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February 3, 2020

By email to: rule-comments@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: Consolidated Comments in Response to SEC Proposed Rulemakings: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (File No. S7-22-19), and Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (File No. S7-23-19)

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to U.S. Securities and Exchange Commission (the “SEC” or “Commission”) Release No. 34-87457, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (the “Proxy Advice Proposal”) and Release No. 34-87458, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (the “Shareholder Participation Proposal”) (collectively, the “Rule Proposals”).²

NASAA generally supports greater transparency in the provision of proxy voting advice. However, the Rule Proposals, especially taken together, would make it more costly and difficult for shareholders to cast informed votes and to put their important issues onto corporate ballots. Consequently, the Rule Proposals would suppress shareholders’ voices on such critical matters as

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Rule Proposals are available at <https://www.sec.gov/rules/proposed/2019/34-87457.pdf> (Proxy Advice Proposal) and <https://www.sec.gov/rules/proposed/2019/34-87458.pdf> (Shareholder Participation Proposal), respectively.

executive pay, director elections, the sale of a company, and other matters that shareholders deem important to the long-term value of the companies they own.

For the reasons outlined more fully below, NASAA urges the Commission not to suppress the exercise of shareholder rights by adopting the Shareholder Participation Proposal, and NASAA urges the Commission not to adopt the Proxy Advice Proposal without substantial revisions.

1. Comments on Release No. 34-87458: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (the “Shareholder Participation Proposal”)

As recognized by the D.C. Circuit Court of Appeals in 1970, “[i]t is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give *true vitality to the concept of corporate democracy*.”³ That is why NASAA agrees with Commissioner Lee’s statement that the shareholder proposal process under Rule 14a-8 “has long provided a vital mechanism for shareholders to communicate their views to, and engage with, management.”⁴ Shareholder proposals have historically been instrumental in the implementation of significant improvements in corporate governance, and they have allowed shareholders to hold management accountable.

In its effort to “modernize” the shareholder proposal process, the Commission has proposed amendments that would make it more difficult for shareholders, in particular those with fewer resources, to have meaningful input on issues affecting their interests. Specifically, the Shareholder Participation Proposal dramatically raises the eligibility thresholds for the shareholder proposal process and suppresses shareholders’ ability to communicate their views to, and engage with, management and other shareholders. Accordingly, NASAA urges the Commission not to adopt the Shareholder Participation Proposal.

A. Overview of the Shareholder Participation Proposal

Rule 14a-8 currently allows shareholders to submit proposals for consideration in an issuer’s proxy materials if they have owned either \$2,000 or 1% of the issuer’s voting securities for at least one year (the “Ownership Threshold”).⁵ An issuer may exclude a proposal from its

³ *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970) (emphasis added).

⁴ Commissioner Allison Herren Lee, Statement on Shareholder Rights (Nov. 5, 2019), https://www.sec.gov/news/public-statement/statement-lee-2019-11-05-shareholder-rights#_ftnref2 (“Statement on Shareholder Rights”). See also Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-87458 (Nov. 5, 2019) (the “Shareholder Participation Proposal Release”) at 18 (“The shareholder-proposal process established by Rule 14a-8 facilitates engagement between shareholders and the companies they own.”); and Dorothy M. Donohue et al., Investment Company Institute, *Proxy Voting by Registered Investment Companies*, 2017, Vol. 25 ICI Research Perspective No. 5, at 6 (Jul. 2019) (“ICI Report”), available at <https://www.ici.org/pdf/per25-05.pdf> (“Rule 14a-8 is intended to allow investors to express their views on company matters and to propose alternative courses of corporate action.”).

⁵ 17 CFR § 240.14a-8(b).

proxy materials for three years if the proposal deals with substantially the same subject matter as another proposal that has been considered within the preceding five years, and the previous proposal failed to receive 3% of the vote the first time it was submitted, 6% the second time, and 10% the third time (the “Resubmission Thresholds”).⁶

The Shareholder Participation Proposal would raise the Ownership Threshold to require that a shareholder have held at least \$2,000 of the company’s voting securities for three years, at least \$15,000 for two years, or at least \$25,000 for one year.⁷ The Shareholder Participation Proposal would increase the Resubmission Thresholds to 5%, 15%, and 25%.⁸ Further, the Shareholder Participation Proposal would add a new basis to exclude a shareholder proposal from an issuer’s proxy materials. Even if a shareholder proposal meets the new Resubmission Thresholds, the issuer could exclude the proposal if it received less than 50% in the most recent vote and support declined by 10% or more compared to the immediately preceding vote on the matter (the “Momentum Exclusion”).

