January 31, 2020

To: The Securities and Exchange Commission

17 CFR Part 240
[Release No. 34-87457; File No. S7-22-19]
RIN: 3235-AM50
Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

To the Commission:

I agree with the Commission's own advisory committee and the letters on behalf of investors filed by CII, T. Rowe Price, John Coates and Barbara Roper, and others that this proposal is wrongly conceived. Despite the Commission's rhetoric of support for proxy voting, this proposed rule would undermine this crucial element of accountability to shareholders by severely hampering the access of investors, including individual investors whose assets are managed by intermediaries to the sole source of independent information. It is wrong in every category.

It is **wrong on the facts**, based on unsupported, thoroughly and conclusively rebutted, allegations of conflicts and costs and on undervalued benefits. It is based on thinly disguised efforts from corporate executives to insulate themselves from even the mildest and most symbolic investor oversight, plus slightly better disguised efforts from fake dark money front groups funded by the same corporate insiders, trying to look like ordinary investors.

It is **wrong on the process** because it is based on faked and fraudulent comment letters and slanted and discredited, skewed data.

It is **wrong on the law**, failing to meet federal and Commission-specific requirements for rigorous, verified cost-benefit analysis. I second the concerns on this point raised in the comment by John Coates and Barbara Roper. It is also **unconstitutional**, beyond the authority of the Commission and an infringement of First Amendment freedoms of speech and the press.

It is also **wrong as a matter of economics**, because proxy advisory firms provide research no one is obligated to buy and recommendations no one is obligated to follow. There is a choice of providers with sharply delineated differences, there are no barriers to entry for new competitors, and the buyers are the most financially sophisticated professionals in the country. This is the very definition of a free market working exactly as it should and there is no possible justification for further regulation, particularly one that would create new barriers to entry. It purports to be based on alleged conflicts of interest/agency costs that may be affecting one of the three proxy advisory firms but ignores the vastly greater conflicts the previous rules were intended to address and those that affect the advocates for this rule.

It is **wrong as a matter of regulatory theory and policy**. If the Commission has evidence that fund managers are voting proxies for any reason other than the exclusive benefit of clients, we strongly encourage them to bring enforcement actions, as they have in the past. There is no evidence in the record of proxy advisors giving recommendations that are objectively "wrong," but even if they were, any regulation or enforcement should be directed at those who fail to act as fiduciaries in evaluating those recommendations. This proposal is a disappointing example of regulatory capture, with the agency that is supposed to advocate for investors instead promoting suppression of shareholder votes and access to the sole source of independent advice.

It is **wrong as a matter of public integrity and accountability**. The widespread distortion of this rulemaking process, including faked "astroturf" comments orchestrated by CEO-funded lobbying firms has irreparably undermined this proposal.

If government agencies were governed by Hippocrates' rules for doctors, it would violate that as well, because its primary principle is "First, do no harm." The regulatory policy variant of that principle is to avoid the law of unintended consequences. This rule's presumably unintended consequences will result in the opposite of what it is purportedly trying to achieve. Every element of this proposed rule is harmful, and every element is inconsistent with the Commission's two fundamental missions, protection of investors and of capital markets. Instead of protecting investors and capital formation, this proposed rule insulates CEOs from the market forces that are most necessary for the credibility of the markets. In *Measure for Measure*, Shakespeare warned against exactly what the Commission is proposing to do here:

> We must not make a scarecrow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape, till custom make
> Their perch and not their terror.

Today, in law and policy circles, we refer to that as regulatory capture. That is what this proposal is. Despite the rhetoric appropriated from marginalized groups and activists, this rulemaking is not on behalf of investors, capital markets, or even issuers/corporations but a small group of corporate executives trying to insulate themselves from even advisory-only feedback from shareholders.

The Commission was created to restore faith in the capital markets following the 1929 stock market crash and took on that challenge again following the subprime financial meltdown as it has with other unexpected failures. This proposed rule is contrary to all of those salutary (and statutory) obligations. It would further insulate corporate CEOs and board members from even the slightest, symbolic, advisory-only shareholder oversight. It will result in "governance discounts" in US stock prices relative to markets that increasingly recognize the value of the G in ESG, meaning accountability to investors, because in seamless global markets it is easy to redirect investment abroad. And this rule will perpetuate and substantiate the fears that retail investors have about the agency costs of intermediaries.

