

Via Email

February 13, 2020

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

***Re: Supplemental Comment on Questions the SEC Should Address in Economic Analysis,  
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) on December 4, 2019, in SEC Release No. 34-87457 (Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice) (Release).<sup>1</sup>

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 fund. 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.<sup>2</sup>

In our comment letter of Jan. 30, 2020,<sup>3</sup> we attempted to respond to all of the questions raised by the Commission in the Release, including the nine sets of questions the SEC raised in connection

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<sup>1</sup> 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>.

<sup>2</sup> 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>.

<sup>3</sup> Letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel to Vanessa A. Countryman, Secretary, Securities and Exchange Commission (Jan. 30, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2020/20200130%20PAF%20comment%20letter%20FINAL.pdf](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 Voting Advice*”).

with the Release's economic analysis.<sup>4</sup> In a supplemental letter of Feb. 4, 2020,<sup>5</sup> we raised questions about the Release's analysis on purported errors by proxy advisory firms.

As an additional supplement to our comment letter of Jan. 30, 2020, this letter respectfully poses the following questions to the Commission and staff that we believe raise essential considerations to the extent the SEC plans to produce a rigorous economic analysis of the proposed rule.

## **VII. Economic Analysis**

***Economic Analysis [EA] Request for Comment 1: Have we correctly characterized the demand for the services of proxy voting advice businesses? What alternatives are available, if any, to the advice of proxy voting advice businesses?***<sup>6</sup>

- ***CII Questions:*** What would be the cost to investors and companies if they seek to perform in-house the services now performed by proxy voting advice businesses, which appears to be the alternative that EA Request for Comment 1 contemplates? How do clients of proxy voting advice businesses benefit (or not) from the economies of scale captured by the services of those businesses? Would any such benefits outweigh the costs to clients of the additional resources that would be committed?

***EA Request for Comment 2: To what extent would the benefits of more reliable and complete voting advice being provided to investment advisers and other clients of proxy voting advice businesses benefit investors? Please provide supportive data to the extent available.***<sup>7</sup>

- ***CII Questions:*** What is the basis for EA Request for Comment 2 that voting advice would be more reliable under a different scenario or different regulatory regime? What is the basis for the assumption that voting advice may be incomplete today? Given that the SEC has indicated a claimed factual error rate of 0.3% on a report basis (that is, companies claim 0.3% of reports have one or more factual errors),<sup>8</sup> do the benefits to clients of any increase in the reliability and completeness of proxy voting advice brought about by the Release's proposed requirements outweigh its costs? What would be the economic impact of limiting private ordering between proxy voting advice businesses and clients of such business on terms such as advice deadlines, whether to allow issuer involvement or not, advice content and tolerable error? How would the proxy voting advice error rate be affected if proxy advisor businesses were incentivized to accept

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<sup>4</sup> *Id.* at 54-59.

<sup>5</sup> Letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission (Feb. 4, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/corespondence/2020/20200204%20PAF%20error%20claims%20letter%20FINAL.pdf](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**") [hereinafter CII February 4 Letter].

<sup>6</sup> 84 Fed. Reg. at 66,552.

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

<sup>8</sup> *See, e.g.*, CII February 4 Letter at 2 ("we have attempted to analyze the matters that may underlie Table 2, to the extent possible, and have found that: . . . **The number of claimed inaccuracies is a very small: 0.3 percent**").

management influence over proxy advice to reduce the risk of litigation over facts, opinions or beliefs that management disputed?

- **CII Questions:** How would the reliability and completeness of proxy voting advice be affected by reduced time for research on proxy proposals under the Release's proposed timeframe? Would the ability of clients of proxy voting advice businesses to exercise their own responsibilities with respect to proxy voting be improved if the timeframe available to review the research prior to voting their shares were reduced? What would be the impact on companies and investors on engagement regarding analysis by proxy advisors (including any errors in analysis) if the time for voting following publication of proxy advisory reports were reduced?