B. The increased Ownership Threshold would unduly restrict smaller shareholders’ exercise of their rights as shareholders.

When the Commission raised the Ownership Threshold to the current level of \$2,000 in 1998, it decided not to propose a higher amount “out of concern that a more significant increase could restrict access to companies’ proxy materials by smaller shareholders.”⁹ The Commission’s approach in 1998 was correct; however, today’s Commission – which has repeatedly declared the primacy of the interests of Main Street investors – appears to have reversed this course. The Shareholder Participation Proposal would inappropriately and unnecessarily favor larger and institutional shareholders over smaller shareholders. The consequence of this reversal would be to further immunize issuers from the concerns of smaller and retail shareholders, and to deprive all investors of the perspectives that such shareholders can contribute to the proper management of the companies they own.

Under the current rules, a shareholder who has held \$2,000 of an issuer’s voting securities for a period of eighteen months is eligible to exercise the same rights as a shareholder who purchased \$25,000 of the same issuer’s voting securities on the same day. However, if Rule 14a-8 is amended as proposed, the former shareholder would suddenly find that they must wait an additional eighteen months before they can enjoy the same rights as the latter shareholder. The Commission states that “holding \$2,000 worth of stock for a single year does not demonstrate enough of a meaningful economic stake or investment interest in a company to warrant the

⁶ 17 CFR § 240.14a-8(i)(12).

⁷ Proposed Rule 14a-8(b)(1)(i), Shareholder Participation Proposal Release at 175-76.

⁸ Proposed Rule 14a-8(i)(12)(i), Shareholder Participation Proposal Release at 178-79.

⁹ Amendments to Rules on Shareholder Participation Proposals, Release No. 34-39093 (Sep. 18, 1997), <https://www.sec.gov/rules/proposed/34-39093.htm>.

inclusion of a shareholder's proposal in the company's proxy statement."¹⁰ This statement is unsupported by the data in the proposal. In fact, based on data analysis by Commission staff, the median retail investor portfolio is valued at approximately \$27,700.¹¹ Given this, not only would it be imprudent for such a retail investor to hold \$25,000 of any single issuer's securities at one time (approximately 90% of their portfolio), but a \$2,000 investment would constitute over 7% of the value of such a portfolio.¹² This investor undoubtedly has a "meaningful" interest in making sure that the issuer conducts its affairs prudently, in a manner consistent with the retail investor's objectives for the investment.

In addition to dramatically increasing the Ownership Threshold, the Shareholder Participation Proposal would preclude shareholders from aggregating their holdings to meet the Ownership Threshold, as they are currently permitted to do.¹³ The Commission states that allowing shareholders to aggregate their holdings "would undermine the goal of ensuring that every shareholder who wishes to use a company's proxy statement to advance a proposal has a sufficient economic stake or investment interest in the company."¹⁴ NASAA disagrees. When a group of shareholders aggregates their shares, they are acting collectively, not individually. The economic stake behind a proposal is the same regardless of whether it is proposed by one shareholder holding \$25,000 of an issuer's voting securities or by ten shareholders collectively holding the same amount. The Commission has provided no valid reason to turn away from this policy that has been in place since at least 1983.¹⁵ On the contrary, the most readily apparent effect would be to further minimize the contributions of smaller and retail shareholders.¹⁶

C. The increased Resubmission Thresholds would preclude investor consideration of many important issues.

Shareholder proponents have historically been instrumental in effecting significant improvements in corporate governance. These include majority vote rules for electing directors, staggered board terms, limits on poison pills that serve to entrench and protect management, and the increased adoption of proxy-access bylaws. Further, the voices of smaller and retail

¹⁰ Shareholder Participation Proposal Release at 19.

¹¹ See Statement on Shareholder Rights at n.14.

¹² It is particularly surprising that the Commission would describe such an ownership interest as "minimal." See Shareholder Participation Proposal Release at 20.

