Council of Institutional Investors®
The voice of corporate governance

Via Email

February 20, 2020

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

Re: Supplemental Comment on Proxy Filing Dates
File No. S7–22–19: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

Dear Madam Secretary:

On behalf of the Council of Institutional Investors (CII), we respectfully submit this supplemental comment letter on the proposed amendments to the federal proxy rules published by the U.S. Securities and Exchange Commission (SEC or Commission).[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 our earlier comment letters.[3] In this letter, we focus on the SEC's proposed incentive for companies to file proxy materials earlier, which we believe will not be

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[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 Dec. 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. 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. In this letter, the terms "shareowner" and "shareholder" are used interchangeably.

[3] Letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, CII, to Vanessa A. Countryman, Secretary, SEC (Jan. 30, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/20200130%20PAF%20comment%20letter%20FINAL.pdf (initial comment letter in response to the "proposed amendments to the federal proxy rules published on December 4, 2019, in SEC Release No. 34–87457, *Amendments to Exemptions From the Proxy Rules for Proxy*

effective. This is a critical issue in evaluating the SEC's proposal, because a central challenge in the quality of proxy voting is the compressed time frame for decision making during the annual spring "proxy season."

CII members include professionals who work for institutional investors – both asset owners and asset managers – in voting proxies. Our members take very seriously their fiduciary duties in carrying out this work. At our conferences and other events, CII provides educational programming for corporate governance professionals who vote proxies, and the Council hosts focused and lively discussions on proxy voting matters by governance professionals highly engaged with their work. It is abundantly clear in these discussions that compressed time for decision-making in proxy voting is already very challenging, particularly for institutional investors that seek debate and consensus among multiple professionals within their organizations.

Proxy advisory firm professionals face the same (or arguably even more difficult) challenges with compressed time for doing their work during the spring proxy season. We note in this regard relevant new research on ISS's assessment of company executive compensation practices that was submitted to the comment file by Susan Gallani of Harvard Business School, Ana Albuquerque of Boston University and Mary Ellen Carter of Boston College. That research found that:

> ISS 'Against' recommendations are able to uncover low quality compensation practices that are associated with worse future accounting performance, even in the presence of a favorable shareholder vote. However, these recommendations are most informative during the "off" season when assessments are less affected by workload compression….
>
> Our findings suggest that ISS evaluations can identify low quality compensation practices which are, in turn, reflected in future firm performance. Our findings that these results are stronger for firms with "off season" fiscal year ends suggest that ISS assessments are of higher quality when the proxy advisor can devote more resources to the analysis of firm disclosures. Therefore, our results also contribute to the literature examining how busyness can influence evaluative activities.[4]

Voting Advice") [hereinafter CII January 30 letter]; letter from Kenneth A. Bertsch and Jeffrey P. Mahoney to Vanessa A. Countryman, Secretary, SEC (Feb. 4, 2020), https://www.cii.org/files/issues_and_advocacy/corespondence/2020/20200204%20PAF%20error%20claims%20letter%20FINAL.pdf ("Data Analysis Supporting Proposed Regulation of Proxy Advisors"); letter from Jeffrey P. Mahoney to Vanessa A. Countryman, Secretary, SEC (Feb. 13, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/February%2013%202020%20Comment%20letter%20on%20proxy%20advisor%20firms%20(final).pdf ("Questions the SEC Should Address in Economic Analysis"); letter from Kenneth A. Bertsch, *et. al.*, to Vanessa A. Countryman, Secretary, SEC (Feb. 13, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/20200213%20PAF%20sign-on%20letter%20FINAL.pdf ("Practical Considerations for Investors who Seek to Carry Out Their Fiduciary Duties in Voting at Shareholder Meetings").

[4] Susan Gallani (corresponding author), Ana Albuquerque and Mary Ellen Carter, *Are ISS Recommendations Informative? Evidence from Assessments of Compensation Practices*, working paper submitted as comment to SEC on the Amendments, available at https://www.sec.gov/comments/s7-22-19/s72219-6741135-207744.pdf, at 1 and 5.

