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

Re: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

Dear Ms. Countryman:

CFA Institute[1] appreciates the opportunity to provide our comments to the Securities and Exchange Commission ("SEC" or the "Commission") on its request for comment on its proposed rule, *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*. CFA Institute represents the views of those investment professionals who are its members before standard setters, regulatory authorities, and legislative bodies worldwide about issues affecting the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues affecting the efficiency, integrity and accountability of global financial markets.

Executive Summary

The Proposals are described as improving the fairness and accuracy of proxy advice and thereby, proxy-voting outcomes that benefit investors and promote a more balanced proxy-voting process. They seek to accomplish these objectives by introducing significant new regulations that would change, if not imperil, the very industry which has done much to achieve the goals the Proposals now seek to alter. After many years of direct and indirect interactions between our members and these enterprises, we have seen significant increases in communications between issuers and investors, broad acceptance of majority voting for board members, the introduction of precatory voting on executive compensation, and enhanced shareowner access to companies' proxies. We are therefore concerned that the Proposals will undermine the improvements experienced during the increasing prominence and importance of proxy advisers.

We are most concerned that the Commission's Proposals will have a chilling effect on analyst independence by limiting the ability of dissenting investors to voice their concerns on management Proposals. We also are concerned that the rebuttal processes mandated in the Proposals will significantly and unnecessarily raise investor costs.

[1] CFA Institute is a global, not-for-profit professional association of nearly 178,500 investment analysts, advisers, portfolio managers, and other investment professionals in 165 countries, of whom more than 171,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 158 member societies in 73 countries and territories.

Specifically, CFA Institute is concerned that these proposed changes will set a faulty and inappropriate precedent for prior review and clearance by issuers of analyst's work and professional judgement. The Proposals appear to be a direct intrusion into not only the business models of these firms but also the integrity of their analyses, with the appearance of giving issuers a new tool to limit negative information and further control proxy outcomes. As part of long-established professional practice, analysts should determine what they wish to fact check with the issuer and should limit that review to only factual information already in the public domain.

Specifics of the SEC Proposals

The Commission proposes codification of its previous interpretation of a proxy "solicitation." Exchange Act Section 14(a) makes it unlawful for any person to "solicit" any proxy with respect to any security registered under Exchange Act Section 12 in contravention of such rules and regulations prescribed by the Commission. The purpose of Section 14(a) is to prevent "deceptive or inadequate disclosure" to shareowners in a proxy solicitation. Section 14(a) grants the Commission broad authority to establish rules and regulations to govern proxy solicitations "as necessary or appropriate in the public interest or for the protection of investors." The Exchange Act does not define what constitutes a "solicitation" for purposes of Section 14(A) and the Commission's proxy rules.

Recognizing the breadth of this definition, the Commission adopted an exemption from the information and filing requirements of the federal proxy rules for communications by persons not seeking proxy authority but continued to include such communications within the definition of a "solicitation." The Commission also adopted another exemption from the information and filing requirements for proxy-voting advice given by advisers to their clients under certain circumstances, but likewise continued to include such advice within the definition of "solicitation." By adopting these exemptions, the Commission removed requirements that were considered unnecessary for these forms of solicitations, in order for shareowners to have access to more sources of information when voting, though the antifraud provisions of the proxy rules continued to apply.

The Commission proposes to refine the exemptions for proxy advisers and expand its interpretation stating, "The Commission has previously observed that the breadth of the definition of a solicitation may result in proxy advisory firms being subject to the federal proxy rules because they (proxy advisory firms) provide recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy and that, as a general matter, the furnishing of proxy-voting advice constitutes a solicitation."

Among other things, the SEC states that they are proposing amendments to Exchange Act Rule 14a-2(b) to condition the availability of existing exemptions from the information and filing requirements of the proxy rules in Rules 14a-2(b)(1) and (b)(3) on all proxy-voting advice businesses in order to:

(i) enhance conflicts of interest disclosure;

(ii) offer a standardized opportunity for registrants and certain other soliciting persons to review and give feedback on the proxy-voting advice of a proxy adviser before the adviser disseminates its advice to clients;

(iii) offer the option for registrants and certain soliciting persons to request that proxy advisers include in their proxy-voting advice a hyperlink or other analogous electronic medium directing the recipient of the advice to a written statement that sets forth the registrant's or soliciting person's views on the proxy-voting advice.