**EA Request for Comment 3.** *The benefits of the proposed amendments for institutional investors and their clients are linked to the extent to which current practices of proxy voting advice businesses would meet the requirements of the proposed conditions. Have we correctly characterized the extent to which the current practices of proxy voting advice businesses would meet such requirements?*<sup>9</sup>

- **CII Questions:** Has the Commission correctly identified current practices of all or substantially all current proxy voting advice businesses? How do their business models differ? To what extent would the cost to meet the proposed conditions force firms into a similar business model, and would that detract from market choice and competition?
- **CII Question:** Which of the current practices of the proxy voting advice businesses named in the Release meet the requirements of the proposed conditions?
- **CII Question:** Which of the proposed conditions in the Release would benefit institutional investors and their clients?

**EA Request for Comment 4.** *We discuss the possibility that proxy voting advice businesses could attempt to mitigate the delay in delivering advice to clients caused by registrant and other soliciting persons' review by committing additional resources to producing proxy voting advice earlier than they do currently. Would proxy voting advice businesses take these steps? How costly would it be for proxy voting advice businesses to produce proxy voting advice faster than they do currently? Please provide supportive data to the extent available.*<sup>10</sup>

- **CII Questions:** What are the costs and benefits to clients of proxy voting advice businesses if the Release's proposed requirements provide that those businesses produce their advice faster than they do currently? Would any benefits of the proposed requirements outweigh the costs to clients of the additional resources that would need to be committed?

**EA Request for Comment 5.** *We expect that the costs of the proposed review and feedback period and final notice of voting advice would be lower for proxy voting advice businesses that currently provide registrants with a mechanism for reviewing draft documents prior to proxy voting advice businesses issuing final drafts to their clients. Are we correct in that*

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<sup>9</sup> 84 Fed. Reg. at 66,552.

<sup>10</sup> *Id.*

*characterization? If other proxy voting advice businesses would be disproportionately affected, to what extent, and how would such effects manifest? What, if any, additional measures could help mitigate any such disproportionate effects? Please provide supportive data to the extent available.<sup>11</sup>*

- **CII Questions:** What would be the economic impact if the Commission’s expectation or “characterization” were incorrect? How would the expected costs of the Release’s proposed review and feedback period and final notice of voting advice promote competition in the proxy voting advice industry? How many potential competitors would decide not to enter the industry because of the expected costs? How many existing competitors would decide to exit the industry because of the expected costs? What are the costs and benefits to clients of proxy voting advice businesses of increasing the barriers to entry in the industry? What are the costs and benefits to clients of proxy voting advice businesses of reducing the number of existing competitors in the industry?
- **CII Question:** What are the costs and benefits of the information asymmetry between registrants and clients of proxy voting advice businesses created by the Release’s proposed review and feedback period and final notice of voting advice?
- **CII Questions:** Has the SEC reviewed the history of Proxy Governance, Inc. and the economic impact of its practice of sharing advance copies of its voting advice with registrants? How does the SEC reconcile the market’s judgment on Proxy Governance, Inc.’s practice with the speculation in the economic analysis that advance sharing of reports may have benefits for institutional investors? How does Proxy Governance, Inc.’s failure bear on the consideration of alternatives for the Commission’s economic analysis? How did investor views about the independence of Proxy Governance, Inc.’s advice affect its viability?<sup>12</sup>

**EA Request for Comment 6.** *To what extent might the increased burdens to proxy voting advice businesses to comply with the proposed conditions be borne by proxy voting advice business clients?<sup>13</sup>*

- **CII Questions:** Under what circumstances would the increased burdens to proxy voting advice businesses to comply with the Release’s proposed conditions *not* be borne by their clients? What is the profitability of proxy voting advice businesses, and to what extent would they absorb additional costs by reduced margins? To what extent would proxy voting advice business clients be protected from increased costs by consolidation of proxy voting advice businesses? Would consolidation (including a potential monopoly) lead to higher costs for proxy voting advice business clients, even beyond direct costs from the increased burdens due to the proposed conditions?
- **CII Questions:** Under what circumstances would the increased burdens to proxy voting advice businesses to comply with the proposed conditions *not* be borne by the

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

<sup>12</sup> See Gretchen Morgenson, “Pfizer and the Proxy Advisor,” N.Y. Times (Apr. 21, 2006), <https://www.nytimes.com/2006/04/21/business/pfizer-and-the-proxy-advisor.html> (registration required & on file with CII).

