proposed condition may (1) delay the timely receipt of the advice for voting purposes because of the need for the proxy voting advice businesses to coordinate with the registrant the timing of the filing of supplementary proxy materials,¹⁰⁹ and (2) increase the proxy voting advice businesses’ direct costs¹¹⁰ which likely

¹⁰⁸ Release at 66,548 n.253.

¹⁰⁹ See *id.* at 66,549 (“registrants and other soliciting persons would incur costs of . . . coordinating timing with proxy voting advice businesses for the filing of supplementary proxy materials.”)

¹¹⁰ *Id.* (“The proxy voting advice business would also incur a direct cost of including that hyperlink or other analogous electronic mechanism.”); see Letter from Nichol Garzon-Mitchell, Senior Vice President, General

would be passed on to the clients and the beneficiaries of clients' funds, including Main Street investors.

Request for Comment 43. *In our view, proxy voting advice businesses would not be liable for the content of the registrant's (or certain other soliciting person's) statement solely due to inclusion of a hyperlink (or other analogous electronic medium) to such a statement in their voting advice. Should we codify this view in the text of proposed Rule 14a-2(b)(9)?*

CII Response. We believe the Commission should codify its view that proxy voting advice businesses would not be liable for the content of the registrant's statement solely due to inclusion of a hyperlink to such a statement in their voting advice. The codification may be particularly helpful in this instance given that the Commission's view appears to be subject to multiple, legalistic qualifications.¹¹¹

Request for Comment 44. *In instances where proxy voting advice businesses provide voting execution services (pre-population and automatic submission) to clients, are clients likely to review a registrant's response to voting advice? Should we amend Rules 14a-2(b)(1) and 14a-2(b)(3) so that the availability of the exemptions is conditioned on a proxy voting advice business structuring its electronic voting platform to disable the automatic submission of votes in instances where a registrant has submitted a response to the voting advice? Should we require proxy voting advice businesses to disable the automatic submission of votes unless a client clicks on the hyperlink and/or accesses the registrant's (or certain other soliciting persons') response, or otherwise confirms any pre-populated voting choices before the proxy advisor submits the votes to be counted? What would be the impact and costs to clients of proxy voting advice businesses of disabling pre-population or automatic submission of votes? Could there be effects on registrants? For example, if a proxy voting advice business were to disable the automatic submission of clients' votes, could that deter some clients from submitting votes at all, thereby affecting a registrant's ability to achieve quorum for an annual meeting? If we were to adopt such a condition, what transitional challenges or logistical issues would disabling pre-population or automatic submission of votes present for proxy voting advice businesses, and how could those challenges or issues be mitigated?*

CII Response. We would strongly oppose amending Rules 14a-2(b)(1) and 14a-2(b)(3) so that the availability of the proposed exemptions is conditioned on a proxy voting advice businesses' structuring its electronic voting platform to disable the automatic submission of votes in instances where a registrant has submitted a response to the voting advice. We are stunned that the Commission would even consider preventing shareowners from exercising their voting rights because they have chosen a proxy voting advice business to execute their votes. The question itself suggests a fundamental misunderstanding of how and why some institutional investors use

Counsel, Glass Lewis to Mr. Alex Goodenough, Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget (Noting the costs in terms of the "many burden hours it would take proxy advisors to process, review and implement each of the SEC-estimated 261 annual requests by companies for a hyperlinked response to be included in the proxy advice and any electronic medium used to deliver the proxy voting advice.").

¹¹¹ See Release at 66,553 n.140 (in explaining the Commission's "view" that that the hyperlink would not expose the proxy advice businesses to liability the SEC used a number of legalistic qualifiers, including "[i]n general," "would not, by itself," "implicitly endorsed," "would likely," and "would not likely").

proxy voting advice businesses' execution services and a disregard for evidence based rule-making.

For some institutional investors, execution services provide the ability to carry out their fiduciary responsibilities for voting in a more cost-effective manner. While some registrant's have alleged that proxy voting advice business' vote automatically in a manner that is inconsistent with their client's proxy voting guidelines, the Release provides no reliable evidence to support the allegation. Moreover, as this request for comment indicates, a disabling of the automatic submission of clients' votes could have a number of negative consequences, including a registrant's ability to achieve quorum for an annual meeting.

We note that the suggested requirement that a client click the hyperlink before being permitted to vote is a surprisingly intrusive, Big Brother-like, suggestion.¹¹² Also, we are aware of no requirement that an investor receiving proxy materials electronically must click the link to the proxy statement before voting.

Request for Comment 45. *Should we permit proxy voting advice businesses to cure any unintentional or immaterial failure to comply with the proposed conditions so long as they make a good faith and reasonable effort, as proposed? We have proposed that the determination of whether a good faith and reasonable effort has been made should depend on the particular facts and circumstances. Is there a need for further clarity on the actions that may be needed to satisfy this standard? If so, what would be appropriate to consider in satisfying this standard?*

CII Response. We generally support the Release's provision permitting proxy voting advice businesses to cure any unintentional or immaterial failure to comply with the proposed conditions so long as they make a good faith and reasonable effort. We generally agree with the Commission that such a provision "would serve to mitigate the risk of any unintended adverse consequences for proxy voting advice businesses as they seek to comply with the review and feedback and other provisions"¹¹³ However, as indicated in Response #25, we believe the Commission should also establish a safe harbor for proxy advisors to shield them from liability under Rule 14a-9 if they comply with all of the requirements of the proposed requirements.

Request for Comment 46. *Should we prescribe a more detailed framework or establish procedural guidelines to help proxy voting advice businesses manage their interactions with registrants and certain other soliciting persons under proposed Rules 14a-2(b)(9)(ii) and (iii)? If so, what would be the appropriate framework?*

CII Response. As noted in Response #7, if the SEC insists on going through with its already highly prescriptive and intrusive regulatory scheme including the review and feedback and final notice periods, it also should at least provide guidance on how a proxy advisor should handle the conflicts of interest created by the scheme.

¹¹² The "click the hyperlink" suggestion arguably is only one step removed from using technology to disable voting subject to a scan of whether client personnel of the appropriate rank (using facial recognition technology) spent appropriate time reading the registrant's (or certain other soliciting persons') writing.

¹¹³ Release at 66,535.

Request for Comment 47. *What steps would proxy voting advice businesses need to take to update their systems and procedures such that they would reasonably be able to comply with the new conditions of proposed Rule 14a–2(b)(9)? Are there other steps that proxy voting advice businesses would need to take, such as re-negotiating contracts with their clients? What are the associated costs that proxy voting advice businesses would be anticipated to incur as a result? If the proposal is adopted, how much preparatory time would a proxy voting advice business require following adoption of the proposed amendments, to ensure that its systems and procedures are equipped to facilitate the business’s compliance with the new rules?*

CII Response. We generally agree with the Commission that among the steps the proxy voting advice businesses would need to take to update their systems and procedures such that they would reasonably be able to comply with the new conditions of proposed Rule 14a–2(b)(9) include the following:

- (i) Modifying current systems, or developing and maintaining systems to track the timing associated with these new requirements; (ii) modifying current systems and methods, or developing and maintaining new systems and methods to share the proxy voting advice with registrants and other soliciting persons; and (iii) delivering draft voting advice to registrants and other soliciting persons for their review and feedback.¹¹⁴

Not surprisingly, the associated costs that proxy voting advice businesses would be anticipated to incur to update their systems and procedures such that they would reasonably be able to comply with the new proposed conditions are likely to vary based in the size of the business. As ProxyVote Plus, LLC (ProxyVote) recently commented: “Unlike ISS, Glass Lewis and Egan-Jones, the first-year costs will be dramatically higher for our small company to create new systems to permit registrants to review and provide feedback on the proxy votes we cast on behalf of our clients.”¹¹⁵

At a minimum, we believe the preparatory time needed to ensure that systems and procedures are equipped to facilitate compliance with any new rule would need to take into account that during the proxy season the proxy voting advice businesses’ will have less time and resources to provide proxy voting advice *and* update their systems and procedures to reasonably comply with the new conditions.

