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May 1, 2020

Vanessa A. Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

VIA ELECTRONIC MAIL  
[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Subject: Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice  
SEC File Number S7-22-19

Dear Ms. Countryman:

The Shareholder Communications Coalition (“Coalition”) submits this supplemental comment letter to the Securities and Exchange Commission (“SEC”), regarding its Proposed Rule to require proxy advisory firms to comply with additional disclosure and procedural requirements when seeking exemptions to the SEC’s proxy solicitation rules.<sup>1</sup>

Advance Review by Public Companies of Proxy Advisory Firm Reports

In its earlier comment letter, the Coalition expressed strong support for the SEC’s proposal that proxy advisory firms should be required to provide each public company with a copy of their draft reports—in advance of dissemination to their clients—to permit a company to review and correct any inaccurate factual information and comment on any methodological weaknesses contained in these reports.<sup>2</sup> The Coalition agrees with the SEC that shareholders should not be voting based on any inaccurate information or flawed assumptions that may be present in the reports.<sup>3</sup>

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<sup>1</sup> See Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66,518 (Dec. 4, 2019) (hereinafter (“2019 Proposed Rule on Proxy Voting Advice”).

<sup>2</sup> See Letter from Niels Holch, Executive Director, Shareholder Communications Coalition, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, at 6 (Feb. 3, 2020), available at <https://www.sec.gov/comments/s7-22-19/s72219-6744360-207909.pdf> (hereinafter “Coalition Comment Letter”).

<sup>3</sup> 2019 Proposed Rule on Proxy Voting Advice at 66,529.

The largest proxy advisory firm—Institutional Shareholder Services (ISS)—already provides these draft reports (on a very short turnaround) to public companies that are members of the S&P 500 Index.<sup>4</sup> The Coalition agrees that this practice should be extended to all listed companies interested in this draft review process and that the companies should have a minimum of 3-5 business days to review and comment on a report.<sup>5</sup> This advance disclosure requirement would permit each company to review and comment on: (a) the factual accuracy of statements made in the report; and (b) the methodologies and assumptions used to develop any recommendations in the report.<sup>6</sup>

After company comments are received, a proxy advisory firm would retain its exclusive right to determine whether to make changes to the company report before disseminating it to its clients. However, the Coalition agrees with the SEC’s proposal that proxy advisory firms would be required to disclose on the front page of a report when comments have been received by the company that is the subject of the report.

Since these reports are distributed electronically, this can easily be accomplished by a hyperlink on the front page of the report, permitting investors with easy access—if they so choose—to the public company’s comments. This “draft review and comment” process is the most efficient and cost-effective mechanism to improve the quality of the information provided to investors before voting decisions are made.

Given the compressed nature of proxy season—and the time constraints imposed on proxy advisory firms and their clients—this proposed approach is simple and far more preferable than the use of an ombudsman or an internal appeal process within each proxy advisory firm to address any issues raised by a public company during the draft review process. Under the SEC’s

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<sup>4</sup> ISS also provides report drafts to French issuers, as recommended by France’s securities regulator, the Autorité des Marchés Financiers (AMF), although the review period is just 24 hours. ISS has touted the benefits of this review process for its clients. See Institutional Shareholder Services, French Market Engagement Disclosure, available at <https://www.issgovernance.com/policy-gateway/french-market-engagement-disclosure/> (“ISS believes that this review process helps [improve] the accuracy and quality of its analyses, an outcome that is in the best interests of both the institutional investors for whom the analyses are prepared, as well as for the issuers that are the subject of these reports.”).

<sup>5</sup> Under the Proposed Rule, public companies that file definitive proxy statements at least 45 calendar days before a shareholder meeting would be permitted five (5) business days to review and comment on a draft report. Companies that file definitive proxy statements less than 45 calendar days, but at least 25 calendar days before a shareholder meeting, would be permitted three (3) business days to review and comment on a draft report. And public companies that file definitive proxy statements less than 25 calendar days before a shareholder meeting would not be permitted any advance review of a draft report. The Coalition supports this concept and these proposed timetables.

<sup>6</sup> Despite concerns expressed by the proxy advisory firms about the burden of this proposal, the Coalition expects that a number of public companies will not participate in this process. For example, companies that have a controlling shareholder, dual-class voting rights, or have only routine matters on the proxy ballot (*i.e.*, election of directors and approval of auditors) would have little interest in reviewing draft proxy advisory firm reports. Similarly, companies with triennial “Say on Pay” votes may only be interested in commenting on proxy firm reports during those years when compensation matters are on the ballot. These factors would reduce the burden of the SEC’s proposal and it is very unlikely that all public companies would submit comment letters to proxy advisory firms every year.

proposal, the proxy advisory firm would retain complete control over the content in its report. A proxy firm's investor clients also would have access to any company comments, if they choose to click on the hyperlink on the front page of the report.

