SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-87457; File No. S7-22-19]

RIN: 3235-AM50

Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing amendments to its rules governing proxy solicitations to help ensure that investors who use proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions, in a manner that does not impose undue costs or delays that could adversely affect the timely provision of proxy voting advice. The proposed amendments would condition the availability of certain existing exemptions from the information and filing requirements of the federal proxy rules for proxy voting advice businesses upon compliance with additional disclosure and procedural requirements. In addition, the proposed amendments would codify the Commission's interpretation that proxy voting advice generally constitutes a solicitation within the meaning of the Securities Exchange Act of 1934. Finally, the proposed amendments would amend the proxy rules to clarify when the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the rule, depending upon the particular facts and circumstances at issue.

DATES: Comments should be received by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (https://www.sec.gov/rules/submitcomments.htm); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-22-19 on the subject line.

Paper comments:

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

All submissions should refer to File Number S7-22-19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Daniel S. Greenspan, Senior Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to 17 CFR 240.14a-1(*l*) ("Rule 14a-1(*l*)"), 17 CFR 240.14a-2 ("Rule 14a-2"), and 17 CFR 240.14a-9 ("Rule 14a-9") under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq*.] ("Exchange Act").[1]

[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. § 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to Title 17, Part 240 of the Code of Federal Regulations [17 CFR 240], in which these rules are published.

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I. INTRODUCTION

Annual and special meetings of publicly-traded corporations, where shareholders are provided the opportunity to vote on various matters, are a key component of corporate governance. For various reasons, including the widely dispersed nature of public share ownership, most shareholders do not attend these meetings in person. Proxies are the means by which most shareholders of publicly traded companies exercise their right to vote on corporate matters.[2] Congress vested in the Commission the broad authority to oversee the proxy solicitation process when it originally enacted the Exchange Act in 1934.[3] As the securities markets have become increasingly more sophisticated and complex, and the intermediation of share ownership and participation of various market participants has grown in kind,[4] the Commission's interest in ensuring fair, honest and informed markets, underpinned by a properly functioning proxy system, dictates that we regularly assess whether the system is serving investors as it should.[5]

One of the defining characteristics of today's market is the significant role played by institutional investors,[6] which today own, by some estimates, between 70 and 80 percent of the

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[2] *See Concept Release on the U.S. Proxy System*, Release No. 34-62495 (Jul. 14, 2010) [75 FR 42982 (July 22, 2010)] ("Concept Release"), at 42984.

[3] *See Regulation of Communications Among Shareholders,* Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276 (Oct. 22, 1992)] ("Communications Among Shareholders Adopting Release"), at 48277 ("Underlying the adoption of section 14(a) of the Exchange Act was a Congressional concern that the solicitation of proxy voting authority be conducted on a fair, honest and informed basis. Therefore, Congress granted the Commission the broad 'power to control the conditions under which proxies may be solicited' . . . .").

[4] *See* Concept Release, *supra* note 2, at 42983 ("This complexity stems, in large part, from the nature of share ownership in the United States, in which the vast majority of shares are held through securities intermediaries such as broker-dealers or banks . . .").

[5] *See, e.g.*, *id.* at 43020 ("The U.S. proxy system is the fundamental infrastructure of shareholder suffrage since the corporate proxy is the principal means by which shareholders exercise their voting rights. The development of issuer, securities intermediary, and shareholder practices over the years, spurred in part by technological advances, has made the system complex and, as a result, less transparent to shareholders and to issuers. It is our intention that this system operate with the reliability, accuracy, transparency, and integrity that shareholders and issuers should rightfully expect.").

[6] *See generally* Janette Rutterford & Leslie Hannah, *The Rise of Institutional Investors*, FINANCIAL MARKET HISTORY: REFLECTIONS ON THE PAST OF INVESTORS TODAY (David Chambers & Elroy Dimson eds., 2017); Lucian A. Bebchuk,

market value of U.S. public companies.[7] Investment advisers voting on behalf of clients and other institutional investors, by virtue of their significant holdings (often on behalf of others, including retail investors) in many public companies, must manage the logistics of voting in potentially hundreds, if not thousands, of shareholder meetings and on thousands of proposals that are presented at these meetings each year, with the significant portion of those voting decisions concentrated in a period of a few months.[8]

Investment advisers and other institutional investors often retain proxy advisory firms to assist them in making their voting determinations on behalf of clients and to handle other aspects of the voting process.[9] For purposes of this release, we refer to these firms and any person who

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Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPECTIVES, Summer 2017, at 89; Marshall E. Blume & Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships*, SSRN ELECTRONIC JOURNAL (2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147757.

[7] *Compare* Charles McGrath, *80% of equity market cap held by institutions,* PENSIONS & INVESTMENTS (Apr. 25, 2017), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions, *with* BROADRIDGE & PWC, *2018 Proxy Season Review*, PROXYPULSE 1 (Oct. 2018), https://www.pwc.com/us/en/governance-insights-center/publications/assets/pwc-broadridge-proxypulse-2018-proxy-season-review.pdf (estimating that institutions own 70% of public company shares). This report also notes that institutional investors have significantly higher voter participation rates than retail investors, casting votes representing 91 percent of all the shares they held in 2018, compared to only 28 percent for retail investors during the same period. *Id.* at 2.

[8] The Investment Company Institute ("ICI") has stated that during the 2017 proxy season, registered investment funds cast more than 7.6 million votes on 25,859 proxy proposals on corporate proxy ballots and that the average mutual fund voted on 1,504 separate proxy proposals for U.S.-listed portfolio companies (figures exclude companies domiciled outside the U.S.). *See* Morris Mitler et al., *Funds and Proxy Voting: The Mix of Proposals Matters*, INVESTMENT COMPANY INSTITUTE (Nov. 5, 2018), https://www.ici.org/viewpoints/view_18_proxy_environment; Letter from Paul Schott Stevens, President and CEO of ICI (March 15, 2019) ("ICI Letter"), at 3. In addition, the Ohio Public Employees Retirement System has noted that it receives in excess of 10,000 proxies in any given proxy season. *See* Letter from Karen Carraher, Executive Director & Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System (Dec. 13, 2018) ("OPERS Letter"), at 2. Unless otherwise indicated, comment letters cited in this release are to the Commission's Roundtable on the Proxy Process held Nov. 15, 2018 ("2018 Proxy Roundtable"), *available at* https://www.sec.gov/proxy-roundtable-2018.

[9] *See generally* GAO Report to Congress, *Corporate Shareholder Meetings—Proxy Advisory Firms' Role in Voting and Corporate Governance Practices* (Nov. 2016) ("2016 GAO Report"); GAO Report to Congress, *Corporate Shareholder Meetings—Issues Relating to Firms that Advise Institutional Investors on Proxy Voting* (June 2007) ("2007 GAO Report"); s*ee also Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers,* Release No. IA-5325 (Aug. 21, 2019) [84 FR 47420 (Sept. 10, 2019)] ("Commission Guidance on Proxy Voting Responsibilities"), at 5; Letter from Gary Retelny, President and CEO of Institutional Shareholder Services, Inc. (Nov. 7, 2018) ("ISS Letter"), at 1.

markets and sells proxy voting advice as "proxy voting advice businesses."[10] Unless otherwise indicated, the term "proxy voting advice" as used in this release refers to the voting recommendations provided by proxy voting advice businesses on specific matters presented at a registrant's shareholder meeting or for which written consents or authorizations from shareholders are sought in lieu of a meeting, along with the analysis and research underlying the voting recommendations, and delivered to the proxy voting advice business's clients through any means, such as in a standalone written report or multiple reports, an integrated electronic voting platform established by the proxy voting advice businesses, or any combination thereof.[11]

Proxy voting advice businesses typically provide institutional investors and other clients a variety of services that relate to the substance of voting, such as: providing research and analysis regarding the matters subject to a vote; promulgating general voting guidelines that their clients can adopt; and making voting recommendations to their clients on specific matters subject to a shareholder vote, either based on the proxy voting advice business's own voting guidelines or on custom voting guidelines that the client has created.[12] This advice is often an important factor in the clients' proxy voting decisions. Clients use the information to obtain a more informed understanding of different proposals presented in the proxy materials, and as an alternative or supplement to using their own internal resources when deciding how to vote.[13]

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[10] *See* proposed Rule 14a-1(l)(iii)(A).

[11] The reference to "proxy voting advice," as used in this release, is not intended to encompass (1) research reports or data that are not used to formulate the voting recommendations or (2) administrative or ministerial services.

[12] ISS Letter, *supra* note 9.

[13] *See* Commission Guidance on Proxy Voting Responsibilities, *supra* note 9 ("Contracting with proxy advisory firms to provide these types of functions and services can reduce burdens for investment advisers (and potentially reduce costs for their clients) as compared to conducting them in-house."); *see also* OPERS Letter, *supra* note 8, at 1 ("However, with limited staff and resources, it is extremely difficult to devote the necessary time and attention to the thousands of proxies we receive each proxy season. Consequently, OPERS has chosen to partner with a proxy advisory firm, which allows us to fulfill our engagement and governance obligations in a more productive and efficient manner."); Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors (Nov. 8, 2018) ("CII Letter"), at 16 ("Proxy research firms, while imperfect, play an important and useful role in enabling

Proxy voting advice businesses may also provide services that assist clients in handling the administrative tasks of the voting process, typically through an electronic platform that enables their clients to cast votes more efficiently.[14] In some cases, proxy voting advice businesses are given authority to execute votes on behalf of their clients in accordance with the clients' general guidance or specific instructions.[15] One way a proxy voting advice business may assist clients with voting execution is through an electronic vote management system that allows the proxy voting advice business to (1) populate each client's ballots with recommendations based on that client's voting instructions to the business ("pre-population"); and (2) submit the client's ballots to be counted. Clients utilizing such services may choose to review the proxy voting advice business's pre-populated ballots before they are submitted or to have them submitted automatically, without further client review ("automatic submission").[16]

Proxy voting advice businesses play an integral role in the proxy voting process by providing an array of voting services that can help clients manage their proxy voting needs and make informed investment decisions.[17] Although estimates vary, each year proxy voting advice

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effective and cost-efficient independent research, analysis and informed proxy voting advice for large institutional shareholders, particularly since many funds hold shares of thousands of companies in their investment portfolios.").

[14] *See* Commission Guidance on Proxy Voting Responsibilities, *supra* note 9.

[15] *Id.*

[16] *See, e.g.*, Letter from Katherine Rabin, Chief Executive Officer, Glass, Lewis & Co., LLC (Nov. 14, 2018) ("Glass Lewis Letter"), at 2, 4 (describing how ballots are populated and submitted).

[17] *Id.*; *see* Letter from Yves P. Denizé, Senior Managing Director, Teachers Insurance and Annuity Association of America (June 10, 2019) ("TIAA Letter"), at 3, 6, 7 ("Proxy advisory services are a crucial part of [TIAA's] voting process . . . . Every year, [TIAA] completes a proxy voting review of more than 3,000 U.S. and 11,000 global companies and processes more than 100,000 unique agenda items. . . . [W]e rely on proxy advisory firms to gather and synthesize the information we need to make informed voting decisions in a timely and efficient manner."); Letter from Michael Garland, Assistant Comptroller, Office of N.Y.C. Comptroller (Jan. 2, 2019) ("NYC Comptroller Letter"), at p. 4 of enclosed statement before the Senate Banking Committee on Dec. 8, 2018 ("During the peak of U.S. proxy season . . . the number of meetings and votes is very large, putting a premium on having a high-quality, efficient process, to which the proxy advisory firms are indispensable."); OPERS Letter, *supra* note 8, at 2 ("OPERS receives in excess of 10,000 proxies in any given proxy season. We have determined it is more operationally efficient to use the workflow of our proxy advisory firm to cast votes on these matters."); Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association (Dec. 31, 2018) ("IAA Letter"), at 2 ("[P]roxy advisory firms . . .

businesses provide voting advice to thousands of clients that exercise voting authority over a sizable number of shares that are voted annually.[18] Accordingly, proxy voting advice businesses are uniquely situated in today's market to influence these investors' voting decisions.

Given these market realities, it is vital that proxy voting advice be based on the most accurate information reasonably available and that the businesses providing such advice be sufficiently transparent with their clients about the processes and methodologies used to formulate the advice.[19] This is especially true when proxy voting advice businesses provide advice to investment advisers, which often make voting determinations on behalf of investors. The Commission has a strong interest in protecting those investors by ensuring that information provided by proxy voting advice businesses enables investment advisers to make informed voting determinations on investors' behalf.[20] In this regard, because proxy voting advice provided by

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provide important support, particularly voting-related administration services. Indeed, investment advisers of all sizes would face extreme logistical difficulty if they were unable to use these services to assist in the mechanics of voting proxies and for research.").

[18] One major proxy voting advice business, Institutional Shareholder Services, Inc. ("ISS"), reported that it had approximately 2,000 institutional clients. *See The ISS Advantage*, INSTITUTIONAL SHAREHOLDER SERVICES, *available at* https://www.issgovernance.com/about/about-iss/ (last visited Sept. 20, 2019). Another major firm, Glass, Lewis & Co., LLC ("Glass Lewis"), reported that, as of 2019, it had "1,300+ clients, including the majority of the world's largest pension plans, mutual funds, and asset managers, who collectively manage more than $35 trillion in assets." *See Company Overview*, GLASS LEWIS, *available at* https://www.glasslewis.com/company-overview/ (last visited Sept. 20, 2019).

[19] *See, e.g.*, Concept Release, *supra* note 2, at 8 ("[T]he proxy system involves a wide array of third-party participants . . . including proxy advisory firms . . . the increased reliance on these third parties . . . adds complexity to the proxy system and makes it less transparent to shareholders and to issuers."). The Commission has previously conducted rulemaking in this area, as well as engaged with the public through various forums and statements on these issues. *See, e.g.*, *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, Release No. 34-86721 (Aug. 21, 2019) [84 FR 47416 (Sept. 10, 2019)] ("Commission Interpretation on Proxy Voting Advice"); 2018 Proxy Roundtable, *supra* note 8; *2013 Roundtable on Proxy Advisory Services* (Dec. 5, 2013), *available at* https://www.sec.gov/spotlight/proxy-advisory-services.shtml; *Proxy Voting by Investment Advisers*, Release No. IA-2106 (Jan. 31, 2003), 68 FR 6585 (Feb. 7, 2003) ("2003 Proxy Voting Release").

[20] In addition, the Commission recently issued guidance regarding how an investment adviser's fiduciary duty and Rule 206(4)-6 under the Investment Advisers Act of 1940 [15 U.S.C. § 80b] (the "Advisers Act") relate to an investment adviser's exercise of voting authority on behalf of clients. *See* Commission Guidance on Proxy Voting Responsibilities, *supra* note 9, at 3. Proxy voting advice businesses also provide their services to a range of clients other than investment advisers, and those clients would also benefit from improvements in the quality of the voting advice they receive.

proxy voting advice businesses generally constitutes a "solicitation" subject to the federal proxy rules,[21] it is important that our rules governing the proxy solicitation process are working to achieve these goals.

In recent years, registrants, investors, and others have expressed concerns about proxy voting advice businesses.[22] As described in more detail below, these concerns have focused on the accuracy and soundness of the information and methodologies used to formulate proxy voting advice businesses' recommendations as well as potential conflicts of interest that may affect those recommendations. Given proxy voting advice businesses' potential to influence the voting decisions of investment advisers and other institutional investors,[23] who often vote on behalf of others, we are concerned about the risk of proxy voting advice businesses providing inaccurate or incomplete voting advice (including the failure to disclose material conflicts of interest) that could be relied upon to the detriment of investors. In light of these concerns, we are proposing amendments to the federal proxy rules that are designed to enhance the accuracy, transparency of process, and material completeness of the information provided to clients of proxy voting advice businesses when they cast their votes, as well as amendments to enhance disclosures of conflicts of interest that may materially affect the proxy voting advice businesses' voting advice.

In undertaking this rulemaking effort, we acknowledge the existence of a wider public debate about the role and impact of proxy voting advice businesses in the proxy voting system.[24]

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[21] *See* Commission Interpretation on Proxy Voting Advice, s*upra* note 19 at 4; *infra* Section II.A.

[22] *See, e.g.*, *infra* notes 24 and 70. *See generally* comment letters submitted in connection with the 2018 Proxy Roundtable, *supra* note 8; comment letters submitted in connection with the *2013 Roundtable on Proxy Advisory Services*, *supra* note 19, *available at* https://www.sec.gov/comments/4-670/4-670.shtml.

[23] *See supra* note 17.

[24] For example, representatives of the registrant and retail investor communities have expressed concerns about the oversight and accountability over proxy voting advice businesses. *See, e.g.*, Letter from Darla Stuckey, President and CEO, Society for Corporate Governance (Nov. 9, 2018) ("Soc. for Corp. Gov. Letter"), at 4 ("There is no regulatory regime that governs the manner in which [proxy advisory firms] develop their policies or form the recommendations or ratings they make."); Letter from Henry D. Eickelberg, Chief Operating Officer, Center on Executive

The focus of our rule proposal, however, is not on all aspects of proxy voting advice businesses' role in the proxy process. Rather, it is on measures that, if adopted, would address certain specific concerns about proxy voting advice businesses and would help to ensure that the recipients of their voting advice make voting determinations on the basis of materially complete and accurate information. The proposed amendments are designed to achieve these purposes without generating undue costs or delays that might adversely affect the timely provision of proxy voting advice.

