Council of Institutional Investors®
The voice of corporate governance

Via Email

December 23, 2021

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

Re: File No. S7–17–21

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to proposed amendments to the Federal proxy rules published on November 26, 2021, in SEC Release No. 34–93,595, *Proxy Voting Advice* (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 $40 trillion in assets under management.[2]

CII generally supports the Release. The following is a brief summary of our responses to key issues raised by the Release:

Proposed Amendments to Rule 14a-2(b)(9).

We generally support amending Rule 14a-2(b)(9) as proposed to rescind the Rule 14a-2(b)(9)(ii) conditions (Conditions).[3] We also support rescinding the related *Supplement to Commission*

[1] Proxy Voting Advice, Exchange Act Release No. 93,595, 86 Fed. Reg. 67,383 (proposed rule Nov. 17, 2021), https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25420.pdf.

[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 $21,100 annually to ISS for its proxy research.

[3] *See* 86 Fed. Reg. at 67,384 ("(A requirement in 17 CFR 240.14a– 2(b)(9)(ii) ('Rule 14a–2(b)(9)(ii)') that a PVAB adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants that

Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (Guidance).[4] For those investors who followed this rulemaking closely it was clear that neither the Conditions nor the Guidance were intended to benefit investors. Most investors neither asked for nor supported the Conditions and Guidance.

We share the view of the SEC that investors and other market participants continue to express concerns about the Conditions and Guidance and their potential adverse effects on the independence, cost and timeliness of proxy voting advice. And we believe, that at a minimum, rescinding the Conditions and the Guidance would give proxy advisors and investors more flexibility to select mechanisms that best serve the needs of investors and adapt to evolving market practices.

Proposed Amendment to 14a-9

We generally support amending Rule 14a–9 as proposed to remove Note (e).[5] In addition, we would support amending Rule 14a–9 to expressly state that a proxy advisor would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations, including its decision to use a specific analysis, methodology or information or its decision as to how to respond to any disagreement a registrant may have with its proxy voting advice.

We agree with the SEC that subjecting proxy advisors to Rule 14a-9 liability[6] creates uncertainties that unnecessarily increase the litigation risk to proxy advisors and potentially increase the cost and impair the independence of the proxy voting advice that investors use to make their voting decisions. We believe removing Note (e) in combination with amending Rule 14a-9 to include an express statement about the application of Rule 14a-9 to proxy advisor recommendations and determinations would substantially reduce those uncertainties and thereby enhance integrity and quality of proxy voting advice to the benefit of investors.

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are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the PVAB's clients and (B) the PVAB provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the security holder meeting (the 'Rule 14a–2(b)(9)(ii) conditions')").

[4] Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Investment Adviser Act Release No. 5,547, 85 Fed. Reg. 55,155 (Sept. 3, 2020), https://www.federalregister.gov/documents/2020/09/03/2020-16338/supplement-to-commission-guidance-regarding-proxy-voting-responsibilities-of-investment-advisers.

[5] *See* 86 Fed. Reg. at 67,389 ("Note (e) to Rule 14a–9 provides that the failure to disclose material information regarding proxy voting advice, 'such as the' [PVAB's] methodology, sources of information, or conflicts of interest' could, depending upon particular facts and circumstances, be misleading within the meaning of the rule").

[6] False or Misleading Statements, 17 C.F.R. § 240.14a-9(a) (2020), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-9 ("No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.").

Alternative to Release

We believe there is a superior alternative to the Release's proposed amendments to mitigate the potential adverse affects on proxy voting associated with the Conditions, the Guidance, and the Rule 14a-9 liability: Rescind, in its entirety, the September 1, 2020, SEC Release No. 34–89,372, *Exemptions From the Proxy Rules for Proxy Voting Advice* (2020 Final Rule).[7]

We note that the 2020 Final Rule is built on an unsettled foundation— the SEC's determination that proxy voting advice delivered to an investor requesting that advice constitutes a "solicitation" under Section 14(a) of the Securities Exchange Act of 1934 (34 Act).[8] The breadth of the Commission's definition of a solicitation will likely continue to be a source of questions and confusion for the Commission, investors, proxy advisors and other market participants. And it is unclear to us that when the definition is challenged, it will survive judicial scrutiny.

Economic Analysis

We generally believe the provisions of the Release, as supplemented by our proposed recommended improvements, would strengthen the integrity and quality of proxy voting by protecting the independence of proxy advisors and reducing the costs to investors resulting from the 2020 Final Rule. As indicated, we believe a superior, more cost-effective, alternative to the Release is to rescind the 2020 Final Rule in its entirety.

Our detailed responses to the requests for comment in the Release are set forth below. The SEC questions to which we are responding appear in italics.

