



Better Health
for a Better World

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Via e-mail to rule-comments@sec.gov

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Re: Comments Regarding File No. S7-22-19 – Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

Dear Ms. Countryman:

Mylan N.V. (“Mylan”) is submitting this letter in response to a request for comment by the U.S. Securities and Exchange Commission (“Commission” or “SEC”) regarding the SEC’s Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (“Proposed Amendments”). Mylan is a global pharmaceutical company committed to setting new standards in healthcare and providing 7 billion people access to high quality medicine. We offer a growing portfolio of more than 7,500 products, including prescription generic, branded generic, brand-name and biosimilar drugs, as well as over-the-counter (OTC) remedies. We market our products in more than 165 countries and territories, and every member of our approximately 35,000-strong workforce is dedicated to creating better health for a better world.

Mylan appreciates the opportunity to comment on the Proposed Amendments. As discussed more fully below, Mylan supports the Proposed Amendments.

I. Introduction

As an initial matter, Mylan would like to note its continued, consistent, and transparent engagement on the topics underlying the Proposed Amendments. Mylan, along with many other public companies, NASDAQ, and the Chamber of Commerce, has, for years, weighed in on transparency, accuracy, and fairness issues presented by the current role and practices of proxy voting advice businesses (“proxy advisors”).¹ As such, Mylan would like to commend the Commission for taking this significant step toward addressing those issues and note its

¹ See, e.g., Ronald Orol, *Mylan Ex-CEO and Glass Lewis Debate Proxy Adviser Power*, THE STREET (Jan. 8, 2015), <https://www.thestreet.com/markets/mergers-and-acquisitions/mylan-ex-ceo-and-glass-lewis-debate-proxy-adviser-power-13004724> (exemplifying the concerns with proxy advisors that Mylan executives have voiced particularly surrounding the inability for issuers to engage with proxy advisors following a recommendation).

appreciation for the Proposed Amendments. Mylan believes the Proposed Amendments will provide investment advisers and other institutional investors, who collectively invest trillions of dollars on behalf of millions of retail investors, with more accurate and complete information on which to make informed proxy voting and investment decisions.

II. The Need for Regulation of Proxy Advisor Voting Advice

Most American families invest for their futures through large mutual funds, exchange-traded-funds (“ETFs”), and pension funds that often own the securities of a large swath of public companies. As a result, the investment advisers to these funds end up voting in hundreds or thousands of shareholder meetings on thousands of proposals every year.² When used properly, proxy advisors may provide a useful service to investment advisers and other investors.

While proxy advisors may have a role to play in the proxy voting system, issuers and market participants have identified areas for practical improvement—for example, more transparent, accurate, and complete proxy voting advice facilitated by issuer engagement and full disclosure around conflicts of interest in connection with voting recommendations—for the benefit of issuers and investors. We think addressing these concerns will help level the playing field to place investors and the companies in which they invest on an equal footing with proxy advisors.

Proxy advisors are currently not legally required to engage with issuers on the proxy voting advice they provide to their clients. Although issuers often identify material inaccuracies or incomplete information in proxy voting advice, many issuers find it difficult to work with proxy advisors to appropriately address these errors prior to issuance of the final voting recommendation. For example, in a review of supplemental proxy filings for 2016, 2017, and the first three quarters of 2018, 107 filings cited 139 significant problems with proxy advisor recommendations at 94 companies. These problems included factual errors, analytical errors, and other material disputes.³

However, issuers do not have the ability to ensure that proxy advisors correct or address these issues in final reports. Moreover, companies have sometimes found it difficult to engage with investors directly to communicate or correct these issues. Likely due to the time constraints around shareholder meetings, some investors often decline to engage with companies directly and defer to the proxy advisors, creating a siloed vacuum for inaccurate information to flow into and impact consequential decision making. The end result in those circumstances is less accurate and complete information for investors and, in turn, potentially misinformed (and, it follows, economically inefficient) voting and investment decisions.

² Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Investment Advisers Act Release No. 5,325, Investment Company Act Release No. 33,605, 84 Fed. Reg. 47,420 (effective Sept. 10, 2019) (citing Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to SEC, at p. 3 (Mar. 15, 2019) (<https://www.sec.gov/comments/4-725/4725-5124158-183336.pdf>)) (stating that “[d]uring the 2017 proxy season, funds cast more than 7.6 million votes for proxy proposals, and the average fund voted on 1,504 separate proxy proposals for U.S. listed portfolio companies”).

³ Frank M. Placenti, *Are Proxy Advisors Really a Problem?*, Harv. Law School F. on Corp. Governance (Nov. 7, 2018), <https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/>.

In addition, issuers, market participants, and other observers have identified certain conflicts of interest associated with proxy advisors that investors may not fully appreciate when receiving proxy advice. Areas of concern include certain proxy advisors' ownership structures and potential conflicts associated with consulting services they provide to issuers, as well as potential conflicts that may result from the outsized influence some investor clients may have on proxy advisors' voting recommendations. Individually and collectively, these conflicts also may lead to less informed and economically suboptimal voting and investment decisions.

