

December 23, 2021

VIA Electronic Delivery

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

RE: Comments on the Amendments to the Exemptions from the Proxy Rules for Proxy Voting Advice - Release No. 34-93595; File No. S7-17-21

Dear Ms. Countryman:

The Center On Executive Compensation (“Center”) is pleased to submit comments to the Securities and Exchange Commission (“Commission”) providing its perspective on the SEC’s decision to propose amendments to the recently finalized and not-yet-implemented Rule 14a-2(b)(9)(ii) conditions (proxy solicitation exemption qualifications). The Center believes the Commission’s original 2020 Final Rule represented a set of sensible updates which would have facilitated needed changes to the proxy process. We urge the Commission to allow those changes to take effect before considering further changes, and thus oppose the Commission’s proposals.

The Center brings a unique issuer perspective to the discussion of the proxy process and proxy voting advice businesses, providing extensive executive compensation and corporate governance public policy insight to Chief Human Resources Officers and executive compensation professionals at over 140 large companies across a range of industries. The commentary in this letter reflects the views of the top human resources and executive compensation professionals at our member companies, who regularly interact with proxy voting advice businesses.

The SEC’s 2020 final rule added reasonable and necessary structure to the proxy voting advice business report process and would have helped to remedy the most significant problems experienced by companies. Further, the rule was structured to recognize the efficiencies investment managers gain through the proper use of proxy voting advice business recommendations as well as the need for proxy voting advice business impartiality.

We find it difficult to understand the Commission’s decision to propose amending the proxy solicitation exemption qualification requirements prior to having any data on their actual impact or cost. Several questions remain unanswered:

- Did the requirement for proxy voting advice businesses to provide issuers with a copy of the proxy voting recommendations report no later than the same time as clients result in more accurate data for investors?

- Did the same requirement increase transparency in how proxy voting businesses evaluate company performance and apply their policies?
- Did the rules provide issuers with a reasonable method of explaining their viewpoint to investors given the tight timelines involved?

None of these answers can be known at this time. Given the level of research and analysis that went into the 2020 final rules – which were substantially modified based on public feedback – we do not believe the Commission has justified its rationale for changing the rules before understanding their impact. It is not possible to conduct an economic or cost benefit analysis for a rule that has not gone into effect, and the decision to amend a finalized rule without such data may have the unintended consequence of establishing an undesirable precedent impacting regulatory stability going forward. We disagree with the Commission’s proposed amendments and encourage the Commission to permit the full 2020 final rule to come into effect.

We have incorporated for reference our comments previously submitted following the 2018 SEC Roundtable on Proxy Process Issues – Proxy Advisory Firms¹ and our comments submitted in response to the SEC’s November 2019 proposed Amendments to the Exemptions from the Proxy Rules for Proxy Voting Advice - Release No. 34-87457; File No. S7-22-19².

I. Executive Summary

The Center fully supported the Commission’s 2020 final rules on proxy voting advice businesses. As the Commission stated at the time, the final rules represented a middle ground between those supporting and opposing the proposed rules – the changes from the November 2019 proposed rules and the July 2020 finalized rules were notable and addressed concerns from multiple constituencies.

The Commission’s newly proposed amendments removing the exemptions to the proxy solicitation requirements included in the 2020 final rule will effectively reverse efforts to increase transparency within the proxy voting advisory business without having evaluated the actual effect of the rule. Whether or not a given entity agrees with the 2020 final rules, it is a fact that the reforms included in the proposed rule were thoroughly researched and publicly debated before a rule was finalized. These proposed amendments take the opposite approach to that process – they propose overturning finalized rules prior to the market understanding the costs or benefits to shareholders seeking accurate advice when considering vote decisions. The SEC has not held a public roundtable such as the one held in 2018, nor has it provided a customary full 60-day comment period, opting instead to require a condensed comment period at year’s end.