### Concurrent Review of Proxy Advisory Firm Reports

Several commenters have recommended to the SEC that proxy advisory firms should provide final versions of their reports to public companies at the same time the reports are distributed to their clients.<sup>7</sup> Companies would then have the opportunity to raise any objections to the proxy advisory firm report and the proxy firm would notify its clients of such objections.<sup>8</sup> One commenter proposed that the proxy firm could insert a “company-provided link into an amended report, or simply send its clients a link to any company filing on EDGAR that addresses the [proxy advisory firm’s] report.”<sup>9</sup>

Unfortunately, voting practices used by proxy advisory firms and their clients, including the timing of votes immediately after a final report is issued, present significant challenges to the effective implementation of this recommendation.

### Robo-Voting Practices by Proxy Advisory Firms and Their Clients

The automated operation of ISS and Glass Lewis voting platforms—often called robo-voting—was first brought to the SEC’s attention by a Coalition member, the National Investor Relations Institute (NIRI), in an August 2017 letter to the SEC.<sup>10</sup> NIRI’s research determined that both proxy advisory firms were automatically submitting client votes using pre-established default positions, without any affirmative consent or real-time voting decisions by their clients.<sup>11</sup>

This automated process is easy to understand. Before proxy season begins, each ISS and Glass Lewis client establishes general voting guidelines and policies in advance of voting on actual proposals and matters at individual shareholder meetings. As shareholder meetings are scheduled and proxy materials are distributed, each proxy firm generates an electronic ballot for

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<sup>7</sup> See, e.g., Letter from Karen L. Barr, President & CEO, Investment Adviser Association, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at 9 (Feb. 3, 2020), *available at* <https://www.sec.gov/comments/s7-22-19/s72219-6742881-207804.pdf>; and Letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, at 29 (Jan. 30, 2020), *available at* <https://www.sec.gov/comments/s7-22-19/s72219-6729687-207381.pdf>.

<sup>8</sup> See Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, at 11 (Feb. 3, 2020), *available at* <https://www.sec.gov/comments/s7-22-19/s72219-6743669-207831.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Gary A. LaBranche, President and CEO, National Investor Relations Institute, to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission (Aug. 3, 2017) (hereinafter “2017 NIRI Letter”).

<sup>11</sup> *Id.*

each client; and, using algorithmically generated instructions, each ballot is pre-populated with voting decisions based on each client's pre-established guidelines and policies.

When proxy advisory firm reports are disseminated, the shares of all clients are voted as this computerized system has mechanically instructed, without the need for any review or approval by an investor client of ISS or Glass Lewis—typically within 24-48 hours.

This voting system works without a human interface and a client only needs to interact with the ISS or Glass Lewis voting system if it wants to change a vote from its general guidelines and policies, or if it disagrees with an ISS or Glass Lewis voting recommendation.

In its earlier comment letter on the Proposed Rule, the Coalition presented recent research indicating that many mid-size and smaller investment advisers have chosen to outsource their voting decisions to ISS and Glass Lewis.<sup>12</sup> This approach to proxy voting reduces costs to these investment advisers and helps them avoid hiring and maintaining an in-house staff to analyze and vote on proxy items.

To document these outsourcing practices, the Coalition examined hundreds of investment adviser disclosures and presented excerpts from more than 35 of them in its comment letter on this rulemaking.<sup>13</sup> These disclosures establish that many of these investment advisers have chosen to adopt ISS and Glass Lewis guidelines and policies on proxy matters, without developing their own policies and procedures. These disclosures also identify a substantial number of investment advisers that are pre-authorizing ISS and Glass Lewis—without further client review—to cast votes using ISS and Glass Lewis recommendations on shareholder proposals and other matters considered at shareholder meetings.

A few examples from these disclosures include the following:

- “We generally follow ISS’s recommendations and do not use our discretion in voting.”<sup>14</sup>
- “Subject to exceptions as noted below, it is our policy to vote client shares based on the recommendations of Glass-Lewis & Co.”<sup>15</sup>

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<sup>12</sup> *Coalition Comment Letter* at 9-10.