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed rule amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

II. DISCUSSION OF PROPOSED AMENDMENTS

A. Proposed Codification of the Commission's Interpretation of "Solicitation" Under Rule 14a-1(l) and Section 14(a)

Compensation (March 7, 2019) ("Center on Exec. Comp. Letter"), at 1 (noting a "concerning lack of accountability" for proxy advisory firms); Letter from James L. Martin, 60 Plus Association (Oct. 5, 2018); Letter from Nan Bauroth, Member, Main Street Investors Coalition Advisory Council (Jan. 25, 2019); Letter from Rasa Mokhoff (March 11, 2019); Letter from Pauline Yee (Apr. 9, 2019), at 1; Letter from Marie Reed (Apr. 16, 2019), at 1; Letter from Christopher Burnham, President, Institute for Pension Fund Integrity (Apr. 29, 2019), at 3; Letters from Bernard S. Sharfman (Oct 8, 2018, Oct. 12, 2018, and Nov. 27, 2018); Letter from Tom D. Seip (Oct. 20, 2010), at 4–6, *available at* https://www.sec.gov/comments/s7-14-10/s71410.shtml; Letter from Mark Latham, Founder, VoterMedia.org (Sep. 29, 2010), at 5–6, *available at* https://www.sec.gov/comments/s7-14-10/s71410.shtml; Letter from Wachtell, Lipton, Rosen & Katz (Oct. 19, 2010) ("Wachtell Letter"), at 4–6, *available at* https://www.sec.gov/comments/s7-14-10/s71410.shtml (commenting in response to the Concept Release, *supra* note 2); 38th Annual SEC Government-Business Forum on Small Business Capital Formation (Aug. 14, 2019) (at which participants developed recommendations for reform of the proxy solicitation system, including "effective oversight of proxy advisory firms"); James R. Copland, David F. Larcker & Brian Tayan, *Proxy Advisory Firms—Empirical Evidence and the Case for Reform*, MANHATTAN INSTITUTE 6 (May 2018), *available at* https://media4.manhattan-institute.org/sites/default/files/R-JC-0518-v2.pdf.

Others, however, have expressed skepticism about these concerns. *See, e.g.*, Sagiv Edelman, *Proxy Advisory Firms: A Guide for Regulatory Reform,* 62 EMORY L.J. 1369, 1409 (2013) (concluding that "[t]he concerns of the critics of proxy advisory firms are overstated and distort how proxy advisory firms function and are used by their clients"); Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 905–06 (2010) (estimating that the impact of proxy advisory firms' voting recommendations on actual voting outcomes is far less than commonly attributed); TIAA Letter, *supra* note 17, at 5 (asserting that the correlation between proxy advisory firms' recommendations and the voting patterns of their clients is due more to the firms' alignment with their clients' voting philosophy than the clients' overreliance on the voting advice); CII Letter, *supra* note 13, at 15 (citing a lack of compelling evidence that additional regulation of proxy advisory firms is necessary).

Exchange Act Section 14(a)[25] makes it unlawful for any person to "solicit" any proxy with respect to any security registered under Exchange Act Section 12 in contravention of such rules and regulations prescribed by the Commission.[26] The purpose of Section 14(a) is to prevent "deceptive or inadequate disclosure" from being made to shareholders in a proxy solicitation.[27] Section 14(a) grants the Commission broad authority to establish rules and regulations to govern proxy solicitations "as necessary or appropriate in the public interest or for the protection of investors."[28]

The Exchange Act does not define what constitutes a "solicitation" for purposes of Section 14(a) and the Commission's proxy rules. Accordingly, the Commission has exercised its rulemaking authority over the years to define what communications are solicitations and to prescribe rules and regulations when necessary and appropriate to protect investors in the proxy voting process.[29] The Commission first promulgated rules in 1935 to define a solicitation to include any request for a proxy, consent, or authorization or the furnishing of a proxy, consent or authorization to security holders.[30] Since then, the Commission has amended the definition as

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[25] 15 U.S.C. § 78n(a).

[26] Registrants only reporting pursuant to Exchange Act Section 15(d) are not subject to the federal proxy rules, while foreign private issuers are exempt from the requirements of Section 14(a). 17 CFR. 240.3a12-3(b).

[27] *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); s*ee* S. Rep. No. 1455, 73d Cong., 2d Sess., 74 (1934) ("In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings."); H.R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934) (explaining the need for "adequate disclosure" and "explanation"); Communications Among Shareholders Adopting Release, *supra* note 3, at 48277.

[28] 15 U.S.C. § 78n(a)*; see Borak*, 377 U.S. at 432 (noting the "broad remedial purposes" evidenced by the language of Section 14(a)); S. Rep. No. 73-792, 2d Sess., at 12 (1934) ("The committee recommends that the solicitation and issuance of proxies be left to regulation by the Commission."); H.R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934) (explaining the intention to give the Commission the "power to control the conditions under which proxies may be solicited").

[29] *See* 15 U.S.C. § 78n(a); 15 U.S.C. § 78c(b); 15 U.S.C. § 78w .

[30] *See* Exchange Act Release No. 34-378, 1935 WL 29270 (Sept. 24, 1935).

needed to respond to new market practices that have raised investor protection concerns.[31]

In particular, the Commission expanded the definition of a solicitation in 1956 to include not only requests for proxies, but also any "communication to security holders under circumstances reasonably calculated to result in the procurement, execution, or revocation of a proxy."[32] This expanded definition was prompted by recognition that some market participants were distributing written communications designed to affect shareholders' voting decisions well in advance of any formal request for a proxy that would have triggered the filing and information requirements of the federal proxy rules.[33] Since 1956, the Commission understood its definition of a solicitation to be broad and applicable regardless of whether persons communicating with shareholders were seeking proxy authority for themselves.[34] Recognizing the breadth of this definition, the Commission adopted an exemption from the information and filing requirements of

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[31] The Commission revised the definition in 1938 to include any request for a proxy, regardless of whether the request is accompanied by or included in a written form of proxy. *See* Release No. 34-1823 (Aug. 11, 1938) [3 FR 1991 (Aug. 13, 1991)], at 1992. It subsequently revised the definition in 1942 to include "any request to revoke or not execute a proxy." *See* Release No. 34-3347 (Dec. 18, 1942) [7 FR 10653 (Dec. 22, 1942)], at 10656.

Courts have also taken a broad view of solicitation, with one noting that a report provided by a broker-dealer to shareholders of the target company in a contested merger constituted a solicitation because it advised the shareholders that one bidder's offer was "far more attractive" than the other and therefore was a communication reasonably calculated to affect the shareholders' voting decisions. *See* Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 5 n.13 (citing *Union Pac. R.R. Co. v. Chicago & N.W. Ry. Co.*, 226 F. Supp. 400, 408 (N.D. Ill. 1964)); *see also Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 796 (2d Cir.1985) (stating that the proxy rules applied not only to direct requests to furnish, revoke or withhold proxies, but also to communications which may indirectly accomplish such a result and finding newspaper and radio advertisements that encouraged citizens to advocate for a state-run utility company to be solicitation made in connection with an upcoming director election); *SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943) (holding that the defendant shareholder who sent a letter to fellow shareholders in connection with an annual meeting asking them not to sign any proxies for the company was engaged in a solicitation).

[32] 17 CFR 240.14a-1(l)(1)(iii)*; see Adoption of Amendments to Proxy Rules*, Release No. 34-5276 (Jan. 17, 1956) [21 FR 577 (Jan. 26, 1956)], at 577; *see also Broker-Dealer Participation in Proxy Solicitations*, Release No. 34-7208 (Jan. 7, 1964) [29 FR 341 (Jan. 15, 1964)] ("Broker-Dealer Release"), at 341 ("Section 14 and the proxy rules apply to any person—not just management, or the opposition. This coverage is necessary in order to assure that all materials specifically directed to stockholders and which are related to, and influence their voting will meet the standards of the rules.").

[33] *See generally* Communications Among Shareholders Adopting Release, *supra* note 3.

[34] *See id.* at 48276 (adopting Exchange Act Rule 14a-2(b)(1)).

the federal proxy rules for communications by persons not seeking proxy authority, but continued to include such communications within the definition of a "solicitation."[35] The Commission also adopted another exemption from the information and filing requirements for proxy voting advice given by advisors to their clients under certain circumstances, but likewise continued to include such advice within the definition of "solicitation," subject to an exception discussed below.[36] By adopting these exemptions, the Commission removed requirements that were considered unnecessary for these forms of solicitations, in order for shareholders to have access to more sources of information when voting, though the antifraud provisions of the proxy rules continued to apply.

The Commission has previously observed that the breadth of the definition of a solicitation may result in proxy advisory firms being subject to the federal proxy rules because they provide recommendations that are reasonably calculated to result in the procurement, withholding, or revocation of a proxy and that, as a general matter, the furnishing of proxy voting advice constitutes a solicitation.[37] Most recently, the Commission issued an interpretative release regarding the application of the federal proxy rules to proxy voting advice.[38] As the Commission explained in that release, the determination of whether a communication is a solicitation depends upon both the specific nature and content of the communication and the circumstances under which the communication is transmitted.[39] The Commission noted several factors that indicate

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[35] *See id.*

[36] *See Shareholder Communications, Shareholder Participation in Corporate Electoral Process and Corporate Governance Generally*, Release No. 34-16356 (Nov. 21, 1979) [44 FR 68764 (Nov. 29, 1979)] ("1979 Adopting Release"), at 68766.

[37] *See* Concept Release, *supra* note 2, at 43009; *see also* Broker-Dealer Release, *supra* note 32, at 341.

[38] Commission Interpretation on Proxy Voting Advice, *supra* note 19.

[39] *See* Question and Response 1 of Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 6; *see also* Concept Release*, supra* note 2 at 43009 n.244.

proxy advisory firms generally engage in solicitations when they give proxy voting advice to their clients, including:

- The proxy voting advice generally describes the specific proposals that will be presented at the registrant's upcoming meeting and presents a "vote recommendation" for each proposal that indicates how the client should vote;
- Proxy advisory firms market their expertise in researching and analyzing matters that are subject to a proxy vote for the purpose of assisting their clients in making voting decisions;
- Many clients of proxy advisory firms retain and pay a fee to these firms to provide detailed analyses of various issues, including advice regarding how the clients should vote through their proxies on the proposals to be considered at the registrant's upcoming meeting or on matters where shareholder approval is sought; and
- Proxy advisory firms typically provide their recommendations shortly before a shareholder meeting or authorization vote,[40] enhancing the likelihood that their recommendations will influence their clients' voting determinations.[41]

Where these or other significant factors (or a significant subset of these or other factors) is present,[42] the proxy advisory firms' voting advice generally would constitute a solicitation subject to the Commission's proxy rules because such advice would be "a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or

[40] *See, e.g.*, Letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (June 3, 2019) ("Business Roundtable Letter 2"), at 9 ("[R]ecent survey results support the contention that a spike in voting follows adverse voting recommendations by ISS during the three-business day period immediately after the release of the recommendation."); Transcript of Roundtable on the Proxy Process, at 242 (Nov. 15, 2018), *available at* https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf ("2018 Roundtable Transcript"); Frank Placenti, *Are Proxy Advisors Really A Problem?*, AMERICAN COUNCIL FOR CAPITAL FORMATION 3 (Oct. 2018), http://accfcorpgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf.

[41] Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 8.

[42] Such other factors may include the fact that many proxy advisory firms' recommendations are typically distributed broadly.

revocation of a proxy."[43] Furthermore, the Commission explained that such advice generally would be a solicitation even if the proxy advisory firm is providing recommendations based on the client's own tailored voting guidelines, and even if the client chooses not to follow the advice.[44]

We are proposing to codify this Commission interpretation by amending Rule 14a-1(l). The proposed amendment would add paragraph (A) to Rule 14a-1(l)(1)(iii)[45] to make clear that the terms "solicit" and "solicitation" include any proxy voting advice that makes a recommendation to a shareholder as to its vote, consent, or authorization on a specific matter for which shareholder approval is solicited, and that is furnished by a person who markets its expertise as a provider of such advice, separately from other forms of investment advice, and sells such advice for a fee. We believe the furnishing of proxy voting advice by a person who has decided to offer such advice, separately from other forms of investment advice, to shareholders for a fee, with the expectation that its advice will be part of the shareholders' voting decision-making process, is conducting the type of activity that raises the investor protection concerns about inadequate or materially misleading disclosures that Section 14(a) and the Commission's proxy rules are intended to address.[46] We further believe that the regulatory framework of Section 14(a) and the Commission's proxy rules, with their focus on the information received by shareholders as part of

[43] *See* Question and Response 1 of Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 9.

[44] *Id.*

[45] The proposed amendment is intended to make clear that proxy voting advice provided under the specified circumstances constitutes a solicitation under current Rule 14a-1(l)(1)(iii). It is not intended to amend, limit, or otherwise affect the scope of Rule 14a-1(l)(1)(iii).

[46] We understand that investment advisers may discuss their views on proxy voting with clients or prospective clients, as part of their portfolio management services or other common investment advisory services. Such discussions could be prompted (such as in the case of a client or prospective client that has asked the adviser for its views on a particular transaction) or unprompted. For example, a mutual fund board may request that a prospective subadviser discuss its views on proxy voting, including particular types of transactions such as mergers or corporate governance. The proposed amendments are not intended to include these types of communications as solicitations for purposes of Section 14(a). Instead, the proposed amendments are intended to apply to entities that market their proxy voting advice as a service that is separate from other forms of investment advice to clients or prospective clients.

the voting process, is well-suited to enhancing the quality and availability of the information that clients of proxy voting advice businesses are likely to consider as part of their voting determinations.[47]

We recognize that the major proxy voting advice businesses may use more than one benchmark voting policy or set of guidelines in formulating their voting recommendations on a particular matter to be voted on at a shareholder meeting (or for which written consents or authorizations are sought in lieu of a meeting). For example, a proxy voting advice business may offer differing voting recommendations on a matter based on the application of its benchmark policy or specialty voting policies, such as a socially responsible policy, a sustainability policy, or a Taft-Hartley labor policy. The voting recommendations formulated under the benchmark policy and each of these specialty policies would be considered to be separate communications of proxy voting advice under proposed Rule 14a-1(l)(1)(iii)(A) and for purposes of the proposed rule amendments discussed below.

We also recognize that the term "solicit" in Section 14(a) arguably might be construed more narrowly than how the Commission has long interpreted that term. Under such a view, "solicitation" arguably might be limited to requests to obtain proxy authority or to obtain shareholder support for a preferred outcome, which might exclude certain proxy voting advice by a person retained to provide such advice to a client. We do not believe, however, such a narrow reading of Section 14(a) is required or warranted, and we adhere to the Commission's longstanding view since 1956 that any communications reasonably calculated to result in a

[47] We understand that a proxy voting advice business might, if applicable requirements are met, be registered as an investment adviser and subject to additional regulation under the Advisers Act and the Commission's rules thereunder. However it is not unusual for a registrant under one provision of the securities laws to be subject to other provisions of the securities laws when engaging in conduct that falls within the other provisions. Given the focus of Section 14(a) and the Commission's proxy rules on protecting investors who receive communications regarding their proxy votes, it is appropriate that proxy voting advice businesses be subject to applicable rules under Section 14(a) when they provide proxy voting advice.

shareholder's proxy voting decision may be regarded as a solicitation subject to Commission rules under Section 14(a). The term "solicit" did not have a single, narrow meaning when Section 14(a) was enacted.[48] Moreover, as discussed above, an overarching purpose of Section 14(a) is to ensure that communications to shareholders about their proxy voting decisions contain materially complete and accurate information.[49] It would be inconsistent with that goal if persons whose business is to offer and sell voting advice broadly to large numbers of shareholders, with the expectation that their advice will factor into shareholders' voting decisions, were beyond the reach of Section 14(a).[50] The fact that shareholders may retain providers of proxy voting advice to advance their own interests does not obviate these concerns; to the contrary, in many circumstances it makes the role of this advice all the more important to those shareholders' decisions, and all the more significant in the proxy process.

Although we adhere to the Commission's longstanding view that any communication reasonably calculated to result in a proxy voting decision is a solicitation, we understand that there may be circumstances in which a person, such as a broker-dealer or an investment adviser, may receive requests for voting advice from a client that are unprompted by that person. The breadth of the Commission's definition of a solicitation could raise questions about whether such voting advice is a communication reasonably calculated to influence proxy voting by shareholders. The

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[48] Contemporaneous dictionaries ascribed several relevant meanings to the term "solicit," including "[t]o take charge or care of, as business"; "[t]o move to action"; "[t]o approach with a request or plea, as in selling"; and "[t]o urge" or "insist upon." *See, e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934); FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1932) (defining "solicit" as including to "influence to action").

[49] *See Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990) ("Proxy solicitations are, after all, only *communications* with potential absentee voters. The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting.").

[50] Courts have expressed similar concerns that the protections established by Section 14(a) would be hollow if the statutory provision is interpreted in an overly narrow manner. *See, e.g.*, *SEC v. Okin,* 132 F.2d 784, 786 (2d Cir. 1943) (declining to view the Commission's authority as strictly limited to only requests for proxies, consents, or authorizations and stating regulation of written communications made prior to such formal requests but [that] are part of a continuous plan for a successful solicitation is needed "if the purpose of Congress is to be fully carried out.").

Commission has expressed the view in the past that such a communication should not be regarded as a solicitation subject to the proxy rules.[51] We are proposing to codify this view through an amendment to Rule 14a-1(l)(2), which currently lists activities and communications that do not constitute a solicitation. As proposed, the definition of a solicitation would exclude any proxy voting advice furnished by a person who furnishes such advice only in response to an unprompted request.[52]

The proposed amendment would make clear that the federal proxy rules do not apply to this form of proxy voting advice. We continue to believe that providing voting advice to a client where the client's request for the advice has been invited and encouraged by the person's marketing, offering, and selling such advice should be distinguished from advice provided by a person only in response to an unprompted request from its client.[53] The information and filing requirements of the proxy rules[54] (including the filing and furnishing of a proxy statement with information about the registrant and proxy cards with means for casting votes) or compliance with the proposed conditions of the exemptions described below, while appropriate for a person who chooses to actively market and sell its proxy voting advice, are ill-suited for a person who receives an unprompted request from a client for its views on an upcoming matter to be presented

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[51] Commission Interpretation on Proxy Voting Advice, *supra* note 19 at 10 ("We view these services provided by proxy advisory firms as distinct from advice prompted by unsolicited inquiries from clients to their financial advisors or brokers on how they should vote their proxies, which remains outside the definition of solicitation."); *see* Broker-Dealer Release, *supra* note 32, at 341 (setting forth the opinion of the SEC's General Counsel that a broker is not engaging in a "solicitation" if it is merely responding to his customer's request for advice and "not actively initiating the communication"); 1979 Adopting Release, *supra* note 36, at 68766.

