Council of Institutional Investors®
The voice of corporate governance

Via Email

February 4, 2020

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

Re: Data Analysis Supporting Proposed Regulation of Proxy Advisors
File No. S7–22–19: Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (the "Amendments" or the "Release")

Dear Madam Secretary:

The Council of Institutional Investors ("CII"), appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission ("SEC" or "Commission") in response to the above-referenced Release.[1] CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $35 trillion in assets under management.[2]

This letter supplements comments we made in our letter of Jan. 30, 2020.[3] This letter focuses on claims by certain corporate representatives that there are pervasive factual inaccuracies in proxy advisors' reports, claims that we believe were relied on in the Release and in the decision of a majority of SEC commissioners to support proposing a new regulatory regime for independent proxy advisors. We believe that the claims of pervasive errors are unfounded and misleading and do not provide a basis for rulemaking. As CII and other investor organizations and various

[1] Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 87,457, 84 Fed. Reg. 66,518 (proposed rule December 4, 2019), https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf (Release).
[2] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org. We note that the two largest U.S. proxy advisory firms, Glass Lewis & Co. (Glass Lewis) and Institutional Shareholder Services (ISS), are non-voting associate members of CII, paying an aggregate of $18,000 in annual dues—less than 1.0 percent of CII's membership revenues. In addition, CII is a client of ISS, paying approximately $19,600 annually to ISS for its proxy research.
[3] Kenneth A. Bertsch and Jeffrey P. Mahoney, Letter, Jan. 30, 2020, at https://www.sec.gov/comments/s7-22-19/s72219-6729687-207381.pdf.

investors have indicated, the paucity of evidence of pervasive factual errors by proxy advisors suggests that, in fact, no regulatory intervention is necessary or justified.[4]

Shortly after the Commission issued the Release, CII requested that the SEC provide the underlying data for Table 2 in the Release ("Table 2"), which classifies what the table describes as company "concerns" on proxy advice drawn from certain supplemental proxy materials (DEFA14As) filed in the period 2016 to 2018. The SEC so far has not provided that underlying data.[5] These company "concerns" compiled in Table 2 clearly played a significant role in the SEC's development and consideration of the Amendments, and therefore we believe access to the data underlying the concerns is important for meaningful public comment. We appreciate that on January 16, 2020, shortly before the February 3 close of the comment period, the SEC's Division of Economic and Risk Analysis added to the comment file a memo providing some additional information (the "DERA Memo").[6] But it was filed too close to the comment deadline for many commenters to digest and respond to the additional information. Moreover, in any event, the DERA Memo did not provide critical information that would be necessary to understand why the Commission believes its proposal is justified, such as the underlying data set that would tie the categories in Table 2 back to the underlying company statements that Table 2 purports to count. Any review or analysis of the table's merits as a basis for rulemaking would require such information.

In the absence of the underlying data, we have done our best to describe in this letter some of the questions we have about the company "concerns" listed in Table 2 as well as our own concerns about Table 2. Specifically, we believe Table 2 does not demonstrate a high rate of errors. Only one of the categories provided in Table 2 even purports to count factual errors. It is a judgmental count, without underlying support to assess whether it is a fair judgment. It is also an extremely low number that does not justify rulemaking, especially rulemaking that presents a significant risk of promoting error by exacerbating time pressure on research and development of advice.

In addition, as described in detail below, we have attempted to analyze the matters that may underlie Table 2, to the extent possible, and have found that:

- **Most of the purported "concerns" actually are policy disputes or communications that a company has changed a proposal or is providing more or clarified information** to address an issue raised in a proxy advisor report.

- **The number of claimed inaccuracies is a very small: 0.3 percent.**

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[4] *See, e.g.*, Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, et al. to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission 3 (Oct. 15, 2019), at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/201910015proxy_advisor_sign_on_final.pdf; and Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission et al. 4 (Oct. 24, 2019), at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191024%20SEC%20comment%20letter%20proxy%20advisor%20accuracy.pdf.

[5] Release at.66,546 (Table 2).

[6] SEC Division of Economic and Risk Analysis, Memorandum Regarding Data Analysis of Additional Definitive Proxy Materials Filed by Registrants in Response to Proxy Voting Advice (DERA Memo), page 1, at https://www.sec.gov/comments/s7-22-19/s72219-6660914-203861.pdf.

- **Matters classified in Table 2 as "Analytical errors" are disagreements on methodology, far from "factual errors" and not even mathematical errors.**

- **Some of the filings cited by the SEC do not actually express any "concerns."** *E.g.*, in some cases, a company merely disclosed additional information or amended its proposal, without criticizing a proxy advisor.

- **Company expression of concern about proxy advice would reflect personal self-interest.** 67 of the filings covered by Table 2 made arguments on a question in which the CEO had a clear personal interest in the outcome. In many of those cases, the CEO had a direct financial interest.

- **Finally, some of the claims appear to be incorrect and/or misleading in their own right.**

The Amendments Are Based on an Unsupported Idea that There is a Systemically High Incidence of Error in Proxy Advisor Reports

In the Release, the SEC proposed to place a series of requirements that would compel a proxy advisor to provide draft research, analysis and recommendations – and then later the final research, analysis and recommendations – to management of subject companies before the proxy advisor can distribute this advice to its paying clients.[7] Specifically, the Amendments impose a period for review of reports and feedback by company management ("Review and Feedback Period"), an additional period during which company management is provided with the final report, analysis and voting recommendations ("Final Notice Period"), and provision by the proxy advisor of a hyperlink to management's statement on the advice ("Hyperlinked Statement").

The compelled Review and Feedback Period, Final Notice Period and Hyperlinked Statement provisions are largely premised on an assumed (but not substantiated) high rate of factual errors and methodical weaknesses in proxy voting advice.[8] For example, consider the following five paragraphs from the Release providing a direct link between alleged factual and methodical weaknesses in proxy voting advice and the Release provisions providing for the Review and Feedback Period, Final Notice Period or Hyperlinked Statement:

> [1] We believe that our proposed rule amendments would . . . establish effective measures to reduce the likelihood of *factual errors or methodological weaknesses* in proxy voting advice . . . .[9]
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> [2] However, in recent years concerns have been expressed by a number of commentators, particularly within the registrant community, that there could be

[7] Our primary focus in this letter is on proxy analysis, and SEC requirements related to, companies registered under the Securities Act of 1933. We do not focus particular attention on investment companies, or on "other soliciting persons" in this letter. We use the terms "registrant," "issuer" and "company" interchangeably in this letter.
[8] Release at 66,525, 66,529-30, 66,533, 66,545, 66,547.
[9] *Id.* at 66,525 (emphasis added).

