

**Committee on Securities Law  
of the Business Law Section of the  
Maryland State Bar Association**

February 3, 2020

**VIA EMAIL TO RULE-COMMENTS@SEC.GOV**

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Secretary  
Securities and Exchange Commission  
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Re: Proposed Amendments to Exemptions from the Proxy Rules for Proxy  
Voting Advice, File No. S7-22-19

Ladies and Gentlemen:

This letter expresses the views of the Committee on Securities Laws (the “Committee”) of the Business Law Section of the Maryland State Bar Association (“MSBA”), with respect to the above-referenced proposing release, SEC Release No. 34-87457; File No. S7-22-19 (sometimes referred to herein as the “release”) relating to the Securities and Exchange Commission’s (the “Commission”) proposed amendments to the proxy rules under the Securities Exchange Act of 1934, as amended, to address their applicability to proxy voting advice. The membership of the Committee consists of securities practitioners who are members of the MSBA and includes lawyers in private practice, business, and government. The Business Law Section and the Board of Governors of the MSBA have not taken a position on the matters discussed herein, and individual members of the MSBA and the Committee, and their associated firms or companies, may not necessarily concur with the views expressed in this letter.

The Committee wishes to express its general support for the proposed amendments. We understand that the proposed amendments will require proxy voting advice businesses, as entities often called “proxy advisory firms” are referred to in the release, to adjust their timetables for providing proxy voting advice to their clients and result in a measure of extra work and inconvenience for these firms. We believe, however, that given these entities’ “integral role in the proxy voting process,” as stated in the release, that some regulation of these entities is appropriate. We believe that, in general, the proposed amendments strike an appropriate balance in addressing the needs of proxy voting advice

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businesses, registrants, and investors although, as noted below, we suggest some simplification to the review process proposed in the amendments that may serve to make them less cumbersome.

We are aware that the proxy voting advice businesses have been quite strident in their objections to the notion that the voting advice they provide has a significant impact on the outcome of votes at stockholder meetings. But the experience of members of the Committee tells us otherwise. As just one example, a few years ago, Institutional Shareholder Services (“ISS”) decided that the practice of many Maryland companies to limit the ability to amend their bylaws to their board of directors, as permitted under Maryland law, was a poor corporate governance practice. Accordingly, ISS started recommending votes against or withheld from directors that served on the corporate governance committees of such companies or the entire board of such companies without a corporate governance committee. That year, Maryland-incorporated registrants started receiving a significantly larger number of withheld votes for such directors compared to their historical norm. It appears that their stockholders had not considered these bylaw provisions a problem in connection with the companies’ prior year annual meetings, but once ISS took a position that it was a problem and recommended a vote against those directors, there was a noticeable impact on these companies’ voting results.

It may well be that not permitting a company’s stockholders to amend the company’s bylaws *is* in fact a poor corporate governance practice; perhaps these proxy voting advice businesses have rightly anointed themselves the arbiters of what constitutes good corporate governance; and perhaps the positions they take are 100% justifiable and correct and are always in the best interests of stockholders. Even if true, however, this does not negate the critical point, which is that many if not most institutional investors follow the advice provided by these proxy voting advice businesses.

As acknowledged in the release, institutional ownership of public companies and, as a result, the influence of proxy voting advice businesses that institutional investors rely on to make their voting decisions, has increased dramatically since the current rules governing the proxy voting process were implemented. We object to the notion that the proxy rules, which were implemented at a time before the proxy voting advice businesses had the role and influence they have now, should not be updated to address current realities. Further, we find one of the proxy voting advice businesses’ objections in this regard – that they do not play a significant role in the proxy voting process, to be

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baffling at best.

With respect to specific proposals set forth in the release, the Committee strongly supports the provisions of the proposed amendments that would require enhanced disclosure about conflicts of interest, methodology, sources of information, standards on which voting recommendations are based (particularly standards that are different than the Commission's), and related matters. We believe that these disclosures would be beneficial to the proxy voting process and in the public interest. The proposed conflict of interest disclosure is of particular importance. For example, no amount of "firewalls" between the department of a firm (or between affiliated entities) that rates registrants on corporate governance and assigns them a corporate governance score, reports such scores, and uses them in determining voting recommendations made to clients, and the department of the same firm (or an affiliated entity) that sells to those same registrants services to help them increase that score, can fully eliminate the inherent conflict of interest in this arrangement. Required disclosure of conflicts, or potential conflicts, of interest or similar arrangements are ubiquitous across federal securities laws, required of registrants, investment advisers, and broker-dealers alike; these disclosures are not considered burdensome or inappropriate with respect to such other securities-industry participants, and we see no reason why the analysis should be different when applied to proxy voting advice businesses.