(iv) Amend the list of examples in Exchange Act Rule 14a-9 to add as an example of a potentially material misstatement or omission within the meaning of the rule, depending upon particular facts and circumstances, the failure to disclose information such as the proxy-voting advice business' methodology, sources of information, conflicts of interest, or the use of standards that materially differ from relevant standards or requirements that the commission sets or approves.

Our views

We agree that improved disclosures around proxy advisers' potential conflicts of interests would be useful to investors. However, we find the other proposed rules in this SEC initiative problematic because, in part, the Commission fails to show valid data on the extent of mistakes in proxy advice these Proposals would fix. Instead, the Proposal has introduced highly questionable comment letters of support from so-called retail "mom-and-pop" investors whose signatories have disavowed their connection to the supportive letters. Of even greater concern is the apparent disregard for the views of the vast majority of investors who are extensive users and consumers of proxy-advisory services and their rights to contract for independent financial analysis and advice as it relates to proxy-voting. They are the ones who use such advisory tools to uphold and maintain proper checks and balances on corporate governance.

Enhanced Conflicts of Interest Disclosure.

CFA Institute supports the Commission's proposed rules considering enhanced disclosures around conflicts of interests. Whether or not proxy advisers are "solicitors," we believe it is reasonable that they provide specific disclosures about their material conflicts of interest.

Likewise, we support the proposed conflicts-of-interest disclosures being required for inclusion in proxy-voting advice provided to clients. Further, we support the Commission's Proposals for more robust disclosures about a proxy adviser's business methodology and the sources of information used in research. We do not object to such increased transparency as long as these further disclosures do not compromise the competitiveness of a proxy adviser by forcing them to divulge trade secrets or other proprietary information, the disclosure of which would be deleterious to the specific adviser.

Proxy Advice is not a Solicitation.

Regarding the interpretation of proxy advisory services as constituting a proxy "solicitation," we disagree. By this interpretation, anyone who offers advice or consulting services that has anything to do with a corporate proxy is likely to be considered a solicitor if the Commission wishes to deem them so. This overly broad definition, therefore, has the potential to rope in too many actors who are "proxy adjacent" and would set an overly broad precedent. To investors in general and especially to their investor clients it is clear these proxy advisers are not soliciting anything from their clients other than payment for their opinions.

Proxy advisors are not seeking proxy authority and should therefore not be considered to be soliciting anything. As ISS mentions in a lawsuit they have filed against the SEC in this matter,[2] The solicitation of a proxy and the provision of proxy advice are fundamentally different activities. We do not believe that investors need and tellingly; are not asking for this protection that the SEC is looking to apply if it adopts this overly broad definition of solicitation.

In its own discussion of the Proposal, the Commission considers sticking to a narrower definition of solicitation:

> *"We also recognize that the term "solicit" in Section 14(a) arguably might be construed more narrowly than how the Commission has long interpreted that term. Under such a view, "solicitation" arguably might be limited to requests to obtain proxy authority or to obtain shareowner support for a preferred outcome, which might exclude certain proxy-voting advice by a person retained to provide such advice to a client."*

That the SEC is prepared to codify this arrangement as solicitation is deeply concerning from an investor protection and analyst independence perspective. We encourage the Commission to reconsider this re-interpretation of the "solicitation" definition and opt to continue with the narrower interpretation of the definition mentioned above.

Registrants' and Other Soliciting Persons' "Preview" of Proxy-Voting Advice and Response.

The Commission proposes to establish a rule allowing registrants and other soliciting parties the right to review the work of proxy advisers before it is sent to clients.

The Commission claims that new rule would establish a mechanism that would foster enhanced engagement between proxy-voting advice businesses, so that investors or those who vote on their behalf would benefit from the input and views of registrants and certain other soliciting persons.

We, however, see this recommendation as potentially establishing a faulty and inappropriate precedent. We find it troubling that the SEC is proposing a rule restricting release of an opinion to the public or paying customers until after that opinion is vetted by a conflicted third party (in this case registrants). We fear this slippery slope could lead to registrants pushing for a similar

[2] https://www.issgovernance.com/file/duediligence/iss-oct-31-2019-complaint.pdf

right of review in the equity and fixed-income securities analyses areas, with a significant chance for a repeat of the chilling consequences previous such experiments produced. We are also concerned with the potential unintended consequences of such a rule, such as less forthright commentary from analysts who are encouraged to self-censor.