Background -- Conflicts of Interest in Proxy Voting

As we consider the role of proxy advisors and the fiduciary obligation of money managers in voting proxies, it is essential to remember that in the 1980s, when the hostile takeover era was fueled by junk bonds, the abuses by what we then called raiders and the entrenched insiders who fought them off put an unprecedented number of complex issues on proxy cards. For decades before that virtually all items on proxy cards except for a very few business combinations and a handful of shareholder proposals, were routine votes for unopposed board members and approval of auditors. In the 1990s, the exponential rise in amounts and complexity of executive pay plans added another category of matters that were no longer routine.

As was thoroughly documented at the time by the Investor Responsibility Research Center and others, and as extensively explained by Vanguard founder John Bogle in a series of books and articles, there were overwhelming conflicts of interest in voting proxies. Money managers who were reviewing, for example, a shareholder proposal asking that takeover defenses like poison pills be put to a shareholder vote, had to decide whether they should vote based on what was best for the beneficial holders, as required by their fiduciary obligations under the strictest standard of integrity our legal system has developed, specifically imposed to counter conflicts of interest, or in their own interest by accommodating insiders at portfolio companies. The latter was irresistibly tempting because the portfolio companies knew how the funds voted while the beneficial owners (and regulators) did not. As Bogle wrote, there are only two kinds of portfolio companies from the perspective of fund managers: those who are already clients and those who are prospective clients. It was not surprising that the data showed votes to promote the commercial interests of the fund managers rather than the economic interests of their clients.

In one widely reported case, Deutsche Bank switched its vote on a business combination after a side payment from Hewlett Packard, resulting in an enforcement action by the SEC and the promulgation of the rules now requiring that votes be disclosed.

There was a related second area of conflicts as well. In 1988, when CEOs who were also pension fund fiduciaries under ERISA wrote to other CEOs/pension fund fiduciaries to ask for their support in opposing shareholder proposals on poison pills, regardless of the calculus of value to the beneficial holders, the Labor Department issued the Avon Letter, making it clear that voting proxies, like the buy/sell/hold decision, is a fiduciary act. If the Commission wants to address the issue of conflicts, it should begin by emphasizing that standard as well.

This rulemaking overlooks the real, documented conflicts of interest that fund managers, including pension funds, face between their immediate commercial interest in accommodating current and potential customers and the beneficial holders who are largely unaware of how their shares are being voted and largely not able to do anything about it -- like switch providers -- if they are. It overlooks the self-interest of corporate executives who are trying to squelch even advisory votes on their pay plans. Instead, it relies on unsupported, disproven allegations that fund managers are voting proxies for reasons unrelated to share value and in violation of their fiduciary obligation.

- ***First****, it is simply not true that fund managers are voting for any reason other than their best analysis of risk and return and no supportable, verified evidence has been submitted to show otherwise. Any effort to move forward on the skimpy and discredited claims submitted so far will not withstand a challenge in court.*
- ***Second****, these claims are being made by the very people who themselves have the most significant conflicts of interest, corporate insiders (directly and indirectly through dark money-funded fake front groups and fraudulent comments), who are trying to prevent oversight on issues like executive compensation. Corporate insiders want pay to be less variable. Shareholders want pay to be tied as tightly as possible to performance. The fact that a tiny fraction of advisory-only votes against CEO pay created a level of panic to divert corporate assets into an avalanche of lobbying money to get this rule passed -- and the fact that it has come this far -- show that the real conflict of interest here is between CEOs and shareholders. Reducing even further the slight level of advisory oversight shareholders have to better insulate overpaid CEOs would ignore the very real conflicts of interest behind the support for this rulemaking.*
- ***Third,*** *even if fund managers are in fact voting contrary to the interests of beneficial holders, as the Deutsche Bank case shows, the Commission has the authority to bring enforcement actions and indeed we strongly endorse a more consistent and vigorous enforcement policy. But to kill the messenger by blaming proxy advisors for allegedly mis-cast votes is not the answer.*

The Real Conflicts of Interest the Commission Should Consider

The focus on conflicts of interest at one of three proxy advisors in this rulemaking is trivial in comparison to the systemic and inescapable conflicts in proxy voting, as discussed above. Fund managers concerned about conflicts at ISS have two other alternative sources for proxy advice. They can purchase the product for the analysis and come to their own conclusions, as the data show many of them do. Or -- as many other investment managers do -- they can rely entirely on their own in-house resources. I cannot emphasize this point too strongly: *Proxy advisors produce reports and advice no one has to buy or follow, purchased by the most sophisticated financial professionals in the country and the data show that those professionals make their own decisions, consistently departing from proxy advisor recommendations on complicated or contested matters to reflect their own independently-arrived-at views. Furthermore, almost all of these votes are advisory only, so that even a 100 percent "wrong" vote (as determined by the corporation's board of directors) can be disregarded.*

These are the real conflicts of interest the rulemaking should address. First are the one in the very rare enforcement action taken against Deutsche Bank cited above. As noted above, if the Commission has concerns about any failure to meet the standards of fiduciary obligation in proxy voting by fund managers, it should bring enforcement actions against them or issue more explicit rules about the procedure or documentation or disclosure of proxy voting policies.

