Request for Comment - File No. S7-22-19
Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

This submission is on behalf of PIRC. PIRC is a proxy voting advice business. PIRC's global proxy research and voting recommendations are based on companies' public disclosures and other sources of information, such as direct engagement with companies and other stakeholders. PIRC is the research and engagement partner to the Local Authority Pension Fund Forum (LAPFF), on whose behalf it submitted a response to the shareholder resolution consultation.

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

1. Should we codify the Commission interpretation on proxy voting advice and the Commission view about unprompted requests for proxy voting advice?[57] Would the proposed codification (adding paragraph (A) to Rule 14a-1(l)(iii) and paragraph (v) to Rule 14a-1(l)(2)) provide market participants with better notice as to the applicability of the federal proxy rules?

No, the Commission interpretation on proxy voting advice and the Commission view about unprompted requests for proxy voting advice should not be codified. The Forum supports the argument in the ISS litigation that there should have been a public comment period on that guidance. It is not appropriate to establish guidance based on feedback from a single stakeholder group, especially one that is seriously lacking in accountability as it is. For example, there is a recurrent argument in the consultation that proxy voting advice businesses play a substantial role in the voting decision of clients, and this argument is used as the basis for further restrictions and limitations on proxy advisors. The end of the consultation then goes on to say that there is no concrete evidence of this influence, and yet the entire consultation is built around this conclusion.

To then turn this input into hard law with no sets of checks and balances is unconscionable. It is akin to the FRC's use of the accounting industry's co-opted definition of true and fair view. This stance contributed substantially to the financial crisis because it failed to account for the interests of shareholders – and other stakeholders - and eschewed an existing, helpful legal definition that was supported by the majority of stakeholders.

Therefore, in principle, given the suspect methodology the SEC has used to draw conclusions about the role and impact of proxy voting advice businesses, it is impossible to assess whether the codification of the Commission's interpretation on an expanded definition of solicitation is necessary, let alone appropriate. Specifically, the SEC seems to have sought input from a range of industry organisations representing companies, not investors, in drawing its conclusions. In addition, it has not disclosed its methodology in detail in drawing these conclusions, such as how it sought advice from these groups and, at the very least, the composition of the groups contributing to the conclusions.

There is an additional concern that the language used in the consultation is setting proxy advisors up for an inordinate amount of litigation (ie, on p. 11 of the consultation document 'we are concerned about the risk of proxy voting advice businesses providing inaccurate or incomplete voting advice ("including the failure to disclose material conflicts of interest that could be relied upon to the detriment of investors.") By widening the definition of solicitation and framing legal consequences this way, it sounds as though the SEC would like to create a platform for companies to sue proxy advisors if the companies are unhappy with voting advice. While such legal action might be appropriate in very limited circumstances, it is hard to see how the proposed system would be beneficial to either investors or the market. It is also hard to see how it would prevent the conflicts of interest that seem to be of primary concern in this consultation document.

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? See response to question one above. Additionally, it appears that the communications of concern are marketing materials that use research and analysis to sell proxy voting products and services. However, it is not immediately clear how these two things could be separated as examples of work products are usually the best way for clients to make an assessment of whether to take a provider on, and this would presumably either be the one of the first communications presented to a prospective client or would be on the back of a 'solicitation' through other materials. So where is the line drawn? It is also not immediately clear that the point in the negotiation process at which 'advice' is provided would affect the completeness, accuracy and quality of information for investors.

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 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? See response to question one above. Additionally, this framing is inverting the investor protection argument by failing to recognise that investors could well be better protected through proxy voting advice than without this advice. It is also extraordinarily patronizing, implying that investors are so suggestible that they need protection from proxy voting marketing materials. Investors are completely capable of determining if a product meets their needs without the expansion of a definition of solicitation in this manner.

4. Is there a different, more appropriate way of distinguishing proxy voting advice from other forms of investment advice? See response to questions one and two above.

5. Should the proposed amendment be expanded to specify any other type of activity as constituting a solicitation? See response to question one above.

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? See response to questions one and two above.

