GLASS LEWIS

November 14, 2018

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: SEC Staff Roundtable on the Proxy Process – File Number 4-725

Dear Chairman Clayton:

Glass Lewis appreciates the opportunity to submit this statement for the record as part of the SEC Roundtable on the Proxy Process, scheduled to be held on November 15, 2018 ("Roundtable").

Founded in 2003, Glass Lewis is a leading, independent governance services firm that provides proxy research and vote management services to more than 1,300 institutional investor clients throughout the world. While, for the most part, investor clients use Glass Lewis research to help them make proxy voting decisions, these institutions also use Glass Lewis research when engaging with companies before and after shareholder meetings. Further, through Glass Lewis' Web-based vote management system, Viewpoint®, Glass Lewis provides investor clients with the means to receive, reconcile and vote ballots according to custom voting guidelines and record-keep, audit, report and disclose their proxy votes. From its offices in North America (San Francisco, New York and Kansas City), Europe (Limerick, London, and Karlsruhe) and Australia (Sydney), Glass Lewis' 360+ employees provide research and voting services to institutional investors globally that collectively manage more than US $35 trillion.

Glass Lewis believes that governance services firms play an important support role, helping institutional investors meet their fiduciary responsibility to vote thousands of securities in an informed manner, usually in a very compressed timeframe. Providing corporate governance services to institutional investors is Glass Lewis' core business and sole focus. Indeed, Glass Lewis does not offer consulting services to corporate issuers, directors, dissident shareholders or shareholder proposal proponents.

As part of our response, we would like to focus on the role of proxy advisory firms; directly address some of the areas you mentioned may warrant attention as they relate to the proxy voting services we provide to our clients; and provide feedback on some of the other agenda items scheduled to be discussed at the Roundtable.

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The Role of Proxy Advisory Firms

The primary role of a proxy services provider is to execute votes on behalf of investor clients in accordance with the specific instructions of those clients.
To that end, Glass Lewis implements client voting policies on the proxy advisor's vote management system so that each ballot populates with recommendations based on the specific policies of the client, enabling clients to submit votes in a timely and efficient manner. Using the term "robo-voting" to describe how votes are cast by institutional investors that engage the services of a proxy advisor is an unfair characterization of the management and oversight of the voting process by those investors.

The guidance from the SEC in Staff Legal Bulletin No. 20 ("SLB 20") was clear. Institutional investors understand that they are in control of and ultimately responsible for their voting decisions. Though the guidance in SLB 20 was not overly prescriptive, investors do employ a variety of methods to oversee the voting process, beginning with their selection of a proxy advisor and continuing throughout their use of that proxy advisor.

Each investor client owns the formulation of its voting policies. For instance, during the policy formulation process, an institution will thoroughly review the policies of its proxy advisor to assess the similarities and differences between the institution's views on certain issues versus the views of the proxy advisor, as noted in its house policy. In some instances, an investor client may elect to implement the same policy as the proxy advisor for some or all of the issues up for vote. Mainly because, after completing an extensive due diligence process, the institution determines that the proxy advisor's policy is philosophically aligned with its own policy, as well as with the views of its investment management team, proxy committee, mutual fund board or other decision-making bodies within its organization. This practice of adopting all or some of an advisor's house policy, however, is by no means the norm.

The vast majority of institutional investors who engage a proxy advisor are opting for increasingly more detailed policies with specific views on how to address all issues that may come up on a proxy (e.g. U.S. companies alone have approximately 250 issues). More importantly, in many instances, their views are so specific to each unique situation that they will often opt for case-by-case analysis. Arguing that proxy advisors exert undue influence on investors is simply untrue. This is clearly evidenced by the fact that during the 2017 proxy season Glass Lewis recommended voting FOR 92% of the proposals it analyzed from the U.S. issuer meetings it covers (the board and management of these companies recommended voting FOR 98% of the same) and yet, directors received majority FOR votes 99.9% of the time.

Further, an analysis of Glass Lewis client voting at US meetings from July 1, 2017 through June 30, 2018 showed the following:

- **Say on Pay**
  - Clients whose selected policy is equal to the Glass Lewis policy, yet voted different than Glass Lewis policy: 14% of votes cast.
  - Clients whose selected policy is a policy different than the Glass Lewis policy, yet voted different than the client policy: 37% of votes cast.

- **Shareholder Proposal: Separation of Chairman and CEO**
  - Clients whose selected policy is equal to the Glass Lewis policy, yet voted different than Glass Lewis policy: 14% of votes cast.
  - Clients whose selected policy is a policy different than the Glass Lewis policy, yet voted different than the client policy: 41% of votes cast.

- **Shareholder Proposal: Political Contributions**
  - Clients whose selected policy is equal to the Glass Lewis policy, yet voted different than Glass Lewis policy: 26% of votes cast.
  - Clients whose selected policy is a policy different than the Glass Lewis policy, yet voted different than the client policy: 57% of votes cast.

- **Shareholder Proposal: Gender Pay Equity**
  - Clients whose selected policy is equal to the Glass Lewis policy, yet voted different than Glass Lewis policy: 18% of votes cast.
  - Clients whose selected policy is a policy different than the Glass Lewis policy, yet voted different than the client policy: 61% of votes cast.

- **Shareholder Proposal: Majority Voting**
  - Clients whose selected policy is equal to the Glass Lewis policy, yet voted different than Glass Lewis policy: 13% of votes cast.
  - Clients whose selected policy is a policy different than the Glass Lewis policy, yet voted different than the client policy: 19% of votes cast.

The market is clearly working, as shareholders are voting independently of both proxy advisors and company management.

As it relates to the actual casting of votes, under no circumstance is Glass Lewis authorized to deviate from a client's instructions or to determine a vote that is not consistent with the policy specified by the client. The pre-population of voting instructions on a ballot strictly adheres to each client's specific voting instructions. Importantly, when a preliminary ballot is ready for review, the proxy advisor's voting system will alert each client and provide clients with all the disclosures and other information they need at their fingertips to review and evaluate the matters up for a vote. Clients can choose to restrict the submission of a ballot until after specified client personnel have reviewed and approved the votes. Clients can also make (and often do make) changes to the preliminary ballot before signing off. And, assuming the voting deadline has not passed, they can even change their vote and resubmit it. Investors take their fiduciary responsibility to vote shares, engage with issuers and operate as good stewards very seriously. This is evidenced by the fact that they regularly audit the voting to ensure their proxy advisor is processing their ballots in accordance with their pre-established instructions.