¹³ See Shareholder Participation Proposal Release at 15, 37.

¹⁴ *Id.* at 24.

¹⁵ See *id.* at 15.

¹⁶ The Shareholder Participation Proposal would also prohibit a person from submitting proposals on behalf of multiple shareholders as a representative. Although NASAA does not oppose limiting each person to one proposal per meeting, there is no valid reason to impose the same limitation on a person who is submitting proposals on behalf of one or more shareholders as their representative. An attorney or investment adviser may have multiple clients who own a particular issuer's securities, each of whom has different viewpoints and priorities. This is simply another unnecessary logistical impediment that would stifle the voices of those shareholders who lack the resources or know-how to navigate the process without assistance, while providing no discernible countervailing benefit.

shareholders are valuable not only to fellow shareholders, but to all investors and the capital markets as a whole. The contributions and insights offered by smaller and retail investors to highlight concerns with issuers are just as meaningful and necessary as the contributions of larger shareholders.¹⁷

The same is true for proposals that do not initially capture the attention and appreciation of a majority of existing shareholders. Shareholders have proven adept at shining a light on emerging issues and the need for reforms that are later adopted. Other commenters have provided examples of shareholder proposals that resulted in significant positive changes, but would have been excluded under the proposed Resubmission Thresholds.¹⁸ The Office of Commissioner Robert J. Jackson, Jr. conducted an analysis of available data and determined that the Shareholder Participation Proposal would exclude up to 35% of shareholder proposals for independent board chairs, 40% of proxy-access proposals, 50% of board diversity proposals, nearly 65% of report on climate change proposals, and 40% of political spending disclosure proposals.¹⁹ The consequences of excluding these proposals would be even more pronounced in issuers that have closely held shareholder majorities or dual class stock, as smaller shareholders would be unable to raise important issues that are unlikely to receive high levels of early support.

Management groups have derided certain proposals as having little relevance to long-term shareholder value or imposing higher costs to other shareholders,²⁰ but many such proposals have led to widely adopted changes and have proven critical to ensuring long-term shareholder value.²¹ While NASAA takes no position on the merits of any particular shareholder proposal, shareholders are entitled to have their voices heard, and NASAA opposes changes that would suppress shareholder rights.

D. It is not clear that the Shareholder Participation Proposal would solve a significant problem.

The Shareholder Participation Proposal Release fails to establish that restricting shareholders' participation in the manner proposed is necessary to solve a significant problem.

¹⁷ See, e.g., Comment Letter from the Office of the Illinois State Treasurer, Michael W. Frerichs (Jan. 16, 2020) at 3 (“Over the years, shareholders’ ability to submit proposals under Rule 14a-8 has provided companies with free guidance on which governance, environmental, and social factors raise investor concern.”)

¹⁸ See, e.g., Comment Letter from Karen Watson, CFA, AIF®, Chief Investment Officer, Congregation of St. Joseph (Jan. 24, 2020); Comment Letter from Shareholder Rights Group (Jan. 6, 2020); and Comment Letter from Ethel Howley, SSND, Social Responsibility Resource Person, School Sisters of Notre Dame (Nov. 19, 2019).

¹⁹ Data Appendix on Proposals to Restrict Shareholder Voting, Office of Commissioner Robert J. Jackson, Jr. (Nov. 7, 2019) (“Data App’x”), available at <https://www.sec.gov/news/statements/2019/jackson-data-appendix-on-proposals-to-restrict-shareholder-voting.pdf>.

²⁰ See, e.g., Letter in Response to the Proxy Process Roundtable from Business Roundtable at 3 (Jun. 3, 2019), available at <https://www.sec.gov/comments/4-725/4725-5619758-185567.pdf>.

²¹ See, e.g., Comment Letter from Shareholder Rights Group (Jan. 6, 2020).

