



December 23, 2021

Submitted via electronic filing: rule-comments@sec.gov

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

Re: File Number S7-17-21 – Proposed Rule Regarding Proxy Voting Advice¹

Dear Ms. Countryman:

I am writing on behalf of the Ohio Public Employees Retirement System (OPERS), the largest public retirement system in Ohio, with more than 1.1 million active, inactive, and retired members. Nearly one out of every 10 Ohioans has some connection to our System, and for many of them, OPERS represents the only retirement income they will ever receive. We invest more than \$125 billion on our members' behalf and we make every effort to maximize the value of those investments, including regularly engaging with stakeholders on issues affecting long-term shareholder value.

The purpose of this letter is to respond to the Securities and Exchange Commission's (SEC or Commission) proposed amendments to recently adopted rules regarding proxy voting advice (Proposed Rules). OPERS strongly supports the Commission's efforts to ensure that investors retain access to independent, objective, timely, and cost-effective proxy voting advice and information, and urges the swift adoption of the Proposed Rules, subject to the comments below.

First, OPERS believes the Commission's decision to remove the Rule 14a-2(b)(9)(ii) conditions is appropriate in light of (1) recent market changes affecting the provision of proxy voting advice that have largely addressed the concerns underlying the recently finalized review and feedback requirements, and (2) the fact that the regulations in question were offered as a benefit to institutional investors who largely did not request or support them.^{2 3}

¹ Securities and Exchange Commission proposed rule regarding SEC Release No. 34-93595, *Proxy Voting Advice*, 86 Fed. Reg. 67,383 (Nov. 26, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25420.pdf>. (Proposed Rules)

² Securities and Exchange Commission final rule regarding *Exemptions from the Proxy Rules for Proxy Voting Advice*, 17 CFR Part 240, 85 Fed. Reg. at 55,135 (Sept. 3, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf> (“We believe the final amendments will benefit clients of proxy voting advice businesses—and thereby ultimately benefit the investors they serve—by enhancing the overall mix of information available to those clients as they assess proxy voting advice and make determinations about how to cast votes.”). (2020 Final Rules)

³ See Council of Institutional Investors comment letter in response to SEC Release No. 34-87457, *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, at 9 (Jan. 20, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6729687-207381.pdf> (“As indicated, most of the paying customers of proxy voting advice businesses—institutional investors—have not asked for and do not support the SEC establishing a new regulatory framework and forcing a significant change to the industry's business model.”).

Second, while OPERS supports the Commission's efforts to more clearly define the scope of proxy advisory firms' Rule 14a-9 liability, we question whether the decision to continue classifying proxy voting advice as a "solicitation" will impede these efforts and prevent the desired improvements in clarity and certainty regarding proxy advisory firms' legal risks. We believe that an exemption or safe harbor for certain aspects of proxy voting advice could better accomplish the Commission's goals.

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

OPERS supports the Proposed Rules and believes that the Commission's decision to reassess its recently adopted rules regarding proxy voting advice⁴ (2020 Final Rules) is consistent with its duty to protect investors; in this case, by seeking to preserve their access to independent, objective, timely, and cost-effective proxy voting advice and information.

From the outset of this rulemaking process, OPERS has repeatedly expressed strong reservations regarding the Commission's efforts to regulate proxy voting advice. Chief among these has been the concern that bringing issuers into the process of developing and disseminating proxy voting advice could have a detrimental effect on the independence and objectivity of that advice. As a result, OPERS has consistently asked the Commission to protect the integrity of the voting advice and information that it purchases from its proxy advisory firm.⁵

While we were appreciative that the Commission ultimately decided to "tailor the 2020 Final Rules to avoid imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice,"⁶ it also created a system where proxy advisory firms were effectively responsible for balancing the interests of issuers and the Commission with those of their own clients.

Following the adoption of the 2020 Final Rules, it was unclear whether proxy advisory firms' newly developed review and feedback mechanisms would satisfy issuers, or indeed, the Commission itself. In that respect, the Proposed Rules bring some welcomed clarity regarding the appropriateness of proxy advisory firms' efforts to both facilitate the Commission's desired improvements in the overall mix of information available to investors and also protect the independence and objectivity of their analysis and advice.

