

December 23, 2021

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

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

Dear Ms. Countryman:

This letter is submitted on behalf of Business Roundtable, an organization whose members lead America's largest companies, employing over 20 million workers. Their companies' total value, over \$20 trillion, accounts for half of the value of all publicly traded companies in the United States. They spend and invest over \$7 trillion a year, helping sustain and grow tens of thousands of communities and millions of medium- and small-sized businesses.

We appreciate the opportunity to comment on the proposed rules, issued by the Securities and Exchange Commission (the "Commission" or "SEC") on November 17, 2021, entitled Proxy Voting Advice (the "2021 Proposing Release").¹ Business Roundtable supports the implementation of reasonable disclosure and procedural requirements for proxy voting advice businesses (or "proxy advisors") that avail themselves of certain exemptions from the information and filing requirements of the federal proxy rules. We believe the changes made in the recently adopted final rules regarding proxy voting advice (the "2020 Rules")² would, if allowed to take effect, make the proxy voting process significantly more transparent, accurate, and effective both for registrants and investors, and we supported the adoption of those rules.³ As a result, we believe the current proposed amendments to the proxy rules for proxy advisors, eliminating certain of the revisions in the 2020 Rules, are inconsistent with the Commission's mission and goals and are likely to create confusion both for investors and registrants.

In addition to the comments provided below, we reiterate our comments on the 2020 Rules with regard to the importance of regulatory oversight of proxy advisors, including requirements to inform investors of conflicts of interest and of any errors or incomplete information in proxy voting advice, while helping to ensure that proxy advisor voting recommendations do not contain false or misleading information.

¹ Proxy Voting Advice, Exchange Act Release No. 34-93595, (Nov. 17, 2021), <https://www.sec.gov/rules/proposed/2021/34-93595.pdf> [hereinafter *2021 Proposing Release*].

² Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 34-89372 (July 22, 2020), <https://www.sec.gov/rules/final/2020/34-89372.pdf> [hereinafter *2020 Adopting Release*].

³ See Business Roundtable, Comment Letter on Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (Feb. 3, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6742505-207780.pdf>.

BACKGROUND

The 2020 Rules, among other things:

1. Amended Rule 14a-1(1) to codify the Commission’s interpretation that proxy voting advice generally constitutes a “solicitation” subject to the proxy rules.
2. Added new conditions to the two exemptions that proxy advisors generally rely on to avoid the proxy rules’ information and filing requirements:
 - a. New conflicts of interest disclosure requirements in Rule 14a-2(b)(9)(i); and
 - b. A requirement in Rule 14a-2(b)(9)(ii) that a proxy advisor must adopt and publicly disclose written policies and procedures reasonably designed to ensure that (i) registrants that are subject to proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the proxy advisor clients and (ii) the proxy advisor provides its clients with a mechanism by which they can reasonably be expected to become aware of written statements regarding its proxy voting advice by registrants that are the subject of such advice in a timely manner before the security holder meeting (the “Rule 14a-2(b)(9)(ii) conditions”).
3. Added Note (e) to Rule 14a-9, which prohibits false or misleading statements, to include specific examples of material misstatements or omissions related to proxy voting advice.

The amendments to Rule 14a-1(1) and 14a-9 became effective on November 2, 2020, and the conditions set forth in Rule 14a-2(b)(9) were scheduled to become effective on December 1, 2021.⁴ However, on June 1, 2021, the Division of Corporation Finance announced that, at the direction of the Chair, the Division was considering whether to recommend that the Commission revisit the 2020 Rules and certain previously-issued interpretations and guidance with regard to proxy advisors.⁵ The Division further noted that in light of this direction it would not recommend enforcement action to the Commission based on the 2020 Rules or the previously-issued interpretations and guidance while it considered further regulatory action in this area.⁶ On November 17, 2021, the Commission issued the 2021 Proposing Release proposing changes to the 2020 Rules based on the staff’s consideration. The proposals in the 2021 Proposing Release (the “Proposals”) would unwind a majority of the provisions adopted as part of the 2020 Rules, which were adopted after rigorous discussion and a lengthy process of consideration and comment. The Proposals would:

1. Amend Rule 14a-2(b)(9) to remove the Rule 14a-2(b)(9)(ii) conditions; and

⁴ 2020 Adopting Release, *supra* note 2, at 1, 135.