SEC Request for Comment 1. *Should we amend Rule 14a–2(b)(9) as proposed to rescind the Rule 14a–2(b)(9)(ii) conditions? Would such a rescission help facilitate the provision of timely and independent proxy voting advice? Alternatively, rather than rescinding the Rule 14a–2(b)(9)(ii) conditions as proposed, should we commit to a retrospective review of the Rule 14a–2(b)(9)(ii) conditions after they have become effective? If so, what is the appropriate period of time after which we should conduct such review? What would be the potential drawbacks of conducting such a retrospective review?*[9]

CII Response. CII supports amending Rule 14a-2(b)(9) as proposed to rescind the Conditions. For those investors who followed this rulemaking process closely it was clear that the Conditions were not intended to benefit shareholders. Most investors neither asked for nor supported the Conditions.[10] As one example, T. Rowe Price commented:

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[7] Exemptions From the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 89,372, 85 Fed. Reg. 55,082 (final rule Sept. 1, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf.
[8] *See* Proxies, 15 U.S.C. § 78n(a) (2012), *available at* https://www.law.cornell.edu/uscode/text/15/78n ("**Solicitation of proxies in violation of rules and regulations**").
[9] 86 Fed. Reg. at 67,388 (emphasis added).
[10] *See* Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System to Vanessa Countryman, Secretary, Securities and Exchange Commission 1 (Dec. 23, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110275-264529.pdf ("OPERS believes the Commission's decision to remove the Rule 14a-2(b)(9)(ii) conditions is appropriate in light of . . . the fact that the regulations in question were offered as a benefit to institutional investors who largely did not request or support them."); Letter

> In adopting those conditions in 2020, the Commission stated that they should "increase confidence across participants in the proxy system that clients of proxy voting advice businesses…have timely access to transparent, accurate, and complete information material to their voting decisions." *As we said in our 2020 comment letter, it is our informed belief, based on years of experience working with proxy advisory firms as both an issuer and an institutional investor, that proxy advisors do not need oversight by issuers in order to provide accurate research reports.* We have not seen any empirical evidence of widespread market abuse or failure that warranted the Rule 14a-2(b)(9)(ii) conditions, and accordingly we are not concerned with the idea of removing those conditions. In our view, this was – and remains – a solution in search of a problem.[11]

We share the concerns of the SEC that proxy advisor "clients and others continue to express about the conditions' potential adverse effects on the independence, cost and timeliness of proxy voting advice."[12] And we generally share the SEC's belief that "rescinding the Rule 14a–

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from Susan Olson, General Counsel, Investment Company Institute et al. to Mr. J. Matthew DeLesDernier, Assistant Secretary, Securities and Exchange Commission 3 (Dec. 23, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110281-264530.pdf ("While we support the intent of the 2020 amendments—to promote more accurate, transparent, and complete information on which to make voting decisions—the 2020 amendments are unnecessary to achieve this objective."); Letter from Kerrie Waring, Chief Executive Officer, ICGN to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2 (Dec. 22, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110198-264470.pdf ("From the onset of the SEC's adoption of Rule 14a-2(b)(9), concerns were raised by investors that the Rule could have a chilling effect on their ability to not only receive proxy voting advice in a timely manner but also *independent* research."); Office of Investor Advocate, U.S. Securities and Exchange Commission, Report on Activities, Fiscal Year 2021 at 6-7 (Dec. 16, 2021), https://www.sec.gov/files/FY21_OIAD_SAR_ACTIVITIES_REPORT_FINAL_508.pdf ("In January 2020, the IAC adopted a recommendation that the Commission revise and republish the rulemaking proposal, but in July 2020, the Commission adopted the final rules without heeding the IAC's recommended approach [and] [w]e, too, opposed the rulemaking and, in our previous Report on Activities (filed December 2020), encouraged the Commission to reconsider the amendments."); David Isenberg, SEC Pitches Reversal to Trump-Era Proxy Advice Rule, Ignites (Nov. 18, 2021) (on file with CII) (quoting Jackie Cook, director of sustainability stewardship research at Morningstar: "The proposal is a 'watered-down version' of the 2020 rule, which was strongly opposed by the investment community . . . ."); Commissioner Allison Herren Lee, Statement on Proposed Amendments Relating to Proxy Voting Advice (Nov. 17, 2021), https://www.sec.gov/news/statement/lee-proxy-advice-20211117 ("Today's proposal represents a targeted reappraisal of only certain aspects of those amendments that generated substantial concern, particularly among investors (the intended beneficiaries of the changes), that we didn't get the balance right in last year's final rules").

[11] Letter from Donna F. Anderson, Vice President, Head of Corporate Governance, T.RowePrice et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 1-2 (Dec. 21, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110165-264411.pdf (emphasis added and footnotes omitted).