Also, worth noting, is the clear fact that the rationales for arriving at a vote decision, especially amongst investors, are often varied, even if the vote is ultimately the same. In many instances, when companies are talking to shareholders, engaging with proxy advisors and reading such advisors' publicly-available policies and methodologies, it should come as no surprise that the voting results may mirror the recommendations issued by proxy advisors as there are many commonly accepted governance principles used by both investors and advisors. To state that investor clients are "robo-voting" their proxies simply because of the existence of default electronic voting, combined with the speed with which votes are cast, and the fact that clients' votes often mirror the recommendations issued by proxy advisors, implies a true lack of understanding of an investor's fiduciary obligations and how they honor it (not to mention, the role of its proxy advisor).

Roundtable Topics Related to Proxy Advisors

1. Have various factors, including legal requirements, resulted in investment advisers, funds and other clients relying on proxy advisory firms for information aggregation and voting recommendations to a greater extent than they should? Is the extent of reliance on these firms in the best interests of investment advisers and their clients, including funds and fund shareholders?

Institutional investors have a fiduciary responsibility to vote proxies in a manner that is in the best interests of their beneficiaries. Availing themselves of qualified advisors – such as Glass Lewis – whose interests are aligned with those of their institutional investor clients to help fulfill this responsibility is prudent and by no means undermines a beneficiary's rights.

As mentioned above, the supermajority of Glass Lewis clients, which include the majority of the world's largest public pension funds, asset managers and mutual funds, vote according to a custom policy or via a custom process, in what is becoming the standard practice among

institutional investors. Accordingly, custom policy clients rely on Glass Lewis more for data and custom analysis than for Glass Lewis' voting recommendations.

Glass Lewis supports its clients in the development and implementation of their custom policies. A client's existing voting policy is initially reviewed both by research staff and a dedicated custom policy team, in order to identify areas that require further discussion with the client before the custom policy is implemented. During the implementation process, the Glass Lewis custom policy team discusses the options that can be used to accommodate the client's specific approaches to various issues. Once the policy is fully developed, the client reviews a final implementation document to ensure that its policy is being implemented by Glass Lewis in a manner that is in line with the client's instructions. Throughout the year, custom policy managers monitor trends and developments in corporate governance and proxy voting, and will consult with clients to implement new approaches that are consistent with their policies. In addition, Glass Lewis conducts annual policy reviews with each custom policy client to further analyze the client's policy and discuss any developments that might result in modifications to the policy.

Both Glass Lewis and its investor clients have policies and procedures for monitoring the accuracy of proxy policy implementation and voting activity in order to ensure votes are being cast in accordance with client specifications. These reviews include but are not limited to spot audits throughout season, comprehensive audits post-season, and annual due-diligence visits by compliance personnel at the investor client that are independent of the people responsible for voting.

2. Are issuers being given an appropriate opportunity to raise concerns if they disagree with a proxy advisory firm's recommendations, including, in particular, if the recommendation is based on erroneous, materially incomplete, or outdated information?

Glass Lewis strongly believes its analysis, research and recommendations should be based on publicly-available information and encourages companies to provide comprehensive and clear disclosure about the relevant issues for consideration by shareholders.

In order to ensure the data Glass Lewis uses in the formulation of its proxy research reports is complete and factually correct, Glass Lewis has a resource center[1] on its website designed specifically for the issuer community via which public companies, their directors and advisors can, among other things: (i) submit company filings or supplementary publicly-available information; (ii) participate in Glass Lewis' Issuer Data Report ("IDR") program, prior to Glass Lewis completing and publishing its analysis to its investor clients; and (iii) report a purported factual error or omission in a research report, the receipt of which is acknowledged

[1] http://www.glasslewis.com/issuer-overview/

immediately by Glass Lewis, then reviewed, tracked and dealt with internally prior to responding to the company in a timely manner.

Glass Lewis's IDR program allows issuers to request, and be provided with, a data-only version of its research report, free of charge. The IDR is made available to issuers prior to Glass Lewis completing the analysis that is based on that data. This review process enables issuers to notify Glass Lewis of any factual mistakes in the publicly-available data we have collected from issuers and third-party sources, prior to our completing and publishing the analysis for our investor clients. The IDR service is available to all issuers that sign up for the IDR prior to releasing their proxy materials for the relevant meeting.

Moreover, if Glass Lewis is notified of a purported factual error or omission after a report has been published, we immediately review the report and, if there is a reasonable likelihood the report will require revision, we remove the report from its published status so no additional clients can access it. If a report is updated to reflect any new publicly-available disclosures by the issuer or the correction of a factual error, Glass Lewis notifies all clients that accessed the report or have corresponding ballots, regardless of whether the update affected any recommendations. There is no deadline for notification of a purported factual error or omission. Additionally, the exact nature of the report's updates and revisions are clearly described in the republished report. If an issuer notifies Glass Lewis of a relevant purported factual error or omission in a report, Glass Lewis' research team will respond and address the issuer's comments and/or questions.

Glass Lewis is committed to ensuring its Proxy Paper reports contain accurate information. Accuracy is reported independently of research teams on a companywide basis; is a key determinant in the performance assessment of analysts; and is strongly aligned with our competitive interests of retaining and winning clients. This accuracy and omission data is also made available to our clients and prospects as they exercise due diligence of our services.

3. Is there sufficient transparency about a proxy advisory firm's voting policies and procedures so that companies, investors, and other market participants can understand how the advisory firm reached its voting recommendations on a particular matter, and whether comparisons of recommendations across similarly situated companies have value?

Glass Lewis believes in being forthcoming with policies and procedures for analyzing companies on behalf of its clients. Therefore, the firm publicly discloses significant information about its research policies and approach[2], including our full U.S. guidelines, as well as the voting guidelines for other major countries[3]. The disclosure describes Glass Lewis' case-by-case approach to analyzing issues submitted for shareholder vote at company shareholder meetings

[2] http://www.glasslewis.com/understanding-our-compensation-analysis/
[3] http://www.glasslewis.com/guidelines/

and notes the firm's belief that each company should be evaluated based on its own unique facts and circumstances, including performance, size, maturity, governance structure, responsiveness to shareholders, domicile and stock exchange listing.

For example, Glass Lewis tailors its approach to each country's relevant regulations, practices and corporate governance codes and consults with Glass Lewis' Research Advisory Council[4], an independent external group of prominent industry experts, to ensure Glass Lewis' proxy voting policies are comprehensive, well-reasoned and reflective of current global governance and regulatory practices and developments. In addition, Glass Lewis engages and maintains an ongoing dialogue with a wide range of market participants, actively participates in panels, working groups and industry conferences, and revises and enhances its methodologies, at least annually, in response to regulatory developments, market practices and issuer trends.