Request for Comment 48. *Should proxy voting advice businesses be required to disclose the nature (e.g., frequency, format, substance, etc.) of their communication with registrants (and certain other soliciting persons) to their clients or publicly?*

CII Response. As noted in Response #7, if the SEC insists on going through with its already highly-prescriptive and intrusive regulatory scheme including the review and feedback and final

¹¹⁴ *Id.* at 66,548.

¹¹⁵ Letter from Craig Rosenberg, Pres., ProxyVote Plus, LLC to Office of Management and Budget 2 (Jan. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6608625-202800.pdf?utm_source=1-23-20+-Weekly+Governance+Alert+Vol+25+Issue+4&utm_campaign=1-23-20+-Weekly+Governance+Alert+Vol+25+Issue+4&utm_medium=email.

notice periods, it also should at least provide guidance on how a proxy advisor should handle the conflicts of interest created by the scheme. We presume at a minimum this would include disclosure on those contacts to clients.

Request for Comment 49. *What factors and/or conditions are primarily responsible for the incidence of factual errors and methodological weaknesses in proxy voting advice businesses' analyses? How effective would our proposal for standardized review and feedback and opportunity to include responses to the proxy voting advice be in addressing these factual errors and methodological weaknesses?*

CII Response. This question exposes a fundamental flaw of the proposal. The proposal's provisions requiring a standardized review and feedback and opportunity to include responses to the proxy voting advice is largely premised on an assumed (but not substantiated) high rate of factual errors and methodical weaknesses in proxy voting advice businesses' analyses.¹¹⁶ For example, consider the following five paragraphs from the Release providing a direct link between alleged factual and methodical weaknesses in proxy voting advice and the Release provisions providing for a standardized review and feedback and opportunity to include responses to the proxy voting advice:

[1] We believe that our proposed rule amendments would . . . establish effective measures to reduce the likelihood of *factual errors or methodological weaknesses* in proxy voting advice^[117]

[2] However, in recent years concerns have been expressed by a number of commentators, particularly within the registrant community, that there could be *factual errors, incompleteness, or methodological weaknesses* in proxy voting advice businesses' analysis and information underlying their voting advice that could materially affect the reliability of their voting recommendations and could affect voting outcomes, and that processes currently in place to mitigate these risks are insufficient. These concerns are coupled with the perception of many registrants that . . . there are not meaningful opportunities to engage with the proxy voting advice businesses and *rectify potential factual errors or methodological weaknesses* in the analysis underlying the proxy voting advice before votes are cast, particularly for registrants that do not meet certain criteria . . . and . . . once the voting advice is delivered to the proxy voting advice business's clients, which typically occurs very shortly before a significant percentage of votes are cast and the meeting held, it is often not possible for the registrant to inform investors in a timely and effective way of its contrary views *or errors* it has identified in the voting advice. Although communication between proxy voting advice businesses and registrants may have improved over time, recent feedback and studies suggest that many registrants remain concerned about the limited ability of registrants to provide input that might address *errors, incompleteness, or methodological weaknesses in proxy voting advice*. . . . Although we recognize that some proxy voting advice businesses have policies in which they would issue alerts informing

¹¹⁶ See Release at 66,525, 66,529-30, 66,533, 66,545, 66,547.

¹¹⁷ *Id.* at 66,525 (emphasis added).

their clients of *errors* in their voting advice or updated information released by the registrant, such policies result in the proxy voting advice businesses, not the client, determining whether the *errors* or information are material to a voting decision and sharing such information only after their advice has already been published. . . . Although we recognize that some proxy voting advice businesses have policies in which they would issue alerts informing their clients of *errors* in their voting advice or updated information released by the registrant, such policies result in the proxy voting advice businesses, not the client, determining whether the *errors* or information are material to a voting decision and sharing such information only after their advice has already been published.^[118]

[3] We believe that establishing a process that allows registrants and other soliciting persons a meaningful opportunity to review proxy voting advice in advance of its publication and provide their corrections or responses would reduce the likelihood of *errors*, provide more complete information for assessing proxy voting advice businesses' recommendations, and ultimately improve the reliability of the voting advice utilized by investment advisers and others who make voting determinations, to the ultimate benefit of investors.^[119]

[4] In formulating the proposed review and feedback period and notice of voting advice requirements, we have sought to improve the quality of information available to investors while balancing, on the one hand, the need for registrants and certain soliciting persons to conduct a meaningful assessment of the advice and communicate any concerns or *errors* regarding the advice with, on the other hand, the concerns about imposing an undue delay or otherwise jeopardizing the ability of proxy voting advice businesses to meet their contractual commitments to clients and their clients' ability to make timely and informed voting decisions.^[120]

[5] These amendments are intended to give registrants and other soliciting persons an opportunity to engage with the proxy voting advice business and identify *factual errors or methodological weaknesses* in the proxy voting advice before it is disseminated to clients.^[121]

As discussed in Response #24, the Release fails to provide a reliable basis for the SEC to conclude that factual errors or methodological weaknesses are prevalent or materially affect a proxy voting advice business's voting recommendation. As a result, the proposal for standardized review and feedback and opportunity to include responses to the proxy voting advice can be not be justified by the need to address factual errors and methodological weaknesses. As explained by SEC Commissioner Lee in her dissent to the Release:

I agree with the stated goal in the proposal that proxy advice should be based on the "most accurate information reasonably available." What is missing in this

¹¹⁸ *Id.* at 66,528-30 (footnotes omitted & emphasis added).

¹¹⁹ *Id.* at 66,530 (emphasis added).

¹²⁰ *Id.* at 66,533 (emphasis added).

¹²¹ *Id.* at 66,545 (emphasis added).

proposal, however, are . . . critical underpinnings for the policy choices it reflects. . . . [I]t is missing data demonstrating an error rate in proxy advice sufficient to warrant a rulemaking. In fact, as the comment file shows, assertions of widespread factual errors have been methodically analyzed and largely disproven.¹²²

More recently, the IAC Recommendation provided the following views about the incidence of factual errors and methodical weaknesses in proxy voting advice businesses' analyses:

We recommend the SEC cite evidence of a problem of the kind that might be addressed by the key elements of the proxy advisor proposal – specifically, the part of the proposal mandating preclearance of draft reports with corporate managers and silencing advisors from speaking to their clients for at least a week while managers review the reports. Instead, the SEC notes that some private interests, such as some corporate managers and their lawyers and trade group representatives, claim problems with proxy advisors exist, such as errors in advice given. The most the SEC says is that such problems “may” or “could” exist.

It is true the SEC cites to sources that assert that errors in proxy advisor reports exist. But a brief review of those sources shows that they provide no reliable basis for concluding material problems actually do exist

. . . .

From over 17,000 shareholder votes over three years, the number of possible factual errors identified by companies themselves in their proxy supplements amounts to 0.3% of proxy statements – and none of those is shown to be material or to have affected the outcome of the related vote.¹²³

***Request for Comment 50.** Are there better approaches for addressing factual errors and methodological weaknesses in proxy voting advice businesses' analyses?*

CII Response. As discussed in Response #24, the Release fails to provide a reliable basis for the SEC to conclude that “factual errors or methodological weaknesses” are prevalent or materially affect a proxy voting advice business's voting recommendations. Better approaches for addressing alleged factual errors and methodological weaknesses in proxy voting advice businesses' analyses should be explored only to the extent the SEC first develops reliable evidence on the issue.¹²⁴ As we explained in the CII October 24 Letter:

While most assertions of pervasive proxy advisor inaccuracy are mere assertions and entirely undocumented, 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

¹²² Commissioner Allison Herren Lee, Statement on Shareholder Rights (footnotes omitted).