We note, however, that no real evidence from objective sources has been submitted showing any such failure. We have repeatedly asked those who make vague allegations of votes contrary to the interests of beneficial holders to give a single documented example; none has been forthcoming. Of course, some fiduciaries will vote no on an item while others will vote yes, just as some will be buying a security while others are selling. That is not just how markets work; that is what makes markets work, what keeps them strong, vital, and robust. Active fund managers will have different ideas based on their assessment of management and the range of their holdings, both stocks and bonds. But no one has provided any evidence -- as was shown in the 1980s and 90s -- that fund managers are voting in their own commercial interests or for any other reason other than what is best for the beneficial holders. One reason is the SEC's rule requiring that votes be disclosed. As Justice Brandeis said, sunlight is the best disinfectant. Another is the rise of index funds; they are essentially permanent shareholders and their only opportunity to respond to matters of concern is through proxy votes. A third is the increasing appreciation for the significance of proxy votes and governance risk, following the Enron accounting scandals and financial meltdown failures.

The other set of conflicts that should be of primary concern to the Commission are the conflicts of interest evident in the support for this rulemaking, as noted above. The distortion of the notice and comment process here has been shocking, calling into question the very foundation of what was created to be the ultimate guarantee of transparency, accountability, and integrity giving legitimacy to the ability of the Executive Branch and independent agencies to exercise their delegated legislative authority and promulgate rules that have the force of law. As revealed in Bloomberg's expose and the questions put to Chairman Clayton by Senator Van Hollen, many of the comments purporting to be from "Main Street" individual investors were fakes, all generated from the same lobbying firm. One was submitted after the signatory had died. There are likely to be others that were less sloppy and harder to spot. Perhaps the most outrageous was the YouTube video from Chris and Holly Turner, designed to appear as ordinary citizens sitting casually in front of a fireplace, without revealing that they run an astroturf (fake grass roots) Republican consulting firm or who is paying them.

The shrill hysteria and outright fraud in that video is reason for a thorough examination of the real sources behind the support for this rulemaking. The quiet disappearance of the fake CEO-funded dark money front group Main Street Investors Coalition (reminder — not from Main Street, not investors, and not a coalition) has led to a round of whack-a-mole, with insidious and equally dissembling new groups trying to mislead actual Main Street investors to get them to support something self-evidently not in their interest. The ultimate proof is not so much the distortions and lies in the video as it is their need to call out the (completely unrelated) trifecta of hot button issues: abortion, open borders, and gun control to get people to file comments. It's worth taking a closer look to see just how desperate and dishonest the people trying to ram this rule through are.

There are defamatory falsehoods throughout the Turner video, which of course provides no documentation for any of its wildly inflammatory claims. They claim proxy advisory firms, which are for-profit businesses in a competitive market, providing research no one has to buy and recommendations no one has to follow, have “a progressive left agenda.” Of course, the Turners do not provide any specific examples, because there aren’t any. They claim proxy advisors “are not only voting but are submitting shareholder proposals, too.” This is a lie. Even if they wanted to, which they do not, they could not submit shareholder proposals unless they actually were shareholders, which they are not. “These companies many of them were started by moms and pops,” Holly Turner says. Not that it matters, but these are multi-billion-dollar public companies with hundreds of thousands of employees, not the corner bodega. But what does the truth matter when you’re being paid to get people to file comments with the SEC?

They say that shareholder proposals depress shareholder value. Not true. Chris casually mentions that he thinks he saw a report that “these” mutual funds (I thought we were talking about proxy advisors?) are “performing 44 percent weaker.” Again, providing no documentation because there isn’t any. "Correct. me if I'm wrong," he says. I hereby do so. He is wrong.

“You’re getting almost half of your money stolen and given to things like abortion and open borders,” Holly says, completely fabricated. She says shareholder proposals give money to groups that oppose the Second Amendment and the First Amendment (while here urging her followers to support a rule that violates the First Amendment by interfering with the right to publish independent research and analysis) and the right to life and support open borders.