Glass Lewis' public Statement of Compliance with the Best Practice Principles for Providers of Shareholder Voting Research & Analysis[5] (BPP) contains substantially more information about the Glass Lewis research approach and methods, including statistics on voting recommendations in conflicted situations or when a client is a shareholder proponent. The publicly-available Statement of Compliance also outlines how Glass Lewis develops its proxy voting policies.

Glass Lewis also recognizes that dialogue, at the appropriate time, with all issuers that wish to engage can foster mutual understanding, transparency and feedback with respect to Glass Lewis' policies, methodologies and analysis, as well as the unique circumstances that each issuer faces based on a multitude of factors (e.g., their size, industry, operations and maturity). Therefore, Glass Lewis is open to engaging with any issuer that wants to engage outside of the solicitation period.

In addition to issuers requesting meetings, Glass Lewis has an ongoing practice of proactively contacting companies globally. By way of example, in 2017 alone we contacted more than 13,000 companies (one-third of which are based in the United States and Canada), to provide them with free and comprehensive information on topics relating to Glass Lewis, including: (i) policy and guideline information; (ii) directions for how to sign up for the free IDR service; (iii) directions for how to request an engagement with Glass Lewis (always at no cost); and (iv) directions for how to provide feedback on Glass Lewis reports and policies.

Through this process, Glass Lewis engaged with more than 2,300 issuers in 2017, nearly half of which independently requested a meeting with Glass Lewis analysts. As a result, Glass Lewis conducted nearly 1,400 formal meetings with almost 1,100 issuers in person or by phone in 2017, many of which were with issuers that engage with Glass Lewis at least once annually.

[4] http://www.glasslewis.com/leadership-2/
[5] http://www.glasslewis.com/wp-content/uploads/2018/02/GL-Compliance-Statement-2018.pdf

Typically, these meetings focus on Glass Lewis' research policies and methodologies and participants' respective views on governance practices given the unique context of their companies. Glass Lewis declined 6% of meeting requests, as they breached our policy of not engaging with issuers during the solicitation period preceding the issuer's shareholder meeting (see below). Additionally, issuers withdrew 7% of meeting requests, as a meeting was no longer required following our response to their initial inquiry.

We believe that allowing an issuer to engage with us during the solicitation period may lead to discussions about the issuer's proxy, thereby providing issuers with an opportunity to lobby Glass Lewis for a change in policy or a specific recommendation against management. To ensure our research is always objective, Glass Lewis takes this added precaution and postpones any engagements until after the solicitation period has ended, with the below exception.

In the case of a dissident campaign, transaction or shareholder proposal, Glass Lewis may meet with the shareholder proponent or dissident during the solicitation period – but only if we afford the issuer the same opportunity. These meetings may provide our analysts with useful context given the unusual volume and timing of disclosures made during the solicitation period of these extraordinary shareholder meetings. As is always the case, however, it is important to reiterate that our analysis and recommendations are based solely on publicly-available information. In the event Glass Lewis does agree to hold such meetings, it makes full disclosure of this decision in the relevant Proxy Paper reports we publish.

During the solicitation period, issuers and clients can and do contact Glass Lewis to provide additional information and clarifications, or to allege an error or omission in any of our reports, via our online, auditable process for receiving, tracking and responding to such queries and notifications. Any issuer or client that contacts us regarding these matters will receive a timely response from our engagement team and, if appropriate, from the analyst(s) responsible for the relevant report. Glass Lewis' analysts may also use the same process to seek clarification from an issuer in the rare circumstance that its public disclosure is unclear. However, in furtherance of Glass Lewis' commitment to avoid any conflicts of interest, as well as to refrain from using non-public information, analysts are strictly prohibited from meeting privately with issuers during the solicitation period.

Engagement meetings are always held at no cost to the issuer company, shareholder proponent or dissident. This is in line with Glass Lewis' commitment to avoid any conflicts of interest.

4. Are proxy advisory firms adequately disclosing and mitigating conflicts of interest?

Glass Lewis has robust policies and procedures in place to help monitor, manage and address any potential conflicts that may arise in the course of its business. These conflict management

policies and procedures, comprised of Glass Lewis' Conflict of Interest Statement[6], Conflict Management Procedures and Code of Ethics, were developed to support investment advisers' responsibilities in voting client proxies and retaining proxy advisory firms, as detailed in SLB 20.

Glass Lewis eliminates, reduces and discloses – proactively, explicitly and comprehensively – potential conflicts, to the greatest extent possible.

For instance, Glass Lewis strongly believes that the provision of consulting services to corporate issuers, directors, dissident shareholders and/or shareholder proposal proponents, creates a problematic conflict of interest that goes against the very governance principles for which we advocate. As a result, Glass Lewis does not have a consulting business. This helps ensure that our voting recommendations and analysis are disinterested.

In addition, to ensure that Glass Lewis' Proxy Paper reports and vote recommendations are in no way influenced by its clients' voting strategies, Glass Lewis' research analysts do not have access to client holdings files, custom policies, and/or voting activity. Access to such information is strictly limited to the client services and operations team members directly responsible for supporting each client.

Moreover, Glass Lewis' Code of Ethics addresses personnel conflicts, confidential treatment of client information, insider trading, among many other topics. All Glass Lewis employees and agents, worldwide, must annually review and affirm their commitment to the Code of Ethics, as well as update Glass Lewis with information on (i) any reportable outside activities (e.g. other employment, involvement in investment clubs, etc.) or any other activities related to the securities industry or the business of Glass Lewis, and (ii) any ownership interest greater than 5% or any position (e.g. director, officer, or executive) the employee or agent, or any of his or her relatives, holds in a publicly-traded company. Glass Lewis' Compliance Committee regularly reviews the Code of Ethics and incorporates any revisions required by applicable laws, rules and regulations. In addition, the Senior Vice President and General Counsel, with the assistance of the Director of Compliance, monitors the disclosure of personal trading accounts, the pre-approval trading process, and all employees' and agents' quarterly personal trading reporting.

For any other potential conflicts of interest that may be unavoidable, Glass Lewis makes full disclosure to its clients to enable them the opportunity to understand the nature and scope of the potential conflict and make an assessment about the reliability or objectivity of the recommendation. This is done by adding a disclosure note to the front cover of the relevant proxy research report when Glass Lewis determines that there is a potential conflict of interest (e.g. related to Glass Lewis' ownership structure, business partnerships, client-submitted shareholder proposals, employee and outside advisors' relationships and when an investment manager client is a public company or a division of a public company).