¹²³ Recommendation of the Investor-as-Owner Subcommittee of the IAC, Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 5 (footnotes omitted).

¹²⁴ See, e.g., CII October 24 Letter at 1-2.

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.¹²⁵

To the extent the SEC does develop reliable evidence on the issue, one potential “better approach” would be to take actions that promote more competition in the proxy voting advice business. As indicated in Response #30, we believe the burdens and corresponding costs imposed by the proposal, if adopted, would likely lead one or more proxy voting advice businesses identified in the Release (and others) to exit the industry, and would increase barriers to entry for other potential competitors. As SEC Commissioner Robert J. Jackson Jr. explained

Those concerned about the influence of the two-principal proxy-advisory firms should consider that today’s actions may lead to further consolidation in the industry—handing even more power to the largest player. . . . Unfortunately, the economic analysis in today’s release fails to address this concern—or even cite an important recent paper showing the benefits of competition in this area for investors and issuers alike. See Tao Li, *Outsourcing Corporate Governance: Conflicts of Interest Within the Proxy Advisory Industry*, 64 *Mgmt. Sci.* 2951 (2018).¹²⁶

Request for Comment 51. *To what extent have factual errors or methodological weaknesses in proxy voting advice businesses’ analyses resulted in impaired voting advice or adversely affected the ability of proxy voting advice businesses’ clients to vote securities effectively?*

CII Response. As described in Response #24 and Response #50, the Release fails to provide reliable evidence that factual errors or methodological weaknesses are prevalent or materially affect a proxy voting advice business’s voting recommendation. We do not believe that factual errors or methodological weaknesses in proxy voting advice businesses’ analyses have resulted in impaired voting advice or has adversely affected the ability of proxy voting advice businesses’ clients to vote securities effectively.

IV. Proposed Amendments to Rule 14a-9

Request for Comment 52. *Is the proposal to amend the list of examples in Rule 14a-9 necessary in light of the Commission’s recent guidance specifically underscoring the applicability of Rule 14a-9 to proxy voting advice? Should the proposal to amend Rule 14a-9 list different or additional examples and, if so, which examples?*

¹²⁵ *Id.*

¹²⁶ Commissioner Robert J. Jackson, Jr., Public Statement, Statement on Proposals to Restrict Shareholder Voting at n.6.

CII Response. We do not believe the proposed list of examples in Rule 14a-9 are necessary because we do not believe the SEC has a reliable basis for amending the list. More specifically, we note that the Release asserts that “due to the lack of clear disclosures, clients are led to mistakenly believe that the unique criteria used by the proxy voting advice businesses were approved or set by the Commission.”¹²⁷ The Release then provides two specific examples: (1) “if a proxy voting advice business were to recommend against the election of a director who serves on the registrant’s audit committee on the basis that the director is not independent under the proxy voting advice business’s independence standard for audit committee members, and the standard applied by the proxy voting advice business is more limiting than the Commission’s rules, it may be necessary for the proxy voting advice business to make clear that the business’s recommendation is based on a misapprehension that a registrant is not in compliance with the Commission’s standards or requirements[; and . . . (2)] “if a proxy voting advice business recommends that clients vote against a reporting company (“SRC”) that provides scaled executive compensation disclosure in compliance with Commission rules for SRCs, rather than the expanded disclosure required of larger registrants [t]o the extent that such a proxy voting advice business does not make clear to its clients that it is making a negative voting recommendation based on its disclosure criteria, notwithstanding that the registrant has complied with the compensation disclosure standards established by the Commission.”¹²⁸

In an effort to evaluate the SEC’s allegations of the lack of clear disclosures for the two specific examples provided, CII staff reviewed a number of recent relevant ISS and Glass Lewis research reports. The results of that review are described below:

Example 1

Per our review, we believe that when ISS or Glass Lewis recommends against the election of a director on the basis that the director is not independent under the proxy voting advice business’s independence standard and the standard applied by the proxy voting advice business is more limiting than the Commission’s rules, the disclosure that is currently provided by ISS and Glass Lewis is clear. Appendices I and II to this letter provide examples of “against” recommendations by ISS for Tutor Perini Corporation board member Peter Arkley (Appendix I), and by Glass Lewis for Cypress Semiconductor Corporation board member J. Daniel McCraine (Appendix II). We challenge the SEC to describe why these disclosures are not clear. We asked Commission staff members to otherwise show us examples of what the Release asserts in this regard, and they did not do so, giving us the impression that they did not have any examples (notwithstanding the assertion of one Commissioner that he had seen examples, which were not presented in the Release or otherwise shown to us).

Example 2

Per our review, we believe that when ISS and Glass Lewis recommends that clients vote against a reporting company that provides scaled executive compensation disclosure in compliance with Commission rules for smaller reporting companies, the ISS and Glass Lewis reports clearly indicate that the company is exercising its authority to provide this reduced level of disclosure.

¹²⁷ Release 66,538.

¹²⁸ Release at 66,538 (footnotes omitted).

Appendix III to this letter provides an analogous example of an “against” recommendation by Glass Lewis for the compensation committee members of Independence Contract Drilling, Inc.—an emerging growth status company which was not required to present a say-on-pay proposal. We challenge the SEC to describe why this disclosure is not clear.

In addition, CII staff reviewed the ISS research reports on U.S. companies not in the Russell 3000 that received an against recommendation by ISS on their say-on-pay proposal in 2019 and the proposal received less than 50% support from shareholders. For those companies with under \$100 million in revenue, we did not find a single company where the ISS report indicated that the scaled executive compensation disclosure was a basis for the ISS negative recommendation.

Finally, even assuming the SEC has some reliable evidence to support the two examples, we note that for the 2019 proxy season ISS recommended against only 9% of uncontested board nominees¹²⁹ and 12.7% of say-on-pay proposals at Russell 3000 companies.¹³⁰

For all the above reasons, we do not believe the Release provides a reliable basis for amending the list of examples for Rule 14a–9.

Request for Comment 53. *To what extent do proxy voting advice businesses currently apply their own standards or criteria that materially differ from those set or approved by the Commission, and how well do they alert clients to these differences when it may impact their voting advice?*

CII Response. Clients of proxy advice businesses expect their advisor to use its own judgment, expertise and methodologies (and generally expect some degree of consistency between companies). As indicated in Response #52, the Release does not provide reliable evidence indicating that proxy voting advice businesses are failing to provide clear disclosure that alerts clients to differences between their own standards or criteria that materially differ from those set or approved by the Commission when it may impact their voting advice.

Request for Comment 54. *Should the proposed amendment refer only to standards or requirements that the Commission sets or approves or is a wider scope (i.e., rules of other legal or regulatory bodies) more appropriate? If a wider scope is preferable, should the regulatory standards of state or foreign regulatory bodies also be referenced?*

CII Response. We do not believe the Commission should consider a wider scope unless and until it can establish a reliable basis for amending the list of examples for Rule 14a–9.

¹²⁹ Sullivan & Cromwell, 2019 Proxy Season: Part 2, ISS Negative Recommendations Against Directors 1 (July 25, 2019), <https://www.sullcrom.com/files/upload/SC-Publication-2019-Proxy-Season-Review-Part-2-ISS-Negative-Recommendations-Against-Directors.pdf> (“ISS issued negative recommendations against 9% of directors in uncontested elections for meetings through June 1, 2019 among the Russell 3000, totaling about 1,100 directors and affecting 411 companies . . .”).