She says that this is a liberal vs. conservative issue. Not true. Conservatives are, at least in theory, in favor of minimal regulation of the free market, as is, according to her firm's website, Holly Turner herself. She says that whoever sends in the most comments “wins.” Not true, but likely to inspire people to write.

Holly Turner accuses commenters opposed to the rule of not being “real Americans” with “real jobs” and she accuses “liberal organizations” of being nasty. I am a real person with a real job and I cannot think of anything nastier than hiding your funders and lying about the most fundamental, easily provable facts in order to protect enormous, powerful corporations from non-binding, advisory-only feedback from their shareholders. So, let me make clear now that our firm is not and never has been and has no intention of being a proxy advisor and no one is paying us to comment or advocate on these issues. Our Chair and I were co-founders of ISS in the mid-80s but left in 1989 and 1990, so we have had decades to observe and evaluate the industry, including having ISS recommend against us several times, and we have had time to develop some objectivity. We have spent those decades advocating for shareholders as fund managers ourselves and then as providers of research. If any additional information about our services or clients would be useful to the Commission in evaluating our perspective, please do not hesitate to inquire.

We expect the Commission to examine all comments carefully, with special scrutiny given the proven deceptive efforts to stuff the comment box. It is our hope that when the final rule is published, Senator Van Hollen will not have to charge the Commission with being "duped" again, and that the inevitable court challenge to the final rule will not be able to point to abuse of the process as the basis for overturning it.

The Proposal Fails the Most Basic Requirements for Regulatory Review Including Cost-Benefit Analysis

The proposed rule does not come close to meeting the standards for rulemaking, including cost-benefit analysis, factual basis, and integrity of the notice and comment process.

Cost-Benefit Analysis

We note that President Ronald Reagan's Executive Order 12,291, still in effect, requires that executive branch agencies only adopt major regulations when "the potential benefits to society for the regulation outweigh the potential costs to society." The SEC's own guidance (Current Guidance on Economic Analysis in SEC Rulemakings, Memo dated March 6, 2012) requires this as well. The final rule must reflect a rigorous and thoroughly proven cost-benefit analysis, which is not in any way reflected in this proposal, as discussed more fully in the Coates/Roper comment letter.

The allegations of cost are based on vague, vague, unsubstantiated, self-serving and self-reported claims by corporate insiders trying to suppress shareholder votes and access to the sole source of independent research. The Commission has acknowledged in this proposal "that proxy voting advice businesses can play a valuable role in the proxy voting process," and that "institutional investors have found efficiencies in hiring these businesses to perform voting-related services, rather than performing them in-house." And yet, there is no effort to quantify these benefits in evaluating the value of the proposal or the beneficial improvements undertaken as a result of shareholder engagement. Given the collective choice problem (the optimal vote on a proxy issue may cost any single investor, even a substantial financial institution, more to investigate than any pro rata benefit), the role of proxy advisors is absolutely essential as the sole source of affordable and independent data and recommendations on what can be complicated issues and any consideration of the cost-benefit of regulations needs to reflect that.

No Factual Basis

Furthermore, rulemakings must be grounded in thorough analysis of the underlying data and the issues raised in the comments, including meticulous vetting of the authenticity of the comments. Otherwise they are "arbitrary and capricious" and subject to being overturned in court. There is simply and incontrovertibly no credible evidence of any significant costs of the current system or of any benefits from the proposed changes.

All we have is wildly inflated, unverified, self-reported estimates of the costs of responding to shareholder proposals and vague assertions -- without any supporting data -- that sophisticated institutional investors in a very competitive market who must disclose their proxy voted are somehow making those votes for "political" reasons contrary to shareholder value. They have not provided a single example supported by the data. In fact, the costs of responding to non-binding shareholder votes on compensation and shareholder proposals are negligible, even if the corporation chooses to spend money on internal or external legal staff challenges to shareholder proposals, communicates with shareholders to better understand their views on the issues, or considers the merits of the proposals to decide whether or not they will negotiate or adopt any of the proposed actions, this is literally the cost of doing business. To say that any expenses in this category are distracting or extraneous would be to say that reviewing customer complaints or surveying consumer preferences is an unreasonable expense.

To make a decision based on these unsupported and vague allegations is the very definition of arbitrary and capricious.

