CARL C. ICAHN
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February 7, 2020

The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Allison H. Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
Vanessa A. Countryman, Secretary
US Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: Comments on Proposed Amendments to Exemptions from the
Proxy Rules for Proxy Voting Advice (File Number S7-22-19)

Dear Chairman Clayton, Commissioners Jackson, Lee, Peirce and Roisman, and Secretary Countryman:

Thank you very much for the opportunity to comment on the Commission's recently proposed rules in respect of proxy voting advice. Notwithstanding the specific concerns highlighted in this letter, we believe that the Commission is still in a position to fashion a workable set of rules to address any perceived regulatory gaps. If it chooses to do so, there is no doubt that this process will be viewed as the good faith attempt to serve the interests of all market participants, as it is surely intended. We look forward to working with the Commission toward that goal.

While there are certain limited provisions within the rulemaking proposals that we can support (such as encouraging disclosure regarding actual or potential conflicts of interests by proxy advisors), on balance we think the proposed rules are a big step backward rather than forward in the area of corporate governance.

Perhaps most importantly, in light of what we view as procedural gaps present in the promulgation of the proposed rule, we believe that pursuit by the Commission of its current path assumes needless legal risk that could damage the Commission's long-standing authority under the Securities and Exchange Act of 1934, as amended (the "Exchange Act").

FURTHER STACKING OF THE DECK

Fundamentally, the proposed rules have the effect of further shifting the balance of power from shareholders to incumbent boards of directors and management. It has always been the case that incumbents have use of the corporate purse (i.e., shareholders' money), the machinery of their

corporate apparatus and the ability to drive media as tremendous advantages when shareholders deign to impose accountability for underperformance. The system has always been stacked against shareholders.

I speak with nearly 60 years of experience when I say that, while there are many well-run companies in this country, there are also unfortunately far too many that are run by boards and CEOs that are doing appalling jobs. If these companies were privately held, their boards and CEOs would have been replaced years ago, but unfortunately it is extremely difficult in our corporate governance system to remove incumbents. This breeds a dangerous lack of accountability, which often results in waste, including CEOs that are drastically overpaid for jobs being very poorly done. It also results in the very worrisome declining productivity in far too many of our companies. Unfortunately, the very difficult job of trying to change the boards and CEOs of these underperforming companies by conducting a proxy contest will become much more difficult under the proposed new rules, which will curtail the efficacy of proxy advisory firms, firms that at times dare to speak out against overpaid CEOs and boards doing inadequate jobs and have therefore brought down upon them the wrath of the powerful Business Roundtable.

A system where companies can influence the substance of a corporate governance research report of which they are the main focus is awkward at best, and a recipe for disaster at worse. Giving two sneak peeks of proxy advisors' reports to companies is a measure that would actually compromise investors' opportunity to make more informed decisions with good advice when they vote. This is a degradation rather than improvement of the status quo. The problem is compounded by the fact that the Commission has provided for a clear litigation path and timing for companies to threaten proxy advisors with litigation if they do not agree with the substance of the report.[1] The result of such a system is unlikely to result in high integrity research, in our view.

We are in no way suggesting that the Commission cannot or should not assert its own jurisdiction over proxy advisors. It is clear that the Commission intends to do so. No one is suggesting that proxy advisors should get a free pass if they publish knowingly false or misleading information. Nor is there any evidence they have done so. But the Commission can retain its power and authority to regulate proxy advisors without granting private rights of action to companies at the same time. The proposed rules should be modified to achieve that result.

INCREASING LITIGATION IS A BAD IDEA

Importantly, the Commission has taken the view that the litigation pathway is nothing new. In other words, in the proposing release, the Commission asserts that it has always been the case that Rule 14a-9, which contains the anti-fraud provisions of the proxy rules, has always applied to proxy advice and proxy advisors. As a consequence, the analysis goes, there was no reason for the Commission to examine the costs to constituents of such an approach.

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[1] If a company chooses to sue, it can assert without cost the "materiality" of its claim and nonetheless impose real litigation costs on proxy advisors. These are not deep-pocketed businesses. This litigation pathway introduces existential risk to their business model, and that of any new entrant. New entrants under these circumstances are hard to imagine.