[52] *See* proposed Rule 14a-1(l)(2)(v).

[53] Some observers contend that a proxy voting advice business that "is contractually obligated to furnish vote recommendations based on client-selected guidelines does not provide 'unsolicited' proxy voting advice, and thus is not engaged in a 'solicitation' subject to the Exchange Act proxy rules." *See* ISS Letter, *supra* note 9, at 8. For the reasons stated in this section, we do not agree with this view.

[54] Rules 14a-3 through 14a-6 set forth the filing, delivery, information, and presentation requirements for the proxy statement and form of proxy for solicitations subject to Regulation 14A [17 CFR 240.14a-3 through 14a-6].

for shareholder approval. For example, a person who does not sell voting advice as a business and who provides such advice only in response to an unprompted request from his or her client is unlikely to anticipate the need to establish the internal processes necessary to comply with our proposed new conditions to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3).[55]

Furthermore, the proposed amendment to Rule 14a-1(l)(2) is intended to permit the furnishing of proxy voting advice without triggering the federal proxy rules under circumstances that present significantly less risk to investor protection. It is reasonable to expect that a person who does not promote himself or herself as an expert in proxy voting advice and provides voting advice only in response to unprompted requests will be furnishing such advice only to a client with whom there is an existing business relationship.[56] We do not believe proxy voting advice provided under these limited circumstances presents the same investor protection or regulatory concerns as proxy voting advice businesses engaged in widespread marketing and sale of proxy voting advice to large numbers of investment advisers and other institutional investors who are often voting on behalf of other investors.

If such advice were considered a solicitation, a person may, in the interest of caution, decline to share his or her advice or views on the upcoming matter with the client due to concerns about the need to file a proxy statement or his or her inability to comply with the exemptions from such a requirement. We believe that our proposed amendments to the definition of a solicitation in Rule 14a-1(l) are appropriately tailored to apply the protections of the federal proxy rules to proxy voting advice where they are most needed and in a manner consistent with Section 14(a).

Request for Comment

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[55] *See supra* Section II.B.

[56] For example, a broker-dealer's role as a financial advisor for a client on investment matters may cause the client to seek voting advice from the broker-dealer as well. *See* Broker-Dealer Release, *supra* note 32, at 341.

1. Should we codify the Commission interpretation on proxy voting advice and the Commission view about unprompted requests for proxy voting advice?[57] Would the proposed codification (adding paragraph (A) to Rule 14a-1(l)(iii) and paragraph (v) to Rule 14a-1(l)(2)) provide market participants with better notice as to the applicability of the federal proxy rules?
2. Does the proposed amendment inadvertently include certain communications made by proxy voting advice businesses or other parties, such as investment advisers, that should not fall within the definition of "solicitation"? If so, which communications, and how? Are there any revisions that we should consider that would better address these concerns or provide greater clarity?
3. For example, the proposed amendment seeks to distinguish proxy voting advice businesses from investment advisers who provide voting advice as part of a broader advisory business that already is subject to an array of investor protection regulations by referring to proxy voting advice that is marketed and sold separately from other forms of investment advice. Instead of the proposed approach, should we refer to proxy voting advice that is marketed as a "standalone service"? What would be the advantages and disadvantages of this approach? Would any further clarification of "standalone services" be required?
4. Is there a different, more appropriate way of distinguishing proxy voting advice from other forms of investment advice?
5. Should the proposed amendment be expanded to specify any other type of activity as constituting a solicitation?
6. Should the proposed amendment clarifying that proxy voting advice provided by a person only in response to an unprompted request from his or her client be limited to persons who are registered broker-dealers or investment advisers? Should there be other limits on the types of

[57] *See* Commission Interpretation on Proxy Voting Advice, *supra* note 19.

persons who should fall outside the definition of a solicitation?

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

Under the Commission's proxy rules, any person engaging in a proxy solicitation, unless exempt, is generally subject to filing and information requirements designed to ensure that materially complete and accurate information is furnished to shareholders solicited by the person. Among other things, the person making the solicitation is required to prepare a proxy statement with the information prescribed by Schedule 14A,[58] together with a proxy card in a specified format, file these materials with the Commission, and furnish them to every shareholder who is solicited.[59] Schedule 14A requires extensive information to be included in the proxy statement, such as descriptions of matters up for shareholder vote, securities ownership information of certain beneficial owners and management, disclosures of the registrant's executive compensation and related party transactions, and, for certain matters, financial statements. Once a proxy statement is furnished to shareholders, any other written communications that constitute solicitations must be filed with the Commission as additional soliciting materials no later than the date they are first sent to shareholders.[60]

Over the years, the Commission has recognized that these filing and information requirements may, in certain circumstances, impose burdens that deter communications useful to shareholders, and in such circumstances, may not be necessary to protect investors in the proxy voting process.[61] Accordingly, the Commission has exempted certain kinds of solicitations from

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[58] 17 CFR 240.14a-101.

[59] 17 CFR 240.14a-3(a).

[60] 17 CFR. 240.14a-6(b).

[61] *See, e.g.*, Communications Among Shareholders Adopting Release, *supra* note 3, at 49278 ("[S]hareholders can be deterred from discussing management and corporate performance by the prospect of being found after the fact to have engaged in a proxy solicitation. The costs of complying with [the proxy] rules also has meant that . . . shareholders and other interested persons may effectively be cut out of the debate regarding proposals . . . .").

the filing and information requirements of the proxy rules, subject to various conditions, where such requirements are not necessary for investor protection. Rule 14a-9, the antifraud provision of the federal proxy rules, still applies, however, to these exempt solicitations.[62]

For example, Rule 14a-2(b)(1) generally exempts solicitations by persons who do not seek the power to act as proxy for a shareholder and do not have a substantial interest in the subject matter of the communication beyond their interest as a shareholder.[63] This exemption was primarily intended to enable such shareholders to freely communicate with other shareholders on matters subject to a proxy vote, subject to other requirements outside of the proxy rules, such as Section 13(d) of the Exchange Act and the rules thereunder.[64] Another exemption, Rule 14a-2(b)(3), generally exempts proxy voting advice furnished by an advisor[65] to any other person with whom the advisor has a business relationship. This exemption was designed to remove an impediment to the flow of such advice to shareholders from advisors such as financial analysts, investment advisers, and broker-dealers who may be especially familiar with the affairs of

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[62] 17 CFR 240.14a-9.

[63] Specifically, Rule 14a-2(b)(1) provides that Sections 240.14a-3 to 240.14a-6 (other than paragraphs 14a-6(g) and 14a-6(p)), Section 240.14a-8, Section 240.14a-10, and Sections 240.14a-12 to 240.14a-15 do not apply to:

> Any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization. *Provided, however*, that the exemption set forth in this paragraph shall not apply to [various interested parties, including the registrant, its officers and directors, and other persons likely to benefit from successful solicitation.]

17 CFR 240.14a-2(1).

[64] *See* Communications Among Shareholders Adopting Release, *supra* note 3, at 48280.

[65] When the Commission adopted this rule (formerly Rule 14a-2(b)(2)), it made clear that "advisor" should be understood to mean "one who renders financial advice in the ordinary course of [its] business." *See* 1979 Adopting Release, *supra* note 36, at 68767. As the Commission stated, "The definition [of advisor] focuses on persons with financial expertise and who are likely to be particularly familiar with information about corporate affairs which may be pertinent to voting decisions." *Id.* Rule 14a-2(b)(3) reflects this by making the exemption contingent, among other things, on the advisor rendering financial advice in the ordinary course of [its] business. *See* Rule 14a-2(b)(3)(i).

registrants.[66]

These exemptions, however, have remained subject to various limitations and conditions designed to ensure that investors are protected where the Commission's filing and information requirements do not apply. For example, any person who wishes to rely on the Rule 14a-2(b)(3) exemption may not receive special commissions or remuneration from anyone other than the recipient of the advice and must disclose any significant relationship or material interest bearing on the voting advice.[67] Furthermore, any person who relies on Rule 14a-2(b)(1) or Rule 14a-2(b)(3) remains subject to Rule 14a-9's prohibition on false or misleading statements.

Proxy voting advice businesses typically rely upon the exemptions in Rule 14a-2(b)(1) and Rule 14a-2(b)(3) to provide advice without complying with the filing and information requirements of the proxy rules.[68] Both exemptions, however, were adopted by the Commission before proxy voting advice businesses played the significant role that they now do in the proxy voting process and in the voting decisions of investment advisers and other institutional

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[66] *See* 1979 Adopting Release, *supra* note 36, at 68766.

[67] The conditions to Rule 14a-2(b)(3) are:

> (i) The advisor renders financial advice in the ordinary course of his business;
>
> (ii) The advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter;
>
> (iii) The advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice and other persons who receive similar advice under this subsection; and
>
> (iv) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of § 240.14a-12(c).

17 CFR 240.14a-2(b)(3).

[68] *See* Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 7 (discussing the "two exemptions to the federal proxy rules that are often relied upon by proxy advisory firms").

investors.[69] Their role in the process today has led some to express concerns about, among other things, the services they provide to their clients, particularly: (i) the adequacy of disclosure of any actual or potential conflicts of interest that could materially affect the objectivity of the proxy voting advice; (ii) the accuracy and material completeness of the information underlying the advice; and (iii) the inability of proxy voting advice businesses' clients to receive information and views from the registrant, potentially contrary to that presented in the advice, in a manner that is consistently timely and efficient.[70]

We recognize that proxy voting advice businesses can play a valuable role in the proxy voting process. We also believe it is unnecessary for such businesses to comply with the filing and information requirements of the proxy rules to the same extent as non-exempt soliciting persons, provided other measures are in place to protect investors. However, in light of the substantial role that proxy voting advice businesses have in the voting decisions of their clients, who often vote on behalf of investors, we are proposing new conditions to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3) that would apply specifically to persons furnishing proxy voting advice that constitutes a solicitation within the scope of proposed Rule 14a-1(l)(1)(iii)(A).[71]

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[69] *See supra* note 18 (providing client statistics for ISS and Glass Lewis).

[70] *See, e.g.*, Soc. for Corp. Gov. Letter, *supra* note 24, at 1; Business Roundtable Letter 2, *supra* note 40, at 10–13; Letter from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (Nov. 12, 2018) ("Chamber of Commerce Letter"), at 5–8; Letter from Tony Huang, Director, Advent Capital Management, LLC (July 29, 2019) ("Advent Capital Letter"), at 6–7 (advocating in favor of Commission rulemaking to reduce the "opacity of the proxy advisory process and the potential for financial conflicts of interest"); Wachtell Letter, *supra* note 24. But commenters also submitted letters generally disputing the need for regulatory reform of proxy advisory firms. *See, e.g.*, CII Letter, *supra* note 13, at 14; OPERS Letter, *supra* note 8, at 2; NYC Comptroller Letter, *supra* note 17, at p. 3 of enclosed statement before the Senate Banking Committee on Dec. 8, 2018; Letter from Thomas DiNapoli, Comptroller, State of New York (Nov. 13, 2018), at 4.

[71] *See supra* Section II.A. Other persons providing voting advice that is beyond the scope of proposed Rule 14a-1(l)(1)(iii)(A), such as financial advisors providing advice to clients with whom they have a business relationship, will be able to continue relying on the Rule 14a-2(b)(1) and Rule 14a-2(b)(3) exemptions without complying with the proposed new conditions.

We believe that our proposed rule amendments would (i) improve proxy voting advice businesses' disclosures of conflicts of interests that would reasonably be expected to materially affect their voting advice, (ii) establish effective measures to reduce the likelihood of factual errors or methodological weaknesses in proxy voting advice, and (iii) ensure that those who receive proxy voting advice have an efficient and timely way to obtain and consider any response a registrant or certain other soliciting person may have to such advice. We believe that these amendments would ensure that investment advisers, who vote on behalf of investors, and others who rely on the advice of proxy voting advice businesses, receive accurate, transparent, and materially complete information when they make their voting decisions.

1. Conflicts of Interest

Proxy voting advice businesses engage in activities or have relationships that could affect the objectivity or reliability of their advice, which may need to be disclosed in order for their clients to assess the impact and materiality of any actual or potential conflicts of interest with respect to a voting recommendation.[72] In recent years, observers have noted the many ways in which these activities and relationships could result in conflicts of interest.[73] Examples include:

- A proxy voting advice business providing voting advice to its clients on proposals to be considered at the annual meeting of a registrant while the proxy voting advice business also earns fees from that registrant for providing advice on corporate governance and

[72] Concept Release, *supra* note 2, at 43011.

[73] *See* 2018 Roundtable Transcript, *supra* note 40, at 202–16; 2016 GAO Report, *supra* note 9, at 32–33; 2007 GAO Report, *supra* note 9, at 9; Center on Exec. Comp. Letter, *supra* note 24, at 2–3; Soc. for Corp. Gov. Letter, *supra* note 24, at 6–7; Wachtell Letter, *supra* note 24, at 8–9; Timothy M. Doyle, *The Conflicted Role of Proxy Advisors*, AMERICAN COUNCIL FOR CAPITAL FORMATION 6 (May 22, 2018), *available at* https://corpgov.law.harvard.edu/2018/05/22/the-conflicted-role-of-proxy-advisors/ ("ACCF 2018 Report"); Edelman, *supra* note 24, at 1409; MANHATTAN INSTITUTE, *supra* note 24, at 16.

compensation policies;[74]

- A proxy voting advice business providing voting advice on a matter in which its affiliates or one of its clients has a material interest, such as a business transaction or a shareholder proposal put forward by that client;
- A proxy voting advice business providing ratings to institutional investors of registrants' corporate governance practices while at the same time consulting for the registrants that are the subject of the ratings to help increase their corporate governance scores; and
- A proxy voting advice business providing voting advice with respect to a registrant's shareholder meeting while affiliates of the business hold a significant ownership interest in the registrant, sit on the registrant's board of directors, or have relationships with the shareholder presenting the proposal in question.

These types of circumstances, where the interests of a proxy voting advice business may diverge materially from the interests of investors, create a risk that the proxy voting advice business's voting advice could be influenced by the business's own interests.[75] Although proxy voting advice businesses have described various measures they believe mitigate this risk,[76] the

[74] *See, e.g.*, Glass Lewis Letter, *supra* note 16, at 9 ("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.").

[75] *See* 2016 GAO Report, *supra* note 9, at 32–33; 2007 GAO Report, *supra* note 9, at 9; *see also* U.S. DEP'T OF THE TREASURY, *A Financial System That Creates Economic Opportunities—Capital Markets* 31 (Oct. 2017), https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf ("Public companies also had concerns about potential conflicts of interest that arise when a proxy advisory firm provides voting advice to its clients on public companies while simultaneously offering consulting services to those same companies to improve their corporate governance rankings.").

[76] *See, e.g.*, ISS Letter, *supra* note 9, at 10 (recognizing its duty of loyalty to its clients as a registered investment adviser and summarizing its various policies and procedures designed to ensure the integrity and independence of its advice, such as: a physical and functional firewall between ISS and ISS Corporate Solutions, Inc. ("ICS"); providing clients with conflicts disclosure; the inclusion of a legend in each proxy report alerting clients to potential conflicts; and the ability of ISS clients to obtain lists of all ICS clients); Glass Lewis Letter, *supra* note 16, at 6 (discussing its policies and procedures to help monitor, manage, and address potential conflicts and its practice of fully disclosing to

voting decisions of persons who rely on these businesses would be better informed if they received information sufficient for them to understand and assess these potential risks and measures.[77] Investment advisers that use proxy voting advice businesses for voting advice cannot fully understand potential risks and the proxy voting advice businesses' mitigation measures if they do not have access to sufficiently detailed disclosure about the full extent and nature of any conflicts that are relevant to the voting advice they receive.[78]

To help ensure that sufficient information about material conflicts of interest is provided consistently across proxy voting advice businesses and in a reasonably accessible manner to the clients of proxy voting advice businesses, we are proposing amendments to the exemptions from the proxy solicitation rules in Rules 14a-2(b)(1) and (b)(3) to specify that they will be available to proxy voting advice businesses only to the extent that they provide specified disclosures about their material conflicts of interest.[79] Rule 14a-2(b)(1) currently does not have a specified disclosure requirement for conflicts of interests. We recognize that the existing Rule 14a-2(b)(3)

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clients the existence of potential conflicts by adding a disclosure note to the front cover of relevant proxy research reports). However, as discussed *infra*, concerns remain about the adequacy of these firms' conflicts of interest disclosures. We note that there is no uniform set of standards that applies to the policies and procedures utilized by the various proxy voting advice businesses to address risks posed by conflicts of interest, the absence of which can lead to inconsistent and inadequate disclosures and mitigation measures.

[77] For example, the Commission recently discussed, in a separate release, steps that investment advisers should consider taking when deciding whether to retain or continue retaining a proxy advisory firm. *See* Question and Response 2 of Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 11–12.

[78] *See* Chamber of Commerce Letter, *supra* note 70, at 3–4 (stating the Chamber's concern that conflicts of interest are pervasive at both ISS and Glass Lewis); ACCF 2018 Report, *supra* note 73, at 24 ("The proxy advisory industry is immensely complex and interwoven. Its offerings and conflicts of interest are vague and unclear and yet the largest institutional investors, pensions, and hedge funds vote based on ISS and Glass Lewis recommendations."); Wachtell Letter, *supra* note 24, at 8; Letter from John Okray, Vice President and Assistant Counsel, OppenheimerFunds, Inc. (Sep. 24, 2009) ("Oppenheimer Letter"), at 2, *available at* https://www.sec.gov/comments/s7-13-09/s71309.shtml.