[6] http://www.glasslewis.com/conflict-of-interest/

Relating to our ownership, Glass Lewis is a portfolio company of the Ontario Teachers' Pension Plan Board ("OTPP") and Alberta Investment Management Corp. ("AIMCo"), that operates as a company independent from its owners. In addition, OTPP and AIMCo are excluded from any involvement in the formulation and implementation of the Glass Lewis proxy voting policies and guidelines, as well as in the determination of voting recommendations for specific shareholder meetings. Moreover, in the event Glass Lewis publishes a Proxy Paper report on a company in which OTPP or AIMCo: (i) holds a stake in the company significant enough to be publicly announced in accordance with such company's local market regulatory requirements; or (ii) is a dissident shareholder in a proxy contest or a shareholder proposal proponent, Glass Lewis adds a prominent disclosure note on the relevant Proxy Paper report.

In addition, in order to ensure any potential new conflicts are addressed appropriately and communicated to clients in a timely manner, Glass Lewis' Compliance Committee – comprised of Glass Lewis' Chief Executive Officer; Chief Operating Officer; Senior Vice President of Research and Engagement; Senior Vice President and General Counsel; and Director of Compliance – meets on a quarterly basis.

5. What is the appropriate regulatory regime for proxy advisory firms and should prior staff guidance about investment advisers' responsibilities in voting client proxies and retaining proxy advisory firms be modified, rescinded, or supplemented?

Since the SEC issued the 2010 Concept Release on the U.S. proxy system, Glass Lewis has been actively engaged with regulators, investors, issuers and other stakeholders across the globe regarding the role of proxy advisors. In responses to three subsequent consultations, issued in 2012 by the European Securities and Markets Authority ("ESMA"), Canadian Securities Administrators ("CSA") and the Corporations and Markets Advisory Committee of Australia ("CAMAC"), Glass Lewis has consistently expressed the view that a market-based solution, in particular a code of best practices developed by proxy advisors, is the appropriate means to address the relevant issues raised in these consultations – namely conflict management, transparency of policies and methodologies, and engagement.

In 2013, after its consultation, ESMA published its final report containing the analysis of the results of the study, in which it stated that it did not see a need for binding or quasi-binding regulation. Further, ESMA said the "appropriate approach" was for the industry to develop a code of conduct, to be applied on a comply-or-explain basis, that would address two areas of concern raised in the public consultation: 1) identifying, disclosing and managing conflicts of interest and 2) fostering transparency to ensure the accuracy and reliability of the advice. Glass Lewis, ISS and the leading providers in the UK (Manifest and PIRC), France (Proxinvest) and IVOX (a Germany-based firm that was acquired by Glass Lewis in 2015) formed the Best Practice Principles group to develop a code of conduct ("Principles") for the industry, which the signatories to the Principles said they would apply globally. Similar to the practice for nearly all

industries, the participants in the industry, i.e. the proxy advisors, took the lead in drafting the Principles to which they would be subject but in consideration of input from ESMA and other stakeholders, including numerous issuer respondents to the consultation from both Europe and North America. Following a global, public consultation regarding the proposed Principles, the final Principles were officially launched in March 2014. And, in 2017, the charter signatories to the Principals conducted another public consultation to elicit market feedback on the extent to which the Principles are achieving their original objectives and to identify opportunities for improving understanding and transparency. An advisory panel, comprised of stakeholders from companies, asset owners, asset managers and other constituencies, provided input to the preparation of the consultation under the guidance of an independent chairman. Among other things, the latest update to the Principles will address the transparency requirements for proxy advisors outlined in the EU DIRECTIVE 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and due for implementation in Member States by June 2019.

Since the launch of the Principles, Glass Lewis and the other charter signatories to the Principles have each published their Statements of Compliance, featuring detailed information on how the organizations comply with the Principles and all the related Guidance. Glass Lewis applies the code to its activities globally, including in the United States. Glass Lewis updates its Statement of Compliance annually.

Glass Lewis believes that requiring proxy advisory firms to register as investment advisers under the Investment Advisers Act of 1940, as the framework stands today, would provide little or no protection to investors and issuers with respect to the areas of concern that have been raised. The existing framework was not originally designed to oversee and monitor the nuanced activities of a proxy advisory firm but was tailored with the investment advisor in mind. Proxy advisors neither advise their clients whether to purchase, sell or hold securities nor do they manage client investments. For a more detailed legal explanation on this, please refer to the Memo prepared by our outside counsel, Willkie Farr and Gallagher LLP, on "Glass Lewis Status under the Investment Advisers Act of 1940," attached here as Attachment 1.

While we can argue that proxy advisors are already subject to various provisions of the federal securities laws and regulations, depending on the nature of their activities, as well as to implied standards of conduct, such as the Principles, we understand the call for a more formalized approach to oversight. In our view, however, validating the standards of conduct already implicitly enforced by the industry, which are based largely on policies and procedures proxy advisory firms already have in place, coupled with a mechanism to monitor and ensure compliance, would be a more appropriate way to address the issues around the role of proxy advisors, conflicts of interest, accuracy and reliability, transparency, and increased oversight. This approach would not only be more aligned with the nature of the industry but would also serve in the best interest of all market participants.

Roundtable Topics Related to the Proxy Process

In our October 18, 2010 comment letter regarding the SEC Concept Release on the U.S. Proxy System, we outlined two important areas of discussion. Specifically, the availability of vote confirmations and the disclosure of agenda items in advance of the record date. Both of these topics remain pertinent to investors as does the universal ballot and the criteria used to assess shareholder proposals.

1. Vote Confirmations

We believe investors are entitled to receive confirmation that the correct number of shares was tabulated and that the voting on each proposal was in accordance with the shareholder's instructions. Vote confirmations would affirm the integrity of the vote and reinforce the importance of voting. Admittedly, there are factors that make vote confirmations a complicated process. However, there are already instances where confirmations are being provided to investors today, so we believe the complicating factors can be readily overcome if the appropriate incentives exist for the various intermediaries involved in the voting process. In return, a fully transparent and accurate voting system would significantly strengthen the value of, and therefore shareholder care applied to, proxy voting.