B. Proposed Amendments to Rule 14a-2(b)

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? We agree that eliminating conflicts of interest from the proxy voting process should be a goal of both legislation and business practice and that the prohibition on false and misleading statements is critical. We also agree that adequate disclosure of conflicts of interest is important to materially understanding the objectivity of the proxy voting advice and that 'where the interests of a proxy voting advice business may diverge materially from the interests of investors [eg, advising businesses as well as investors], [these interests] create a risk that the proxy voting advice business's voting advice could be influenced by the business's own interests.' This rule might also consider requiring the disclosure of the business models and business strategies of proxy voting advice businesses to ensure any systemic conflicts of interests that could be material are available for clients to assess. Such disclosure should however be informed by a materiality matrix, or otherwise the SEC should provide a comply-or-explain format for reporting, evaluating the explanation where applicable, and eventually preventing advisors with inadequate explanation from issuing recommendations on certain companies (where e.g. the same proxy advisor is soliciting the business on which it is advising investors)

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? The proposed disclosures on conflicts of interest seem fair and will likely help in the assessment of whether information is accurate, complete and framed fairly for investors. There are a number of initiatives regulating the work of proxy advisors (most recently the Shareholders Rights Directive II, published by the European Commission) as well as sectoral groups (such as the Best Practice Principles Group (BPPG). Within the BPPG, signatories have to publicly disclose a conflicts-of-interest policy that details their procedures for addressing potential or actual conflicts-of-interest that may arise in connection with the provision of services (https://bppgrp.info/signatory-statements/). Once a conflict has been disclosed, actions in response include promptly updating the client in writing of any changes in circumstances. This model might be considered in the current context.

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? Any information related to significant financial impacts on the business and its relationships would be helpful. We are not sure that there can be an exhaustive set of documents or information prescribed for this purpose. There will likely need to be an element of judgment

based on appropriate principle used in this assessment, so we support the principles-based approach.

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? Amounts received from various clients could help to clarify relationships and interests, but there would need to be an assessment of whether these disclosures would create competition concerns and how these concerns could be balanced with the benefit of disclosure.

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? Yes, potentially - see the response to question ten above.

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? See question nine above. Also, transparency around the proxy voting advice business's business model and business strategy can help to clarify any inherent and systemic conflicts. Policies and procedures on conflicts of interest should be clearly displayed, and there might be a role for the law to prescribe some of the content of at least the policy document, for example to specify the accountability structure within the organisation, to explain how conflicts are assessed for materiality, and to set out the complaints procedure, including complaint resolution, when a conflict of interest arises, among other information.

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? A clear description of the proxy advisor's business model and business strategy would be helpful in understanding whether there are conflicts of interest ingrained in the business's operations. A clear description of service offerings would help too. As this consultation makes clear, conflicts of interest are evident where the conclusions do not address communication between proxy advisors, companies and investors as a whole community. Proxy voting amendments should include the requirements for US-listed companies to show a contact for investors on the investor relations page of the investors' web page to ensure that all viewpoints are accounted for in the information they receive.

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? Clarity on the definition and threshold of materiality seems to be the crux of this issue. This clarification needs to be made clear in the guidance. The Item 404 and Item 5 definitions are not useful unless the materiality points are clarified. We would point out that PRI has published a number of reports on fiduciary duty making clear that materiality assessments must include meaningful and effective assessments of environmental, social and corporate governance considerations, as these factors have the potential to impact on the financial performance of companies. These reports should be considered in establishing a definition of materiality.

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? A more principles-based disclosure requirement is preferable as prevention of conflicts and contingent impacts should be a goal of any amendments, and conflict of interest assessments are often case-specific and can and should be made prior to any actual occurrences of conflicts.

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? We think it would be fair to set a minimum set of disclosures required, but these disclosures should not be exhaustive as different situations will require different information. So the rule could be partially prescriptive but should leave room for additional necessary disclosures. As long as the disclosure is clear, the manner of disclosure need not be prescribed.

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? It depends on what the agreed disclosure is – if it is general, it would probably suffice to provide it separately. However, if it is prescriptive, it might be helpful to provide it within the proxy voting advice to have it accessible for analysis purposes.

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? This could work.

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? We think that a general disclosure about any conflicts related to a proxy voting advice business's business model and business strategy could be disclosed publicly on the business's website, and that public disclosure of any conflicts that have arisen to the level of legal disputes should also be disclosed publicly on the businesses' websites. This approach should avoid any competitive or other concerns for proxy voting advice businesses.

