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December 27, 2021

Submitted by email

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Proxy Voting Advice
Release No. 34-93595; File No. S7-17-21

Dear Ms. Countryman:

Thank you for the opportunity to comment on the amendments to the Commission's rules on proxy voting advice recently proposed by the Securities and Exchange Commission.[1]

Glass Lewis appreciates the Commission revisiting its 2020 proxy advice rulemaking and supports the proposed changes. These changes are amply justified for the same reasons we opposed the rules' adoption last year. In short, as Commissioner Lee put it at the time, the rules adopted in 2020 were "unwarranted, unwanted, and unworkable." The Commission has never identified a market failure or other good reason for the government to intervene in how institutional investors get proxy advice. In fact, investors, the supposed beneficiaries of the rules, have consistently told the Commission they do not want them. And while one of the most extreme elements of the proposed rules was not adopted, the rest of the final rules were adopted largely as proposed and have already caused cost and confusion, even before their principal elements were scheduled to go into effect. In short, there are ample good reasons for the Commission to now make a different policy choice than it did in 2020 and we urge it to do so.

At the same time, we also urge the Commission to revisit its earlier decision to codify a definition of "solicitation" that includes proxy advice and thereby facilitate companies' efforts to threaten and sue proxy advisors that recommend against them. While we recognize the ostensible virtue of a "compromise," there is no principled reason to leave in place large elements of a rulemaking there was no basis for to begin with and that, by design, sought to impair the objectivity of the proxy advice institutional shareholders receive. If the SEC decides to continue to define proxy advice as a solicitation, it should at least take additional, targeted steps to mitigate the harmful measures taken in 2019-2020 to stoke company litigation against proxy advisors over judgmental matters.

[1] U.S. Securities and Exchange Commission, Proxy Voting Advice, Release No. 93595 (Nov. 17, 2021) (the "Proposing Release" or "Release").

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I. Background

A. Glass Lewis

Founded in 2003, Glass Lewis is a leading independent proxy advisor. Glass Lewis provides proxy research and/or vote management services to more than 1,300 institutional investor clients throughout the world - primarily public pension funds, mutual funds and other institutions that invest on behalf of individual investors and have a fiduciary duty to act, including through proxy voting, in the best interests of their beneficiaries. While, for the most part, investor clients use Glass Lewis research to help them make proxy voting decisions, these institutions also use Glass Lewis research when engaging with companies before and after shareholder meetings. Further, through Glass Lewis' web-based vote management system, Viewpoint, Glass Lewis provides investor clients with the means to receive, reconcile and vote ballots according to custom voting guidelines and record-keep, audit, report and disclose their proxy votes.

While we will not repeat the fuller description of Glass Lewis' business in our 2020 comment letter,[2] we do make two points here that are often missed in the public discussion of proxy advisors.

First, Glass Lewis does not decide how its clients vote. Instead, Glass Lewis applies our institutional clients' voting policies, which today are mostly custom policies unique to that client, to the facts presented in companies' proxy statements and makes voting "recommendations" to the client based on that analysis. Depending on the circumstances, clients may then perform additional analysis or engage with the companies involved to help determine how to vote. To be sure, institutional investors often vote in line with their proxy advisor's recommendation, but this should be expected given the institutional context. First, many ballot items are routine, leaving little to decide; Glass Lewis recommends a vote to support management's recommendation on management proposals nearly 90% of the time. Second, on many issues, our recommendations are based on corporate governance best practices that reflect the consensus view of most institutional investors. Finally, we are applying the client's chosen voting policy, so our recommendation should accord with their preferences and expected vote, absent unusual circumstances.

Second, contrary to the impression pushed on the SEC in trade association comment letters and sponsored reports, proxy advice is not an industry beset with conflicts, let alone undisclosed ones. Unlike auditors, credit rating agencies, or sell-side analysts, proxy advisors' core job involves providing advice and vote execution assistance to our investor clients for a fee. Among other things, this direct business model creates strong market incentives for proxy advice to be

[2] See Letter of Kevin Cameron and Nichol Garzon-Mitchell, Glass Lewis, to the SEC, at 2-3 (Feb. 3, 2020) ("Glass Lewis Comment Letter"), available at https://www.sec.gov/comments/s7-22-19/s72219-6745349-207938.pdf.

accurate and responsive to investors' needs.[3] To be sure, like other professional service providers, proxy advisors' ancillary services and employees' personal relationships can pose potential conflicts. If there is any risk our advice might be swayed by such a conflict, our sophisticated clients expect to know that. For that reason, we have long had a thorough and publicly-available conflict of interest policy and, pursuant to that policy, we prominently disclose potential conflicts on the first page of our research reports. While our investor clients take potential conflicts seriously, it is telling that companies – the apparent beneficiaries of the most credible conflict that is discussed - and not our clients are the ones continually raising this issue as a reason to regulate proxy advice.[4]

B. The Regulatory Environment of Proxy Advisors

We will also not repeat the full discussion in our 2020 letter of the regulatory environment of proxy advisors.[5] However, we note here in summary that the SEC, long before 2020, has established a robust set of expectations for how investment advisers will oversee their proxy advice service providers, including with respect to their accuracy, conflicts management and disclosure and engagement with companies. Therefore, pursuant to the operation of these SEC rules and guidance, even if the Commission withdrew the current rules entirely – and were for some reason unwilling to rely on the market forces described above or the self-regulatory process noted below – proxy advisors would still effectively have to meet high standards on accuracy, conflicts, and engagement with companies in order to obtain and retain the business of their many investment adviser clients.

We also commend the SEC for its recognition of the work of the Best Practices Principles Group, a self-regulatory organization for shareholder research providers that was established at the behest of the European Securities and Markets Authority ("ESMA") and whose work has been leveraged in the regulatory approach of a number of the SEC's international counterparts. In fact, even since the issuance of the Commission's proposed rules, the French AMF has joined

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[3] See Letter of Ken Bertsch, Executive Director, Council of Institutional Investors and 60 institutional investors to Chairman Jay Clayton, at 3 (Oct. 15, 2020) ("Proxy advisors' business model depends on factual accuracy and their incentives are thus aligned with issuers and institutional investors alike.").

[4] See Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, at 5 (Dec. 31, 2018) ("Some commentators point to conflicts of interest as grounds for regulation of proxy advisory firms. However, . . . proxy advisory firms currently disclose their conflicts of interest transparently in a manner sufficient for investment advisers to review and evaluate them."), available at https://www.sec.gov/comments/4-725/4725-4840960-177135.pdf.; cf. Statement of Commissioner Allison Herren Lee at SEC Open Meeting at note 7 (July 22, 2020) ("Lee Open Meeting Statement") (" While enhanced conflicts disclosure is generally a laudable goal, it does not justify this specific rulemaking, and in fact may function more as a fig leaf for a rule that is otherwise unsupported and strenuously opposed by investors."), available at https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22.