> *factual errors, incompleteness, or methodological weaknesses* in proxy voting advice businesses' analysis and information underlying their voting advice that could materially affect the reliability of their voting recommendations and could affect voting outcomes, and that processes currently in place to mitigate these risks are insufficient. These concerns are coupled with the perception of many registrants that . . . there are not meaningful opportunities to engage with the proxy voting advice businesses and *rectify potential factual errors or methodological weaknesses* in the analysis underlying the proxy voting advice before votes are cast, particularly for registrants that do not meet certain criteria . . . and . . . once the voting advice is delivered to the proxy voting advice business's clients, which typically occurs very shortly before a significant percentage of votes are cast and the meeting held, it is often not possible for the registrant to inform investors in a timely and effective way of its contrary views *or errors* it has identified in the voting advice. Although communication between proxy voting advice businesses and registrants may have improved over time, recent feedback and studies suggest that many registrants remain concerned about the limited ability of registrants to provide input that might address *errors, incompleteness, or methodological weaknesses in proxy voting advice*. . . . Although we recognize that some proxy voting advice businesses have policies in which they would issue alerts informing their clients of *errors* in their voting advice or updated information released by the registrant, such policies result in the proxy voting advice businesses, not the client, determining whether the *errors* or information are material to a voting decision and sharing such information only after their advice has already been published. . . . Although we recognize that some proxy voting advice businesses have policies in which they would issue alerts informing their clients of *errors* in their voting advice or updated information released by the registrant, such policies result in the proxy voting advice businesses, not the client, determining whether the *errors* or information are material to a voting decision and sharing such information only after their advice has already been published.[[10]]
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> [3] We believe that establishing a process that allows registrants and other soliciting persons a meaningful opportunity to review proxy voting advice in advance of its publication and provide their corrections or responses would reduce the likelihood of *errors*, provide more complete information for assessing proxy voting advice businesses' recommendations, and ultimately improve the reliability of the voting advice utilized by investment advisers and others who make voting determinations, to the ultimate benefit of investors.[[11]]
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> [4] In formulating the proposed review and feedback period and notice of voting advice requirements, we have sought to improve the quality of information available to investors while balancing, on the one hand, the need for registrants and certain soliciting persons to conduct a meaningful assessment of the advice and communicate any concerns or *errors* regarding the advice with, on the other hand, the concerns about imposing an undue delay or otherwise jeopardizing the ability

[10] *Id.* at 66,528-30 (footnotes omitted & emphasis added).
[11] *Id.* at 66,530 (emphasis added).

> of proxy voting advice businesses to meet their contractual commitments to clients and their clients' ability to make timely and informed voting decisions.[[12]]
>
> [5] These amendments are intended to give registrants and other soliciting persons an opportunity to engage with the proxy voting advice business and identify *factual errors or methodological weaknesses* in the proxy voting advice before it is disseminated to clients.[[13]]

In addition, all three Commissioners who voted in favor of the proposal at the Commission's November 5, 2019, open meeting explicitly cited concerns about factual errors as a motivating factor in their deliberations. Specifically, SEC Chairman Jay Clayton said:

> The proposal also would provide an opportunity for a brief period of review and feedback through which registrants will be able to identify any *factual errors or methodological weaknesses* in the proxy voting advice and proxy voting advice businesses would have an opportunity to amend and supplement their reports to the extent they believed necessary, if at all.[14]

Commissioner Hester Peirce said:

> The proposals also respond to concerns that issuers have raised with us about their difficulty in timely flagging and responding to factual errors contained in proxy voting recommendations. The proposals seek to ensure that all registrants, not just the biggest firms, have the opportunity to identify these *factual inaccuracies* in time for them to be corrected.[15]

Commissioner Elad Roisman said:

> Many have worried that their publication of *voting advice containing errors* has the ability to go unchecked, and the widespread use of their voting advice by asset managers has made the governance principles they propound de-facto standards, despite no regulatory oversight or public notice and comment process. . . . . To the extent an issuer or other soliciting party believes the firm's voting advice contains *errors or methodological biases*, it would have an opportunity to note that in a way that proxy voting advice business clients can more easily access than they can today. . . . . beyond these principles, our staff has crafted a detailed policy framework that would (i) improve proxy voting advice businesses' disclosures of material conflicts of interests, (ii) establish effective measures to reduce the likelihood of *factual errors or methodological weaknesses in proxy voting advice*, and (iii) ensure that those who receive proxy voting advice have an efficient and

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[12] *Id.* at 66,533 (emphasis added).
[13] *Id.* at 66,545 (emphasis added).
[14] Statement, SEC Chairman Jay Clayton, Nov. 5, 2019, at https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting (emphasis added).
[15] Statement, SEC Commissioner Hester Peirce, Nov. 5, 2019, at https://www.sec.gov/news/public-statement/statement-peirce-2019-11-05-proxy-voting-advice (emphasis added).

> timely way to obtain and consider any response an issuer or other soliciting person may have to such advice.[16]

In fact, the evidence suggests the rate of factual errors in proxy advice is extremely low, and the mechanisms that proxy advisors have in place to correct any such errors are prompt and effective. Proxy advisors have strong incentives to provide clients accurate, high quality advice, and the absence of significant errors shows those incentives are working.

CII Has Requested the Data Underlying Table 2 to Understand the SEC's Rationale for the Amendments

Table 2 tallies and organizes into categories certain unspecified company management concerns about proxy advice that the Commission's staff gleaned from supplemental proxy materials filed, among other reasons, to respond to proxy advisor reports. Only one of the categories purports to count factual errors. The other categories are "analytical errors," "general or policy dispute," "amended or modified proposal," and "other." In order to test Table 2's assertions and comment on its analysis, as mentioned above, on November 7, 2019, CII requested that the SEC staff provide its underlying data used for Table 2.[17]

CII repeatedly re-requested this information after November 7, including through filing a Freedom of Information Act (FOIA) request.[18] On January 16, 2019, the SEC included the

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[16] Statement, SEC Commissioner Elad Roisman, Nov. 5, 2019, at https://www.sec.gov/news/public-statement/statement-roisman-2019-11-05-14a-2b (emphasis added).