However, some clients of proxy advisory firms have expressed that they are satisfied with their proxy advisory firms' efforts at managing conflicts of interest and the quality of conflicts disclosures. *See, e.g.*, 2018 Roundtable Transcript, *supra* note 40, at 211–13; CII Letter, *supra* note 13, at 14; OPERS Letter, *supra* note 8, at 2; NYC Comptroller Letter, *supra* note 17, p. 3 of enclosed statement before the Senate Banking Committee on Dec. 8, 2018.

[79] *See* proposed Rule 14a-2(b)(9)(i).

exemption does require advisors, including proxy voting advice businesses, to disclose to their clients the existence of significant relationships and material interests,[80] a condition which the Commission adopted to address concerns that certain conflicts of interest might negatively affect the value of an advisor's advice.[81] However, a number of observers have expressed concerns about the adequacy of these disclosures and have stated that more specific, prominent disclosure about conflicts is needed to enable clients to make a more informed assessment of proxy voting advice businesses' voting advice.[82] For example, some observers have asserted that the conflicts disclosures provided by proxy voting advice businesses are vague or boilerplate disclosures that do not provide sufficient information about the nature of potential conflicts.[83] In light of these concerns, we are proposing to require that persons who provide proxy voting advice within the scope of proposed Rule 14a-1(l)(1)(iii)(A) include in such advice (and in any electronic medium used to deliver the advice) the following disclosures, which are intended to be more illuminating than what is currently specifically required by the existing Rule 14a-2(b)(1) and (b)(3) exemptions and specifically tailored to proxy voting advice businesses and the nature of their conflicts:[84]

- Any material interests, direct or indirect, of the proxy voting advice business (or its affiliates [85]) in the matter or parties concerning which it is providing the advice;

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[80] *See* current Rule 14a-2(b)(3)(ii).

[81] *See* 1979 Adopting Release, *supra* note 36, at 68766–67.

[82] *See, e.g.*, Soc. for Corp. Gov. Letter, *supra* note 24, at 6–7; Wachtell Letter, *supra* note 24, at 8–9.

[83] *See, e.g.*, ACCF 2018 Report, *supra* note 73, at 24 (noting that the proxy advisory industry's "conflicts [disclosures] are vague and unclear"); Wachtell Letter, *supra* note 24, at 8 (describing the current practice of "minimal and vague disclosure, sometimes in the form of blanket statements that simply note that conflicts may generally exist"); Oppenheimer Letter, *supra* note 79, at 2.

[84] *See* proposed Rule 14a-2(b)(9)(i).

[85] The term "affiliate," as used in proposed Rule 14a-2(b)(9)(i), would have the meaning specified in Exchange Act Rule 12b-2. We recognize that proxy voting advice businesses may not necessarily have access to the information needed to determine whether an entity is an affiliate of a registrant, another soliciting person, or the shareholder proponent. Therefore, as proposed, proxy voting advice businesses would only be required to use publicly-available

- Any material transaction or relationship between the proxy voting advice business (or its affiliates) and (i) the registrant (or any of the registrant's affiliates), (ii) another soliciting person (or its affiliates), or (iii) a shareholder proponent (or its affiliates), in connection with the matter covered by the proxy voting advice;
- Any other information regarding the interest, transaction, or relationship of the proxy voting advice business (or its affiliate) that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction, or relationship; and
- Any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction, or relationship.

As revised, the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3) would not be available unless the disclosures required by proposed Rule 14a-2(b)(9)(i) are provided. By extending these disclosure requirements to both Rule 14a-2(b)(1) and Rule 14a-2(b)(3), the proposed amendments would help ensure that investment advisers and other clients that use proxy voting advice businesses for voting advice receive the same information about potential conflicts of interests, regardless of which exemption a proxy voting advice business may rely upon for its proxy voting advice.

Proposed Rule 14a-2(b)(9)(i) would augment current disclosure requirements in Rules 14a-2(b)(1) and 14a-2(b)(3)[86] by specifying that enhanced disclosure about material conflicts of

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information to determine whether an entity is an affiliate of registrants, other soliciting persons, or shareholder proponents.

[86] The exemption in Rule 14a-2(b)(1) does not currently require conflicts of interest disclosure, while Rule 14a-2(b)(3)(ii) requires disclosure of "any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests in such matter." 17 CFR 240.14a-2(b)(3)(ii).

interest must be included in the proxy voting advice. In addition, it would utilize a principles-based requirement to elicit disclosure of any other information regarding the interest, transaction, or relationship that would be material to a reasonable investor's assessment of the objectivity of the proxy voting advice. The disclosures provided under these provisions should be sufficiently detailed so that clients of proxy voting advice businesses can understand the nature and scope of the interest, transaction, or relationship to appropriately assess the objectivity and reliability of the proxy voting advice they receive. This may include the identities of the parties or affiliates involved in the interest, transaction, or relationship triggering the proposed disclosure requirement and, when necessary for the client to adequately assess the potential effects of the conflict of interest, the approximate dollar amount involved in the interest, transaction, or relationship. Boilerplate language that such relationships or interests may or may not exist would be insufficient for purposes of satisfying this condition to the exemptions.

The proposed amendments also would require a discussion of the policies and procedures, if any, used to identify and steps taken to address such potential and actual conflicts of interest. Such disclosure should include a description of the material features of the policies and procedures that are necessary to understand and evaluate them. Examples include the types of transactions or relationships covered by the policies and procedures and the persons responsible for administering these policies and procedures. We believe that clients of proxy voting advice businesses would benefit from having this information as they assess the objectivity of the voting advice in light of disclosures about actual or potential conflicts of interest, develop a better understanding of the businesses' approaches for handling conflicts of interests, evaluate whether the conflicts were addressed effectively, and make decisions regarding whether and how to use the voting advice.

Furthermore, the proposed conflicts of interest disclosures would be required to be included in the proxy voting advice provided to clients.[87] For example, the disclosures would have to be part of the written report, if any, containing the proxy voting advice provided to the business's clients. To the extent that a proxy voting advice business provides its voting advice through means of an electronic voting platform or other electronic medium in addition to or in lieu of a written report, proposed Rule 14a-2(b)(9)(i) also would require that the disclosure be conveyed on such voting platform or other electronic medium to ensure that the information is prominently disclosed regardless of the means by which the advice is disseminated. Due to this proposed requirement, it would be insufficient for a proxy voting advice business only to provide such disclosures upon request from the client. We believe that imposing an affirmative duty on proxy voting advice businesses to provide the proposed disclosures of material conflicts of interest is consistent with obligations to disclose potential conflicts of interest in other contexts.[88] The proposed requirement also would standardize the manner in which conflicts of interest are disclosed by proxy voting advice businesses and assure that the required information receives due prominence and can be considered together with proxy voting advice at the time voting decisions are made.

[87] Currently, Rule 14a-2(b)(3)(ii) requires that disclosure of conflicts-related information be conveyed to the recipient of the proxy voting advice, but does not specify in what manner.

[88] For example, the information about the interests of participants in a matter presented for a vote required by Item 5 of Schedule 14A and information about related party transactions required by Item 404 of Regulation S-K [17 CFR 229.404] must be affirmatively disclosed. *See* 17 CFR 229.404. In addition to the existing disclosure requirements of Rule 14a-2(b)(3)(ii), some proxy voting advice businesses are registered as investment advisers under the Advisers Act, and therefore have obligations to disclose conflicts of interest. The proposed requirements would apply to all proxy voting advice businesses and are tailored to address concerns that arise in the context of those activities. The proposed requirements would not limit, in any way, the obligations of a proxy voting advice business registered under the Advisers Act and would complement existing requirements. However, where the substance of the disclosure requirements overlap, we do not anticipate that proxy voting advice businesses registered as investment advisers would incur substantial duplicative costs because, in complying with the proposed requirements, these proxy voting advice businesses will have already needed to complete at least some of the work of identifying conflicts and developing disclosures to explain the conflicts.

We are aware that some proxy voting advice businesses have asserted that they have practices and procedures that adequately address conflict of interest concerns.[89] Nevertheless, we believe that disclosure of such conflicts and any practices to address them should be more consistent across proxy voting advice businesses so that all clients of proxy voting advice businesses have materially complete information upon which to make informed voting decisions.[90] As such, the proposed amendments would establish a baseline disclosure standard to which a proxy voting advice business must adhere in order to avail itself of the exemptions in Rule 14a-2(b)(1) and (3). We believe that by requiring proxy voting advice businesses to provide standardized disclosure regarding conflicts of interest, clients of these businesses would be in a better position to evaluate these businesses' ability to manage their conflicts of interest, both at the time the proxy voting advice business is first retained and on an ongoing basis.[91]

[89] *See supra* note 76 and accompanying text.

[90] Currently, proxy voting advice businesses have differing ways of disclosing their conflicts of interest. ISS discloses the details of its potential conflicts of interest, such as the identities of the parties and the amounts involved, through its ProxyExchange platform while Glass Lewis states that its disclosures are on the front cover of the report with its proxy voting advice. *See ISS FAQs Regarding Recent Guidance from the U.S. Securities and Exchange Commission Regarding Proxy Voting Responsibilities of Investment Advisers* (Oct. 17, 2019) ("ISS FAQs"), *available at* https://www.issgovernance.com/file/faq/ISS_Guidance_FAQ_Document.pdf.; Glass Lewis Letter, *supra* note 16.

[91] Although some commenters have advocated in favor of public disclosure of a proxy advisory firm's conflicts of interest, in addition to requiring disclosure in the advisor's proxy voting advice, *see, e.g.*, Center on Exec. Comp. Letter, *supra* note 24, at 2; Wachtell Letter, *supra* note 24, at 8, we are not proposing such a requirement. The Commission's primary concern in proposing these amendments to Rule 14a-2(b) is with the recipients of proxy voting advice, including investment advisers who use that advice to make voting decisions on behalf of clients with whom they have a fiduciary relationship. Moreover, we are aware that some proxy voting advice businesses may have compelling and legitimate business reasons for limiting the dissemination of this information. For example, ISS has stated that it maintains a strict firewall between itself and its subsidiary, ICS, in order to control the risk that a conflict of interest might jeopardize the independence of its proxy voting advice business. ISS Letter, *supra* note 9, at 13. ISS indicates that "a key goal of the firewall is to keep the ISS Global Research team from learning the identity of ICS' clients, thereby insuring the objectivity and independence of ISS' research process and vote recommendation." *Id.* ISS has stated that requiring public disclosure of relevant details about ICS' clients might compromise this information barrier and severely undermine the company's conflict mitigation program. *Id.* at 14.

Request for Comment

4. Is the text of proposed Rule 14a-2(b)(9)(i) sufficient to elicit appropriate disclosure of a proxy voting advice business's conflicts of interest to its clients? Are there other examples of conflicts of interest that the Commission should take into account in considering the text of proposed Rule 14a-2(b)(9)(i)? Is the principles-based requirement in Rule 14a-2(b)(9)(i)(C) sufficient to capture material information about conflicts of interest not otherwise included within the scope of paragraphs (9)(i)(A) and (B)? Is there additional material information that should be required?
5. Would the proposed disclosures provide clients of proxy voting advice businesses with adequate and appropriate information about the businesses' conflicts of interest when making their voting determinations?
6. To what extent do existing disclosures address the concerns discussed in this release? What additional information may be required to ensure that they provide clients with the information clients need?
7. Is there specific information, whether qualitative or quantitative, about proxy voting advice businesses' conflicts of interest that they should be required to disclose? For example, should proxy voting advice businesses be required to disclose the specific amounts that they receive from the relationships or interests covered by the proposed conflicts of interests disclosures?
8. Would requiring specific disclosure of this sort raise competitive or other concerns for proxy voting advice businesses? For example, would the proposed disclosures be incompatible with firewalls or other mechanisms used by proxy voting advice businesses to prevent conflicts of interest from affecting the advice these businesses provide?

9. What information would be most relevant to an investment adviser or other client of a proxy voting advice business in seeking to understand how the proxy voting advice business identifies and addresses conflicts of interest?

10. Do proxy voting advice businesses consult on particular matters where their input influences the substance of the matter to be voted on (e.g., providing consulting services to a hedge fund with respect to transformative transactions, such as a proxy contest where the fund is presenting a competing slate of directors)? If so, what type of disclosure would help investors to understand the proxy voting advice business's role and potential conflicts of interest regarding these situations? Is the text of proposed Rule 14a-2(b)(9)(i) sufficient to elicit disclosure of material conflicts of interest of this type?

11. Currently, Rule 14a-2(b)(3) requires disclosure to the recipient of the voting advice of "any significant relationship" with the registrants and other parties as well as "any material interests" of the advisor in the matter. By contrast, disclosure under proposed Rule 14a-2(b)(9)(i) would be required only to the extent that the information would be material to assessing the objectivity of the proxy voting advice. Is the terminology in each provision sufficiently clear with respect to the types of relationships or interests that are covered by each requirement? For example, is there sufficient clarity on how to assess whether a relationship is "material," or is additional guidance needed? Should we consider alternative thresholds or language for the proposed conflicts of interests disclosure requirement of Rule 14a-2(b)(9)(i)? If so, what language should we consider? As an alternative, should we use the same terminology as Rule 14a-2(b)(3)? Should we look instead to Item 404 of Regulation S-K, which requires disclosure of a "direct or indirect material interest"? Is Item 5 of Schedule 14A, which requires disclosures of "any substantial interest" of the covered persons, an alternative that we should consider?

12. Should proposed Rule 14a-2(b)(9)(i) limit the matters which a proxy voting advice business must disclose to those that occurred on or after a certain date, or is a more principles-based disclosure requirement preferable?
13. Proposed Rule 14a-2(b)(9)(i) is a principles-based requirement that does not specify the manner in which conflicts of interest should be disclosed, so long as the disclosure is included in the proxy voting advice business's voting advice and, if applicable, conveyed through any electronic medium that the proxy voting advice business uses in lieu of or in addition to a written report. Should proposed Rule 14a-2(b)(9)(i) be more prescriptive regarding the presentation of conflicts of interest disclosure, or is it preferable to let the proxy voting advice business and its client determine how this information will be presented to the client?
14. Is it important that the conflicts of interest disclosure required by proposed Rule 14a-2(b)(9)(i) be included in the proxy voting advice, or would providing it separately suffice?
15. To the extent that a proxy voting advice business uses a voting platform or other electronic medium to convey its voting advice, should we require that the conflicts of interest disclosure be conveyed in the same manner?
16. Should we require the conflicts of interest disclosure that a proxy voting advice business provides to its clients be made public? If public disclosure were required, when and in what manner should the disclosures be released to the public? Would this raise competitive or other concerns for proxy voting advice businesses?
17. The proposed amendments are intended to promote consistency in the disclosures proxy voting advice businesses make about their conflicts of interest. Is the consistency of this information an important consideration?
18. Should we require proxy voting advice businesses to include in their disclosure to clients a discussion of the policies and procedures used to identify, as well as the steps taken to address,

any conflicts of interest, as proposed? Do proxy voting advice businesses have sufficient incentive to include this disclosure on their own?

19. What are the anticipated costs to proxy voting advice businesses and their clients associated with requiring additional conflicts of interest disclosure, as proposed? For example, what are the costs for proxy voting advice businesses to determine whether an entity is an affiliate of a registrant, another soliciting person, or shareholder proponent? Should we impose structural requirements (e.g., like the structural reforms in the global analyst research settlements)[92] in addition to disclosure requirements?

20. Are there existing regulatory models of conflicts of interest disclosure that would be useful for us to consider? If so, what are the alternatives that we should consider in lieu of proposed Rule 14a-2(b)(9)(i)? For example, should we require all proxy voting advice businesses to disclose conflicts to the same extent that their clients (e.g., an investment adviser) would be reasonably expected to disclose such conflicts to their own clients (e.g., the funds or retail investor clients to whom the investment adviser provides advice)?

2. Registrants' and Other Soliciting Persons' Review of Proxy Voting Advice and Response

a. Need for Review of Proxy Voting Advice by Registrants and Other Soliciting Persons

For the clients of proxy voting advice businesses to be able to rely on the voting advice they receive to make informed voting decisions, the analysis and research supporting the advice must be accurate and complete in all material respects.[93] This is especially critical when an

[92] *See* Federal Court Approves Global Research Analyst Settlement, SEC Litigation Release No. 18438 (Oct. 31, 2003). *See also* SEC Fact Sheet on Global Analyst Research Settlements (April 28, 2003), *available at* https://www.sec.gov/news/speech/factsheet.htm.

