

February 3, 2020

Via Electronic Submission

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice
(File No. S7-22-19)**

Dear Ms. Countryman:

The Investment Adviser Association¹ (IAA) appreciates the Commission's interest in proxy voting issues and the opportunity to comment on the proposal regarding proxy voting advice (**Proposal**).² We are extremely disappointed that, in seeking to address problems in the U.S. proxy voting system, the Commission chose to focus on proxy advisory firms rather than proxy infrastructure. As was made clear at the SEC Staff Roundtable on the Proxy Process held in November 2018 (**Roundtable**),³ the proxy infrastructure is in need of urgent attention. Investors and those voting on behalf of investors should be able to rely on the integrity of the proxy process and there are serious deficiencies in that process that cast doubt on its integrity. Our members want assurances that the proxy votes that they cast on behalf of their clients are in fact counted and counted accurately. We respectfully urge the Commission to prioritize proxy infrastructure, where there is evidence of significant problems.

In contrast, there is no compelling evidence justifying the current Proposal, and we are concerned about its likely negative effects, especially its effects on the ability of investment advisers to continue to vote proxies in their clients' best interest. In particular, we are concerned

¹ The IAA is the largest organization dedicated to advancing the interests of SEC-registered investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than \$25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information please visit www.investmentadviser.org.

² *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Rel. No. 34-87457 (Nov. 5, 2019), 84 FR 66518 (Dec. 4, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf>.

³ See <https://www.sec.gov/proxy-roundtable-2018>.

that the requirement for advance review of and feedback on proxy voting advice by issuers⁴ (**Review Process**) and the requirement to provide proxy voting advice to issuers before providing it to users of proxy advisory firms' services (**Notice Process**) would put more pressure on a proxy voting system that is already sorely in need of an overhaul and would undermine the independence of the advice.

Investment advisers of all sizes routinely vote proxies on behalf of their clients consistent with their fiduciary duty. They retain the services of proxy advisory firms to help them do this efficiently and effectively. Proxy advisory services are critically important to help investment advisers manage the mechanics and administrative process of voting and reporting on thousands of votes each year. These firms also provide substantial research and analysis regarding the matters subject to a vote, offer various types of voting guidelines that advisers can use, and make voting recommendations based on their own voting guidelines or on custom voting guidelines. In short, proxy advisory firms are integral to the voting process for many investment advisers.

Accordingly, we strongly object to regulations that would diminish the independence of proxy advice, make the services of proxy advisory firms more expensive and difficult to use, and increase barriers to entry. We also strongly object to any additional regulatory burdens that would impair investment adviser proxy voting. Advisers are already subject to a robust regulatory regime designed to ensure that they vote proxies in their clients' best interest, which includes the recent guidance issued to investment advisers in August on proxy voting (**Adviser Guidance**).⁵ Unless the Proposal is substantially modified, we believe that it will make it more difficult and expensive for investment advisers to vote proxies on behalf of their clients. This is not an outcome that the Commission should welcome.

We make the following points below:

- The Proposal is not necessary and is not justified by the evidence;
- The Proposal would make it more difficult for investment advisers to vote proxies, including by significantly compressing an already very challenging timeline, increasing the costs and barriers to entry for proxy advisory firms, increasing costs and burdens for investment advisers, and negatively affecting the independence of advice;
- The Review Process and the Notice Process are not necessary, but at a minimum they need to be significantly modified. If the Commission proceeds with these requirements, we recommend that the Commission:

⁴ For purposes of this letter, we use the term "issuers" to refer to registrants and certain other soliciting persons.

⁵ *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Rel. No. IA-5325 (Aug. 21, 2019), 82 FR 47420 (Sept. 10, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18342.pdf>.

- Replace the Review Process and the Notice Process with a single review of facts;
- Reduce the number of days for issuer review of and feedback on the facts;
- Allow of delivery of proxy voting advice to users of proxy advisory firms at the same time as it is delivered to issuers; and
- Exclude Custom Policies, as defined below, from the review process and the notice process; and
- The Commission should not impair or further regulate investment adviser proxy voting.

The Proposal is Not Necessary and is Not Justified by the Evidence

While we agree with the Commission's statement on the importance of proxy advisory firms providing accurate, transparent information to users of their advice, there is no compelling evidence that they are not already doing so, nor is there any other clear evidence on the need for additional regulation.