We recognize that vote confirmations are made more challenging by the number of entities in the chain of intermediaries (e.g., investors, proxy advisors, ballot distributors, custodians, sub-custodians, depositaries, transfer agents, tabulators, etc.). This complexity is exacerbated by both the lack of standard account identifiers, since each intermediary may assign a different identifier to the same account, and the absence of a robust communication standard, making ballot reconciliation a resource-intensive, time-consuming and, occasionally, inexact exercise. We believe vote confirmation could be facilitated through the creation of an electronic tag for each account that could be followed through the chain of intermediaries. Using a unique identifying code provides the added benefit of allowing investors to retain their anonymity. Ideally, a central entity with no vested interest in the process, such as DTCC, could assign and manage the identification codes.

Additionally, new technologies, such as blockchain, could be very effective in solving the traditional challenges associated with providing accurate, timely and granular vote confirmations while also addressing concerns around over/under-voting, investor anonymity and distribution costs.

2. Advanced Disclosure of Agendas

We recognize that share lending is a valuable means of maximizing returns for investors as well as an important source of market liquidity. However, this practice results in a separation of economic and voting interest as investors lose their ability to vote any shares that are out on-

loan. Ideally, investors should be able to assess the benefits derived from continuing to lend their shares versus those from recalling and voting their shares. Since recall decisions need to be made before record date and agendas are disclosed after record date, any meaningful assessment of the differences is virtually impossible. This leaves investors with three possible options: 1) don't participate in share lending; 2) participate and recall all shares; and/or 3) participate and don't recall any shares. These are all blunt solutions that might not be in the long-term, best interests of investors or issuers.

The easiest way to ensure shareholders have the opportunity to recall lent shares would be for issuers to provide full advance notice of their proposals prior to record date. We believe with adequate notification, shareholders would be armed with enough information to decide whether to recall their shares. Often the decision to recall shares on loan requires the input of several investment professionals, and once decided, the mechanics of the recall process generally takes several days. Therefore, public notice of the issues to be voted on should be made at least 14 calendar days prior to record date.

To address concerns about companies having sufficient time to provide information and, in some cases, await SEC decisions on no-action requests to exclude shareholder proposals, advanced notification could also be accomplished by moving the record date closer to the meeting date. However, setting the record date too close to the meeting can make it difficult to distribute meeting information to investors, especially retail investors receiving information via mail. Therefore, we believe the record date should be no closer than 21 calendar days prior to the meeting date. This timing, coupled with prior disclosure of agenda details, would ensure investors have enough time and information to recall shares; would provide issuers with sufficient time to finalize and distribute their meeting materials; and would allow investors to make thoughtful voting decisions in advance of voting deadlines.

3. Universal Ballots

The current system for contested meetings limits flexibility and increases voting complexity by forcing investors to choose between management and dissident nominees on separate proxy cards. There may be instances where investors believe that the best option for the long-term success of an issuer is to support a mix of management and dissident nominees. In theory, it is possible for investors to vote their shares in this manner, but the administrative hurdles and associated risk of vote rejections generally dissuade investors from pursuing this option.

Requiring the use of universal ballots for contested meetings would provide investors with the flexibility to vote for their choice of management and/or dissident nominees, potentially lower the costs associated with proposing a nominee, and dramatically simplify the mechanics of the voting process for these high-profile meetings by eliminating the need for two competing proxy cards.

4. Shareholder Proposals

The shareholder proposal process serves as an important outlet for shareholders to raise concerns with management and affect changes to a company's governance processes and policies. Shareholders, as the ultimate owners of the company, do bear the costs associated with management's consideration of a proposal and its inclusion in the proxy statement. However, in many instances, shareholders have ultimately benefited from these measures, which often promote decision-useful disclosure, board accountability, and/or the protection of shareholder rights.

The shareholder proposal process has resulted in positive externalities for many in the marketplace, as there have been a number of broad shifts in the governance profiles of U.S. companies as a result of the private ordering of certain shareholder rights. For example, after a court overturned a regulation that would have required all listed companies to adopt proxy access, shareholders submitted resolutions requesting that companies adopt this provision. As a result, more than 60% of S&P 500 companies now have adopted some form of proxy access.

The U.S. currently has relatively low thresholds for the submission of shareholder proposals. However, unlike certain other markets, the U.S. provides for important protections for companies that counterbalance the low ownership required to submit shareholder resolutions. In certain markets, companies have no recourse when they receive a proposal that inappropriately micromanages a company or otherwise fails to serve the best interests of shareholders. However, should such proposals be submitted at U.S. companies, the SEC provides an important protection to companies and their shareholders through the no-action process. This process effectively mitigates the potential of abusive proposals that could harm the long-term interests of companies and their shareholders. Similarly, although relatively low, existing resubmission thresholds have not posed a significant risk to companies or their shareholders as there is little evidence that proposals receiving minimal shareholder support are being resubmitted to companies on an ongoing basis.

In summary, our view is that the current hurdles and protections in place around the shareholder proposal process are working, and are sufficiently protecting both the interests of issuers and investors.

As outlined above, we believe that the proxy advisory industry has been very responsive to the needs of our institutional investor clients, but also to the interests of the issuer community. We share the same goal of ensuring investors have accurate, reliable and timely access to information so that they can fulfill their obligations as fiduciaries. As such, we have put extensive practices in place to ensure our analysis is based on data that is factually correct, there is sufficient public information on our research policies and methodologies, and we prevent, manage and disclose conflicts effectively. Ultimately this ensures that all proxy

decisions made by investors are well-informed and that all votes we submit on their behalf are cast in accordance with their specific instructions.

Glass Lewis appreciates the convening of this Roundtable and the opportunity to submit this statement.

Sincerely,

Katherine Rabin

Chief Executive Officer

cc: The Honorable Kara M. Stein
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
Dalia Blass, Director, Division of Investment Management
William Hinman, Director, Division of Corporation Finance
Brent J. Fields, Secretary

TO: Glass Lewis & Co., LLC

FROM: James Anderson
Richard Jackson

RE: Glass Lewis Status under the Investment Advisers Act of 1940

DATED: November 6, 2018

You asked us to provide a written analysis of Glass Lewis & Co. LLC's ("Glass Lewis") status under the Investment Advisers Act of 1940 ("Advisers Act") in connection with the upcoming Securities and Exchange Commission ("SEC") Staff Roundtable on the Proxy Process. Our analysis follows.

I. BACKGROUND

Glass Lewis is an independent governance services firm. Glass Lewis principally provides proxy voting research, analysis, recommendations and custom services to institutional investors. Glass Lewis' clients use its research primarily to help them form their proxy voting decisions. Clients also use Glass Lewis' research when engaging with companies before and after their shareholder meetings.

