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March 30, 2020

Elad L. Roisman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attention: Ms. Vanessa Countryman, Secretary

Re: Release No. 34-87457 (Nov. 5, 2019); File No. S7-22-19

Dear Commissioner Roisman,

Thank you for taking the time to speak to us about our comment letter on the proposed Rule with respect to proxy advisory firms. As you know, we continue to have significant concerns about aspects of the proposal and we appreciated the opportunity to share these with you in greater depth.

As you invited us to do, we are following up regarding the alternative approach that you alluded to in general terms in a speech at the Council on Institutional Investors ("CII") earlier this month. Although we cannot offer adequate comments in the absence of a formal proposed text or a full description of this novel idea, we wanted to try to offer some initial thoughts. As we understand it, the alternative you suggested would include two components. Each proxy advisory firm would send its report to the issuer and its clients at the same time, and then notify its clients in the event the issuer raises any objections. In addition, the rules would impose a "speed bump" (also included in the Commission's report) period during which the proxy voting advice services would be required to suspend their application of established voting policies, or so-called automatic voting. (It was not clear to us when that period of suspension would end and whether such policies could be reinstated as originally intended.)

We want to underscore three concerns we have about this alternative framework. First, because the alternative framework was not addressed in the Commission's request for comments, adopting it would raise a serious question regarding whether the framework is a "logical outgrowth" of the Commission's original proposal, and if not, whether it complies with the requirements under the Administrative Procedure Act for appropriate notice and comment.[1] We believe the better course, as we expressed on the call, would be to initiate a separate rulemaking process in which the "speed bump" proposal is transparently and fully articulated to the public for comment. This approach would also clarify that it is actually an SEC proposal in contrast to, as you pointed out to us, simply the idea of one Commissioner. Many may not view your speech as a proposal on which to comment, particularly while their attention is understandably focused on the ongoing COVID-19 crisis.

[1] *See, e.g.*, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) ("Under the APA … [a] final rule must be a 'logical outgrowth' of the proposed rule."); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (vacating rule based on failure to comply with "logical outgrowth" requirement).

As discussed on the call, we also do not believe that the proposed dual "preclearance" approach in which issuers and clients each have an opportunity to comment would be any less problematic under the First Amendment than the Commission's proposal of a "prior review." The requirement that proxy advisory firms must notify their clients of an issuer's objections to the content of the report is a form of compelled speech and is prohibited by the First Amendment.[2] Proxy advisors will be effectively required to broadcast the views of public companies to their clients, which would (1) undermine their credibility with clients, (2) burden them with additional administrative costs, and (3) create potential legal issues as they are compelled to become the intermediaries for issuer statements to investors. These factors make proxy advisors' role under the "speed bump" proposal one that cannot be easily reconciled with their status as a source of independent and objective advice. That is especially true because public companies have constant opportunity to advocate to their shareholders every day, and there is no credible basis to believe that they need the proxy advisory firms to express their views for them.

As was pointed out in many of the comments on the Commission's proposal, proxy advisory firms and issuers are not on equal footing. Public companies are well-resourced and powerful institutions. Although proxy advisors play an important role in shareholder elections, the balance sheets and teams of advisors that can be marshalled by large public companies mean that their "error correction" will resonate loudly in practice. These objections from an issuer would have a substantial chilling effect on the speech of proxy advisors, who will not want to be reprimanded, threatened, or sued by public companies in front of their clients. The alternative, like the original proposal, would no doubt impact the way proxy advisors frame their recommendations, inhibiting fair and impartial criticism of issuers. In effect, there would be significant damage to the free exchange of ideas that is essential for the proper functioning of the capital markets.

We do not believe such intrusive measures to prevent "errors" are justified for the simple reason that there is no evidence of persistent or even occasional errors by the proxy advisors. We have repeatedly cited the lack of evidence of significant errors and have yet to see any such evidence be presented. The independent advice proxy advisors offer investors and the market plays a critical role in the open debate that allows investors to make informed judgements about public companies. Equally important, public companies already control their disclosures and have access to other avenues including the media in order to correct any such errors, even if they were shown to exist or emerged in the future.

We would add that if there were in fact significant problems in how investors' votes are being cast – another purported argument in favor of the need for a speed bump – we would expect the many investors whose votes were cast against their wishes to have spoken up. There have been no such concerns expressed in any significant way. This speed bump then cannot be said to be required in order to protect the integrity of investors' votes. The unfortunate false letter writing campaign that the SEC was subjected to and in part relied on only emphasizes the reality that there were few if any bona fide investors who are concerned about the way votes are cast. However, we know that issuers do object to the influence of proxy advisors and how votes are cast. Therefore, while we understand that you do not

[2] *See, e.g.*, *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795, 798 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," thus triggering "exacting First Amendment scrutiny.").

intend to carry water for companies and their desire for more control over what proxy advisors say, you can see why these proposals are broadly perceived to be in service of corporations and not investors.

Finally, we note that the "speed bump" alternative replicates the most fundamental problem of the original proposal because it exceeds the scope of the Commission's authority under the Exchange Act. The alternative, even with its modifications, still seeks to regulate objective and independent advice and, for the reasons we outlined in our original letter, is therefore beyond the scope of the Commission's authority regulate "solicitation." The plain meaning of "solicitation," and the purpose and consistent interpretation of this statutory text, do not support such a significant expansion of the Commission's authority. We therefore urge the Commission to abandon any form of required preclearance as an element of the proposal.

Thank you again for taking the time speak with us on the proposed Rule. We are available at your convenience if you would like to discuss any other aspects of the Rule or our comment letter.

Sincerely,

DocuSigned by:
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cc:

Chairman Jay Clayton

Commissioners Allison Lee and Hester Peirce