



National Investor Relations Institute

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February 3, 2020

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

Subject: Release No. 34-87457; File No. S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

Dear Ms. Countryman:

I am writing on behalf of the National Investor Relations Institute (NIRI) to express our support for the common-sense reforms that are included in the Commission's proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice.

Founded in 1969, NIRI is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. Our more 3,000 members represent over 1,600 publicly held companies and \$9 trillion in stock market capitalization. Our members, together with corporate secretaries, play a vital role in communicating with institutional and retail investors on proxy voting matters. This role is especially critical when a public company needs to engage promptly with shareholders during a proxy contest, or after receiving a negative proxy advisor recommendation on an equity incentive plan or during a Say-on-Pay vote.

A Draft Review Mandate Would Benefit Investors and Issuers

We are gratified to see that the SEC's proposed amendments include a mandatory draft review process that would be available to *all* issuers.¹ While the proxy advisors and their allies oppose this provision, we view these draft review safeguards as the most essential component of the Commission's proposed rule. NIRI represents investor relations officers at a significant number

¹ NIRI submitted a comment letter in April 2019 that details why a draft review process would be beneficial to both companies and their investors. NIRI Letter on Roundtable on the Proxy Voting Process, SEC File No. 4-725, April 30, 2019, available at: <https://www.sec.gov/comments/4-725/4725-5436094-184708.pdf>.

of small- and mid-cap companies that have not been able to take advantage of the draft-review process offered by Institutional Shareholder Services (ISS) to S&P 500 firms.² Many of these small- and mid-cap issuers don't have large IR teams or cannot afford to hire corporate governance consultants, so they have a greater need to review report drafts before publication.³

We strongly support and endorse the proposed requirement that proxy advisory firms provide a three-business day review period for issuers that release their proxy materials more than 25 days in advance of the annual meeting (and a five-business day review period for issuers that release their materials more than 45 days in advance of the meeting). The two major U.S. proxy advisory firms report that they typically release their proxy reports approximately 20 days prior to a shareholder meeting, so it certainly appears that it would be feasible to add a three-to-five-business-day review process without adversely impacting the ability of investors to cast their votes in time.⁴

A review period would be beneficial to any company that receives a negative proxy advisor recommendation, even if the proxy report contains no errors or methodology concerns. It would give corporate IR professionals and their senior management teams more time to plan how they might engage with their institutional investors following the issuance of the final report. Neither investors nor issuers are well served when companies are blindsided by negative recommendations, have to decide quickly if a response is warranted, and then try to persuade investors to change their voting instructions or re-vote their shares.

NIRI also supports the proposed requirement that a proxy advisory firm include in each final proxy report a hyperlink to any comments submitted by an issuer. Such a procedure would ensure that investors can quickly access the company's response before they vote – if they care

² While NIRI members welcome the S&P 500 draft review opportunity provided by ISS and the recent efforts by Glass Lewis & Co. to provide more transparency, we believe there should be a standardized time period to ensure companies have adequate time to review report drafts and respond if necessary. NIRI members have complained about the short periods (often less than 48 hours) or the late notice (i.e., learning late on a Friday afternoon that a response is due by Monday morning) to review report drafts.

³ A draft review mandate has broad support among IR professionals. In an August 2018 survey of 200 NIRI members, more than 95 percent agreed that the SEC should require proxy advisors to provide report drafts to all issuers.

⁴ ISS asserts that the proposed SEC rules would result in a nine-to-13-day delay in the delivery of its reports to its clients. This estimate does not appear credible, given the firm's experience in providing drafts to S&P 500 issuers as well as to public companies in France, where a draft review process has been recommended by regulators since 2011. ISS has even touted the benefits of the French review process for its clients: "ISS believes that this review process helps [improve] the accuracy and quality of its analyses, an outcome that is in the best interests of both the institutional investors for whom the analyses are prepared, as well as for the issuers that are the subject of these reports." See ISS webpage, "Additional procedures in France regarding the disclosure of draft proxy advisory reports," available at: <https://www.issgovernance.com/policy-gateway/french-market-engagement-disclosure/>

to do so.⁵ Hyperlinked responses would be an efficient way for investors to hear issuer concerns that do not relate to specific factual errors, such as a proxy advisor’s methodology, peer group selection, or other details. Finally, we believe that this hyperlink approach would address the concerns of some investors about preserving the independence of proxy research. As Commissioner Roisman has noted, proxy advisory firms would not be required to change the content of their reports in response to corporate feedback, but simply include a hyperlink so investors can hear from both sides.⁶

In sum, NIRI believes that the Commission’s proposed draft review/issuer feedback provisions would improve proxy research accuracy and lead to more thoughtful engagement between companies and their investors.

FINRA Rules Do Not Preclude Draft Reviews for Proxy Research

Some reform opponents have argued that the Commission should not require proxy advisors to provide a draft review process by pointing out that equity research analysts are not permitted under FINRA Rule 2241 to share report drafts with companies prior to publication.⁷

However, these opponents ignore the reality that the two major U.S. proxy advisors are not subject to FINRA rules, as they are not broker-dealers. Furthermore, there are important differences between how proxy advisors and equity research firms operate and how their research reports are used by investors, so it would not be appropriate to apply FINRA’s regulatory approach to proxy advisors.