Glass Lewis' proxy research subscribers receive a publication called *Proxy Paper*. *Proxy Paper* features contextual, objective analysis and voting recommendations on all proposals contained in thousands of proxies for companies around the world. Glass Lewis' recommendations are based on its own analysis of each particular company's proposals. Glass Lewis does not tailor its proxy voting recommendations to the needs of any client, nor does Glass Lewis decide how any investor client will vote on any particular matter. Rather, Glass Lewis' subscribers decide for themselves how to cast their votes in accordance with their own proxy voting policies, which may or may not be consistent with Glass Lewis' recommendations on particular issues.

For clients that desire assistance in exercising their vote, Glass Lewis administers a Web-based vote management system through which clients may receive, reconcile and vote proxies according to their own voting guidelines and record, audit, report and disclose their proxy votes. Glass Lewis also operates a share recall service which helps clients to evaluate the importance of upcoming shareholder meetings in order to determine whether to recall shares on loan in order to vote them.

Glass Lewis also publishes a number of other reports periodically. Recent examples include annual reviews discussing trends in shareholder voting, board composition, Glass Lewis recommendations and other areas; annual reports on key trends and case studies

covering board elections, executive pay, ESG practices, shareholder activism, stewardship and engagement, and other notable trends in various markets; a review focusing specifically on shareholder proposals brought at U.S. companies; and a report on emerging best practices relating to disclosure of board skills.

Glass Lewis does not manage client investments and does not advise any client whether to purchase, sell or hold securities. Glass Lewis also does not provide consulting services to the companies it covers in its reports, although it does make its proxy research reports available to such companies post-publication.

II. ANALYSIS

A. Definition of "Investment Adviser"

Section 202(a)(11) of the Advisers Act defines "investment adviser" as

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .

The SEC staff has stated that a person would be considered an investment adviser within this definition only if it falls within each of the three principal elements of the definition, *i.e.,* it (1) provides advice or analyses concerning securities; (2) is in the business of providing such services; and (3) provides such services for compensation.[1] We analyze each of these elements in the following subsections.

1. Advice or Analyses Concerning Securities

The SEC and its staff have taken a broad view of what constitutes advice or analyses concerning securities. Of course, advice or recommendations either about specific securities or about securities generally have been deemed to be advice concerning securities.[2] A person who advises a client concerning the relative advantages and disadvantages of investing in securities as compared to other types of investments also has been deemed to be advice concerning securities for purposes of Section 202(a)(11).[3] The staff also has taken the position that a person provides advice concerning securities if that person, in the course of developing a financial program for a client, advises the client as to the desirability of investing in, purchasing

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[1] *See* Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Advisers Act Release No. 1092, 1987 SEC LEXIS 3487 (Oct. 8, 1987) ("Release 1092").

[2] *See id.;* College Resource Network, SEC No-Action Letter (avail. Apr. 9, 1993).

[3] *See, e.g.,* Release 1092, *supra* note 1; College Resource Network, SEC No-Action Letter (avail. Apr. 9, 1993).

or selling securities, as opposed to or in relation to any non-securities investment or financial vehicle.[4]

Glass Lewis provides advice to clients solely about voting proxies and the issues about which the proxies relate, such as corporate governance, executive compensation, and accounting practices. Glass Lewis also provides administrative and other ancillary services relating to voting and participating in class action settlements. Glass Lewis' reports focus on a company's financial statements, disclosures, corporate governance, financial performance, litigation risks, related party transactions, internal controls and accounting policies. The reports do not analyze a company's securities, or discuss whether investors should take any action in response to Glass Lewis' analyses, such as purchasing, selling or holding the company's securities. Glass Lewis' reports also are not personalized, *i.e.,* the reports are not tailored to address factors of concern to any client with respect to its investment objectives or guidelines.

Glass Lewis never makes any recommendation as to whether to purchase, sell or hold securities. Rather, Glass Lewis' reports analyze the issues presented for shareholder vote and make recommendations as to how shareholders should vote, without commenting on the investment merits of the securities issued by the subject companies. Glass Lewis does not provide advice as to the value of securities. From time to time, Glass Lewis may express a view about the adequacy of consideration offered in connection with a transaction as to which shareholders have been asked to vote, but any such view is in the context of a particular vote and does not address the merits of the securities as an investment. More specifically, Glass Lewis' analysis of the terms of a transaction typically focuses on the process followed by the company's board of directors in determining to enter into the transaction and recommend it to shareholders, the alternatives considered by the board, the analysis and advice provided to the board by its advisors, and the quality and extent of the disclosure provided to shareholders about these matters. While Glass Lewis also reports its own views of the economic terms of the transaction, it does so by analyzing whether the terms of the transaction are fair to shareholders. Glass Lewis reports on the board's consideration of various valuation measures that are applicable to the company, but does not independently determine a fair price for the company's securities or recommend that shareholders take any particular action other than voting for or against a proposal. Glass Lewis does not exercise investment discretion over client assets, nor does it have any responsibility for selecting which securities are to be purchased or sold by clients, or how to allocate investments among different types of securities or other assets.

The focus of Glass Lewis' reports is the companies they cover and the issues they submit to shareholders for voting, not the securities issued by such companies, and Glass Lewis' recommendations are limited to recommendations about how to vote. While this is the sole purpose of Glass Lewis' analyses and recommendations, it is possible that some subscribers may use Glass Lewis' reports for other purposes. Some subscribers may consider Glass Lewis' analysis of a company together with other information in deciding to buy or sell the company's securities. The fact that some subscribers may use Glass Lewis' reports in this way does not mean that the reports are investment advice. To hold otherwise would make a wide variety of

[4] *See, e.g.,* Release 1092, *supra* note 1; Financial Strategies, Inc., SEC No-Action Letter (avail. Feb. 14, 1994).

reports and other materials published by trade associations, public interest groups and others investment advice regardless of their content, based simply on how their subscribers choose to use those materials. The fact that an individual chooses to invest in stock of an automaker based on an article in *Car and Driver* or *Consumer Reports* about the quality of their automobiles should not by itself result in those publications being deemed investment advice.