¹³⁰ Semler Brossy, 2019 Say on Pay and Proxy Results 2 (Oct. 3, 2019), <https://www.semlebrossy.com/wp-content/uploads/SBCG-2019-SOP-Report-2019-10-03.pdf> (“The ‘Against’ recommendation rate in 2019 (12.7%) is 140 basis points lower than the 2018 rate (13.9%); and is in line with the historical average observed since 2011 (12.8%)”).

Request for Comment 55. *Alternatively, instead of amending Rule 14a-9 as proposed, should we require, as an additional condition under proposed Rule 14a-2(b)(9), that a proxy voting advice business include in its voting advice (and in any electronic medium used to deliver the proxy voting advice) disclosure of its use or application, in connection with such proxy voting advice, of standards that materially differ from standards or requirements that the Commission sets or approves?*

CII Response. We are indifferent as to which alternative is selected for requiring that a proxy voting advice business include in its voting advice disclosure of its use or application, in connection with such proxy voting advice, of standards that materially differ from standards or requirements that the Commission sets or approves. Before considering alternatives, the Commission should first gather evidence establishing a reliable basis supporting the alternatives under consideration. We believe the Release fails to provide such evidence.

V. Transition Period

Request for Comment 56. *Are there any challenges that proxy voting advice businesses, their clients, or registrants anticipate in undertaking to develop systems and processes to implement the proposed amendments? If so, what are those challenges, and how could they be mitigated?*

CII Response. As indicated in Response #47, it is our understanding that one significant challenge to implementing the proposed amendments is that during the proxy season it may be difficult to devote resources to develop new systems and processes that would be required to implement the proposed amendments. We believe that those challenges may be mitigated, at least in part, by revising the proposed “one-year transition period after the publication of a final rule in the Federal Register”¹³¹ to, at a minimum, an “18-month transition period after the publication of a final rule in the Federal Register.”

The challenges could also be mitigated by adopting our suggested revisions to the proposed amendments. See Response #25.

Request for Comment 57. *Is the proposed transition period appropriate? If not, how long should the transition period be and why? Please be specific.*

CII Response. See Response #56.

Request for Comment 58. *Are there any other accommodations that we should consider for particular types of proxy voting advice businesses, registrants, or circumstances? Are there other transition issues or accommodations that we should consider?*

CII Response. We currently do not have any additional comments on “other transition issues or accommodations” that should be considered.

¹³¹ Release at 66,539.

VI. General Considerations

Request for Comment 59. *How effective would the proposed amendments be in facilitating the ability of proxy voting advice businesses' clients to obtain the information they need to make informed voting determinations, including for investment advisers that are exercising voting authority on behalf of clients?*

CII Response. As described in Response #1, the Commission is well aware that most of the clients of proxy voting advice businesses have not asked for the proposed amendments and do not believe the amendments are needed to facilitate their ability to obtain the information they need to make informed voting decisions. In our view, the proposed amendments would pose substantial harm to the ability of proxy voting advice businesses' clients to obtain the information they need to make informed voting determinations, including for investment advisers that are exercising voting authority on behalf of clients.

Request for Comment 60. *Are there any other conditions that should apply to proxy voting advice businesses seeking to rely on the exemptions in Rules 14a-2(b)(1) and (b)(3)? If so, what are these conditions?*

CII Response. As indicated in Response #25, if, despite our strong objections, the Commission insists on a government-mandated review of proxy voting advice and response, we believe the conditions should: (1) limit the required sharing of proxy advisor draft reports with subject companies to only the factual information and data used by the proxy advisor in preparing its report and recommendations; (2) permit proxy advisors to provide drafts that include more than factual information and data; (3) permit proxy advisors to disclose a draft of their reports to subject companies simultaneously with disclosing them to their institutional investor clients; and (4) provide a waiting period before proxy advisors and clients subject to the SEC's jurisdiction could act on the advice; and (5) establish a safe harbor for proxy advisors to shield them from liability under Rule 14a-9¹³² if they comply with all of the proposed requirements.

In addition, as indicated in Response #31, we believe the proposed amendments should include a provision that allows a proxy voting advice business to seek reimbursement from registrants and other soliciting persons of the reasonable expenses associated with any required review and feedback period.

Before the Commission considers any conditions that should apply to proxy voting advice businesses seeking to rely on the exemptions in Rules 14a-2(b)(1) and (b)(3), the SEC should first evaluate whether there is reliable basis to support the conditions.

Request for Comment 61. *Are there other approaches that are better suited to accomplish the Commission's objectives? For example, should proxy voting advice businesses be required to develop policies and procedures to help ensure that conflicts of interest are dealt with appropriately and to improve the accuracy of the information on which their proxy voting advice is based?*

¹³² False or Misleading Statement 17 U.S.C. § 240.14a-9 (Jan. 1966), available at <https://www.law.cornell.edu/cfr/text/17/240.14a-9>.

CII Response. Response #7 describes our views on “conflicts of interest and responses,” and Response #24 and Response #25 describe our views on the “accuracy of the information.” Before the Commission considers any approaches on those issues, the SEC should first evaluate whether there is reliable basis to support the approaches contemplated.

Request for Comment 62. *What effect would these proposals, if adopted, have on competition in the proxy advisory industry? Would adoption of the proposals increase barriers to entry into the market for potential competitors or lead to unhealthy market concentration within the proxy advisory industry or, ultimately, lead to decline in the quality of proxy voting advice provided to investors?*

CII Response. As described in Response #30 and Response #50, we believe the adoption of the proposals would, among other negative effects, increase barriers to entry into the market for potential competitors, lead to unhealthy market concentration (with at least one of the five businesses identified by the SEC likely to exit the industry), and likely lead to a decline in the quality of proxy voting advice provided to investors. We note that our view is consistent with the following view expressed in the Admati Letter:

We share the Commission’s concerns about *concentration in the proxy advisory market*. Yet, we disagree with the following proposed remedies: 1) forcing proxy advisors to share their opinions with managers ahead of time and 2) treating opinions on proxies as proxy solicitations. By increasing the cost of opining on proxy statements such proposals *will only discourage new entry into the proxy advisory market and exacerbate the problem of market concentration in this sector*. We ask the Commission to strike these proposed changes ¹³³

Request for Comment 63. *To the extent that adoption of the proposed amendments would limit the ability of smaller proxy voting advice businesses or potential new market entrants to operate and compete in the market for these services, should they be subject to the additional conditions in proposed Rule 14a–2(b)(9) in order to rely on the exemptions in Rules 14a–2(b)(1) and (b)(3)? If not, what should the criteria be for determining who is not subject to Rule 14a–2(b)(9)? For example, should we base the availability of an accommodation for smaller proxy voting advice businesses on annual revenues, number of clients or market share? Would investment advisers or other institutional investors be less likely to hire proxy voting advice businesses that take advantage of such an accommodation? Are there other accommodations we should consider in lieu of or in addition to this exemption for certain proxy voting advice businesses?*

CII Response. As described in Response #30, Response #50, and Response #62, we believe the adoption of the proposed amendments would limit the ability of smaller proxy voting advice businesses or potential new market entrants to operate and compete in the market for proxy voting advice services. As we described in the CII November 14 Letter:

¹³³ Letter from Anat Admati, George G.C. Parker Professor of Finance and Economics, Stanford Graduate School of Business et al. to Chairman, Jay Clayton, Securities and Exchange Commission et al. at 1 (emphasis added).