⁵ SEC Division of Corporation Finance, Statement on Compliance with the Commission’s 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9 (June 1, 2021), <https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01>.

⁶ *Id.*

2. Amend Rule 14a-9 to delete Note (e).

THE PROPOSALS

Rulemaking Process

Business Roundtable believes the Proposals are premature and ill advised. Rather than proposing changes at this point, the 2020 Rules, which were developed with input from numerous stakeholders over an extended period of time, should be allowed to go into effect. The 2020 Rules were thoughtfully considered and commented upon by market participants, including proxy advisors, registrants, and investors. The Commission spent significant time and resources to craft tailored requirements to help ensure that investors who use proxy voting advice would receive transparent, accurate, and complete information on which to make their voting decisions without imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice.⁷ Business Roundtable believes that the 2020 Rules struck this appropriate balance.

After the investment of significant resources by all stakeholders, the Commission should allow for the 2020 Rules to go into effect and evaluate the impact of the 2020 Rules over the next several years to determine whether and to what extent the 2020 Rules achieve the Commission's goals. Only after evaluating the effectiveness of the 2020 Rules should the Commission propose additional revisions, to the extent necessary to accomplish these stated goals, and provide a comment period of sufficient duration to allow for rigorous and balanced discussion of the issues by all relevant stakeholders.

Rule 14a-2(b)(9)(ii) Conditions

The Rule 14a-2(b)(9)(ii) conditions were adopted after a comprehensive notice and comment process, which supported the conditions in the form adopted. The Commission now seeks to remove these conditions based on a brief comment period and without ever having seen the conditions in operation. As explanation for the proposed removal of the Rule 14a-2(b)(9)(ii) conditions, the 2021 Proposing Release relies on vague "concerns," including from the regulated entities, about the potential impact of the new requirements as well as the fact that several proxy advisors have developed practices to at least partially address some of the concerns that were the impetus for the 2020 Rules.⁸ However, the Commission is overlooking the value of consistent and clear standards and instead relying on proxy advisors to take a piecemeal approach to address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions.

Under the Proposals, if enacted, proxy advisors would be able to develop divergent practices that may or may not effectively address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. The 2021 Proposing Release notes the differing approaches already seen in the

⁷ See 2020 Adopting Release, *supra* note 2, at 110.

⁸ See 2021 Proposing Release, *supra* note 1, at 19-21.

industry, by detailing that an industry group has been created, comprised of six proxy advisors, and has developed three principles and accompanying guidance.⁹ However, the third largest proxy advisor is not part of this industry group and has instead developed its own policies and procedures that “approximate at least a portion of the Rule 14a-2(b)(9)(ii) conditions.”¹⁰ Similarly, one of the largest proxy advisors has only put “mechanisms in place that approximate at least a portion” of the Rule 14a-2(b)(9)(ii) conditions.¹¹ This lack of uniformity in addressing the concerns targeted by the Rule 14a-2(b)(9)(ii) conditions is a suboptimal solution, particularly when a set of uniform rules has already been discussed, reviewed, and adopted by the Commission in the 2020 Rules.

Clear regulations that address *all* the concerns underlying the Rule 14a-2(b)(9)(ii) conditions and that are universally applicable to *all* proxy advisors (including possible future new entrants in the industry) is a much stronger and comprehensive approach. Instead of piecemeal adoption of certain procedures that may or may not address the concerns underpinning the 2020 Rules, the Commission should allow the 2020 Rules, which were well thought out and developed specifically to address the concerns cited by the SEC in a balanced and meaningful way, to go into effect. We believe that implementing the Rule 14a-2(b)(9)(ii) conditions as adopted would not disproportionately or negatively impact the independence, cost, or timeliness of proxy voting advice. Our position is that the Commission already struck the correct balance in its 2020 Rules by adopting the Rule 14a-2(b)(9)(ii) conditions, and so it should instead allow these conditions to go into effect and monitor their impact going forward.

