February 3, 2020

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

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

Dear Ms. Countryman:

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers who collectively lead companies with more than 15 million employees and $7 trillion in revenues. Business Roundtable members invest nearly $147 billion in research and development. In addition, our companies annually pay $296 billion in dividends to shareholders and generate $488 billion in revenues for small and medium-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 5, 2019, entitled Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (the "Proposing Release"). Business Roundtable supports the implementation of reasonable disclosure and procedural requirements for proxy voting advice businesses (or "proxy advisors") that avail themselves of certain existing exemptions from the information and filing requirements of the federal proxy rules. We believe the changes included in the Proposing Release will make the proxy voting process significantly more transparent, accurate and effective both for companies and investors, and this letter provides our comments on the proposed amendments to Rules 14a-2(b) and 14a-9 of the Securities Exchange Act of 1934. We also have included feedback from our member companies on the need for Rule 14a-2(b) and 14a-9 reform and on the Proposing Release, which was obtained through surveys we distributed to our member companies in 2019 and anonymized for purposes of public submission.

EXECUTIVE SUMMARY

Overall, Business Roundtable is highly supportive of the SEC's proposed changes to the rules for proxy voting advice outlined in the Proposing Release. We believe the proposed amendments will appropriately 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. We have also summarized below our comments on areas where we think issuers, investors and our capital markets would benefit from additional Commission action on this topic:

- Proxy advisors should disclose how they determine that their voting policies and methodologies are consistent with the investor's best interests, including addressing any new or additional empirical studies or evidence on the subject of voting issues and the company's long-term value.
- Proxy advisors should publish their criteria and requirements for evaluating matters subject to a vote before the fiscal year in which the matters arise.
- The SEC should extend the review and feedback concept to proxy advisors' custom reports issued over the course of the year, not just the benchmark and specialty reports currently contemplated by the proposed amendments.
- Proxy advisors should publicly disclose final voting reports and custom reports 90 days after a shareholder meeting to allow for analysis of the impact of the advice on the company's long-term value.
- The Commission should condition the availability of exemptions under SEC Rules 14a-2(b)(1) and 14a-2(b)(3) on a proxy advisor structuring its voting platform to disable the automatic submission of votes (so-called "robo-voting") when an issuer has submitted a response to the voting advice.
- When a proxy advisor provides analysis and a recommendation based on information different from what the company filed, the Commission should require the proxy advisor to disclose that fact and to illustrate how the proxy advisor's analyses or recommendations would change if it would have used the filed information.

BACKGROUND ON PROXY VOTING ADVICE

Today, most retail investors participate in our capital markets through mutual funds and exchange-traded funds that are offered through intermediary broker-dealers and investment advisers. These funds own 70 percent of all public company shares in the United States, and the investment advisers to these funds have a fiduciary duty to vote proxies in the best interest of the funds they advise.[1] Because proxy voting decisions can affect investment outcomes for millions of retail investors, it is vitally important that our proxy voting system is as transparent, accurate and efficient as possible.

We understand that based largely on the SEC's 2003 Rule 206(4)-6 adopting release and two 2004 SEC staff "no-action" letters (withdrawn in 2018), institutional investors have for some time operated under the belief that they could avoid potential conflicts of interest by voting client proxies in accordance with the recommendations of proxy advisors.[2] In addition, many

[1] Broadridge Investor Communication Solutions, Inc. and PricewaterhouseCoopers LLP, *Proxy Pulse: 2018 Proxy Season Review*, BROADRIDGE (October 2018) https://www.broadridge.com/report/2018-proxy-season-review.
[2] *See* SEC Rule 206(4)-6, 17 C.F.R. §275.206(4)-6 (2019); Proxy Voting by Investment Advisers Adopting Release, Advisers Act Release No. 2106, 68 Fed. Reg. 6585 (Feb. 7, 2003), *available at* https://www.govinfo.gov/content/pkg/FR-2003-02-07/pdf/03-2952.pdf; Egan-Jones Proxy Services, SEC No-Action

institutional investors historically interpreted SEC and Department of Labor rules and guidance as requiring institutional investors to vote every share on every matter on a proxy.[3] At the same time, many institutional investors today face the prospect of voting on a large number of corporate matters every year.[4] Since many institutional investors lack the personnel and back-office support to manage such extensive voting activities, they have outsourced these tasks to proxy advisors. As a result of the combined effect of the foregoing, proxy advisors have come to wield enormous influence over shareholder voting at public companies.