For example:

* Supporters of this rule have claimed that the lower number of IPOs is somehow attributable to a tiny fraction of non-binding shareholder votes at a tiny fraction of issuers. There is no evidence of any kind to support this. Even if we assume that the reduced number of IPOs is a problem, there are many other factors that are responsible.

* The CEOs behind the fake dark money front groups Main Street Investor Coalition and American Council on Capital Formation produced a bogus study purporting to show "robo-votes" by professional money managers, alleging they blindly follow the recommendations of proxy advisory firms. In an extraordinary statement, the provider of the data used for the "report" Immediately repudiated its findings, noting that the data was both distorted and provided to third parties in breach of the client agreement. The made-up term "robo-votes," suggesting some sort of mindless proxy voting, is contrary to the data. Any commenter who uses that term is as fake as those with the typo in the address of the SEC or responding to Holly Turner's claims that proxy advisors promote abortion and open borders.

Here is the ProxyInsight statement in full:

On Friday I was made aware of a report, citing Proxy Insight data, criticizing the undue influence of Proxy Voting Advisors on the stewardship activities of the investment community.

As a data provider, we fully understand that our data will be used in many different ways. However, in this instance we feel compelled to respond.

Proxy Insight's "Investor Correlation to ISS /Glass Lewis" was used to support a claim that investors simply blindly follow the recommendations of the PVAs. This is a classic case of using the data to tell the story you want. Tomorrow, Proxy Insight will submit a response to the SEC Proxy Process Roundtable concluding the exact opposite based on splitting the FOR and AGAINST recommendations of each PVA. This provides, for the first time, conclusive proof of the divergence between investor voting and PVA house recommendations.

Proxy Insight is not, has never been and does not intend to be a proxy voting advisor, so we can be completely unbiased and objective in this regard. We have nothing to gain by taking sides in this debate, other than representing what investors tell us on a day-to-day basis which is clearly backed up by our data.

Finally, the authors of the report are not our clients but were provided our data from a client in breach of our agreement. May I remind all our users that only limited extracts of our data may be supplied to third parties in the course of your normal business – if in doubt please contact us before supplying externally.

If you would like to discuss this matter further please contact me directly at nick.dawson@proxyinsight.com or call +44 20 7788 7772

Nick Dawson
Managing Director

ProxyInsight indeed produced its own study proving the opposite of the wildly distorted corporate-funded version. They found that only 21 percent of investors use the Proxy Voting Policy of a Proxy Voting Advisor and of the 1,086 investors surveyed 70.9 percent vote proxies based on their own policy with a further 8.5 percent delegating to a sub advisor or other asset manager.

This is especially significant given the sharply divided vote of the Commission, with two of the five Commissioners strongly opposed to the proposal, and given the proof that many of the comments purportedly filed by individual investors are fraudulent, coming from lobbying firms and "astroturf" (fake grassroots) dark money organizations. As Howard Fischer and Matthew Handler wrote on Bloomberg:

> This is more than simply an embarrassment to the rule-making process, and an affront to the credibility of the SEC. Even though the rules are, at this stage, simply proposals (there is a 60-day public comment period, after which the SEC must again vote whether to approve the rules), the procedural and institutional impropriety occasioned by the reliance on fraudulently procured investor “evidence” so deeply infects the rule-making process as to preclude the adoption of the proposed rules in their current form.

Supporters of this rule have also made inflated and unsupported claims about the "influence" of proxy advisors. If they are influential, corporate insiders should be delighted as more than 95 percent of proxy votes are cast as management recommends, including approval of 98 percent of compensation plans. If the corporate insiders behind this push to silence the only source of independent research think that 98 percent is too low, we would like them to tell the Commission and their shareholders on the record what level they think is appropriate.

The proxy advisors are more influenced by their clients than their clients are influenced by them. Each year, for example, ISS revises its policies after consulting with clients about their preferences and priorities. As we continue to reiterate, proxy advisory firms produce research no one has to buy and recommendations no one has to follow. Their clients are sophisticated financial professionals subject to the strictest fiduciary standards, and those clients have a choice of providers. Many of them use more than one proxy advisor; many choose none at all. That is a textbook example of free market efficiency and the exact opposite of a justification for government intervention.