[93] *See* Concept Release, *supra* note 2, at 43011 ("To the extent that proxy advisory firms develop, disseminate, and implement their voting recommendations without adequate accountability for informational accuracy . . . informed shareholder voting may be likewise impaired.").

investment adviser retains a proxy voting advice business to provide information that will inform the adviser's voting determinations. However, in recent years concerns have been expressed by a number of commentators, particularly within the registrant community, that there could be factual errors, incompleteness, or methodological weaknesses in proxy voting advice businesses' analysis and information underlying their voting advice that could materially affect the reliability of their voting recommendations and could affect voting outcomes, and that processes currently in place to mitigate these risks are insufficient.[94] These concerns are coupled with the perception of many registrants that (i) they lack an adequate opportunity to review proxy voting advice before it is disseminated, (ii) there are not meaningful opportunities to engage with the proxy voting advice businesses and rectify potential factual errors or methodological weaknesses in the analysis underlying the proxy voting advice before votes are cast, particularly for registrants that do not meet certain criteria (such as inclusion in a particular stock market index),[95] and (iii) once the voting advice is delivered to the proxy voting advice business's clients, which typically occurs very shortly before a significant percentage of votes are cast and the meeting held, it is often not possible for the registrant to inform investors in a timely and effective way of its contrary views or

[94] *See, e.g.*, Letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (Nov. 9, 2018) ("Business Roundtable Letter 1"), at 11 (discussing examples of errors in voting advice and registrants' interactions with proxy advisory firms to address perceived errors); Letter from Neil Hansen, Vice President, Investor Relations and Corporate Secretary, Exxon Mobil Corporation (June 26, 2019) ("Exxon Letter"), at 4–5 (addressing perceived methodological limitations of proxy advisory firms' evaluation of executive compensation structures); Richard Levick, *'Vinny' and the Proxy Advisors: A Five Trillion Dollar Debate*, FORBES.COM (Dec. 17, 2018), https://www.forbes.com/sites/richardlevick/2018/12/17/vinny-and-the-proxy-advisors-a-five-trillion-dollar-debate/#73164b9f2f4b; Placenti, *supra* note 40, at 10–11. *But see, e.g.*, Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors (Oct. 24, 2019)(asserting the lack of evidence of pervasive inaccuracies in proxy voting advice); OPERS Letter, *supra* note 8, at 3 (discussing the effectiveness of OPERS' internal controls to identify and mitigate errors in proxy reports and indicating its satisfaction with the quality of the advice it receives from its proxy advisory firm); CII Letter, *supra* note 13, at 15 (noting a lack of compelling evidence indicating that more regulation of proxy advisory firms is necessary or in the best interests of investors, companies, or the capital markets generally).

[95] *See* ISS Letter, *supra* note 9, at 10.

errors it has identified in the voting advice.[96] Although communication between proxy voting advice businesses and registrants may have improved over time,[97] recent feedback and studies suggest that many registrants remain concerned about the limited ability of registrants to provide input that might address errors, incompleteness, or methodological weaknesses in proxy voting advice.[98]

In response, proxy voting advice businesses have pointed to internal policies and procedures aimed at ensuring the integrity of their research[99] and the steps they have taken to enable feedback from registrants before their voting advice is issued. ISS and Glass Lewis, for

[96] *See, e.g.,* Business Roundtable Letter 1, *supra* note 94, at 16 (discussing survey results and testimonials supporting the contention that a spike in shareholder voting follows adverse voting recommendations during the period immediately after the release of proxy voting advice); Soc. for Corp. Gov. Letter, *supra* note 24, at 5 ("The inability to review draft reports from proxy advisory firms as a matter of right means that companies who want factual errors or omissions corrected are often unable to get a response from proxy advisory firms until it is too late, i.e., until after votes have been cast on the basis of a recommendation that relied – at least in part – on inaccurate or incomplete information."); Business Roundtable Letter 2, *supra* note 40, at 9 ("This high incidence of voting immediately on the heels of the publication of proxy advisory reports suggests, at best, that investors spend little time evaluating proxy advisory firms' guidance and determining whether it is in the best interests of their clients and, at worst, that they simply outsource the vote to the proxy advisor."); *see also* 2018 Roundtable Transcript, *supra* note 40, at 226–40.

[97] *See* 2016 GAO Report, *supra* note 9, at 23.

[98] *See, e.g.*, Business Roundtable Letter 1, *supra* note 94, at 11; Placenti, *supra* note 40, at 7 (discussing the results from a survey of one hundred public companies about the quality of information in proxy voting advice and its impact on *shareholder* voting); *2015 Proxy Season Survey*, NASDAQ & U.S. CHAMBER OF COMMERCE 2 (as of Sept. 24, 2019), http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/2015-Proxy-Season-Survey-Summary.pdf (summarizing the results of a survey of public companies' concerns about the accuracy of information in the proxy voting advice pertaining to their companies, as well as complaints about the efficacy of engaging with proxy advisory firms to impact the voting advice).

[99] For example, ISS has stated that it offers all registrants a free copy of its published analysis for their shareholder meetings upon request, which ISS believes affords the registrants the opportunity to bring any factual errors to ISS' attention. *See* ISS Letter, *supra* note 9, at 9. When it does become aware of material factual errors, ISS notes that it promptly issues a "Proxy Alert" to inform clients of any corrections and, if necessary, any resulting changes in ISS' vote recommendations. *Id.* at 11. Glass Lewis has similar policies to address factual errors and omissions. *See* Glass Lewis Letter, *supra* note 16, at 6. ISS has also noted that, as a registered investment adviser, it has a fiduciary duty of care to make a reasonable investigation to determine that it is not basing vote recommendations on materially inaccurate or incomplete information. *See* ISS Letter, *supra* note 9, at 2. We note, however, that not all proxy voting advice businesses are registered as investment advisers. It is also important to note that there is often disagreement between proxy voting advice businesses and registrants over whether information in proxy voting advice should be classified as an "error." *See id.* at 10.

example, both have systems in place to share certain information with registrants.[100] In the United States, ISS offers the constituent companies of the Standard and Poor's 500 Index the opportunity to review a draft of ISS' voting advice before it is delivered to clients.[101] Glass Lewis has a program that allows registrants who participate to receive a data-only version of its voting advice before publication to clients.[102] In addition, Glass Lewis implemented a pilot program for the 2019 proxy season, known as its Report Feedback Statement ("RFS") service, which offers U.S. public companies and shareholder proponents the opportunity to express differences of opinion they may have with Glass Lewis' research.[103] Participants in this pilot program were able to submit feedback about the analysis of their proposals, and have comments delivered directly to Glass Lewis's investor clients along with Glass Lewis' response to the RFS.[104]

Although some proxy voting advice businesses provide opportunities for review and feedback, these existing practices may be inadequate to address registrants' and others' concerns

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[100] *See* ISS Letter, *supra* note 9, at 2; Glass Lewis Letter, *supra* note 16, at 6–7; *see also* 2016 GAO Report, *supra* note 9, at 28 (summarizing the issuer-review programs of ISS and Glass Lewis).

[101] *See* ISS Letter, *supra* note 9, at 10. ISS states that drafts of its proxy advice are always provided on a "best efforts" basis and it does not guarantee that an issuer in the S&P 500 will have an opportunity to review a draft analysis. *See ISS Draft Review Process for U.S. Issuers*, ISS, https://www.issgovernance.com/iss-draft-review-process-u-s-issuers/ (last visited Sept. 20, 2019). Participating companies need to register with ISS in advance to receive a draft, and drafts are provided only for the reports for annual shareholder meetings, not special meetings, nor for any meeting where the agenda includes a merger or acquisition proposal, proxy fight, or any item that ISS, in its sole discretion, considers to be of a contentious nature, such as a "vote-no" campaign. *Id.*

[102] Glass Lewis refers to this as its Issuer Data Report (IDR) service. *See Issuer Data Report*, GLASS LEWIS, https://www.glasslewis.com/issuer-data-report/ (last visited Oct. 25, 2019); 2018 Roundtable Transcript, *supra* note 40, at 230.

[103] *See* Katherine Rabin, CEO of Glass, Lewis, & Co., *Glass Lewis' Report Feedback Service: Direct, Unfiltered Commentary from Issuers and Shareholder Proponents*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, https://corpgov.law.harvard.edu/2019/03/31/glass-lewis-report-feedback-service-direct-unfiltered-commentary-from-issuers-and-shareholder-proponents/; *Report Feedback Statement – Frequently Asked Questions*, GLASS LEWIS (May 2019), *available at* https://www.glasslewis.com/report-feedback-statement-service/.

[104] Registrants generally must pay the proxy voting advice business to obtain access to the information that they can then review. This is true as well for the RFS service. Rabin, *supra* note 103 ("In order to facilitate processing and distribution, there is a distribution fee associated with participation in the RFS service, and subscribers must also purchase a copy of the relevant Proxy Paper on which they wish to provide feedback.").

and ensure that those who make proxy voting decisions receive information that is accurate and complete in all material respects. For example, some proxy voting advice businesses do not provide registrants with an opportunity to review their reports containing voting advice in advance of distribution to their clients. Even those proxy voting advice businesses that provide such review opportunities do not provide all registrants with an advance copy of their reports containing their voting advice.[105] For example, it is our understanding that proxy voting advice businesses do not typically extend this opportunity to registrants with smaller market capitalization or to registrants holding special meetings. Those registrants that do have an opportunity to review the draft reports are often given a short period of time, sometimes with little advance notice, to provide their feedback to the proxy voting advice business and are not given an opportunity to see the final report sent to clients to determine the business's response, if any, to their feedback. Finally, because a substantial percentage of proxy votes are typically cast within a few days or less of the proxy voting advice business's release of its proxy voting advice[106] and registrants often become aware of the recommendations in the proxy voting advice only after the advice has already been distributed, it can be difficult for the clients of proxy voting advice businesses to obtain registrants' factual, methodological, or other objections to the voting advice before submitting their votes.[107] Although we recognize that some proxy voting advice businesses have policies in which they would issue alerts informing their clients of errors in their voting

[105] *See* 2018 Roundtable Transcript, *supra* note 40, at 230.

[106] *See* Business Roundtable Letter 2, *supra* note 40, at 9.

[107] *See* 2018 Roundtable Transcript, *supra* note 40, at 227–28 ("So once the report is issued, it is an uphill battle . . . filing SEC solicitation materials or doing other things to try to correct the record are very difficult."); Placenti*, supra* note 40, at 3 ("[C]ompanies do not have the opportunity to adequately respond to the recommendation, even if it is factually incorrect."). Registrants may file supplemental proxy materials to counter negative proxy voting recommendations and to alert investors to any factual or analytical errors they have identified in a proxy advisor's advice or disagreements with regard to methodology or analysis, but the efficacy of this is uncertain. *Id.* Although shareholders have the ability to change their vote at any time prior to the shareholder meeting, to our knowledge this seldom occurs. There may be a number of explanations for this, including the degree of inconvenience to a shareholder entailed in changing his or her vote.

advice or updated information released by the registrant, such policies result in the proxy voting advice businesses, not the client, determining whether the errors or information are material to a voting decision and sharing such information only after their advice has already been published.[108] As a result, some have advocated for the establishment of mandatory review periods that would allow registrants a meaningful opportunity to review and provide their feedback on proxy voting advice before the businesses provide the advice to clients and before the clients make their voting decisions.[109]

We believe there would be value in establishing a mechanism that would foster enhanced engagement between proxy voting advice businesses and registrants and, as discussed below, certain other soliciting persons (such as dissident shareholders engaged in a proxy contest), so that investors or those who vote on their behalf would have the benefit of the input and views of registrants and certain other soliciting persons as they consider and potentially act on proxy voting advice. Such a mechanism has the potential to improve the accuracy, transparency, and completeness of the information available to those making voting determinations. Indeed, we believe such benefits could be realized even where the proxy voting advice business's voting recommendation is not adverse to the registrant's or certain other soliciting person's recommendation and no errors exist in the analysis underlying the advice. The registrant and certain other soliciting person may have disagreements that extend beyond the accuracy of the data

[108] *See, e.g., ISS FAQs Regarding Recent Guidance from the U.S. Securities and Exchange Commission Regarding Proxy Voting Responsibilities of Investment Advisers* (Oct. 17, 2019) ("ISS FAQs"), *available at* https://www.issgovernance.com/file/faq/ISS_Guidance_FAQ_Document.pdf.

[109] *See, e.g.*, Business Roundtable Letter 1, *supra* note 94, at 11; Center on Exec. Comp. Letter, *supra* note 24, at 3; Letter from Gary A. LaBranche, President and CEO, National Investor Relations Institute (Nov. 13, 2018) ("NIRI Letter"), at 4; Soc. for Corp. Gov. Letter, *supra* note 24, at 5; Wachtell Letter, *supra* note 24, at 7 (recommending that proxy advisory firms should give registrants the opportunity to review proxy voting advice before it is disseminated to clients); *see also,* ICI Letter, *supra* note 8, at 13 (noting its amenability to exploring ways in which registrants' objections to proxy voting advice could be communicated to investors in a more timely way and convenient way, including "pushing" company views to clients of proxy advisory firms).

used, such as differing views about the proxy advisor's methodological approach or other differences of opinion that they believe are relevant to the voting advice. In these circumstances, providing the clients of proxy voting advice businesses with convenient access to the views of the registrant and certain other soliciting persons at the same time they receive the proxy voting advice could improve the overall mix of information available when the clients make their voting decisions.[110]

Accordingly, we are proposing measures intended to (i) facilitate improved dialogue among proxy voting advice businesses and registrants and certain other soliciting persons (including certain dissident shareholders) before the advice is disseminated to clients of the proxy voting advice business and (ii) provide a means for registrants and certain other soliciting persons to communicate their views about the advice before the proxy voting advice businesses' clients cast their votes. We believe that establishing a process that allows registrants and other soliciting persons a meaningful opportunity to review proxy voting advice in advance of its publication and provide their corrections or responses would reduce the likelihood of errors, provide more complete information for assessing proxy voting advice businesses' recommendations, and ultimately improve the reliability of the voting advice utilized by investment advisers and others who make voting determinations, to the ultimate benefit of investors.

b. Review of Proxy Voting Advice by Registrants and Other Soliciting Persons

The proposed amendments to Rule 14a-2(b) would require one standardized opportunity for timely review and feedback by registrants of proxy voting advice before a proxy voting advice business disseminates its voting advice to clients, regardless of whether the advice on the matter is

[110] *See* Communications Among Shareholders Adopting Release, *supra* note 3, at 48280 ("Shareholders will be better protected by having access to as many sources of opinions relating to voting matters as possible . . . .").

adverse to the registrant's own recommendation.[111] The proposal would provide the same opportunity to review and provide feedback on the proxy voting advice to persons who are conducting non-exempt solicitations through the use of a proxy statement and proxy card pursuant to Regulation 14A, such as a person soliciting proxies in support of its director nominees in a contested election or its own proposal that is unrelated to director elections (e.g., a solicitation by a dissident shareholder against a proposed business combination transaction). As noted above, a registrant or certain other soliciting person may have disagreements with the proxy voting advice, whether factual, methodological or otherwise, which if available to investors would help inform their voting decisions, even in instances where the registrant or certain other soliciting person's voting recommendation on the matter is the same as that of the proxy voting advice business.[112]

New proposed Rule 14a-2(b)(9)(ii) would require, as one of the conditions to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3), that, subject to certain conditions, the proxy voting advice business provide registrants and certain other soliciting persons covered by its proxy voting advice a limited amount of time to review and provide feedback on the advice before it is disseminated to the business's clients, with the length of time provided depending on how far in advance of the shareholder meeting the registrant or other soliciting person has filed its definitive

[111] *See* proposed Rule 14a-2(b)(9)(ii).

[112] Under our proposal, registrants and certain other soliciting persons would have the opportunity to review and provide feedback on the proxy voting advice, regardless of whether that advice is adverse to the voting recommendation of the registrant or certain other soliciting person. For ease of administration, we do not think that our proposed requirement should put the burden on the proxy voting advice business, registrant, or certain other soliciting person to determine whether proxy voting advice is "adverse" to another person's voting recommendation. For example, in a contested director election, it is common for a proxy voting advice business to recommend the election of some nominees of the registrant's slate of candidates as well as the election of some nominees of the dissident shareholders' slate. Making a determination whether such advice would be adverse to the registrant or the dissident shareholder could be difficult and highly subjective. It is also common for a proxy voting advice business to present in a single, integrated written report its voting recommendations on all matters to be voted at the registrant's meeting, with its recommendations on some matters aligned with the registrant's recommendations but recommendations on other matters contrary to those of the registrant. Requiring the proxy voting advice business to separate its written report so that only adverse recommendations would be presented for review could require additional time, burden, and cost for the proxy voting advice business.

proxy statement. Given the challenges typically faced by proxy voting advice businesses to prepare and deliver their proxy voting advice to clients within very narrow timeframes,[113] the proposed rule is intended to provide an incentive for registrants and others to file their definitive proxy statements as far in advance of the meeting date as practicable,[114] thereby allowing more time for proxy voting advice businesses and their clients to formulate and consider voting recommendations.[115] As proposed, if the registrant (or certain other soliciting person) files its definitive proxy statement less than 45 but at least 25 calendar days before the date of its shareholder meeting, the proxy voting advice business would be required to provide the registrant (or certain other soliciting person) no fewer than three business days to review the proxy voting advice and provide feedback as a condition of the exemptions.[116] However, if the registrant (or certain other soliciting person) files its definitive proxy statement 45 calendar days or more before its shareholder meeting, the proxy voting advice business would be required to provide the registrant (or certain other soliciting person) at least five business days to review the proxy voting

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[113] *See, e.g.*, Letter from Donna F. Anderson, Head of Corporate Governance & Eric Veiel, Co-Head of Global Equity, T. Rowe Price (Dec. 13, 2018), at 3 (discussing the "compressed" proxy voting process); IAA Letter, *supra* note 17, at 5 (noting the "extremely tight timeline for the entire proxy voting process").

[114] Registrants customarily file their definitive proxy materials 35–40 days before a shareholder meeting. *The Proxy Materials*, BROADRIDGE FINANCIAL SOLUTIONS, INC., https://www.shareholdereducation.com/SHE-proxy_materials.html. *See also 2019 Proxy Statements*, ERNEST & YOUNG LLP, *available at* https://www.ey.com/publication/vwluassetsdld/2019proxystatements_05133-181us_6december2018-v2/$file/2019proxystatements_05133-181us_6december2018-v2.pdf?OpenElement (noting that registrants generally mail proxy statements 30 to 50 days before the annual meeting). Furthermore, registrants using the "notice and access" method of delivery for proxy materials must make their proxy materials publicly available and send the Notice of Internet Availability of the Proxy Materials at least 40 calendar days prior to the shareholder meeting date. *See* Exchange Act Rule 14a-16.