[17] Release, Table 2., op. cit.

On Nov. 7, 2019, CII requested that the SEC staff show the underlying data for Table 2. The request was made (1) by email to SEC Division of Corporation Finance staff (email on file with CII), and (2) in a meeting that day with SEC staff. Our particular goal was to obtain detail on how the SEC categorized "concerns" by company management about proxy advisor reports. The Nov. 7, 2019, meeting included staff members from the Division of Corporation Finance, the SEC Division of Investment Management, the SEC Division of Economic and Risk Analysis (DERA) and from the office of SEC Chairman Jay Clayton.

SEC staff indicated (1) by email on Nov. 7, 2019, (email on file with CII), and (2) verbally in the Nov. 7 meeting that the staff would consider the request.

[18] **CII reiterated its request for underlying data for Table 2 (see previous footnote) in a Nov. 14, 2019, letter** to SEC Chairman Jay Clayton, along with additional requests for information and clarifications on 12 other subjects on which CII believed the SEC proposal may have been unclear and/or on which more information was needed, in CII's view, in order to comment on the proposal. *See* Letter from Kenneth A. Bertsch and Jeffrey P. Mahoney, Nov. 14, 2019, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/November%2014%202019%20letter%20to%20SEC%20Chairman.pdf. In this letter, **CII asked that supplemental, clarifying information be added to rulemaking record**, so that it would be available to all commentators, as the information was necessary to provide useful responses to many of the questions posed by the SEC in the Release.

In the absence of an indication from the SEC staff that it would provide this data, **on Nov. 14, 2019, CII also filed a FOIA request for the underlying data used for Table 2**. See Letter to SEC Office of FOIA Services from Glenn Davis, Nov. 14, 2019, available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191114%20CII%20FOIA%20request%20to%20SEC(1).pdf.

On Dec. 4, 2019 CII reiterated its request for the Table 2 data in an email to Division of Corporation Finance staff (email on file with CII). SEC staff responded that day that staff members "are actively considering the data request as well as other items mentioned" in CII's letter of Nov. 14, 2019 (email on file with CII).

DERA Memo with limited additional information in the comment file. This was produced 70 days after our initial request and 18 days before the end of the comment period for this proposal However, the DERA Memo did not provide the key information sought by CII, which is the SEC classifications of specific company claims.[19]

On Dec. 10, 2019, in a meeting with SEC Chairman Jay Clayton and members of his staff, CII reiterated the request. Chairman Clayton said he was aware of our request for underlying data, and expressed surprise that anyone would challenge DERA research. Chairman Clayton and members of his staff did not indicate whether the information would be provided.

On Dec. 31, 2019, CII appealed for dispute resolution services on the FOIA request in a letter to SEC General Counsel Robert Stebbins. See Letter from Glenn Davis, Dec. 31, 2019, at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191231%20CII%20Appeal%20for%20Dispute%20Resolution.pdf.

On Jan. 1, 2020, CII reiterated its request for the Table 2 data in an email to Division of Corporation Finance staff (email on file with CII). On Jan. 2, 2020, SEC staff responded by email that "we are still in the process of considering your data requests" (email on file with CII).

On Jan. 2, 2020, CII wrote to SEC staff that CII staff members had devoted significant time to an attempt to replicate the SEC analysis for 2018, and "are unable to do so" (email on file with CII). In that email, CII provided SEC staff with preliminary summary information on CII's attempt to recreate the SEC analysis on 2018 DEFA14A filings as presented in Table 2.

SEC staff agreed to meet with CII on this and other matters on Jan. 7, 2020. On January 7, shortly before the scheduled time for the meeting, the SEC postponed the meeting due to the threat of snow. The meeting was rescheduled for Jan. 15, 2020.

CII met with SEC staff on Jan. 15, 2020, at which time SEC staff members said they still were reviewing the CII request.

On Jan. 16, 2020, the SEC posted a memo from the SEC Division of Economic and Risk Analysis (the DERA Memo and DERA) to its webpage that provides links to "Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice." Later that day, SEC staff sent an email alerting CII staff to the DERA Memo.

In an email CII sent to SEC staff later on Jan. 16, 2020, CII staff said the DERA Memo appeared to lack the key information that CII had requested – specific information on the SEC's classification of issuer concerns.

On Jan. 22, 2020, the SEC Office of FOIA Services by email that **informed CII that the DERA Memo "have been identified as being responsive to your [FOIA] request."** *See* Letter from Clarissa Anderson to Glenn Davis, Jan. 22, 2020, at https://www.cii.org/files/issues_and_advocacy/correspondence/2020/1-22-20%20Response%20to%20appeal.pdf.

On Jan. 28, 2020, CII wrote to the SEC Office of FOIA Services to appeal the Jan. 22, 2020, FOIA determination that the DERA Memo was responsive to the CII request. *See* Letter from Glenn Davis to the SEC Office of FOIA Services, at https://www.cii.org/files/issues_and_advocacy/correspondence/2020/1-28-20%20CII%20FOIA%20Appeal.pdf ("CII wishes to appeal the responsiveness determination . . . . As indicated in our FOIA request, CII seeks SEC staff's analysis and related materials pertaining to Table 2 of "Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice ("Proposed Rule"). Specifically, our FOIA request sought "any and all documents, spreadsheets and other material produced by SEC staff, as well as any lists of proxy advisory firm shareholder meeting reports or SEC filings reviewed by SEC staff, in connection with obtaining some degree of assurance that the Table contains an accurate depiction of proxy advisory firm errors suitable for inclusion in the 'Economic Analysis' section of the Proposed Rule." The DERA Staff Memo stops short of this request. It provides a description of DERA's methodology in creating Table 2, a list of registrants involved and a list of amended proxy statement filings analyzed. Missing from the DERA Staff Memo is the analysis itself—how each allegation was ultimately categorized by DERA into one of five DERA-defined groups.")

Also on Jan. 22, 2020, CII staff spoke by phone with SEC staff, who indicated that the SEC was reluctant to provide the requested classifications, as the staff judgments were "subjective," and providing the information could focus too much attention on the issue of claims about proxy advisor errors. CII staff reiterated the goal of seeing the underlying analysis for Table 2.