Moreover, the market for proxy advisory services is dominated by two companies, Institutional Shareholder Services Inc. ("ISS") and Glass Lewis & Co. ("Glass Lewis"). Together, ISS and Glass Lewis effectively operate as a duopoly, enjoying a 97 percent combined market share.[5] Academic studies have produced varied conclusions regarding the degree to which proxy advisors influence voting outcomes, but a recent analysis generated two important findings based on an extensive review of the research: (1) an adverse recommendation on a proposal from a proxy advisor is associated with a reduction in the favorable vote count by 10 percent to 30 percent and (2) proxy advisors' influence on voting is generally shown to be *at a minimum* moderate.[6]

Letter (May 27, 2004) (withdrawn Sept. 13, 2018); Institutional Shareholder Services, Inc., SEC No-Action Letter (Sept. 15, 2004) (withdrawn Sept. 13, 2018).

[3] *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Exchange Act Release No. 47304, 68 Fed. Reg. 6563 (Feb. 7, 2003) *available at* https://www.govinfo.gov/content/pkg/FR-2003-02-07/pdf/03-2951.pdf; Letter from Allan Lebowitz, Deputy Assistant Sec'y of the Pension Welfare Benefits Admin., U.S. Dep't of Labor, to Helmuth Fandl, Chairman of the Ret. Bd., Avon Products, Inc. (Feb. 23, 1988), *available at* http://online.wsj.com/public/resources/documents/ProxyAdvisoryWhitePaper02072011.pdf; Daniel M. Gallagher, *Outsized Power & Influence: The Role of Proxy Advisers*, (Wash. Legal Found., Working Paper No. 187, 2014), *available at* https://s3.us-east- 2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/GallagherWP8-14.pdf. In 2019, however, the Commission provided guidance making clear that investment advisers do not have to vote on every matter. Specifically, the SEC clarified that "an investment adviser is not required to accept the authority to vote client securities, regardless of whether the client undertakes to vote the proxies itself. If an investment adviser does accept voting authority, it may agree with its client, subject to full and fair disclosure and informed consent, on the scope of voting arrangements, including the types of matters for which it will exercise proxy voting authority." Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Advisers Act Release No. 5325, 84 Fed. Reg. 47420, 47422 Question 1 (Sept. 10, 2019) [hereinafter "Investment Adviser Guidance"], *available at* https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18342.pdf.

[4] *See, e.g.*, James K. Glassman and J. W. Verret, How to Fix Our Broken Proxy Advisory System, Mercatus Research (Apr. 16, 2013) (noting that "US issuers pose more than 250,000 proxy questions a year, and it is not unusual for large mutual funds and their advisers to be required to cast votes on more than 100,000 of them on the basis of actively developed voting policies") *available at* http://mercatus.org/sites/default/files/Glassman_ProxyAdvisorySystem_04152013.pdf.

[5] James K. Glassman and Hester Pierce, How Proxy Advisory Services Became So Powerful (June 18, 2014), *available at* https://www.mercatus.org/publication/how-proxy-advisory-services-became-so-powerful.

[6] James Copland, David F. Larcker, and Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (Stanford Bus. Sch., Working Paper No. 3679, 2018) (also noting that proxy advisors' influence on corporate behavior and shareholder value is generally shown to be negative), *available at* https://www.gsb.stanford.edu/faculty-research/working-papers/big-thumb-scale-overview-proxy-advisory-industry.

DISCUSSION OF PROPOSED AMENDMENTS

1. RULES 14a-2(b)(9)(i) CONFLICTS OF INTEREST DISCLOSURES

Proxy advisors engage in activities and have relationships that could affect the objectivity or reliability of their advice. Just as investment advisers are required to disclose potential conflicts, whether or not they currently exist, conflicts of interest that may arise for proxy advisors should be disclosed in order for their clients to assess for themselves the effect and materiality of any actual or potential conflicts of interest with respect to a voting recommendation. Without a robust conflicts of interest disclosure requirement, investment advisers may have difficulty complying with their fiduciary duties related to the voting of the shares they control on behalf of funds or investors, as well as obligations to oversee the proxy advisors they retain. We agree with the Commission's assessment that institutional investors and investment advisers who rely on proxy advisors for voting guidance cannot identify potential risks if they do not have access to sufficiently detailed disclosure about the full extent and nature of any conflicts that are relevant to the voting advice they receive. The inability to make such assessments not only makes fiduciary compliance uncertain, but weakens the overall goal of protecting retail investors that the fiduciary requirements for investment advisers were designed to address.