2. The "Business" Standard

The SEC staff interprets the phrase "engages in the business" broadly, asserting that giving advice need not be the principal business activity of the person, so long as it engages in this activity with some regularity. The staff has stated that

> Whether a person giving advice about securities for compensation would be "in the business" of doing so, depends upon all relevant facts and circumstances. The staff considers a person to be "in the business" of providing advice if the person: (i) holds himself out as an investment adviser or as one who provides investment advice, (ii) receives any separate or additional compensation that represents a clearly definable charge for providing advice about securities, regardless of whether the compensation is separate from or included within any overall compensation, or receives transaction-based compensation if the client implements the investment advice, or (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice. [5]

Regarding these three factors, we note first that Glass Lewis does not hold itself out as an investment adviser or as a firm that provides investment advice. Glass Lewis's subscriber agreements, website and marketing materials do not hold Glass Lewis out as providing investment advice or making investment recommendations. Rather, Glass Lewis consistently holds itself out as providing advice regarding the voting of proxies and associated corporate governance and accounting issues. Second, Glass Lewis does not receive a separate or "clearly definable charge" for investment advice. Subscribers to Glass Lewis' reports pay based on the number of reports they receive, with the incremental cost declining as a subscriber's consumption increases. For clients that enroll in Glass Lewis' ViewPoint proxy voting system, subscription fees are based on the number of accounts and the number of ballots cast by the subscriber. Third, as we have discussed above, Glass Lewis does not provide investment advice, either specific advice or otherwise. Glass Lewis provides advice only regarding the voting of proxies.

3. Compensation

The definition of investment adviser applies only to persons who provide investment advice about securities for compensation. The SEC staff has stated that the compensation element is satisfied by the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some combination of the foregoing.[6] Compensation could be in the form of a separate charge or fee

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5 *See* Release 1092, *supra* note 1.

6 *See id.*

for advice, or there could be a single fee covering a variety of services, including investment advice.

As we noted previously, Glass Lewis is compensated for its reports either directly through subscription fees that are based on the number of reports a client receives, or as part of the fee the client pays for enrolling in the ViewPoint proxy voting system, as applicable. In neither case, however, is this compensation for investment advice. As discussed above, the content of Glass Lewis' reports is not investment advice, but instead consists of analyses of companies, their proxy voting proposals, and related matters such as corporate governance, executive compensation and accounting matters. The reports only provide recommendations as to the voting of shares of the companies covered, and do not purport to advise anyone about purchasing, selling or holding securities issued by such companies or about the value of such securities.

B. The Publisher's Exclusion

Based on the discussion above, we believe Glass Lewis should not be deemed to be in the business of providing investment advice within the meaning of Section 202(a)(11). Notwithstanding this analysis, if Glass Lewis were deemed an investment adviser, Glass Lewis still could rely on the exclusion for publishers contained in Section 202(a)(11)(D).

Section 202(a)(11)(D) of the Advisers Act excludes from the definition of investment adviser "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." In analyzing the scope of the publisher's exclusion, the United States Supreme Court has noted that "Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto."[7] Further,

> The [Advisers] Act was designed to apply to those persons engaged in the investment advisory profession -- those who provide personalized advice attuned to a client's concerns, whether by written or verbal communication. [footnote omitted] The mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser.[8]

The key terms used in the publisher's exception, "bona fide" and "of general and regular circulation," are not defined in the Advisers Act. The Supreme Court explained their meaning as follows. The Supreme Court stated that to be "bona fide," a publication should "contain disinterested commentary and analysis as opposed to promotional material disseminated by a 'tout.'"[9] A publication with a "general and regular circulation" would be offered to the public on a regular schedule, but would not include "people who send out bulletins from time to time on the advisability of buying and selling stocks" or "tipsters" promoting particular securities

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7 Lowe v. Securities and Exchange Commission, 472 U.S. 181, 204 (1985).

8 Id. at 207-8.

9 Id. at 206.

investments.[10] The Court further stated that in determining whether a publication was "regular," the consistency of its circulation was less important than the fact that the publication was not timed to specific market activity or to events affecting or having the ability to affect the securities industry.[11]

Glass Lewis' reports clearly fall within the publisher's exclusion. Glass Lewis' proxy voting reports and recommendations and other reports on corporate governance, accounting and other matters are not personalized or tailored to meet any subscriber's investment objectives or other policies. Glass Lewis' reports contain disinterested analysis and voting recommendations, and they do not promote investment in securities generally, or in any particular company's securities. Glass Lewis' reports focus on what the firm believes to be in the best interests of shareholders of each of the companies it covers. Moreover, Glass Lewis does not provide consulting services to the companies it covers in its reports, which helps ensure that its voting recommendations and analysis are disinterested.

Glass Lewis' reports also are published on a regular basis. Glass Lewis does not base the publication time of its reports on any specific market activity or other events affecting securities. Glass Lewis publishes its proxy voting reports and recommendations whenever there is a proxy solicitation by one of the thousands of public companies it covers. Glass Lewis' other reports are published generally on a quarterly, annual or other periodic basis.

C. Policy

Apart from the definitional issues discussed above, there is no reason, as a matter of public policy and the purposes of the Advisers Act, to requiring a proxy advisory firm such as Glass Lewis to register as an investment adviser. When the Advisers Act was enacted in 1940, the House Report described the purpose of the Act as follows:

> The essential purpose of [the Advisers Act] is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment adviser against the stigma of the activities of these individuals by making fraudulent practices by investment advisers unlawful. The [Act] also recognizes the personalized character of the services of investment advisers and special care has been taken in the drafting of the [Act] to respect this relationship between investment advisers and their clients.[12]

In its 2010 Concept Release on the U.S. proxy system, the SEC outlined its principal concerns regarding the regulatory status and role of proxy advisory firms under the Advisers Act. These concerns were the following:

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10 Id.

11 Id. at 209.

12 H.R. Rep. No. 2639, 76th Cong., 3d Sess., at 28 (1940).

- Conflicts of interest – the Commission expressed concern that the inadequate disclosure and management of conflicts of interest by proxy advisory firms could result in shareholders being misled and could impair informed shareholder voting;

- Accuracy – the Commission said that to the extent that proxy advisory firms develop, disseminate and implement their voting recommendations without adequate accountability for the accuracy of the information on which those recommendations are based, informed shareholder voting could be impaired; and

- Power – the Commission noted that some have argued that proxy advisory firms have too much power to influence shareholder voting without appropriate oversight and without having an actual economic stake in the issuers.[13]

Requiring proxy advisory firms to register as investment advisers under the Advisers Act would not be a necessary or appropriate way to address these concerns. In fact, registration as investment advisers, in and of itself, will provide little or no protection to investors with respect to these issues.