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.¹³⁴

More recently, ProxyVote's comment letter states:

We are proud of the fact that we have not sought fee increases from our clients because we recognize the extraordinary pressures faced by these Taft-Hartley pension plans as they seek to protect the retirement income of tens of thousands of retired working men and women. *If faced with the Proposed Rulemaking's enormous paperwork burden imposed on our small company, we may have little choice other than to increase fees or seek to sell our business.* We believe this will have a very negative effect on our clients as well as their participants and beneficiaries¹³⁵.

We also note that similar negative views about the Release were expressed by Minerva Analytics (Minerva Letter), which we observe could be a credible potential entrant to the U.S. proxy voting advice business.¹³⁶ The Minevera Letter states:

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

. . . .

- Damage much-needed competition and unfairly prejudice the business chances of challenger service providers like Minerva and present impossible competition hurdles¹³⁷

For all the above reasons, we would support permitting, but not requiring, smaller proxy voting advice entities from complying with the proposed amendments.¹³⁸ More specifically, we would propose, consistent with the bi-partisan U.S. Senate legislation to regulate proxy advisors

¹³⁴ CII November 14 Letter at 3.

¹³⁵ *Id.* at 2.

¹³⁶ Letter from Sarah Wilson, Chief Executive, Minerva Analytics to Hon. Jay Clayton, Chairman, U.S. Securities and Exchange Commission.

¹³⁷ *Id.* at 2.

¹³⁸ See News Release, Senator Jack Reed, SEC Evaluates Proxy Process, U.S. Senators Introduce Corporate Governance Fairness Act (Nov. 14, 2018), <https://www.reed.senate.gov/news/releases/as-sec-evaluates-proxy-process-us-senators-introduce-corporate-governance-fairness-act> (bi-partisan registrant supported bill to regulate proxy advisory firms bill "provides smaller proxy advisory firms the choice to voluntarily register . . . but does not require them to do so").

introduced by Senator Jack Reed in 2018,¹³⁹ that proxy voting advice businesses that have annual “gross receipts from the clients of the person in an amount that is not more than \$5,000,000”¹⁴⁰ be exempt from the proposed amendments. . In addition, we would also support an exemption for tax exempt proxy voting advice businesses that are established under section 501(c)(3) of the Internal Revenue Code (IRC).

VII. Economic Analysis

Economic Analysis [EA] Request for Comment 1: *Have we correctly characterized the demand for the services of proxy voting advice businesses? What alternatives are available, if any, to the advice of proxy voting advice businesses?*

CII Response. We do not believe the Release correctly characterizes the demand for the services of proxy voting advice in its discussion of why investment advisers and other institutional investors may retain proxy voting advice businesses to perform execution of proxy votes.¹⁴¹ We note that the Release describes such service as [(1)] “voting the shares in accordance with a customized proxy voting policy resulting from consultation between a proxy voting advice business and its client, [(2)] the proxy voting advice businesses’ proxy voting policies, *or* [(3)] the client’s own voting policy.”¹⁴² We believe this description is, at best, misleading because it implies that the execution of votes under scenario (1) and (2) results in the execution of proxy votes that are not based the client’s own voting policies—this is a mischaracterization unsupported by reliable evidence. See also Response #44.

One alternative available to the advice of proxy voting advice businesses is for the clients of those businesses to use their own resources to independently conduct the work necessary to analyze voting issues. As the Release fairly describes:

In the absence of the services offered by proxy voting advice businesses, investment advisers and other clients of these businesses may require considerable resources to independently conduct the work necessary to analyze and make voting determinations. Proxy voting advice businesses generally are compensated on a fee basis for their services, and they are able to capture economies of scale for several of the services they provide, including supplying voting advice to clients. As a consequence, investment advisers and other institutional investors have found

¹³⁹ Corporate Governance Fairness Act, S. 3614, 115th Cong. (Nov. 13, 2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3614/text?q=%7B%22search%22%3A%5B%22Corporate+Governance+Fairness+Act%22%5D%7D&r=1>.

¹⁴⁰ *Id.* § 2(32)(A)(II) (“(ii) does not include any person described in clause (i) that, together with the parent, subsidiaries, and affiliates of the person, receives on a consolidated basis in a fiscal year gross receipts from the clients of the person in an amount that is not more than \$5,000,000, as adjusted annually by the Commission to reflect the percentage change for the previous calendar year in the gross domestic product of the United States, as calculated by the Bureau of Economic Analysis of the Department of Commerce, except that a person described in this clause may choose to be considered a proxy advisory firm for the purposes of this Act.”).

¹⁴¹ See Release at 66,540.

¹⁴² Release at 66, 540 (emphasis added).

efficiencies in hiring these businesses to perform voting-related services, rather than performing them in-house.¹⁴³

EA Request for Comment 2: *To what extent would the benefits of more reliable and complete voting advice being provided to investment advisers and other clients of proxy voting advice businesses benefit investors? Please provide supportive data to the extent available.*

CII Response. We believe the provisions of the Release would not provide a net benefit to investors in terms of more reliable and complete voting advice for at least three reasons. First, as detailed in the CII October 24 Letter and described in Response #24, CII staff performed a detailed review of the alleged errors in proxy voting advice business research reports and found 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)”¹⁴⁴ We believe an error rate of that magnitude is insufficient “to impose a costly new regulatory structure that will constrain competition”¹⁴⁵

We note that the only quantitative evidence presented in the Release on the reliability of voting advice is “Table 2” that provides data of registrant allegations of errors.¹⁴⁶ As indicated in Response #49 the number of possible factual errors identified by companies themselves in their proxy supplements amounts to 0.3% of proxy statements. Despite repeated CII requests detailed in footnote 4 of this letter (page 2), the SEC has to-date failed to provide us with their underlying analysis so that we and other commentators can determine the accuracy of the allegations.

Second, as indicated in Response #25, even assuming the Commission believes a 0.3% error rate for proxy voting advice business research reports is too high and should be lowered, the proposed timeframe available for the proxy voting advice businesses to undertake their research and draft their recommendations, and, importantly, for institutional investor clients to review the advice, will generally decrease by at least 5 days with ISS estimating a decline of “9-13 calendar days.”¹⁴⁷ We believe the shorter timeframe would not increase the reliability and completeness of voting advice.

Finally, as also indicated in Response #25, the shorter time frame is largely created by the provisions of the Release requiring proxy voting advice businesses to share draft research reports with registrants for a review and feedback period. Those proposed requirements can be reasonably perceived as impairing the independence of the proxy voting advice, particularly since (1) the proxy advisor is required to seek review and receive feedback from the self-interested company management *before* sharing the draft report with their own paying clients, and (2) the proxy advisor opinions and recommendations are subject to liability to registrants under Rule 14a-9. We believe this impairment of the independence of proxy voting advice would not increase the reliability and completeness of voting advice.

¹⁴³ *Id.* at 66,540-41.

¹⁴⁴ CII October 24 Letter at 3.

¹⁴⁵ *Id.*

¹⁴⁶ Release at 66,546.

¹⁴⁷ Letter from Lorraine Kelly, Head of Governance Business, ISS to Valued Client.

EA Request for Comment 3. *The benefits of the proposed amendments for institutional investors and their clients are linked to the extent to which current practices of proxy voting advice businesses would meet the requirements of the proposed conditions. Have we correctly characterized the extent to which the current practices of proxy voting advice businesses would meet such requirements?*

CII Response. As an initial matter, we do not believe the Release provides a reliable basis for asserting that the proposed amendments provide “benefits” to institutional investors and their clients. More specifically, we believe the characterization of the extent to which the current practices of proxy voting advice businesses would meet the requirements of the proposed conditions is not sufficiently detailed to be useful for most commentators.