A. *Conflicts of Interest Disclosure*

As discussed in the Proposing Release, the interests of proxy advisors may diverge significantly from the interests of recipients of voting advice. Such divergence of interests creates a significant risk that voting advice could be influenced by the proxy advisor's own financial interests. The best way to mitigate such risks is to ensure that the recipients of proxy voting advice receive adequate information for them to understand and assess these potential risks. Business Roundtable supports the establishment of consistent, standard and reasonably accessible policies and procedures to disclose potential conflicts of interest by proxy advisors.

Both ISS and Glass Lewis have policies and procedures to address potential conflicts of interest and disclose such potential conflicts, but, as noted in the Proposing Release, there is no uniform set of standards that applies to the policies and procedures various proxy advisors utilize to address risks posed by conflicts of interest. The absence of such standards can lead to inconsistent and inadequate disclosures and mitigation measures. The fiduciary relationship requires the investment adviser to avoid undisclosed conflicts of interest. The expectation that advice is free of hidden conflicts of interest should logically flow up the chain to the proxy advisors informing the fiduciaries as well.

Proxy advisors should disclose the policies and procedures used to identify, as well as the steps taken to address, any conflicts of interest. In doing so, the Commission will further mitigate conflicts of interest inherent in the for-profit proxy advisor model. We believe such disclosure should be required and we support standardizing the manner in which conflicts of interest are disclosed. Business Roundtable agrees with the Commission's statements in the Proposing

Release that such information will help clients of proxy advisors assess the objectivity of the voting advice and evaluate whether actual or potential conflicts were addressed effectively. Therefore, Business Roundtable supports including the disclosures in the proxy voting advice provided to clients.

As will be further discussed below, when proxy voting advice is delivered through an electronic voting platform or other electronic means, Business Roundtable supports such disclosure being conveyed directly on the voting platform to ensure that the information is prominently disclosed. Providing disclosures only upon request from the client likely defeats the purpose of the proposed amendments since the client would not necessarily realize the existence or content of a material disclosure.

B. *Ownership Conflicts*

Several aspects of the current ownership and operations of proxy advisors create the potential for conflicts of interest. For example, Glass Lewis is owned by the Ontario Teachers' Pension Plan and Alberta Investment Management Corp., which invest in companies on whose proxies Glass Lewis makes recommendations, and ISS is owned by a private equity firm.[7] In addition, proxy advisors may have a variety of financial and other incentives to align their recommendations with their clients' interests, who may be proponents of a matter to be voted on at a shareholder meeting or who may have a specific agenda on governance, executive compensation or other matters.

C. *Commercial Conflicts*

As discussed above, conflicts of interest are an inevitable part of the ownership and operation of for-profit proxy advisors. When the possibility exists that the proxy advisor's financial and other incentives diverge materially from the investor's best interests, investors must be given sufficient information to fully understand the potential risks and the mitigation measures that the proxy advisor has in place internally when assessing whether to rely on the voting advice they receive.

Proxy advisors have historically relied, in part, on SEC Rule 14a-2(b)(3), which generally exempts proxy voting advice an advisor provides to any other person with whom the advisor has a business relationship. The exemption is well-established and effectively removes any impediment to the flow of advice advisors such as financial analysts, investment advisers and broker-dealers provide to shareholders. As noted in the Proposing Release, these exemptions remain subject to various limitations and conditions designed to ensure that investors are protected when the Commission's filing and information requirements do not apply. For example, any person who wishes to rely on the Rule 14a-2(b)(3) exemption may not receive special commissions or remuneration from anyone other than the recipient of the advice and must disclose any significant relationship or material interest bearing on the voting advice.

[7] GLASS LEWIS: COMPANY OVERVIEW, http://www.glasslewis.com/company-overview/ (last visited Jan. 2020); ISS: HISTORY, https://www.issgovernance.com/about/iss-history/ (last visited Jan. 2020).

These conflicts need to be addressed. Staff Legal Bulletin 20 and the 2019 Commission guidance on the applicability of proxy rules effectively clarified that to qualify for the exemption from certain proxy rules, proxy advisors must proactively and specifically disclose "significant" or "material" interests the proxy advisor has "in the matter that is the subject of the voting recommendation." However, the SEC can, and should, do more to address the risks posed by proxy advisor conflicts of interest. As the Proposing Release notes, the Commission adopted the current exemption before proxy advisors played the outsized role they do today. We support the additional steps outlined in the Proposing Release. We agree with the Commission that the proposed amendments will improve the disclosure of conflicts of interests and, as a result, facilitate more informed voting and investment decisions. Such improvements will minimize the incentive to provide recommendations that promote the interests of paying clients (including, for example, some pension funds and activist investors), which in many instances may be at the expense of issuers and retail investors.