In fact, the Commission makes clear in the Proposal's economic analysis that there is insufficient evidence to justify additional regulation in this area, especially when the regulation proposed would be so consequential for the users of proxy advisory firms' services. First, the Proposal states that "[r]esearch on the role of proxy advice businesses in proxy voting has produced inconclusive results. For example, with respect to the amount of influence that proxy voting advice has on proxy votes, some studies suggest that proxy voting advice has substantial influence on proxy votes, and some studies suggest a more limited influence."⁶ The Proposal also recognizes that, "existing research provides limited information on the extent to which proxy voting advice business clients incorporate proxy voting advice into their voting determinations relative to what would be expected given such an advice relationship."⁷ These types of inconclusive statements do not provide a convincing case for the need for the Proposal.

The Commission raises concerns about the accuracy of information provided by proxy advisory firms in the Proposal, and states that "an overarching purpose of Section 14(a) [of the Securities Exchange Act of 1934 (**Exchange Act**)] is to ensure that communications to shareholders about their proxy voting decisions contain materially complete and accurate information."⁸ We agree that factual accuracy is critically important to the integrity of the proxy voting process. However, we do not believe that the Commission has shown that there are significant factual errors in proxy voting advice that would justify the burdens the Commission

⁶ Proposal at 66541.

⁷ *Id.*

⁸ Proposal at 66523 (footnote omitted).

seeks to impose. According to the Commission's economic analysis, 5,862 registrants filed proxy materials in 2018, and there were only 17 (less than 0.3%) additional definitive proxy materials filed in response to perceived factual errors of proxy advisory firms, and 28 (less than 0.5%) additional filings due to perceived analytical errors.⁹ This small number of potential errors does not support the significant costs and negative consequences of the Proposal on investment adviser proxy voting.

Further, the Commission's economic analysis does not include sufficient analysis of the effect of the Proposal on small and medium-sized investment advisers, which will be disproportionately affected. Indeed, the Commission has acknowledged that the benefits of aspects of the Proposal may be "limited," while it has significantly underestimated the costs.¹⁰

The Commission also has not had time to consider whether and to what extent the Adviser Guidance, which was only issued in August – less than four months before the Proposal was issued and well before the upcoming proxy season – addresses the concerns outlined in the Proposal. We strongly agree with Commissioner Lee's statement that the Adviser Guidance "introduces increased costs and time pressure into an already byzantine and highly compressed process" – which will only be exacerbated by the Proposal.¹¹ However, the Adviser Guidance is now in effect and we believe that the Commission should not proceed with a rulemaking regarding proxy voting advice without first considering the effect of this guidance on proxy advisory firms' and advisers' practices.¹² For example, the Adviser Guidance calls on investment advisers and proxy advisory firms "to review their policies and practices in light of the guidance ... in advance of next year's proxy season"¹³ and the Commission is not yet in a position to assess how any such reviews may address its concerns.

⁹ Proposal at 66545-66546.

¹⁰ Proposal at 66547-66548. The economic analysis also does not include evidence of harm to investors, including retail investors, that would support the Proposal.

¹¹ Statement of Commissioner Allison Herren Lee on Proxy Voting and Proxy Solicitation Releases (Aug. 21, 2019) (**Lee Statement**), available at <https://www.sec.gov/news/public-statement/statement-lee-082119>.

¹² We do not believe that the Adviser Guidance was necessary and, in our view, the Commission should have solicited public comment before making it effective. We also agree with Commissioner Lee that the Adviser Guidance contains prescriptive direction and that "[a] regulated entity ignores such direction at its peril." Lee Statement.

¹³ Adviser Guidance at 47422.

The Proposal, Combined with the Adviser Guidance, Would Make it More Difficult and Expensive for Advisers to Vote Proxies

The Proposal would amend the definition of “solicitation” to include proxy voting advice. In order to be exempt from the proxy information and filing requirements, proxy advisory firms would have to comply with additional disclosure and procedural requirements that include the Review Process and the Notice Process. Under the Review Process that is in proposed amendments to Rule 14a-2(b) under the Exchange Act, proxy advisory firms would be required to provide issuers a copy of proxy voting advice *before* that advice is delivered to the users of the proxy advisory firm’s services. If the issuer files its definitive proxy statement at least 45 calendar days before the shareholder meeting or voting deadline, the proxy advisory firm must provide a review and feedback period of no less than five business days. The review and feedback period would be no less than three business days if the issuer files its definitive proxy statement at least 25 calendar days, but less than 45 calendar days, before the shareholder meeting or voting deadline. The issuer would also be able to request that the proxy advisory firm include in its proxy voting advice a hyperlink to the issuer’s statement regarding the proxy voting advice.