[5] See Glass Lewis Comment Letter at 5-10.

other regulators in relying on the work of the BPPG's Independent Oversight Commission ("IOC") as part of its oversight of corporate governance in France.[6] The IOC, under the leadership of Dr. Stephen Davis, has introduced an independent review process for BPP Signatories' annual compliance statements and announced other steps to formalize and further enhance IOC governance. The IOC's 2021 Stakeholder Forum provided concrete examples of how the annual reporting and IOC review process has led proxy advisors to improve their practices with respect to each of the three core Best Practices Principles – transparency, conflict management and disclosure, and communications, including engagement with companies.[7] In short, this self-regulatory approach is credible, well-established, and working.

C. The Commission's 2019-2020 Rulemaking

Some have already contended that the Commission should not revisit the 2020 Rules because they "had undergone the rigor of the Administrative Procedure Act"[8] and even that "the Commission's process in adopting these amendments was beyond reproach."[9] Without belaboring all our procedural and legal objections to the Commission's 2020 rulemaking, we note that –

1. The Commission had to abandon its primary justification for the rulemaking when it became apparent that there was no evidence to support its claim the rules were needed to "promote accuracy" in proxy advice;[10]

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[6] See Autorite des Marches Financiers, "The AMF publishes its annual report on corporate governance and the executive compensation of listed companies" (Dec. 2, 2021) (AMF "reviews the main findings of the first report of the oversight committee of the Best Practice Principles Group (the BPPG), which monitors the implementation of its code of conduct. Based on a questionnaire sent to issuers, the AMF notes that there have been great strides in the quality of dialogue between listed companies and proxy advisers."), available at https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-publishes-its-annual-report-corporate-governance-and-executive-compensation-listed-companies.

[7] Best Practices Principles Group Independent Oversight Committee Stakeholder Forum (Oct. 12, 2021), available at https://bppgrp.info/. The Best Practices Principles were published in April 2014 and updated, mainly to account for the requirements of the European Union's Shareholder Rights Directive II, in 2019.

[8] Statement of Commissioner Elad L. Roisman at SEC Open Meeting (Nov. 17, 2021), available at https://www.sec.gov/news/statement/roisman-proxy-advice-20211117#_ftnref38.

[9] See the Statement of Commissioners Hester M. Peirce and Elad L. Roisman (June 1, 2021), "Response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice," available at https://www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121.

[10] See Lee Open Meeting Statement (inaccuracy "failed as a justification for the proposal because there simply was not evidence of any significant error rate in proxy voting advice"); see also Annual Report for 2020 of the SEC Investor Advocate, at 5 ("SEC Investor Advocate 2020 Report") (reviewing the claims of

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2. The purported "mom and pop" investor letters heralded by several Commissioners in proposing the rules turned out to be ghost-written by dark money groups to support the false narrative that "main street investors" were concerned about the influence of proxy advisors;[11]

3. When the Commission shifted its focus from accuracy to so-called "robovoting" and the idea of installing a "speed bump," it did not repropose those concepts for comment, but instead rushed to adopt final rules and guidance in advance of the anticipated Congressional Review Act "cut-off" date;

4. The proposal's Economic Analysis failed to meet the SEC's own standards in the most basic ways, including never identifying a market failure and not quantifying any costs or benefits, except for the burdens that had to be quantified for the Paperwork Reduction Act analysis. (As to these, Glass Lewis showed that they were understated by 240x.[12]);[13]

"select market participants that proxy voting advice historically had not been transparent, accurate, and complete" and noting that "these claims remain unsupported by empirical evidence"), available at https://www.sec.gov/files/sec-investor-advocate-report-on-activities-2020.pdf; SEC Investor Advisory Committee Recommendation on Proxy Advice, at 5 ("IAC Recommendation") (demonstrating that a chart used by the SEC in its proposal reflected that issuers only claimed proxy advice errors 0.3% of the time and "none of those is shown to be material or to have affected the outcome of the related vote"), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf.

[11] See Zachary Mider and Ben Elgin, "SEC Chairman Cites Fishy Letters in Support of Policy Change," Bloomberg News (Nov. 19, 2019); see also comments of Sen. Van Hollen at Oversight Hearing, Senate Banking Committee (Dec. 10, 2019) (asking then-Chair Clayton whether he was aware that some of these letters were from relatives of the head of the 60 Plus Association, a dark money group funded, in part, by major corporations), available at https://www.c-span.org/video/?c4837351/user-clip-exchange-sen-chris-van-hollen-sec-chairman-jay-clayton. In fact, this unprecedented corruption of the notice-and-comment process continued even after it was exposed. See Andrew Ramonas and Andrea Vittorio, "SEC Proxy-Firm Rules Spur YouTube Call to Stop 'Liberal Agenda'," Bloomberg Law (Jan. 17, 2020) (describing efforts of groups to spread misinformation that proxy advisors are supporting "liberal causes" like abortion and "sanctuary cities" to generate SEC comment letters supporting proxy advisor regulation).

[12] Letter of Nichol Garzon, Glass Lewis, to the Office of Management and Budget, at 13-15 (Jan. 7, 2020) (illustrating how the SEC had estimated that negotiating and signing confidentiality agreements with companies, sharing advance copies of proxy advice twice, considering companies' feedback, hyperlinking to company responses, and taking the other steps required by the SEC proposal would, in total, take less than three minutes per company), available at https://www.sec.gov/comments/s7-22-19/s72219-6617071-202957.pdf.

[13] See Glass Lewis Comment Letter at 41-42 ("[T]he economic analysis included in the Release falls short of the Commission's responsibilities and its own standards on almost every count. No market failure is identified. No data or even information from the Commission's examinations was used to establish the baseline in practice. Reasonable alternatives — including ones chosen by coordinate regulators and

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5. DERA only divulged the names of the companies it considered to have *alleged a* proxy advisor mistake of some sort late in the rulemaking process, after a protracted letter-writing campaign by the Council of Institutional Investors ("CII"), allowing CII to then perform the analysis DERA should have of the merits of these complaints;[14]

6. There was no discussion of the SEC's 2018 Proxy Process Roundtable, which is now cited as evidence of the Commission's deliberativeness, in the proposing release, presumably because none of the Roundtable panelists supported further SEC regulation of proxy advisors;[15]

7. The 2019 Interpretation and 2020 Rules divided the Commission along partisan lines. The 2020 Rules were proposed on a 3-2 vote and were adopted by a 3-1 vote, with both actions drawing strong dissents on substantive and procedural grounds; and

8. The 2020 Rules not only exceed the Commission's statutory authority, but blatantly violate the First Amendment to the Constitution, an issue not even mentioned in the proposing release.