At a minimum, proxy advisors should provide conflicts of interest disclosures that are prominently displayed and describe specific conflicts, instead of relying on more generalized, "boilerplate" statements. For instance, proxy advisors should disclose to their clients when they are providing voting recommendations on shareholder proposals submitted by their institutional investor clients, as well as when the subject company has received consulting services from the proxy advisor. Additionally, the Commission should include, in the text of final Rule 14a-2(b)(9)(i), the conflicts of interest outlined in question three of the Commission's September 2019 guidance, e.g., related to the provision of voting advice and voting services generally, other activities, affiliations, provision of consulting services, amounts of compensation paid to the firm, etc.[8]

Business Roundtable member companies have expressed concerns that proxy advisors currently provide only boilerplate disclosures around potential conflicts of interest and do not provide sufficient information about the nature of such potential conflicts. Several member companies have indicated that proxy advisors' disclosure of conflicts should be made in the proxy voting reports themselves. Requiring the disclosure within the report would be consistent with an issuer's requirement to disclose related party transactions under the SEC's proxy rules, and disclosure of the conflict would be more relevant when it is made at the time of the report. We agree with the Commission's acknowledgement that such disclosures should be sufficiently detailed so that clients of proxy advisors can understand the nature and scope of the interest, transaction, or relationship to appropriately assess the objectivity and reliability of the proxy voting advice they receive.

D. *Proposed Amendments to Rules 14a-2(b)(1) and (b)(3)*

Business Roundtable supports the proposed amendments to the exemptions from the proxy solicitation rules in Rules 14a-2(b)(1) and (b)(3), which specify that such exemptions will be

[8] *See* Investment Adviser Guidance, *supra* note 3 at 47422 Question 3.

available to proxy advisors that provide specified disclosures about their material conflicts of interest.

As noted above, market participants and other commenters have raised concerns around a variety of potential financial, and other, conflicts of interest associated with proxy advisors' voting recommendations. For example, many of our member companies have specifically raised concerns that proxy advisors are providing voting recommendations on shareholder proposals submitted by their institutional investor clients.[9] We think it is appropriate that the exemptions provided in Rules 14a-2(b)(1) and (b)(3) specifically require that any material transaction or relationship between the proxy advisor and a shareholder proponent be disclosed by the proxy advisor.

We also believe that proxy advisor businesses should disclose their internal policies and procedures used to identify, as well as the steps taken to address, any conflicts of interest. We believe such disclosure should be required. We agree with the SEC that such information will help clients of proxy advisors assess the objectivity of the voting advice and evaluate whether actual or potential conflicts were addressed effectively.

2. RULE 14a-2(b)(9)(ii) AND (iii) REVIEW OF PROXY VOTING ADVICE BY ISSUERS AND OTHER SOLICITING PERSONS

A. *Review of Proxy Advisor Recommendations*

a. *The Need for Reform*

Business Roundtable has long been concerned that proxy advisors produce reports that frequently include errors, factually inaccurate information and incomplete analyses. In 2013, and again in 2018, a survey of Business Roundtable member companies found that nearly all respondents found one or more factual error(s) in reports proxy advisors prepared about their companies.[10] The 2018 survey results indicate that although 90 percent of companies notify the proxy advisors of the errors, only 8 percent of companies find that the proxy advisor consistently corrects the errors. Additionally, even if errors are corrected in the report, our member companies have noted that corresponding updates are not necessarily made to the recommendations. The majority of our member companies responding to the survey have pursued opportunities to meet with proxy advisors, but only 33 percent report that their efforts have resulted in meetings. Further, nearly one in five respondents who met with proxy advisors to discuss their reports was unsatisfied with the outcome of those interactions.

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[9] Center for Capital Market Competitiveness & Nasdaq, *2019 Proxy Season Survey*, U.S. CHAMBERS, 8-9 (2019) https://www.uschamber.com/sites/default/files/ccmc_proxyseasonsurvey2019_v1.pdf (highlighting that 58% of issuers surveyed have been approached by ISS's corporate consulting arm in years that ISS also provided negative vote recommendations on that same company).

[10] Letter from Alexander M. Cutler, Chairman and Chief Exec. Officer, Eaton, and Chair, Corp. Governance Comm., Bus. Roundtable, to Mary Jo White, Chairman, Sec. & Exch. Comm'n (September 12, 2013) *available at* https://www.businessroundtable.org/archive/resources/letter-to-chairman-white-on-proxy-advisory-firms.