<sup>13</sup> See Shareholder Communications Coalition, *Excerpts from Investment Advisory Disclosures—ISS and Glass Lewis Proxy Voting Systems* (February 2020), available at <https://www.sec.gov/comments/s7-22-19/s72219-6744360-207909.pdf>.

<sup>14</sup> Driehaus Capital Management LLC, Form ADV Part 2A, Item 17, at 27, August 28, 2019.

<sup>15</sup> U.S. Bancorp Investments, Inc., Wrap Fee Program Brochure, at 14, November 13, 2019,

- “We outsource all proxy voting services to ISS and have adopted the ISS annual voting guidelines based on their research and due diligence.”<sup>16</sup>

The American Council for Capital Formation (ACCF) has commissioned several studies that provide additional documentation of these outsourcing practices and the automated voting platforms used to cast client votes using ISS and Glass Lewis recommendations.

In 2018, the ACCF commissioned a study determining that, in the 2016 and 2017 proxy seasons, between 15-20% of shareholder votes were cast within three (3) days of an adverse recommendation by a proxy advisory firm.<sup>17</sup> This data is further confirmation that many investment managers automatically follow the recommendations of their proxy advisory firms without conducting their own due diligence.<sup>18</sup>

A second study by ACCF in 2018 examined how investment managers have historically voted when compared to ISS recommendations on the same ballot items at shareholder meetings.<sup>19</sup> ACCF reviewed the voting records of 175 entities with more than \$5 trillion in assets under management and found that these investment managers followed ISS recommendations more than 95% of the time between July 2012 and 2018.<sup>20</sup>

Although the SEC did not directly address these automated voting practices in its Proposed Rule, it did acknowledge them:

One way a proxy voting advice business may assist clients with voting execution is through an electronic vote management system that allows the proxy voting advice business to (1) populate each client’s ballots with recommendations based on that client’s voting instructions to the business (‘pre-population’); and (2) submit the client’s ballots to be counted. Clients utilizing such services may choose to review the proxy voting advice business’s pre-populated ballots before they are submitted or to have them submitted automatically, without further client review (‘automatic submission’).<sup>21</sup>

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<sup>16</sup> Vision Capital Management, Inc., Form ADV Part 2A, Item 17, at 30, January 1, 2020.

<sup>17</sup> Frank M. Placenti, “Are Proxy Advisors Really a Problem?,” American Council for Capital Formation, at 8 (October 2018), available at [https://accfcorgov.org/wp-content/uploads/2018/10/ACCF\\_ProxyProblemReport\\_FINAL.pdf](https://accfcorgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf). This ACCF study presented data from a survey of 100 public companies about their experiences in the 2016 and 2017 proxy seasons.

<sup>18</sup> Letter from Timothy M. Doyle, General Counsel, American Council for Capital Formation, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, at 1 (Nov. 14, 2018), available at <https://www.sec.gov/comments/4-725/4725-4649199-176473.pdf>.

<sup>19</sup> Timothy M. Doyle, “The Realities of Robo-Voting,” American Council for Capital Formation (November 2018), available at [https://accfcorgov.org/wp-content/uploads/ACCF-RoboVoting-Report\\_11\\_8\\_FINAL.pdf](https://accfcorgov.org/wp-content/uploads/ACCF-RoboVoting-Report_11_8_FINAL.pdf).

<sup>20</sup> *Id.* at 7.

<sup>21</sup> 2019 Proposed Rule on Proxy Voting Advice at 66,519-66,520.

### Coalition Recommendations

The Coalition strongly opposes the concurrent review recommendation. With 15-20% of the institutional investor vote being cast within 72 hours of the issuance of a final company report, any comments by a company about a proxy advisory firm report would not be timely and would be completely marginalized and irrelevant for these initial voting decisions. And this problem is only exacerbated by the widespread practice by mid-size and smaller investment advisers to outsource voting decisions to these proxy advisory firms, based largely on the policies and the recommendations of these firms.

The Coalition believes that the SEC's current proposal for a draft review process is far simpler and strikes a better balance among the parties. The proposal would merely extend the existing ISS draft review process to all public companies. It confirms that the proxy advisory firm would retain control over the content of the report as it is finalized. And the use of a hyperlink to any company comment letter permits investors to review the company position without the need for an ombudsman or an internal appeal process to resolve disputes before or after a report is issued.