[115] *See, e.g.,* ICI Letter, *supra* note 8, at 13 ("Timeliness also is a crucial consideration. In the current compressed proxy voting schedule, any response that a company wishes to make to a proxy advisory firm's recommendation . . . must occur promptly, so that investors can consider it prior to casting their votes.").

[116] Proposed Rule 14a-2(b)(9)(ii)(A)*(2)*. We note that the proxy voting advice required to be provided may include multiple reports, if applicable, that the proxy voting advice business produces for its clients. For example, some proxy voting advice businesses may provide a so-called "benchmark report," as well as separate "specialty reports" to a client. *See* Exxon Letter, *supra* note 94, at p. 7.

advice and provide feedback.[117] To the extent that registrants customarily file their definitive proxy materials 35–40 days in advance of a shareholder meeting,[118] we expect that this five-business day period would be available to many issuers only if they file earlier than they typically do today. In the event a registrant (or certain other soliciting person) files its definitive proxy statement less than 25 calendar days before the meeting, the proxy voting advice business would have no obligation under the proposed amendment to provide the proxy voting advice to the registrant (or certain other soliciting person) as a condition of the exemption. As proxy voting advice businesses perform much of the work related to their voting advice only after the filing of the definitive proxy statements describing the matters presented for a proxy vote,[119] we do not believe there would be sufficient time for a meaningful assessment of the advice or opportunity to make revisions in response to any feedback provided when the definitive proxy statements are filed so close to the date of the shareholder meeting.[120] By requiring that registrants and other soliciting persons file their definitive proxy statements at least 25 calendar days in advance of the shareholder meeting in order to avail themselves of the review and feedback process, we believe that the proposed amendments would afford proxy voting advice businesses a reasonable amount

[117] Proposed Rule 14a-2(b)(9)(A)*(1)*. Where the registrant is soliciting written consents or authorizations from shareholders for an action in lieu of a meeting, the proxy voting advice business must allow no fewer than three business days for the review and feedback period if the registrant files its definitive soliciting materials less than 45 but at least 25 calendar days before the action is effective. Similarly, if the registrant files its definitive soliciting materials for written consents or authorizations for a proposed action at least 45 calendar days before the expected effective date of the action, it must be given at least five business days to review and provide feedback on the proxy voting advice.

[118] *See supra* note 114.

[119] *See* ISS Letter, *supra* note 9, at 10 (describing the availability of the registrant's proxy statement as the "hard start" of the firm's process for formulating the proxy voting advice that will be delivered to clients.).

[120] Based on the staff's experience, it is relatively uncommon for registrants or other soliciting persons to file their definitive proxy statement so close to the date of shareholder meeting. For example, registrants and soliciting persons typically are motivated to file the definitive proxy statements as soon as possible in order to maximize the period of time they have to solicit and obtain the votes needed for approval of their proposals.

of time to engage with registrants and other soliciting persons without jeopardizing their ability to provide timely voting advice to their clients.

In addition to the review and feedback period, in order to rely on the exemptions in Rules 14a-2(b)(1) or (b)(3), a proxy voting advice business would be required to provide registrants and certain other soliciting persons with a final notice of voting advice. This notice, which must contain a copy of the proxy voting advice that the proxy voting advice business will deliver to its clients, including any revisions to such advice made as a result of the review and feedback period , must be provided by the proxy voting advice business no later than two business days prior to delivery of the proxy voting advice to its clients.[121] This would provide registrants and certain other soliciting persons the opportunity to determine the extent to which the proxy voting advice has changed, including whether the proxy voting advice business made any revisions as a result of feedback from the registrant. We note, however, that registrants and certain other soliciting persons would be entitled to this two-business day final notice period whether or not they provided comments on the version of proxy voting advice they received in connection with the review and feedback period.[122] This final notice would allow the registrant and/or soliciting person to determine whether or not to provide a statement in response to the advice and request that a

[121] Proposed Rule 14a-2(b)(9)(ii)(B). Both paragraphs (A)*(1)* and (A)*(2)* of proposed Rule 14a-2(b)(9)(ii) specify that the proxy voting advice business is required to provide the version of its proxy voting advice that it "intends to deliver to its clients," which allows for the possibility that the proxy voting advice business may subsequently revise such advice. However, proposed Rule 14a-2(b)(9)(ii)(B) refers to the proxy voting advice that the proxy voting advice business "will deliver to its clients," which effectively requires that the version of voting advice included in the final notice of voting advice will be the actual voting advice that will be disseminated to clients, including any revisions made that were not incorporated into the advice as a result of the review and feedback period under Rules 14a-2(b)(9)(ii)(A)*(1)* or (A)*(2)*, as applicable.

[122] Providing this final notice of voting advice, whether or not the registrant or certain other soliciting person chooses to provide comments to the proxy voting advice business during the review and feedback period, would, we believe, eliminate the possibility that such parties might provide frivolous comments to the proxy voting advice business during the review and feedback period merely to preserve their right to receive the final notice of voting advice.

hyperlink to its response be included in the voting advice delivered to clients of the proxy voting advice business.[123]

Once the two-day final notice period has expired, proposed Rule 14a-2(b)(9)(ii) would not impose any obligation on the proxy voting advice business to provide registrants or certain other soliciting persons with any additional opportunities to review its proxy voting advice with respect to the same shareholder meeting in order to rely on the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3).[124]

To provide a means for proxy voting advice businesses to maintain control over the dissemination of their proxy voting advice and minimize the risk of unintentional or unauthorized release, our proposed amendment would allow a proxy voting advice business to require that registrants and certain other soliciting persons, as applicable, agree to keep the information confidential, and refrain from commenting publicly on the information, as a condition of receiving the proxy voting advice.[125] The terms of such agreement would apply until the proxy voting advice business disseminates its proxy voting advice to one or more clients and could be no more restrictive than similar types of confidentiality agreements the proxy voting advice business uses with its clients.[126]

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[123] *See, e.g.*, Center on Exec. Comp. Letter, *supra* note 24 (recommending that registrants be allowed two opportunities to review proxy voting advice before it is issued—the first time to review the "draft" proxy report and the second time to review the "final" proxy report).

[124] *See* Note 1 to paragraph (ii) of proposed Rule 14a-2(b)(9).

[125] *See* Note 2 to paragraph (ii) of proposed Rule 14a-2(b)(9).

[126] We note by way of analogy that express agreements to maintain material non-public information in confidence are sufficient to exempt communication of such information from triggering the public disclosure requirements of Regulation FD [17 CFR 243.100 to 103] ("Regulation FD"). *See* 17 CFR 243.100(b)(2)(ii).

We also recognize that certain proxy voting advice businesses currently have policies that expressly prohibit the businesses from considering or using any material non-public information provided by registrants during their engagement with the businesses. These policies also call for the registrants to promptly disclose to the public any non-public information shared with the businesses or any commitments with respect to future actions or behavior

Proxy voting advice businesses would not be required to extend the review and feedback period or final notice of voting advice to persons conducting solicitations that are exempt pursuant to Rule 14a-2[127] or to proponents who submit shareholder proposals pursuant to Exchange Act Rule 14a-8 and whose proposal will be voted upon at the registrant's upcoming meeting. We are mindful of the potential disruptions and costs that the proposed review and feedback period and final notice of voting advice requirements could have on the current practices of proxy voting advice businesses and their clients. Therefore, we are proposing to require proxy voting advice businesses to extend the review and feedback and final notice opportunities to parties other than the registrant only in those instances in which the registrant's solicitation is contested by soliciting persons who intend to deliver their own proxy statements and proxy cards to shareholders.[128] We believe that the proxy voting advice businesses' voting advice in these types of contested situations likely will be based on the soliciting persons' proxy statements, other mandated disclosure documents, and public statements containing substantive information.[129] By contrast, neither shareholder proponents nor persons conducting exempt solicitations are required to file substantive disclosure documents with the Commission or to make public statements containing

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during the engagement process. *See FAQs: Engagement on Proxy Research*, ISS, https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/ (last visited Sept. 23, 2019).

[127] *See* 17 CFR 240.14a-2. For example, under our proposal, the review requirement would not apply to solicitations in which:

- a person is soliciting that shareholders cast "withhold" or "against" votes with respect to one or more of the registrant's director nominees, without seeking proxy authority, which is generally a soliciting activity exempt under Rule 14a-2(b)(1); or
- a person is not acting on behalf of the registrant and the aggregate number of persons solicited is not more than ten, which are exempt under Rule 14a-2(b)(2).

[128] Our proposed approach is similar to existing review and comment practices used by certain proxy voting advice businesses, which also differentiate such practices based on whether a matter to be considered at the meeting is contested or not. *See* ISS, *supra* note 126 ("Notably, during the annual meeting season, in-person meetings are typically limited to contentious issues, including contested mergers, proxy contests, or other special situations . . . .").

[129] *See supra* note 126 ("ISS research and recommendations are based exclusively on public information . . . .").

substantive information that proxy voting advice businesses likely will include in their analyses. Accordingly, we believe it is appropriate to limit the proposed review and feedback period and final notice requirements to those solicitations where the soliciting persons are providing mandated disclosures or other substantive information that are likely to be part of the proxy voting advice businesses' analyses. Providing such soliciting persons with the same opportunity to review and provide feedback on proxy voting advice that is afforded to registrants would ensure equality of treatment among contesting parties and should enable investment advisers and other clients of proxy voting advice businesses to receive more accurate and complete information at the time they are casting votes.

It is important to note that while our rule proposal would require, as a condition of the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3), that proxy voting advice businesses provide an opportunity for registrants and other parties engaged in non-exempt solicitations to review proxy voting advice and suggest revisions before the distribution of the advice, it does not require proxy voting advice businesses to accept any such suggested revisions.[130] It is equally important to recognize, however, that proxy voting advice subject to the Rule 14a-2(b) exemptions is not exempt from Rule 14a-9 liability, which prohibits materially misleading misstatements or omissions in proxy solicitations.

A number of alternative approaches for a review and feedback mechanism have been suggested by commenters,[131] with a range of different review periods,[132] as well as the ability of

[130] As proposed, the rule would leave the content of proxy voting advice entirely within the proxy voting advice business's discretion, the only exception being the inclusion of the registrant's or other soliciting person's hyperlink (or other analogous electronic medium, as discussed *infra* in Section II.B.2.c.). We believe leaving the content to the proxy voting advice businesses' discretion may allay concerns that a registrant's or certain other soliciting person's review of proxy voting advice could interfere with the business's objectivity and independence. *See, e.g.*, ISS Letter, *supra* note 9, at 11; Glass Lewis Letter, *supra* note 16, at 8.

[131] *See supra* note 109.

registrants to include full written statements in the body of the proxy voting advice business's written reports containing its advice.[133] Others have expressed concerns about increased costs and timing pressures, emphasizing the need to consider the impact of any additional regulation on the ability of proxy voting advice businesses to deliver timely, cost-effective advice to their clients.[134] We believe the amendments we have proposed would give registrants and certain other soliciting persons sufficient time to assess the voting advice without being overly intrusive to proxy voting advice businesses and their clients. In formulating the proposed review and feedback period and notice of voting advice requirements, we have sought to improve the quality of information available to investors while balancing, on the one hand, the need for registrants and certain soliciting persons to conduct a meaningful assessment of the advice and communicate any concerns or errors regarding the advice with, on the other hand, the concerns about imposing an undue delay or otherwise jeopardizing the ability of proxy voting advice businesses to meet their contractual commitments to clients and their clients' ability to make timely and informed voting decisions.[135] However, we are soliciting comment on whether the proposed review and feedback period and notice requirements are appropriate and invite comments on how this proposed process

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[132] *See, e.g.*, Center on Exec. Comp. Letter, *supra* note 24, at 3 (recommending "a review period of at least five business days"); NIRI Letter, *supra* note 109, at 4 (recommending review "at least five business days before issuance").

[133] *See, e.g.*, Soc. for Corp. Gov. Letter, *supra* note 24, at 2; Wachtell Letter, *supra* note 24, at 8.

[134] *See, e.g.*, 2018 Roundtable Transcript, *supra* note 40, at 233, 251–52; *see also* CII Letter, s*upra* note 13, at 15–16 ("More regulation of proxy research firms could increase costs for pension plans and other institutional investors, with no clear benefits. . . . [E]xcessive regulation of proxy research firms could impair the ability of institutional investors to promote good corporate governance and accountability at the companies in which they own stock.")

[135] *See* ISS Letter, *supra* note 9, at 10 (cautioning that the imposition of additional burdens and requirements might be untenable given the firm's existing time constraints) ("In many cases, ISS has a contractual obligation to deliver proxy reports and vote recommendations to clients ten days to two weeks in advance of the meeting. . . . Given the limited time between the hard start of receiving the proxy statement and the hard stop of delivering the report to clients sufficiently in advance of the meeting, along with the concentration of a large percentage of meetings during so called 'proxy season,' there simply is not time to afford all of the approximately 39,000 issuers ISS covers globally the opportunity to review draft reports."); *see also* CII Letter, *supra* note 13, at 14–15.

could be revised to improve the information available to investors and better serve the needs of the various parties involved in the proxy process.

c. Response to Proxy Voting Advice by Registrants and Other Soliciting Persons

In addition to the proposed review and feedback period and final notice requirements, registrants and certain soliciting persons would also have the option under the proposed amendments to request that proxy voting advice businesses include in their proxy voting advice (and on any electronic medium used to distribute the advice) a hyperlink or other analogous electronic medium directing the recipient of the advice to a written statement prepared by the registrant that sets forth its views on the advice. Although registrants are able, under the existing proxy rules, to file supplemental proxy materials to respond to negative proxy voting recommendations and to alert investors to any disagreements they have identified with a proxy voting advice business's voting advice, the efficacy of these responses may be limited, particularly given the high incidence of voting that takes place very shortly after a proxy voting advice business's voting advice is released to clients and before such supplemental proxy materials can be filed.[136] The proposed amendments would provide a more efficient and timely means of ensuring that a proxy voting advice business's clients, including investment advisers, are able to consider registrants' views at the same time they are considering the proxy voting advice and before making their voting determinations, thus improving the overall mix of information available to them at that time.[137]

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[136] *See supra* note 96 and accompanying text.

[137] *See* Question 2 of Commission Guidance on Proxy Voting Responsibilities, *supra* note 9, at 12 (discussing steps an investment adviser could use to evaluate its compliance). We expect that the proposed amendments to permit a registrant to review and provide its response to proxy voting advice would aid an investment adviser that has determined to take such steps. For example, we expect that the proposed requirement for inclusion of a hyperlink or other analogous electronic medium directing the recipient of the proxy voting advice to a written statement prepared

Under proposed Rule 14a-2(b)(9)(iii), as a condition to the exemptions found in Rules 14a-2(b)(1) and 14a-2(b)(3), a proxy voting advice business must, upon request, include in its proxy voting advice and in any electronic medium used to deliver the advice a hyperlink (or other analogous electronic medium) that leads to the registrant's statement about the proxy advisor's voting advice. To improve the overall mix of information available to the clients of proxy voting advice businesses, such a hyperlink (or other analogous electronic medium) would need to be included upon request regardless of whether the advice is adverse to the registrant's recommendation to its shareholders.[138] Although we considered proposing a requirement that proxy voting advice businesses include a full written statement from the registrant in the proxy voting advice delivered to clients, we believe that requiring the inclusion of a hyperlink or other analogous electronic medium is a more efficient and straightforward approach that enables sufficient access to the registrant's statement without unduly restricting the proxy voting advice businesses' flexibility to design and prepare their proxy voting advice in the manner that they and their clients prefer. A hyperlink or other analogous electronic medium would likewise allow registrants flexibility to present their views in the manner they deem most appropriate or effective.[139] It is important to note, however, that the registrant's statement would constitute a "solicitation" as defined in Rule 14a-1(l) and be subject to the anti-fraud prohibitions of Rule 14a-9,[140] as well as the filing requirements of Exchange Act Rule 14a-12,[141] which would necessitate

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by the registrant that sets forth the registrant's views on the advice could assist a proxy voting advice business's clients by alerting them to matters where, due to the differing views expressed by the registrant, the clients' assessment of any "pre-populated" votes made by the proxy voting advice business may be warranted before such votes are submitted.

[138] *See supra* note 112.

[139] In cases where the proxy voting advice is electronically accessible, the proposed rule contemplates that the client would be able to click on a hyperlink, for example, and be directed to the registrant's statement. Alternatively, the client could type in the relevant URL (web address) using a web browser on the internet.

[140] In general, the inclusion of the hyperlink (or analogous electronic medium) required under proposed Rule 14a-2(b)(9)(iii) would not, by itself, make the proxy voting advice business liable for the content of the statements made

that it be filed as supplemental proxy materials no later than the date that the proxy voting advice, and thereby the registrant's statement, is first published, sent, or given to shareholders.[142] To prevent undue delays in the distribution of the proxy voting advice to clients, registrants would be required to provide the hyperlink (or other analogous electronic medium) to the proxy voting advice business no later than the expiration of the two-day final notice period that would be required under proposed Rule 14a-2(b)(9)(ii)(B) as a condition of the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3).

As with the proposed review and feedback period and final notice requirements, our proposal to require inclusion of a hyperlink (or other analogous electronic medium) would provide other persons who are conducting non-exempt solicitations through the use of a proxy statement and proxy card pursuant to Regulation 14A with the same opportunity to include in the proxy voting advice and in any electronic medium used to deliver the advice a hyperlink (or other analogous electronic medium) that would lead to their response to the voting advice. We believe it is appropriate to limit the proposed requirement to extend this opportunity to parties other than the registrant to contested situations where shareholders and those acting on their behalf, including investment advisers, are actively being solicited by opposing sides through delivery of each side's own proxy statements and proxy cards and must decide with whom they wish to vote.