In addition to having little opportunity to review and correct material errors, Business Roundtable member companies report that proxy advisors are not transparent with respect to their methodologies and procedures, so errors cannot be anticipated and may be systematically repeated. In order to verify the accuracy of numerical data in proxy advisor reports, companies either need access to the underlying data, or the figures included in proxy advisors' reports and voting recommendations should be reconciled to figures in the companies' public filings. Business Roundtable encourages reform in this area to ensure that proxy advisors are not publishing false or misleading information, whether inadvertently or otherwise.

Given the significant impact of proxy advisors' voting advice and the effect of such on their client's voting patterns, it is critical that the analysis and research supporting that advice is accurate and complete, and that companies and investors are aware of methodologies and practices underlying the voting advice. The need for additional transparency is particularly pressing around issues of executive compensation and employee incentive plans, where Business Roundtable member companies report the criteria used are not generally well understood and are inflexible when applied. In order to increase transparency with respect to these matters, to the extent that a proxy advisor's analyses and/or recommendations utilize information different from what the company filed (e.g., peer group or value of option grant), we believe the Commission should require proxy advisors to disclose not just the fact that different information was used, but also illustrate what the analysis would have been if the company's filed information had been used.

In addition, there is no indication that proxy advisor voting guidelines and recommendations are, in fact, in line with long-term value creation or are even consistent with peer-reviewed academic research or empirical analysis of voting recommendations and economic outcomes. Furthermore, ISS and Glass Lewis do not disclose the academic research, if any, that is used in formulating their recommendations and whether the recommendations were designed to promote the creation and preservation of a company's long-term value for the benefit of investors and other corporate stakeholders. To allow investment advisers to fulfill their own obligations to oversee and assess the policies and methodologies of proxy advisors upon whom they rely, we believe proxy advisor disclosures should explain how the proxy advisor has determined that its voting policies and methodologies are consistent with the investor's long-term interests, including addressing any new or additional empirical studies or evidence on the subject of voting issues and the company's long-term value. The end goal of the proxy voting system should be to ensure that investors are provided with information to make the most informed voting and investment decisions possible.

Additionally, there is a lack of transparency around how proxy advisors choose their peer groups. By selecting peer groups at the end of the year, for example, proxy advisors may be cherry-picking results that may not necessarily be accurate or complete. One member company suggested requiring proxy advisors to apply the company's peer groups to a company's pay-for-performance model and disclose the results.

Separately, the Commission has requested comment as to whether issuers should enter into confidentiality agreements before being allowed to review and provide feedback on proxy advisor reports. While our member companies recognize the importance of confidentiality of proxy advisor reports, such as the revelation of the client's investment strategies in custom reports, companies should maintain the ability to share draft reports with legal counsel and other advisors on a confidential basis.

b. Expanding Review of Proxy Advisor Reports

Business Roundtable member companies believe that the SEC's proposed amendments should not be limited to the benchmark reports of proxy advisors. For example, ISS produces six separate, full reports (a benchmark and five specialty reports) on each public company every season. Each specialty report includes analyses and voting recommendations for shareholder proposals that differ from those in the benchmark report. We believe, as currently contemplated by the Proposed Amendments, these specialty reports should be subject to the same expanded review process proposed for proxy voting advice. At a minimum, these specialty reports should be reviewed by issuers to ensure that those relying on the advice of proxy voting businesses are receiving information that is accurate and complete.

Additionally, we think the Commission should extend the review and feedback process to the voting recommendations and reports proxy advisors produce based on their clients' customized voting guidelines. The majority of our member companies surveyed indicated that voting advice formulated under a clients' custom policies should be subject to the proposed review and feedback period. Member companies noted that the same need to correct factual inaccuracies exists with these reports and many investor policies have the flexibility to review matters on a case-by-case basis.

Finally, proxy advisors should publicly disclose the final voting report and custom reports about a public company 90 days after a shareholder meeting has occurred. Public disclosure would allow for analysis of the effect proxy advisor recommendations have on a company's long-term value.

c. *Proposed Amendments to Rule 14a-2(b)(9)(ii)*

The SEC is proposing that, as a condition of meeting an exemption from the proxy solicitation rules, proxy advisors must provide issuers with either (1) three days to send feedback on a vote recommendation, so long as issuers file their definitive proxy statement less than 45, but at least 25, days before the annual general meeting; or (2) five days to send feedback on a vote recommendation, so long as issuers file their definitive proxy statement at least 45 days before the annual general meeting.

d. *Analysis*

Business Roundtable believes that the timeframes set forth in proposed Rule 14a-2(b)(9)(ii) are appropriate. The proposed timeframes provide a reasonable window to communicate with proxy advisors and correct material errors that appear in proxy voting advice and will improve access to accurate information. Such a change improves the current system and will enable companies to review the reports, correct inaccurate information, and make any significant comments.[11] Our member companies vary as to when they choose to file their definitive proxy statements, but they appreciate the balance this proposal strikes between providing issuers with an opportunity to review and provide feedback on proxy voting advice and allowing more time for proxy advisors and their clients to formulate and consider voting recommendations.