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? Yes, consistency based on good principles surrounding conflicts of interest is very important and can also help markets by distinguishing providers on this point.

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? Yes, proxy voting advice businesses should be required to include in their disclosures to clients a discussion of the policies and procedures used to identify, as well as the steps taken to address, any conflicts of interest. They should also be required to disclose their business models and business strategies and any conflicts they envision as stemming from these approaches. While there is a long-term incentive for proxy voting advice businesses to include this disclosure on their own, it would be good to require disclosures in case any of these businesses take a short-term approach to disclosure, which might not create this incentive.

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)[92] in addition to disclosure requirements? The costs surrounding additional conflicts of interest disclosure will be contingent on the materiality determinations set by the SEC and the proxy advisors. For example, if materiality is set merely by whether a relationship has a financial impact of a scale that can affect the effective operation of the business, or something to that effect, there should be little cost impact because lack of awareness about affiliates of registrants is less likely to meet this threshold. However, if materiality is highly relationship-dependent, then the affiliates of registrants issue will likely be more important in the balance of considerations and will impose greater costs.

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)? To be frank, conflict of interest assessments and disclosures should be made more stringent for all of the parties

mentioned here. However, given the intermediary nature of proxy advisor roles, it might be that these businesses need more stringent conflict of interest disclosure requirements than other parties in the financial chain that do not play intermediary roles. This is because as an intermediary proxy advisors have a particularly important role and responsibility in managing the flow of information between parties in the investment chain. An alternative to the proposed conflicts of interest requirement that would manage this information flow appropriately is to mandate that proxy advisors include in their advice the positions of both companies and opposing views as the basis of research and analysis provided in advice.

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? To our understanding, factual errors are rare and are not of a nature that would generally impact voting outcomes. Voting processes are increasingly automated, which has significantly reduced the number of errors. However, the big point to make here is that factual errors should not be conflated with methodological concerns. Factual errors are objective and need to be fixed. Methodological concerns are largely subjective and based on opinion. Allowing companies to influence proxy advisor methodologies would in itself be an inappropriate methodological approach because it would lead to severe, systemic conflict of interest concerns in the proxy voting process in favour of companies. Additionally, methodological differences are an important market differentiator for investors who choose one or another proxy advisor based on the methodology they employ. There are times when methodologies are inappropriate and should not be used, and there is scope for regulators to sanction proxy advisors for use of these methodologies on evidence-based grounds. However, as long as methodologies can be explained and justified adequately by proxy voting advice businesses, these should not be up for challenge by companies.

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? Companies currently have this opportunity, and they should have the opportunity to fact check the advice. 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 these proposed timeframes be on registrants, proxy voting advice businesses, and their clients? Are there alternative timeframes that would be more appropriate?
The description of timeframes in this consultation is disingenuous. This short time frame is in large part due to the fact that companies issue their reporting materials in very close proximity to their AGMs. This timing provides proxy advisors little time to do what are often complicated analyses of company disclosures. Also, because proxy advisors make their voting policies public well in advance of the proxy voting season, companies can easily read these policies and deduce how an advisor is likely to vote on most resolutions. This SEC assessment lacks any balanced understanding of the proxy voting process. Investors already receive voting advice and company information almost simultaneously. In fact, proxy voting advice is based on company disclosures, so the investors will have to see the company advice in order to understand the proxy voting advice.

This orientation of the proposal for 14a-2(b)(9)(ii) is correct, but it is not clear from the proposed rule that this incentive creates sufficiently long time frames to accommodate both companies and proxy advisors. The time frames do not account for the realities of the volume of work faced by proxy advisors during busy season.

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? This should be a contractual consideration to be determined with the client, but generally this might put pressure on analysts to issue advice more favourable to companies.

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? Perhaps where accurate summaries of information representing the company's reporting materials are disclosed in the proxy materials, this inclusion could help to allay concerns about inaccuracy and lack of complete information and could trigger the exemptions.