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even raised by the SEC itself in its 2010 Concept Release — were ignored. No benefits or even costs are quantified, except for the burdens that had to be quantified for the PRA analysis. (And, as to those, Glass Lewis has already explained how they were vastly understated.) In fact, other than general market statistics, the only data in the economic analysis is a tabulation of issuer complaints in SEC filings, with no effort made to analyze whether those complaints were justified. The Release says little on the significant issue of competition, ignoring the concerns of other regulators. Nor does the analysis discuss or reconcile the proposed rules with the broader academic literature on the balance of power between management and shareholders in corporate governance. And the economic analysis sidesteps what may be the most significant economic consequence of the proposal, claiming that subjecting proxy advisors to potential litigation by companies was the result of an August 2019 Commission interpretation (with no economic analysis or public comment) and need not be economically analyzed now because the interpretation was already in place before this rule was proposed.") (footnote omitted); see also See IAC Recommendation on Proxy Advice at 3-10 (delineating shortcomings in the SEC's economic analysis).

[14] See Letter of Ken Bertsch, Executive Director, Council of Institutional Investors to Chairman Jay Clayton, at 2 (Oct. 24, 2019) (reviewing "studies" relied on by the SEC in 2019-2020 and showing that "most of the claimed 'errors' actually [were] disagreements on analysis and methodologies, and that some other alleged proxy advisory firm errors derive from errors in the company proxy statements"), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191024%20SEC%20comment%20letter%20proxy%20advisor%20accuracy.pdf.

[15] See IAC Recommendation on Proxy Advice at 7-8 (noting how the SEC moderator during the panel was left to ask: "I can't believe … Is there anyone on the panel [who] thinks there should be additional regulation? I haven't heard it yet, and I'm kind of surprised.").

While significant, none of these procedural infirmities necessarily pertains to the Commission's current decision. Purely on the substance, there are ample reasons why the Commission should revisit and change these rules. We rehash this merely to respond to the expected claims of other commenters about the rigor, integrity, and thoroughness of last year's rulemaking process. Those claims have no merit. The Commission should not hesitate to revisit this rulemaking and make a better policy decision now.

II. The Commission's Proposed Changes.

We support the Commission's two proposed changes to its 2020 Rules and urge their adoption.

A. Elimination of the Issuer Access and Response Dissemination Mandate

First, the Commission proposes to eliminate Rule 14a-2(b)(9)(ii)-(vi) of the rule. Those provisions effectively require proxy advisors to make their research reports available to companies and help disseminate any company responses to those reports. They also establish two complex "safe harbors" for meeting the condition's expectations and carve out limited exceptions to the condition.

We agree that the Commission should eliminate this condition from the rule. At a general level, the whole concept of this part of the rule was antithetical to the concept of a marketplace of ideas.[16] Company management have plenty of resources (and can, in fact, use shareholder resources) to try to persuade shareholders how to vote. In addition to lengthy proxy statements, companies can and do regularly make supplemental proxy filings to make their case. Once the claimed need to enhance proxy advisor accuracy collapsed, this part of the rule became a simple attempt to give these well-resourced parties a boost (and the last word) in making their arguments.[17]

At a more specific level, the condition should be eliminated because it is unnecessary and harmful. First, it is not necessary because proxy advisors already have the right incentives to engage with companies in an appropriate manner and provide potentially useful information to their clients. As the release notes, Glass Lewis' Report Feedback Statement ("RFS") program,

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[16] Cf. Jonathan Macey, "Behind the SEC's War on Freedom of Speech," Bloomberg (Mar. 2, 2020) ("Macey Op-Ed") (the SEC's "proposal would land a one-two punch against corporate democracy and freedom of speech. Not only is the commission demonstrating a deep hostility for the value of dissent. It is also abandoning the idea that the free and open exchange of competing views will result in the triumph of good investment policies over inferior ones."), available at https://www.bnnbloomberg.ca/behind-the-sec-s-war-on-freedom-of-speech-1.1398605.

[17] The suggestion that this condition somehow replicates the dialogue that would have occurred at a company's annual meeting in a pre-digital world also makes no sense. Proxy advisors only advise those institutional shareholders that have hired them for advice. They do not attend and present their advice at companies' annual meetings. In fact, since they are not a shareholder, our understanding is that a proxy advisor would not even be allowed to attend, let alone speak at, many such meetings under state law and companies' practices.

which was started as a pilot in 2019, allows companies, as well as shareholder proponents, dissident shareholders, and parties to an M&A transaction, that purchase our research reports to opt to have a statement responding to Glass Lewis' research transmitted to Glass Lewis customers, along with Glass Lewis' research report, through our customer and voting platforms. The program has now been expanded globally and has seen significant uptake in the United States, Canada, Europe, Australia, and Japan.[18]

This condition is also not necessary because the BPPG and its IOC already oversee proxy advisors' engagement with companies. An important aspect of the Best Practices Principles' third Core Principle is how BPP Signatories communicate with issuers, shareholder proponents and other stakeholders. Glass Lewis meets this principle through its RFS program, along with its Issuer Data Report ("IDR") program, through which companies can review the key data Glass Lewis intends to use before its report is prepared, and its error correction processes, through which companies can raise a claimed error in Glass Lewis research at any point in time.

The SEC should also eliminate this condition because of its substance. Simply by codifying a role for companies in how institutional shareholders get proxy advice, the final rules continue to present threats to the independence, cost, and timeliness of that advice. To be sure, they do not do so to the same, drastic extent as the Commission's proposal. But, merely being not as bad as something else does not equate to being good. Even before seeking comment on this issue, the Commission already has ample evidence, which it cites in the release, of market participants' concerns about the final rules.[19]

In addition, the wording of this condition in the final rules has created unnecessary confusion. This is so because this part of the rules employs a needlessly complex "safe harbor" construct,[20]

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[18] See Nicholas Grabar et al., "The SEC Backs Off on Proxy Advisory Firms," Harvard Law School Corporate Governance Blog (Dec. 19, 2021) ("Even without SEC rules on the matter, developing market practices may give companies better and more timely opportunities to respond . . . ."), available at https://corpgov.law.harvard.edu/2021/12/19/the-sec-backs-off-on-proxy-advisory-firms/.

[19] See also SEC Investor Advocate 2020 Report ("We worry that the newly mandated feedback mechanism enables undue interference in the voting process and will likely result in the suppression of dissenting views."); Comment Letter of Elliott Management Corp. (Mar. 30, 2020) (commenting, in response to Commissioner Roisman's CII speech on the alternative concept of issuer post-publication review and a "speed bump") ("The alternative, like the original proposal, would no doubt impact the way proxy advisors frame their recommendations, inhibiting fair and impartial criticism of issuers. In effect, there would be significant damage to the free exchange of ideas that is essential for the proper functioning of the capital markets."), available at https://www.sec.gov/comments/s7-22-19/s72219-7009612-214910.pdf.