[12] 86 Fed. Reg. at 67,388; Letter from Susan Olson, General Counsel, Investment Company Institute et al. to Mr. J. Matthew DeLesDernier, Assistant Secretary, Securities and Exchange Commission at 4 ("We believe that any improvements from the 2020 amendments with respect to accuracy and transparency of proxy advice would be slight, as indicated by the SEC's own analysis, and likely would be more than offset by negative effects on timeliness and cost."); Letter from Jennifer W. Han, Executive Vice President, Chief Counsel, Managed Funds Association to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission 2 (Dec. 20, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110063-264374.pdf ("Rule 14a-2(b)(9)(ii) of the Exchange Act, in its current form, disrupts the preparation and delivery of proxy voting advice to fund managers and increases compliance costs by requiring proxy advisory firms to provide proxy voting advice to each issuer at the time such advice is disseminated to its clients, while also requiring the firm to disclose an issuer's response to the proxy voting

2(b)(9)(ii) conditions would give [proxy advisors] PVABs, investors and registrants the flexibility to select mechanisms that best serve the needs of investors and other stakeholders and adapt to evolving market practices."[13]

SEC Request for Comment 2. *Are the existing mechanisms in the proxy system, including the role played by the BPPG and the Oversight Committee and the policies and procedures that PVABs have in place, sufficient to obviate the need for the Rule 14a–2(b)(9)(ii) conditions? Are there other relevant existing mechanisms in the proxy system that the Commission should consider?*[14]

CII Response. CII believes the existing mechanisms in the proxy system are sufficient to obviate the need for the Conditions. As we observed in response to the December 4, 2019, SEC Release No. 34–87,437, *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice* (2019 Proposal).[15]

> The market itself is an important source of pressure for accuracy and quality in proxy advisor reports. Our members generally would like to have more than two dominant providers, not fewer. The Release seems to entirely ignore the value of market-based solutions . . . .[16]

We share the SEC's belief that "there are market-based incentives for [proxy advisors] PVABs to adopt and maintain policies and procedures that provide some of the same benefits as those of the Rule 14a–(b)(9)(ii) conditions without raising the concerns investors have expressed about

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advice to clients in a 'timely manner' before the relevant shareholder meeting."); David Isenberg, SEC Pitches Reversal to Trump-Era Proxy Advice Rule, Ignites (quoting Jackie Cook, director of sustainability stewardship research at Morningstar: "The proposal 'nevertheless [places] an additional burden on proxy advisory firms and an additional liability risk – the effect of which is to raise the cost of providing voting advice' . . . ."); Commissioner Allison Herren Lee, Statement on Proposed Amendments Relating to Proxy Voting Advice ("investors in particular have explained that certain features of the final rules still include the same infirmities they had identified in the proposal, namely increased risk of impaired independence and significant new costs and delays").

[13] 86 Fed. Reg. at 67,388; s*ee* Letter from Theresa Whitmarsh, Chief Executive Officer, State of Washington, State Investment Board to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission 1 (Dec. 23, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110243-264512.pdf ("We support the proposed rule changes (S7-17-21) that would eliminate the requirement for proxy advisory firms to issue their research in advance to the subject companies, and proactively provide any feedback from those companies to investors."); Letter from Susan Olson, General Counsel, Investment Company Institute et al. to Mr. J. Matthew DeLesDernier, Assistant Secretary, Securities and Exchange Commission at 4 ("we believe the 2020 amendments are unnecessary and could impede continuing innovations and market developments"); Letter from Jennifer W. Han, Executive Vice President, Chief Counsel, Managed Funds Association to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission at 2 ("Such a recission will help facilitate the provision of timely proxy voting advice and alleviate unnecessary compliance burdens and costs.").

[14] 86 Fed. Reg. at 67,388 (emphasis added).

[15] 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.

[16] Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 5 (Jan. 30, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/20200130%20PAF%20comment%20letter%20FINAL.pdf.

those conditions."[17] More specifically, we generally agree with the law firm Cleary Gottlieb Steen & Hamilton LLP that the Best Practice Principles Group and its Independent Oversight Group "could have an important positive impact on the process."[18]

SEC Request for Comment 3. *How might we address the risk that PVABs will change their policies and procedures to the detriment of investors if we rescind the Rule 14a–2(b)(9)(ii) conditions? How might we address the risk that, absent the Rule 14a–2(b)(9)(ii) conditions, new entrants to the PVAB market will not be properly incentivized to adopt policies and procedures that approximate those conditions?*[19]

CII Response. CII believes there is little risk that the proxy advisory firms (whether existing or new entrants) will change or adopt policies and procedures to the detriment of investors—the primary customers of proxy research—if the Conditions are rescinded. As indicated in response to SEC Request for Comment 1, the Conditions were neither requested nor supported by investors. Moreover, if the proxy advisors should change their policies and procedures in ways that are detrimental to investors, nothing precludes the SEC from reevaluating market practices and adopting rule amendments as necessary and appropriate.[20]