Note (e) to Rule 14a-9

Note (e) to Rule 14a-9, which was added as part of the 2020 Rules, sets forth examples of scenarios that may, depending on the particular facts and circumstances, be misleading with respect to proxy voting advice. The Note was drafted and adopted to provide clarity regarding the potential application of Rule 14a-9 to proxy voting advice. When the 2020 Rules were adopted, the Commission made clear that Note (e) was not intended to change the application or scope of Rule 14a-9 or to create a new potential cause of action against proxy advisors.¹² Instead, Note (e) serves to clarify and reinforce that no solicitation may contain any statement which is false or misleading with respect to any material fact or which omits to state any material fact necessary to make the statements therein not false or misleading. Accordingly, the purpose of Note (e) was clear. Nevertheless, the Commission is proposing to delete Note (e) to Rule 14a-9 to avoid creating a misperception that the Note alters the law governing Rule 14a-9’s application and scope, something the Commission has explicitly said the Note is not designed to do.

While the stated intention of the proposed deletion is to “reduce any resulting uncertainty,”¹³ deleting Note (e) would instead create more confusion and uncertainty. This is particularly true

⁹ *Id.* at 14.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 20.

¹² 2020 Adopting Release, *supra* note 2, at 132.

¹³ 2021 Proposing Release, *supra* note 1, at 28.

given that, after explaining the proposed amendment to delete Note (e), the 2021 Proposing Release reiterates that, under certain circumstances, a proxy advisor may still be subject to liability under Rule 14a-9 for materially misleading statements or omissions in the areas addressed by Note (e). Deleting a Note that illustrates scenarios under which antifraud liability may arise is inconsistent with the Commission's intent, because it may reasonably give the impression that a proxy advisor's statement or omission may never lead to liability under Rule 14a-9. Further, deleting Note (e) but maintaining elsewhere that Rule 14a-9 may apply to proxy advisors under certain circumstances will, in our view, send mixed messages to proxy advisors, investors, registrants, and the markets as to the scope of Rule 14a-9 in this context.

In contrast, as written, Note (e) provides concrete, illustrative examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9. Thus, its inclusion highlights that the Commission's antifraud rules may apply to proxy voting advice under certain circumstances – without suggesting that or how they would apply under any particular set of facts. Thus, Note (e) is additive and will assist in providing clarity to participants in the proxy process with regard to the application of Rule 14a-9 in the context of proxy advisory services by providing informative scenarios where the Rule may apply to proxy advisors. We do not believe that Note (e) would reasonably create confusion as to the scope or application of Rule 14a-9, particularly given the Commission's existing guidance as to the appropriate scope of the Rule. Further, we do not believe that the Commission's stated reasoning for proposing deletion of Note (e) – vague "concerns" regarding litigation exposure for proxy advisory firms – supports such a change, particularly absent any real experience under the new Note.

CONCLUSION

In conclusion, Business Roundtable opposes the Commission's proposed rulemaking to eliminate certain of the revisions in the 2020 Rules. We believe the 2020 Rules represented reasonable disclosure and procedural requirements for proxy advisors that avail themselves of certain existing exemptions from the information and filing requirements of the federal proxy rules and were a significant step in the right direction. Therefore, we urge the Commission to allow the 2020 Rules to go into effect. Business Roundtable appreciates the opportunity to provide our input during this process.

Thank you for considering our comments and recommendations. We would be happy to discuss these comments or any other matters you believe would be helpful. Please contact Maria Ghazal, Senior Vice President & Counsel of Business Roundtable, at mghazal@brt.org or 202-496-3268.