



ICGN

International Corporate Governance Network

The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Allison Herman Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner

c/o Securities and Exchange Commission (SEC)
100 F Street, NE
Washington, DC 20549
United States

By email: rule-comments@sec.gov

21 November 2019

Re: SEC Proxy Advisor Interpretation and Guidance

Dear Commissioners,

The International Corporate Governance Network (ICGN) is a global investor-led body based in London whose mission is to promote effective standards of corporate governance and investor stewardship to advance efficient markets and sustainable economies world-wide.

ICGN was established in 1995, and today our network of governance professionals spans over 45 countries and includes investors representing assets under management in excess of US\$34 trillion. As such, ICGN offers an important investor perspective on corporate governance to help inform public policy development and the encouragement of good practices by capital market participants.¹

Our policy positions are guided by the ICGN Global Governance Principles² and Global Stewardship Principles³, both of which have been developed in consultation with ICGN Members and as part of a wider peer review. One of ICGN's policy priorities relates to shareholder responsibilities, including those related to the exercise of shareholder rights such as proxy voting.

We thank the SEC for the opportunity to weigh in on the proposed amendments to SEC rules governing proxy solicitations. ICGN fully agrees that the proxy voting process should be conducted in a way that allows investors to receive accurate, transparent and complete proxy related information without imposing excessive costs or delays.

However, we regret that the Securities and Exchange Commission (the "Commission") chose not to issue a formal public consultation regarding its earlier *Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*⁴, and *Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*⁵ (together the "Proxy Advisor Interpretation and Guidance") which the Commission published on 21 August 2019.

¹ For more information on the ICGN, please visit www.icgn.org.

² <https://www.icgn.org/policy/global-governance-principles>

³ <https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf>

⁴ Release No. 34-86721.

⁵ Release Nos. IA-5325 and IC-33605

In this letter we would like to respond to these new releases and the Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice and address our concerns around the potential unintended consequences the Proxy Advisor Interpretation and Guidance may have on investor participation in the proxy voting process, and on the resources involved in the process by which investment advisers render their advice.

1. Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

In an increasingly complicated investment landscape, investment advisers often choose to engage the services of data and analytics providers and other research providers to support their investment-related activities. Proxy advisors provide research and analysis services to support investors in exercising a fundamental shareholder right, and stewardship responsibility, that of casting informed votes at a companies' annual general or special meetings.

One of ICGN's seven Stewardship Principles states that 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. It also emphasizes that use of a proxy voting advisor is not a substitute for the investor's own responsibility to ensure that votes are cast in an informed and responsible manner, and that investors should clearly specify how they wish votes to be cast and should ensure that such votes are cast in a manner consistent with their own voting policies.

Since the *Guidance Regarding Proxy Voting Responsibilities of Investment Advisers* changes the extent to which investment advisers can make use of the services of proxy advisory firms, we are concerned that the Guidance may hinder investment advisers in their ability to rely on these services while still fulfilling their fiduciary duties to beneficiaries or clients. According to SEC Commissioner Elad Roisman, the new Guidance "would not change the law or create a new regulatory regime for proxy advisory firms but reiterate longstanding Commission rules and positions that remain applicable and very relevant in today's marketplace." We are however concerned that, based on the prescriptive nature of the Guidance, investment advisers will face a significant increase in the time and resources they will have to spend on meeting their stewardship responsibilities through the exercise of their voting rights on behalf of their clients and beneficiaries. Indeed, the interpretation and guidance statement fails adequately to analyze the potential costs to investment agents, many of whom are members of the ICGN. The SEC was created to fulfill its mission, the first of which is to protect investors. Proxy voting is regarded as a fundamental fiduciary responsibility of institutional investors, who vote to represent fund beneficiaries, the ultimate share-owners. The SEC has spent considerable time discussing how to protect investors. We are concerned that this latest action is counter to protecting investors because it could impact timely and independent voting.

2. Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice

The new *SEC Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice* states that proxy voting advice by proxy advisory firms constitutes a solicitation, regardless of whether the person is seeking authorization to act as a proxy and even if the person seeking influence is indifferent to its ultimate outcome.

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.

In that regard, we also note the Commission's proposed rule amendments of 5 November⁶ where it 'is proposing amendments to its rules governing proxy solicitations. This is to help ensure that investors who use proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions, and in a manner that does not impose undue costs or delays that could adversely affect the timely provision of proxy voting advice.'