The Commission last modified the Ownership Threshold in 1998, increasing it from \$1,000 to \$2,000.²²

The Commission states that it is “concerned that the \$2,000/one-year threshold established in 1998 does not strike the appropriate balance today,”²³ and that the current shareholder proposal process in Rule 14a-8 is “susceptible to overuse.”²⁴ This suggests that the Commission’s data would show that shareholders have taken advantage of this susceptibility to overuse. But that is not the case, and is in fact contrary to the Commission’s data. The Commission states that “[its] analysis shows *no discernible trend* in the number of submitted shareholder proposals in the 1997 to 2018 period,”²⁵ that “[t]he percentage of voted, omitted, and withdrawn proposals has *largely remained stable*” from 2004 to 2018,²⁶ and that the average number of proposals submitted to S&P 500 companies and Russell 3000 companies has *decreased by 33% and 26%, respectively*, from 2004 to 2018.²⁷ Further, a steady decline in voter support for shareholder proposals could also suggest that the process is being misused. However, the Commission also concludes that “the average voting support of all proposals has remained stable [between 2004 and 2018], but there is *an increase in the average voting support for environmental and social proposals* over the sample period.”²⁸

The Shareholder Participation Proposal Release indicates, at most, that there is consistent disagreement between management groups, arguing that the Ownership and Resubmission Thresholds should be increased,²⁹ and institutional investors and shareholder rights groups, supporting the existing Ownership and Resubmission Thresholds.³⁰ The Shareholder Participation Proposal Release also documents disagreement about the costs that issuers incur as a result of shareholder proposals,³¹ whether it is problematic for a small number of investors to submit

²² Shareholder Participation Proposal Release at 15.

²³ *Id.* at 19.

²⁴ *Id.* at 18.

²⁵ *Id.* at 70 (emphasis added).

²⁶ *Id.* at 72 (emphasis added).

²⁷ *Id.* at 74 (emphasis added).

²⁸ *Id.* at 85 (emphasis added).

²⁹ *See id.* at 11, n.19 (citing approximately 18 letters in response to the Commission’s November 2018 Proxy Process Roundtable that recommended increasing the Ownership and Resubmission Thresholds).

³⁰ *See id.* at 11-12, n.20 (citing approximately 53 letters in response to the Commission’s November 2018 Proxy Process Roundtable that were supportive of the existing Ownership and Resubmission Thresholds); *see also* Shareholder Participation Proposal Release at 16-17 (describing competing views on whether and how the Ownership Threshold should be modified), 43-47 (describing competing views on whether and how the Resubmission Thresholds should be modified).

³¹ *Compare id.* at 12, n.21-n.24, and accompanying text (estimating that each shareholder proposal costs an issuer between \$87,000 and \$150,000), *with id.*, n.25, and accompanying text (suggesting that the costs to companies are low and that most companies receive few shareholder proposals).

proposals to companies in which they own “nominal stakes,”³² and the value of resubmitting proposals.³³ In a July 2019 report, the Investment Company Institute found that shareholder proposals typically make up only a small fraction of overall proposals.³⁴ Furthermore, Commissioner Jackson’s Office found, based on available data, that many individual shareholder proposals tend to enhance shareholder value.³⁵ Thus, it is not clear from the Shareholder Participation Proposal Release that there is a significant problem with the shareholder proposal process. On the other hand, it is clear that the Shareholder Participation Proposal will stifle the contributions of certain shareholders.

Other than the Commission staff’s value judgments, informed by the views of management groups, there is scant analysis in the Shareholder Participation Proposal Release to suggest that shareholders are using the process excessively or inappropriately. Even if the Commission’s concerns were borne out by the data, which they are not, it is not clear what impact the Shareholder Participation Proposal would have on the volume and substance of these proposals, or on long-term shareholder value. The Commission admits that its “economic analysis does not speak to whether any particular shareholder proposal or type of proposals are value enhancing, whether the proposed amendments would exclude value enhancing proposals, or whether the proposed amendments would have a disproportionate effect on proposals that are more or less value enhancing.”³⁶ Further, the Commission is unable to say how many proposals would have been blocked under the Shareholder Participation Proposal if it had been in effect in 2018. Relying on assumptions, “without any data to support the assumption,” the Commission concludes only that the revised Ownership and Resubmission Thresholds would have excluded as little as 0% or as much as 56% of shareholder proposals that were submitted for consideration at shareholder meetings in 2018.³⁷ The Commission should therefore be concerned that the Shareholder Participation Proposal could materially and unexpectedly limit shareholder input, which in turn could materially affect the quality of corporate governance. The Commission should therefore not

³² Compare *id.* at 12, n.26, and accompanying text, *with id.*, n.27, and accompanying text (explaining that proposals submitted by these individuals between 2004 and 2017 received an average level of support of 40 percent and, in the commenter’s opinion, this level of support “indicates these filers provide a valuable service to fellow shareholders by promoting good corporate governance.”).