The data show that (a) overwhelmingly, the proxy advisory services recommend votes consistent with the recommendations of the issuer boards and executives, and (b) when they do not, the financial professionals who purchase the reports make their own decisions about how to vote. The more complex and controversial the proxy issue (with business combinations at the top of both lists), the more the votes vary, showing that critics of the proxy advisory services have it exactly wrong; proxy advisory services are guided by their clients more than the clients are guided by the proxy advisory services. Ning Chiu of Davis Polk reports, “On shareholder proposals, ISS recommended for social and environmental proposals 55.4 percent of the time, but funds only supported those proposals 25.2 percent of the time. Overall, ISS was in favor of shareholder proposals 64.7 percent of the time, yet funds voted for them only 34.6 percent of the time. But average support for shareholder proposals during the 2017 season was 39 percent,” indicating that of that 39 percent a substantial group may not be ISS clients at all.

The whole claim of "robo-votes" is completely bogus, a self-serving fiction invented by and paid for by entrenched executives. Any comment referring to that claim must be reviewed with the greatest of skepticism and any rule based on such a thoroughly discredited allegation is clearly arbitrary and capricious.

"Duopoly"

"Duopoly" is also a meaningless term here. There are three major players in the proxy advisor space. If the Commission thinks there is some kind of an antitrust issue, there are two major government departments devoted to antitrust enforcement. However, I worked as a lawyer in the Justice Department's Antitrust Division and my best assessment is that there is none.

So, what is the issue? We see no evidence to be concerned about a "duopoly" here, and again, there is no data to support any such claim in the record. Fund managers have a choice, including the choice to buy from one, two, all, or none. Many fund managers subscribe to more than one proxy advisory service; many subscribe to none. The three major players have significant differences to choose from: one is a registered investment advisor, one is a registered NRSRO, one is not registered. One has (disclosed) conflicts of interest due to consulting fees from covered companies; the others do not. A corporate-funded competitor founded by a former SEC Commissioner had an excellent product but was unable to make a profit because the same sophisticated financial professionals, fiduciaries for the Main Street Americans who entrust their retirement savings to them, were able to evaluate the potential conflicts and decide they undermined the quality of the product.

The big players have beat or bought their competition. That is how markets work. But there are no barriers to entry; anyone who has a better idea (and is not funded by corporations) has a good chance to compete with ISS and Glass-Lewis. It is never easy to start a new business, but I was there at the start of ISS and I can say that anyone entering now has two important advantages we could only have dreamed of in 1986: online access to data and delivery and the fact that the category is already established. Having to get all of the proxy materials and provide all of our publications on paper was an expensive obstacle in the late 1980s. Having to explain to potential subscribers what it was we were doing and why they should pay us for it was so daunting we had only one client for the first three years and it was many years after that before we made a profit.

I was also immersed in federal rulemaking for eight years, including four years in President Reagan's Regulatory Relief program (as the SEC's desk officer in OIRA for some of that time). I can assure you that right up there with "first, do no harm," one of the key challenges in rulemaking is to minimize the law of perverse unintended consequences and making the identified problem worse. The rules the Commission is proposing here will have the opposite effect of what you say you intend. These rules themselves are a monumental barrier to entry for any would-be competitor to the purported "duopoly." The Commission should be encouraging competition for the current proxy advisors, not extinguishing it.

"Proxy Solicitor"

Abraham Lincoln famously asked, "How many legs does a tail have if it calls a tail a leg?" His answer: "Four. Calling a tail a leg doesn't make it one." The same applies to the truly outrageous proposal to call proxy advisors proxy solicitors. This is the very definition of arbitrary and capricious because, and we cannot emphasize this strongly enough, *proxy* *advisors are the opposite of proxy solicitors*. The justification for regulating proxy solicitors is that they are picked and paid for by corporate insiders and their job is to be advocates, not to provide balanced information, so some regulatory oversight is necessary.

Proxy advisors, on the other hand, are selected and paid by the most sophisticated financial professionals in the US. They are the sole source of independent research on proxy issues, the only way to get a perspective that does not come from the self-interested insiders who run the corporation and their paid representatives, like proxy solicitors. There is no justification in the record or elsewhere for imposing additional liability on proxy advisors beyond that which already exists in the marketplace and the law.

Quality Control

The record also fails to support any regulation due to concerns over the quality of proxy advisory services. The complaints are all coming from the people they are reviewing; not the people who subscribe to their publications. Questioning the quality of analyses that say that 13 percent of CEO pay plans deserve a "no" vote because corporate insiders think the pay plans should be approved is undermining the entire idea of shareholder oversight. Again, we have repeatedly asked for a single example of a "wrong" recommendation or a "wrongly" decided proxy proposal. The record has no such evidence. As with the issue of "influence," we note that over 90 percent of ISS recommendations are to vote as management recommends. So, it is understandable that those promoting this rule would have a hard time coming up with an example of a "wrong" recommendation.

