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Dear Chairman Clayton,

S7-22-19: Public Consultation on the Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

Baillie Gifford welcomes the opportunity to respond to the public consultation on the proposed amendments to the proxy rules. Baillie Gifford is an investment manager with a long-only, active approach to investment. Based in Edinburgh, Scotland, we are one of the UK's oldest independent fund management firms, having been founded in 1908. We are, we believe, unique for a company of our size in being an independent partnership with no outside shareholders and unlimited liability to our clients, for whom we invest US$290 bn as at the end of December 2019. For context, we utilise research from proxy advisors for information only, analysing all meetings in-house using a variety of sources including company source documents, direct company engagement and said proxy advisor research. We do not outsource any part of the responsibility for voting decision making to third-party suppliers.

We would be supportive of an overall goal of increasing the transparency of proxy advisory firms and recognise some benefit could result from the proposed amendment surrounding the increased disclosure of potential conflicts of interest which could impact the objectivity of proxy advice, but we do not believe the proposed approach is a means by which to reach this goal.

Our main concern with the proposed amendments is that the proposed process for registrants and other parties to review and comment on proxy voting advice would introduce delays and costs into the proxy voting process which would ultimately operate to the detriment of shareholders. Based on the low numbers of instances, as set out in the consultation, where registrants indicated particular concerns with respect to proxy voting advice in additional definitive proxy materials, in our view the potential delays and costs would be disproportionate to the perceived issue.

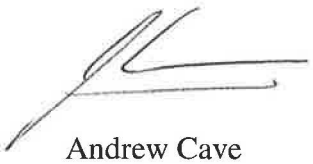
A related concern is that allowing registrants and other parties to comment on analysis, methodology and opinion, as opposed to facts only, renders advice vulnerable to influence. The appropriate forum for review of the processes and methodologies of proxy advisory firms is as part of the regular due diligence of these firms by their clients.

In our view it would be sufficient to mandate that proxy advisory firms provide a copy of the underlying facts used within the report, to registrants in advance of its dissemination to clients. Proxy advisors frequently do this already as a matter of course and we believe that it would be beneficial for this practice to be compulsory to help identify any material inaccuracies in the proxy advice.

We have provided responses to specific consultation questions in the attached Appendix.

Thank you again for providing the opportunity to contribute to the proposed amendments to the proxy rules.

Yours sincerely,



Andrew Cave
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Appendix

Question 1: Should we codify the Commission interpretation on proxy voting advice and the Commission view about unprompted requests for proxy voting advice? Would the proposed codification (adding paragraph (A) to Rule 14a-1(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?

We believe that codifying the Commission view that unprompted requests for proxy voting advice are not solicitations would provide clarity to market participants and protect investment advisors responding to unsolicited requests from their clients.

Question 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 specific disclosure within the advice itself of any material interests, material transactions/relationships and any other information that is material to assessing the objectivity of the proxy advisor in the matter or parties concerning which it is providing the advice would be useful. Values, where relevant, should be disclosed, e.g. how much a proxy advisor has been paid for consulting services, the nature of the services, duration of the relationship, etc. However, a requirement for disclosure of policies and procedures and steps to address conflicts will lead to boilerplate clauses and will not be useful. This type of disclosure is more suited to ongoing due diligence by investment advisors of their proxy advisor relationships.

We find it surprising that it is proposed that proxy advisors disclose extensive information about conflicts but there is no similar requirement on other parties which may be subject to conflict, such as auditors which also carry out consulting services for the companies which they are auditing.

Question 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?

It is appropriate that proposed Rule 14a-2(b)(9)(i) should only require disclosure of information which is material to assessing the objectivity of the proxy voting advice. Disclosures which are too broad will not be helpful. Potential conflicts of interest more broadly should be discussed during regular due diligence of proxy advisors by their clients.

