



CENTER FOR CAPITAL MARKETS  
C O M P E T I T I V E N E S S

**TOM QUAADMAN**  
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
(202) 463-5540  
tquaadman@uschamber.com

July 19, 2021

The Honorable Gary Gensler  
Chairman  
U.S. Securities and Exchange Commission  
Washington, DC 20549

**Re: Review and Non-enforcement of Proxy Advisor Rule**

Dear Chairman Gensler:

The U.S. Chamber of Commerce (“the Chamber”) writes to express our serious concern over the recent announcement<sup>1</sup> that staff of the Securities and Exchange Commission (“SEC” or “Commission”) will not enforce the proxy advice rule adopted by a vote of the Commission in July 2020 (“Proxy Advisor Rule” or “Rule”).<sup>2</sup> Further, because the SEC plans to conduct a review of the Proxy Advisor Rule, the Chamber wishes to provide recommendations for how the SEC can take additional action to improve the transparency and quality of the proxy advisory system in the United States.

The Proxy Advisor Rule was adopted by a full vote of the Commission in July 2020 after a careful and well-informed regulatory process that considered the views of a broad spectrum of stakeholders.<sup>3</sup> The Commission’s efforts were further bolstered by its decade-long examination of the role proxy advisory firms play in corporate governance and the need to address serious flaws within the industry that had been identified to protect investors.

By contrast, the abrupt decision to suspend enforcement of the Rule appears to be an effort to placate the proxy advisor oligopoly and a minority of activists that wish to preserve the status quo. The decision is void of any evidence or methodical arguments for why non-enforcement is in the best interest of investors. Key provisions of the Proxy Advisor Rule have yet to go into effect, so it is not possible for the Commission to make a reasoned determination for how the rule has functioned in practice.

---

<sup>1</sup> 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. Division of Corporation Finance (June 1, 2021)

<sup>2</sup> Exemptions from the Proxy Rules for Proxy Voting Advice (July 22, 2020)

<sup>3</sup> “SEC Adopts Amendments to Provide Investors Using Proxy Voting Advice More Transparent, Accurate and Complete Information” (July 22, 2020)

More fundamentally, we are concerned about the precedent this decision sets by signaling to market participants that the SEC can arbitrarily pick and choose what regulations it wishes to enforce. The SEC is an agency of limited resources and establishing regulatory and enforcement priorities has always been a necessity. However, the decision to effectively ignore a Commission rule adopted less than a year ago is unprecedented, raises serious concerns about the Commission's deliberative process, and harms the SEC's reputation as an independent regulator that is free from political agendas.

The Chamber wishes to provide the following views and recommendations to the SEC on this critical issue:

- 1. The Proxy Advisor Rule is grounded in years of evidence and data regarding flaws in the proxy advisory system that harm investors and competition - the SEC should prioritize effective oversight and enforcement of the Rule;**
- 2. The SEC should preserve its longstanding view that proxy advice constitutes a "solicitation" under the Federal proxy rules;**
- 3. As the SEC considers "further regulatory action" regarding proxy voting advice and proxy advisors, it should revisit some provisions of the November 2019 rule proposal that were not finalized.**

These views are discussed in more detail below.

**The Proxy Advisor Rule is grounded in years of evidence and data regarding flaws in the proxy advisory system – the SEC should prioritize effective oversight and enforcement of the Rule.**

Proxy advisors have received increased attention during the last decade from the SEC, members of Congress, academics, and market participants over serious deficiencies within the industry. While proxy advisors undoubtedly play an important role in the corporate governance ecosystem, they have been criticized over their conflicts of interest, lack of transparency, and tendency to make significant factual and analytical errors when developing vote recommendations. The industry is also dominated by two firms – Institutional Shareholder Services (ISS) and Glass Lewis – that, until the Proxy Advisor Rule was adopted, were effectively able to set their own regulatory standards for how to operate. These inherent flaws ultimately harm Main Street investors if the voting decisions of fiduciaries are based upon flawed information, influenced by conflicts of interest, or do not always prioritize the economic interests of shareholders.