Several of our member companies indicated that the proposed rule change may slightly modify when they file their definitive proxy statements, but only if it would ensure the longer review period. However, the majority of those surveyed indicated that the proposed rule would not change their timetables for filing as they would continue to file 40-45 days prior to their annual general meeting. Additionally, our member companies indicated that three days is typically a sufficient time to submit feedback, but five days may be necessary when there is a larger gap between the positions of the proxy advisor and the company's position.

We believe that the proposed review and feedback period should be a condition to the exemption in all cases, as proposed. Our member companies support this view because, in their words, there could be factual inaccuracies that should be corrected regardless of the voting recommendation. Another member company shared that the purpose of the review is to find errors with the data and the analysis, not just the conclusions. And finally, one Business Roundtable member company stated that there are occasions when proxy advisors support management's position, but include in their analysis cautionary warnings that may influence negative voting, thus necessitating the need for review and feedback.

[11] ISS provides draft reports to S&P 500 companies with a limited window for comment, but Glass Lewis does not (although it does provide an "Issuer Data Report" for a fee). The ISS review period is generally short. At the 2013 Proxy voting advice businesses Roundtable, ISS President Gary Retelny noted that their target was a 24- to 48-hour review time. *See* Transcript of SEC Proxy Advisory Firms Roundtable at 141 (Dec. 5, 2013), *available at* https://www.sec.gov/spotlight/proxy-advisory-services/proxy-advisory-services-transcript.txt. However, some respondents to a recent joint survey from Nasdaq and the Center for Capital Markets Competitiveness indicated receiving as little as 30 to 60 minutes to review the report, and 36 percent of respondents to a recent survey of public companies indicated they received fewer than 12 hours to review the report. Only 15 percent of respondents in the same survey of public companies reported receiving more than 72 hours to review the report. These periods are all shorter than the five days many believe necessary to communicate with shareholders on a negative recommendation.

B. *Hyperlinked Statement and "Automatic" Voting of Shares*

a. *The Need for Reform*

As noted above, our member companies also have raised concerns with the accuracy and completeness of proxy advisor voting recommendations. Under existing proxy rules, issuers can file supplemental proxy materials to respond to adverse proxy voting recommendations. However, our member companies have raised concerns that some investment advisers rely on the recommendations of proxy advisors and allow their votes to be cast automatically, shortly after publication of a proxy advisor's voting recommendations, without first reviewing supplemental proxy filings to ensure votes are cast in the best interest of their clients.

Business Roundtable members report that a spike in voting follows adverse voting recommendations by ISS during the three-business-day period immediately after the release of the recommendation. One Business Roundtable member company, for example, reported that the number of votes cast tripled in a single business day following a report from ISS, with the votes overwhelmingly consistent with ISS's recommendation. This high incidence of voting immediately on the heels of the publication of proxy advisory reports suggests that investors may not be spending sufficient time evaluating proxy advisors' guidance and determining whether it is in the best interests of their clients or, alternatively, that they simply outsource the vote to the proxy advisor (i.e., automatic or robo-voting).

b. *Proposed Amendment to Rule 14a-2(b)(9)(iii)*

The proposed amendments would require that proxy advisors include in their proxy voting advice and in any electronic medium used to deliver the proxy voting advice, if requested by the issuer or other soliciting person, a hyperlink (or other analogous electronic medium) to the issuer's or other soliciting person's statement regarding the proxy voting advice.

c. *Analysis*

i. Hyperlinked Statements

Business Roundtable supports proposed Rule 14a-2(b)(9)(iii) and encourages the option to require proxy advisors to include a hyperlink (or other analogous electronic medium) directing the recipient of such proxy advice to an issuer's response. Including a hyperlink, or other electronic option, to an issuer's response is a simple and efficient solution to ensure that the clients of proxy voting firms are able to consider issuers' views at the same time they are considering the proxy voting advice and before making their determinations. This will lead to more informed voting and investment decisions. We agree with the SEC that proxy advisors should not be liable for the content of the issuer's (or certain other soliciting person's) statements in such a hyperlink. Therefore, the Commission should not restrict or limit responses of the company that are found in the content of the hyperlink.

ii. "Automatic" Voting of Shares

Many of our member companies report a significant portion of their votes are automatically cast shortly after publication of a proxy advisor's voting recommendations, and we are therefore concerned that many investors will not review issuers' hyperlinked statements. One of our member companies also noted that some proxy advisor clients receive the reports as PDFs and may be unable to even view hyperlinks required in the proposed rule.