[19] DERA Memo, *op. cit.*

The DERA Memo did not provide underlying data other than identifying the Form DEFA14As that DERA examined. The Memo indicated that further DERA review of filings after the Release was published on Nov. 5, 2019, led DERA to reclassify some of the items, but DERA did not provide a revised Table 2.[20] In an Excel spreadsheet, DERA identified 36 DEFA14s on which it believed it erred in Table 2 as to including or excluding filings, but it provided no information as to how it classified specific filings either in the original Table 2 or to enable the public to create a corrected Table 2.

With this letter, **we again request that the SEC provide in the public comment file its classification(s) for each case of registrant "concern" as reported in Table 2, plus any adjustments made when it corrected underlying information on the DERA Memo.**

Table 2 Analysis

CII tried but was unable to replicate the SEC analysis of management concerns as expressed in 2018 Forms DEFA14A.

Moreover, the DERA Memo acknowledged that its analysis was subjective:

> DERA recognizes that reviewers of the registrant filings may reach different conclusions about the classifications (for example, what one reviewer or registrant characterizes as a factual error may be viewed by another reviewer or registrant as a perceived methodological deficiency, or both a factual error and a methodological deficiency). DERA notes that the Table should be viewed in light of these and other considerations applicable to the aggregation and classification of data of this type.[21]

The DERA Memo also stated that "Different reviewers may reach different conclusions about the classifications."[22] As we note above, DERA did not provide its classifications, either in the Release or in the subsequent DERA Memo.

DERA described its methodology in the Release and, more clearly, in the later DERA Memo.[23]

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[20] *Id.*, page 2 ("Since the date of the Proposing Release, in the relevant filings identified from the keyword search DERA classified additional DEFA14A filings as expressing a registrant concern and reclassified other filings as not expressing a concern. The accompanying data file lists these additional filings and reclassifications.")
[21] *Id.*, pages 1-2.
[22] *Id.*, page 4.
[23] *Id*., pages 2-4:

> DERA manually reviewed each filing discussed above to classify it as either (i) a qualifying registrant response addressing particular concerns with respect to proxy voting advice or (ii) a non-qualifying registrant response referring to proxy voting advice but not addressing such concerns or some other supplemental proxy materials with no relationship to proxy voting advice. DERA used the following general categories for DEFA14As to qualify a filing for inclusion in our dataset:
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> - The registrant substantively disputed or addressed proxy voting advice that provided a voting recommendation against one or more of the registrant's proposals.
> - The registrant expressed disagreement with the adverse voting recommendation and made a generalized attempt to persuade investors to vote for the proposal, but without directly addressing or critiquing the proxy voting advice business's rationale.

CII Analysis on 2018 Claims

Table: Summary of Analysis on Table 2 Data for 2018

	Company Claims on Proxy Advisors in 2018 DEFA14As								
	Number of registrants	Number of filings	Number of filings expressing "concerns"	Factual errors	Analytical errors	General or policy dispute(s)*	Amended or modified proposal	Other	*Additional disclosure***
SEC	78	84	84	17	28	58	6	2	NA
CII	78	84	71	7	13	50	7	9	21

Both the SEC and CII classified some supplemental filings as fitting in more than one category.
** In Table 2, the SEC labels "General or policy dispute" as a singular, while in its definition, it refers to "General or policy disputes" (that is, plural).*
*** SEC does not use this category.*

Analysis of Table 2 appears above.[24]

- The registrant identified explicit changes it made in the current year in response to an adverse voting recommendation that occurred in the current year or prior year.
- The registrant identified changes of circumstance that should warrant reconsideration of an adverse voting recommendation.

DERA used the following general categories for DEFA14As when concluding that a filing did not qualify for inclusion in our dataset:

- The registrant referred to the adverse voting recommendation and indicated some disagreement but did not make any attempt to persuade investors with additional information other than to perhaps reiterate its position on the proposal and urge investors to vote accordingly.
- The registrant cited to the positive voting recommendations provided by a proxy voting advice business and only briefly acknowledged any adverse voting recommendations.
- The registrant identified explicit changes it made to its proposal either in response to discussions with a proxy voting advice business or based on general knowledge of a proxy voting advice business's guidelines but did not cite to a specific adverse voting recommendation.
- The registrant offered additional clarification or information to a proxy voting advice business for the purpose of securing a specific recommendation without reference to any prior adverse recommendation.
- The filing contained a registrant response that was followed by an identical or nearly identical DEFA14A filed by the same registrant. . . .

After identifying each DEFA14A that qualified as a registrant response addressing particular concerns with proxy voting advice, DERA classified each filing into categories based on the type of concern that appeared to be expressed by the registrant. Specifically, each registrant's response was classified into one or more of the following categories:

- factual errors;
- analytical errors;
- general or policy disputes;
- amended or modified proposal; and
- other.

The method for the classification of registrant concerns is set forth in footnote 239 of the Proposing Release. Different reviewers may reach different conclusions about the classifications. As noted above, the Table provides a list designed to describe generally the types of concerns with respect to proxy voting advice expressed by registrants in the additional definitive proxy materials reviewed by DERA.

[24] DERA conceded some errors, but did not do so prominently or with clear labeling, and buried the DERA Memo spreadsheet file. In reviewing its work, aside from changing a handful of assessments, DERA discovered some additional DEFA14As criticizing proxy advisory firms. There were seven additional filings that DERA found for 2018. Because of the short comment period for the Release, and the slow production of the DERA Memo, we have

The SEC defined its categories as follows:

1. **Factual errors**: "when the registrant identifies what it considers to be incorrect data or inaccurate facts that the proxy voting advice business uses in some part as a basis for its negative recommendation"

2. **Analytical errors**: "when the registrant identifies what it considers to be methodological errors in the proxy voting advice business's analysis that it used as a basis for its negative recommendation"

3. **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 proxy voting advice business are overly simplistic or restrictive and do not adequately or holistically capture the merits of the proposal"

4. **Amended or modified proposal**: "when the registrant responds to a current or prior year negative recommendation from a proxy voting advice business by indicating that it has amended or modified proposals or existing governance practices prior to the annual meeting and requests investor consideration of these facts in making their vote"

5. **Other**: "where the registrant objects to the proxy voting advice business'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" (*emphasis added*)

In general, CII did not classify a concern as "Other" if it also fit in another SEC category, relying on the word "instead" in the SEC definition of "Other" to mean the "Other" label excludes from that designation any filing that made another claim.