Under the Notice Process in the proposed amendments to Rule 14a-2(b), no earlier than the expiration of the five business day or three business day period in the Notice Process, and no later than two business days *prior* to delivery of the proxy voting advice to users of the proxy advisory firm’s services, the proxy advisory firm must provide issuers a final notice of the voting advice which includes the advice that the proxy advisory firm will deliver to users of its services, including any revisions made as part of the Review Process.

The Proposal also would amend Rule 14a-9 under the Exchange Act, the proxy rules’ antifraud provision, to include examples of information that may be misleading to fail to disclose, such as the proxy advisory firm’s business methodology, sources of information, conflicts of interest, or use of standards that materially differ from relevant standards or requirements set or approved by the Commission.

As we discuss above, we believe that the Commission has not shown that the Proposal as a whole is necessary. More specifically, the Proposal raises several concerns for investment advisers, including the following:

Compresses an Already Challenging Time Schedule: Investment advisers are extremely concerned with the timelines associated with the Review Process and the Notice Process. Despite the dearth of evidence to indicate that there is a problem in the proxy advice area, the Commission states that the Proposal would “ensure that those who receive proxy voting advice have an efficient and timely way to obtain and consider any response a registrant or certain other soliciting person may have to such advice.”¹⁴ We believe that the Proposal would do the opposite

¹⁴ Proposal at 66525.

because it would significantly reduce the time that investment advisers have to review proxy materials and engage with issuers.

As we have discussed in previous comment letters, the current timelines in the proxy process are already exceedingly tight, underscoring the importance of the Commission engaging in a holistic review of the proxy voting process rather than targeting the services of proxy advisory firms in a way that would further frustrate the overall proxy voting process.¹⁵ The Commission emphasizes the importance of the review time to be accorded issuers, but does not focus on how much time would remain for advisers to review the information. Indeed, the timelines set forth in the Proposal would only make the voting process more challenging, and could in fact impair proxy voting by investment advisers. Reducing timelines for advisers to review proxy materials and engage with issuers is also not consistent with – and would make it even harder for advisers to follow – the Adviser Guidance, which emphasizes the need for investment advisers to conduct reviews and oversight in voting proxies in the best interest of their clients.

Increases Costs and Barriers to Entry: The amendment to the definition of “solicitation” and the proposed disclosure and procedural requirements related to the exemption from the proxy information and filing requirements would increase costs and liability for proxy advisory firms. The reduced timelines in the Proposal also could increase costs for proxy advisory firms, because they may be required to hire additional staff to evaluate proxy materials in a shorter period of time. The proposed amendments to Rule 14a-9 would also likely increase costs for proxy advisory firms since they could be expected to result in these firms’ needing to take additional steps to reduce their risk of liability. In response to the Commission’s question about the effects of the Proposal on competition in the proxy advisory industry,¹⁶ we believe that, by increasing operational and liability costs, the Proposal would increase barriers to entry. This is not beneficial for the proxy voting system, especially given the very small number of firms currently offering proxy voting advice. With costs increasing for proxy advisory firms, users of proxy advisory firms, including investment advisers, would likely pay more for proxy advice. Smaller investment advisers may be particularly negatively affected by increases in costs for proxy advisory services because they are less likely to be able to have staff solely dedicated to the proxy voting process. Even larger investment advisers with such staff may need to hire additional staff due to compressed timeframes and other impacts of the Proposal. These increased costs would make it more difficult for advisers to continue to vote proxies on their clients’ behalf, including on behalf of retail clients.

¹⁵ Letter from Gail C. Bernstein, IAA General Counsel, regarding the SEC Staff Roundtable on the Proxy Process (Dec. 31, 2018), available at <https://www.sec.gov/comments/4-725/4725-4840960-177135.pdf> (IAA Roundtable Letter).

¹⁶ Proposal at 66539, Question 62.

Negatively Impacts the Independence of Proxy Voting Advice: We are also very concerned that the Review Process and the Notice Process would negatively impact the independence of proxy voting advice. Investment advisers and other users of proxy advisory services greatly value the independence of the advice provided them by proxy advisory firms. They already obtain information about what the management of an issuer recommends but retain the services of proxy advisory firms to obtain proxy voting advice that is independent from management.¹⁷ Advisers value – and pay for – an independent viewpoint on proxy issues. The Commission should not consider it to be a deficiency in the proxy process if a proxy advisory firm’s viewpoint differs from that of the management of an issuer, particularly on non-routine or contested matters. Investment advisers currently assess this information to determine how to vote in their clients’ best interest. We believe that the proposed Review Process and Notice Process, by introducing the potential for influence, will reduce the independence of the advice paid for by users of proxy advisory firms.¹⁸

The Review Process and the Notice Process are Unnecessary, But at a Minimum They Need to be Significantly Modified

While we believe that the Proposal, in particular the proposed addition of the Review Process and the Notice Process to Rule 14a-2(b), is not warranted, if the Commission nevertheless proceeds with amendments to Rule 14a-2(b), it should make important changes to address concerns relating to timing, independence of proxy voting advice, and the use of Custom Policies.