The Proxy Advisor Rule was adopted after a thorough and transparent rulemaking process that considered the views of a wide spectrum of stakeholders. The Rule serves two purposes. It ensures that institutional investors receive the most accurate and objective information available when making voting decisions and also promotes more transparency within the proxy advisory industry. The Rule was informed by a public roundtable held by the

SEC in November 2018,<sup>4</sup> public comments submitted on the November 2019 rule proposal,<sup>5</sup> and countless meetings that commissioners and staff of the SEC held with investors, public companies, and others involved in the proxy process.

Contrary to how some special interests have portrayed the Rule, addressing problems with proxy advisors is not an idea that came out of thin air. In fact, the SEC has been grappling with this issue for over a decade under the leadership of both parties. They previously took action to improve the quality of proxy advice and reaffirm the fiduciary duty of institutional investors that hire proxy advisors. These efforts include:

- The SEC’s 2010 “proxy plumbing” release, which acknowledged concerns over proxy advisor conflicts of interest and transparency, and sought public input for how best to address these flaws;<sup>6</sup>
- A public roundtable held by the SEC in 2013 to solicit views from the public regarding the role of proxy advisory firms and ideas for reform;<sup>7</sup>
- The issuance of Staff Legal Bulletin 20 (SLB 20) in 2014, which reaffirmed the responsibilities of institutional investors that hire proxy advisory firms. SLB 20 stated then when receiving vote recommendations, clients of proxy advisor firms should “(i) ensure that its proxy voting recommendations are based on current and accurate information and (ii) identify and address any conflicts of interest and any other considerations that the investment adviser believes would be appropriate in considering the nature and quality of the services provided by the proxy advisory firm;<sup>8</sup>”
- The withdrawal of two no-action letters in 2018 that had contributed to an overreliance on proxy advisory firms and allowed conflicts of interest to proliferate throughout the industry;<sup>9</sup> and,
- Commission-level guidance in 2019, which again reminded institutional investors they cannot blindly outsource their voting obligations to proxy advisors.<sup>10</sup>

Additionally, proxy advisor reform has won bipartisan support in Congress, including House passage of legislation in 2017 that would require proxy advisors to register with the SEC and become subject to regular examinations.<sup>11</sup> Bipartisan legislation was also introduced in the Senate in 2018 that would mandate the registration of proxy advisory firms under the

---

<sup>4</sup> Roundtable on the Proxy Process (November 15, 2018)

<sup>5</sup> Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (November 5, 2019)

<sup>6</sup> Concept Release on the U.S. Proxy System (July 14, 2010)

<sup>7</sup> Proxy Advisory Services Roundtable (December 5, 2013)

<sup>8</sup> Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms (June 30, 2014)

<sup>9</sup> Statement Regarding Staff Proxy Advisory Letters (September 2018)

<sup>10</sup> Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (August 21, 2019)

<sup>11</sup> H.R. 4015, Corporate Governance Reform and Transparency Act of 2017

Investment Advisers Act.<sup>12</sup> These efforts demonstrate the longstanding bipartisan support for the SEC to adopt regulatory reforms for proxy advisors to protect investors.

Since the SEC promulgated the Proxy Advisor Rule, new evidence has come to light which shows why strong enforcement of the Rule is necessary. A recent report from the Manhattan Institute found the practice of “robovoting” (i.e. institutional investors automatically following the recommendations of proxy advisors) remained a problem during the 2020 proxy season. According to the report, over 100 institutional investors – managing over \$5 trillion in assets – voted in lockstep with either ISS or Glass Lewis during 2020, calling into question whether these investors are fulfilling their fiduciary duty to clients.<sup>13</sup>