As to whether existing or future proxy advisory firms might retract or fail to extend the opportunities for review and feedback that have recently been offered to issuers, we see little incentive for proxy

⁴ See 2020 Final Rules at 85 Fed. Reg. 55,082.

⁵ See Ohio Public Employees Retirement System comment letter in response to SEC Release No. 34-87457, *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice*, at 3 (Feb. 3, 2020), <https://www.opers.org/pdf/government/FederalResponses/2020/2020-02-03-OPERS-Comment-Letter-SEC-Proxy-Rules-for-Proxy-Voting-Advice.pdf> ("In past comments, we have said that we do not believe there is a need for further federal regulation of proxy advisory firms, and we maintain that position. But, rather than let that be our final word on the matter, we have consistently and respectfully requested that if the Commission believes it must act, that it refrain from making regulatory changes that will (1) erode the confidence we have in the independence and objectivity of the reports and recommendations we purchase from our proxy advisor, (2) increase the cost of said reports and recommendations, and (3) reduce the time we have to review any information we receive from our proxy advisor. In our estimation, the Commission's proposal fails this basic test."). (OPERS 2020 Comment Letter)

⁶ See Proposed Rules, 86 Fed. Reg. at 67,384.

advisory firms to change course now and have received no indication that our proxy advisory firm intends to do so. 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.

With that said, 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.

It is worth noting once again that when the SEC hosted its Roundtable on the Proxy Process in 2018, none of the participants – including issuer representatives – requested additional regulation of proxy advisory firms or their work product, even in response to a direct question on whether there was a need or desire for such regulations.⁷

In spite of this, the Commission issued proposed rules the following year (2019 Proposed Rules) requiring proxy advisory firms to comply with certain disclosure and procedural requirements if they intended to continue relying on established exemptions to the information and filing requirements of the federal proxy rules.⁸ These changes were alarming and elicited strong opposition from the clients of proxy advisory firms.

In explaining the reasoning behind the 2019 Proposed Rules, the Commission emphasized issuer concerns regarding the quality of proxy voting advice. However, little evidence was provided to support the accusations of frequent errors, methodological weaknesses, and rampant conflicts of interest described in the 2019 Proposed Rules, which was salient given the level of the proposed intrusion into our private business relationships. OPERS was among the commenters that offered its own experience in order to rebut the allegations in the 2019 Proposed Rules.⁹

Significantly, when the Commission issued its more “tailored” 2020 Final Rules, it focused less on the alleged errors and conflicts of interest and more on the benefits to investors of regulating proxy voting advice; namely, that the 2020 Final Rules would improve the overall mix of information and produce more informed proxy votes.¹⁰

⁷ See OPERS 2020 Comment Letter at 3, citing Securities and Exchange Commission, Roundtable on the Proxy Process Transcript at 250 (Nov. 15, 2018), <https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf>.

⁸ Securities and Exchange Commission proposed rule regarding SEC Release No. 34-87457, *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518 (Dec. 4, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf>. (2019 Proposed Rules)

⁹ See OPERS 2020 Comment Letter at 5 (“For example, OPERS has identified only three errors over the past two years (two in 2018, and one in 2019) as a result of our regular audits of the research reports and voting recommendations we receive from our proxy advisor. In each instance, we reported the error and it was addressed in a timely and professional manner.”).

¹⁰ See 2020 Final Rules at 85 Fed. Reg. 55,107 (“Regardless of the incidence of errors in proxy voting advice, we believe it is appropriate to adopt reasonable measures designed to promote the reliability and completeness of information available to investors and those acting on their behalf at the time they make voting determinations.”).

As the Commission seeks to amend the 2020 Final Rules, it makes sense that if the true purpose of those rules was to benefit investors, and if those same investors continue to express concerns that the potential costs of the 2020 Final Rules outweigh the possible benefits, then it is appropriate for the Commission to, at the very least, reassess the 2020 Final Rules' purpose, usefulness, and value.