Replace the Review Process and the Notice Process with a Single Review of the Facts and Do Not Require a Review of Proxy Voting Advice

If the Commission determines to proceed with the Proposal, it should replace the proposed Review Process and the Notice Process with a single review of underlying facts in order to preserve the independence of both the proxy voting advice provided by proxy advisory firms, and the process used to develop that advice. We believe that a single review and opportunity for feedback – limited to facts – by issuers should be sufficient to address the Commission’s concerns about the factual accuracy of proxy voting advice. This would allow issuers to address with proxy advisory firms any factual errors they identify.

¹⁷ See *Recommendation of the SEC Investor Advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals* (Jan. 24, 2020), available at <https://www.sec.gov/comments/s7-22-19/s72219-6698769-206000.pdf> and Lee Statement.

¹⁸ We recognize that some proxy advisory firms currently provide for a review by certain issuers of the accuracy of facts used in proxy voting advice. Our understanding is that the review provided is limited to facts, or to a baseline report solely related to annual meetings that do not include controversial issues or mergers and acquisitions. The information provided to issuers is limited, and does not include recommendations in connection with specialty policies or Custom Policies, discussed below.

The Commission is also concerned with what it calls “methodological weaknesses.” For example, the Commission cites a comment letter that addresses “perceived methodological limitations of proxy advisory firms’ evaluation of executive compensation structures.”¹⁹ However, we believe that these are largely issues of opinion or analysis, rather than fact. The Commission acknowledges in the Proposal that “there is often disagreement between proxy voting advice businesses and registrants over whether information in proxy voting advice should be classified as an ‘error.’”²⁰ Opinions based on accurate facts should not be subject to review by issuers. Users of proxy advisory services, including investment advisers, are paying for independent advice and analysis – including methodological approaches – and this is what they should receive.

Reduce the Number of Days for Review and Feedback

The timelines in the proxy process are already very compressed. Adding the Review Process and the Notice Process would only make a difficult situation worse. In fact, the tight timeline is one of many factors that point to the need to address the proxy process and infrastructure before trying to solve for a perceived problem with proxy voting advice around which there is no consensus.

The Review Process and the Notice Process as proposed – and indeed any advance review or advance notice requirement – would take away time for investment advisers to review the information they receive to inform their proxy voting and engage with issuers. The reduced time would make it more difficult for advisers to fulfill their fiduciary duty to vote proxies in their clients’ best interest. Some advisers may choose to no longer vote proxies due to the compressed timeframe. We do not believe that this would be a beneficial outcome.

At a minimum, if the Commission proceeds with the Proposal, it needs to reduce the number of days that issuers have to review and provide feedback to proxy advisory firms. Any delay that is added to the process reduces time that could be used by investment advisers to analyze the issues and engage with issuers and others prior to voting. In our view, eliminating the Review Process and the Notice Process, or, at a minimum, replacing those processes with a single review of facts only that would not exceed two business days would lead to a better outcome than the proposed timeframes.

¹⁹ Proposal at 66528-66529, Footnote 94, citing letter from Neil Hansen, Vice President, Investor Relations and Corporate Secretary, Exxon Mobil Corporation (June 26, 2019).

²⁰ Proposal at 66529, Footnote 99.

Allow for Delivery of Proxy Voting Advice to Users of Proxy Advisory Firms' Services at the Same Time as it is Provided to Issuers

If the Commission proceeds with the Review Process and the Notice Process, it should allow for delivery of proxy voting advice to proxy advisory firms' clients at the same time as it is provided to issuers. When investment advisers and other users of proxy advisory services have paid for independent advice, they should be able to receive it in a timely manner and not after it has been shared with issuers. There is no justification for providing proxy voting advice to issuers ahead of proxy advisory firm clients.

Exclude Custom Policies from the Review Process and the Notice Process

The Commission asks whether voting advice formulated under policies established by users whose specialized needs are not addressed by a proxy advisory firm's benchmark or specialty policies (**Custom Policies**) should be subject to the proposed Review Process and the Notice Process.²¹ Where proxy voting advice reflects a user's Custom Policies, we see no need for any information to be shared in advance for review or notice. Proxy voting advice that reflects a user's Custom Policies is proprietary to that user and may be indicative of a proprietary investment approach. It may also reflect confidential information about the user and its investment process. In these situations, we do not think it is appropriate to require the proxy advisory firm to engage with the issuer on the user's Custom Policies. We believe it is up to the user to so engage as it considers appropriate.