It defeats the purpose of a review for potential errors to have that review *after* the final report is distributed to ISS and Glass Lewis clients. As demonstrated by the research presented above (and confirmed by anecdotal evidence reported by individual companies), a significant number of votes are going to be cast in favor of ISS and Glass Lewis recommendations during the time when this review and comment process is unfolding. For example, assume a proxy advisory firm has made a material error in analyzing a company's executive compensation policies. The proxy firm finalizes its report and distributes it to its clients and to the public company involved. The company takes 2-3 business days to find the error(s) and submit its comments to the proxy firm. The proxy firm then takes another 2-3 business days to evaluate the comments, amend its report, and re-issue it to clients. During this period of at least five (5) business days (and probably more), a significant number of institutional investors have already voted and may or may not be willing to change their votes. And, more importantly, their earlier voting was based on inaccurate information.

These problems are eliminated with a draft review process that occurs *before* a final company report is issued. The SEC has proposed several sensible timeframes that would apply, depending on when a company files its definitive proxy statement. These timeframes could certainly be adjusted to give proxy advisory firms more time to process company comments, but the review and comment process should occur before a final report is issued and before proxy voting occurs.<sup>22</sup> The current proposal by the SEC is simply an extension of the draft review

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<sup>22</sup> A properly constructed draft review process, with at least three (3) business days for any company review and a hyperlink to any company comment letter on the final version of the report, may render as unnecessary the SEC's

process that ISS currently offers to companies listed in the S&P 500 Index. The SEC's proposal also would be feasible for Glass Lewis to implement, as the firm recently announced an opportunity for companies to provide unedited feedback within seven (7) days after the publication of its proxy reports.<sup>23</sup>

The Coalition also reiterates its view that a proxy advisory firm should not be permitted to offer an automated voting service that allows the proxy firm to make and execute voting decisions on behalf of investment advisers without any ongoing oversight by these clients, except for the approval of general guidelines and policies before proxy season begins.<sup>24</sup> Additionally, the Coalition strongly opposes investment adviser policies that simply adopt ISS or Glass Lewis recommendations during the proxy process, without any further actions taken by the advisers to exercise their voting responsibilities.

In adopting this position, the Coalition does not oppose the use of technology to pre-populate individual ballots for ISS and Glass Lewis clients, based on each client's general guidelines or policies. However, each investment adviser client should be required to review each pre-populated ballot and provide affirmative consent by expressly authorizing and directing its voting decisions for each individual ballot prepared by the proxy advisory firm.<sup>25</sup>

Investment advisers should not be able to defer to ISS and Glass Lewis voting recommendations and then have these proxy firms generate and vote an electronic ballot, without any subsequent client review before these votes are cast. Investment managers that do not review and specifically approve (or modify) each ballot cast on their behalf are not fulfilling the fiduciary responsibilities that they owe to their clients and beneficiaries.

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Thank you for the opportunity to present the views of the Shareholder Communications Coalition on this proposed SEC rule. If you have questions, or need additional information, please contact me at 202-624-1461, or via email at [nholch@holcherickson.com](mailto:nholch@holcherickson.com).

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additional proposal for proxy advisory firms to provide to registrants and other soliciting persons a final notice of voting advice two (2) days before the final report is sent to their clients. *See* Proposed Rule 14a-2(b)(9)(ii)(B). 84 Fed. Reg. 66,558 (Dec. 4, 2019).

<sup>23</sup> Glass Lewis & Co., Press Release: "Glass Lewis Announces that Company Opinions are Now Included With Research and Voting Recommendations," April 2, 2020, available at <https://www.glasslewis.com/report-feedback-statement-included-with-research/>. While the Coalition welcomes this opportunity for more corporate feedback, we believe, based on past investor voting practices, that a significant number of Glass Lewis clients would cast their votes during the seven-day review period without the benefit of reviewing this feedback.

<sup>24</sup> *See, e.g., 2017 NIRA Letter, supra* note 10.

<sup>25</sup> The implementation of this recommendation would be more cost-efficient for proxy advisory firms and their clients than the alternative discussed in the Proposed Rule of disabling certain pre-populated ballots and/or automatic submission capabilities. *See 2019 Proposed Rule on Proxy Voting Advice* at 66,551-66,552.

Vanessa A. Countryman  
May 1, 2020  
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Sincerely,

A handwritten signature in black ink that reads "Niels Holch". The signature is written in a cursive, slightly slanted style.

Niels Holch  
Executive Director  
Shareholder Communications Coalition

cc: The Honorable Jay Clayton  
The Honorable Hester M. Peirce  
The Honorable Elad L. Roisman  
The Honorable Allison Herren Lee  
William Hinman, Director, Division of Corporation Finance  
Dalia Blass, Director, Division of Investment Management