Regarding the proposal for further rulemaking around proxy solicitation rules 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. In that regard, we have also taken note of the different recent public statements of the SEC Commissioners at the open meeting of 5 November.

While investors may expect that proxy advisors act in full independence of issuers, we challenge the introduction of a mandatory requirement of prior review or influence by issuers of the product of proxy advisors. This particular aspect of Guidance strikes us as misaligned with the fundamental purpose of proxy advisors, and indeed may undermine the independent nature of their recommendations and serve to slow down the proxy recommendation process – especially of concern during the busy proxy season. Similar to what we observed in our comment letter to the Commission regarding the Corporate Governance Reform and Transparency Act of 2016 the "likely outcomes are likely to be anathema to its stated intent".⁷

Many ICGN institutional investor members are responsible for voting at thousands of publicly traded companies across the globe, with multiple ballot items, and today this is efficiently facilitated via the use of research provided by a variety of service providers. While there may be a perception by some that investors 'blindly' defer to proxy advisory advice, we believe this not to be the case for the majority of ICGN Members. In fact, the policies that proxy advisors adopt often reflect the consensus opinion of global investors and, in many cases, investors instruct their proxy advisors to vote specifically in alignment with their in-house voting policies.

Another consideration is that public company proxy statements are typically lengthy documents, drafted by the management of the companies. The proxy statement is written to present a company's financial overview, proxy materials, directors' qualifications, executive remuneration and performance plans, and any shareholder proposals to seek support for management. Institutional investors should be able to receive independent review and research on public companies' proxy statements and any voting items in the ballot. Institutional investors already have access to the company's proxy statement and may review it along with independent research to inform their votes.

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

⁶ <https://www.sec.gov/rules/proposed/2019/34-87457.pdf>

⁷ ICCN sent the following comment letter to the Securities and Exchange Commission in 2016 with regard to the Corporate Governance Reform and Transparency Act of 2016 (HR 5311):

https://www.icgn.org/sites/default/files/Corporate%20Governance%20Reform%20and%20Transparency%20Act%202016_1.pdf

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. However, ICGN does not advocate that proxy advisors should be required to mandatorily share advance copies of their reports with companies for regular review as has been proposed by the Commission. Rather, this should be a matter of choice for the individual advisor. However, guidance would be appropriate to encourage early engagement between advisers and issuers on matters of fact, on a timely basis, to provide greater confidence in the accuracy of facts underpinning recommendations. Such focus should not in any way compromise the independence of advice but provide greater confidence that recommendations are soundly based.

3. Best Practice Principles for Shareholder Voting Research and Analysis

In the context of the Proxy Advisor Interpretation and Guidance we would like to bring to the Commission's attention the [2019 Best Practice Principles for Shareholder Voting Research & Analysis](#) (BPPG), published on 22 July 2019, which were developed within the framework of a structured Independent Review Process which referred to the [Follow-up Report on the development of the 'Best Practice Principles for Providers of Shareholder Voting Research and Analysis'](#), the [requirements of the revised EU Shareholder Rights Directive II](#) and the latest updated stewardship codes globally. These principles and accompanied guidance not only address the accuracy, transparency, and completeness of the information investors use to make well-considered voting decisions, but also the importance of avoidance or management of conflicts of interest.

The Independent Review Process also referred to the important input of regulators, investors, issuers and other stakeholders received through a Public Consultation by the BPPG (completed in December 2017), 2017 and 2019 Stakeholder Advisory Panels and a June 2019 BPPG Stakeholder Preview Event.

Furthermore, we refer the Commission to the approach taken by the UK Financial Reporting Council in the recently published Stewardship Code ("UK Code") which may offer a suitable model to emulate. The UK Code places renewed emphasis on service provider responsibilities with six principles explicitly defined. Also, other recent global developments around stewardship responsibilities and service provider regulation, such as in the revised EU Shareholder Rights Directive II, explicitly require greater transparency of proxy advisors.⁸

We hope our comments are useful for your deliberations. Should you wish to discuss this matter further, please contact me or George Dallas, ICGN's Policy Director, by email at george.dallas@icgn.org.

Yours faithfully,



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⁸ See *Article 3j* regarding Transparency of proxy advisors of the revised EU Shareholder Rights Directive II: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0828&from=EN>

Copies

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