³³ Compare *id.* at 44, n.86, n.87, and accompanying text (claiming that resubmitted proposals distract shareholders), *with id.*, n.88, n.89, and accompanying text (explaining that it may take time and resubmitting proposals to increase interest and support for issues that at least some shareholders consider important).

³⁴ ICI Report at 4 (between 2011 and 2017, shareholder proposals under Rule 14a-8 accounted for only 2% of total proposals).

³⁵ See Data App’x at 5.

³⁶ Shareholder Participation Proposal Release at 112.

³⁷ See Statement on Shareholder Rights at n.15.

proceed to adopt the Shareholder Participation Proposal.

E. Conclusion as to the Shareholder Participation Proposal

In sum, the Shareholder Participation Proposal strays from the Commission's declared focus on the interests of Main Street investors, would deal a serious blow to the concept of corporate democracy, and may well be directed at a non-existent problem. The Shareholder Participation Proposal would suppress the voices of shareholders, particularly shareholders with fewer investment resources, on important corporate governance matters. It would do so without a thorough analysis of the need for the proposed changes or whether those changes would solve the problems that the Commission and management groups have cited as the bases for the Shareholder Participation Proposal. For the foregoing reasons, NASAA opposes the Shareholder Participation Proposal and strongly urges the Commission not to move forward with this rulemaking. If the Commission does see a need to move forward, NASAA urges the Commission to study the actual need for this proposal and make a determination, based on data, as to the depth of the problems cited by the management groups.

2. Comments on Release No. 34-87457: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (the "Proxy Advice Proposal")

Proxy voting advice is important to help investors decide how to vote their shares on important corporate governance matters, such as director elections or the sale of the company, and proxy advisory firms are an important aid to such investors.³⁸ Those providing proxy voting advice ("Proxy Advisers") exert considerable influence over shareholder decisions, while at the same time operating as for-profit entities working in the interests of their specific clients. That is why NASAA supports increased transparency and oversight of Proxy Advisers.

However, NASAA does not support the proposed review and feedback process because it apparently places the priorities of issuers and management ahead of Proxy Advisers' contractual obligations to their clients – i.e., shareholders and investors. While NASAA generally opposes the imposition of a review process between Proxy Advisers and their clients, NASAA specifically notes that any such process should accommodate the input of shareholder proponents, and should be crafted to allow sufficient time for Proxy Advisers to receive and react to such inputs.

A. NASAA supports increased transparency and oversight of Proxy Advisers.

NASAA generally supports increased transparency and oversight of Proxy Advisers in order to ensure that they are managing conflicts of interest appropriately and providing advice that

³⁸ See Commissioner Robert J. Jackson, Jr., Statement on Proxy-Advisor Guidance (Aug. 21, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-082119>; Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (the "Proxy Advice Release"), Release No. 34-87457 at 6; Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (the "Shareholder Participation Proposal Release"), Release No. 34-87458 at 5 ("[T]he proxy solicitation process rather than the shareholder meeting itself has become the 'forum for shareholder suffrage.'").

is based on complete and accurate information.³⁹ The disclosure requirements in the Proxy Advice Proposal are a good step in this direction. In order to avoid the extensive filing and information requirements in the proxy rules, a Proxy Adviser would have to disclose: 1) its material interests, and those of its affiliates, in the matter or parties concerning which it is providing voting advice; 2) any material relationship or transaction that it or an affiliate has with any of the interested parties connected to the matter on which it is providing voting advice; 3) any other information that would be material to assessing the objectivity of the voting advice in light of the conflicts presented; and 4) the policies and procedures the Proxy Adviser used to identify any material conflicts and the steps taken to address them.

These requirements are appropriately drafted to cover a wide array of potential interests, transactions, and relationships that may affect a Proxy Adviser's objectivity or the quality of its voting advice. The disclosures in the Proxy Advice Proposal also represent a significant enhancement to the current disclosures required under Rule 14a-2(b)(3), which requires only the disclosure of "any significant relationship" and do not reach the interests of the Proxy Adviser's affiliates. Ultimately, shareholders and investors would derive more benefit from the disclosure of this information directly in the voting advice.

