

December 27, 2021

Via Electronic Submission

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

Re: Proxy Voting Advice (File No. S7-17-21)

Dear Ms. Countryman:

The Investment Adviser Association¹ (IAA) appreciates the Commission's interest in proxy voting issues and the opportunity to comment on the recent proposal to amend the Federal proxy rules governing proxy voting advice (**Proposal**).² The Commission is proposing these amendments "in light of feedback from market participants on those rules and certain developments in the market for proxy voting advice."³ We raised substantial concerns when the Commission proposed changes to these rules in November 2019⁴ and we appreciated that the Commission addressed several of our comments upon adoption.⁵ We continued to have concerns about these rules, however, and we therefore support the Proposal.

In particular, we support the Commission's proposal to remove certain conditions to the availability of exemptions from the information and filing requirements for proxy voting advice

¹ The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than \$35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

² *Proxy Voting Advice*, SEC Rel. No. 34-93595 (Nov. 17, 2021), 86 FR 67383 (Nov. 26, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-11-26/pdf/2021-25420.pdf>.

³ Proposal at 67383.

⁴ *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Rel. No. 34-87457 (Nov. 5, 2019), 84 FR 66518 (Dec. 4, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf> (**2019 Proposal**), and Letter from Karen L. Barr, IAA President & CEO, *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice* (Feb. 3, 2020), available at https://investmentadviser.org/wp-content/uploads/2021/10/February_3_2020_-_IAA_Proxy_Advice_Comment_Letter.pdf (**IAA Letter**).

⁵ *Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Rel. No. 34-89372 (July 22, 2020), 85 FR 55082 (Sept. 3, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf> (**2020 Proxy Advice Rules**).

businesses (**PVABs**).⁶ We also support removal of a note added to the 2020 Proxy Advice Rules that provides examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the antifraud provision of the proxy rules.⁷

While we support the proposed amendments, our primary concern is with the guidance that the Commission issued in 2019⁸ and 2020⁹ for investment advisers on proxy voting. Both sets of guidance were issued without the benefit of notice and comment. In our comments on the 2019 Proposal, we discussed our agreement with Commissioner Lee's statement that the 2019 Adviser Guidance "introduces increased costs and time pressure into an already byzantine and highly compressed process"¹⁰ and that, because much of it is "presented as steps the adviser *should* in fact take . . . [a] regulated entity ignores such direction at its peril."¹¹ The same goes for the 2020 Supplemental Adviser Guidance. We recommend that the Commission rescind both sets of guidance. If the Commission believes that guidance is necessary in this area, we request that it propose guidance and provide the opportunity for comment.

We are submitting our comments within the 30-day deadline set by the Commission for this Proposal; however, we are concerned that this exceedingly short comment period is inadequate to provide stakeholders with an appropriate time period in which to evaluate and comment on the Proposal.¹²

⁶ 17 CFR § 240.14a-2(b)(9)(ii)(B).

⁷ 17 CFR § 240.14a-9.

⁸ *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Rel. Nos. IA-5325 and IC-33605 (Aug. 21, 2019), 84 FR 47420 (Sept. 10, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18342.pdf> (**2019 Adviser Guidance**).

⁹ *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Rel. No. IA-5547 (July 22, 2020), 85 FR 55155 (Sept. 3, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16338.pdf> (**2020 Supplemental Adviser Guidance**).

¹⁰ *Statement of Commissioner Allison Herren Lee on Proxy Voting and Proxy Solicitation Releases* (Aug. 21, 2019) (**Lee Statement**), available at <https://www.sec.gov/news/public-statement/statement-lee-082119>.

¹¹ *Id.* ("Staff views like those expressed in Staff Legal Bulletin 20 are non-binding and cannot create legal rights or obligations. Commission action, on the other hand, is different and commands attention and compliance.")