Regardless of whether proxy advice and proxy advisors were always subject to Rule 14a-9, the proposing release goes much farther than the historic words contained in Rule 14a-9. Consequently, it appears to us that the Commission failed to apply its own guidelines for economic analysis as required in the rule promulgation process.

By way of one example, the Commission proposes to add Note (e) to Rule 14a-9, which would explicitly provide that Rule 14a-9 could be violated by "the failure to disclose information such as the proxy voting advice business's methodology..."[2] The Commission's guidance on proxy advisors from August 2019 was replete with suggestions that "inadequate," "incomplete," "incorrect" or "insufficiently explained" methodology or analysis can be the basis of a Rule 14a-9 violation. It appears to us that the references to "methodology" and "analysis" provide newly invented Rule 14a-9 violations in the context where companies allege that the methodology or analysis were flawed or inappropriate or the conclusion was based on what the complainant considers incorrect or inadequate methodology.

In our view, this amounts to a newly invented cause of action. We do not believe introducing new grounds for companies or investors to sue proxy advisors (or anyone else) is a good idea, and in any event the costs and implications of such a new rule have not been sufficiently explored or accounted for.[3] The historic rule of Rule 14a-9 was intended to deal with misstatements of facts and omissions to state facts necessary to make the statements made not misleading. Methodology and analysis are not facts; they are part of a process by which market participants form their own subjective beliefs and should be remote from second guessing in the context of litigation. Regulating opinions and beliefs is a far step away from the Commission's historic role.

To put a fine point on it: it is not clear from the proposing release whether companies will also be subject to claims under Rule 14a-9 for methodologies they choose to present information. For instance, will it be the case that shareholders will have a private right of action against companies for how they choose to present benchmark peer companies for compensation purposes? If supposed methodological weaknesses can pollute proxy advisors work, is it not plausible that it would impact companies' work, too? Would there be any policy purpose served by applying some elements of an anti-fraud rule against only some participants? This is an area that we believe has not been sufficiently thought through to merit a rule change by the Commission at the present time.

INSUFFICIENT ECONOMIC ANALYSIS

The proposing release is bereft of explanations as to what methodologies or modes of analysis are seen to be erroneous or otherwise merit regulatory intervention. Without knowing what the Commission intends to cover in terms of concrete examples, and without any analysis of the practical effects and costs of such a change, it is impossible for constituents to fully understand the intended and unintended consequences of the proposed rule changes.

The failure of sufficient data and economic analysis is not limited to the issue of "methodologies"

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[2] *See* Proposing Release, 70.

[3] On the other hand, if the Commission does grant companies a private right of action it should also give investor-advocates parity in standing as well.

under Rule 14a-9. The entire proposing release (like the August guidance before it) asserts with little or no independent support that there are factual inaccuracies and methodological weaknesses in proxy advisors' work. The only supporting "proof" contained in the proposing release are the self-serving (and we believe to be factually incorrect) statements by consultants-of-hire to the issuer community. These claims of errors, as cited in the proposing release, seem more like proof of the absence of a problem rather than the basis for regulation. Even assuming all the claimed errors and the like are true (which we dispute), the error rate for these companies is absurdly low. Globally, we understand that they cover something approaching 26,000 companies and have less than a 1% error rate.

If it is true that the Commission engaged in no independent work or analysis to validate these claims, we think that is a problem. It is one thing for the Commission to be sensitive to claims of error or methodological biases that have been brought to its attention. It is another matter entirely for the Commission to regulate on the basis of those claims with no data-driven validation. Dramatic changes to corporate governance should be preceded by deep study and clear thinking. We do not believe that the rule proposal, in its current state, reflects that required effort. In our assessment, the combined effect of both rule changes would be to disrupt a system that, by all shareholder accounts, is not broken.

RISKS TO THE COMMISSION'S BEDROCK AUTHORITY

The Commission has a peculiar role, in a manner of speaking. Despite the First Amendment of the Constitution promise of free speech, under the Exchange Act the Commission has a set of laws and rules that both compel and restrict certain kinds of speech related to the securities markets. The exercise of this authority is no more present than in the proxy solicitation process.