NASAA also agrees with the Commission that proxy voting advice should be based on the "most accurate information reasonably available." However, as is explained below NASAA is concerned that the proposed review, feedback, and final notice requirements may jeopardize the timeliness, quality, and independence of proxy voting advice. Accordingly, NASAA urges the Commission to revise these provisions.

B. The requirements for review, feedback, and final notice would jeopardize the independence of proxy voting advice.

It is NASAA's view that requiring review, feedback, and final notice as currently proposed would undermine the independence of proxy voting advice.⁴⁰ NASAA acknowledges that certain Proxy Advisers already provide issuers with advance notice of their voting advice in certain circumstances. Nonetheless, at minimum these requirements would raise questions about the influence that issuers have on the contents of voting advice.

NASAA strongly recommends that the Commission take steps to preserve the independence of proxy voting advice. The Commission states that the Proxy Advice Proposal

³⁹ NASAA believes, however, that these concerns would be most intuitively and effectively addressed by regulating Proxy Advisers under the Investment Advisers Act of 1940 (the "Advisers Act"). The fiduciary duty under the Advisers Act, as well as registration with the Commission, mandated disclosures, and periodic examination by Commission staff, is well suited to ensure that proxy voting advice is "based on the most accurate information reasonably available and that the businesses providing such advice be sufficiently transparent with their clients about the processes and methodologies used to formulate the advice." See Proxy Advice Release at 10.

⁴⁰ Commissioners Jackson and Lee expressed similar concerns in their respective statements regarding the Rule Proposals. See Statement on Shareholder Rights; Commissioner Robert J. Jackson Jr., Statement on Proposals to Restrict Shareholder Voting (Nov. 5, 2019), https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting#_ftnref10.

“does not require [Proxy Advisers] to accept any such suggested revisions” provided by issuers.⁴¹ But interjecting the review, feedback, and final notice provisions, as currently proposed, would ensure that the independence of proxy voting advice, on which investors rely, would be unduly subordinated to the views of issuers and management.

C. Shareholder proponents should receive the same opportunity to review and provide feedback on proxy voting advice concerning their proposals.

In its current form, the Proxy Advice Proposal would require a Proxy Adviser to provide issuers and certain other soliciting persons an opportunity to review the intended advice and to provide feedback before the Proxy Adviser delivers the advice to its clients.⁴² As proposed, the Proxy Advisers’ clients, who are paying for the advice, and other shareholder proponents would be disadvantaged because issuers and management would be provided with an unfair and unearned opportunity to respond to the advice before it is offered. In yet another example of structural impediments that accomplish little beyond making it more difficult for shareholders to have their voices heard, the Commission has proposed to interfere with the contractual obligations of Proxy Advisers and to shut shareholder proponents out from the opportunity to access the advice. The Commission justifies this exclusion by stating that shareholder proponents are not required to file substantive disclosure documents with the Commission or to make public statements containing substantive information that Proxy Advisers are likely to include in their analyses.⁴³ In NASAA’s view, this reality is precisely why shareholder proponents should have an opportunity to review voting advice and correct errors. Denying shareholders that opportunity only serves to further marginalize their proposals and makes it harder for such proposals to attain the increased Resubmission Thresholds, let alone majority support.

D. The timeframes for review, feedback, and final notice may jeopardize the timeliness and quality of proxy voting advice.

The proposed review period would be five business days if the definitive proxy statement is filed at least 45 days before the vote or meeting⁴⁴ or three business days if the definitive proxy statement is filed between 25 and 44 days before the vote or meeting.⁴⁵ The Proxy Adviser would not need to provide an opportunity for review and feedback if the definitive proxy statement is filed less than 25 days before the vote or meeting.⁴⁶ The Proxy Adviser would also be required to provide “final notice” of the voting advice to the issuer or other soliciting person at least two business days before delivering the advice to clients.⁴⁷ If requested, the Proxy Adviser would have

⁴¹ Proxy Advice Release at 51.

⁴² See Proposed Rule 14a-2(b)(9)(ii), Proxy Advice Release at 138-40.

⁴³ Proxy Advice Release at 50-51.