¹ Eickelberg, Henry. Center On Executive Compensation Comment Letter in response to the 2018 SEC Roundtable on Proxy Process Issues – Proxy Advisory Firms. Linked from: <https://www.sec.gov/comments/4-725/4725-5033823-183086.pdf>

² Eickelberg, Henry, Center On Executive Compensation Comment Letter in response to November 2019 proposed Amendments to the Exemptions from the Proxy Rules for Proxy Voting Advice - Release No. 34-87457; File No. S7-22-19. Linked from: <https://www.sec.gov/comments/s7-22-19/s72219-6743676-207834.pdf>

The proposal to amend a well-researched and debated final rule prior to implementation raises several points of concern, including:

- The conditions included under Rule 14a-2(b)(9)(ii) would have provided needed transparency to registrants into what information proxy voting advice businesses were presenting to investors as the basis for vote recommendations;
- The amendments would reverse course on the Commission's efforts to encourage greater transparency in the market, including within the proxy voting advice sector; and
- The Commission has not sufficiently justified the articulated rationale for why amendments are needed prior to the availability of market data on the 2020 final rule's impact.

The proxy voting advice industry is effectively a duopoly comprising Institutional Shareholder Services (ISS) and Glass Lewis, with ISS commanding significantly larger market share.³ Given ISS's majority market share, its vote recommendations come with significant consequences for vote outcomes. An ISS vote recommendation for or against a proposal can increase or decrease support anywhere from 10 – 40%⁴. While ISS does not publicly disclose its error rates, research shows that the number of supplemental filings needed to address inaccuracies increased from 2020 to 2021⁵, showing the importance issuers place on the content of such reports and reinforcing the need for greater, not lesser transparency.

Removing the requirement that proxy voting advice businesses provide final reports to issuers at the same time as their clients creates a substantial risk that issuers will be unable to correct errors or mischaracterizations before their annual meetings. Given the potential for errors, companies must pay close attention to ISS reports, review their content carefully, and address any errors or inaccuracies before investors have completed voting. Once investors have voted, it is often too late to make changes. As a result, mandating proxy voting advice businesses provide final reports simultaneously to registrants and providing an accessible method for companies to respond is critical to proxy voting transparency. The longer the time between when an error is caught and a registrant can publish a response, the less likely these errors are to receive investors' full attention.

³ Academic research has estimated that ISS and its closest competitor, Glass Lewis, [control more than 90% of the proxy voting advice business in the US](#). Other [estimates put ISS's sole market share at more than 60%](#).

⁴ Copland, James and Larcker, David F. and Tayan, Brian, The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry (May 31, 2018). Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-72, Stanford University Graduate School of Business Research Paper No. 18-27, Available at SSRN: <https://ssrn.com/abstract=3188174> or <https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/>

⁵ Research by the American Council for Capital Foundation found the number of supplemental filings on Edgar directly related to inaccuracies in proxy voting advice business reports increased from 42 in 2020 to 50 in 2021. Source : <https://accf.org/2021/12/15/proxy-woes-accf-2021-proxy-season-analysis-shows-companies-still-reporting-errors-at-similar-rate-despite-claims-to-the-contrary/>

The need for reforms and sensible regulations for the proxy voting advice business has only increased since the rules were finalized in July 2020. The COVID-19 pandemic resulted in historic market volatility, which created the need for nuanced understanding of compensation plans and results. As issuers held their first meetings with shareholders (including rapid implementation of virtual meetings) discussing financial results and company performance amid the pandemic, the largest proxy voting advice business (ISS) elected to reduce both the transparency of its evaluation and recommendation report process and its engagement with issuers. In other words, the sole major change in the proxy voting advice market since the 2020 final rules were published has been a *reduction* in transparency from the largest proxy voting advice business, and the Commission's proposed action would further reduce needed information. We encourage the Commission to evaluate the data on actual impacts once all firms are required to comply with the 2020 final rule before considering further changes.

Proxy voting advice businesses have a substantial, well-documented⁶, causal impact on the proxy voting system and vote results. If transparency is a pillar of maintaining a well-functioning proxy voting system, it is incumbent upon proxy voting advice businesses to be transparent about the information and policies they use to make voting recommendations. As they have not shown a willingness to do so, it became the responsibility of the Commission as the primary market regulator to require a modest improvement in transparency as it has already done with companies and investment managers. To ensure that the goal of transparency is reached, we strongly encourage the Commission to not amend the 2020 final rule, allow it to fully take effect as scheduled, and evaluate the actual data and economic impacts (if any) as they become known.