For example, the section on “Certain Industry Practices”¹⁴⁸ describes the proposed conditions as an “augment [to] existing obligations.”¹⁴⁹ If the Release, however, had provided a more detailed description of each of the proposed conditions and the corresponding scope of the current practices (or lack thereof) of ISS and Glass Lewis, it would have been clearer to most commentators as to whether the use of the word “augment” is a correct characterization.

EA Request for Comment 4. *We discuss the possibility that proxy voting advice businesses could attempt to mitigate the delay in delivering advice to clients caused by registrant and other soliciting persons’ review by committing additional resources to producing proxy voting advice earlier than they do currently. Would proxy voting advice businesses take these steps? How costly would it be for proxy voting advice businesses to produce proxy voting advice faster than they do currently? Please provide supportive data to the extent available.*

CII Response. We believe it is unclear whether proxy voting advice businesses can provide voting advice earlier than they do currently, particularly if that advice is subject to the proposed review and feedback requirements. In addition, speeding up the proxy voting advice would also risk the quality of the research and advice, both in the sense of the depth of analysis that could be done on complicated issues like executive compensation or shareholder proposals, and potentially introducing errors which is contrary to the SEC's stated goal. Finally, we note that if the proxy voting advice businesses are required to commit additional resources to producing voting advice those costs, which may be substantial, will likely be passed on to its paying customers, institutional investors and the beneficiaries of their funds, many of whom are Main Street investors.

As you are aware, “proxy advisors effectively serve as collective research providers for large numbers of institutional investors, providing these investors an affordable alternative to the high costs of individually performing the requisite analysis for literally hundreds of thousands of ballot proposals at thousands of shareholder meetings each proxy season.”¹⁵⁰ While we do not have the data necessary to determine how less affordable proxy voting advice would become if those businesses were required to produce proxy voting advice faster than they currently do, we do know that Glass Lewis has provided the Office of Management and Budget a preliminary,

¹⁴⁸ Release at 66,544.

¹⁴⁹ *Id.*

¹⁵⁰ CII October 15 Letter at 2.

rough estimate of annual burden under the provisions of the Release (Glass Letter).¹⁵¹ That analysis found that their burden would be “240x the Commission’s estimate.”¹⁵² Glass Lewis explains that the Commission’s analysis:

[S]ummarily concludes that, after the initial year, compliance with the new disclosure and review requirements would take proxy advisors an average of 250 hours per year -- or somewhat less than three minutes for each US public company on which Glass Lewis publishes a research report.¹⁵³

EA Request for Comment 5. *We expect that the costs of the proposed review and feedback period and final notice of voting advice would be lower for proxy voting advice businesses that currently provide registrants with a mechanism for reviewing draft documents prior to proxy voting advice businesses issuing final drafts to their clients. Are we correct in that characterization? If other proxy voting advice businesses would be disproportionately affected, to what extent, and how would such effects manifest? What, if any, additional measures could help mitigate any such disproportionate effects? Please provide supportive data to the extent available.*

CII Response. We believe the costs of the proposed review and feedback period and final notice of voting advice may be lower for proxy voting advice businesses that currently provide registrants with a mechanism for reviewing draft documents prior to proxy voting advice businesses issuing final drafts to their clients. However, as described in Response EA #4, it appears that the Commission has vastly understated the costs of the proposed review and feedback period and final notice of voting advice.

For those proxy voting advice businesses that do not currently have any registrant review procedures and processes in place, it is understandable that their businesses would be disproportionately affected by the provisions of the Release. As explained in the ProxyVote comment letter:

Note 261 of the Proposed Rulemaking cites a letter from Egan-Jones, the third largest proxy advisory firm, for the proposition that “the costs associated with the review and feedback process would not disproportionately affect certain proxy voting advice businesses.” Proposed Rulemaking at p. 112. This assumption is inaccurate for small businesses such as ours that do not have any registrant review procedures or processes in place. Unlike ISS, Glass Lewis and Egan-Jones, the first-year costs will be dramatically higher for our small company to create new systems to permit registrants to review and provide feedback on the proxy votes we cast on behalf of our clients.

The disproportionate regulatory burden on our firm is magnified by the fact that our companies’ business model is substantially different from ISS, Glass Lewis and

¹⁵¹ Letter from Nichol Garzon-Mitchell, Senior Vice President, General Counsel to Mr. Alex Goodenough, Policy Analyst, Office of Information and Regulatory Affairs, Office of Management and Budget.

¹⁵² *Id.*

¹⁵³ *Id.*

Egan-Jones. Each of these three firms issue research reports that recommend how to vote proxies. In contrast, ProxyVote does not issue research reports or recommendations to our clients in advance of shareholder meetings. Rather, ProxyVote casts votes as an ERISA fiduciary on behalf of our clients. Our clients receive a detailed written report on all proxy votes that we cast on their behalf after the shareholder meetings have taken place. Because the Proposed Rulemaking explicitly contemplates that it will apply to our company, our business model may well need to change dramatically. To comply with the Proposed Rulemaking, our company may need to create a new registrant-specific report for each registrant to review prior to casting proxy votes on behalf of our clients.¹⁵⁴

As suggested by the ProxyVote comment letter, one measure that might be taken to mitigate the disproportion effects of proxy voting advice businesses that do not currently provide registrants with a mechanism for reviewing draft documents is to exempt businesses that do not routinely issue research reports to clients in advance of shareholder meetings.

In addition, as indicated in Response #31, we would support including a provision in the proposed amendments that allows proxy voting advice businesses to seek reimbursement from registrants and other soliciting persons of the reasonable expenses associated with any required review and feedback period.

Finally, as indicated in Response #63, we would support permitting, but not requiring, smaller proxy voting advice businesses that have annual gross receipts from clients that is not more than \$5,000,000 to be exempt from the proposed conditions. In addition, we would also support an exemption for tax exempt proxy voting advice businesses established under section 501(c)(3) of the IRC.

EA Request for Comment 6. *To what extent might the increased burdens to proxy voting advice businesses to comply with the proposed conditions be borne by proxy voting advice businesses clients?*

CII Response. As described in EA Response #4, and throughout this letter, we believe the increased burdens to proxy voting advice businesses to comply with the proposed conditions would be incurred by the proxy voting advice businesses' clients—institutional investors—and the beneficiaries of their funds—many of whom are Main Street investors. Our belief was confirmed in the Glass Letter when they observed: “The costs . . . would be borne by proxy advisors and would inevitably have to be passed on to their institutional investor clients, who, in turn, may have to pass these costs on to their individual investor participants and beneficiaries.”¹⁵⁵

EA Request for Comment 7. *In response to the Commission's recent releases on proxy voting responsibilities and proxy voting advice, one commenter argued that the Commission's*

¹⁵⁴ Letter from Craig Rosenberg, Pres., ProxyVote Plus, LLC to Office of Management and Budget at 2.

¹⁵⁵ Letter from Nichol Garzon-Mitchell, Senior Vice President, President, Glass Lewis to Mr. Alex Goodenough, Policy Analyst, Desk Officer of the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget.

interpretation and guidance would likely create substantially increased costs and unnecessary burdens on the process by which proxy voting advice businesses render their advice. According to that commenter, proxy voting advice businesses would face increased litigation, staffing and insurance costs that could be passed on to their institutional investor clients and their underlying retail clients. Would these concerns similarly apply to aspects of the proposed amendments, or is this concern overstated in that the aspects of the interpretation and guidance that are encompassed in the proposed amendments reflect current legal obligations regarding solicitation activities?