Another report from the American Council for Capital Formation (ACCF) highlighted at least 42 instances during the 2020 proxy season where issuers had to file supplemental proxy materials with the SEC to dispute or correct errors contained in ISS or Glass Lewis recommendations.<sup>14</sup> A recent research paper found proxy advisors give advice that is often distorted in a way that advances the agenda of “socially responsible” activist investors and is not necessarily based upon what is in the best economic interest of all investors.<sup>15</sup>

The Proxy Advisor Rule contained reasonable, non-invasive provisions to address these problems. The Rule codifies the longstanding SEC interpretation that proxy advice constitutes a “solicitation” under the Federal proxy rules. It requires that proxy advisors maintain policies to provide robust disclosure regarding conflicts and to establish a mechanism for issuers to review and provide comments on draft recommendations. Importantly, the Rule also clarifies that the antifraud provisions under Rule 14a-9 apply to any false or misleading statements made by proxy advisors.

It is worth noting that the SEC made significant changes to the November 2019 proposal when it issued the Proxy Advisor Rule in July 2020. The final Rule adopted more of a principles-based approach to compliance, as compared to the proposal, and incorporated many of the concerns and comments raised by proxy advisors and others during the rulemaking process. Additionally, the proposal contained certain provisions intended to more broadly address the robovoting problem. These included a “speed bump” that would disable automated voting by proxy advisors and incentivize institutional investors to consider all the facts and evidence prior to voting on proxy matters. While the Chamber preferred that some of the proposal’s provisions be maintained, in terms of the SEC’s obligations under the APA, this was a model regulatory effort defined by transparency and the incorporation of public input.

By contrast, there is no underlying rationale or transparency behind the brief statement issued by the Division of Corporation Finance last month to announce the Proxy Advisor Rule will not be enforced until the Rule is reviewed. This approach substitutes the judgement of SEC

---

<sup>12</sup> S. 3614, Corporate Governance Fairness Act

<sup>13</sup> Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting (April 22, 2021)

<sup>14</sup> Are Proxy Advisors Still a Problem? 2020 Proxy Season Analysis Shows Companies Believe Errors Continue (July 2020)

<sup>15</sup> Does Proxy Advice Allow Funds to Cast Informed Votes? (J. Matsusaka, C. Shu) (June 13, 2021)

staff for that of the Presidentially-appointed commissioners who voted for the Proxy Advisor Rule and undermines the thorough rulemaking process undertaken by the SEC.

The SEC faces a high hurdle in reconsidering this carefully conducted rulemaking that was supported by a decade of Commission activity, careful cost-benefit analysis, and thorough consideration of extensive public comments. The decision not to enforce it will be to the detriment of Main Street investors and will invite focused scrutiny of any future regulatory action by the Commission concerning proxy advisors.

**The SEC should preserve its longstanding view that proxy advice constitutes a “solicitation” under the Federal proxy rules.**

The Chamber is somewhat perplexed by the recent directive to SEC staff to review the codification of proxy advice as a “solicitation” under the Federal proxy rules. It is unclear why the SEC would choose to review this now given that the Commission has for years defined proxy advice as a solicitation without controversy.

For example, SLB 20 noted that *“As a general matter, the Commission has stated that the furnishing of proxy voting advice constitutes a “solicitation” subject to the information and filing requirements of the federal proxy rules. Providing recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy would subject a proxy advisory firm to the proxy rules.”* The Proxy Advisor Rule also notes that the SEC treated proxy advice as a solicitation as early as 1964 and reiterated that position in 1979 and 2010.<sup>16</sup>

ISS, the largest proxy advisor firm, has itself in the past acknowledged that proxy advice constitutes a solicitation – a position it now has elected to refute. The former CEO of Glass Lewis has also testified before Congress that proxy advisory firms are “subject to the SEC’s proxy solicitation rules” under the Securities Exchange Act.<sup>17</sup>

Put simply, there is no historical or evidentiary basis that the SEC has elected to treat proxy advice as anything other than a solicitation under the Federal proxy rules. Proxy advisors’ efforts to contradict the SEC’s longstanding position are nothing but an open attempt to avoid SEC oversight and accountability. In the interest of protecting investors, the SEC should reject these efforts and maintain its interpretation of proxy advice as a solicitation.