CII added a sixth category not used by the SEC: that the company provides "**Additional disclosure**." Provision of additional disclosure occurred with some frequency, at least in comparison with total number of supplemental filings cited by the SEC. We believe the DERA categories appear to be unsatisfactory in several respects, but particularly in not noting that some filings simply provide additional information. It is conceivable that the SEC considers a company's provision of additional information to be modification of a "practice," and therefore within the SEC's definition of "Amended or modified proposal." But this is not clear in the SEC's description of Table 2. We designated this category (sometimes in addition to one or more other category) where provision of additional information was a key aspect of the registrant filing, intended to help satisfy concerns raised in one or more proxy advisor reports. In 10 of the filings identified by the DERA Memo, we see additional disclosure but no other "concerns" that fit in any of the SEC's categories.

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not analyzed most of these claims, or the overall Table 2 claims and DERA Memo corrections for 2016 and 2017. We may submit additional information after the comment deadline.

We have these observations:

- **Most of the purported "concerns" actually are policy disputes or communications that a company has changed a proposal (or governance practice) or is providing more or clarified information** to address an issue raised in a proxy advisor report. We would expect complicated questions of analysis and opinion to involve differing approaches to analysis and differing opinions. The only categories used by the SEC that appear to be relevant for purposes of the Commission's regulation based on frequency of factual errors are, at most, the categories on company assertions of "factual errors" and "analytical errors."

- **The number of claimed inaccuracies is very small:** If we try to use the SEC's classifications to the extent information is available, we count 57 ISS and Glass Lewis reports criticized for either "factual error" or "analytical error" in 2018, out of more than 11,000 published by those firms in the year on U.S. registrants. [25] This would constitute an "error rate" on a report basis of 0.5%. And this appears to be exaggerated, both because some of these company assertions appear to be in error, and because the SEC's counts for these categories appear high. We count 26 filings that claim error in 38 reports, an "error rate" of 0.3% on a report basis.

- **"Analytical errors" are disagreements on methodology, not "factual errors."** The SEC defines "analytical error" as "methodological error," and does not seem to include in the "analytical error" category actual analytical mistakes, such as math errors. (We assume therefore that the SEC classified the latter as "factual errors.") Institutional investors retain proxy advisors to do their own analysis, relying on their own methodologies, not to simply validate every company according to each company management's preferred methodology for evaluating its pay, or other matters. The SEC identifies only 17 filings that claim "factual errors." Below, we identify the 12 filings that the SEC was most likely to have found as asserting factual error, but we think no more than seven actually do so (0.06%). And the company assertions of factual errors appear to be incorrect in most of those seven filings.

- **Some of the filings cited by the SEC do not actually express any "concerns."** Table 2 indicated that issuers expressed "concerns" on proxy advice in 84 filings in 2018. The data file linked with the later DERA Memo conceded that one of these was an error by DERA (in that filing, the company cited Glass Lewis support for management in a proxy fight, which in no way was a management complaint about Glass Lewis). In at least 12 other filings, the SEC appears to have attributed to the company, which usually provided additional information, expression of "concern" that was not actually expressed by the company in the filing. In a few other filings, one could impute concern. Most of these amended proposals or provided more disclosure.

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[25] We cannot determine with confidence which supplemental filings the SEC classifies as containing accusations of factual or analytical error, and the SEC so far has declined to show its work. As noted below, we were not able to find as many such claims as the SEC asserted in Table 2. But we did identify 45 supplemental filings with claims of factual or analytical error, and 12 criticisms of information or advice in proxy reports by both ISS and Glass Lewis (thus, the total of 57 reports).

- **Company expression of concern about proxy advice would reflect personal self-interest.** CII identified 67 filings that made arguments on a question in which the CEO had a clear personal interest in the outcome. In many of those cases, the CEO had a direct financial interest. In all 67 of those filings, the company argued in favor of the position that served the CEO's personal interest. In no cases (zero) did the company argue against the CEO's interest. This is relevant in that the SEC is seeking to compel proxy advisors to show their work to management of the companies that are subject of the research, so those companies can provide "feedback." From the precedent offered by supplemental proxy filings, it appears that the "feedback" provided will be one-sided if the CEO's interests are at stake. It is unrealistic to believe that company management will correct "errors" or critique methodologies where the errors or misguided methodologies serve the interests of the CEO.

- **Finally, some of the claims appear to be incorrect and/or misleading.** We discuss this further below.

Accuracy of Company Claims of Proxy Advisor Inaccuracy Relied on by DERA

We discussed inaccuracies in claims by corporate management representatives in our October 24, 2019, letter to the SEC.[26] Most of these questionable claims have filtered into the Release as part of the Table 2 evidence. The SEC staff told CII that DERA made no attempt to assess accuracy of management complaints, even while categorizing the complaints.

We believe it is likely that the SEC classified the following company claims in 2018 as asserting factual error, based on language used by company management in the company's DEFA14As, and the fact that the DERA Memo indicated that these DEFA14As were included in the Table 2 classifications. We think some may not actually have been claims of proxy advisor factual inaccuracy, notwithstanding sometimes heated language, and that others are misleading. Of course, we cannot know whether the SEC classified these DEFA14As as claiming factual error, because the SEC so far has declined to disclose its specific assessments. We believe it is worth discussing these in some detail, because the detail shows how tenuous most of these few accusations of inaccuracy really are.

- **Abbott Laboratories**: ISS shared a pre-publication draft of its report on the Abbott Laboratories (Abbott) annual meeting with company management. Abbott, unhappy with recommendations against its say-on-pay proposal and for a shareholder proposal requesting an independent board chair, asserted that the ISS draft report had various flaws and inaccuracies. It seems probable that the SEC classified Abbott as claiming factual error, analytical error and general policy disagreement. ISS agreed there were two factual inaccuracies in the draft and corrected them in the published report.[27] Subsequently, Abbott filed a DEFA14A[28] that made a number of assertions that we believe were

[26] Letter, Oct. 24, 2019, *op. cit.*
[27] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Abbott Laboratories, April 5, 2018 (on file at CII).
[28] Abbott Laboratories, DEFA14A, April 5, 2018, at https://www.sec.gov/Archives/edgar/data/0000001800/000110465918022657/0001104659-18-022657-index.htm.

inaccurate, aside from being notably heated in defending the pay of Chairman and CEO Miles D. White. The Abbott filing, featuring a letter from Abbott Compensation Committee Chair Roxanne Austin, was rebutted by ISS in a response letter[29] dated April 16, 2018. We find the ISS rebuttal entirely persuasive, including on descriptions of inaccuracies in the Abbott DEFA14A.[30]