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? No, because both proxy advisor and company workloads cannot be predicted and will necessarily affect the ability to comment within given timeframes. 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? This might help to alleviate all of the reports being due at the same time, but if all companies disclose early, this would still mean that proxy advisors would have the same massive workload – it would just be earlier than it is now. 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? It is hard to predict in the abstract. More appropriate timeframes would include spacing AGMs more evenly throughout the year so that proxy advisors and investors do not find themselves in a mad rush to assess often detailed and complicated company disclosures all within the space of a couple of months. More even spacing would allow proxy advisors more time to produce good advice and would allow them to provide companies with a longer comment period.

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? See the response to question 26.

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? Companies should have the opportunity to see and comment on advice once, and then should be notified once the advice is issued. If they are offered more opportunities than this, they could compromise the independence of the process.

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 reviewing parties? How, if at all, could the independence of the advice be called into question if other parties reviewed and commented on it?[149] 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? Yes, if companies have too many opportunities to comment on the proxy advice, the independence of the advice could be called into question. Companies often respond to proxy advice with scathing, heavy-handed responses that can be intimidating for researchers. It needs to be clear that researchers will only amend factually incorrect information and content where the voting advice does not match with the client or house position on an issue. Otherwise, companies cannot expect that advice content will be amended, and for independence reasons it should not be amended.

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? As mentioned above, this process is contingent on the timely disclosure by companies of their reporting materials, so compliance burdens might fall unfairly on proxy advisors if companies do not disclose in a timely fashion, or if they disclose materials that are unclear or unhelpful. Making the proxy voting timetable more even throughout the year would help to alleviate workload and response timing concerns.

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? One option might be a financial penalty for failure to disclose in a timely manner. However, it is hard to know what an appropriate penalty amount would be and what timings would be fair given variations in workload.

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? We would advocate that the final notice of voting advice be made to other parties, especially shareholder proponents and other affected stakeholders. Transparency in all aspects of voting will also help to hold all parties in the process accountable for their contributions.

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[150] be subject to the proposed review and feedback period and final notice of voting advice requirements? Yes, clients should be required to make their voting positions public, and voting advice from proxy advisors should be made public to ensure transparency in the voting chain and to allow for an accurate assessment of how clients are using proxy advice. 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? There might be, and this needs to be considered, but by and large, voting on good governance should underpin all investment strategies so should not raise confidentiality concerns. If clients have control over disclosure of their voting policies, this should help to alleviate confidentiality concerns. The SEC may wish to set a standard on disclosure of proxy advice that is commercially sensitive, for example, any resolutions that involve mergers and acquisitions, large capital expenditures, and any other financial transactions that have implications for business strategy. However, given that most of this information is publicly disclosed on websites, and there are insider trading considerations, the information with which proxy advisors work and on which they comment should already have been vetted from a commercial sensitivity perspective, so it is not clear that such a disclosure standard would be necessary. 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.[151] There could be a statement or disclaimer making clear that a client's voting policy is being represented, not its investment strategy – it would then be incumbent on the client, not the proxy advisor, to provide an appropriate voting policy that does not subject it to confidentiality concerns. In the interest of transparency, it would be useful to know when proxy advice reflects custom recommendations rather than proxy advisor house positions.

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? As discussed above, there should be no final notice period for companies in any case.

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 unique challenges or specific issues with the parties' compliance with these proposed requirements that are foreseeable in contested solicitations? No comment.

36. Should we require the entirety of the proxy voting advice, including separate specialty reports,[152] to be provided to the reviewing party or only excerpts of 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? In the interest of transparency and fairness, the entire report should be disclosed to companies as factual errors could occur in almost any part of the report. It is also important for companies to see and understand the scope and nature of information covered in these reports.

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? Again, in the interest of fairness and transparency, all topics and kinds of proposals should be covered in the company review but should not be subject to final notice.

38. Are there any risks raised by proxy voting advice businesses providing advance copies of voting advice (e.g., misuse of material, non-public information, or misappropriation of proprietary information), and if so, how can such risks be managed? See the response to question 29.

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? It is probably in the interest of both companies and proxy advisors that the content of the advice be kept confidential, so there is no need to promulgate an additional rule. Furthermore, if there is an incentive to make advice public by either party, this is probably a good market regulatory practice to keep either party honest in their reporting and disclosure, both in how information is represented and in terms of quality of information.

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? See the response to question 39.

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 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)? There are usually summaries of the companies' responses in the voting advice, but a hyperlink to company responses might be helpful too.