Regarding conflicts of interest, the Commission cited a 2007 report of the U.S. Government Accountability Office ("GAO") which noted that the most commonly cited conflict of interest for proxy advisory firms is the fact that some firms provide both proxy voting recommendations to investors and their investment advisers and consulting services to corporations relating to issues to be presented to shareholders or improving their corporate governance ratings.[14] Requiring all proxy advisory firms to register as investment advisers would be an overly drastic response to this issue. Not all proxy advisory firms provide consulting services to the companies they cover in their proxy voting advisory services, and the Commission has noted that there has been concern about the adequacy of the disclosures that proxy advisory firms that have so registered have provided to their clients regarding their consulting activities.[15] In this regard, the Commission requested comment regarding whether it should revise or provide interpretive guidance regarding the exemption for proxy advisory firms in Rule 14a-2(b)(3) under the Securities Exchange Act of 1934, which requires disclosure of "any significant relationship" the firm has with the issuer, its affiliates, or a shareholder proponent of a matter on which it provides voting advice, and specifically whether to require more specific disclosure regarding potential conflicts of interest. Glass Lewis has stated that it would support enhancing the disclosure requirement associated with Rule 14a-2(b)(3).

Glass Lewis provides several types of disclosures to its clients regarding relevant conflicts of interest. All clients receive Glass Lewis' written Conflict of Interest Statement, which describes its conflict of interest policies. This statement is also published on Glass Lewis'

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[13] *See* Concept Release on the U.S. Proxy System, Securities Exchange Act Release No. 62495 (July 14, 2010), at 114-26 ("Concept Release").

[14] *See id., citing* GAO, "Corporate Shareholder Meetings – Issues Relating to Firms That Advise Institutional Investors on Proxy Voting" (June 2007), at 10-11.

[15] *See* Concept Release, *supra* note 13, at 117-18.

website. Glass Lewis also has adopted and implemented written Conflict Management Procedures which are intended to help ensure that conflicts of interest associated with its proxy advisory activities are identified, managed and disclosed appropriately. Among other things, the Conflict Management Procedures require specific and prominent disclosure in its research reports of conflicts of interest involving issuers, Glass Lewis' parents, the Ontario Teachers' Pension Plan and Alberta Investment Management Corp., or shareholder proponents. For example, in cases where a Glass Lewis parent owns a significant stake in a company that Glass Lewis covers, Glass Lewis provides the following disclosure to its clients in a note on the relevant research report:

> Glass Lewis policy requires full disclosure to its customers of any potential conflicts of interest. Please be advised that Ontario Teachers' Pension Plan Board, one of Glass Lewis' owners, holds a stake in this company significant enough to be publicly announced in accordance with such company's local market regulatory requirements. For a complete copy of the Glass Lewis Conflict of Interest Statement, please visit www.glasslewis.com/conflict-of-interest/.

In addition, if one or both of Glass Lewis' owners is a dissident shareholder in a proxy contest or a shareholder proposal proponent, Glass Lewis will provide the following disclosure in a note on the relevant research report:

> The shareholder proponent of Proposal X is the Ontario Teachers' Pension Plan Board, one of Glass Lewis' owners.

Glass Lewis' Conflict Management Procedures also set forth Glass Lewis' policies intended to ensure the independence and objectivity of its analysis and recommendations. Glass Lewis provides a copy of its written Conflict Management Procedures to clients on request.

As we have noted above, Glass Lewis does not provide consulting services to issuers, which helps to ensure the independence of its advice. This is a key factor in Glass Lewis' ability to rely on the publisher's exception, as it ties closely to the issue of whether its publications are "bona fide" within the meaning of that provision as interpreted by the Supreme Court in *Lowe*. To the extent that the SEC believes proxy advisory firms that do consulting should be registered, proxy advisory firms that do not provide consulting services should be excluded from this requirement and only be required to register if they otherwise provide investment advice and cannot rely on an existing exception, such as that for publishers. Glass Lewis' policy against providing consulting services is reflected in its Conflict of Interest Statement and its Conflict Management Procedures.

The Commission noted that to the extent that proxy advisory firms may base their voting recommendations on flawed data or analysis, some concern has been expressed by issuers that there should be a process for correcting such mistakes, such as by permitting issuers to review drafts of the reports before they are published. The Commission further noted that proxy advisory firms are not currently required to have specific procedures in place to ensure that their

research and analysis are materially accurate or complete before recommending a vote.[16] Requiring registration of proxy advisory firms is not an appropriate means to ensure greater accuracy in the firms' recommendations. There is nothing in the Advisers Act that addresses the quality or accuracy of advice given by investment advisers or the advisers' qualifications, nor has the Act ever been interpreted so in the absence of fraud. Somewhat to the contrary, registered investment advisers that refer to themselves as such in their brochures must state on the cover page of the brochure that registration does not imply any level of skill or training.[17]

Regarding the supposed power that proxy advisory firms have,[18] it is difficult to see how registration as investment advisers would provide an answer, and if so what that answer would be. The fact remains that Glass Lewis does not decide how to vote proxies for any client. The clients retain the right and power to vote their proxies, and they may or may not follow Glass Lewis' recommendations. In fact, many of the clients that receive Glass Lewis' voting recommendations are themselves subject to a fiduciary duty with respect to voting their proxies, so they have a duty to vote in the manner that they believe is in the best interest of their clients, regardless of Glass Lewis' recommendations. Thus, registration as an investment adviser would not have any effect on proxy advisory firms' ability to influence the results of shareholder votes.

Since registration as an investment adviser would not by itself resolve the concerns raised in the Concept Release about the role of proxy advisory firms, the SEC could address these concerns by proposing a safe harbor rule by which a proxy advisory firm could be exempt from registration as an investment adviser if it meets certain conditions. In addition to conditions needed to make sure the proxy advisory firm is not providing investment advice, such a rule could address potential conflicts of interest by, for example, prohibiting a firm relying on the rule from providing consulting services to the companies the firm covers, requiring the firm to adopt written policies and procedures regarding the misuse of material nonpublic information, and requiring the firm to disclose potential conflicts of interest to clients. In addition, a proxy advisory firm relying on such a rule could be required to adopt and implement written policies and procedures reasonably designed to ensure that its proxy voting recommendations are based on accurate information and to disclose these policies to clients.

III. CONCLUSION

Based on the facts and analysis set forth above, Glass Lewis should not be deemed an investment adviser as defined in Section 202(a)(11) of the Advisers Act. Changes to the facts or to the SEC or the SEC Staff's positions referenced herein could result in a different conclusion.

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16 *See id.*, at 119.

17 *See* Form ADV, Part 2A, Item 1.C.

18 The GAO has examined recent studies, reports and other documentation and interviewed market participants and other stakeholders and found that they have mixed views about the extent to which proxy advisory firms influence proxy voting and corporate governance practices. *See* GAO, "Corporate Shareholder Meetings – Proxy Advisory Firms' Role in Voting and Corporate Governance Practices Issues" (Nov. 2016), at 15-19.