Further, disclosure is generally considered a good thing by proxy voting advice businesses and the investor advocates that generally support them - at least when it comes to disclosure by registrants. In the past, the Commission's mere suggestion of streamlining disclosure requirements so that issuers can focus on material information has been met with howls of protest from investor advocates deriding the notion that there could possibly be any sort of "information overload" in the disclosure arena despite annual reports that have grown to 100+ pages. It seems a little disingenuous that these same groups now opine that requiring any mandated disclosure by the proxy voting advice businesses, which as noted in the release is intended to "help ensure that investors who use proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions," is unnecessary or unduly burdensome.

We further believe that it is appropriate that the proxy voting advice provided by proxy voting advice businesses be subject to Rule 14a-9, which prohibits materially misleading misstatements or omissions in proxy

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solicitations. We see no salient reason that statements of proxy voting advice businesses should not be subject to a provision that applies to other participants in this process, including those exempt from the proxy rules' filing requirements, and do not believe that avoiding misleading, etc., statements could ever be considered a "burden" or otherwise not appropriate.

While there were some contrary views on the Committee regarding the proposal to require that proxy voting advice businesses provide registrants and certain other soliciting persons the opportunity to review and comment on their proxy voting advice before such advice is communicated to client stockholders, on balance the Committee supports this proposal as well, although we think it would be helpful if the process could be simplified and discuss a couple of suggestions in that regard below.

As noted above, we understand that implementation of the proposed review period will add time and work to these businesses processes for providing proxy voting advice, but we do not believe that this is an appropriate reason to continue the status quo, which leaves many registrants with no avenue to respond to the statements and recommendations made in such voting advice or opportunity to attempt to correct factual errors therein. As noted in the release, "[i]n recent years, registrants, investors, and others have expressed concerns about proxy voting advice businesses" including "the accuracy and soundness of the information and methodologies used to formulate proxy voting advice businesses' recommendations." We agree, as discussed in the release, that the proxy voting advice businesses' efforts to address these concerns to date have been inadequate. As noted in the release,

[e]ven those proxy voting advice businesses that provide such review opportunities do not provide all registrants with an advance copy of their reports containing their voting advice. For example, it is our understanding that proxy voting advice businesses do not typically extend this opportunity to registrants with smaller market capitalization or to registrants holding special meetings.

We do not see a basis for excluding smaller registrants, or registrants asking stockholders to vote at special meetings - during which stockholders are often asked to vote on major corporate events, such as a significant acquisition or the acquisition of the registrant by another entity, from the opportunity to review and provide feedback on proxy voting advice. Further, even for proxy voting advice businesses that do provide registrants this opportunity, or make an effort to alert their clients of errors in their voting advice, there is no requirement for

them to do so. This means not only that the proxy voting advice businesses that currently provide advance copies of their proxy voting advice to certain registrants can choose at any time not to do so, whether in a particular instance or on an ongoing basis, but that there are no consequences if they fail to follow their own policies in this regard.

We also wish to address the objection, as set forth in Commissioner Jackson's November 5, 2019 public statement on the release ("Statement on Proposals to Restrict Shareholder Voting"), that the proposed amendments to provide registrants and certain other soliciting persons with the opportunity to review and provide feedback on proxy voting advice before it is disseminated is objectionable because "firms recommending a vote against executives must now ... risk federal securities litigation over their methodology." Registrants risk federal securities litigation each time their stock price drops or they engage in a merger or acquisition transaction. Among investor advocates, the risk of litigation against registrants and their management for providing false or misleading statements or omitting material facts in their disclosures to stockholders, or not properly vetting proposed merger and acquisition transactions, is seen as a good thing - a way to hold management accountable. Given these businesses' "integral role in the proxy voting process," we believe the risk of litigation for similar failures as a way to hold these businesses accountable should similarly be viewed as a positive development. Yet, Commissioner Jackson states that this proposal would instead serve to "further insulate corporate managers from accountability," and we believe that other commenters objecting to the proposed amendments will make similar arguments. We believe that statements like these are rooted in the base assumption, not wholly uncommon, that with respect to stockholder voting and the proxy process management's actions are based on their own self-interests, while the those of persons who oppose management are unbiased and beyond reproach. Analyzing the review proposal in the context of such an assumption would of course make it more likely to be deemed unnecessary regulatory overreach. While such an assumption is certainly true with respect to at least some registrants, we believe that it is inappropriate and counterproductive to use such an assumption as a starting point for determining appropriate levels of regulatory oversight and disclosure and compliance obligations and attempting to fairly balance the appropriate needs and obligations of all participants in the proxy voting process.

We also acknowledge the view of proxy voting advice businesses that what registrants sometimes deem "factual errors" are often merely differences of

opinion. Again, however, the fact that not all instances of accused factual errors may in fact be factual errors does not seem to us a basis for not providing registrants with an avenue to point out, and attempt to correct, factual errors where they do exist. Given that the proposed amendments do not require a proxy voting advice businesses to accept, address, or even seriously consider (or for that matter, even look at) any feedback from registrants or other soliciting persons, we believe the threat of litigation is necessary to provide a modicum of accountability when proxy voting advice businesses simply ignore feedback that is intended to address what are clearly false or misleading factual statements or inappropriate methodology.