Question 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 requirement is preferable because whether a matter is material to the proxy advice will depend on the facts and circumstances. For example, in some situations it may be relevant that a proxy advisor had an historical relationship with a registrant, albeit that the relationship is no longer live, if the relationship were very significant in terms of duration or value. In other cases, less significant relationships will cease to be relevant as soon as they come to an end. It should be for the proxy advisors to make the assessment and for their clients to understand how the advisor makes this determination as part of regular due diligence.

Question 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?

The presentation of disclosure should not be prescribed. A prescriptive form runs the obvious risk that pertinent information could be lost if it does not fit easily within the form. The important aspect is disclosure of material facts which allow the client to assess the objectivity of the advice, and the rule should be flexible enough to accommodate the various scenarios which could arise.

Question 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?

The advantage of the proposed amendments, as opposed to the existing conflict of interest disclosure requirements, is that the disclosures will be within the advice and therefore easily accessible and easy to consider in the context of that particular vote.

Question 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 do not believe that it would be appropriate that conflicts of interest disclosure be made public. It is not clear there is any legitimate public interest in this matter. If it were to be in the public interest, it would be logical that registrants should also disclose any relationships with proxy advisors as part of their proxy materials.

Question 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?

In our view the intention of this amendment should be to allow clients to easily access pertinent information. Consistency is important in terms of the facts which are disclosed, such as values and durations. As different facts may be material in different situations, it would not be helpful to be prescriptive about disclosure.

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

In our experience most proxy advisors already have structures in place to avoid or mitigate potential conflicts. Further detailed research and analysis is required on the adequacy of current practices before it can be determined whether regulatory intervention is required.

Question 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?

There are occasional errors in the advice of proxy advisors - we are unable to provide data on this. Registrants often engage with us directly where they disagree with proxy advice, whether on the facts in the advice or on the proxy advisor's interpretation or analysis. As we use the advice of proxy advisors for information only, alongside a variety of other sources, and do not follow the voting recommendations of proxy advisors, we cannot comment on whether any errors materially affect the voting recommendations.

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

No, registrants and certain other soliciting persons should not 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. We have two main concerns with the proposals: 1) increased delays and costs which would be borne by the clients of proxy advisors, and 2) the potential for registrants to influence proxy advice. In addition, there is no compelling evidence that such extensive amendments are required. Table 2 on page 96 of the consultation demonstrates the very low numbers of instances where registrants indicated particular concerns with respect to proxy voting advice in additional definitive proxy materials. The proposed process is not a proportional response to the scale of the perceived problem based on these low figures.

In terms of increased delays and costs, it is beyond question that the proposed additional process and required system adjustments will incur costs for both registrants and proxy advisors. In both cases these costs will likely ultimately be passed on to shareholders. The proposed timescales do not appear

to have regard for the minimum amount of time required for the clients of proxy advisors to review the advice and make informed voting decisions. If imposed, review and feedback periods for companies should be expressed as maximums, not minimums, to avoid registrants deliberately minimising the time proxy advisors have to disseminate advice.

In relation to the influence of registrants, allowing registrants to also comment on analysis and dispute methodology and opinion, in conjunction with the proposed anti-fraud amendments, could render proxy advisors vulnerable to litigation if these matters are not incorporated into the advice. This is clearly inappropriate as these matters are necessarily subjective. This could result in the watering down of advice to avoid potential actions, rendering the advice too bland to be of use. We are unconvinced by the claim that this review could improve the overall mix of information available. It is not the role of proxy advisors to be the conduit for all opinions on a matter: they are private companies employed to summarise facts and present recommendations based on their own methodologies, which methodologies are disclosed and subject to due diligence by their clients.

Registrants should be provided with a copy of the underlying facts used within the report for information only. This should be sent to the registrant a certain number of days in advance of the meeting and the proxy advisor should state when the advice will be disseminated to its clients. If the registrant believes there are factual errors they can notify the proxy advisor. This frequently does happen at present and proxy advisors often reissue advice following such a notification. Requiring a final notice of advice is too cumbersome and would introduce an unacceptable delay into the proxy voting process. If a link to an issuer's response is provided more than 2 days before the advice is disseminated, then the proxy advisor should be required include it.

Question 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?