SEC Request for Comment 4. *Are there ways that we can mitigate the potential adverse effects on proxy voting advice associated with the Rule 14a–2(b)(9)(ii) conditions other than by rescinding those conditions?*[21]

CII Response. CII believes that another way that the SEC can mitigate the potential adverse effects on proxy advice associated with the Conditions is by repealing the 2020 Final Rule in its entirety.[22] We note that the 2020 Final Rule is built on an unsettled foundation—the SEC's determination that proxy voting advice delivered to an investor requesting that advice constitutes a "solicitation" under Section 14(a) of the 34 Act. As we explained in response to the 2019 Proposal:

> Proxy solicitation arguably is different than proxy advice. Proxy solicitors generally are viewed as playing an advocacy role, requesting proxies as, or on behalf of, an interested party, the company or a shareholder proponent. In contrast,

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[17] 86 Fed. Reg. at 67,388.
[18] Nicolas Grabar et al., The SEC Backs Off on Proxy Advisory Firms, Alert Memorandum, Cleary Gottlieb (Nov. 21, 2021), https://www.clearymawatch.com/2021/11/the-sec-backs-off-on-proxy-advisory-firms/#:~:text=On%20November%2017%2C%20the%20SEC,advisory%20firms%20in%20July%202020.
[19] 86 Fed. Reg. at 67,388 (emphasis added).
[20] *See id.* ("To the extent that there are changes in the quality of PVABs' policies and procedures or new entrants to the PVAB market that do not adopt policies and procedures consistent with best practices, we will reevaluate the state of the PVAB market and consider whether further action should be taken."); *see also* Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System to Vanessa Countryman, Secretary, Securities and Exchange Commission at 3 ("Presumably, the importance of this issue, as well as the Commission's own comments regarding its on-going observation of the marketplace will also discourage any reversal.").
[21] 86 Fed. Reg. at 67,388 (emphasis added).
[22] *See, e.g.*, Letter from Kerrie Waring, Chief Executive Officer, ICGN to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 2 ("ICGN is broadly supportive of the proposed changed to Rule 14a-2(b); however, we note that the change represents only a slight give, while leaving the operating portions of the 2020 Final Rule in place.");

proxy advisors have no stake in the outcome and are hired by shareholders to give objective advice as a disinterested party.

The proposed codification depends on collapsing the distinction between proxy solicitors and proxy advisors and essentially treating proxy advice as a proxy solicitation. This does not make any logical sense.

Institutional investors solicit research, analysis and recommendations from proxy advisors, and pay for those services. The SEC believes that because proxy advisors market their services to institutional investors, "solicitation" of business somehow makes their work product proxy solicitation. In competitive free markets, firms do market their services; this is a key element in how most markets work.

We believe from our members that there is clear market demand for proxy advisory services even beyond vote execution, as the expense of proxy voting analysis would be vastly more expensive if done from scratch by each investor individually. Proxy advisors market mainly because they are competing with each other.

We believe it is unclear at best whether collapsing the distinction between proxy solicitors and proxy advisors makes sense from a legal perspective.

As Nell Minow, an expert on corporate governance and the proxy advisor industry, has commented.

> The reference to proxy solicitation rules is so inapposite as to be absurd. The proxy solicitation rules are a safeguard against the advocacy of parties with a clear incentive to provide only one side of the story on matters that are fundamental to a company's continuing operations and structure. Proxy advisors are independent third parties who sell a product no one has to buy with recommendations no one has to follow.

A letter endorsed by 62 prominent academics, led by Stanford Graduate School of Business Professor Anat Admati and University of Chicago Booth School of Business Professor Luigi Zingales (Admati Letter), states that they believe the Commission should not "treat[] opinions on proxies as proxy solicitations."

The Release acknowledges that the "breadth of the Commission's definition of a solicitation could raise questions." The Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee (IAC) recommendation addressing the Release (IAC Recommendation) indicates that it not only raises questions but raises "confusion among many investors."

In addition to questions and confusion . . . it is unclear to us whether . . . [a] Federal Court . . . will agree with the Commission that Section 14(a) applies to proxy

> advisors whose activities are not intended to solicit proxies and who do not solicit proxies, but instead provide advice solicited by institutional investor clients.[23]

In addition to eliminating the unstable foundation of the 2020 Final Rule, as indicated in our response to SEC Request for Comment 1, we believe that repealing the 2020 Final Rule in its entirety would also give proxy advisors and investors the flexibility to select those mechanisms that best serve the needs of investors and adapt to evolving market practices.