The proposed amendments to Rule 14a-2(b) would require one standardized opportunity for timely review and feedback by registrants of proxy-voting advice before a proxy-voting advice business disseminates its voting advice to clients.

We do not believe this rule is needed as registrants already have many opportunities to communicate with investors. Beginning with a company's own proxy materials, the views of management are fully articulated and reiterated by issuers' proxy solicitation firms for any shareowners they contact. Issuers have the full array of social media avenues to reiterate and confirm their positions and communicate their views. This includes the ability to rebut any proxy advisory service that disagrees with managements' views.

Rights of Rebuttal on Proxy Advice.

Of course, an issuer should and does have many avenues to rebut proxy advice they do not like. Indeed, we are aware that proxy advisers already provide a select group of issuers covering the vast majority of all market capitalization with the opportunity to review the advisers' research in full, rather than just the facts. We do not support this, and our Research Objectivity Standards (the "Standards") stipulate that the most an analyst or firm should provide to the focus of research is information sufficient to ensure factual representation is provided. Otherwise, the entire process is rife with potential conflicts of interest, from the type describe just a few paragraphs ago, to the kind of conflicted research that exacerbated the financial crisis of 2007-2009 through faulty and conflicted credit ratings. We have expressed our objections to one of the proxy advisory firm on this issue.

While we do not support their providing their full research reports prior to delivery to their clients, we even more strenuously object to the proposal to require through regulation that proxy advisers share their full reports with target companies, to do so for the universe of listed companies, and to give issuers two opportunities over the course of five to seven days to rebut the advisers' analyses and recommendations.

Such requirements would not only create conflicted research but also raise the cost of the research to the point that many investment managers will choose to forego the research, if they can afford it. Then, at the end of this lengthy process, proxy advisers may have to include the issuer's rebuttal to any of the positions in their report, taken by the adviser. To suggest the independent service provider hired by the shareowner must open their research product up to include the issuer's critique and complaints infringes on commercial rights to contract between investors and analysts. Moreover, it is contrary to investor protection and overrides important state-law corporate governance protections.

Economic Impact and Cost/Benefit.

Finally, we encourage the Commission to do a more thorough and detailed analysis of the costs and benefits of the Proposal. We do not believe that what has been presented to date has provided valid evidence as to the number, frequency and nature of proxy advice mistakes, especially when compared with the vast number of proxy issues on which shareowners vote annually. Based on several estimates, the mistakes are a tiny fraction of annual proxy issues voted. Moreover, the quality of proxy advice has never been higher.

We believe our view is supported by the data contained in a table the Commission included in the Proposal. The table cites Registrant Concerns Identified in Additional Definitive Proxy Materials (Table 2 on page 96 of the proposed rule, which we recreated below).

Table 2 from page 96 of proposed rule: Registrant Concerns Identified in Additional Definitive Proxy Materials

Type of Registrant Concern						
Year	Filings	Factual Errors	Analytical Errors	General or policy dispute	Amended or modified proposal	Other
2016	99	24	40	54	18	11
2017	77	13	28	42	10	8
2018	84	17	28	58	6	2

On January 16th, 2020, the Commission responded to a request from the Council of Institutional Investors ("CII") for more data about this table.[3] It is clear from the response given by the Division of Economic and Risk Analysis (DERA) that no analysis of errors by proxy advisers was done beyond aggregating the complaints of issuers from 2016 – 2018 listed in Table 2 above. In its response to CII, DERA says it uses the filing of definitive proxy materials in response to proxy voting advice in 2016, 2017 and 2018 as a proxy for legitimate complaints about factual errors, analytical errors, and general or policy disputes.