See question 25 – allowing registrants to review and comment on not only facts but opinion and methodology obviously renders the advice vulnerable to influence. Limiting review to facts only would assist in alleviating these concerns.

Question 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?

Our view is that a copy of the underlying facts used within the report should be sent to registrants for information only. This review of facts is relevant whether or not the advisor is recommending to vote in line with management, as material inaccuracies may have been made within the advice regardless of the recommendation.

Question 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?

We agree that confidentiality agreements should be allowed in principle but further consideration is required on how this would work in practice. There is a risk that the negotiation of a confidentiality agreement would result in further delays to the dissemination of advice. Furthermore, if the confidentiality agreement is not concluded within the proposed review and comment timescales then proxy advisors may be unable to fulfil their contractual obligations to clients and may unintentionally breach the proxy rules.

Question 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)?

See question 25. We agree with the inclusion of a hyperlink. Our view is that the review should only be of facts, so the response should also only cover any alleged inaccuracies.

Question 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)?

We agree that proxy advisors should not be liable for the content of hyperlinks. Codifying this would provide clarity.

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

Baillie Gifford does not utilise automatic submission of votes and exercises each vote individually. We do not agree with automatic submission of votes from a stewardship perspective. However, on principle we disagree with the disabling of automatic submission of votes. Shareholders may vote however they choose for whatever reasons they choose (p72 of consultation: 'Shareholders may use any standards or criteria when making their proxy voting decisions, and proxy voting advice businesses and their clients may use any standards or criteria for proxy voting advice'). It is for investment managers to manage their own proxy voting process and determine whether automatic submission of votes is appropriate.

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

Yes, proxy voting advice businesses should be permitted to cure any unintentional or immaterial failure to comply with the proposed conditions so long as they make a good faith and reasonable effort.

Question 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?

Proxy advisors already do disclose whether there have been communications with registrants in relation to a particular piece of advice. This practice should continue. Useful information would include the date that the advice was provided to the registrant; whether material amendments were made to the advice as a result of feedback from the registrant; and a link to the registrant's response, if any. We do not see any reason for this information to be available publicly. In addition it is standard, as part of the due diligence of the relationship, for the clients of proxy advisors to request information on more general communications with registrants. We do not believe that there is benefit in codifying this as a disclosure requirement.

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

We do not believe that amendment to the list of examples is necessary. Codifying the contents of guidance calls into question the purpose and legal status of the guidance. In addition we do not believe that formal examples are helpful as they will never be exhaustive and could lead to a tick-box approach.

If the list of examples is amended as proposed, further clarifications would be required. Will the rule simply require that the proxy advisor disclose its sources of information, or will it prescribe the sources which ought to be included to avoid the advice being misleading? Conflicts disclosure will be required under proposed Rule 14a-2(b)(9)(i) – is the intention that failure to disclose will be a breach of that rule and also be misleading within the terms of this rule?

Question 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?

The suggestion that proxy advisors should educate their clients about global regulatory standards is too onerous. It would be sufficient for proxy advisors to state that recommendations are based on the advisor's own policy and methodology, and do not necessarily indicate a breach of relevant regulation or guidance.

Question 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?

The proposed amendments would not be effective for Baillie Gifford as we use proxy advisors for information only alongside a variety of other sources. They would almost certainly make it slower and more expensive to obtain this advice. There will also be costs for registrants, which will impact the returns of our clients.

Question 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?

It seems likely that the proposed amendments would be perceived as onerous and deter new entrants to the proxy advisory industry. The industry is already dominated by a small number of businesses and suffers from a lack of competition. It is also likely that the proposed amendments would lead to a decline in the quality of proxy voting advice as timescales for the production of advice will be shorter and, as outlined above, there is a risk of registrants influencing the content of the advice.

Question 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?

No, it would be unfair and confusing to treat different proxy advice firms differently. It would seem paradoxical for there to be sufficient concern about proxy advice being conflicted and containing errors to warrant rule amendments, but to allow some firms to operate without the proposed safeguards in place.