SEC Request for Comment 5. *Have registrants or others relied on the Commission's adoption of the Rule 14a–2(b)(9)(ii) conditions? How, and to what extent, should any such reliance interests factor into the Commission's determination of whether to rescind those conditions?*[24]

CII Response. CII does not currently have information about whether registrants or others have relied on the Commission's adoption of the Conditions. We, however, note the following comment from the Ohio Public Employees Retirement System (OPERS):

> OPERS has not experienced a significant increase in issuer outreach regarding disputes over proxy voting advice either directly or through Glass Lewis' Report Feedback Service since the adoption of the 2020 Final Rules. Further, in the instances that we do receive information contradicting our proxy voting advice, much of that involves differences of opinion regarding the methodologies used by our proxy advisory firm, which is less useful in helping us to formulate our proxy votes. This lack of meaningful feedback at least prompts a question as whether the 2020 Final Rules were properly substantiated or even necessary to begin with.[25]

SEC Request for Comment 6. *Should we also reconsider the Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers that the Commission issued in connection with the 2020 Final Rules? Because that supplemental guidance was prompted, in part, by the Rule 14a–2(b)(9)(ii) conditions, will the guidance be useful if the Rule 14a–2(b)(9)(ii) conditions are rescinded? Should the guidance be rescinded concurrently with the Rule 14a–2(b)(9)(ii) conditions? Should it instead be revised, and, if so, how?*

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[23] Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 7-8 (footnotes omitted), s*ee* Brief for Council of Institutional Investors at al. as Amici Curiae Supporting Plaintiffs, ISS v. SEC at 5-9 (U.S.D.C. D. D.C. Oct. 2020) (No. 1:19-cv-3275-APM), https://www.cii.org/files/issues_and_advocacy/legal_issues/Doc_%2024-1%20-%20Brief%20Amici%20Curiae.pdf (arguing that "**THE SEC'S DETERMINATION THAT PROXY VOTING ADVICE DELIVERED TO AN INVESTOR REQUESTING THAT ADVICE CONSTITUTES A "SOLICITATION" UNDER SECTION 14(a) IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS**."); Letter from Theresa Whitmarsh, Executive Director, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission 1 (Jan. 22, 2020), https://www.sec.gov/comments/s7-22-19/s72219-6684993-205890.pdf ("WSIB's proxy advisors are providing guidance, data, tracking and timely execution of our voting on proxy resolutions [and] [o]ur advisors are NOT soliciting us to vote in support of particular policies or in a particular direction").

[24] 86 Fed. Reg. at 67,388 (emphasis added).

[25] Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System to Vanessa Countryman, Secretary, Securities and Exchange Commission at 3.

Notwithstanding the proposed rescission of the Rule 14a–2(b)(9)(ii) conditions, are there aspects of the supplemental guidance that should be clarified?[26]

CII Response. CII believes the Commission should rescind the Guidance. Like the 2020 Final Rule, investors neither requested nor supported the Guidance.

In addition, we believe the Guidance should be rescinded because it was prompted, in part, by the Conditions which are proposed to be rescinded. Moreover, we believe the Guidance should be rescinded because, as explained by SEC Commissioner Allison Herren Lee, in the following statement, it supplements guidance that will add to uncertainty and delays:

> [T]he guidance instructs investment advisers to consider any issuer response to proxy voting advice *prior to exercising voting authority*. But how long must investment advisers wait to see if an issuer will respond? And how much time and effort must be afforded these responses before voting? Taken together, the final rules and guidance introduce uncertainty and delays, force proxy advisors to convey management views, and effectively require consideration of those views before voting occurs. All to solve a problem that we have not established exists, and ostensibly to benefit proxy advisor clients who have emphatically stated that no rule is needed or wanted.[27]

SEC Request for Comment 7. *Should we amend Rule 14a–9 as proposed to remove Note (e)? Should we modify the Note instead of deleting it? If so, how should the Note be modified? Rather than rescinding or amending Note (e), should we instead commit to conducting a retrospective review of Note (e) after a given period of time? If so, what is the appropriate amount of time after which we should conduct such review? What would be the potential drawbacks of conducting such a retrospective review?*[28]

CII Response. CII supports amending Rule 14a–9 as proposed to remove Note (e).[29] We, and many investors, agree that subjecting proxy advisors to Rule 14a-9 liability creates "uncertainties [that] unnecessarily increase the litigation risk to [proxy advisors] PVABs and impair the independence of the proxy voting advice that investors use to make their voting decisions."[30] As CII member OPERS commented:

