



ICGN

International Corporate Governance Network
Inspiring good governance & stewardship

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Submitted via SEC email: rule-comments@sec.gov

22nd December 2021

Dear Secretary Countryman,

Re: File Number S7-17-21: Proxy Voting Advice

The International Corporate Governance Network (“ICGN”) is pleased to respond to the Securities and Exchange Commission (“SEC”) proposed amendments to the Federal proxy rules governing proxy voting advice.

Led by investors responsible for assets under management of over \$59 trillion, and bringing together companies and stakeholders, ICGN advances the highest standards of corporate governance and investor stewardship worldwide in pursuit of long-term value creation, contributing to healthy and sustainable economies, society, and environment.

Our work programme is framed by ICGN’s flagship Global Governance Principles¹ used by many ICGN Members as a bellwether for their voting policies and company engagements. The ICGN Principles also offer an important investor perspective on corporate governance to help inform public policy development and to encourage good practices by capital market participants.

Over 30% of ICGN Members are based in the United States (US) and ICGN has committed to engaging with US based regulators and standard setters in the development of national policies for decades. With regards to the amendments to the Federal proxy rules governing proxy voting advice we refer you to previous ICGN commentary to the SEC published in November 2019², on the initial SEC Proxy Advisor Interpretation and Guidance. At that time, we *‘recommend the Commission to carefully consider the extent to which these rules will actually contribute to the aforementioned Commission’s aims in the interest of investors, and carefully assess and weigh the additional burden – including costs – that this may put on both the parties affected.’* We were inferring that the 2019 Interpretation and Guidance, adopted by the SEC, would become problematic for investors as they fulfilled their fiduciary duties.

The commentary within the recent Proposed Rule states that the SEC is considering whether to *“recalibrate the rules to preserve the independence of proxy voting advice and ensure that PVABs can deliver advice in a timely manner without ultimately passing on higher costs to their clients.”*³ ICGN believes that preserving independence of voting advice, providing it on a timely basis, and keeping higher costs from being passed on to clients, are essential. However, it is our concern that the 2020 Final Rule, even after being modified by the Proposed Rule, actually causes investors to be worse off by providing company management greater insight and control of the agents that investors hire.

¹ <https://www.icgn.org/policy/global-governance-principles>

² Comment letter from ICGN to the SEC, November 21, 2019, [SEC Proxy Advisor Interpretation and Guidance.pdf \(icgn.org\)](#)

³ [Amendments to the Proxy Rules for Proxy Voting Advice \(sec.gov\)](#), p. 8.

Proxy voting is not only a core share ownership right but a fundamental fiduciary duty that investors owe to their beneficiaries. In turn, the exercise of these voting rights is a prominent element of investor stewardship. In this regard we refer you to Principle 5 of the ICGN Global Stewardship Principles⁴, which states that: *“Exercising and protecting voting rights. Investors with voting rights should seek to vote shares held and make informed and independent voting decisions, applying due care, diligence, and judgement across their entire portfolio in the interests of beneficiaries or clients.”*

More specifically, there are two separate requests for comments in the recent Proposed Rule, which ICGN has responded to below.

1. Proposed Amendments to Rule 14a-2(b)(9)

ICGN is broadly supportive of the proposed change to Rule 14a-2(b); however, we note that the change represents only a slight give, while leaving the operating portions of the 2020 Final Rule in place. ICGN notes that overall voting results are already widely in favor of management.

The SEC’s adoption of Rule 14a-2(b)(9) required Proxy Voting Advisory Businesses (PVABs) to *“adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants that are the subject of their proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the PVABs’ clients and (B) the PVABs provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding their proxy voting advice by registrants who are the subject of such advice, in a timely manner before the relevant shareholder meeting (or, if no meeting, before the votes, consents or authorizations may be used to effect the proposed action).”*⁵

From the onset of the SEC’s adoption of Rule 14a-2(b)(9), concerns were raised by investors that the Rule could have a chilling effect on their ability to not only receive proxy voting advice in a timely manner but also *independent* research. The provision that registrants would be able to review proxy voting advice in advance of its distribution to clients caused major concern.

The proxy voting advice was being paid for by clients of the PVABs and any delay in receiving the reports could impact their ability to vote in a timely manner.

Proxy ballots contain significant votes for investors, whether they are retail investors or large institutional investors. An issuer’s ballot will contain the election of nominees for the board of directors, the ratification of the auditor, an advisory vote on “Say on Pay” or executive remuneration, and any management and/or shareholder proposals that have been filed. One of the most important votes on the ballot are the votes “for”, “against” or to “withhold” from the directors who are nominated by the issuer. Research and proxy advice provided by PVABs to their clients will include extensive information on each director nominee, any potential conflicts of interest, a review of the board’s diversity, the tenure of the directors, and any over-boarding concerns. Clients, who are investors, should have the tools they need to vote effectively and ensure that those votes are counted in the final tallies.

Since the adoption of the 2020 Final Rules, PVABs have made their advice available to registrants at or prior to the time it is disseminated to their clients. PVABs have modified their businesses to meet the 2020 Final Rule requirements. Investors and registrants have adapted to the sharing of information in such a way that retains the need for investors to receive independent and timely advice.

⁴ [ICGN Global Stewardship Principles 2020](#) (2020).

⁵ 17 CFR 240.14a-2(b)(9)(ii).