¹² The Commission has very rarely provided a comment period as short as 30 days, and those have typically involved very ministerial rulemakings. While we appreciate the Commission's desire to move its agenda forward, given the importance of the issues at stake, significant implications for a broad range of market participants and the public, and current and upcoming end-of-year holidays, a 30-day comment period is an unreasonably short amount of time to provide thoughtful and comprehensive comments on this Proposal. We are also concerned that the substantial number of concurrent SEC rule proposals with 30-day comment periods will greatly diminish the quantity and quality of comments received by the Commission and effectively denies stakeholders a meaningful opportunity to provide useful commentary, data, and other information that serves the purposes of the Administrative Procedure Act's notice and comment requirements.

We Support Removing the Conditions in Rule 14a-2(b)(9)(ii)

The 2020 Proxy Advice Rules amended the proxy rules to add conditions that a PVAB must satisfy to rely on the exemptions from the proxy rules' information and filing requirements. The Proposal would remove conditions that require a PVAB to adopt and publicly disclose written policies and procedures reasonably designed to ensure that (i) issuers¹³ that 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 (ii) 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 issuers that are the subject of such advice, in a timely manner before the security-holder meeting (**Rule 14a-2(b)(9)(ii) conditions**).¹⁴

We support removal of the Rule 14a-2(b)(9)(ii) conditions, as we believe they potentially undermine the independence of proxy voting advice and increase the costs and barriers to entry for PVABs, which in turn increases the costs and burdens for investment advisers. These conditions are also unnecessary. The Proposal details the efforts of PVABs to develop industry-wide standards through a "Best Practice Principles Group" (**BPPG**)¹⁵ and references a report of this group's "Independent Oversight Committee" that found that all six PVABs in the group met the standards established in three best practice principles.¹⁶ Because PVABs have voluntarily adopted policies and procedures consistent with the requirements imposed by the Commission, the Rule 14a-2(b)(9)(ii) conditions are currently unnecessary and we support their removal.¹⁷

We Support Removing the Note that Discusses Liability for PVABs

The 2020 Proxy Advice Rules amended Rule 14a-9, the antifraud provision of the proxy rules, by adding paragraph (e) to the Note to that rule. Paragraph (e) sets forth examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice.¹⁸ The amendments include examples of information that may be misleading to fail to disclose, such as the PVAB's business

¹³ For purposes of this letter, we use the term "issuers" to refer to corporate issuers and certain other soliciting persons.

¹⁴ 17 CFR § 240.14a-2(b)(9)(ii).

¹⁵ The BPPG's six member-PVABs are Glass Lewis, ISS, Minerva, PIRC, Proxinvest, and EOS at Federated Hermes. Proposal at 67386, n.27.

¹⁶ Proposal at 67386, n.26 (citing Best Practice Principles Oversight Committee, Annual Report 2021 (July 1, 2021), available at <https://bppgrp.info/wp-content/uploads/2021/07/2021-AR-Independent-OversightCommittee-for-The-BPP-Group-1.pdf>). The three principles are (i) service quality, (ii) conflicts-of-interest avoidance or management, and (iii) communications policy.

¹⁷ Members of the BPPG have at least a 97 percent market share in the proxy advisory market, according to industry data.

¹⁸ Proposal at 67389.

methodology, sources of information, and conflicts of interest. The Proposal would delete Note (e) from Rule 14a-9.

As the Commission notes in the Proposal, PVABs have raised concerns that paragraph (e) “may increase their litigation risks, thereby increasing their costs, which, ultimately, may be passed along to their clients.”¹⁹ Moreover, “PVABs and their clients remain concerned that Rule 14a-9 claims may be available for registrants who disagree with their proxy voting advice,”²⁰ potentially undermining the independence of that advice. We agree with these concerns and we support the Commission’s rationale that removing the Note (e) language “will reduce uncertainty that could lead to increased litigation risks or the threat of litigation and impaired independence of proxy voting advice.”²¹ We agree with the Commission that “Rule 14a-9 liability cannot rest on mere differences of opinion,” and commend the Commission for clarifying its “understanding of the limited circumstances in which a PVAB’s statement of opinion might subject it to liability under Rule 14a-9.”²²