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[26] 86 Fed. Reg. at 67,388-89 (emphasis added).
[27] Commissioner Allison Herren Lee, Statement, Paying More For Less: Higher Costs for Shareholders, Less Accountability for Management (July 22, 2020), https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22.
[28] 86 Fed. Reg. at 67,390 (emphasis added).
[29] *See id.* at 67,389 ("Note (e) to Rule 14a–9 provides that the failure to disclose material information regarding proxy voting advice, 'such as the' [PVAB's] methodology, sources of information, or conflicts of interest' could, depending upon particular facts and circumstances, be misleading within the meaning of the rule").
[30] *Id.* at 67,389-90; *see* Brief for Council of Institutional Investors at al. as Amici Curiae Supporting Plaintiffs, ISS v. SEC at 18-19 (*"*the Commission repeatedly refused to account for the cost of self censorship by proxy voting advisors likely to result from exposing them to new or increased liability to issuers for alleged misstatements or omissions in proxy advice under Rule 14a-9"); Letter from Jennifer W. Han, Executive Vice President, Chief Counsel, Managed Funds Association to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission at 2 ("While we believe that it is important to ensure that proxy voting advice contains all material information and is not misleading, we suggest that the examples in Rule 14a-9 extend beyond material, factual

> OPERS was among the commenters that expressed concerns regarding the Commission's extension of Rule 14a-9 liability to proxy voting advice. Specifically, we questioned whether proxy advisory firms could be held liable for mere differences of opinion regarding perceived errors or preferred methodologies, and if so, whether that extension of liability could affect decisions regarding the content of proxy voting advice.
>
> We appreciate that the Commission has sought to clarify the scope of proxy advisory firms' Rule 14a-9 liability in the Proposed Rules, but question whether the attempt at establishing a legal bright line will sufficiently improve the predictability of the 2020 Final Rules such that proxy advisory firms will feel confident that they can continue to issue their advice and information without unnecessary fear of legal reprisal.[31]

We agree with OPERS and believe removing Note (e) reduces,[32] but does not eliminate investor concerns about the effect of Rule 14a-9.[33]

SEC Request for Comment 8. *Has the addition of Note (e) to Rule 14a–9 improved the quality or integrity of proxy voting advice? Is there a risk that PVABs will change their policies and procedures to the detriment of investors if the Commission adopts the proposed amendments to Rule 14a–9? Are there any other adverse consequences associated with the removal of Note (e) to Rule 14a–9?*[34]

CII Response. CII is currently unaware of any information indicating the addition of Note (e) has improved the quality and integrity of proxy voting advice. As indicated in response to SEC Request for Comment 7, CII believes that there is a risk that subjecting proxy advisors to Rule 14a-9 liability could result in proxy advisors changing their policies and procedures to the detriment of investors. And we are unaware of any adverse consequences associated with the removal of Note (e).

SEC Request for Comment 9. *Has the addition of Note (e) to Rule 14a–9 resulted in increased litigation for PVABs? Have PVABs experienced an increase in litigation costs or credible threats*

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information, subjecting proxy advisory firms to the threat of litigation in cases where issuers may disagree with the analysis and voting recommendations regardless of the presence or absence of factual errors.").

[31] *See* Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System to Vanessa Countryman, Secretary, Securities and Exchange Commission at 4 (footnote omitted).

[32] *See, e.g.*, Letter from Jennifer W. Han, Executive Vice President, Chief Counsel, Managed Funds Association to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission at 3 ("If removed, proxy advisory firms will have more legal certainty in preparing their proxy voting advice and can provide robust analysis in the final advice without potential for litigation.").

[33] *See, e.g.*, David Isenberg, SEC Pitches Reversal to Trump-Era Proxy Advice Rule, Ignites (quoting Jackie Cook, director of sustainability stewardship research at Morningstar: "The proposal 'nevertheless [places] an additional burden on proxy advisory firms and an additional liability risk – the effect of which is to raise the cost of providing voting advice' . . . .").

[34] 86 Fed. Reg. at 67,390-91 (emphasis added).

of litigation since the adoption of the 2020 Final Rules? Have there been any other adverse consequences associated with the addition of Note (e) to Rule 14a–9?[35]

CII Response. We believe the proxy advisors are in a better position than CII to determine whether the addition of Note (e) to Rule 14a–9 resulted in increased litigation for proxy advisors or that proxy advisors experienced an increase in litigation costs or credible threats of litigation since the adoption of the 2020 Final Rules. However, as indicated in response to SEC Request for Comment 7, we believe that subjecting proxy advisors to Rule 14a-9 liability has the adverse consequences of creating uncertainties that unnecessarily increase the litigation risk to proxy advisors and that could impair the independence and increase the costs of proxy voting advice that investors use to make their voting decisions.