The best determiners of the value of proxy proposals are shareholders and the best determiners of the value of proxy advisory services are the financial professionals who are freely able to decide whether to buy the reports, who to buy them from, and whether to follow their recommendations. Proxy advisory firms are the *only* independent source for evaluation of proxy issues. Shareholder proposals and say-on-pay votes are non-binding. So even if proxy advisors are as powerful as critics say (but are unable to prove as the data is all to the contrary), and even if there is a 100 percent vote against the wishes of management, the corporation does not have to do anything about it, as the testimony at the roundtable on this topic showed. Worst case scenario is that if all of the wild (and unsupported) allegations of proxy advisory firm critics are true, there is no risk of harm other than the hurt feelings of corporate insiders; and that is literally the reason we pay them the big bucks – to be able to respond to challenges with courage and integrity.

The very last people we should ask to evaluate the worth of proxy advisory services are the people they evaluate: corporate executives and board members. We don’t let students grade their own papers, and we don’t let manufacturers decide what toxins to pour into the air and water. We cannot let the squeamishness of corporate insiders about assessments they do not control (plus the millions of corporate dollars they spend on lobbyists and fake front groups) lead to any impediment to that independent assessment. The real question the SEC, as the investors’ advocate and protectors of the free flow of capital, should investigate here is why executives and directors do not want to hear from their shareholders in the most low-key, low-risk, low-cost manner possible. I strongly endorse the comment by T. Rowe Price on this proposal and find their comments on the practical issues and the value of proxy advisory services especially compelling.

There is nothing in the record that supports any intrusion by the government into publications voluntarily subscribed to protected by the First Amendment. The documented error rate is under one percent and all errors are promptly acknowledged. I challenge any of the public companies covered by proxy advisors to do as well. If the quality of the proxy advisors' products is an issue, the right people to respond are the customers, not the government.

First Amendment Issues

Any regulation of proxy advisors must be very careful to avoid unconstitutional infringements of the rights of free speech and free press. Proxy advisory reports are publications, produced independently and subscribed to voluntarily. They are thus entitled to the broadest First Amendment protections for "viewpoint speech." I also agree with those like former SEC lawyers Richard A. Kirby and Beth-ann Roth, authors of "A Step Too Far: The SEC'S Attempt To Regulate Proxy Advisory Services Violates The First Amendment." They write:

> By taking these steps, the SEC is attempting to exercise regulatory authority over an aspect of business not expressly reserved to it by Congress. Not only would implementation impose substantial burdens on a service to shareholders already explicitly carved out from the proxy rules, it interferes with a private business relationship.
>
> As such, the very manner in which the proposed rules are designed to be implemented appears to violate the First Amendment. By defining "solicitation" to include the analyses and recommendations provided by proxy advisory services to their clients, the SEC seeks to regulate private discourse between shareholders and the firms they hire to provide analyses based on criteria chosen by the shareholder. The result is to restrict contractual parties from having a free and frank interchange, in this case relating to their proxy voting choices. No statute grants the SEC that authority and - even if there were such a statute - it would likely not withstand First Amendment scrutiny.

A particularly sensitive issue under First Amendment law is prior restraint, which can only be justified by "inevitable, direct, and immediate danger to the United States." The proposed rule's imposition of an obligation on proxy advisors to submit their publications for review to the corporations they cover is impermissible prior restraint because it is imposed by the government, even though the government is not performing the review. If the proposed rule here is issued in final form, it is certain to be overturned on this basis.

We Need More Time

I support the many comments raising concerns about the exceptionally short comment period, given the complexity and unprecedented reach of the proposal, the failure to accumulate reliable data, and the number of questions left for commenters to answer and the open-ended and subjective framing of questions which does not meet the minimum standards for reliable survey responses. There are three reasons that this rulemaking should be handled with the utmost careful consideration and the Commission must extend the truncated timeline for this massive proposal.

First, as discussed above, there is literally no evidence of any problem with proxy advisors, which is why the CEOs who are unhappy with any analysis they do not control, particularly around issues of CEO pay and climate change, had to resort to fake dark money front groups, fraudulent comments, and slanted, instantly discredited "studies" to try to create some. Even so, they have been unable to point to a single actual proxy issue that was wrongly recommended or decided. This proposal is based on obviously "fishy" fake comments, including those cited by the Chairman in announcing this proposal. The entire record must be thoroughly disinfected before any final decision is made, or the rulemaking will make an easy case for being challenged as arbitrary and capricious.