Based on years of experience and historical data, it is clear these issues cannot be fully resolved without regulatory intervention.

III. Support for the Proposed Amendments

Mylan supports the Proposed Amendments, which meaningfully address the aforementioned issues and are consistent with the Commission's ongoing efforts to improve corporate governance for the benefit of investors and issuers alike. The success of our capital markets rests on a foundation of full and accurate disclosure of material information to investors so that they can make informed voting and investment decisions. The Proposed Amendments are a significant step forward in achieving this goal without disrupting proxy advisors' ability to provide the potentially useful service (proxy voting advice) that is at the core of their business.

The Proposed Amendments will promote transparency and the flow of more accurate and complete information to investors, which will enable more informed voting and investment decisions for the ultimate benefit of shareholders, issuers, and our capital markets. By requiring proxy advisors to make a good faith effort to comply with proposed Rule 14a-2(b)(9) to avail themselves of the exemptions from the proxy solicitation rules available in current Rules 14a-2(b)(1) and (3), the Commission would promote constructive engagement between proxy advisors and issuers to ensure that investors receive accurate and complete proxy voting advice.

First, proposed Rule 14a-2(b)(9)(ii) and (iii) would require proxy advisors to (a) provide issuers and certain other soliciting persons specific periods of time to review and comment on proxy voting advice, (b) provide the final recommendation to issuers/soliciting persons at least two business days prior to submission, and (c) provide investors access to issuers'/soliciting persons' comments.

Currently, even for those companies with access to proxy advisors to request corrections of mistakes in proxy recommendations, the proxy advisor is not obligated to make the requested corrections or communicate the existence of a discrepancy to the ultimate recipient. This amendment will give qualifying issuers and soliciting persons a guaranteed period of time prior to submission to provide corrections and identify incomplete information. This also will allow proxy advisors sufficient time to incorporate such information and give those issuers and soliciting persons advance notice of the final voting advice. Importantly, it will provide investors with access to the voting advice and the issuer's/soliciting person's response, allowing the investor more information upon which to make an informed voting decision. Proposed Rule 14a-2(b)(9)(ii) and (iii) would arm investors with more of the information by facilitating valuable and constructive engagement between issuers/soliciting persons and proxy advisors.

Second, proposed Rule 14a-2(b)(9)(i) would require proxy advisors to disclose specified categories of conflicts of interest to investors. The disclosure of material information to investors, including conflicts of interest, has been a bedrock principle of the federal securities laws and regulations for more than eighty years. The disclosures outlined in proposed Rule 14a-2(b)(9)(i) are consistent with this bedrock principle—they require the disclosure of certain potential conflicts of interest that could be expected to have a material impact on voting and investment decisions.

Currently, proxy advisory firms wield a significant degree of influence on not only routine annual meeting proposals, but also in corporate control contests and other significant corporate matters. The voting recommendations in these matters can be influenced by a number of factors, including meetings and other communications with third parties (including proxy advisor advisory clients and other interested parties), yet there is currently little to no transparency into such engagements. In addition, some proxy advisors may provide consulting services to clients on particular matters and issue voting recommendations on those same matters.⁴ Such consulting activities and other service offerings could impact proxy advisor recommendations, and such recommendations can often determine the outcome of significant corporate matters, particularly with respect to challenges for corporate control.⁵ To address the conflicts raised by these scenarios, the Commission should make it clear that the amendments set forth in proposed Rule 14a-2(b)(9)(i)—particularly subsection (C) regarding information about the interest, transaction, or relationship of the proxy voting advice business (or its affiliates) that is material to assessing the objectivity of the proxy voting advice in light of the particular circumstances—would require disclosure of every instance of substantive engagement between proxy advisors and existing advisory clients and any other third party providing substantive input regarding the proxy advisor’s recommendations. These disclosures would give investors the information they need to determine what incentives the proxy advisors have when providing voting recommendations and, ultimately, would result in more informed voting and investment decisions.

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Mylan appreciates the opportunity to comment on the Proposed Amendment. We would be happy to discuss any of these points and to respond to any questions you may have.

Sincerely,



Brian S. Roman
Global General Counsel

⁴ Ike Brannon and Jared Whitley, Capital Policy Analytics, *Corporate Governance Oversight and Proxy Advisory Firms*, Harv. Law School F. on Corp. Governance (Sept. 17, 2018), <https://corpgov.law.harvard.edu/2018/09/17/corporate-governance-oversight-and-proxy-advisory-firms/>.

⁵ Michelle Celarier, *How Eight Men Inside a Maryland Office Park Decide the Fate of the Country’s Greatest Companies*, INSTITUTIONAL INVESTOR (Jan. 29, 2018), <https://www.institutionalinvestor.com/article/b16pv90bf0zj8/the-mysterious-private-company-controlling-corporate-america>.