II. Influence of Proxy Voting Advice Businesses on Investor Voting

Institutional investors and asset managers have a fiduciary duty to vote shares in the best interests of their clients. To meet this standard, they must either perform their own due diligence on invested companies or hire a third party to perform this research. That duty provides the *raison d'être* for the proxy voting advice businesses. However, as opposed to investment managers and public companies, proxy voting advice businesses face few regulations ensuring their voting advice is based on factual data and sound analysis. As stated above, proxy voting advice market consists largely of a duopoly between two firms, ISS and Glass Lewis, and there is little to indicate the emergence of any notable competitors. Over a ten-year period from 2007 – 2017, the duopoly's market share saw only a minor decline from 96.5% to 91%. ISS alone controls more than 60% of the proxy voting advice market⁷.

⁶ Copland, James and Larcker, David F. and Tayan, Brian, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (May 31, 2018). Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-72, Stanford University Graduate School of Business Research Paper No. 18-27, Available at SSRN: <https://ssrn.com/abstract=3188174>

⁷ Shu, Chong, *The Proxy Advisory Industry: Influencing and Being Influenced* (November 29, 2021). USC Marshall School of Business Research Paper, Available at SSRN: <https://ssrn.com/abstract=3614314> or <http://dx.doi.org/10.2139/ssrn.3614314>

The duopoly's influence is clearly visible in vote results. Academic research in 2018 revealed that an adverse vote recommendation from ISS on a say-on-pay proposal corresponded to a decline of 27% in investor support. In 2021, consulting firm Semler Brossy found that decline had deepened to 31%⁸. When ISS recommends shareholders vote against a company's equity plan proposal, that proposal receives an average of 17% less support; uncontested director elections receive 18% less votes in favor. In proxy contests, ISS support for one card corresponds to a 73% increase in favorable shareholder votes⁹.

The impact of proxy voting advice businesses is even greater when investor clients elect to automatically vote shares in line with published recommendations. These votes are cast automatically through a proprietary proxy voting system instantaneously following publication of the report. Automated "robovoting" poses additional risks related to report accuracy as firms that utilize robovoting appear less likely to review supplemental filings in response to vote recommendations, check alerts from proxy voting advice businesses, or change votes if errors or inaccuracies are significant¹⁰. It is the combined element of proxy voting advice businesses issuing vote recommendations *and* managing client votes that makes the transparency improvements from the conditions included under Rule 14a-2(b)(9)(ii) so necessary. If proxy voting advice businesses are entrusted with such vital steps in the voting process, it is incumbent on them to provide the transparency necessary to ensure asset managers, beneficial owners, and registrants have a complete view of the information used to make vote recommendations.

The market duopoly, strong influence of proxy voting advice businesses, and prevalence of robovoting all underscore the need for enhanced efforts towards accuracy and transparency. However, contrary to recent SEC policy and rulemaking initiatives, the Commission is now proposing amendments that would effectively give the largest proxy voting advice businesses regulatory endorsement for decreasing transparency and eliminating opportunities to ensure factual and analytical accuracy in proxy vote recommendations.

⁸ Sirras, Todd, et al. "2021 Say On Pay & Proxy Results", Published September 30, 2021. Located at: <https://semlebrossy.com/wp-content/uploads/2021/07/SBCG-2021-SOP-Report-2021-09-29.pdf>.

⁹ Copland, James, et al. Ibid. Available at SSRN: <https://ssrn.com/abstract=3188174> or <https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/> <https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/>.

¹⁰ In the Center's comments to the 2019 Proposed Rule, we noted the challenges companies face in engaging with proxy voting advice businesses once a report is published as well as the financial incentives the businesses have to resist changes. Please see pages 7, page 13, and footnote 22: <https://www.sec.gov/comments/s7-22-19/s72219-6743676-207834.pdf>.