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by the registrant or certain other soliciting persons about the proxy voting advice. The Commission has previously stated a person's responsibility for hyperlinked information depends on whether the person has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. *See Use of Electronic Media*, Release No. 34-42728 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)]. We believe our view is consistent with this framework as a proxy voting advice business would not likely be involved in the preparation of the hyperlinked statement and would likely be including the hyperlink (or analogous electronic medium) to comply with proposed Rule 14a-2(b)(9)(iii), and not to endorse or approve the content of the statement. We seek comment on the need for rule amendments to codify this view.

[141] 17 CFR 240.14a-12.

[142] Activation of the hyperlink (or other analogous electronic medium) so that the response is publicly available would trigger the registrant's obligation to publicly file its statement of response pursuant to Rule 14a-6 [17 CFR 240.14a-6]. Additional soliciting materials would be filed with the Commission on EDGAR under submission type DEFA 14A or DFAN 14A.

Accordingly, proxy voting advice businesses would not be obligated to provide the same opportunity to persons conducting exempt solicitations. As with the proposed review and feedback period and final notice requirements, we are cognizant of the costs and potential logistical complications arising from the need to include a means for proxy voting advice businesses' clients to access a response to the proxy voting advice businesses' recommendations. Similarly, as discussed above, it is likely that the disclosures in these proxy statements and other mandated disclosure documents filed by the opposing sides, as well other public substantive statements that they make, would be considered by proxy voting advice businesses when formulating their voting advice. Accordingly, in our view, clients of proxy voting advice businesses have a greater need in non-exempt solicitations to be aware of disagreements over facts or opinions presented in the voting advice provided by proxy voting advice businesses. As with the registrant's statement of response, any such statements by dissident shareholders and other persons conducting non-exempt solicitations would constitute a "solicitation" as defined in Rule 14a-1(l), and would therefore be subject to the anti-fraud prohibitions of Rule 14a-9, and must be filed with the Commission as additional soliciting materials pursuant to Rule 14a-12.

The timing of the review and feedback period and final notice of voting advice under proposed Rule 14a-2(b)(9)(ii) generally would operate as follows:[143]

[143] For purposes of illustration, the following chart assumes that the registrant or other soliciting party is soliciting proxies for a meeting of shareholders. However, the description of timing would be identical if, in lieu of a shareholder meeting, the registrant or other soliciting party were soliciting proxies for a proposed action to be effected by shareholder vote, consent or authorization.

The information in this chart is intended only as an illustration and, as such, should be read together with the complete text of this release.

Action	Timing
Person conducts solicitation exempt under § 240.14a-2 or submits shareholder proposal pursuant to Exchange Act Rule 14a-8	N/A. Proposed rules do not apply
Registrant and/or soliciting person conducts non-exempt solicitation and files definitive proxy statement for shareholder meeting	N/A. Proposed rules do not dictate when the registrant and/or soliciting person files its definitive proxy statement
Proxy voting advice business provides the registrant and/or soliciting person with the version of the voting advice† that the business intends to deliver to its clients [proposed Rule 14a-2(b)(9)(ii)]	Subject to the proxy voting advice business's discretion, so long as it provides its voting advice to the registrant and/or soliciting person and complies with the required review and feedback and final notice periods in proposed Rule 14a-2(b)(9)(ii) prior to the distribution of such advice to the business's clients
Review and feedback period: Registrant and/or soliciting person has an opportunity to review and provide feedback, if any, on the proxy voting advice business's voting advice [proposed Rules 14a-2(b)(9)(ii)(A)*(1)* and (A)*(2)*]	• If definitive proxy statement is filed at least 45 calendar days before the date of the meeting, registrant and/or soliciting person has at least five business days to review and provide feedback; or • If definitive proxy statement is filed less than 45 but at least 25 calendar days before the date of the meeting, registrant and/or soliciting person has at least three business days to review and provide feedback; or • If definitive proxy statement is filed less than 25 calendar days before the date of the meeting, the proxy voting advice business is not required to provide its voting advice to registrant or soliciting person
Proxy voting advice business may revise its voting advice, as applicable	N/A. Subject to the proxy voting advice business's discretion
Final notice of voting advice: Proxy voting advice business provides a copy of its voting advice that it will deliver to its clients to allow the registrant and/or soliciting person to assess whether or not to provide a statement with its response to the advice [proposed Rules 14a-2(b)(9)(ii)(B) and 14a-	No earlier than upon expiration of review and feedback period. Registrant and/or soliciting person has at least two business days to provide a hyperlink (or other analogous electronic medium) with its response, if any

Action	Timing
2(b)(9)(iii)]	
Proxy voting advice business publishes its proxy voting advice to clients, which includes an active hyperlink* (or other analogous electronic medium) with the registrant's and/or soliciting person's response, if requested [proposed Rule 14a-2(b)(9)(iii)] *Registrant and/or soliciting person is responsible for providing a web address (URL) for the response and is expected to coordinate with the proxy voting advice business as necessary to ensure that the hyperlink (or other analogous electronic medium) is functional when included in the proxy voting advice	Subject to the proxy voting advice business's discretion, but no earlier than upon expiration of two-business day period allotted for the final notice of voting advice
Registrant holds its shareholder meeting	N/A

† *See supra* note 121.

We designed proposed Rules 14a-2(b)(9)(ii) and (iii) so they would not overly prescribe the manner in which proxy voting advice businessess and registrants (and certain other soliciting persons) interact with each other, but instead allow the parties the flexibility to determine the most effective and cost-efficient methods of compliance. Because our approach is meant to allow the parties flexibility within this general framework, there may be a number of market solutions capable of facilitating the parties' compliance with this proposed review process. There may be existing providers and/or services readily available to support the parties' needs or, alternatively, new services and providers may emerge to satisfy demand for effective market solutions. The parties may coordinate directly with each other to manage the review process or they could elect to enter into arrangements with third-party service providers who could coordinate the process on their behalf. We recognize that there also may be various technological solutions available to the parties that would facilitate their coordination. For example, we note that one commenter suggested the use of a digital portal as a draft review mechanism, as well as for management and

dissemination of the registrant's statement in response to the proxy advisor's voting advice.[144]

Because there may be a number of implementation details to resolve, effective coordination between proxy voting advice businesses and registrants (and certain other soliciting persons, as applicable) would be needed. For example, to ensure that the hyperlink to the statement from the registrant (or certain other soliciting persons) is activated concurrently with the release of the proxy voting advice and that the registrant (or certain other soliciting persons) is able to timely file its statement of response as additional soliciting materials, it would be necessary for the parties to coordinate the release date of the proxy voting advice containing the active hyperlink.[145]

In light of the potentially significant adverse result for a proxy voting advice business if it experiences an immaterial or unintentional failure to comply with the conditions of new Rule 14a-2(b)(9),[146] the proposed amendments provide that such failure will not result in the loss of the exemptions in Rules 14a-2(b)(1) or 14a-2(b)(3) so long as (A) the proxy voting advice business made a good faith and reasonable effort[147] to comply and (B) to the extent that it is feasible to do so, the proxy voting advice business uses reasonable efforts to substantially comply with the

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[144] *See* Letter from Barbara Novick, Vice Chairman, & Ray Cameron, Managing Director, Blackrock ("Blackrock Letter") (Nov. 16, 2018), at 3.

[145] If the parties do not adequately coordinate the activation of the hyperlink with the release of the proxy voting advice, there is a risk that the hyperlink could be functional prematurely, and therefore that the registrant's or other soliciting person's statement of response would be publicly available before the registrant or other soliciting person was able to comply with Rule 14a-12(b) and timely file the statement with the Commission as additional soliciting material.

[146] For example, without such an exception, a proxy voting advice business that failed to give a registrant the full number of days for review of the proxy voting advice due to technical complications beyond its control, even if only a few hours shy of the requirement, would be unable to rely on the exemptions in Rule 14a-2(b)(1) and (b)(3). Without an applicable exemption on which to rely, the proxy voting advice business likely would be subject to the proxy filing requirements found in Regulation 14A and its proxy voting advice required to be publicly filed.

[147] Similar to analogous provisions in other Commission rules, the determination of whether there has been a good faith and reasonable effort to comply with the proposed conditions would depend on the particular facts and circumstances. See, e.g., 17 CFR 230.164 (providing relief for immaterial and unintentional failures to file or delays in filing free writing prospectuses.)

condition as soon as practicable after it becomes aware of its noncompliance.[148] We believe this provision would serve to mitigate the risk of any unintended adverse consequences for proxy voting advice businesses as they seek to comply with the review and feedback and other provisions that we are proposing as new conditions to Rules 14a-2(b)(1) and 14a-2(b)(3). Also, failure to comply with the conditions of new Rule 14a-2(b)(9) does not create a new private right of action for registrants against proxy voting advice businesses.

Request for Comment

21. How prevalent are factual errors or methodological weaknesses in proxy voting advice businesses' analyses? To what extent do those errors or weaknesses materially affect a proxy voting advice business's voting recommendations? To what extent are disputes between proxy voting advice businesses and registrants about issues that are factual in nature versus differences of opinion about methodology, assumptions, or analytical approaches?
22. As a condition to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3), should registrants and certain other soliciting persons be permitted an opportunity to review proxy voting advice and provide feedback to the proxy voting advice businesses before the businesses provide the advice to clients, as proposed? If yes, how much time should be given to review and provide feedback on proxy voting advice? Are the timeframes set forth in proposed Rule 14a-2(b)(9)(ii) appropriate? What would the impact of these proposed timeframes be on registrants, proxy voting advice businesses, and their clients? Are there alternative timeframes that would be more appropriate? Should we allow a proxy voting advice business to provide its final notice of voting advice to the registrant at any time after the registrant has provided its comments during the review and feedback period, regardless of whether the review and feedback period has expired? Are there alternative conditions to the exemptions that the

[148] *See* paragraph (iv) of proposed Rule 14a-2(b)(9).

Commission should consider to address the concerns regarding inaccuracies and the ability for investors to get information that is accurate and complete in all material respects?

23. Should the number of days for the review and feedback period be contingent on the date that the registrant files its definitive proxy statement? For example, should there be a longer period (e.g., five business days instead of three) if the registrant files its definitive proxy statement some minimum number of days before the shareholder meeting at which proxies will be voted, as proposed? Would registrants and other soliciting persons be likely to take advantage of the additional time by filing their definitive proxy statements early enough to qualify for this treatment?
24. What impact would the proposed review and feedback period and final notice of voting advice have on the ability of proxy voting advice businesses to complete the formulation of their voting advice and deliver such advice to their clients in a timely manner? Are there additional timing considerations or logistical challenges that we should take into account?
25. Should there generally be a review and feedback period and a final notice of voting advice, as proposed? Should we allow registrants (and certain other soliciting persons) more or fewer opportunities to review the voting advice than proposed? Should a proxy voting advice business be required to provide the final notice of voting advice only if the registrant (or certain other soliciting person) provides comments to the proxy voting advice business during the review and feedback period and the proxy voting advice business's revisions are pertinent to such comments? Should the period allotted for the final notice of voting advice be two business days, as proposed? Should it be longer or shorter?
26. Are there specific ways in which, if we allow the opportunity for registrants and certain other soliciting persons to review and provide feedback on the proxy voting advice, questions may arise about possible influencing of the proxy voting advice by the reviewing parties? How, if

at all, could the independence of the advice be called into question if other parties reviewed and commented on it?[149] How could we address such concerns? For example, would disclosure of the specific comments raised by the reviewing party and the proxy voting advice businesses' responses to this feedback help alleviate concerns about the independence of the advice?

27. What effect will the proposals, if adopted, have on proxy voting advice businesses' ability to provide timely voting advice to their clients? What are the anticipated compliance burdens and corresponding costs that proxy voting advice businesses are expected to incur as a result of the proposed new conditions? What impact will these burdens and costs have on proxy voting advice businesses' clients?

28. Should the proposed amendments allow a proxy voting advice business to seek reimbursement from registrants and other soliciting persons of reasonable expenses associated with the review and feedback period and final notice of voting advice in proposed Rule 14a-2(b)(9)(ii)? If so, what would constitute reasonable expenses and how should these amounts be calculated? Should the calculation of these amounts be dependent on the size or other attributes of the proxy voting advice business, or on the size of the registrant, or number of recommendations? Should there be limits on the amount beyond reasonable expenses for which a proxy voting advice business can seek to be reimbursed?

29. We proposed to limit the review and feedback period and final notice of voting advice requirements to only registrants and soliciting persons conducting non-exempt solicitations. Should the opportunity to review and provide feedback and receive final notice of voting

[149] *See* Glass Lewis Letter, *supra* note 16, at 8 (noting that its policy of not engaging with registrants during the solicitation period preceding the shareholder meeting is due to concerns that such engagement could be viewed as affecting the independence of the voting advice provided to its clients).

advice also be given to other parties, such as shareholder proponents or persons engaged in exempt solicitations, such as in "vote no" or withhold campaigns?

30. Should the voting advice formulated under the custom policies established by clients whose specialized needs are not addressed by a proxy voting advice business's benchmark or specialty policies[150] be subject to the proposed review and feedback period and final notice of voting advice requirements? Are there any confidentiality concerns, such as the revelation of the client's investment strategies, which would arise from the ability of registrants or others to review the advice formulated under these customized policies? If so, is there a need for a method for distinguishing voting advice formulated under a proxy voting advice business's benchmark or specialty policy from advice formulated under a client's custom policy, and what would be the appropriate method for making this distinction? We note, for example, at least one major proxy voting advice business asserts that it is not the "norm" for its clients to adopt all or some of the business's benchmark policy, with the "vast majority of institutional investors" opting for "increasingly more detailed policies with specific views" on the issues presented for a vote in the proxy materials.[151]

31. Should the review and feedback period and final notice of voting advice requirements be a condition to the exemptions in all cases, as proposed, or should they be required only where a proxy voting advice business's voting recommendations are adverse to the reviewing party? In a proxy contest, should we require the review and feedback period and final notice of voting advice requirements only if voting recommendations are adverse to the reviewing party? In the case of a split vote recommendation, who should have the right to review the voting advice?

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[150] *See supra* note 116.

[151] *See* Glass Lewis Letter, *supra* note 16, at 2.

32. Would the proposed review and feedback period and final notice of voting advice requirements work effectively in the context of a contested solicitation? Are there unique challenges or specific issues with the parties' compliance with these proposed requirements that are foreseeable in contested solicitations?

33. Should we require the entirety of the proxy voting advice, including separate specialty reports,[152] to be provided to the reviewing party or only excerpts or certain reports? If the latter, which excerpts or reports? How should the scope of any such excerpts or reports be determined? Should only the portions of the voting advice that are adverse to the registrant or certain other soliciting persons be subject to the review and feedback period and final notice of voting advice requirements? Should we require only the factual information and/or data underlying the advice to be provided to the reviewing party?

34. Should proxy voting advice on certain topics or kinds of proposals be excluded from the proposed review and feedback period and final notice of voting advice requirements? If so, which ones? If some are excluded, are there topics or kinds of proposals for which proxy voting advice should always be subject to the proposed requirements?

35. Are there any risks raised by proxy voting advice businesses providing advance copies of voting advice (e.g., misuse of material, nonpublic information, or misappropriation of proprietary information), and if so, how can such risks be managed?

36. Should we allow proxy voting advice businesses to require registrants and other soliciting persons to enter into confidentiality agreements prior to providing their proxy voting advice? If so, should we specify any terms or parameters of the required confidentiality agreement? For example should the rule stipulate that the terms of the confidentiality agreement may be no more restrictive than similar types of confidentiality agreements the proxy voting advice

[152] *See supra* note 116.

business uses with its clients, as proposed? Should we stipulate in the rule that a proxy voting advice business is not required to comply with the proposed review and feedback period and final notice of voting advice requirements unless the reviewing party has entered into an agreement to keep the information received confidential? Are there similar types of confidentiality agreements between proxy voting advice businesses and their clients? If so, what are the terms of those agreements? Is it appropriate for the rule to address the nature of a private contract between two parties?

37. Can the confidentiality of information that a proxy voting advice business would provide to registrants and other soliciting persons under the proposal be effectively safeguarded? Would it be feasible for a proxy voting advice business to obtain a confidentiality agreement from the numerous registrants or soliciting persons with whom it interacts? Could confidentiality be assured through other means?

38. Should proxy voting advice businesses be required to include in their voting advice to clients a hyperlink (or other analogous electronic medium) to the response by the registrant and certain other soliciting persons, as a condition to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3)? Are there better methods of making the response available to the clients of proxy voting advice businesses? Should the proposed rule provide certain guidelines or limitations on the responses (e.g., responses may cover only certain topics, such as disagreements on facts used to formulate the proxy voting advice)?

39. Would the proposed condition that proxy voting advice businesses include a hyperlink (or other analogous electronic medium) directing their clients to the registrant's (or certain other soliciting person's) statement impact clients of proxy voting advice businesses, such as investment advisers? If so, how?

40. In our view, proxy voting advice businesses would not be liable for the content of the

registrant's (or certain other soliciting person's) statement solely due to inclusion of a hyperlink (or other analogous electronic medium) to such a statement in their voting advice. Should we codify this view in the text of proposed Rule 14a-2(b)(9)?