SEC Request for Comment 10. *We have set forth our understanding of the scope of Rule 14a–9 liability in the context of proxy voting advice. Are there other ways we could address concerns about potential increased litigation risks to PVABs and impairment of the independence of proxy voting advice? For example, should we amend Rule 14a–9 to codify this understanding? Alternatively, should we exempt all or parts of proxy voting advice from Rule 14a–9 liability entirely? For example, should we amend Rule 14a–9 to expressly state that a PVAB would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations, including its decision to use a specific analysis, methodology or information or its decision as to how to respond to any disagreement a registrant may have with its proxy voting advice?*[36]

CII Response. In addition to removing Note 9(e), CII and other investors support amending Rule 14a–9 to expressly state that a proxy advisor would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations, including its decision to use a specific analysis, methodology or information or its decision as to how to respond to any disagreement a registrant may have with its proxy voting advice.[37] We believe that such an amendment could provide investors with additional comfort that they will not indirectly bear the costs of meritless litigation under Rule 14a-9 on the basis of mere disagreements by issuers over the proxy advisor's analysis, methodology or sources of information.[38] Moreover, we believe the amendment *would not* "lower the overall quality of the advice that PVABs provide, . . . negatively affect the voting decisions of institutional investors . . . [or] generate additional uncertainty and litigation."[39] We believe the

[35] *Id.* at 67,391 (emphasis added).
[36] *Id.*
[37] *See, e.g.*, Letter from Kerrie Waring, Chief Executive Officer, ICGN to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 3 ("We also broadly support the proposed alternative solution but believe the SEC could have gone further.").
[38] *See* Letter from Patti Gazda, Corporate Governance Officer, Ohio Public Employees Retirement System to Vanessa Countryman, Secretary, Securities and Exchange Commission at 4 ("We believe that a narrowly tailored exemption or safe harbor – possibly tied to those items that are truly subjective – could better establish the guardrails within which proxy advisory firms feel that they are shielded from the possibility of litigation and thereby encourage the continued independence and objectivity of their advice"); Letter from Kerrie Waring, Chief Executive Officer, ICGN to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 3 ("ICGN would agree that Rule 14a-9 should not be interpreted to subject PVABS to liability for determinations simply because a registrant disagrees with the interpretation [and] [a]s such, the SEC should add additional language to clarify this point.").
[39] 86 Fed. Reg. at 67,396.

more likely result of the amendment is that it would *raise* the quality of the proxy voting advice, *positively* affect investors' voting decisions and *reduce* the uncertainty that proxy advisors' subjective determinations would result in meritless and costly litigation.

We note the recommended amendment to Rule 14a-9 is generally consistent with the following "safe harbor" we and others, recommended to the Commission in response to the 2019 Proposal:

> [W]e believe the SEC should limit impairing the independence of proxy advisor research by establishing a safe harbor for proxy advisors to shield them from liability under Rule 14a-9 . . . . We understand the Commission has established safe harbors from liability in this manner in other contexts.
>
> We note that the recent SEC guidance, which established at a Commission level or at least specifically underscored the applicability of Rule 14a–9 to proxy voting advice, appears intended to impose accountability of proxy voting advice businesses to company management rather than to their paying clients—institutional investors. As Michael Cappucci of the Harvard Management Company observed: "[C]orporate interests have sought to make it more difficult for institutional investors to vote independently of management by urging measures that would hamstring their proxy service providers." We believe a safe harbor would fairly shield proxy advisors from undue pressure to insert biased content into their research that advances the company interests in order to minimize litigation risk.[40]

Similarly, we believe amending Rule 14a–9 to expressly state that a proxy advisor would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations could fairly shield proxy advisors from undue pressures to a greater extent than just the removal of Note (e).

SEC Request for Comment 11. *Have we correctly characterized the benefits and costs for PVABs from the proposed amendments? Are there any other benefits and costs that should be considered? Please provide supportive data to the extent available*.[41]

CII Response. We believe the proxy advisors are in a better position than CII to determine whether the Commission has correctly characterized the benefits and costs of the proposed amendments for proxy advisors. However, as indicated, we continue to believe that subjecting proxy advisors to Rule 14a-9 liability without removing Note (e) and without adding our recommended amendment creates uncertainties that unnecessarily increases the litigation risk to

[40] Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 30 (footnotes omitted); *see* Brief for Council of Institutional Investors at al. as Amici Curiae Supporting Plaintiffs, ISS v. SEC at 20 n.4 ("the Commission never addressed the Council's comments suggesting the establishment of a Rule 14a-9 safe harbor for proxy advisors satisfying the amendments' procedural requirements in order to lessen these concerns [and] [t]hat unfortunate omission deprives the Court of any explanation from the Commission for its apparent view that the benefit of leaving Rule 14a-9 liability hanging over the heads of proxy advisors, despite the absence of evidence of material errors in their advice, outweighs the cost of the self-censorship that is likely to result.").

[41] 86 Fed. Reg. at 67,396 (emphasis added).

proxy advisors and could impair the independence and increase the costs of the proxy voting advice that investors use to make their voting decisions. Those costs almost certainly will be passed on to institutional investors and ultimately their underlying beneficiaries – who by definition are at least indirect Main Street investors through pension funds, mutual funds and ETFs in which they are invested.