III. Simultaneous Delivery and Opportunity to Comment are Necessary to Ensure Accuracy

Prior to 2020, the largest proxy voting advice business (ISS) maintained a limited transparency program where constituent companies of the S&P 500 index could request the privilege of receiving a draft proxy voting recommendation report two business¹¹ days prior to publication to verify the ISS report did not contain material errors, factual inaccuracies, or mischaracterizations and omissions. Shortly after the publication of the Commission's rules in 2020, ISS decided to eliminate the practice of providing draft reports to members of the S&P 500 index. This imposed a particular hardship for companies given the economic turmoil, costs incurred to protect customers and employees, rapid changes to operations, and adjustments to compensation structures to reflect the new reality. The elimination of the only measure of transparency previously available effectively prohibited companies from evaluating the factual accuracy of ISS reports, as companies were unable to verify the accuracy of the ISS report until after it was published and votes were being cast¹².

Further, ISS's reduction in transparency ran counter to its own funding of a newly established "self-regulatory" organization. While the proxy voting advice industry established its own organization (the Best Practice Principles for Providers of Shareholder Voting Research & Analysis or BPPG¹³) aimed at enhancing transparency, its largest member (controlling more than half of the market), has taken a step in the opposite direction by withdrawing draft reports. Such an action should call into question the BPPG's ability to meaningfully encourage or enforce change or provide useful guidance on unknowable costs and benefits to rules that have not become effective. Notably, in the 2021 report, the BPPG's Independent Oversight Committee recommended several best practices, including that proxy voting advice businesses should:

- Disclose data and explanations on fact-checking and error-tracking together with remediation practices as well as explain internal controls over quality, reliability, independence, and accuracy, including data on alerts to clients concerning errors or revisions; and
- Implement and maintain a method that provides for timely issuer feedback and the opportunity to promptly address errors, or to disclose why it is electing to not do so.

¹¹ While ISS stated that S&P 500 companies would have two full business days to review and comment on a report, many companies have reported being given significantly less time or a required return date over a holiday weekend. Such reduced review periods appear most common during proxy season in the US (April and May). Draft reports were not provided for special shareholder meetings, contentious meetings, or proxy contests.

¹² Center comments to the 2019 Proposed Rule – "Most significantly, the influence manifests itself almost immediately during proxy season with a significant percentage of votes cast within the first 24-48 hours after publication of the final report." This concern is not driven solely by robovoting. During the proxy season workload, proxy voting advice businesses publish reports closer to the meeting date. Investors and registrants have less time to evaluate recommendations. See page 4: <https://www.sec.gov/comments/s7-22-19/s72219-6743676-207834.pdf>

¹³ <https://excomp.org/News/NewsStories/proxy-advisor-oversight-committee-issues-first-ever-compliance-report> - As highlighted in the Commission's proposed amendments, the BPPG was established and is funded by the proxy voting advice industry (with the exception of Egan-Jones). The Independent Oversight Committee is comprised of representatives from the investment, registrant, and academic communities. That committee published its first report in July 2021.

In the same report, the Independent Oversight Committee recognized Glass Lewis for adhering to these best practices by providing issuers with an opportunity to submit a response to the proxy voting recommendation report¹⁴, showing that allowing issuers to respond to proxy reports before investors cast their votes is considered even by the BPPG to be a best practice¹⁵.

Further, the BPPG report, and ISS's flouting of its recommendations, underscores why the Commission should allow its 2020 final rules to take effect.

The 2020 final rule sought to balance the need for greater transparency and information correction with the regulatory burden on proxy voting advice businesses. The 2021 proposal would eliminate that balance by not requiring proxy voting advice businesses to provide final reports, leaving registrants with *less* transparency than before. The 2020 final rule did not require proxy voting advice businesses to provide a draft report and enough time for companies to review and comment before voting. Instead, the rule only required final proxy reports to be made available to issuers at the same time as clients. Further, *if* companies chose to produce a timely response, proxy voting advice businesses would be required to push that response or a link to any filings to investor clients. Significantly, both ISS and Glass Lewis already grant access to reports once they have been provided to clients; ISS provides the reports for free while Glass Lewis charges companies to view their report¹⁶. Ultimately, then, complying with the final rules should not have amounted to a significant burden. Concerns about whether waiting for a company response could shorten the already brief proxy voting period could be mitigated by Commission guidance on how long a company has to provide a response or the applicability of the rules in sensitive cases such as proxy contests, vote no campaigns, or special meetings.