While we believe it is important to preserve the independence of *all* advice provided by proxy advisory firms to users of their services, it is especially important in cases where a proxy advisory firm's advice and analysis are based on Custom Policies that are created by a user of the proxy advisory firm's services. In these situations, the proxy advisory firm's advice is not related to policies or methodologies developed by the proxy advisory firm, but is commissioned and driven by the user that is undertaking the responsibility to vote. Where a user of proxy advisory services has developed its own Custom Policies based on its clients and investment objectives and strategies, we do not believe that it is necessary or appropriate for the Commission to require issuer review or notice of proxy voting advice based on those Custom Policies.

If the Commission requires any review in connection with Custom Policies, a single review of the facts, as discussed above, would address concerns the Commission has about factual accuracy, and we see no justification for requiring anything more. If the Commission proceeds with requiring issuers to be provided with the opportunity to review proxy voting advice – as opposed to a facts-only review – we urge the Commission to exempt advice based on Custom Policies from that process. In addition, if the Commission goes forward with the Notice Process and insists on requiring proxy voting advice to be delivered to issuers *before* it can be

²¹ Proposal at 66536, Question 33.

provided to users of proxy advisory firms' services, we urge the Commission to exempt proxy voting advice based on Custom Policies from that process as well.²²

The Commission Should Not Impair or Further Regulate Investment Adviser Proxy Voting

The Commission requests comment on whether the availability of the proposed exemptions for proxy advisory firms from the proxy information and filing requirements should be "conditioned on a proxy voting advice business structuring its electronic platform to disable the automatic submission of votes in instances where a registrant has submitted a response to the voting advice."²³ The Commission also asks if it should "require proxy voting advice businesses to disable the automatic submission of votes unless a client clicks on a 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."²⁴ We strongly disagree with both of these concepts and believe that they are wholly inappropriate. The idea that the Commission would mandate how a business sector, such as proxy advisory firms, must structure its business or platform offerings, sets a dangerous precedent.

Disabling the voting submission process used by proxy advisory firms would significantly burden and potentially disrupt the voting process. It would also significantly increase the chance that votes are not cast, inadvertently or by choice. The Commission asks "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?"²⁵ We believe that disabling the voting submission process would indeed result in these additional negative consequences and we are frankly troubled that the Commission is even requesting comment on such an idea.

We also believe that these requests for comment are based on an inaccurate perception that pre-population tools and automated processes imply a lack of independent consideration of important issues by users of proxy advisory firms' services. As was discussed extensively at the Roundtable, this is simply not the case. In any event, advisers are required to exercise care and diligence in their proxy voting processes, whether the systems are manual or automated. Indeed, investment advisers are currently subject to substantial regulation in their voting of proxies on

²² Excluding proxy voting advice related to Custom Policies from the Review Process and the Notice Process would also make any such process more efficient for issuers. It is not clear to us how issuers could review the thousands of sets of recommendations that reflect users' Custom Policies in the tight timeline of the proxy process.

²³ Proposal at 66537, Question 44.

²⁴ *Id.*

²⁵ *Id.*

behalf of their clients. The Investment Advisers Act of 1940 (**Advisers Act**) fiduciary duty,²⁶ the Proxy Voting Rule,²⁷ the Compliance Program Rule,²⁸ and the Adviser Guidance together provide a robust regulatory framework designed to ensure that advisers vote proxies in the best interest of their clients and, as part of that, that they conduct appropriate due diligence on third party providers. No further regulation of the investment adviser proxy voting process is warranted.

* * *

For the reasons discussed above, we believe that the Proposal is not justified by the evidence and that it will only serve to increase costs and barriers to entry for proxy advisory firms, negatively impact the independence of proxy voting advice, and impose additional burdens on investment advisers that vote proxies on behalf of their clients. The Commission should instead focus on how to improve and modernize the proxy infrastructure to ensure the integrity of the system and effective shareholder engagement. Please do not hesitate to contact the undersigned or Gail Bernstein at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Karen L. Barr

Karen L. Barr
President & CEO

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner

Dalia Blass, Director, Division of Investment Management
William Hinman, Director, Division of Corporation Finance

²⁶ See *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Rel. No. IA-5248 (June 5, 2019), 84 FR 33669 (July 12, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf>.

²⁷ Rule 206(4)-6 under the Advisers Act.

²⁸ Rule 206(4)-7 under the Advisers Act.