**As the SEC considers “further regulatory action” regarding proxy voting advice and proxy advisors, it should revisit some provisions of the November 2019 rule proposal that were not finalized.**

We noted your statement of June 1<sup>st</sup> directing staff to “consider whether to recommend further regulatory action regarding proxy voting advice.”<sup>18</sup> It is the prerogative of the SEC to review existing rules for their effectiveness as market conditions evolve. Indeed, the Chamber has historically supported such retrospective reviews at the SEC and other Federal agencies

---

<sup>16</sup> Proxy Advisor Rule at 42.

<sup>17</sup> Proxy Advisor Rule at 44-45

<sup>18</sup> Statement on the application of the proxy rules to proxy voting advice (June 1, 2021)

aimed at improving or updating regulations. Chamber support has been contingent upon reviews being consistent with the APA and other legal and ethical requirements.

In this case, the thoughtful approach would be to allow the Rule to fully go into effect so that the staff can provide recommendations to the Commission for how the Rule could be improved. The staff has no data or experience associated with the application of the rule that could justify a fundamentally different assessment of the costs and benefits of the rule than the one reached less than a year ago. It will be extremely difficult, if not impossible, for SEC staff to conduct an appropriate review given that staff has *already decided not to enforce the existing rule*. Nevertheless, the Chamber would welcome an opportunity to formally suggest the SEC revisit key provisions of the 2019 rule proposal and consider further strengthening the Proxy Advisor Rule in the coming years.

For example, the 2019 proposal included provisions intended to address robovoting, including a “speed bump” to disable automated voting by proxy advisors on behalf of institutional investors. The Commission-level guidance issued in 2019<sup>19</sup> and subsequent supplemental guidance<sup>20</sup> also cautioned against robovoting and reminded institutional investors they have a fiduciary duty to assess the quality, objectivity, and accuracy of proxy advisor firm recommendations prior to casting votes. Any efforts to weaken this guidance would harm investors by likely resulting in a greater reliance on proxy advisory firms despite the fundamental conflicts and deficiencies that exist within the two largest firms.

The 2019 rule proposal also would have imposed explicit requirements for proxy advisors to disclose conflicts of interest and to provide issuers with sufficient time to review and comment on recommendations to maintain an exemption from the proxy solicitation rules. These explicit requirements contrasted with the more principles-based approach of the final Rule, which generally required proxy advisors to have policies and procedures in place for conflict disclosure and issuer review.

We take the directive to consider “further regulatory action” to mean that the SEC will actively consider whether the Commission should in fact promulgate *additional* regulations for proxy advisors—especially in light of the documented issues noted above concerning proxy advisors during the most recent proxy season. The SEC must justify how its sudden reversal protects investors and comports with the carefully considered evolution of proxy advisor regulation over the last decade. We hope that this is not just a predetermined effort to weaken the Rule to appease proxy advisors and their political allies that dismisses the careful analysis supporting past Commission pronouncements and actions on this issue. While the principles-based approach in the final Rule was a major step in terms of reform, its effectiveness was largely dependent upon the SEC actually enforcing its own rules – an outcome that can no longer be taken for granted.

---

<sup>19</sup> Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (effective September 10, 2019)

<sup>20</sup> Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (effective September 3, 2020)

## Conclusion

The Chamber urges the SEC to reconsider the non-enforcement policy it announced on the Proxy Advisor Rule and to be more transparent as it considers further regulatory action for proxy advisors. As we have for over a decade, the Chamber looks forward to safeguarding market participants by being actively engaged in the regulatory process. We hope to ensure that proxy advisors are transparent and accountable in their practices, and that the advice they give is always tied to the economic interests of investors.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Quadman', with a long, sweeping horizontal stroke extending to the right.

Tom Quadman