The proposed amendments do not condition the availability of the exemptions provided in Rules 14a-2(b)(1) and 14a-2(b)(3) on a proxy advisor structuring its voting platform to disable the automatic submission of votes in instances where an issuer has submitted a response to the voting advice. Business Roundtable believes that disabling the automatic submission of votes until the client affirmatively acknowledges that it has been provided access to the issuer's or other soliciting person's response to the proxy advisor's report and reviewed the response is in the best interest of informed voting by shareholders. As noted above and in our letter to the Commission dated November 9, 2018, recent survey results support the contention that a spike in voting follows adverse voting recommendations by ISS during the three-business-day period immediately after the release of the recommendation.[12] This issue warrants further evaluation by—and guidance from—the Commission as an independent issue, particularly in instances where companies seek to directly respond to an adverse recommendation before shareholders cast their votes.

Our member companies strongly believe that the SEC should require proxy advisors to disable pre-populated voting mechanisms or the automatic submission of votes in instances where companies respond to a proxy advisor's adverse voting recommendation, because it is important that investors consider the company's perspective before voting and to ensure that voting is not based on inaccurate information. Indeed, if the Commission failed to address automatic voting and the practice were to continue unabated, it would significantly undermine the review-and-response mechanism established in the proposed rule. One member company reported that they have seen some of their largest shareholders vote shares consistent with recommendations that were based on inaccurate data as a result of pre-populated voting. In one case the shareholder worked with a proxy advisor for a few days before their annual meeting and was unable to have its vote changed to be consistent with the revised recommendation based on accurate data.

[12] Frank M. Placenti, *Are Proxy Advisors Really a Problem?*, AMERICAN COUNCIL FOR CAPITAL FORMATION (Oct. 2018), https://accfcorpgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf.

3. RULE 14a-9 FALSE OR MISLEADING STATEMENTS

A. *The Need for Reform*

Proxy advisors offer little transparency into their internal standards, procedures, and methodologies. Neither ISS nor Glass Lewis fully discloses the methodologies used to develop their voting recommendations. As a result, it is not possible to determine the degree to which any factors, including pressure to conform to the agenda of large clients of the proxy advisors and the demand for proxy advisor consulting services, are driving updates to voting guidelines. ISS, in particular, may have a financial incentive to make its policies opaque and complex and to change them frequently to increase demand for its consulting services from issuers. For example, as part of its "2019 Benchmark Policy Comment Period," ISS has proposed switching its Financial Performance Assessment measures from GAAP-based measures to Economic Value Added (EVA) measures, notably in the same year that ISS acquired EVA Dimensions LLC. [13]

Additionally, Business Roundtable member companies are concerned that, when making recommendations, proxy advisors rely upon information not included in the company's public SEC filings or on factors other than the actual regulatory requirements to which companies are subject. For instance, proxy advisors have their own guidelines for determining the independence of directors. This has resulted in situations where a proxy advisor recommends against a director's election because it decided that the director is not independent under its standards, despite the fact that the company's board of directors—carrying out its fiduciary duties—determined that the director in question was independent under the Commission's requirements, the company's stock exchange listing rules and its corporate governance guidelines. Similarly, Glass Lewis announced, beginning in 2019, it may recommend a vote against members of a company's governance committee if the company excludes shareholder proposals through a valid use of the "no-action" letter process.[14] The proxy advisor's decision will hinge on whether, in their own judgment, excluding the shareholder proposal was "detrimental to shareholders." As a result, companies will now need to contend with the reality that their legitimate use of the "no-action" letter process could result in votes against directors based on the proxy advisor's subjective views.

B. *Proposed Amendments*

Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made. The proposed rule includes examples of statements that may be false or misleading, including the use of standards that materially differ from relevant standards or

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[13] Press Release, Institutional Shareholder Services Inc., *ISS Announces Acquisition of EVA Dimensions* (Feb. 12, 2018), https://www.issgovernance.com/iss-announces-acquisition-of-eva-dimensions/.