[20] The rule itself is an exemption to the requirement to file proxy solicitations with the SEC. This part of the rule is a two-part condition on the exemption – 17 C.F.R. 240.14a-2(b)(9)(ii)(A) (the "make available" prong of the condition) and 17 C.F.R. 240.14a-2(b)(9)(ii)(B) (the "mechanism for access" prong of the condition) - followed by a clarifying note to 17 C.F.R. 240.14a-2(b)(9)(ii)(A). 17 C.F.R. 240.14a-2(b)(9)(iii) then creates a non-exclusive "safe harbor" to the "make available" prong, 17 C.F.R. 240.14a-

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as well as including superfluous, non-binding references in the rule text itself to the rule proponents' wish list items – i.e., getting proxy advice "prior to" the time it is made available to our clients and "at no charge." This is compounded by the adopting release's extensive discussion of the safe harbors and encouragement for proxy advisors to go beyond the rule's actual requirements.[21]

As a result, on multiple occasions since the rule's adoption, we have had to respond to companies' claims that the SEC's rules entitle them to a free copy of our reports. (These reports are, of course, our intellectual property and our primary business consists of selling them.) In fact, these instances all precede this part of the rule even going into effect. Nor can this be ascribed to a careless mistake by a few overworked in-house lawyers. A leading U.S. law firm told its clients and the public that the primary takeaway from the SEC's final rules was: "After the new rules are fully effective in December 2021, a company will be assured of a prompt look (**at no cost**) at the voting advice that the proxy advisory firms provide."[22] While the more issuer-friendly terms of the "safe harbors" may have been seen as a way to placate companies that wanted the final rules to go further, in practice they have created confusion about what the rules require of proxy advisors, leading to unnecessary rancor, distraction and cost.

Finally, the Commission should eliminate this condition from the rule for the simple reason that it is unconstitutional. It is well-settled that, under the First Amendment, the government cannot

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2(b)(9)(ii)(A), which itself has two distinct conditions - 17 C.F.R. 240.14a-2(b)(9)(iii)(A) and 17 C.F.R. 240.14a-2(b)(9)(iii)(B) - with the first of those two conditions itself having two alternatives for measuring the relevant time period. 17 C.F.R. 240.14a-2(b)(9)(iv) then creates a non-exclusive "safe harbor" to the "mechanism for access" prong, which, again, itself has two distinct conditions - 17 C.F.R. 240.14a-2(b)(9)(iv)(A) and 17 C.F.R. 240.14a-2(b)(9)(iv)(B). 17 C.F.R. 240.14a-2(b)(9)(v) and (vi) are relatively straightforward, carving limited types of proxy advice out of the 17 C.F.R. 240.14a-2(b)(9)(ii) condition (but not the 17 C.F.R. 240.14a-2(b)(9)(i) conflicts disclosure condition).

[21] See, for example, U.S. Securities and Exchange Commission, "Exemptions from the Proxy Rules for Proxy Voting Advice," Release No. 43-89732 at 93 (Jul. 22, 2020) ("SEC Proxy Advice Adopting Release") ("providing registrants with the opportunity to review their proxy voting advice in advance would satisfy the principle and is encouraged to the extent feasible"). In contrast, in defending the rule in court, the SEC only mentions the "safe harbors" in a footnote and refers to the conditions as "minimally burdensome." U.S. Securities and Exchange Commission, Combined Memorandum in Support of Defendants' Cross-Motion in Support of Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment in Case No. 1:19-cv-3275 (Oct. 30, 2020); see also id. ("Proxy voting advice businesses need not share their advice until it is delivered to clients" and rule does not "compel proxy voting advice businesses to subsidize registrant speech," although it does prevent them "charging registrants unreasonably high fees for their advice.").

[22] See Alert Memorandum, "The SEC Takes Action on Proxy Firms" (July 31, 2020) (emphasis added), available at https://www.clearygottlieb.com/-/media/files/alert-memos-2020/the-sec-takes-action-on-proxy-advisory-firms.pdf.

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require a private party "to help disseminate hostile views."[23] That is, in fact, the very purpose and effect of this condition and neither the Commission's adopting release nor its briefing in the ongoing litigation over the constitutionality of this provision has offered any good reason to exempt the SEC from this basic constitutional principle.[24]

B. Elimination of the Examples of "Misleading" Proxy Advice

Glass Lewis also supports the Commission's proposal to remove the three examples of "misleading" proxy advice added to Rule 14a-9 as part of the 2020 Rulemaking. As the release notes, companies at times have different opinions on "the appropriate analysis, methodology or information that the [proxy advisor] should use to formulate its voting recommendations (e.g., a disagreement between a registrant and a [proxy advisor] regarding the appropriate peer companies for a particular analysis)." The examples invited litigation in such circumstances by suggesting that – even if the proxy advice was accurate – it could still be somehow misleading because the proxy advisor had not disclosed enough about its methodology, sources of information or conflicts.

No real basis was ever given for adding these examples to the rule. The Commission's August 2019 Interpretation did not even explain how proxy advisors' sophisticated clients were at risk of being misled on these topics, let alone give any examples or other evidence of that happening. Nor did it explain the Commission's expectations for non-misleading disclosure, beyond a few short and general footnotes. The Commission then adopted these examples as rule text in 2020, with no additional explanation of their basis or scope, on the grounds that it was just codifying its prior interpretation (which also meant no cost-benefit analysis of the changes was needed).

Absent any such explanation, retaining the examples in the rule would lead to significant, harmful uncertainty about the scope of Rule 14a-9 for proxy advisors.[25] It would also raise unanswered questions about the implications of these interpretations for other parties that file proxy materials and face potential liability under Rule 14a-9 – and who, of course, have their

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[23] *Pacific Gas & Electric v. Public Utility Commission*, 475 U.S. 1, 14 (1986).

[24] The Commission's purported distinction of *Pacific Gas* makes no sense; proxy advisors are not talking to themselves when they are forced to disseminate company responses to their proxy advice. And the suggestion courts should carve out a lesser standard of First Amendment protection for the SEC's proxy regulation runs headlong into the SEC's position that the term "solicitation" is broad enough to apply to "newspaper op-ed articles, public speeches or television commentary on a specific company." U.S. Securities and Exchange Commission, Regulation of Communication among Shareholders, Release No. 34-31326 (Oct. 22, 1992), 57 Fed. Reg. 48,276 at 48,278 ("SEC Shareholder Communications Release"); see also id. at 48,279 ("almost any statement of views could be alleged to be a solicitation").

[25] See the discussion in Note 36 about some companies' understanding of the types of analyses and proxy advisor judgments these examples open up to litigation.

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own conflicts and use their own methodology and information sources. The Commission should delete Note (e) from the rule.

III. Other Issues[26]

A. Defining Proxy Advice as a Solicitation

We continue to respectfully disagree that our advice to our investor clients can fairly be characterized as our soliciting proxies. Just as a matter of plain English usage, solicitation and advice are different concepts. For the simple reasons that proxy advisors are not requesting anyone's proxy and do not even seek to persuade shareholders to vote a certain way, they are not soliciting proxies. Whatever the merits of the Commission's past "broad" interpretations of the term, we would suggest that – rather than being seen as license to broaden the term further – they warrant caution in now trying to stretch the definition even further to cover proxy advice.