This is important evidence that confirms the existing benefits of expert proxy research and analysis, which should have been considered in the Commission's regulatory baseline. Not surprisingly, these benefits are greater when proxy advisors have more time and less distractions, which further undermines the weak justification for the Commission's proposal. In contrast, as we have discussed in detail in prior comment letters, one of the most significant stated motivations for the proposal – claims by companies of errors in proxy advice – is unsubstantiated and overstated. Rather, what this evidence shows is that the key to high quality research is to minimize distractions. The Commission's proposed measures – forcing proxy advisors to clear their research with the subject companies and include a hyperlink to a company's unverified assertions in opposition to proxy research and analysis, or subject proxy advisors to private litigation by companies that disagree with the advice – would only worsen the status quo, by aggravating the problem of compressed time for proxy voting decision making in the spring proxy season and introducing unnecessary and inappropriate distractions.

Recognizing that companies' proxy filing practices leave insufficient time for the proposed company review processes, the Proposing Release asserts that certain provisions in the proposed Amendments are "intended to provide an incentive for registrants and others to file their definitive proxy statements as far in advance of the meeting date as practicable."[5] Specifically, the SEC's proposal would offer the proxy analysis "review and feedback," "final notice" and "hyperlink" privileges only to companies that file proxy statements at least 25 days before the shareholder meeting, and would offer an even longer review period to those companies that file at least 45 days before the shareholder meeting.[6]

Both company comments and the data on when companies tend to file proxy materials today show that the proposed incentive would not work. We believe this data should have been considered in the regulatory baseline.[7] In the CII January 30 letter, we cited evidence that nearly all companies already currently file proxy materials at least 25 days before an annual meeting, so that element of the SEC clearly will not change behavior in any significant way. We also questioned the SEC's basis for believing the incentive was structured in a manner that would be strong enough to motivate companies to file proxy materials 45 or more days before the shareholder meeting, as the SEC acknowledges would be necessary to counteract a portion of the undue time pressure that its proposed corporate review and feedback process would put on the development of high quality proxy advice.

The Feb. 3, 2020, comment letter filed by the Center on Executive Compensation (the Center) confirms our view that the incentive does not provide enough motivation to change behavior. In its letter, the Center reported that it had asked for feedback to the SEC proposal from its subscribers, and "no Center Subscriber reported any plan to alter" proxy filing schedules in reaction to the rule.[8] Thus, as designed, the SEC's proposed "incentive" system will not work. The SEC claims to seek to affect behavior, but with no evidence its incentive will do so.

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[5] Release at 66,531.
[6] *Ibid*.
[7] The SEC only cited to secondary material from Broadridge and EY (Release, footnote 114, at 66,531).
[8] Letter from Henry D. Eickelberg, Chief Operating Officer, Center on Executive Compensation, to Vanessa A. Countryman, Secretary, SEC (Feb. 3, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6743676-207834.pdf.

In our letter of January 30, 2020, we noted that we requested data from Broadridge on public companies' filing dates, information we sought to fill in a critical gap in the SEC's analysis.[9] Broadridge's initial data set included both public companies and investment companies, which we manually separated. The Broadridge data only included the initial filing date and the date a meeting actually took place, so "noise" caused by postponed investment company meetings distorted the data. Investment companies frequently postpone meetings due to challenges in gaining quorum; postponed meetings are much less frequent for public companies, particularly for annual meetings. Moreover, it appears that investment companies routinely distribute proxy materials earlier because of the challenges in gaining quorum, even setting aside meeting postponements.[10]

Broadridge sent us a second data set, on 2018 meetings, a short time before the SEC's February 3, 2020, deadline for comments on its proposal to regulate proxy advisors.[11] We did not have time to analyze this data before the SEC deadline but have since endeavored to analyze it both carefully and expeditiously. This revised data set more effectively screened out investment companies, and we discuss it here to supplement our comments on current company practices in the CII January 30 letter.

The revised data set included 3,946 U.S. 1933 Act company shareholder meetings that took place in 2018, including 3,868 annual meetings (a handful of which were also designated as special meetings). We excluded meetings designated exclusively as "special meetings" from our analysis of this second data set. We also excluded 20 meetings at each "tail" – that is, those for which companies filed proxy materials an unusually long period or unusually short period before the annual meeting. For the remaining 3,828 annual meetings, the median company filed proxy materials 42 calendar days before the annual meeting, 865 of which (22.6% of all the companies) filed exactly 42 calendar days before the annual meeting.

In total, 2,900 companies (75.8%) filed from 40 to 48 calendar days before the annual meeting. Filings drop sharply outside of that window. Some 460 companies (12.0%) filed materials 50 calendar days or more before an annual meeting. Only 95 companies (2.5%) filed proxy materials 25 calendar days or less before the annual meeting.