CII Response. We continue to have concerns that proxy voting advice businesses face increased litigation, staffing and insurance costs that would be passed on to their institutional investor clients. The original concern had been expressed not by “one commentator,” but a coalition of 61 investors in connection with Commission’s interpretation and guidance. That concern has only increased with the proposed amendments. As the Glass Letter explained:

[T]he SEC has explicitly warned proxy advisors that do not take company suggestions during [the proposed] . . . review process that their failure to do so could precipitate litigation. In the Proposing Release’s words, while the proposed rule “does not require proxy voting advice businesses to accept any such suggested revisions. *It is equally important to recognize, however, that proxy voting advice subject to the Rule 14a-2(b) exemptions is not exempt from Rule 14a-9 liability, which prohibits materially misleading misstatements or omissions in proxy solicitations.*” This not-too-subtle threat means that proxy advisors will have to review company feedback with an eye on the SEC’s invitation, should they not take all company comments, for companies to sue them.¹⁵⁶

EA Request for Comment 8. *If registrants and other soliciting persons choose to provide a statement regarding the proxy voting advice, registrants and other soliciting persons would incur costs of drafting a statement, providing a hyperlink (or other analogous electronic medium) to the proxy voting advice business, maintaining their statement online, and coordinating timing with proxy voting advice businesses for the filing of supplementary proxy materials. Please provide data with respect to these costs.*

CII Response. As described in Response #42, the SEC appears to acknowledge, and the Glass Letter confirms, that providing a hyperlink and the related coordinating timing with proxy voting advice businesses for the filing of supplementary proxy materials may delay the timely receipt of the advice. It will also increase the proxy voting advice businesses’ costs which likely would be passed on to the clients and the beneficiaries of clients’ funds, including Main Street investors.

EA Request for Comment 9. *To what extent do investors change their votes? To what extent do investors change their votes in response to a registrant filing additional definitive proxy materials? Please provide supportive data to the extent available.*

CII Response. We suggest the proxy voting advice businesses are in a better position to respond to this question.

¹⁵⁶ *Id.*

VIII. Initial Regulatory Flexibility Analysis

Request for Comment Regarding:

Initial Regulatory Flexibility Analysis [IRFA] Request for Comment 1. How the proposed amendments can achieve their objective while lowering the burden on small entities;

CII Response. As described in Response #63 and EA Response #5, we would support permitting, but not requiring, smaller proxy voting advice entities from being subject to the provisions of the Release.

IRFA Request for Comment 2. The number of small entity companies that may be affected by the proposed amendments;

CII Response. As indicated in the CII November 14 Letter, in addition to ProxyVote, we believe that there are a number of other small proxy voting agents and research providers that are not identified in the Release but come within the broad sweep of the proposed amendments.

IRFA Request for Comment 3. The existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis;

CII Response. See Response EA #5 for a description of the potential effects of the proposed amendments from the perspective of ProxyVote.

IRFA Request for Comment 4. How to quantify the effects of the proposed amendments.

CII Response. We note that the ProxyVote comment letter provides some quantification of the effects of the proposed amendments as follows:

The Proposed Rulemaking also estimates that one-fourth of this 1,000 hours will be for outside counsel at a rate of \$400 (ProxyVote's actual outside legal fees are approximately \$650 per hour).

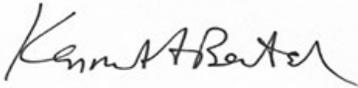
....

Our company's clients require that we vote all of their holdings, not one-third of their holdings. Accordingly, the appropriate number of registrants that should be subject to the Proposed Rulemaking's estimates should be 5,690 registrants, not 1,897 registrants. Under the Proposed Rulemaking, each of these registrants will be given the opportunity to review our proxy votes, provide comments to us, and then review our proxy votes a second time. This is a significant, non-trivial expense for any company, let alone a small business such as ProxyVote.¹⁵⁷

¹⁵⁷ Letter from Craig Rosenberg, Pres., ProxyVote Plus, LLC to Office of Management and Budget at 2-3.

CII appreciates the opportunity to submit comments on this important matter and is available to provide any additional information the Commission requests.

Sincerely,

A handwritten signature in black ink that reads "Kenneth A. Bertsch". The signature is written in a cursive style with a large initial 'K'.

Kenneth A. Bertsch
Executive Director

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large initial 'J'.

Jeffrey P. Mahoney
General Counsel

APPENDIX I EXCERPT FROM ISS 2018 PROXY REPORT ON TUTOR PERINI

Tutor Perini Corporation (TPC)
POLICY: United States

Meeting Date: 23 May 2018
Meeting ID: 1227644

Board Profile (after upcoming meeting)

Director Independence & Affiliations

EXECUTIVE DIRECTORS

Item On Ballot	Name	Affiliation	Independence Classification		Attend <75%	Gen-der	Age	Tenure	Term Ends	Outside		Key Committees				
			Company	ISS						Boards	CEO	Audit	Comp	Nom	Gov	
1.1	Ronald Tutor	CEO/Chair	Non-Independent	Executive Director		M	77	21	2019	0						
1.4	James (Jack) Frost	President	Non-Independent	Executive Director		M	65	3	2019	0						

NON-EXECUTIVE DIRECTORS

Item On Ballot	Name	Affiliation	Independence Classification		Attend <75%	Gen-der	Age	Tenure	Term Ends	Outside		Key Committees				
			Company	ISS						Boards	CEO	Audit	Comp	Nom	Gov	
1.6	Michael Klein	Lead Director	Independent	Independent		M	76	21	2019	1		F	M	C	C	
1.2	Peter Arkley	Professional Relationship	Independent	Non-Independent		M	63	18	2019	0			M	M	M	
1.3	Sidney (Sid) Feltenstein	Transactional Relationship, Relative of Employee	N/D	Non-Independent		M	77	4	2019	0						
1.5	Michael Horodniceanu		Independent	Independent		M	73	0*	2019	0						
1.7	Robert Lieber		Independent	Independent		M	63	3	2019	1	✓	F		M	M	
1.8	Dennis Oklak		Independent	Independent		M	64	1	2019	1		F				
1.9	Raymond Oneglia		Independent	Independent		M	70	18	2019	0				M	M	
1.10	Dale Reiss		Independent	Independent		F	70	4	2019	2		C F				
1.11	Donald Snyder		Independent	Independent		M	70	10	2019	1			C	M	M	
1.12	Dickran Tevrizian Jr.		Independent	Independent		M	77	6	2019	0				M	M	

Shaded cells indicate that company and ISS independence classifications differ.

*Indicates director not previously submitted to shareholders for election.