Further, we anticipate that the risk of litigation, while existent, would be low in all but the most egregious cases. Registrants are generally not in the habit of commencing litigation, which diverts management time and the company's money to actions other than running the business, for frivolous reasons, which among other things would open up management to stockholder claims for violation of fiduciary duty, waste of corporate assets, etc. As a result, we believe that the risk of litigation would, as a practical matter, be remote, therefore helping to hold proxy voting businesses accountable for their advice without seriously impacting their ability to recommend votes against management. Further, the risk of litigation is a simple fact of life in the United States, particularly for those involved in the securities industry; helping a particular group of participants in that industry avoid the possibility of being subject to litigation does not seem to be a reasonable basis for continuing to exempt them from any oversight or compliance obligations in this regard.

The simple fact is that the current regime provides many registrants with little or no ability to respond to proxy voting advice even in the face of factual errors. Given the significant role proxy voting advice businesses now play in the proxy voting process, some amount of oversight is warranted. We understand that proxy voting advice businesses will have to absorb some additional costs and extra work and personnel time as a result of complying with these proposed requirements, but we do not believe such costs and time will be exorbitant and are confident the proxy voting advice businesses will find a way to absorb the extra costs and activities without upending the "decades-long relationships between investors and their advisors."

We also disagree, and believe that the proxy voting advice businesses would as well, that the proposals would "significantly skew voting recommendations toward executives." We believe that, similar to the way that

most registrant's management want to do what they believe is best for their companies, most voting proxy advice businesses and their personnel will hew to their mission and obligations towards their own clients and, for the most part, would adapt to absorb these costs and personnel time and not be swayed to make recommendations that are more in line with management solely to avoid the risks of incurring additional costs. We suspect that proxy voting advice businesses would object to the notion that they would let such factors influence their voting recommendations.

In addition, for the most part, the understanding that new regulations will impose costs and work/time has historically not been a reason to wholly avoid oversight or the imposition of new obligations. The pay ratio disclosure requirement set forth in Item 402(u) of Regulation S-K, which has cost many registrants significant amounts of time and money<sup>1</sup> to present a ratio that has little benefit in the investor context,<sup>2</sup> is a good example of this.

We do, however, acknowledge that the proposed review process may be viewed as quite cumbersome, and would support any recommendations to simplify this process that do not negate the benefits of the proposal. For example, perhaps the requirement that proxy voting advice businesses provide registrants and certain other soliciting persons with a final notice of voting advice could be limited to instances in which the final proxy voting advice contains material changes from the version initially provided to registrants or other soliciting person or where material comments from the Company or other soliciting person will not be addressed in the version sent to stockholders. It also may be helpful to provide a mechanism whereby registrants and other soliciting persons could notify a proxy voting advice business that has provided it an advance copy of the proxy voting advice that it either has no comments or does not intend to review the proxy voting advice. This could allow the proxy voting advice business to not have to wait the full three- or five-day period before moving onto the next step in the process or sending the voting advice to its client.

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<sup>1</sup> See, e.g., Ike Brannon, President, Capital Policy Analytics, Center for Competitive Markets Competitiveness, U.S. Chamber of Commerce, *The Egregious Costs of the SEC's Pay-Ratio Disclosure Regulation* (May 2014).

<sup>2</sup> E.g., Chris Gaetano, *Study Critiques SEC Pay Ratio Rule, Calls It Disclosure By Soundbite*, The Trusted Professional (February 12, 2019), available at <https://www.nysscpa.org/news/publications/the-trusted-professional/article/study-critiques-sec-pay-ratio-rule-calls-it-disclosure-by-soundbite-021219> (“The study said that ... any data produced is not very useful for making comparisons between companies. ... Investors themselves, while interested in the ratios (63 percent said they planned to compare ratios between companies), do not consider them very important. According to the study, ‘[t]hree of the largest institutional investors have indicated that the pay ratio would not be a significant factor in their compensation analysis for proxy voting purposes.’”).

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Finally, we suggest that the Commission study and consider whether there is an alternative to the proposed requirement that proxy voting advice businesses include a hyperlink to the registrant's or other soliciting person's responsive statement in their proxy voting advice and any electronic medium used to deliver such advice. We believe that, ideally, a registrant's or other soliciting person's statement addressing proxy voting advice should be provided to stockholders by the registrant or other soliciting person, respectively, to the extent practicable. While currently this is in many cases not possible, as discussed above and in the release, we believe that the provision of an advance draft of the proxy voting advice to registrants and such other soliciting persons, as proposed, may give them the opportunity to prepare a responsive statement and provide such statement to stockholders prior to the time that stockholders would typically vote after receiving the proxy voting advice.

We appreciate the Commission's consideration of the foregoing comments.

Very truly yours,

*Committee on Securities Law* of the Business Law  
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Penny Somer-Greif, Chair



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