The Commission Should Rescind the 2020 Supplemental Adviser Guidance and the 2019 Adviser Guidance

The Commission asks in the Proposal whether it should reconsider the 2020 Supplemental Adviser Guidance that it issued in connection with the 2020 Proxy Advice Rules.²³ We recommend that the Commission rescind both the 2020 Supplemental Adviser Guidance and the 2019 Adviser Guidance. If the Commission believes that guidance is necessary in this area, we request that it issue a proposal and provide the opportunity for comment.²⁴

2020 Supplemental Adviser Guidance

The 2020 Supplemental Adviser Guidance was premised on PVABs having to follow the new Rule 14a-2(b)(9)(ii) conditions. Because the Commission is proposing to remove those

¹⁹ *Id.* (footnote omitted).

²⁰ *Id.*

²¹ Proposal at 67390.

²² Proposal at 67390. The Commission explains that a PVAB’s statement of opinion may give rise to liability if it “omits material facts about the [PVAB’s] inquiry into or knowledge concerning [the] statement” and “those facts conflict with what a reasonable investor would take from the statement itself.” *Id.* (citing *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 189 (2015)).

²³ Proposal at 67388, Question 6.

²⁴ As noted above, neither the 2019 Adviser Guidance nor the 2020 Supplemental Adviser Guidance was subject to public comment. As stated in our previous letter to the Commission, we believe that the Commission should have solicited public comment before making the 2019 Adviser Guidance effective. IAA Letter at 4. We are concerned that the guidance creates risks for stakeholders without the opportunity to provide feedback, and without the Commission having justified the policy choices it made or weighing the costs and benefits of the chosen course.

conditions, we believe that the Commission should also rescind the 2020 Supplemental Adviser Guidance.

We also have concerns about the prescriptive nature of that guidance. For example, it states that “if an issuer files...additional information sufficiently in advance of the submission deadline and such information would reasonably be expected to affect the investment adviser’s voting determination, the investment adviser would likely need to consider such information prior to exercising voting authority in order to demonstrate that it is voting in its client’s best interest.”²⁵ While we believe there are situations where that information would need to be considered by an investment adviser, the statement is very broad. An investment adviser may determine that a review of additional information is not necessary because it would not change its vote, for example, if an investment adviser and its client agree that the adviser will always vote with corporate management, will vote a specific way on specific types of votes, or where a client’s holding in an issuer is so small that the investment adviser determines that it is not in the client’s best interest for the investment adviser to spend a significant amount of time reviewing issuer statements. We believe that the prescriptive nature of the guidance detracts from an investment adviser’s ability to determine what information is material to its clients.

2019 Adviser Guidance

While not specifically requested in the Proposal, we believe the Commission should also rescind the 2019 Adviser Guidance, which is highly prescriptive and was issued without notice and the opportunity for comment. This guidance was characterized as providing “examples to help facilitate investment advisers’ compliance with their proxy voting responsibilities,” with the proviso that “these examples are not the only way by which investment advisers could comply with their principles-based fiduciary duty imposed on them by the Advisers Act.”²⁶ However, notwithstanding this characterization, the guidance includes many prescriptive statements indicating that an investment adviser “should consider” certain detailed factors and practices in order to generally comply with its fiduciary duties, without explicitly indicating whether or how other principles-based approaches would suffice for this purpose. For example, the 2019 Adviser Guidance is extremely specific as to how advisers should conduct oversight over PVABs without addressing smaller advisers or advisers that have agreed with their clients to vote a specific way on certain matters. The specificity of the approach in the 2019 Adviser Guidance is also contrary to the principles-based approach the Commission has generally taken to oversight by advisers of third-party vendors.

As stated in our previous letter to the Commission, we also do not believe that the 2019 Adviser Guidance was necessary.²⁷ Investment advisers are required to exercise care and diligence in their proxy voting processes. Indeed, investment advisers are currently subject to

²⁵ 2020 Supplemental Adviser Guidance at 55156.