A registrant using the "notice and access" method for delivery of proxy materials must make proxy materials available at least 40 calendar days before a shareholder meeting, which no doubt is a factor in so many filings presently made at or just more than the 40 calendar day mark.[12] It is striking that the SEC prohibits notice and access if proxy materials are published less than 40 calendar days before a meeting, but proposes, without justification, to impose a minimum one-week delay in proxy advisor research for companies providing proxy materials only 25 calendar days before a shareholder meeting.

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[9] CII January 30 letter, 27-28.
[10] If we had included investment companies, the median date for filing proxy materials before an annual meeting in 2018-2019 was 45 days, and the average was 51 days. That would dramatize the ineffectiveness of the SEC's 45-day incentive. But we thought this also would be misleading.
[11] On file with CII.
[12] Release, Footnote 114, at 66,531.

Data on actual filing dates indicates that a large number of public companies filing proxy materials 40 to 44 calendar days before annual meetings. Let us suppose, implausibly but for argument's sake, that every single one of the 1,676 companies that in 2018 filed proxy materials 40 to 44 calendar days before their annual meetings all decided to distribute proxy materials 45 calendar days before the meeting, in order to gain two extra days for review and feedback on proxy advisor reports. On average, that would mean that for the entire group, proxies would have been filed 1.4 calendar days earlier. This compares with the SEC proposed Amendment "review and feedback" and "final notice" requirements that, at a minimum would add seven (7) calendar days to the process.

We believe the SEC's proposed incentives will lead to average filing closer to zero days earlier rather than 1.4 days, which would appear to be an (implausibly high) upper limit. Logic suggests that the "extra two-day review period incentive" is weak tea, unlikely to persuade many (if any) companies to make extra efforts to file any earlier, particularly since company management is under its own strains from time compression in producing annual meeting materials. And as we mention above, Center on Executive Compensation member feedback suggests that their members say they will not file proxy materials earlier due to the SEC proposal.

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CII opposes the proposed amendments in their entirety, for multiple reasons. But should the SEC proceed, it is critical that the Commission not aggravate compression of time for investors in reaching voting decisions, particularly given the high concentration of shareholder meetings over a limited period in the spring.

We have suggested that if the Commission moves forward on a requirement that proxy advisors provide company management with a right to pre-review reports, the Commission should create a more limited maximum two business day review and feedback right, for factual information and data only, with the draft information also provided concurrently to clients, and <u>with a requirement that such right be provided only to a company that publishes proxy materials at least 50 days before a shareholder meeting</u>.[13]

We also urge the Commission to conduct its own thorough analysis of recent company practice on timing of proxy filings and provide the public an opportunity to comment on that analysis. This should be done before the SEC imposes any review and feedback of final notice requirements on proxy advisors.

The week-plus delay contemplated by the SEC's proposal is significant, and likely to be highly damaging to the quality of proxy voting processes and costly to investors. The proposal would require a minimum three-business day review period for draft reports, including analysis and recommendations. For some companies, the minimum would be five business days. On top of that, the proposed regulatory scheme would require the "final" report be furnished to the company that is the subject of the report two business days before it can be provided to paying

[13] CII January 30 Letter, at 3-4. We also would require the company to reimburse proxy advisors for costs for this process, and that the proxy advisor be provided a safe harbor from 14a-9 liability if it complies with the requirements.

clients. The proxy advisor will be under pressure to consider comments from company management, which we presume would require at least one business day.

Therefore, the actual delay for investors in receiving reports would be at least eight to 11 calendar days, reducing the time for investor clients to evaluate the reports and consider proxy votes by half or more for most meetings, given that on average proxy advisory firms send reports about 20 calendar days in advance of the meeting, and voting by proxy generally should be done at least the day before the meeting at the latest. We note that proxy advisor ISS has studied the requirements and determined that the delays will be, on average, nine to 13 calendar days.

In addition to examining company filing practices, the SEC should study how institutional investors who use services of proxy advisory firms actually manage this process, particularly during the spring “proxy season” (the Release presents no evidence that the Commission has done so). The Commission should include in this work consideration for demands on proxy voting staff and proxy advisor staff not only in voting at U.S. shareholder meetings, but also voting in other markets, many of which have a “proxy season” that coincide with or are on the shoulders of the peak U.S. season.

We appreciate your consideration of these additional comments.

Sincerely,

Kenneth A. Bertsch
Executive Director

Jeffrey P. Mahoney
General Counsel