As noted above, ISS canceled its draft review policy for S&P 500 companies on January 1, 2021, and currently provides no factual review for companies prior to publication. Without requiring proxy voting advice businesses to comply with the conditions in the final rule, companies will have no opportunity for post-publication review of a final report or a channel for providing ready feedback quickly to investors.

In discussions with member companies, we have noted increased resistance on the part of ISS to making changes to its final reports. Companies have requested discussions with ISS staff to highlight errors, omissions, or mischaracterizations, but the ISS research team has noticeably scaled back its willingness to engage. Given that errors corrected post-publication necessitate a public alert to clients, ISS is far more reticent to make such changes and even more resistant if the error requires a change in a vote recommendation. Thus, fixing errors highlighted by companies in a final report is much more complex than doing so to a draft report.

¹⁴ In April 2020, Glass Lewis announced that company opinions would be included with research and voting recommendations. <https://www.glasslewis.com/report-feedback-statement-included-with-research/>

¹⁵ <https://bppgrp.info/wp-content/uploads/2021/07/2021-AR-Independent-Oversight-Committee-for-The-BPP-Group-1.pdf> - see best practices on page 52

¹⁶ <https://www.glasslewis.com/issuer-data-report/> - Glass Lewis allows registrants to review the data included in their annual reports provided that the proxy statement is filed at least 30 days prior to the annual meeting.

The lack of simultaneous report delivery and a reasonable opportunity to respond will mean that companies will have no time to correct proxy voting advice business errors or prepare for investor questions, and by the time they do, a large percentage of votes will already have been cast¹⁷. If errors are found, the cost of correcting those errors creates a disincentive for proxy voting advice businesses to acknowledge them. Even if errors are corrected several days after a vote recommendation report is issued, it is not clear investors will respond to the new information. If companies had the opportunity to see a report at the same time as investors and respond in a timely fashion, they would stand a better chance of their concerns being heard and considered by investors.

The 2020 final rule solicitation exemption requirements for report provision provided benefits to several constituencies. First, all companies, regardless of size, would have the same opportunity to address errors and mischaracterizations (if necessary) on equal footing. Second, the rule would provide proxy voting advice businesses with a regulatory imperative to quickly address material errors given a universal requirement for access to the reports and the enhanced ability of companies to present a rebuttal where needed. It is unclear what additional cost the requirement for proxy voting advice businesses to push forward a timely company response to investors would have imposed, given that ISS (for example) already uses links to SEC filings, press statements, and documents furnished on company websites in its alert system.

We urge the Commission to retain the exemption qualifications requiring proxy voting advice businesses to provide issuers with access to reports no later than the same time as provided to clients and to provide clients with access to a timely company response. It is worth noting that neither of those qualifications require proxy voting advice businesses to wait for a company to respond to their report, nor take the time to explain their decisions to issuers or address criticisms, much less change data or vote recommendations. Instead, the requirement to provide the reports will supply the Commission with an excellent opportunity to collect clear data on proxy voting advice error rates.

In sum, the Commission's proposed amendments run counter to the agency's goals of enhanced transparency and pose a risk to the Commission's mandate to maintain fair, orderly and efficient markets. The whiplash nature of amending a rule that was finalized approximately one year ago and under which proxy voting advice businesses have not yet had to comply presents a risk to regulatory stability – and may set a precedent for precipitous rule amendments in the future.

¹⁷ Shu, Chong. Research estimates that nearly 20% of votes cast through the ISS proprietary system are cast as robovotes. Graphs, page 40. - <https://chong-shu.com/papers/shu2020proxy.pdf>

IV. Recommendation

For the reasons discussed above, we recommend that the Commission not approve the amendments as proposed and permit the reforms to take effect as laid out in the 2020 final rules. As the Commission and the market review the actual data on costs and benefits for investors, we stand ready to assist the Commission in any further work to ensure transparency, accuracy, and efficiency going forward.

Thank you for the opportunity to comment.

Best regards,

A handwritten signature in black ink that reads "Ani Huang". The signature is written in a cursive, flowing style.

Ani Huang
President and CEO
Center On Executive Compensation