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? It would be an extra layer of information for clients to read and process.

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)? Yes, and add advice that proxy advisors should have a disclaimer to this effect.

44. In instances where proxy voting advice businesses provide voting execution services (prepopulation and automatic submission) to clients, are clients likely to review a registrant's response to voting advice? Yes, company responses are taken very seriously. 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? Immense. Could there be effects on registrants? Reduced quality information and more factual errors. 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? Yes. 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? Proxy voting advice businesses would have to hire significantly more people so would incur significant staff costs, both to conduct the analysis and to check the information in voting advice.

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? Yes, there is no need for niggly, unnecessary litigation or legal recourse. This won't help any parties. 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? Maximum timeframes for rectifying errors or responding to queries might be helpful.

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? A framework to allow for a more even spread of AGMs throughout the year would be the best solution.

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? Yes, contracts would need to be re-negotiated and there would be associated systems and training costs, though the latter would likely be minimal. However, the best solution would still be to spread out AGMs more evenly throughout the year.

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? Yes, and this currently happens through the annual disclosure of the house voting guidelines.

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? This would be ineffective in that it already happens. The best way to deal with these issues – to the extent they are actually a problem – is to even out company AGMs over the year so that there is a more even distribution of work throughout the year. As mentioned above, however, factual errors must be addressed and methodological weaknesses should only be addressed in exceptional circumstances.

50. Are there better approaches for addressing factual errors and methodological weaknesses in proxy voting advice businesses' analyses? See the response to question 49.

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? See the response to questions 24 and 49.

C. Proposed Amendments to Rule 14a-9

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?[168] Should the proposal to amend Rule 14a-9 list different or additional examples and, if so, which examples? Perhaps this list could also include analysis that provides the perspective of only the company or only the proponent in relation to shareholder resolutions, or any other element of the analysis where a balanced perspective from relevant parties could have a material impact on the complete and accurate understanding on an issue or recommendation.

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? Proxy advisors publish their own standards and criteria publicly, so clients should be well aware of the differences both between proxy advisors and between clients and proxy advisors.

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? A lot of this discussion around transparency and conflicts of interests is relevant to anti-bribery and corruption law, so it might be worth widening the scope to consider global anti-bribery and corruption standards, especially since these laws are becoming more stringent and more inter-connected.

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? This approach might help to distinguish proxy advisors to the market.

D. Transition Period

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? It depends how onerous the rules end up being. If, for example, the cost implications are large, it might take more than a year to figure out an adjusted business model or business strategy to cope with them. If they are more around basic transparency issues and advice to clients, this should be doable within an annual policy and disclosure cycle.

57. Is the proposed transition period appropriate? If not, how long should the transition period be and why? Please be specific. See the response to question 56.

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? Given that there might be differentiated timings and deadlines for providing advice, if there are any penalties invoked through the amended rules, it might be good to suspend their application for a year or two to ensure that all parties have time to get used to the new expectations and so that there is not an undue workload and burden placed on complaints mechanisms in the event that things do not roll out smoothly at first.

Request for Comment – General Considerations
We request and encourage interested persons to submit comments on any aspects of the proposed amendments, other matters that may have an impact on the amendments, and any suggestions for additional or alternative changes. With respect to any comments, we note that they are of the greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed by those comments, particularly quantitative information as to the costs and benefits, and any alternatives to the proposals where appropriate. Where alternatives to the proposal are suggested, please include information as to the costs and benefits of those alternatives. These suggestions and comments are included in the body of the consultation. The main suggestions are to mandate disclosure of business model and business strategy in relation to the conflict of interest concerns and to facilitate a more even distribution of AGMs over the year to help with deadline concerns. However, the more fundamental concern is that the methodology used to inform this consultation is not explained adequately and does not seem to be appropriate. Therefore, the issues and findings raised are not necessarily accurate and, consequently, are not an appropriate basis for a consultation.

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? Given that it is not apparently the clients themselves who have complained, it is not clear that these amendments are needed. It appears that many of the suggested amendments, particularly in relation to additional reporting, would add burdens that could disrupt the timings of the proxy voting process significantly.

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? Business model and business strategy disclosures would help.