M = Member | C = Chair | F = Financial Expert

Director Notes

Ronald Tutor	1) Ronald Tutor is the son-in-law of non-employee director Sidney J. Feltenstein. 2) The company leases certain facilities from an entity indirectly owned and controlled by R. Tutor at market lease rates. Under these leases, the company paid \$2.8 million and recognized expense of \$3.2 million during fiscal year ended Dec. 31, 2017. (Source: DEF14A, 4/13/18, pp. 4, 9, 16.)
Peter Arkley	The company uses Alliant Insurance Services, Inc. for various insurance related services. The associated expenses for services provided for the years ended Dec. 31, 2017, 2016, and 2015 were \$17.6 million, \$8.9 million, and \$9.8 million, respectively. Peter Arkley is a senior managing director for construction services group of Alliant. (Source: DEF14A, 4/13/18, pp. 4, 8; 10-K, 2/27/18, p. F-35.)
Sidney (Sid) Feltenstein	1) Sidney J. Feltenstein is the father-in-law of Chairman and CEO Ronald Tutor. 2) Feltenstein is a designated director of Tutor pursuant to the amended shareholders agreement. 3) The company leases certain facilities from an entity indirectly owned and controlled by R. Tutor at market lease rates. Under these leases, the company paid \$2.8 million and recognized expense of \$3.2 million during fiscal year ended Dec. 31, 2017. (Source: DEF14A, 4/13/18, pp. 4, 9, 16.)
Dennis Oklak	Deloitte & Touche LLP serves as the company's independent registered public accounting firm and was paid \$4,493,933 and \$4,392,330 during Dec. 31, 2017 and 2016, respectively. Dennis D. Oklak previously served for nine years at Deloitte. (Source: DEF14A, 4/13/18, pp. 6, 18.)
Raymond Oneglia	During the year ended Dec. 31, 2017, the company had three active joint ventures with O&G Industries, Inc. including two infrastructure projects in the northeastern United States that are both complete, and one for a project in Los Angeles, California in which the company's and O&G's joint venture interests are 75 percent and 25 percent, respectively. Payments totaling less than \$1 million were made to O&G by the joint ventures during 2017. Raymond R. Oneglia is the vice chairman of the board of O&G. (Source: DEF14A, 4/13/17, pp. 6, 9, 16.)

Director Employment, Compensation & Ownership

Name	Primary Employment	Outside Boards	Total Compensation*	Shares Held	60-day Options	Total	Voting Power (%)
Ronald Tutor	CEO, Chairman - Tutor Perini Corporation		**	8,844,856	1,393,408	10,238,264	20.00
Michael Klein	Other	CoStar Group, Inc.	274,100	423,703	0	423,703	<1
Peter Arkley	Financial Services		236,300	54,357	0	54,357	<1
Sidney (Sid) Feltenstein	Financial Services		233,600	25,993	0	25,993	<1
James (Jack) Frost	COO, President - Tutor Perini Corporation		**	577,276	572,136	1,149,412	2.30
Michael Horodniceanu	Consultant		N/A	0	0	0	0.00
Robert Lieber	CEO, President - Resource Capital Corp.	ACRE Realty Investors Inc.	247,500	33,969	0	33,969	<1
Dennis Oklak	Prof Director	Xenia Hotels & Resorts, Inc.	237,700	5,725	0	5,725	<1
Raymond Oneglia	Retired		240,400	568,947	0	568,947	1.10
Dale Reiss	Consultant	iStar Inc., CYS Investments, Inc.	263,600	20,625	0	20,625	<1
Donald Snyder	Other	Western Alliance Bancorporation	254,100	36,567	0	36,567	<1
Dickran Tevrizian Jr.	Retired		237,500	51,993	0	51,993	<1

*Local market currency

**For executive director data, please refer to Executive Pay Overview.

APPENDIX II
EXCERPT FROM 2018 GLASS LEWIS REPORT ON CYPRESS SEMICONDUCTOR

1.00: ELECTION OF DIRECTORS

SPLIT

PROPOSAL REQUEST: Election of nine directors

ELECTION METHOD: Majority

RECOMMENDATIONS & CONCERNS:

AGAINST: J. McCranie (Affiliate/Insider on nominating/governance committee)

FOR: W. Albrecht ; H. El-Khoury ; O. Kwon ; C. Lego ; C. Martino ; J. Owens ; J. Sargent ; M. Wishart

BOARD OF DIRECTORS

UP	NAME	AGE	GENDER	GLASS LEWIS CLASSIFICATION	COMPANY CLASSIFICATION	OWNERSHIP**	COMMITTEES				TERM START	TERM END	YEARS ON BOARD
							AUDIT	COMP	GOV	NOM			
✓	Hassane El-Khoury* ·CEO	38	M	Insider 1	Not Independent	Yes					2016	2018	2
☐	✓ J. Daniel McCranie	74	M	Affiliated 2	Independent	Yes		✓	✓		2017	2018	1
✓	W. Steve Albrecht ·Chair	71	M	Independent 3	Independent	Yes	C		✓	✓	2003	2018	15
✓	Oh Chul Kwon	59	M	Independent	Independent	Yes					2015	2018	3
✓	Catherine P. Lego	61	F	Independent	Independent	Yes	✓				2017	2018	1
✓	Camillo Martino	56	M	Independent	Independent	Yes	✓	C			2017	2018	1
✓	Jeffrey J. Owens	63	M	Independent	Independent	Yes		✓			2017	2018	1
✓	Jeannine Sargent	54	F	Independent	Independent	Yes		✓			2017	2018	1
✓	Michael S. Wishart	63	M	Independent	Independent	Yes	✓	✓	C	C	2015	2018	3

C = Chair, * = Public Company Executive, ☐ = Withhold or Against Recommendation

1. President and CEO.
2. Former executive vice president of Sales and Applications (until April 2015).
3. Chair.

**Percentages displayed for ownership above 5%, when available

APPENDIX III EXCERPT FROM 2018 ISS PROXY REPORT ON INDEPENDENCE CONTRACT DRILLING

Independence Contract Drilling, Inc. (ICD)
POLICY: United States

Meeting Date: 24 May 2018
Meeting ID: 1226047

- ✘ *Increased grant size*
- ✘ *Alternate vesting provision*

LTI is majority time-based; performance shares have alternate vesting provision. The CEO's long-term awards consisted of 81,567 performance-based restricted stock units (RSUs) valued at \$469,010 and 190,324 time-based restricted stock units (RSUs) valued at \$1.1 million. Collectively, the awards were valued at \$1.6 million and, when measured by grant value, were 30 percent performance-based and 70 percent time-based. The proxy statement does not disclose any factors considered in determining grant size or a target equity award opportunity. The RSUs vest ratably over three years. In regard to PRSUs, the proxy states "Such awards are subject to a performance period and a performance achievement (either earnings before interest, taxes, depreciation and amortization ("EBITDA") or Total Shareholder Return)." TSR is measured relative to the company's peer group and earned PRSUs cliff vest at the end of the three-year measurement period (FY2017-2019). The proxy does not disclose the specific EBITDA or relative TSR targets. Moreover, the PRSUs appear to include an "alternate vesting" provision as the disclosure provides the awards are subject to EBITDA or TSR goals.

OTHER NOTABLE FACTORS

Outsized company-selected peers. The company includes outsized peers in its peer group, which may have an augmenting effect on executive compensation without a strong link to company performance.

CONCLUSION

The company's peer group contains a number of peers that are much larger than the company, as measured by revenue. The use of outsized peers may have an increasing effect on pay without requiring a commensurate increase in performance. Indeed, we highlight that the CEO's total pay increased for the year in review, amid short- and mid-term TSR underperformance and mixed operational results, and that his total pay of \$2.4 million is relatively high when compared to the median total CEO pay from [ISS' selected peers](#) of \$642,000. In addition to pay magnitude concerns, there are concerns in regard to the annual incentive and long-term awards. While the annual incentive is heavily weighted toward objective measures, for the year in review, the portion applicable to subjective personal goals constituted most of the payout, yet disclosure of how the subjective component was assessed is lacking. In regard to long-term awards, over 50 percent of the CEO's equity awards were subject to time-based vesting and the proxy provides no disclosure of factors considered in determining grant sizes, which increased for the year in review. Finally, the goals for performance-based equity awards are not disclosed and such awards contain an alternate vesting provision to provide multiple opportunities to earn the same award, which diminishes the at-risk nature of the award.

Based on these factors, support for compensation committee members is not warranted as the company is not required to present a say-on-pay proposal. While not required given the company's emerging growth status, shareholders would benefit from additional compensation-related disclosure to understand the rationale for pay amounts and to better assess the pay for performance linkage of the overall program.