Rule 14a-9 Liability

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.¹¹

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.

As the Commission has declined to rescind its determination that proxy voting advice is a "solicitation," it may be worthwhile to consider something akin to the Commission's own Reasonable Alternative regarding "exempt[ing] certain portions of proxy voting advice from Rule 14a-9 liability."¹² 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.

With regard to the Commission's comments on the apparent conflict between the independence and the quality of proxy voting advice, we can only offer that this has not been OPERS' experience. OPERS engaged with its proxy advisory firm for many years prior to the adoption of the 2020 Final Rules and has never had any reason to believe that the advice or information it was purchasing was biased, misleading, or otherwise flawed. To the contrary, we continue to have confidence in the accuracy and completeness of the advice we receive and have worked diligently with our proxy advisory firm to effectuate *our* corporate governance goals, not theirs. If OPERS believed that the quality of its proxy voting advice was compromised or otherwise lacking, it would have terminated its professional relationship and engaged the services of another proxy advisory firm.

Implicit in the concern that proxy advisory firms are less likely to provide quality advice absent some legal risk or regulatory guardrails is the suspicion that the clients of proxy advisory firms are likely to be swayed by bad advice. This minimizes the immense work that goes into identifying and adopting

¹¹ See OPERS 2020 Comment Letter at 6 ("... we believe the Commission should clarify how it will differentiate between legitimate 'disagreements' – including true methodological weaknesses – and mere differences of opinion regarding perceived errors or preferred methodologies when considering the accuracy of proxy voting advice under Rule 14a-9.").

¹² See Proposed Rules, 86 Fed. Reg. at 67,396 ("Rather than, or in addition to, deleting Note (e) to Rule 14a-9, the Commission could amend Rule 14a-9 to exempt certain portions of proxy voting advice from Rule 14a-9 liability.").

effective corporate governance guidelines, as well as the due diligence that must be performed to ensure that those guidelines are consistently followed.

As we noted in our comments regarding the 2019 Proposed Rules, OPERS does not robo-vote, rubber stamp, or otherwise blindly follow the recommendations made by its proxy advisory firm.¹³ To do so would be a violation of our fiduciary responsibility to act in the best interests of our members. In fact, OPERS' custom proxy voting guidelines have historically been in alignment with management more than 80 percent of the time.

What is often unsaid is that our goals as an institutional investor are remarkably similar to those of issuers – we wish to maximize the value of the company, and by extension our investment in the company. With limited resources, we require the assistance of an independent proxy advisory firm that can review all the available data and provide us with advice based on our own corporate governance guidelines. Ensuring that our proxy advisory firm is guided by *our* goals and guidelines and not considerations related to how an issuer might react to its advice is of the utmost importance to us. We urge the SEC to consider how it can best preserve and promote that independence and objectivity.

Conclusion

OPERS appreciates that the SEC has decided to revisit the 2020 Final Rules in an effort to make them more equitable for shareholders. As we have noted repeatedly throughout this rulemaking process, the services provided by our proxy advisory firm allow us to be a more engaged and attentive shareholder and fulfill our fiduciary responsibility to our members. From the issuance of the 2019 Proposed Rules to the current Proposed Rules, we appreciate the Commission's willingness to consider our feedback. We believe the Commission's proposed amendments are consistent with the SEC's mandate to protect investors, in that they help to ensure that investors can continue to access timely, objective, independent, and cost-effective proxy voting advice and information.

Sincerely,



Patti Gazda
Corporate Governance Officer
Ohio Public Employees Retirement System

¹³ See OPERS 2020 Comment Letter at 2 (“When our proxy advisor makes a voting recommendation, it does so according to [our Board-approved proxy voting] guidelines – there is no opportunity for the proxy advisor’s discretion to enter into the voting process. As a result, OPERS maintains complete discretion and control over its proxy votes, though in most cases they are functionally being cast by our proxy advisor. Moreover, OPERS staff conduct monthly audits of our proxy advisor to ensure on-going compliance with our policies and guidelines.”).