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? Presumably, proxy advisors have discussed and developed these policies and procedures. The question is more whether they are adequate and the extent to which they have been disclosed and implemented, which has been a substantial point of discussion in this consultation. We would advocate for focusing the amendments more on consistent and good faith engagement between parties in the investment chain, rather than on creating a bias toward company needs. It would be helpful to consult investors rather than companies as the basis of this consultation for a start.

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? There are potentially positive and potentially negative consequences for users of proxy advisory businesses. The potentially positive consequence is that the additional rules and disclosures could be used as differentiating factors in determining which proxy advisor to

engage. The potentially negative consequence is that the additional requirements could significantly impact the information flow and content provided thus compromising the quantity and timeliness of information available to clients. But overall, the amendments would make the proxy voting process significantly more work-intensive and costly so would create a barrier to entry for more providers. Also, a lot of the information requested seems irrelevant or superfluous and therefore, among other problems, would lead to a delay in conveying appropriate information to clients and therefore would lead to reduced quality in products provided to clients.

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? It is not clear that the new rules per se would be a barrier to entry for smaller proxy advisory firms and new entrants to the market. The proxy advisory business model in general is probably more of a deterrent, but coupled with the proposed rules might amount to an insurmountable barrier. To be profitable, proxy advisors need to be of a certain size and have a certain number of clients. Given the nature of the service and demand, there is probably a limited market space for proxy advisory businesses that is unrelated to the rules discussed here. However, again, added costs and work associated with the proposed rules added to the market restrictions could well bias the market against smaller providers.

Comments on the following questions are of particular interest.

☐ 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? Without the necessary disclosure of the methodology used to set the parameters of this consultation, it is not possible to know whether the demand for services of proxy voting advice businesses has been characterised correctly. Strict, uncaptured regulation on company activities, including adequate, appropriate and transparent enforcement by government, is an alternative.

☐ 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.
There is already a large amount of voting advice provided. Investors already monitor the reliability of voting advice, but to the extent it can be made even more reliable, this is a good thing. The issue is less that more complete voting advice should be provided, but possibly that more targeted advice should be provided. This targeted advice is contingent on investors', and particularly asset owners', being as involved as possible in working with proxy advisors and

proxy advice to set appropriate expectations on what type of advice is material and relevant for their purposes.

☐ 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? A lot of the consultation description of the proxy voting processes seems skewed to a business perspective on how things work. So if one works off of a company understanding rather than an investor and proxy voting understanding of procedures, elements such as timings get skewed to a company perspective, as has happened here. As mentioned above, it would be necessary to use a more rigorous methodology and consult appropriate stakeholders in assessing current practices and systems in the proxy voting process before drawing conclusions on which to base law and policy around this area.

☐ 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. This requirement would impose significant costs on proxy advisors in terms of employing additional staff, and the whole process is really contingent on companies releasing their voting materials and reporting earlier. The reality of this process is not accurately reflected in the consultation, which puts the onus on proxy advisors when the process is driven first and foremost by timings, accuracy and completeness of company disclosures. What would help most would be to have company disclosures and AGMs distributed more evenly throughout the year to ensure that analysts throughout the investment chain have adequate time and space to consider fully company disclosures and practices.

☐ 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. This sounds right. Clear and fair disclosure requirements might help the proxy advisors not already issuing draft documents to adopt a process more efficiently.

☐ 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? Fees could go up to cover costs, depending on the extent of the burdens imposed. Delayed advice and sub-standard quality could result for clients if the changes prove excessively burdensome or difficult to implement well.

☐ In response to the Commission's recent releases on proxy voting responsibilities and proxy voting advice, one commenter argued that the Commission's interpretation and guidance[263] 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? We think this is a real possibility, and these outcomes would likely compromise the quality and timeliness of the proxy advice we receive.

☐ 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.

☐ 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. Some investors use multiple proxy advice sources and use the information to maintain or change votes based on the best argued advice and the advice that best meets their investment aims.

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

☐☐ How the proposed amendments can achieve their objective while lowering the burden on small entities;

☐ The number of small entity companies that may be affected by the proposed amendments;

☐ The existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis; and

☐ How to quantify the effects of the proposed amendments. Number of complaints from investors about timing and quality and extent to which timings of advice exceed mandated or expected deadlines could be indicators of the effect of proposed amendments.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of that effect. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.