DERA classifies a concern as "factual errors" when the registrant identifies what it considers incorrect data or inaccurate facts that the proxy adviser uses in some part as a basis for its negative recommendation. DERA classifies concerns as "analytical errors" when the registrant identifies what it considers methodological errors in the analyses that were used as a basis for negative recommendations. DERA classifies a concern as "general or policy disputes" when the registrant does not dispute the facts, or the analytical methodology employed but instead generally espouses the view that specific evaluation policies or the evaluation framework established by the adviser are overly simplistic or restrictive or do not adequately or holistically capture the merits of the proposal. DERA classifies a concern as an "amended or modified

[3] https://www.sec.gov/comments/s7-22-19/s72219-6660914-203861.pdf

proposal" when the registrant responds to an adviser's current or prior year's negative recommendation by indicating that it has amended or modified proposals or existing governance practices prior to the annual meeting and requests investors' consideration of these facts when casting their votes. Finally, DERA classifies "other" as those concerns where the registrant objects to the adviser's negative recommendation but does not specifically cite nor respond to the rationale for the negative recommendation and instead makes a generalized argument in favor of the Proposal. According to DERA, registrants may have more than one concern with a proxy adviser's voting advice, so the number of firms filing amended proxy materials may not equal the sum of concern types within a given year.

In building the list of issuer concerns listed in Table 2 on page 96 of the Proposal, the Commission states the number of unique registrants that filed proxy materials with the Commission in 2016, 2017 and 2018. We present this information in CFA Institute Table 1 below and use it to determine what percentage of registrants in each year is driving this proposed regulation.

CFA Institute Table 1: Percentage of registrants who raised concerns about proxy advisers

Year	Number of Unique Registrants	Number of Filings Raising a concern	Percentage of registrants raising a concern
2016	5,690	99	1.74%
2017	5,744	77	1.34
2018	5,862	84	1.43

This means the SEC is proposing to issue new rules to govern the proxy advisory industry based on concerns raised by just 1.5% of registrants, on average, and without determining whether the concerns of the registrants are legitimate. Without a more thorough review and analysis of the issue, we believe it would be irresponsible for the Commission to use the word of a small fraction of complaining issuers, each with potentially conflicted perspectives, as representative of material problems that need significant regulations to remedy.

Finally, the cost to investors who are proxy firms' primary clients will be significant due to the number of reviews, potential amendments and legal negotiations as to what is factual and what is opinion etc. The time required and deadlines involved also increases the risk that investors will not receive the advice in time for assessment prior to proxy execution and submission. Ironically, then, the rule could make it more likely that investors will take proxy advisers' perspectives without further review because they will not have time to do so.

Thus, the cost to the process in financial and efficiency terms will be potentially very substantial in our view. These costs will ultimately be passed on to investors, damaging the returns of investors for no good reason. Moreover, the proposed process will undermine trust in the independence of the final product, thus reducing investment manager efficiency.

We emphasize that any increased benefits to the proxy-voting system or to investor protection from this rule are mainly illusory relative to the costs and disruption the rule will create, none of which are supported by investors. We expect this proposed rule will result in a punitive tax on investors, one that will harm returns for retirees and retail investors most. These are costs we do not believe investors should be forced to bear.

Conclusion

We conclude that this Proposal is ill advised in many respects, unsupported by a proper economic impact analysis, and warrants further refining. It should not go forward as currently proposed.

Of particular concern, as noted above, is the proposed process of preclearing financial analysis and recommendations in violation of long-standing professional standards of analyst prudence, care and independence. This proposed rule violates the right of investors to contract for independent advice services and invokes first amendment issues when forcing prior review by issuers, and the subsequent side-by-side inclusion of issuers' opinions.

All investors support the correcting of factual errors. However, the extra time and expense this proposed rule will cost proxy advisers will ultimately be borne by investors. In the name of investor protection, the SEC is essentially proposing a tax on investors to solve a problem that neither issuers nor the Commission have adequately proven exists.

The Commission should document the current level of proxy errors through their own analysis, not simply rely on registrant complaints. Based on those findings it should calibrate proper, less-intrusive steps such as a limited factual review of proxy advice where the parties agree. It should switch its focus to addressing proxy-plumbing upgrades such as end-to-end vote confirmation and examining the OBO/NOBO system. It should continue to help balance and support the roles and responsibilities of all corporate governance players, including shareowners.

Should you have any questions about our positions, please do not hesitate to contact James Allen, CFA james.allen@cfainstitute.org, or Matt Orsagh at matt.orsagh@cfainstitute.

Sincerely,

/s/ Jim Allen

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/s/ Matt Orsagh

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