We also note that, on a policy level, the SEC's concededly "sweeping" interpretation of "solicitation"[27] provides a foundation for companies to seek to enlist the Commission in regulating a range of other market participants whose work may displease them. Calls for the SEC to do just that have already started.[28]

Even if the Commission is unwilling at this stage to revisit its codified definition of proxy advice as a solicitation, however, it should clarify its interpretation of that term in one important respect. Specifically, the SEC should revise the statements in the 2019 Interpretation and 2020

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[26] Glass Lewis has no objection to the terms of the conflicts disclosure condition the Commission adopted in 2020. While that rule was not necessary for the reasons we have explained, we have always prominently disclosed any material conflicts to our clients and will continue to do so whether or not a rule is in place.

[27] SEC Shareholder Communications Release at 48,277.

[28] See Comment Letter of Exxon Corp. at 8 (Feb. 3, 2020) ("Exxon Comment Letter") ("Independent ESG rating firms also include information in their reports that is meant to influence voting. . . . We request that the Commission expand the proposed amendments to specify that reports published by ESG rating firms are also solicitations subject to Rule 14a-9. We also request that the rule address principles for similar types of future communications as these markets continue to grow and evolve."), available at https://www.sec.gov/comments/s7-22-19/s72219-6742834-207796.pdf; cf. Comment Letter of Bernard Sharfman, at 39 (March 18, 2020) (arguing that "the stewardship teams of large mutual fund families [] need to be designated investment advice fiduciaries. Like proxy advisors, stewardship teams provide shareholder voting recommendations."), available at https://www.sec.gov/comments/s7-22-19/s72219-6969406-214061.pdf. Of course, it also provides the foundation for any future Commission to renew efforts to impose a proxy advice "sneak peek" requirement or any other exemptive condition that is favored at the time.

Adopting Release suggesting that even advice based on a client's custom policy constitutes the proxy advisor's "solicitation" of that client.[29]

As explained in our prior letter, many Glass Lewis clients have custom policies, meaning Glass Lewis is issuing them "recommendations" based on their voting preferences on designated issues. Put simply, Glass Lewis' "recommendation" in these circumstances reflects the client's position, not Glass Lewis'. In practice, this means that Glass Lewis can be simultaneously "recommending" that two of its clients vote in opposite ways on the same ballot item.[30] Per the 2019-20 interpretation, however, we would be "soliciting" both those clients to vote in opposition to each other.

The SEC's 2019 Interpretation concluded that such advice is still a solicitation because it "is typically transmitted to the client shortly before the meeting to aid the client's voting determination; and it may be a factor in the client's voting determination." But that is no less true of a clerk who relays a voting recommendation from one of an investment adviser's portfolio managers to its proxy voting team. Surely, no reasonable person would describe that ministerial act as the clerk's "soliciting" a proxy vote. And, while proxy advisors' work in this context does require the application of the client's preferences to the facts presented, it still defies the common meaning of the terms to characterize this as "soliciting" or even "seeking to influence" the outcome of a proxy vote. At some point, the SEC has to acknowledge that its statutory authority over those who "solicit" proxies is not carte blanche to regulate every communication that may affect how any shareholder votes a proxy. We submit that stopping short of claiming to reach a proxy advisor's implementation of a client's custom policy is a more reasonable and defensible interpretation of the Exchange Act than the line it drew in 2019-2020.[31]

Again, this would not necessarily require the SEC to change its rules in any respect. The SEC should, however, reconsider its earlier statements and explain that when a proxy advisor is not

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[29] See, for example, SEC Proxy Advice Adopting Release at 36 ("proxy voting advice formulated pursuant to a custom policy constitutes a distinct solicitation under the final rule as well.").

[30] For example, one client may want to vote against any director who already serves on four or more boards, while another client may prioritize experience over capacity and therefore not vote against a director unless they serve on six or more boards. All else being equal, if a director who serves on four other boards were up for a new board seat, we would, per their wishes, recommend that the former client vote against her nomination and the latter client for it.

[31] The statements in the 2019 Interpretation were the first, to our knowledge, in which the SEC claimed custom advice was a solicitation.

applying its own policy, but is just helping implement a client's custom policy, it is not "soliciting" proxies from that client.[32]

B. Mitigating the Commission's Encouragement of Litigation Against Proxy Advisors

a. The SEC should adopt a safe harbor for proxy advice from private actions brought under Rule 14a-9

The August 2019 Interpretation and 2020 Rules and release changed the legal landscape in which proxy advisors work. By codifying its interpretation and highlighting avenues for companies to seek to file lawsuits over proxy advice, the SEC has facilitated and increased the practical likelihood of companies filing such lawsuits.[33] And, through its codified examples and related release discussions, the Commission has invited that litigation to relate not just to material errors of fact, but to a range of subjective matters, including proxy advisors' methodology, sources of information and peer group construction.

We acknowledge the Staff's insistence that nothing has changed because it has been the Commission's "longstanding" position that proxy advice is a solicitation. Even assuming that is so, however, the reality is that codifying that position and issuing two releases discussing, in broad and loose terms, how proxy advisors could be sued is a meaningful change. The Commission's same longstanding interpretation of "solicitation" sweeps up journalists, lawyers, politicians and pretty much any other professional whose work may involve expressing an opinion on a public company.[34] Had the Commission codified in its rules that those professions are soliciting proxies and issued multiple releases explaining how they could be sued for such speech, we suspect they might be equally unappeased by the argument that they should have been aware of this prospect all along.

And, while we appreciate the current Release's discussion of *Omnicare* and *Virginia Bankshares*, all that does is partially remedy a glaring omission in the Commission's 2019 and 2020 releases, which suggested proxy advisors could be liable for their "opinions, reasons, recommendations, or beliefs," without explaining the limited circumstances in which an opinion can be actionable under current law. The new release discussion does little, overall, to lessen the risk the Commission created through its earlier statements.

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[32] Glass Lewis today provides the same conflict disclosures to its custom policy clients as its benchmark policy clients. This was true long before this rule was in place and there is no reason to think that proxy advisors would change their practices if the SEC were to make this modest change.

[33] Comment Letter of Ohio Public Employees Retirement System at 4 n.9 (June 1, 2020) ("OPERS II Comment Letter") ("[W]e wonder whether issuers will see the Commission's repeated remarks highlighting the relationship between proxy voting advice and Rule 14a-9 liability as encouragement to explore that legal option if they disagree with a PAF's methodologies or conclusions."), available at https://www.sec.gov/comments/s7-22-19/s72219-7258833-217617.pdf.

[34] See note 24.

From a practical perspective, the threat of Rule 14a-9 liability to a proxy advisor is fundamentally different than that faced by other parties who make "solicitations." A company or even activist investor may make one or two "solicitations" a year. Glass Lewis issues roughly 6000 research reports a year just on U.S. companies, all on a tight timetable not of its choosing and with over half of those having to be issued in a two-month span. And, while proxy advisors generally agree with management recommendations on management proposals nearly 90% of the time, the remaining thousands of situations are instances where the proxy advisor sees the issue differently than management did. As one commentator has noted, "Almost by definition, this means that recommendations that don't agree with management are viewed as inaccurate, uninformed, and value destroying."[35] Because the SEC's 2019 Interpretation and 2020 releases suggested various ways these disagreements could be recharacterized as material omissions related to a proxy advisor's methodology, conflicts, or sources of information, they create a pervasive risk of litigation over proxy advice.[36]

This very real threat of litigation creates risks to proxy advisor's objectivity. In the words of one investor: "If issuers threaten or resort to private rights of action under Rule 14a-9 in order to pressure PAFs to incorporate issuer feedback or accept revisions to their voting advice, the independence and objectivity of the proxy voting advice could be jeopardized and would at least be called into question."[37] Or, as another said: "In addition to th[e] potential financial burden, the risk of increased litigation against proxy advisory firms would negatively affect the quality and reliability of proxy advisory firms' advice . . . ."[38] And this potential skewing of proxy advisor objectivity is all in one direction. As Matt Levine simply put it, "if [proxy advisors] get

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[35] Michael Cappucci, Harvard Management Company, "The Proxy War Against Proxy Advisors," at 30 (Nov. 16, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488427; see also SEC Investor Advocate 2020 Report, at 5 ("Corporate governance is at times inherently contentious because shareholders may seek reforms that are opposed by management. Although dialogue and information sharing amongst participants are an important part of corporate governance, those with competing views may never see eye-to-eye.").

[36] Macey Op-Ed ("Proxy advisory firms under the proposed rules would even be subject to penalties for relatively minor errors such as failing to cite studies that produce different results from any studies cited by the firms."). For example, Exxon has explained its view that Rule 14a-9 would be violated if a proxy advisor reported allegations against it that the proxy advisor had not itself independently analyzed or verified (supposed omission of "sources of information") or for not disclosing the potential conflicts and biases of someone who has made an allegation against the company (supposed omission of "conflicts"). See Exxon Comment Letter at 22-23; see also id. at 43-44 ("Rule 14a-9 Should Address Many Different Examples to Provide Clarity"). Exxon's comments were cited 36 times in the Commission's 2020 Adopting Release.

[37] OPERS II Comment Letter at 4 n.9.

[38] Comment Letter of Elliott Management Co. (Jan. 31, 2020) at 21 ("Elliott Comment Letter I"), available at https://www.sec.gov/comments/s7-22-19/s72219-6730874-207436.pdf.

stuff wrong by [] managers' standards, those managers can now make life hard for them. Whereas if they just do what the managers want there's no problem."[39]

This dynamic threatens the quality of the proxy advice that institutional shareholders depend on. As Commissioner Crenshaw explained at the Open Meeting for this proposal, "Proxy voting advice is integral to our current system of corporate governance and shareholder democracy. And the independence of that advice is essential. Independent advice informs and empowers investors' voting decisions."[40] For this reason, the SEC has an institutional interest in taking measures to preserve the objectivity of proxy advice.

For these reasons, the SEC should adopt a limited safe harbor for proxy advice from private actions brought under Rule 14a-9. As other commenters have noted, the SEC has often created such safe harbors where the potential benefit of applying a provision of the securities laws to a type of conduct is outweighed by its costs.[41] That is unquestionably the case here. Despite strong incentives and well-funded efforts, the 2020 rules' proponents have failed to produce any meaningful evidence that proxy advisor inaccuracy is a problem in today's markets. On the other side of the scale, the real-world concerns of investors demonstrate that the "threat of such litigation (even if ultimately meritless) could create incentives for proxy advisory firms to curry favor with issuers, steer away from potentially important but controversial positions, and chill their willingness to provide negative recommendations or otherwise raise difficult issues."[42] The balance of this scale unquestionably tips in favor of not allowing such litigation.

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[39] Matt Levine, "Advice is Different from Solicitation," Bloomberg (Nov. 6, 2019) ("In the old regime, proxy advisers were answerable to their clients (institutional investors), and had to get stuff right by their clients' standards. In the new regime, proxy advisers are answerable to *everyone*, which means in particular corporate managers, who have the strongest interest in the advisers' recommendations."), available at https://www.bloomberg.com/opinion/articles/2019-11-06/advice-is-different-from-solicitation.

[40] Statement of Commissioner Caroline Crenshaw at SEC Open Meeting (Nov. 17, 2021), available at https://www.sec.gov/news/statement/crenshaw-proxy-advice-20211117.

[41] See Council of Institutional Investors et al. Comment Letter at 30 ("CII Comment Letter") (Jan. 30, 2020) ("[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 if they comply with all of the proposed requirements. We understand the Commission has established safe harbors from liability in this manner in other contexts.") (footnote omitted), available at https://www.sec.gov/comments/s7-22-19/s72219-6729687-207381.pdf; Elliott Comment Letter I at 23 (citing Rule 10b-18 as an example).

[42] Elliott Comment Letter I at 21; see also CII Comment Letter at 30 ("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.").

Creating a safe harbor from private Rule 14a-9 liability for proxy advice is clearly in the public interest and would further the interests of investors.[43]

At a minimum, the SEC should create such a safe harbor for proxy advice when the proxy advisor makes its advice available to companies (at the same time as its investor clients) and has created a mechanism for companies to raise any concerns with the proxy advisor and have those concerns conveyed to the proxy advisor's clients. We are not aware of any other type of "solicitation" in which the speaker regularly invites the subject of its speech to respond to it and conveys those responses to its clients, as Glass Lewis does. Proxy advice, when carried out with this feature, is thus distinct from other "solicitations." And this distinction merits different treatment under Rule 14a-9. When the subjects of proxy advice have an available mechanism to respond, rebut, dispute, clarify or make any other point they wish on the proxy advice <u>and have that response conveyed with the proxy advice itself</u>, the sophisticated recipients of such advice can weigh the arguments for themselves and the subjects of that research have no legitimate need to file lawsuits to get their point across.

From a policy perspective, adopting such a limited safe harbor would mitigate the costs, risks, and potential harm to the objectivity of proxy advice of allowing private Rule 14a-9 litigation, while, at the same time, further incentivizing proxy advisors to allow companies to highlight any concerns they have with their proxy advice. In other words, this would be a less costly and harmful way to further the Commission's stated goal in 2020 of "enhancing the overall mix of information available to [proxy advisor] clients as they assess proxy voting advice and make determinations about how to cast votes."

b. The SEC Should Clarify Key Points Missing from its 2019 and 2020 Releases

As noted above, we appreciate that the Commission has now squarely said that mere differences of opinion are not a basis for liability under Rule 14a-9. The issues created by the SEC's discussion of the liability issues in its 2019 Interpretation and 2020 Release, however, go well beyond that. By loosely suggesting that there are a variety of circumstances in which factually accurate proxy advice could still be the basis for a Rule 14a-9 lawsuit, those releases invite companies to wield that rule and the SEC's statements against pretty much any adverse

[43] We generally support the suggestion in the Release that the Commission "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." We were perplexed and dismayed, however, to see this option characterized as "differ[ing] from existing law" and potentially "lower[ing] the overall quality of the advice that PVABs provide" in the Release's economic analysis. For the reasons above, minimizing the chances of companies even filing litigation over these sorts of judgmental issues would certainly enhance the objectivity and quality of proxy advice. And, if the Commission understands existing law to conceivably allow lawsuits over proxy advisor "voting recommendations and [] subjective determinations," that, to us, strongly militates in favor of a clear, bright-line safe harbor for proxy advice.

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proxy advisor recommendation. This risk is a compelling reason to create a safe harbor for proxy advice, of course. If the Commission does not do so for some reason, however, it is critical to clarify the points below to at least minimize the potential misuse of Rule 14a-9.

i. Questions of corporate governance do not have right and wrong answers

First, the SEC should reaffirm its prior statements about the judgmental nature of most corporate governance issues. While the current release makes helpful steps in this direction, the Commission should go further and clearly explain that subjective determinations on corporate governance issues are not actionable under Rule 14a-9.

In 1992, the SEC was similarly confronted with management arguments for a "role to play in rebutting any misstatements or mischaracterizations" made about their company in the proxy process.[44] In an echo of more recent arguments, companies maintained that this was necessary for "the benefit of shareholders as a whole in ensuring that proxies are executed on the basis of 'correct' information." But the SEC rejected this argument because the types of issues that come up on corporate proxy statements are subjective. As the Commission explained at that time:

> Of course, much commentary concerning corporate performance, management capability or directorial qualifications or the desirability of a particular initiative subject to a shareholder vote is by its nature judgmental. As to such opinions, there typically is not a 'correct' viewpoint.[45]

This is no less true today. The SEC should reaffirm these statements and note how they apply to proxy advice. Proxy advisors make recommendations on these very issues every day, often applying the custom policies of sophisticated clients that take different approaches to the same issue. The SEC should recognize that recommendations and discussion of these issues involve subjective opinions.[46] As the Commission put it some thirty years ago, they deal with issues that are "by [their] nature judgmental" and on which there is no "correct viewpoint."

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[44] U.S. Securities and Exchange Commission, Regulation of Communication among Shareholders, Release No. 34-31326 (Oct. 22, 1992), 57 Fed. Reg. 48,276 at 48,278 (internal quotations omitted).

[45] Id. at 48,278.

[46] Most proxy advice involves opinion statements that are different in important respects from what the Court considered in *Omnicare*. The company in *Omnicare* expressed its opinion on something that could be shown to be objectively true or not – i.e., whether the company was in compliance with the law. Here, when a proxy advisor expresses an opinion on a corporate governance matter – for example, it recommends a vote against a director who already serves on five other boards or a vote in favor of a CEO's pay in light of the company's performance – that opinion is not about something that can be shown to be objectively true or not. It is an opinion on a subjective issue, one that is "by its nature judgmental."

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ii. The context in which proxy advice is provided is important

The SEC should also clarify an important aspect of its discussion of when an opinion can be actionable under Rule 14a-9. As the current Release notes, one of the very limited circumstances in which an opinion may be actionable is if the opinion conveys facts about how the speaker formed the opinion. *Omnicare* made clear, however, that in this sort of omission case, whether a statement is misleading "always depends on context."[47] A court must consider not only the context in which the statement was made, but also all surrounding statements made by the company and other available information, including the customs and practices of the relevant industry. The Court elaborated that showing a statement to be misleading under this full context rule is "no small task."

The Release takes an example the Court gave in *Omnicare* of when a company could be liable under this theory for statements made in the course of issuing securities and applies it directly to proxy advice.[48] The institutional context of proxy advice is different in important respects, however, from a company filing a registration statement to sell securities.

First, as *Omnicare* itself recognizes, when a company files a registration statement discussing its own operations, a reasonable investor would have higher expectations because the company has access to information the plaintiffs do not.[49] Proxy advisors have no such inside knowledge. In fact, Glass Lewis makes clear to companies and its investor clients that it does not want or have any non-public information about the companies whose meetings it covers. In fact, since Glass Lewis analysts are not company insiders, they necessarily cover many companies in a short time frame. In contrast to a company that may file one or two solicitations a year on its own operations, Glass Lewis, as noted above, may issue research reports on as many as 6000 companies each year, just in the United States.

Second, in the decisions discussed in the Release, the material omissions analysis focused on whether a party with superior information and an economic incentive to persuade its audience to do something – the company in *Omnicare* was selling shares to the public and the defendants in *Virginia Bankshares* needed the freeze-out merger to go through to keep their board seats[50] – had misled through a statement couched as an opinion. With proxy advice, there is no information asymmetry and no incentive to mislead. Unlike the company in

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[47] *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 190 (2015).

[48] See Proposing Release at 30 n. 88.

[49] See *Omnicare* at 191-192 ("as in a registration statement--a speaker holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff") (footnote and internal quotations omitted); see also *Omnicare* at 192 n. 11 ("an issuer has special knowledge of its business . . . not available to an ordinary investor.")

[50] *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1098 (1991).

Omnicare and the Board in *Virginia Bankshares*, proxy advisors have nothing to gain by having their clients vote one way or the other on a proxy matter.

Third, the sophisticated clients that use our research understand the institutional context in which our work is performed. While our clients depend on us to read lengthy and complex proxy statements and summarize and analyze them in a standardized format, they also understand the time frames involved and that our work is not an audit or investigation of each issue up for vote. Moreover, our work is an input to our clients' voting processes. In fact, this is why we typically provide our clients our research some three weeks before they must vote, allowing them time for any additional research or analysis they want to perform, engagement with the company to test any salient points, and time to consider any company feedback on the report, as the SEC requires of investment advisers. In fact, we go so far – unlike any other comparable professional service we are aware of – to provide companies an opportunity to contest any material facts or provide any additional information they feel is missing from our analysis and convey those responses with our proxy advice itself.

All of this, of course, militates against allowing private Rule 14a-9 litigation over proxy advice at all. At a minimum, however, the SEC should acknowledge these aspects of proxy advice and their relevance to how, if at all, a proxy advisor could be liable for an opinion because it conveys facts about how the speaker formed the opinion.

C. The Commission Should Rescind the 2020 Guidance and Revisit its 2019 Guidance

The release also asks whether the Commission should reconsider and rescind the supplemental investment adviser guidance it issued in 2020 in conjunction with its final rules. The Commission should rescind that guidance for a number of reasons, the most obvious being that it was premised on the amendments the Commission is now proposing to rescind.[51] If that basic reason were not enough, however, there are a number of other good reasons to do so –

- The 2020 Guidance is far too prescriptive. It is unclear why the principles-based Investment Advisers Act would mandate that an investment adviser consider one piece of information - a potential rebuttal to its service provider - before voting a client's proxy, particularly when there are not, to our knowledge, comparable requirements to consider any particular company filing before making investment decisions for a client[52];

[51] See U.S. Securities and Exchange Commission, "Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers," Release No. IA-5547, at 3 (July 22, 2020) ("we are providing supplementary guidance to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of these amendments") ("2020 Guidance"); see also id. at 2-3 and id. at 4 n. 6 (referencing the rule amendments the Commission now proposes to delete from the rule).

