



December 27, 2021

Submitted by SEC Webform (<http://www.sec.gov/rules/submitcomments.htm>)

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

RE: File No. S7-17-21: Proxy Voting Advice

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to U.S. Securities and Exchange Commission (“SEC” or the “Commission”) Release No. 34-93595, *Proxy Voting Advice* (the “Proposal”),² through which the Commission proposes to rescind certain amendments to the rules applicable to proxy voting advice businesses (“PVAB”) that were adopted in July 2020.³ NASAA generally supports the Proposal for the reasons explained below.

PVABs play an important role in the corporate governance ecosystem by helping certain investors decide how to vote their shares on important corporate governance matters.⁴ Because PVABs can exert considerable influence on shareholder voting decisions, it is essential that their advice be transparent, independent, and objective.

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.sec.gov/rules/proposed/2021/34-93595.pdf>.

³ See Final Rule, *Exemptions from the Proxy Rules for Proxy Voting Advice* (the “2020 Adopting Release”), SEC Rel. No. 34-89372 (July 22, 2020), available at <https://www.sec.gov/rules/final/2020/34-89372.pdf>.

⁴ See Commissioner Robert J. Jackson, Jr., *Statement on Proxy-Advisor Guidance* (Aug. 21, 2019), available at <https://www.sec.gov/news/public-statement/statement-jackson-082119>; and *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Rel. No. 34-87457 (Nov. 5, 2019) at 6, available at <https://www.sec.gov/rules/proposed/2019/34-87457.pdf>.

I. Conflict of Interest Disclosures Enhance Transparency in Proxy Voting Advice.

While PVABs are important sources of information for shareholders, they are also for-profit businesses with the inherent potential for conflicts of interest. That is why NASAA supported the Commission’s prior proposal to require PVABs to disclose any material information about existing or potential conflicts, as well as the manner in which conflicts are identified and addressed.⁵ We are pleased to see that the Commission remains committed to these critical transparency measures.⁶

II. Note (e) is Unnecessary for the Proper Application of Rule 14a-9.

NASAA supports the proposed deletion of Note (e) from Rule 14a-9. In combination with statements in interpretive guidance issued by the Commission in August 2019 that Rule 14a-9 may apply to “opinions, reasons, recommendations, or beliefs” included in proxy voting advice,⁷ Note (e) appears to have created the perception that issuers may use the threat of litigation to pressure PVABs to change their proxy advice, methodologies, analyses, and sources of information.⁸ Regardless of whether any such suits are ultimately filed, the risk perceived by PVABs could create a dynamic that impairs the independence and objectivity of their proxy voting advice.

In light of this risk, NASAA supports deleting Note (e) because it does not appear to add anything of interpretive significance to Rule 14a-9. First, Note (e) is largely duplicative of the Commission’s 2019 Guidance, which explains in greater detail the circumstances under which a PVAB “should consider” whether Rule 14a-9 requires it to include information in its advice about its methodology, sources of information, and conflicts of interest.⁹ Second, as the Commission notes in the Proposal, Note (e) does not expand or modify the law regarding material misrepresentations and omissions, nor does it add or create any bases for liability under Rule 14a-

⁵ See Letter from Christopher Gerold, NASAA President, to Vanessa Countryman, Sec’y, U.S. Sec. and Exch. Comm’n (Feb. 3, 2020) at 8-9, available at <https://www.sec.gov/comments/s7-22-19/s72219-6742428-207766.pdf>. See also NASAA’s Legislative Agenda for the 116th Congress at 10, available at <https://www.nasaa.org/wp-content/uploads/2019/03/NASAA-Legislative-Agenda-for-116th-Congress.pdf>.

⁶ NASAA continues to believe, however, that these concerns would be most intuitively and effectively addressed by regulating PVABs as investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”). See Letter from Christopher Gerold, *supra* note 5, at 9 n.39. We further note that one of the two largest PVABs is currently registered as an investment adviser and is thus already subject to fiduciary obligations under the Advisers Act. See Form ADV – Annual Amendment, Institutional Shareholder Services Inc. (filed Mar. 30, 2021), available at <https://reports.adviserinfo.sec.gov/reports/ADV/111940/PDF/111940.pdf>.