²⁶ 2019 Adviser Guidance at 47424.

²⁷ IAA Letter at 6.

substantial regulation in their voting of proxies on behalf of their clients. The Investment Advisers Act fiduciary duty,²⁸ the Proxy Voting Rule,²⁹ and the Compliance Program Rule³⁰ together provide a robust principles-based regulatory framework designed to ensure that investment advisers vote proxies in the best interest of their clients.

If the Commission Decides Proxy Voting Guidance is Needed for Investment Advisers, it Should Propose Guidance and Provide the Opportunity for Comment

If the Commission rescinds the 2019 and 2020 guidance and believes revised guidance is necessary, it should propose guidance and provide an opportunity for comment. Interpretation and guidance are important ways the Commission can implement its views and many issues are properly addressed without formal rulemaking. We believe that in this instance, however, where the guidance is so prescriptive, the Commission should be open to revisiting it, and allowing the public to comment on any new proposed guidance.

If the Commission proceeds to propose new guidance, we believe it should consider the following, at a minimum:

Do not make it more difficult for investment advisers to engage in proxy voting or to use PVABs. We are concerned about the effect of Commission rules and guidance, particularly on smaller investment advisers.³¹ We recommend that the Commission fully consider the extent to which the services provided by PVABs enhance, rather than detract from, the ability of investment advisers to fulfill their fiduciary duty in the context of proxy voting.

Advisers and clients should continue to be able to agree on proxy voting authority. We support the Commission's statement in the adopting release for the Proxy Voting Rule that "[t]he scope of an adviser's responsibilities with respect to voting proxies would ordinarily be determined by the adviser's contracts with its clients, the disclosures it has made to its clients, and the investment policies and objectives of its clients."³²

²⁸ See *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Rel. No. IA-5248 (June 5, 2019), 84 FR 33669 (July 12, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf>, discussing the fiduciary duty under the Investment Advisers Act of 1940 (**Advisers Act**).

²⁹ Rule 206(4)-6 under the Advisers Act.

³⁰ Rule 206(4)-7 under the Advisers Act.

³¹ See SEC Asset Management Advisory Committee, *Report and Recommendations on Regulatory Approach for Small Advisers and Funds* (Nov. 1, 2021), available at <https://www.sec.gov/files/final-report-and-recommendations-small-advisers-and-small-funds-subcommittee-110121.pdf> ("There is continuing 'disconnect' on use of proxy voting advisory services by advisers and funds as a method of fiduciary fulfillment. Recent Commission guidance has materially increased the cost of deploying resources necessary by the typical adviser/fund, while decreasing the ability of advisers/funds to rely on those resources.").

³² *Proxy Voting by Investment Advisers*, SEC Rel. No. IA-2106 (Jan. 31, 2003), 68 FR 6585, 6587 n.18 (Feb. 7, 2003), available at <https://www.govinfo.gov/content/pkg/FR-2003-02-07/pdf/03-2952.pdf>.

Advisers should have the discretion to determine whether to review supplemental information from issuers. Much of the 2019 and 2020 guidance discusses engagement with issuers and reviewing statements from issuers in response to recommendations from PVABs. As we discuss above, depending on the circumstances, an investment adviser may determine that it is not necessary to review supplemental information from issuers.

* * *

For the reasons discussed above, we commend the Commission for its Proposal to amend certain aspects of the 2020 Proxy Advice Rules that generated substantial concern, and we appreciate the Commission's requesting comment about guidance issued to investment advisers on proxy voting. As the Commission considers policies in this area, we ask that it not impose unnecessary burdens on investment advisers that vote proxies on behalf of their clients. Instead, the Commission should focus on proxy "plumbing" or infrastructure, which all stakeholders agree is badly needed. Please do not hesitate to contact the undersigned or IAA Associate General Counsel William Nelson at [REDACTED] if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
William Birdthistle, Director, Division of Investment Management
Renee Jones, Director, Division of Corporation Finance