The reason that the Commission's authority has only rarely been challenged under First Amendment principles is because the nature of both the process and substance of the agency's rules have built a moat of authority. The process and substance of the proposed proxy advisor rules fall short on both counts. If there were litigation challenging the Commission's approach, we believe the resulting judgement could substantially damage and curtail the Commission's authority.

The proposed rules seek to regulate opinions and judgements, not disclosures or omissions of facts. It is clear that the proposed rules would be a prior restraint on proxy advisors' speech. The two sneak peek requirement is the operative mechanism, coupled with the private litigation threat by companies on old and wholly new litigation grounds. Prior restraints on speech are the most vulnerable to attack under the First Amendment. Even if the proposed rules are only viewed merely as commercial speech, the burden on the Commission to justify its proposed rules will be overwhelmingly heavy, particularly since it only targets independent, third party proxy research providers with no interest, pecuniary or other stake in the outcome of a contested solicitation. The absence of any data on the part of the Commission that actually validates perceived claims of errors on the part of proxy advisors will, we predict, be fatal to Commission's defense. The absence of any economic impact analysis by the Commission on many aspects of the proposed rules provides confirming and independent grounds for the same result.

A SOLUTION IN SEARCH OF A PROBLEM

A great many mutual funds, pension funds, retirement plans and other professional investors have lined up firmly in opposition to the proposed rules. Dwell deeply on the wise words of William Stromberg, President & CEO of T. Rowe Price in his letter to you on this subject on January 29, 2020 where he noted, "[w]e join others in noting that the Proposal appears to be a solution in search of a problem." This is no small statement. T. Rowe Price is a nearly $40 billion public company that manages over $1 trillion in assets. As a public company CEO, it is certain that Mr. Stromberg is greatly inconvenienced yearly by his experience with proxy advisors. But as an investor, he recognizes the value that proxy advisors bring to his firm and the marketplace. We find ourselves in good company.

Some advocates for the proposed rules have begun shifting justification of further regulatory intrusion because of some perceived absence of independence of proxy advisors and their clients.[4] Flags have been raised by the specter that large asset manager clients get together and decide if they do not like a certain board member of a particular company and use proxy advisors as a means to coordinate.

This suggestion is far from our real-world experience. In the context of a proxy contest, we have to publicly disclose and file proxy statements and all additional written materials used in our advocacy, often in advance or simultaneously with their use. Once we do so, we openly coordinate directly with other shareholders through the Commission's highly regulated solicitation process in an effort to receive a proxy, or the right to vote, on those shareholders' behalf. Proxy advisors do not even come on the scene until the end of the contest, most of which rarely go the distance. We are startled by any suggestion that any person engaging in a lawful proxy solicitation, whether advocating directly to another shareholder or its external proxy advisor, should somehow raise any issues under the beneficial ownership reporting rules.

We urge the Commission to appreciate that the proxy process is virtually the only process by which shareholders are permitted to openly coordinate amongst themselves, so long as the soliciting persons comply with the rules. This exercise of coordinated speech in furtherance of the shareholder franchise is one of the few market-driven feedback mechanisms that have a chance of imposing accountability. The whole point of the proxy rules is that, so long as you follow them, shareholders are permitted to grant and receive voting authority between each other in a perfectly lawful manner. Corporate democracy is hard enough as it is. We are baffled by any suggestion that coordination among shareholders in the context of a proxy contest could (or should) create any conflict of interest or represent a potential Section 13D violation.

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[4] *See* https://corpgov.law.harvard.edu/2020/02/02/speech-by-commissioner-elad-roisman-on-myths-and-realities-modernizing-the-proxy-rules/#13b

Historically, the Commission has a recognized and sensible approach to evaluating new rules. A rule's potential benefits and costs should be considered in making a reasoned determination that adopting a rule is in the public interest. We do not believe that the proposals as currently framed reflect that approach.

Respectfully Submitted,

CARL C. ICAHN