⁴⁴ See Proposed Rule 14a-2(b)(9)(ii)(A)(1), *id.* at 138-39.

⁴⁵ See Proposed Rule 14a-2(b)(9)(ii)(A)(2), *id.* at 139.

⁴⁶ Proxy Advice Release at 47.

⁴⁷ See Proposed Rule 14a-2(b)(9)(ii)(B), *id.* at 139.

to include a hyperlink in its voting advice that leads to the issuer's or other soliciting person's statement regarding that advice.⁴⁸

These timeframes could make it very difficult for Proxy Advisers to provide quality, timely voting advice to investors. To illustrate, Commissioner Lee gives the following example:

An issuer could file its proxy statement 25 calendar days (3 weeks and 4 days) before its annual meeting. It could then take 5 business days of that time with its two reviews. That's one week down. The largest proxy advisor has stated that in some cases it must deliver its recommendation to the client two weeks before the meeting. That's three weeks down, leaving a total of four days (or at most six counting the weekend) for the proxy advisor to do the actual work of researching and compiling the recommendation.⁴⁹

Under these circumstances, the Proxy Adviser could rush the formulation of its advice, which would jeopardize the quality of that advice. Or, the Proxy Adviser could fail to deliver the voting advice to its clients with sufficient time for them to consider it fully when making voting decisions. NASAA does not believe that such results are either beneficial or reflective of the Commission's intent.

In order to avoid these results, the Commission should revise the review and feedback requirements so that a Proxy Adviser would only have to provide such an opportunity if the proxy statement is filed 45 days or more before the meeting or vote. This would strengthen the incentive for issuers and other soliciting persons to file their proxy statements earlier. Further, a 45 day threshold would not unduly burden issuers, as it is only five to ten days earlier than when they customarily file their proxy statements.⁵⁰ If the Commission is inclined to keep the two-tiered approach to these timeframes, NASAA recommends that the three business day review period be allowed only if the proxy statement is filed at least 35 days before the meeting or vote. This would allow Proxy Advisers an additional ten days to compile quality advice and would also be consistent with customary practice.

E. Conclusion as to the Proxy Advice Proposal

NASAA supports increased transparency and the avoidance of conflicts of interest through additional disclosures by Proxy Advisers. However, NASAA does not support a review process that interferes with the contractual obligations of Proxy Advisers to their clients by providing prior review for issuers and management. At the very least, NASAA asserts that shareholder proponents should receive the same opportunity to review and provide feedback on proxy voting advice as is proposed for other parties. The Commission also should revise the review and feedback requirements so that a Proxy Adviser would only have to provide this opportunity if the proxy

⁴⁸ See Proposed Rule 14a-2(b)(9)(iii), *id.* at 140.

⁴⁹ Statement on Shareholder Rights (emphasis original).

⁵⁰ See Proxy Advice Release at 46, n.114 (“Registrants customarily file their definitive proxy materials 35–40 days before a shareholder meeting.”).

statement is filed 45 days or more before the meeting or vote. Further, if the two-tier approach is adopted the three business day review period should be allowed only if the proxy statement is filed at least 35 days before the vote. We believe that these proposed revisions will strengthen the Proxy Advice Proposal and result in better, more timely voting advice for investors to rely on in their decision making.

3. Conclusion

For the foregoing reasons, NASAA urges the Commission not to move forward with the Shareholder Participation Proposal, and it urges the Commission to revise the Proxy Advice Proposal prior to adoption. The Shareholder Participation Proposal would jeopardize the concept of corporate democracy, make it substantially harder for smaller shareholders to have a meaningful say on issues affecting their interest in the companies they own, and serves primarily to benefit management. Furthermore, the Commission clearly lacks the data to justify the adoption of the Shareholder Participation Proposal. The Proxy Advice Proposal would meaningfully increase transparency and oversight of Proxy Advisers. Further, while NASAA opposes a process that interferes with the relationship between Proxy Advisers and their clients, the Commission should at least revise the proposed review and feedback process to provide access to shareholder proponents and sufficient time for Proxy Advisers to render quality advice.

Thank you for considering these views. NASAA looks forward to continuing to work with the Commission in the shared mission to protect investors. Should you have questions, please contact either the undersigned or NASAA's Executive Director, Joseph Brady, at 202-737-0900.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Gerold". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities