R|K InvestLaw™
A Public Benefit Corporation

December 27, 2021

Honorable Gary Gensler, Chair
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. S7-17-21

The Proxy Voting Advice Rules Are Unsupported by Statute, and Violate the First Amendment

Dear Chairman Gensler:

On behalf of R|K Invest Law, PBC,[1] and ESG Legal Services, Inc.,[2] we respectfully submit these comments on the proposed rule. The shareholders of R|K Invest Law are former members of the Commission's General Counsel staff. We practice before the Commission, and represent stakeholders in connection with the proxy solicitation process.

We applaud the Commission for its willingness to revisit the 2020 Final Rules relating to proxy voting advice. However, we believe that the original 2020 rule analysis is flawed in two respects:

First, we submit that the rule's initial premise - that providers of proxy voting advice can in any manner be deemed to "solicit" proxies - is flawed. The Commission does not have the statutory authority to regulate the proxy adviser business under the proxy rules by redefining the term “solicit” in Section 14(a)(1).

---

[1] R|K Invest Law, PBC is a law firm organized as a Delaware Public Benefit Corporation. In furtherance of our commitment to provide a public benefit in connection with our financial services legal work, our mission is to:

a. Serve as advocates on behalf of shareholders to ensure they have a voice on ESG issues in the companies they own and can exercise the corporate franchise;

b. Offer legal services that advance social and environmental justice and promote diversity and balance in corporate governance;

c. Work to develop frameworks that promote responsible investing for positive impact, and make an effort to work with suppliers that strive to provide one or more public benefits in connection with their work;

d. Volunteer our time to advocate in favor of regulatory initiatives that support sustainable, responsible and impact investing; and

e. Work through ESG Legal Services, Inc., our affiliated 501(c)(3) public interest law firm, to ... serve as pro bono and low bono legal counsel for nonprofit initiatives that work for environmental and social justice.

[2] ESG Legal Services, Inc. is a 501(c)(3) public interest law firm.

Further, the rules are unconstitutional because to enforce them would violate the First Amendment rights of shareholders to discuss the issues at stake in a proxy solicitation. Regulation of private communications between a proxy adviser and its clients violates the First Amendment prohibitions against government regulation of content-based speech. Nothing in the existing or proposed rules meets the level of scrutiny required for limits on protected speech.

In its final rule dated July 22, 2020, the Commission codified its 2019 interpretation of the term "solicitation" to include proxy advice provided to investors who have contracted for such services from firms marketing their services. See 17 C.F.R. §14a-1(l).[3] As explained in the new rule proposal to reconsider other aspects of its 2020 final rule relating to proxy advisers, the Commission is explicit that it does not intend to revisit its prior decision in the 2020 Rule that that the proxy adviser business – or "PVAB" under the Commission's current terminology -- is subject to SEC regulation under the proxy rules.

We support the Commission's decision to abandon the 17 CFR 240.14a-2(b)(9)(ii) requirement that PVABs disclose their proxy voting advice to registrants. In addition to the reasons offered by the Commission, we view that decision as compelled by the recent Supreme Court opinion in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), decided at the end of the last term. For the same reasons, we support the Commission's decision to further narrow and explain the limitations of the application of Rule 14a-9 to PVABs.

However, we reiterate our February 2020 rule proposal comments that the Commission lacks the statutory authority to regulate proxy adviser business under Section 14(a)(1). Even if it had the authority, the Commission has not adequately justified its choice of regulation under the exacting scrutiny or strict scrutiny standards of the current Supreme Court's application of the First Amendment.

1. *Bonta* requires the Commission to abandon the compelled disclosure of proxy voting advice by PVABs.

In its July 1, 2021 decision, the Supreme Court in *Bonta* struck down a California state law that sought to compel disclosure from private foundations of the identities of their donors. The Court declined to require the foundations to disclose the identities of their donors because to do so would chill their freedom of association. The freedom to associate, as a right imbedded in the First Amendment, is particularly apt here in the context of the Commission rule requiring PVABs to disclose private communications with their clients.

Such disclosures strike at the heart of the right of persons to retain their own investment adviser to counsel them on the potentially complicated transactions at issue in proxy solicitations. Where research had previously been done in-house on what was traditionally a relatively small scale, the growth of proxy advisory services has provided a tremendous benefit

---

[3] The pertinent language of the rule is found in Section 14a-1(1)(iii)(A): proxy advice "furnished by a person that markets its expertise as a provider of such <u>proxy</u> voting advice, separately from other forms of investment advice, and sells such <u>proxy</u> voting advice for a fee."

to those seeking data-driven resources to assist with making decisions consistent with their investment objectives.

In *Bonta*, a plurality of the Court for the first time extended to all compelled disclosure inquiries under the First Amendment a standard of "exacting scrutiny," first adopted by the Court in its landmark case of *Buckley v. Valeo*, 424 U.S 1 (1976). *Bonta*, 141 S. Ct. at 2383. The reason for this standard is that "where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Id*. at 2384. As explained by the Court, "under that standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." Such scrutiny is appropriate given the "deterrent effect on the exercise of First Amendment rights" that arises as an "inevitable result of the government's conduct in requiring disclosure." *Id*. *quoting Buckley*, 424 U.S. at 65.

The concurring opinions concluded that the same standards would govern the compelled disclosures even if the Court applied it under the more traditional strict scrutiny standard required in other First Amendment questions of compelled disclosure. *See* 141 S. Ct 2389 et seq. (concurring opinions of Thomas, J and Alito, J).

Under either standard, the Commission must show that the required disclosure is narrowly tailored to the governmental interest requiring such disclosure. Here, the Commission's 2020 rule failed to articulate any standard that could meet the *Bonta* test, and it has not expanded on its rationale in the 2021 rule proposal. The Commission was correct in abandoning that requirement for proxy advisers in its new rule proposal.

2. The First Amendment prohibits the regulation of the content of PVAB speech.

While we agree that the Rule 14a-2(b)(9)(ii) conditions are problematic, we disagree that rescinding them solves the problems associated with the rule. Specifically, in addition to the compelled disclosures prohibited by cases like *Bonta*, the Commission's effort to regulate the content of discussions between PVAB and its clients also violates First Amendment principles because it impermissibly seeks to regulate viewpoint speech. Advisory services analyze publicly-available information (which primarily comes from the issuer's own disclosure documents), synthesize it to meet specific client requests for information, and provide guidance on how that information relates to a client's stated investment objectives. Clients then incorporate that analysis into their own evaluation of how to vote on the issues presented at a shareholder meeting.

As the Supreme Court explained, government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. _,135 S. Ct. 2218, 2226 (2015) (citation omitted). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 2230. On its face, the proposed Commission regulation seeks to limit discussions between a shareholder and its proxy advisory service where the subject matter is the question of how to vote proxies. The Commission does not otherwise attempt to limit the content of discussions about other topics for which the shareholder and its service provider may be engaged, such as potential compliance with ESG screens. Thus, the SEC's proposed regulation is aimed at the subject matter of the proxy advisory service. This is content regulation of speech at its most basic level.

Even if one were to accept the Commission's assertion that the integrity of research provided by proxy advisory services “could be” suspect, what the government may not do is regulate the discussions between shareholders and their service providers. The Supreme Court explained that “viewpoint regulation” goes to the heart of First Amendment protections, striking down the Lanham Act limitation on registration of offensive trademarks: “The government may not discriminate against speech based on the ideas or opinions it conveys.” *Iancu v. Brunetti*, 588 U.S. _, 139 S. Ct. 2294, 2299 (2019).

There can be little question that the communication between a proxy advisory service and its client constitutes "speech". As stated by the Supreme Court, “the creation and dissemination of information are speech within the meaning of the First Amendment.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). What the Commission rules seek to do is regulate communications regardless of the nature of the content. That is the essence of content or viewpoint regulation of speech barred by the First Amendment.

The analysis does not change if the proxy advisory service is offered by a registered investment adviser. Courts have long recognized the limits that the First Amendment places on the regulatory reach of the Investment Advisers Act of 1940. *See SEC v. Lowe,* 472 U.S. 181 (1985), and *SEC v. Wall Street Publishing, Inc*., 851 F.3d 365 (D.C. Cir. 1988). The Advisers Act regulates the disclosure of conflicts of interest and fraudulent practices by an investment adviser, but it may not regulate the content of speech by the investment adviser to its client. The Commission may well regulate an investment adviser's disclosure of conflicts of interest or define the type of information required to proscribe fraud.

The Commission's attempt to overreach is not somehow "cured" because the securities laws apply to a highly-regulated industry. The First Amendment does not distinguish among types of businesses. Rather, the analysis of whether the Commission's proposed regulation violates the First Amendment is subject to "strict scrutiny," and requires that the agency's regulatory choices as to content regulation be the least intrusive of any alternative. *See Reed v. Town of Gilbert*, 135 S. Ct. at 2231-32. Demanding disclosure of methodology and making proxy advisory firms give prior notice of the content of their advice is perhaps the most intrusive rather than the least intrusive alternative that could have been chosen by the Commission.