Second, the sharp, party-line division in the vote on this proposal and the substantive, thoughtful objections of two Commissioners and the Commission's own advisory group make clear the precariousness of the rationale for this proposal and the necessity to rethink it in its most fundamental terms. This is not a partisan issue. Some people might be surprised to find the Democratic Commissioners arguing in favor of a free market, non-regulatory approach to a voluntary transaction between financially sophisticated private enterprises to reduce collective choice costs and conflicts of interest while the Republican Commissioners support a nanny state approach, assuming that major financial institutions are incapable of making market-based choices and meeting their obligation as fiduciaries. But we recognize the power of crafty lobbyists, increasingly deploying avalanches of dark money astroturfing to masquerade as ordinary citizens, distorting the notice and comment process, and we know how difficult it can be to be heard over their sock puppets and fake front groups. This rulemaking requires the most rigorous, skeptical, and careful consideration to bring some credibility to what has been a distressingly abused and skewed process.

Third, the Commission has taken no time to examine the effect of its rescission of the guidance on proxy advisors many of the supporters of this rule claim created the problem. Indeed, when you listen to my debate with Professor Steven Kaplan at the University of Chicago's Stigler Center on January 13, 2020, which I have submitted as a supplemental comment for this rulemaking, you will see that the foundation of his argument in favor of the rule is that the 2004 guidance interfered with free market forces by effectively requiring fund managers to subscribe to proxy advisor publications. I do not agree with this claim and it is not supported by the data. Many fund managers do not rely on proxy advisors or review their recommendations and come to a contrary decision on voting and 70 percent of those who delegate voting authority to ISS do so under their own in-house-developed proxy policies. But even if he is right, since it has been rescinded, there is no basis for building an extended regulatory structure based on a guidance that no longer exists, at least without analysis of the impact of that decision.

That is especially critical because the decision to rescind the guidance was mysteriously unsupported. Why rescind two 2004 letters about proxy advisory services before the roundtable scheduled for just weeks later to present expert testimony on many elements of the proxy system, including proxy advisors and shareholder proposals? Why act before the evidence was on the record and the Commissioners and staff had a chance to ask questions? At the time, I followed up with the “for more information, contact” email in the very unforthcoming announcement of this decision and the only answer I got from the staff was that rescinding the guidance would “facilitate” the hearing. I then asked how acting without evidence would "facilitate the hearing" and was simply told again that it would facilitate the hearing. Rosanna Landis Weaver of As You Sow filed an FOIA request asking for any memoranda or notes from staff meetings with interested parties concerning the guidelines. She received a reply saying that no such documents existed. The Commission has never explained who asked for withdrawal of the guidelines and there is no information in the record about any analysis that went into the decision, a prima facie case of the decision's being arbitrary and capricious. There is nothing in the record of this rulemaking about the impact of that decision. I still have the strongest possible objections to the mysteriously undocumented and unjustified rescinding of those guidelines, but the fact is, they were rescinded and it makes no sense to move forward with this rulemaking without documentation of the impact of that decision, which may in itself have accomplished anything this proposal is intended to achieve.

Conclusion

We agree with the former SEC attorneys who have concluded that this proposed rule is unconstitutional and exceeds the Commission's authority. We agree with the Commission's own Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee that this proposal is not based on a supportable cost-benefit analysis or factual record. Furthermore, it fails to address the real issues of conflicts of interest and proxy mechanics (often referred to as plumbing).

There have been very significant improvements in corporate governance, board effectiveness and independence, transparency, and accountability since ISS began providing proxy advisory services for two reasons. First is the growing sophistication and attention of investors as they recognize the importance of corporate governance and shareholder oversight. Second are catastrophic failures attributable in significant part to inadequate corporate governance, including the dot.com bubble, the Enron/Worldcom/ Adelphi/Hollinger era accounting scandals, and the sub-prime era financial meltdown. The first of these categories of correction is vastly more cost-effective than the second. The Commission must be a true advocate for investors and the capital markets by making sure shareholders have the opportunity and the independent resources to provide the essential oversight that is the foundation of robust free markets, or all future fixes will come only after ruinous catastrophe.

I appreciate the opportunity to comment and may file one or more supplements to respond to any new information. If the Commission holds hearings on this proposal, I would be happy to provide testimony and answer any questions.

Sincerely,

Nell Minow

Nell Minow

Vice Chair, ValueEdge Advisors