- **Ambarella**: An October 2018 American Council for Capital Formation (ACCF) Study (the ACCF Study) said that Ambarella alleged factual errors in a DEFA14A.[31] This ACCF characterization appears to be inaccurate. The company appeared to disagree with elements of reporting on say-on-pay proposals by Glass Lewis (which recommended clients vote for the proposal) and ISS (which recommended that clients vote against). ACCF characterized some portion of the following as a "factual error" by one or both proxy advice firms: "The Company argued that CEO target pay had decreased (not increased); annual incentives required stretch performance; and PRSU strategic goals helped position the Company for future growth and success." But the company did not assert that either ISS or Glass Lewis reported that CEO target pay had increased, or that annual incentives did not require stretch performance, or that as a factual matter the PRSU strategic goals did not position the company for future growth and success. The

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[29] Letter from ISS to Abbott Laboratories, April 16, 2018, on file with CII.

[30] The errors and misleading comments from Abbott and Austin included: (a) Abbott said that ISS "disregarded" management attempts to correct alleged inaccuracies and flaws in the report, which is false; (b) Abbott said it made "multiple requests to ISS for a meeting" and that "contrary to their [ISS's] stated policies…ISS refused to engage Abbott." ISS said it engaged Abbott before drafting the report and received one request to do so after it send the draft report. We cannot know whether Abbott or ISS is correct on the company's "multiple request" claim, but ISS is clear and public that its policies do not require meeting with every issuer that requests a meeting ("that determination is at ISS's sole determination. During proxy season, companies should expect that only truly exceptional situations will warrant engagement immediately prior to, or following, publication of ISS's reports."); (c) Abbott incorrectly called standard ISS analysis conducted in accordance with clearly described ISS methodologies as "manipulation" and "distorted"; (d) Abbott ignored the stated grounds on which ISS opposed the company's say-on-pay proposal in finding the ISS vote recommendation to be "absurd that in the face of these facts" [cited by Abbott to show strong performance and alignment of CEO pay] that ISS did not recommend in favor on the say-on-pay vote, which recommendation "should be objective and based on facts"; (e) Abbott falsely claimed that the ISS quantitative assessment resulted in a "low concern," whereas that assessment resulted in a "medium concern"; (f) Abbott falsely alleged that ISS did not follow its own criteria for selecting peer companies (which substantially overlapped management's preferred peer group), "purposely manipulating the outcome," an *ad hominem* attack delivered wholly without evidence; (g) Abbott falsely accused ISS of "manipulation" of GAAP and non-GAAP measures, and in so doing asserted several inaccurate claims, including that ISS stated that "EBITDA is the most important measure for our GICS code"; (h) Abbott charged that ISS's standard valuation model for stock options led to an "incorrect" calculation of CEO pay and "inflation of CEO compensation" – an argument over methodology, not accuracy; (i) Abbott described ISS criticisms of aspects of the company's disclosure as "false," while not confronting specific criticisms made by ISS and inaccurately stating ISS's concerns; (j) Abbott incorrectly described the basis for ISS's support for a shareholder proposal to separate the roles of chair and CEO; (k) Abbott asserted that the CEO's 2018 equity award was "irrelevant to 2017's Say on Pay recommendation," which appears incorrect at best given that Abbott said the award was based in part on 2017 performance (and proxy advisors and investors have a right to take into account recent developments and forward-looking awards in deciding on say-on-pay votes).

[31] Frank M. Placenti, "Are Proxy Advisors Really A Problem?", American Council for Capital Formation, October 2018, at http://accfcorpgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf. In this letter, we examine the detailed ACCF information on which Placenti's report is based, which is available at http://accfcorpgov.org/wp-content/uploads/2018/10/Analysis-of-Proxy-Advisor-Factual-and-Analytical-Errors_October-2018.pdf

ACCF claim may relate to an ISS assertion that the CEO long-term equity pay grant increased year-over-year. The company said "equity grant levels" actually decreased since FY 2016, which the ISS report actually indicates.[32] However, ISS showed an increase between FY 2017 and FY 2018, which is factually accurate based on the company's proxy statement. The company explains that it changed the performance year, which resulted in the increase between FY 2017 and FY 2018. It appears to be correct that the company criticizes the ISS analysis, but the ACCF claim of factual inaccuracy appears to be factually incorrect, from what we can see. We are unsure whether the SEC, like ACCF, classified the company as asserting factual inaccuracy.

- **American Outdoor Brands**: American Outdoor Brands filed two supplemental proxy filings in 2018 that are included in SEC Table 2.[33] One complaint was on Glass Lewis reporting from a shareholder that the company did not disclose certain donations and should have under its policy on disclosure of political contributions. In fact, Glass Lewis reported on what the company said and what the proponent said, and specifically did not oppose directors on this basis.[34] Glass Lewis did oppose some directors based on non-disclosure of a public company board on which a director was serving that Glass Lewis believed raised particular conflict of interest issues. The company said that omission of disclosure of that board was an error in the proxy statement, caused by failure of the director to disclose the board service, and argued why there was no conflict of interest. Glass Lewis acknowledged the argument and reversed its position on some directors, but maintained a recommendation to oppose the director who the company said had failed to disclose his board service. In another filing, American Outdoor Brands said an ISS recommendation "is based on misinformation." The company asserted that it would not be possible for it "to monitor violent events associated with our firearms," and that ISS "erroneously" suggested that such monitoring (even if feasible according to the company) would help "mitigate potential damage to the company's reputation among law-abiding owners and other members of the public." The company may be right, but these are not factual errors. We assume the SEC probably classified the company's assertions as claims of factual errors since the company couched some of them as such.