As mentioned in the rules commentary, the release of the first annual report, on July 1, 2021, by the Independent Oversight Committee (Oversight Committee) of the Best Practice Principles Group (BPPG), found that all six proxy advisory firms met the standards established in the Best Practice Principles for Providers of Shareholder Voting Research and Analysis, including following the three principles related to (1) service quality, (2) conflicts-of-interest avoidance or management, and (3) communications policy.⁶

2. Proposed Amendment to Rule 14a-9

We also broadly support the proposed alternative solution but believe the SEC could have gone further.

In its commentary, the SEC stated conclusively, but without explanation, that PVABs' proxy voting advice generally would constitute a solicitation subject to the proxy rules. ICGN notes that this determination is different from that applied in the past forty-years. As a solicitation, "proxy voting advice is subject to Rule 14a-9. Rule 14a-9 'prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact.'" ⁷

In our November 2019 letter, ICGN respected the decision by the SEC to characterize proxy voting advice as a solicitation, however, we noted that there were lingering concerns by investors as follows, "*While the ICGN supports the Commission's intention to establish rules and regulations for the protection of investors we are concerned that the call for greater issuer involvement in the proxy advisor process may undermine the reliability and independence of voting recommendations and could have unintended consequences for the proxy advisory firms' ability to independently and timely deliver data, research and advice to their clients in a timely fashion.*"⁸

Furthermore, we emphasised in 2019 that any factual inaccuracies should be corrected, which is a different matter than a disagreement between an issuer and a PVAB on other disputed pieces of information that are subject to interpretation. We noted that: "*We encourage constructive dialogue between proxy advisors and companies particularly when concerns are raised by companies that there may be factual inaccuracies in proxy advisor reports. ICGN advocates that proxy advisors should be accessible to companies to discuss any factual errors, noting that some disputes arise from differences in analytical approach which may then result in a different outcome. Where there is a factual error, the report should be corrected.*"⁹

In explaining the rationale to delete Note (e), the Commission said:

[W]e are proposing to delete Note (e) to Rule 14a-9. As discussed above, Note (e) sets forth examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice. Although Note (e) was intended to clarify the potential implications of Rule 14a-9 for proxy voting advice under existing law, it appears instead to have unintentionally created a misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion. The proposed deletion of Note (e) is intended to address that misperception and thereby reduce

⁶ See BEST PRACTICE PRINCIPLES OVERSIGHT COMMITTEE, Annual Report 2021 (Jul. 1, 2021), available at ([2021-AR-Independent-Oversight-Committee-for-The-BPP-Group-1 \(bppgrp.info\)](https://www.bppgrp.info)) ("2021 Annual Report"). The BPPG was formed in 2014 after the European Securities and Markets Authority requested that PVABs engage in a coordinated effort to develop an industry-wide code of conduct focusing on enhancing transparency and disclosure.

⁷ [Amendments to the Proxy Rules for Proxy Voting Advice \(sec.gov\)](#), p. 25.

⁸ [Letter to the SEC Proxy Advisor Interpretation and Guidance \(icgn.org\)](#), November 21, 2019, pp. 2-3.

⁹ *Ibid*, pp. 3-4.

any resulting uncertainty that could lead to increased litigation risks or the threat of litigation and impaired independence of proxy voting advice.¹⁰

ICGN appreciates the explanation by the SEC that the amendments do “not make ‘mere differences of opinion’ actionable under Rule 14a-9.”¹¹ This clarification may hopefully serve to limit potential litigation costs, which would be passed on to clients. It is fair to say that the drafting and distribution of proxy voting advice to clients requires some degree of subjective thinking and a degree of professional judgment as mentioned by the SEC. It can also be part of a broader engagement strategy, which the SEC appears not to have considered. ICGN would agree that Rule 14a-9 should not be interpreted to subject PVABs to liability for determinations simply because a registrant disagrees with the interpretation. As such, the SEC should add additional language to clarify this point.

The SEC has proposed an alternative solution which ICGN has reviewed. Under the section, “Exempting Certain Parts of PVABs’ Proxy Voting Advice from Rule 14a-9 Liability,” the SEC noted:

Rather than, or in addition to, deleting Note (e) to Rule 14a-9, the Commission could amend Rule 14a-9 to exempt certain portions of proxy voting advice from Rule 14a-9 liability. For example, the Commission could amend Rule 14a-9 to expressly state that a PVAB would not be subject to liability under that rule for any subjective determinations it makes in formulating its recommendations, including its decision to use a specific analysis, methodology or information. The benefit of this alternative would be that it may give PVABs additional comfort that they will not be subject to liability under Rule 14a-9 on the basis of mere disagreement over their analysis, methodology or sources of information.¹²

ICGN recommends that the SEC adopt a clear solution to these express liability concerns to ensure that proxy voting advice can be provided to our members in an independent and timely manner, and without significant cost increases.

ICGN appreciates the opportunity to comment on the proposed amendments, and we hope that our comments are helpful in your deliberations. Should you wish to discuss our comments further, please contact me or George Dallas, ICGN’s Policy Director, by email at george.dallas@icgn.org.

Yours faithfully,



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¹⁰ [Amendments to the Proxy Rules for Proxy Voting Advice \(sec.gov\)](#), p. 28.

¹¹ [Amendments to the Proxy Rules for Proxy Voting Advice \(sec.gov\)](#), p. 26.

¹² [Amendments to the Proxy Rules for Proxy Voting Advice \(sec.gov\)](#), p. 51.