[52] Cf. Lee Open Meeting Statement at n.19 ("The uncharacteristically prescriptive requirement for advisers to wait for and review the views of a particular party threatens to add significant complexity, delay, and costs to an already complicated undertaking. Those costs will be borne by advisers directly and by their clients indirectly, and advisers may determine instead to refrain from accepting authority to

- The 2020 Guidance relies on an overly simplistic model of how institutional investors use proxy advice. As technology advances and institutional investors become more sophisticated in their stewardship practices, it is increasingly common for such an investor to use proxy advisor recommendations as an input to an internal model. For example, an institutional investor may have an internal model that considers a number of factors, including financial metrics as well as the recommendations of one or more proxy advisors, to screen issues for internal review. In such circumstances, the investor may not be aware a proxy advisor's recommendation has played a role in triggering such a review or even have read that proxy advisor recommendation. Rigidly mandating that such an investor read all company responses to proxy advice makes little sense;

- The 2020 Guidance addresses an assumed problem. We understand the supplemental guidance to serve as a "speed bump" of sorts, a concept floated by a Commissioner during the 2020 rulemaking to respond to claims about so-called "robovoting." These claims, however, have not been subject to the notice-and-comment process.[53] If the SEC believes claims about "robovoting" warrant regulatory intervention, it should test those claims before regulating based on them. The same groups' claims of proxy advisor inaccuracy collapsed under such examination;

- The scope of the 2020 Guidance is arbitrary and capricious. The main point in the guidance applies when an investment adviser uses a proxy advisor's platform for assistance in executing proxy votes.[54] Many investment advisers, however, use vote execution platforms of companies that are not proxy advisors. There is no apparent reason why investment advisers' responsibilities on this point should vary based on their choice of vendor;

- The 2020 Guidance is unclear in important respects. Given the rushed process and lack of prior comment, the guidance does not address a number of important questions

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vote client securities. This outcome would significantly undermine investor participation and representation in the governance of public companies.").

[53] "Robovoting" was not discussed in the Commission's 2019 proposing release. In fact, the term only appears in the title of a trade group report cited for another point.

[54] 2020 Guidance at 3-4 ("[P]roxy advisory firms assist clients, including investment advisers, with voting execution, including through an electronic vote management system that allows the proxy advisory firm to: (1) populate each client's votes shown on the proxy advisory firm's electronic voting platform with the proxy advisory firm's recommendations based on that client's voting instructions to the firm ("pre-population"); and/or (2) automatically submit the client's votes to be counted ("automated voting"). . . . In these circumstances . . . .").

> about its operation, including critical aspects of the timing,[55] how and when investment advisers are expected to know that an issuer "intends to file . . . additional soliciting materials with the Commission," as well as containing other unexplained statements on disparate issues that have not benefited from public comment. While this uncertainty would be problematic in any context, it is especially challenging and harmful in light of the volume of work involved and exceedingly tight timeframes a large investor is confronted with in voting proxies today.[56]

Finally, the SEC should also revisit its 2019 Investment Adviser Guidance, as Commissioner Lee has already called for.[57] In addition to the specific points raised by Commissioner Lee, parts of that guidance were rendered obsolete by the Commission's subsequent rules, especially with regard to conflicts of interest. Equally importantly, the 2019 Guidance reflects the management perspective on proxy voting that permeated the Commission's other releases and guidance on this issue from 2019-2020. In particular, parts of the 2019 Guidance encourage investment

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[55] See Lee Open Meeting Statement ("At the same time, the 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?") (footnotes omitted).

[56] If, for some reason, the SEC decides to retain a version of this guidance, it should frame any discussion of how the investment adviser's duty to making voting determinations in its clients' best interest applies to issuer responses to proxy advice at a much higher level, consistent with investment advisers' principles-based fiduciary duty. For example, if the investment adviser uses the services of a proxy advisor that allows companies to respond to its proxy advice and transmits those responses to its clients, there is no reason an investment adviser could not rely on that mechanism as part of fulfilling its fiduciary duty in this context. Any future version of this guidance should make clear that it does not, for some reason, mandate an additional step of searching for any supplemental proxy filings outside such a response mechanism or that the investment adviser need make a do novo review of any company response disregarding any proxy advisor analysis of that response it has already paid for.

[57] See Commissioner Allison Herren Lee, "Every Vote Counts: The Importance of Fund Voting and Disclosure" (March 17, 2021) ("I am concerned that the Commission guidance issued in 2019 on the proxy voting responsibilities of investment advisers attempted to, and may have, tilted this calculus against shareholder voting without sufficient data or analysis to support the wisdom of doing so. This guidance should be revisited to ensure that fiduciaries understand how to weigh competing concerns of all types in deciding whether and how to cast votes on behalf of their beneficiaries.") (footnote omitted), available at https://www.sec.gov/news/speech/lee-every-vote-counts.

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advisers to vote in line with management,[58] to only vote a small fraction of all ballot items,[59] or simply to not vote at all.[60] Proxy voting is an integral part of a healthy system of corporate governance. Moreover, the inability of even institutional investors to fully capture the benefits of their own voting and engagement suggests there will be underinvestment in it.[61] Sensible regulatory policy would therefore encourage responsible voting and engagement for the good of all shareholders and investors, not discourage it. The Commission should revisit the 2019 Guidance to update it for its rules, remove this bias, and address the important issue Commissioner Lee raised in a more careful and informed manner, in light of the empirical evidence that has emerged.

Conclusion

Again, we commend the Commission for being responsive to investors' concerns and revisiting its 2020 proxy advice rules. For the reasons above, we urge the Commission to adopt the proposed changes and make the other changes we have described in order to preserve the important role proxy advice plays in our system of corporate governance and shareholder democracy. Thank you for your consideration of our comments.

Sincerely,

Nichol Garzon-Mitchell
Senior Vice President, General Counsel

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[58] See U.S. Securities and Exchange Commission, "Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers," Rel. No. IA-5325 at 10 (Aug. 21, 2019) (giving, as the first example of a permissible voting arrangement, "[t]he investment adviser will vote in accordance with the voting recommendations of management of the issuer").

[59] Id. at 11 (suggesting only voting on "proposals relating to corporate events (mergers and acquisition transactions, dissolutions, conversions, or consolidations) or contested elections for directors").

[60] Id. at 11 (share lending) and 12 (suggesting not voting when it "would not reasonably be expected to have a material effect on the value of the client's investment").

[61] See Lucian A. Bebchuk, Alma Cohen and Scott Hirst, "The Agency Problems of Institutional Investors," at 90 (August 2017) (describing the free rider problem in proxy voting: "investment managers generally capture only a small fraction of the benefits that results from their stewardship activities while bearing the full cost of such activities"), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982617.