- **Ameriprise Financial:** The company (1) noted an ISS assertion that pay decisions are overly discretionary, and said the discretion historically has been used mainly to reduce the incentive pool.[35] The company (2) also said that "classifying our Balance Sheet or our Strategic and Business metrics as discretionary is incorrect." The SEC may have called the latter a claim of factual error on the part of a proxy advisor, but it is not clear to us that the company was making such a claim. In any case, ISS did not say the balance sheet

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[32] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Ambarella, Inc., May 24, 2018 (on file with CII).
[33] American Outdoor Brands DEFA14A, Sept. 6, 2018, at https://www.sec.gov/Archives/edgar/data/0001092796/000119312518267792/0001193125-18-267792-index.htm; and American Outdoor Brands DEFA14A, Sept. 10, 2018, at https://www.sec.gov/Archives/edgar/data/0001092796/000119312518270028/0001193125-18-270028-index.htm.
[34] Glass Lewis, Proxy Paper on American Outdoor Brands, Sept. 20, 2018, and earlier editions for which Glass Lewis supplemented information (on file with CII).
[35] Ameriprise Financial DEFA14a, April 6, 2018, at https://www.sec.gov/Archives/edgar/data/0000820027/000104746918002622/0001047469-18-002622-index.htm.

or strategic and business metrics were discretionary. In fact, ISS specifically noted that these metrics are "absolute."[36] On the first issue (presumably not interpreted by the SEC as a claim of factual error), the company was clear in its proxy statement that it leaves room for discretion in setting the bonus pool, and that there is discretion in individual awards.

- **CNX Resources:** The company said that ISS "incorrectly calculated our EBITDA for the year by failing to properly account for the transformational spin-off transaction of our coal business."[37] It appears to us that CNX may have a valid concern about how ISS applied Compustat-reported EBITDA. It seems likely that the SEC classified this as a claim as a factual error, since the company's language misleadingly implies as such, and the SEC did not look beyond the company's statements. We think it would be reasonable if the SEC classified this as an analytical error.

- **FMC:** The company filed a letter from FMC Chairman and CEO Pierre Brondeau defending his pay, saying that ISS had "relied on factual errors in its analysis."[38] In our view, Brondeau's letter misstated ISS's objection to reduced short-term incentive targets, pointing to reduction of an EBITDA target not specifically discussed by ISS.[39] As Brondeau said this was a "glaring error," we think it likely that the SEC analysis considered this a claim of "factual error." But it is not a factual error, notwithstanding the CEO's heated language. As ISS indicated more than once, its relevant objection was that payout opportunities were not reduced when performance goals were lowered. It is true that the business was shrinking due to the expected sale of the company's Health and Nutrition business, but it is not clear to us why it is not a legitimate question to ask why shrinking a company's business would not reduce CEO pay opportunities. The company argued with other aspects of the ISS analysis, which from FMC's standpoint made analytical errors, but these were not factual errors. For example, the CEO was concerned that ISS did not adequately, in his view, note anomalies in the SEC-mandated methodology for the summary compensation table that led to a reported increase in his pay from $10.4 million in 2016 to $13.0 million in 2017. He said his pay actually went down if the SEC mandated "total" compensation figure as adjusted in a manner that he thought it should be adjusted. ISS did send clients a Proxy Alert after FMC filed its DEFA14A, indicating that the company in that supplemental filing provided additional information on the goal-setting process for the annual incentive program, which mitigated certain ISS concerns. However, ISS continued to oppose management on say on pay, due to what ISS viewed as an inadequate company response to a low say on pay vote the previous year.

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[36] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Ameriprise Financial, March 29, 2018 (on file with CII).
[37] CNX Resources, DEFA14A, April 30, 2018, at https://www.sec.gov/Archives/edgar/data/0001070412/000119312518143184/0001193125-18-143184-index.htm.
[38] FMC DEFA14A, April 4, 2018, at https://www.sec.gov/Archives/edgar/data/37785/000130817918000126/lfmc2018_defa14a.htm.
[39] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on FMC Corporation, April 7, 2018 (on file with CII).

- **Interface:** The company noted in a DEFA14A cited by DERA that the ISS report indicated the company paid dividends on unvested performance shares.[40] The company said this was incorrect. ISS then corrected the error in a Proxy Alert.[41] The company also provided additional disclosure on engagement with shareholders on executive pay, leading ISS to reverse its earlier recommendations against two directors and the 2018 say on pay vote, which ISS had made based on lack of responsiveness to a 2017 say on pay vote. We presume that the SEC included this DEFA14A in its count on claims of factual error, notwithstanding the later correction, which would make sense to us.

- **Macquarie Infrastructure:** In a DEFA14A cited by DERA, the company (MIC) said ISS that relied "substantially on the incorrect assertions of Moab Capital Partners" (a dissident).[42] We think it likely that DERA classified this as a complaint about proxy advisory report inaccuracy. The company identified various Moab assertions that the company asserts are inaccurate. MIC said that "By adopting Moab's misleading version of events and not considering all of the publicly available information to the contrary disclosed by MIC, MIC believes that ISS has reached the wrong conclusion." But the company seemed to imply that ISS endorsed the dissident's version of events entirely, which is not correct. In recommending for three of six dissident nominees, ISS actually devoted more text to presenting MIC's views than to views of the dissident, and ISS clearly did not agree with the dissident on all matters.[43]

- **STAG Industrial:** We suspect the SEC classified a STAG Industrial DEF14A included in the DERA data set as raising issues of factual accuracy because the company calls an ISS valuation methodology inaccurate (but that appears to actually be an analytical disagreement) and because the company suggests (without using the word "incorrect") that ISS incorrectly found that the compensation plan's "muting design" creates volatility in payout levels for same levels of performance.[44] (The company said, "Muting design decreases volatility by leveling year-over-year compensation," says company.) ISS reported that the muting design "creates volatility in payout levels for the same levels of performance," which seems to us to be a different point, although not as clear as it could

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[40] Interface, DEFA14A, May 2, 2018, at https://www.sec.gov/Archives/edgar/data/%200000715787/000071578718000014/0000715787-18-000014-index.htm.

[41] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Interface, May 4, 2018 (on file with CII).

[42] Macquarie Infrastructure, DEFA14A, May 7, 2018, at https://www.sec.gov/Archives/edgar/data/0001289790/000114420418025761/0001144204-18-025761-index.htm.

[43] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Macquarie Infrastructure Corporation, May 4, 2018 (on file with CII). The ISS analysis concluded: "Where MIC's rebuttal appears weakest is in regard to the utilization decline timeframe posited by the dissident. The company has indicated that it only provides disclosure of aggregate utilization, rather than more granular details on capacity, for competitive reasons. Although the board asserts that Moab's allegations are misplaced because the dissident's calculations assume that utilization has declined in linear fashion, it has thus far failed to provide a conclusive, fact-based argument that definitively disproves the dissident's assumptions or calculations. Given the severity of the recent stock price decline, the board may want to reconsider whether the competitive benefits of limited disclosure continue to outweigh the mistrust discount being applied by the market."