Unlike in the U.S. proxy advisor sector, a “Sell” (or similar) recommendation from one equity analyst does not automatically trigger a large number of investors to sell their shares within 24 to

⁵ NIRI agrees with Commissioner Elad L. Roisman’s recent remarks that the inclusion of hyperlink responses from companies would be beneficial to investors. “I believe that such a measure could offer investors the opportunity to make more informed decisions when they vote. In one place, they would have access to the voting advice and the soliciting party’s perspective for ready consideration. To the extent an issuer or other soliciting party believes the firm’s voting advice contains errors or methodological biases, it would have a time and place to note that in a way that voting advice business clients can more easily access than they can today. For these reasons, I cannot understand how anyone would argue that this proposal is anything but an improvement upon the status quo.” Speech by Commissioner Elad Roisman, “Myths and Realities: Modernizing the Proxy Rules,” January 30, 2020, available at: <https://www.sec.gov/news/speech/roisman-myths-and-realities-2020-01-30>.

⁶ As Commissioner Roisman observed in his January 30 speech, “The proposal made clear that voting advice businesses would not have to make any changes to their reports in response to the companies’ feedback. The voting advice business would only be required to include a hyperlink in its report to the company’s response statement, rather than including such content in the report itself. In this way, the proposal seeks to maintain separation between the perspectives of the proxy voting advice businesses and companies.”

⁷ See, e.g., Letter from the Council of Institutional Investors, January 30, 2020.

72 hours. Investment managers who subscribe to equity research do not routinely link their buy/sell decisions to the recommendations of a single sell-side firm, as many investment managers do for proxy advice and voting. Furthermore, equity research providers do not enter into arrangements with their institutional clients whereby their client's shares in a particular company would be automatically sold if the client takes no action after the release of a "Sell" recommendation.

Whereas the U.S. proxy advisor sector is dominated by two major firms, there is far more competition among equity research providers. As a result, a single adverse recommendation from an equity analyst does not have the same impact on a public company as a negative proxy recommendation does. Most companies that have equity research coverage typically have more than two equity analysts, and their investors generally will consider other information sources and engage with the company before blindly acting on a single equity analyst's "Sell" recommendation.

There is not the same need for a prepublication review process for equity research as there is for proxy research. Equity analysts, who may cover as many as 15 or 20 issuers in a single industry, are far more knowledgeable about the companies they cover than proxy research analysts, who will opine on hundreds of issuers during the spring proxy season.⁸ Most equity analysts listen to the quarterly earnings calls of the companies they cover, engage with corporate IROs throughout the year, listen to the earnings calls of competing companies, attend industry conferences and analyst/investor day events, and review research provided by competing analysts. In addition, equity analysts routinely consult with IROs to confirm the accuracy of the models that they use to evaluate and estimate corporate financial performance. If analysts at proxy advisory firms were able to devote this same level of attention to the companies they opine on, there would be less need for a draft review process. However, the reality is that proxy research analysts have to generate recommendations on hundreds of issuers over a short period of time, and it's inevitable that mistakes will occur. The most cost-effective way to prevent these errors is for companies to review proxy report drafts before voting starts.

In this proposed rulemaking, the Commission has distinguished investment advice from the services provided by proxy advisory research businesses. We wholeheartedly agree with this distinction and the Commission's conclusion that proxy advice amounts to a "solicitation" and thus should be subject to the federal proxy rules. As the Commission has found, it is clear that proxy advisors are providing advice that "will be part of the shareholders' voting decision-making process" and are "conducting the type of activity that raises the investor protection

⁸ The level of expertise is typically much higher among equity research analysts, who are regulated by FINRA and/or have obtained a Chartered Financial Analyst designation. By contrast, the two major U.S. proxy advisory firms, which are largely unregulated, hire temporary employees and/or send work to overseas workers to cope with their proxy season workloads.

concerns about inadequate or materially misleading disclosures that Section 14(a) and the Commission's proxy rules are intended to address."⁹

Given the important differences between equity and proxy research, the absence of a draft review process within the equity research sector should not deter the Commission from imposing draft review safeguards on proxy advisors, which undoubtedly will benefit both investors and issuers.¹⁰

Please feel free to contact us at NIRI if you need additional information or are interested in discussing these issues further. Thank you for your consideration of our views on this matter.

Sincerely,

A handwritten signature in black ink that reads "Gary LaBranche". The signature is written in a cursive, flowing style.

Gary A. LaBranche, FASAE, CAE
President & CEO
National Investor Relations Institute

⁹ See Release No. 34-87457; File No. S7-22-19, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, at 17.

¹⁰ The major proxy advisors also have raised First Amendment objections to a draft review mandate and argued that they are similar to journalists, who can publish opinions without requesting any comment from the subjects of their coverage. These arguments ignore the crucial differences between journalists and proxy advisors. While most newspapers issue endorsements in political elections, they do not maintain voting systems or solicit their readers to outsource their voting responsibilities to the newspaper's editorial writers.