<sup>13</sup> 84 Fed. Reg. at 66,552.

beneficiaries of their institutional investor clients? Would these burdens further contribute to consolidation in the asset management industry, adding to scale advantages of the largest asset management firms? If so, how would those effects on asset manager competition affect beneficiaries, including institutional asset owner clients, individual investors and beneficiaries of institutional asset owners?

***EA Request for Comment 7.*** *In response to the Commission’s recent releases on proxy voting responsibilities and proxy voting advice, one commenter argued that the Commission’s interpretation and guidance would likely create substantially increased costs and unnecessary burdens on the process by which proxy voting advice businesses render their advice. According to that commenter, proxy voting advice businesses would face increased litigation, staffing and insurance costs that could be passed on to their institutional investor clients and their underlying retail clients. Would these concerns similarly apply to aspects of the proposed amendments, or is this concern overstated in that the aspects of the interpretation and guidance that are encompassed in the proposed amendments reflect current legal obligations regarding solicitation activities?*<sup>14</sup>

- ***CII Questions:*** How many lawsuits have been filed to date against proxy voting advice businesses that included a claim under SEC Rule 14a-9?<sup>15</sup> What were the litigation, staffing and insurance costs incurred by proxy voting advice businesses for those claims? Will the SEC’s August 2019 interpretation and guidance<sup>16</sup> or the proposed amendments change the likelihood of litigation against proxy voting advice businesses? What are the expected costs to proxy voting advice businesses (and their clients) of an increased likelihood of litigation? What would be the competitive impacts of litigation, and any change in litigation risk, on proxy voting advice businesses?

***EA Request for Comment 8.*** *If registrants and other soliciting persons choose to provide a statement regarding the proxy voting advice, registrants and other soliciting persons would incur costs of drafting a statement, providing a hyperlink (or other analogous electronic medium) to the proxy voting advice business, maintaining their statement online, and coordinating timing with proxy voting advice businesses for the filing of supplementary proxy materials. Please provide data with respect to these costs.*<sup>17</sup>

- ***CII Questions.*** How many additional days of delay in the client receipt of proxy voting advice would result from the Release’s proposed requirement that the registrant coordinate with the proxy voting advice businesses the timing for the filing of supplementary proxy materials? What are the costs and benefits to clients of proxy voting advice businesses from the additional delay?

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<sup>14</sup> *Id.* (footnotes omitted).

<sup>15</sup> 17 C.F.R. § 240.14a-9 (Jan. 1966), available at <https://www.law.cornell.edu/cfr/text/17/240.14a-9>.

<sup>16</sup> Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Exchange Act Release No. 86,721, 84 Fed. Reg. at 47,416, 47,419 (Sept. 10, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18355.pdf> (“Question 2: Does Exchange Act Rule 14a-9 apply to proxy voting advice? Response: Yes.”).

<sup>17</sup> 84 Fed. Reg. at 66,552.

- **CII Questions.** What economic benefit, if any, would result from a hyperlinked statement as opposed to current practices, including registrant use of supplementary proxy filings? What is the role of registrants' use of supplementary proxy filings in establishing the regulatory baseline?

**EA Request for Comment 9.** *To what extent do investors change their votes? To what extent do investors change their votes in response to a registrant filing additional definitive proxy materials? Please provide supportive data to the extent available.*<sup>18</sup>

- **CII Questions.** Would the ability of investors to change their votes be reduced because of the delay in the client receipt of proxy voting advice as a result of the Release's proposed requirements? What are the costs and benefits to clients of proxy voting advice businesses of a reduced ability to change their votes?

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CII appreciates the opportunity to submit comments on this important matter and is available to provide any additional information the Commission requests.

Sincerely,



Jeffrey P. Mahoney  
General Counsel

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<sup>18</sup> *Id.* at 66,552-53.