[44] STAG Industrial DEFA14A, April 20, 2018, at https://www.sec.gov/Archives/edgar/data/1479094/000110465918025636/a18-11296_1defa14a.htm.

be.[45] In any case, we also find the company's discussion of "muting" in its proxy statement to be confusing (see proxy statement, pages 31-32).[46] We believe this DEFA14A discussed analytical differences and general policy differences, but would be skeptical about a DERA decision to classify this as a claim of "factual inaccuracy."

- **Stifel Financial Services:** Stifel asserted in a DEFA14A included in the Table 2 data set that ISS's recommendation against SOP "rests on a number of factually inaccurate conclusions," particularly related to tax "gross-ups."[47] The company also provided additional disclosures on special grants to three executives. ISS revised its report and changed the recommendation, saying that it interpreted "tax mitigation" cash payment as tax gross-up payments, which the company filing makes clear is not correct.[48] (The payments were inducements for executives and other employees to make individual tax elections that would lead the individual to incur additional tax liability but provide tax savings to the company). The initial ISS report did appear to contain inaccuracies, although in our view the same is true of the company's additional filing (for example, that ISS claimed that each named executive officer received $2 million in tax payments, which is not correct). Both the ISS and Stifel inaccuracies related at least in part to less-than-clear language by the other party.

- **Virtus Investment Partners Inc.:** The company said in a DEFA14A included in Table 2 data set that ISS and Glass Lewis used "incorrect peer groups."[49] and did not understand the rigorous nature of performance metrics used by Virtus, or changes made based on feedback from shareholders. The company also said that ISS and Glass Lewis were "incorrect" in indicating that the executive compensation program uses "a high degree of discretion," although the programs do provide for use of discretion "Incorrect peer groups" and the characterization of the of extent for discretion appear to be judgment calls, colored of course by how the company described its own programs in its proxy statement. In our view, these were analytical differences, with legitimate points by both the proxy advisors and the company.[50] We suspect that the SEC classified Virtus as making claims of factual error, which we think is not accurate despite use of the word "inaccuracy." We note that Glass Lewis used the Equilar peer group, based on an algorithm that incorporates peer groups as defined by a broad group of public companies. We also would note that the company peer group appeared to skew toward larger companies on a revenue basis (the company included three "peers" larger than any named

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[45] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on STAG Industrial, Inc., May 16, 2018 (on file with CII).
[46] STAG Industrial DEF 14A, March 21,2018,pages 31-32, at https://www.sec.gov/Archives/edgar/data/1479094/000110465918019321/a18-2942_1def14a.htm
[47] Stifel Financial, DEFA14A, May 23, 2018, at https://www.sec.gov/Archives/edgar/data/0000720672/000119312518171118/0001193125-18-171118-index.htm.
[48] ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Stifel Financial Corp., May 23, 2018 (on file with CII).
[49] Virtus Investment Partners, Inc., DEFA14A, May 7, 2018, at https://www.sec.gov/Archives/edgar/data/883237/000119312518154548/d582385ddefa14a.htm.
[50] Glass Lewis, Proxy Paper on Virtus Investment Partners, April 30, 2018 (on file with CII); and ISS, ISS Proxy Analysis & Benchmark Policy Voting Recommendations on Virtus Investment Partners, Inc., April 30, 2018 (on file with CII).

> by ISS). The company did not address relevance of company size in peer groups. We note that Glass Lewis revised its report to reflect a correction and more information, but well before the company filed its DEFA14A. It appears the company means to apply its commentary to the GL report as revised.

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In conclusion, we would emphasize that the SEC's own evidence suggests the rate of factual errors in proxy advice is extremely low, and the mechanisms that proxy advisors have in place to correct any such errors are prompt and effective. Proxy advisors have strong incentives, through the market for their research and analysis, to provide clients accurate, high quality advice, and the absence of significant errors shows those incentives are working.

SEC staff involved in the rulemaking have suggested, in meetings with us, that what matters most is that the regulatory approach ensure the lowest possible incidence of error, whatever the actual rate of errors in recent reports. This implicitly is an argument for a "perfection standard," which is neither economically justified nor likely to be attainable given the nature of the requirements the SEC has proposed

In our view, the SEC staff's suggestion that the point is to reduce errors, no matter how low their present frequency, is a fallback argument that belies awareness that error rates are low and that many of the complaints are, instead, differences of opinion and preferences on methodologies.[51]As others have said, this makes the Amendments a clear example of a solution in search of a problem. But as important, there is no evidence that the proposal is calculated to attain a lower rate of error.

Rather, what the proposal seems designed to do is ensure that management will "be comfortable" that its perspectives will be reflected in the proxy advice that investors procure. That is the point of the hyperlink, which the Release's economic analysis treats as indispensable, albeit disruptive to the proxy advisors.[52] We submit that the goal of management comfort is both itself unattainable and inappropriate, given that investors privately order the advice specifically to obtain independent, critical analyses of management proposals, just as they might have sought advice from independent, buy-side stock analysts before purchasing their shares and might read independent financial analyst reports when considering whether to continue to hold the shares. Moreover, the Release ignores strong reasons to expect that <u>the Commission's proposals will lead to more errors, and lower quality proxy advice</u> – even setting aside clear costs from jeopardizing the independence of advice and introducing major new conflicts of interest. With the time for proxy voting decisions already compressed and subject to very large seasonal

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[51] We question whether making sure executives are comfortable with independent, third-party advice on proxy voting matters that investors privately arrange for should be a *sine qua non* for proxy advice. Indeed, given the personal interest any executive would have in some of the topics – such as board composition and management pay – the Commission should expect tension with unvarnished, independent advice. At the very least, we believe that investors who pay for proxy voting advice should be comfortable with the process, which we believe most definitely will <u>not</u> be the case if the SEC's Amendments are enacted.

[52] Release at 114-115.

burdens, the SEC Review and Feedback and Final Notice requirements will subtract substantially from the time that proxy advisors and/or investor clients have to review proxy voting research, analysis and decisions.

That said, we think that the argument for new, costly and intrusive regulation that compromises free speech rights must, at a minimum, be based on evidence beyond a contention that proxy voting advice is not perfect or error-free.

If you have any questions on this letter or need additional information, please do not hesitate to contact me at 202.822.0800 or ken@cii.org.

Sincerely,

Kenneth A. Bertsch
Executive Director

Jeffrey P. Mahoney
General Counsel