This First Amendment inquiry is fundamentally the same whether the question is analyzed under traditional First Amendment principles, or under the narrower commercial speech standard. “Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.” *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 638 (1985). There is no factual basis for the notion that every communication between a proxy advisory firm and its client is potentially false or deceptive speech. At best the rule seeks to prevent possible incomplete communications between them, which is hardly a sound foundation for regulation of even commercial speech. The Commission conclusion in its 2020 rule that there is a “risk” that there “could be” misleading conclusions communicated to security holders cannot serve as grounds for regulation consistent with the First Amendment. The risk of possible misleading or incomplete communications is far below any First Amendment threshold for content regulation. Even if the record could establish a stronger case for potential deception, there are less intrusive means available to guard against potential false or deceptive disclosures.

Nor do the proposed rules advance a substantial governmental interest. As recognized in *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964), the governmental interest of Section 14(a) is on the full disclosure by the person seeking the proxy. Instead, the 2020 rules governing PVABs interfere with communications between shareholders and their service providers.

That a shareholder seeks assistance in determining how a particular shareholder proposal in the already-filed proxy statement squares with the shareholder's individual investment policies and objectives is outside the scope of the Commission's regulatory reach. In the context of the First Amendment analysis, there is no legitimate government interest in requiring any sort of disclosure by the proxy advisory service of the content of its analysis.

3. The word "solicit" as it appears in Section 14(a) is neither ambiguous nor subject to interpretation, and nothing in the statute gives the SEC authority to redefine the term.

The Commission’s recent effort to extend the definition of "proxy solicitation" to the PVAB is beyond any power Congress delegated to the agency. While the Commission is given broad authority to regulate the solicitation of proxies as necessary and appropriate, that power is not unlimited. It may not redefine basic terms in the statute, nor may it seek to regulate an entire industry segment. In its adopting release in 2020, the Commission seeks to meet the issue of authority head on by asserting that the term “solicit” in the statute is ambiguous and did not have a sufficiently well-understood meaning when Congress enacted it in 1934.

That position seems forced. The term “solicit” has a commonly-understood meaning, requires no definition as used in Section 14(a), and Congress accordingly did not provide one. It would be presumptuous of the Commission to assume that Congress erred in that respect. The term “solicit” in Section 14(a)(1) is focused on the procurement of a proxy or consent by a registrant or other person seeking a proxy. The term "solicit" therefore is aimed at the request for a proxy, not on the process by which the security holder makes a decision how or whether to give that proxy.

The Commission’s 2020 adopting release seeks to shifts this focus to how the security holder decides whether to give the proxy. This interpretation departs from its statutory antecedent. As explained by the Supreme Court in *Borak*, 377 U.S. at 431, “[t]he purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.” The focus of the statute is on the authorization for corporate action, not on the process of how security holders make decisions based on the solicitation materials.

This same purpose was reiterated by the D.C. Circuit in *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990). There the court found, in rejecting a Commission rule to regulate share classes, that the proxy rules have a narrow focus rather than a broader general corporate suffrage mandate. "Proxy solicitations are, after all, only communications with potential absentee voters." *Id*. at 410. This purpose is best captured by the understanding that the proxy rules are aimed at the communications between persons requesting the votes of the security holders, not on the process security holders take in reaching that voting decision.

A unanimous Supreme Court recently reversed the Commission for engaging in a similar definitional sleight of hand. In *Digital Realty Trust, Inc. v. Somers*, 583 U.S. _, 138 S. Ct. 767 (2018), the Court struck down an SEC Rule that sought to define the term "whistleblower" contrary to the unambiguous statutory text. That same fate may well befall the Commission's current effort to redefine the term "solicit" in the proxy rules beyond its well-understood meaning. The Commission does not have the authority to extend the regulation beyond the commonly and long understood meaning of "solicit" as focused on those persons seeking to procure, withhold or revoke a proxy.

By expanding the definition of "solicit," the SEC seeks to regulate the content of the discussions between a shareholder and its proxy advisory service. This content-based regulation is as noted above contrary to modern First Amendment jurisprudence. For that reason, it is likely that a court would refrain from accepting the SEC's expanded definition when to do so would force the court: (i) to confront the First Amendment constitutional issue of whether Congress has the power to regulate the scope of private discourse among shareholders and their service providers; and, if so, (ii) to consider whether Congress has delegated such a power to the SEC to implement by agency rulemaking.

* * *

For these reasons, we ask the Commission to reject any regulation of proxy advisers under the Securities Exchange Act. The Commission lacks the statutory power to do so, and any such effort to regulate the content of an investment adviser's advice to their clients would violate the First Amendment of the Constitution.

Respectfully submitted,
/s
Richard A. Kirby
Beth-ann Roth

R|K Invest Law, PBC
ESG Legal Services, Inc.

cc: Commissioner Peirce
Commissioner Roisman
Commissioner Lee
Commissioner Crenshaw