⁷ *Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, SEC Rel. No. 34-86721 (the “2019 Guidance”) (Aug. 21, 2019) at 11, available at <https://www.sec.gov/rules/interp/2019/34-86721.pdf>.

⁸ See Proposal at 26-27.

⁹ 2019 Guidance at 12-13.

9.¹⁰ Instead, it simply “clarif[ies] ‘what has long been true about the application of Rule 14a-9 to proxy voting advice and, more generally, proxy solicitations as a whole: no solicitation may contain any statement which, at the time and in 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.’”¹¹ Therefore, while NASAA supports the application of this important principle to proxy voting advice, we believe that Note (e) should be deleted.

III. The Rule 14a-2(b)(9)(ii) Conditions Burden PVABs and Shareholders Unnecessarily, and Privilege the Views of Company Management Inappropriately.

NASAA agrees that proxy voting advice should be objective and based on accurate and complete information. However, NASAA opposed the Commission’s original proposed review, feedback, and final notice requirements because of their potential to jeopardize the timeliness, quality, and independence of proxy voting advice.¹² The Commission softened these requirements in the final rule, ultimately requiring PVABs (A) to make their advice available to the company at issue “at or prior to” the time the advice is delivered to the PVAB’s clients,¹³ and (B) to provide their clients with a mechanism to access the company’s response to the advice.¹⁴ NASAA supports the proposed rescission of these requirements because they still inordinately privilege the viewpoints of company management and impose unnecessary burdens on PVABs, which can undermine the timeliness, cost, and independence of proxy voting advice.

It is also unnecessary to require PVABs to disseminate the views of company management because they have ample opportunities to make their positions known, and responsive proxy materials are publicly available on the EDGAR database.¹⁵ The sorts of investors who utilize the services of PVABs are sophisticated enough to know where to find a company’s written statements if they are interested in them.

The current requirements tilt the playing field in favor of company management and create unequal access to the proxy solicitation process, which the Commission has recognized has

¹⁰ Proposal at 26.

¹¹ *Id.* (quoting 2020 Adopting Release, *supra* note 3, at 132).

¹² See Letter from Christopher Gerold, *supra* note 5, at 9-12.

¹³ 17 CFR § 240.14a-2(b)(9)(ii)(A).

¹⁴ 17 CFR § 240.14a-2(b)(9)(ii)(B).

¹⁵ See, e.g., 17 CFR § 240.14a-2(b)(9)(iv) (establishing a safe harbor for the requirement in Rule 14a-2(b)(9)(ii)(B) when a PVAB notifies its clients electronically that the company has filed or intends to file a written statement in response to the advice and provides a hyperlink to the materials in EDGAR).

become the primary “forum for shareholder suffrage.”¹⁶ The current rule does not require a PVAB to afford these opportunities to any other stakeholders. This means that shareholder proponents are not afforded these opportunities even with respect to their own proposals, which can further marginalize their voices.¹⁷ Accordingly, NASAA supports rescinding the requirements of Rule 14a-2(b)(9)(ii).

IV. Conclusion

For the foregoing reasons, NASAA supports the proposed deletion of Note (e) to Rule 14a-9 and the rescission of the requirements in Rule 14a-2(b)(9)(ii). Thank you for considering these views. NASAA looks forward to continuing to work with the Commission in our shared mission to protect investors. Should you have questions, please contact either the undersigned or NASAA’s General Counsel, Vince Martinez, at [REDACTED].

Sincerely,



Melanie Senter Lubin
NASAA President
Maryland Securities Commissioner

¹⁶ *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, SEC Rel. No. 34-87458 (Nov. 5, 2019) at 5, available at <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>.

¹⁷ Indeed, NASAA previously advocated that if the Commission were to allow privileges of access and response to company management, then it should afford the same privileges to shareholder proponents with respect to advice regarding their proposals. See Letter from Christopher Gerold, *supra* note 5, at 10. While we are not advocating for that outcome in response to the Proposal here, we maintain that if any privileges are extended to any party to review and respond to a PVAB’s advice, then such privileges should be granted equally to other relevant and affected parties.