SEC Request for Comment 12. *Have we correctly characterized the benefits and costs for institutional investors, their clients and registrants from the proposed amendments? Are there any other related benefits and costs that should be considered? Please provide supportive data to the extent available.*[42]

CII Response. See our response to SEC Request for Comment 11. CII also notes that another indirect cost of the proposed amendments to investors is that they retain a 2020 Final Rule that was neither requested nor supported by most investors and that we believe SEC Commissioner Lee has fairly characterized as in conflict with the "Commission's fundamental obligation to identify the need for this rulemaking and to explain how the rules . . . will meet this need."[43] That cost includes the resources investors and the Commission continue to devote to this unnecessary rulemaking.

As has been well documented, this rulemaking has been driven, in part, by the unethical behavior and practices of some who have actively promoted false and misleading information to the Commission and its staff and to the general public in support of the rulemaking.[44] We continue to believe that the resources devoted this rulemaking should be redirected as soon as possible to reforming the proxy process in areas that can effect positive change.[45] In that regard, we continue to believe that an SEC priority should be to modernize our proxy infrastructure[46] starting with end-to-end vote confirmation. We and many other investors continue to believe that shareholders deserve to have their proxy votes consistently and transparently counted.[47]

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[42] *Id.*

[43] Commissioner Allison Herren Lee, Paying More For Less: Higher Costs for Shareholders, Less Accountability for Management.

[44] *See* Letter from Nell Minow, Vice Chair, ValueEdge Advisors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 1 (Dec. 20, 2021), https://www.sec.gov/comments/s7-17-21/s71721-20110068-264377.pdf ("the problem of dark money-funded 'astroturf' (fake grassroots), fake 'public policy' thinktanks, fishy' comments, sock puppets, and advocacy masquerading as scholarship that undermined the integrity of the notice and comment system in the previous rulemaking"); User Clip: Exchange Between Sen. Chris Van Hollen and SEC Chairman, Jay Clayton, C-SPAN (Dec. 10, 2019), https://www.c-span.org/video/?c4837351/user-clip-exchange-sen-chris-van-hollen-sec-chairman-jay-clayton (the exchange was about SEC Chairman Jay Clayton's reading of comment letters from "Main Street" investors in support of the SEC's proposed regulation of proxy advisors written by individuals with relationships to the 60 Plus Association).

[45] *See, e.g.*, Letter from Donna F. Anderson, Vice President, Head of Corporate Governance, T.RowePrice et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 2 ("While we support the Commission's current proposal, we end this letter as we have with many of our proxy-related letters in the past several years, by encouraging the Commission to focus its efforts on reforming the proxy process in areas where it can effect positive changes.").

[46] *See, e.g.*, Letter from Nell Minow, Vice Chair, ValueEdge Advisors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 4 ("The Commission's priorities here should be . . . to fix the extensive proxy plumbing issues . . . .").

[47] See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 15 (Aug. 19, 2021),

SEC Request for Comment 13. *We assume that the proposed amendments would strengthen the independence of PVABs. Are we correct in that characterization? Please provide supportive data to the extent available.*[48]

CII Response. CII generally believes the SEC is correct in characterizing the proposed amendments as strengthening the independence of proxy advisors. However, as indicated in our responses to SEC Request for Comment 6 and 10, we believe the independence of proxy advisors could be further strengthened by, at minimum, rescinding the Guidance and further amending Rule 14a-9 to state that a proxy advisor would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations. In addition, in our response to SEC Request for Comment 4, we explain why rescinding the 2020 Final Rule it is entirety may be a superior alternative to strengthening the independence of proxy advisors than the proposed amendments.

SEC Request for Comment 14. *Have we correctly characterized the effects on efficiency, competition and capital formation from the proposed amendments? Are there any effects that should be considered? Please provide supportive data to the extent available.*[49]

CII generally believes that the SEC has properly characterized the effects on efficiency, competition and capital formation from the proposed amendments.

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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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https://www.cii.org/files/issues_and_advocacy/correspondence/2021/Reg%20Flex%20Letter.pdf ("After first finalizing a rule on universal proxy, we believe the SEC should prioritize as a next step to improving proxy plumbing addressing end-to-end vote confirmation."); Letter from Donna F. Anderson, Vice President, Head of Corporate Governance, T.RowePrice et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 2 ("We continue to strongly believe that the SEC's highest priority should be to modernize our proxy infrastructure starting with end-to-end vote confirmation, because shareholders deserve to have their proxy votes consistently and transparently counted.").

[48] 86 Fed. Reg. at 67,395 (emphasis added).

[49] *Id.*