[14] Glass, Lewis & Co., *2019 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice – United States*, GLASS LEWIS at 29 (Oct. 24, 2018), https://www.glasslewis.com/wp-content/uploads/2018/10/2019_GUIDELINES_UnitedStates.pdf.

requirements that the Commission sets or approves. For example, the SEC noted that if a proxy advisor were to recommend to vote against an audit committee director on the basis that the director is not independent under the proxy advisor's independence standard for audit committee members, and such standard is more limiting than the SEC's rules, it may be necessary for the proxy advisor to make clear that its recommendation is based on its own different—and potentially subjective—independence standard, rather than the SEC's standard, in order for such recommendation to be not misleading.

C. *Analysis*

We agree with the SEC that subjecting proxy advisors to the same antifraud standard as issuers and other persons engaged in soliciting activities is appropriate in the public interest and for the protection of investors. Therefore, it is important that proxy advisors not omit the disclosure of information underlying the basis of their advice or which would affect its analysis and judgments.

As noted above, the need for additional transparency has been raised particularly around issues of executive compensation and employee incentive plans, where Business Roundtable member companies report the criteria used are not generally well understood and are inflexible when applied. In order to increase transparency with respect to these matters, to the extent that a proxy advisor's analyses or recommendations utilize information different from what the company filed (e.g., peer group or value of option grant), the proxy advisor should be required to disclose not just the fact that different information was used, but also illustrate what the analysis would have been if the company's filed information had been used.

Proxy advisors also set certain requirements, the bases for which are unclear, and compliance with which is based on a subjective analysis (e.g., whether a board has been "responsive" to a say-on-pay vote receiving less than 70 percent of the vote). The degree to which proxy advisors outsource their fact gathering and analysis to third-party raters and rankings, especially in the environmental, social and governance space, has also been a growing concern. While there may be justification to exclude certain proprietary information, proxy advisors should be required to provide more transparency into their internal controls, policies, procedures, guidelines, and methodologies, and to disclose when and why they choose to deviate from their stated standard practices.

Member companies that responded to our survey were in unanimous agreement that the SEC should require that proxy advisor firms disclose their use or application of standards that materially differ from standards or requirements that the SEC has established or approved. Member companies stated that such disclosure would be important for proxy advisor clients to know, and at least one member company specifically highlighted the clarification that the rule applies to the requirements set by any relevant stock exchange. Moreover, disclosure of standards that materially differ from the SEC generally would help provide additional context to voting recommendations for issuers and stockholders.

Further, proxy advisors' criteria and requirements for evaluating matters subject to a vote should be published before the beginning of the fiscal year in which the matters arise. For example, a change in criteria published in November 2018 ought to apply only to issuers' fiscal years beginning after that date. At present, changes to criteria published in November 2019 would apply retroactively, in the case of a calendar-year issuer, to the company's policies and actions beginning on January 1, 2019.

Additionally, the Commission should specifically make clear whether these anti-fraud provisions apply when proxy advisors' voting reports include information, statements or opinions that have not been included in material filed with the Commission.

4. RULE 14a-1(l) CODIFICATION OF THE COMMISSION'S INTERPRETATION OF "SOLICITATION"

A. *Discussion*

Amending Rule 14a-1(l) to clarify that "solicitation" includes any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent or authorization on a specific matter for which shareholder approval is solicited, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee is consistent with the Commission's interpretation of the term "solicitation" as it is currently used. We see no issue with codifying a current interpretation that shields investors by addressing the types of activity that raise investor protection concerns about inadequate or materially misleading disclosures that Section 14(a) and the Commission's proxy rules are intended to address.

B. *Analysis*

We agree that, as noted in the Proposing Release, it would be inconsistent with the goal of ensuring access to fair and accurate information if persons whose business is to offer and sell voting advice to large numbers of shareholders, with the expectation that their advice will factor into shareholders' voting decisions, were beyond the reach of Section 14(a). Business Roundtable supports exceptions to this proposed rule in the case of persons who provide proxy voting advice in response to an unprompted request as there are a number of relationships and situations in which proxy voting advice is given in response to an unprompted request and such advice is incidental to a broader relationship. There is little investor risk in the provision of voting advice by a person who does not promote himself or herself as an expert in proxy voting matters as such advice will likely be in the context of an existing business relationship.

CONCLUSION

In conclusion, Business Roundtable is encouraged by the Commission's proposed rulemaking to implement 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. The changes discussed in the Proposing Release are a significant step in the right direction and 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.