41. In instances where proxy voting advice businesses provide voting execution services (pre-population and automatic submission) to clients, are clients likely to review a registrant's response to voting advice? Should we amend Rules 14a-2(b)(1) and 14a-2(b)(3) so that the availability of the exemptions is conditioned on a proxy voting advice business structuring its electronic voting platform to disable the automatic submission of votes in instances where a registrant has submitted a response to the voting advice? Should we require proxy voting advice businesses to disable the automatic submission of votes unless a client clicks on the hyperlink and/or accesses the registrant's (or certain other soliciting persons') response, or otherwise confirms any pre-populated voting choices before the proxy advisor submits the votes to be counted? What would be the impact and costs to clients of proxy voting advice businesses of disabling pre-population or automatic submission of votes? Could there be effects on registrants? For example, if a proxy voting advice business were to disable the automatic submission of clients' votes, could that deter some clients from submitting votes at all, thereby affecting a registrant's ability to achieve quorum for an annual meeting? If we were to adopt such a condition, what transitional challenges or logistical issues would disabling pre-population or automatic submission of votes present for proxy voting advice businesses, and how could those challenges or issues be mitigated?
42. Should we permit proxy voting advice businesses to cure any unintentional or immaterial failure to comply with the proposed conditions so long as they make a good faith and reasonable effort, as proposed? We have proposed that the determination of whether a good faith and reasonable effort has been made should depend on the particular facts and

circumstances. Is there a need for further clarity on the actions that may be needed to satisfy this standard? If so, what would be appropriate to consider in satisfying this standard?

43. Should we prescribe a more detailed framework or establish procedural guidelines to help proxy voting advice businesses manage their interactions with registrants and certain other soliciting persons under proposed Rules 14a-2(b)(9)(ii) and (iii)? If so, what would be the appropriate framework?

44. What steps would proxy voting advice businesses need to take to update their systems and procedures such that they would reasonably be able to comply with the new conditions of proposed Rule 14a-2(b)(9)? Are there other steps that proxy voting advice businesses would need to take, such as re-negotiating contracts with their clients? What are the associated costs that proxy voting advice businesses would be anticipated to incur as a result? If the proposal is adopted, how much preparatory time would a proxy voting advice business require following adoption of the proposed amendments, to ensure that its systems and procedures are equipped to facilitate the business's compliance with the new rules?

45. Should proxy voting advice businesses be required to disclose the nature (e.g., frequency, format, substance, etc.) of their communication with registrants (and certain other soliciting persons) to their clients or publicly?

46. What factors and/or conditions are primarily responsible for the incidence of factual errors and methodological weaknesses in proxy voting advice businesses' analyses? How effective would our proposal for standardized review and feedback and opportunity to include responses to the proxy voting advice be in addressing these factual errors and methodological weaknesses?

47. Are there better approaches for addressing factual errors and methodological weaknesses in proxy voting advice businesses' analyses?

48. To what extent have factual errors or methodological weaknesses in proxy voting advice businesses' analyses resulted in impaired voting advice or adversely affected the ability of proxy voting advice businesses' clients to vote securities effectively?

C. Proposed Amendments to Rule 14a-9

Rule 14a-9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in the light of the circumstances under which the statements are made.[153] In addition, such solicitation must not omit to state any material fact necessary in order to make the statements therein not false or misleading.[154] Even solicitations that are exempt from the federal proxy rules' information and filing requirements are subject to this prohibition, as "a necessary means of assuring that communications which may influence shareholder voting decisions are not materially false or misleading."[155] This includes proxy voting advice that is exempt under Rules 14a-2(b)(1) and (b)(3). The Commission has previously stated that the furnishing of proxy voting advice, while exempt from the information and filing requirements, remains subject to the prohibition on false and misleading statements in Rule 14a-9.[156] We continue to believe that subjecting proxy voting advice businesses to the same antifraud standard as registrants and other persons engaged in soliciting activities is appropriate in the public interest and for the protection of investors. In recent Commission guidance,[157] we specifically addressed the application of Rule 14a-9 to proxy voting advice, stating that:

> Any person engaged in a solicitation through proxy voting advice must not make

[153] 17 CFR 240.14a-9.

[154] *Id.*

[155] 1979 Adopting Release, *supra* note 36, at 48942.

[156] *See* Concept Release, *supra* note 2, at 43010.

[157] *See* Question and Response 2 of Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 11.

> materially false or misleading statements or omit material facts, such as information underlying the basis of its advice or which would affect its analysis and judgments, that would be required to make the advice not misleading. For example, the provider of the proxy voting advice should consider whether, depending on the particular statement, it may need to disclose [certain] types of information in order to avoid a potential violation of Rule 14a-9.[158]

The types of information a proxy voting advice business may need to disclose could include the methodology used to formulate the proxy voting advice, sources of information on which the advice is based, or material conflicts of interest that arise in connection with providing the advice, without which the proxy voting advice may be misleading.[159]

Currently, the text of Rule 14a-9 provides four examples of what may be misleading within the meaning of the rule. These are:

- Predictions as to specific future market values;
- Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation;
- Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter; and
- Claims made prior to a meeting regarding the results of a solicitation.

Consistent with the Commission's recent guidance, we are proposing to amend the list of examples in Rule 14a-9 to highlight the types of information that a proxy voting advice business

[158] *Id.* at 12.

[159] *Id.*

may, depending upon the particular facts and circumstances, need to disclose to avoid a potential violation of the rule. Thus, the amended rule would list failure to disclose information such as the proxy voting advice business's methodology, sources of information and conflicts of interest as an example of what may be misleading within the meaning of the rule.

In addition, we are aware of concerns that may arise when proxy voting advice businesses make negative voting recommendations based on their evaluation that a registrant's conduct or disclosure is inadequate, notwithstanding that the conduct or disclosure meets applicable Commission requirements.[160] Without additional context or clarification, clients may mistakenly infer that the negative voting recommendation is based on a registrant's failure to comply with the applicable Commission requirements when, in fact, the negative recommendation is based on the determination that the registrant did not satisfy the criteria used by the proxy voting advice business. If the use of the criteria and the material differences between the criteria and the applicable Commission requirements are not clearly conveyed to proxy voting advice businesses' clients, there is a risk that the clients may make their voting decisions based on a misapprehension that a registrant is not in compliance with the Commission's standards or requirements. Similar concerns exist if, due to the lack of clear disclosures, clients are led to mistakenly believe that the unique criteria used by the proxy voting advice businesses were approved or set by the Commission.

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[160] *See, e.g.*, Business Roundtable Letter 1, *supra* note 94, at 12 (expressing concern over recommendations by proxy advisory firms to vote against (i) directors that do not meet the firms' own definition of "independence" and (ii) directors on governance committees where the registrant has excluded shareholder proposals through the Commission staff's no-action letter process); Letter from Tom Quaadman, Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (Feb. 24, 2014), at 2–3, *available at* https://www.sec.gov/comments/4-670/4670-12.pdf (discussing the practice by proxy advisory firms of adopting policies that favored annual shareholder votes on executive compensation, notwithstanding that the Commission's Rule 14a-21(a) [17 CFR 240.14a-21] requires such a vote no less than once every three years); Timothy Doyle, *The Realities of Robo-Voting*, AMERICAN COUNCIL FOR CAPITAL FORMATION 9 (Nov. 2018), http://accfcorpgov.org/wp-content/uploads/ACCF-RoboVoting-Report_11_8_FINAL.pdf ("[In cases where] limited legal disclosures are actually required, a proxy advisory recommendation drawn from an unaudited disclosure can in many cases create a new requirement for companies – one that adds cost and burden beyond existing securities disclosures.").

For example, if a proxy voting advice business were to recommend against the election of a director who serves on the registrant's audit committee on the basis that the director is not independent under the proxy voting advice business's independence standard for audit committee members, and the standard applied by the proxy voting advice business is more limiting than the Commission's rules,[161] it may be necessary for the proxy voting advice business to make clear that the business's recommendation is based on its own different independence standard, rather than the Commission's standard, in order for such recommendation to be not misleading.

Similarly, a concern could arise if a proxy voting advice business recommends that clients vote against a say-on-pay proposal[162] of a smaller reporting company ("SRC")[163] that provides scaled executive compensation disclosure in compliance with Commission rules for SRCs,[164] rather than the expanded disclosure required of larger registrants.[165] To the extent that such a

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[161] *See* Exchange Act Rule 10A-3 (specifying the independence standards for members of the audit committee). Further, Item 407 of Regulation S-K requires identification of each nominee for director that is "independent" under the standards of independence provided in Item 407(a)(1). 17 CFR 229.407(a)(1).

[162] Rule 14a-21 under the Securities Exchange Act of 1934 requires, among other things, companies soliciting proxies for an annual or other meeting of shareholders at which directors will be elected to include a separate resolution subject to a shareholder advisory vote to approve the compensation of named executive officers.

[163] A smaller reporting company is defined in Item 10(f)(1) of Regulation S-K [17 CFR 229.10(f)(1)] as an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that:

(i) Had a public float of less than $250 million; or

(ii) Had annual revenues of less than $100 million and either:

(A) No public float; or

(B) A public float of less than $700 million.

[164] *See* Item 402(l) of Regulation S-K. 17 CFR 229.402(l).

[165] When the Commission adopted comprehensive amendments to its executive compensation and related person disclosure requirements in 2006, it expressly provided certain scaled disclosure requirements for smaller issuers, in recognition of the fact that: (i) the executive compensation arrangements of smaller issuers are typically less complex than those of other public companies and (ii) satisfying disclosure requirements designed to capture more complicated compensation arrangements might impose new, unwarranted burdens on small business issuers. *See Executive Compensation and Related Person Disclosure,* Release No. 33-8732A [71 FR 53158 (Sept. 8, 2006)], at 53192.

proxy voting advice business does not make clear to its clients that it is making a negative voting recommendation based on its own disclosure criteria, notwithstanding that the registrant has complied with the compensation disclosure standards established by the Commission, the proxy voting advice business's clients may misunderstand the basis for the proxy voting advice business's recommendation.

To address these concerns, the proposed amendment would add as an example of what may be misleading within the meaning of Rule 14a-9, depending upon particular facts and circumstances, the failure to disclose the use of standards or requirements that materially differ from relevant standards or requirements that the Commission sets or approves.[166] We wish to emphasize, however, that including such an example is not meant to imply that it would be inappropriate for proxy voting advice businesses to use standards or criteria that are different from Commission standards or requirements when formulating proxy voting advice. Shareholders may use any standards or criteria when making their proxy voting decisions, and proxy voting advice businesses and their clients may use any standards or criteria for proxy voting advice. By including this example, our focus is on ensuring that any advice provided to those clients is not materially misleading with respect to its underlying bases.

The ability of a client of a proxy voting advice business to make voting decisions is affected by the adequacy of the information it uses to formulate such decisions. As we recently discussed in a separate release, investment advisers may seek information of the type we are proposing from proxy voting advice businesses when exercising voting authority on behalf of

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[166] *See* note (e) to proposed Rule 14a-9. We understand that some proxy voting advice businesses currently may be providing this type of disclosure, as well as some of the other disclosures described in proposed note (e). Examples of standards or requirements that the Commission approves are the listing standards of the registered national securities exchanges, such as the New York Stock Exchange (NYSE). The SEC supervises, and is authorized to approve rules promulgated by, the NYSE and other national securities exchanges pursuant to Section 19 of the Exchange Act.

clients.[167] The proposed amendments are designed to help ensure that proxy voting advice businesses' clients are provided the information they need to make fully informed decisions and to clarify the potential implications of Rule 14a-9.

Request for Comment

49. Is the proposal to amend the list of examples in Rule 14a-9 necessary in light of the Commission's recent guidance specifically underscoring the applicability of Rule 14a-9 to proxy voting advice?[168] Should the proposal to amend Rule 14a-9 list different or additional examples and, if so, which examples?
50. To what extent do proxy voting advice businesses currently apply their own standards or criteria that materially differ from those set or approved by the Commission, and how well do they alert clients to these differences when it may impact their voting advice?
51. Should the proposed amendment refer only to standards or requirements that the Commission sets or approves or is a wider scope (i.e., rules of other legal or regulatory bodies) more appropriate? If a wider scope is preferable, should the regulatory standards of state or foreign regulatory bodies also be referenced?
52. Alternatively, instead of amending Rule 14a-9 as proposed, should we require, as an additional condition under proposed Rule 14a-2(b)(9), that a proxy voting advice business include in its voting advice (and in any electronic medium used to deliver the proxy voting advice) disclosure of its use or application, in connection with such proxy voting advice, of standards that materially differ from standards or requirements that the Commission sets or approves?

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[167] *See* Question and Response 3 of Commission Guidance on Proxy Voting Responsibilities, *supra* note 9, at 17–20.

[168] *See* Question and Response 2 of Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 11–13.

D. Transition Period

We recognize that, if adopted, the proposed amendments would require proxy voting advice businesses to develop processes and systems to comply with the proposed conditions.[169] As such, we propose to provide a one-year transition period after the publication of a final rule in the Federal Register to give affected parties sufficient time to comply with the proposed new requirements. We request comment on the specific challenges that would be posed in implementing the proposed amendments, including those related to timing and the need for a transition period to address these issues.

Request for Comment

53. Are there any challenges that proxy voting advice businesses, their clients, or registrants anticipate in undertaking to develop systems and processes to implement the proposed amendments? If so, what are those challenges, and how could they be mitigated?
54. Is the proposed transition period appropriate? If not, how long should the transition period be and why? Please be specific.
55. Are there any other accommodations that we should consider for particular types of proxy voting advice businesses, registrants, or circumstances? Are there other transition issues or accommodations that we should consider?

Request for Comment – General Considerations

We request and encourage interested persons to submit comments on any aspects of the proposed amendments, other matters that may have an impact on the amendments, and any suggestions for additional or alternative changes. With respect to any comments, we note that they are of the greatest assistance to our rulemaking initiative if accompanied by supporting data

[169] *See supra* Section II.B.2.c.; *supra* note 145 and accompanying text (discussing potential logistical issues associated with the proposed amendments to allow registrants and certain other soliciting persons the opportunity to review and respond to proxy voting advice).

and analysis of the issues addressed by those comments, particularly quantitative information as to the costs and benefits, and any alternatives to the proposals where appropriate. Where alternatives to the proposal are suggested, please include information as to the costs and benefits of those alternatives.

56. How effective would the proposed amendments be in facilitating the ability of proxy voting advice businesses' clients to obtain the information they need to make informed voting determinations, including for investment advisers that are exercising voting authority on behalf of clients?

57. Are there any other conditions that should apply to proxy voting advice businesses seeking to rely on the exemptions in Rules 14a-2(b)(1) and (b)(3)? If so, what are these conditions?

58. Are there other approaches that are better suited to accomplish the Commission's objectives? For example, should proxy voting advice businesses be required to develop policies and procedures to help ensure that conflicts of interest are dealt with appropriately and to improve the accuracy of the information on which their proxy voting advice is based?

59. What effect would these proposals, if adopted, have on competition in the proxy advisory industry? Would adoption of the proposals increase barriers to entry into the market for potential competitors or lead to unhealthy market concentration within the proxy advisory industry or, ultimately, lead to decline in the quality of proxy voting advice provided to investors?

60. To the extent that adoption of the proposed amendments would limit the ability of smaller proxy voting advice businesses or potential new market entrants to operate and compete in the market for these services, should they be subject to the additional conditions in proposed Rule 14a-2(b)(9) in order to rely on the exemptions in Rules 14a-2(b)(1) and (b)(3)? If not, what should the criteria be for determining who is not subject to Rule 14a-2(b)(9)? For example,

should we base the availability of an accommodation for smaller proxy voting advice businesses on annual revenues, number of clients or market share? Would investment advisers or other institutional investors be less likely to hire proxy voting advice businesses that take advantage of such an accommodation? Are there other accommodations we should consider in lieu of or in addition to this exemption for certain proxy voting advice businesses?

III. ECONOMIC ANALYSIS

A. Introduction

We are proposing amendments to Exchange Act Rule 14a-2(b) to condition the availability of existing exemptions from the information and filing requirements of the proxy rules in Rules 14a-2(b)(1) and (b)(3) on all proxy voting advice businesses providing the following in connection with their proxy voting advice: (i) enhanced conflicts of interest disclosure; (ii) a standardized opportunity for review and feedback by registrants and certain other soliciting persons of proxy voting advice before a proxy voting advice business disseminates its proxy voting advice to clients; and (iii) the option for registrants and certain soliciting persons to request that proxy voting advice businesses include in their proxy voting advice (and on any electronic medium used to distribute the advice) a hyperlink or other analogous electronic medium directing the recipient of the advice to a written statement that sets forth the registrant's or soliciting person's views on the proxy voting advice.[170] We also are proposing to codify the Commission's interpretation that, as a general matter, proxy voting advice constitutes a solicitation within the meaning of Exchange Act Rule 14a-1(1). Finally, we are proposing to amend the list of examples in Exchange Act Rule 14a-9 to add as an example of a potentially material misstatement or omission within the meaning of the rule, depending upon particular facts and circumstances, the failure to disclose information

[170] The registrant's or soliciting person's written statement would constitute a "solicitation" under Exchange Act Rule 14a-1(l) and be subject to the anti-fraud prohibitions of Exchange Act Rule 14a-9, as well as the filing requirements of Exchange Act Rule 14a-12.

such as the proxy voting advice business's methodology, sources of information, conflicts of interest, or the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves.

We are sensitive to the costs and benefits of our rules. When engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, Section 3(f) of the Exchange Act requires that the Commission consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[171] In addition, Section 23(a)(2) of the Exchange Act requires the Commission to consider the effects on competition of any rules the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[172]

The parties affected by the proposed amendments would include proxy voting advice businesses, clients of proxy voting advice businesses such as investment advisers and institutional investors, retail investors, as well as registrants and other soliciting persons.

We have considered the economic effects of the proposed amendments, including their effects on competition, efficiency, and capital formation. Many of the effects discussed below cannot be quantified. Consequently, while we have, wherever possible, attempted to quantify the economic effects expected from this proposal, much of the discussion remains qualitative in nature. Where we are unable to quantify the economic effects of the proposed amendments, we provide a qualitative assessment of the potential effects and encourage commenters to provide data

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[171] 15 U.S.C. § 78c(f).

[172] 15 U.S.C. § 78w(a)(2).

and information that would help quantify the benefits, costs, and the potential impacts of the proposed amendments on efficiency, competition, and capital formation.

1. Overview of Proxy Voting Advice Businesses' Role in the Proxy Process

Every year, investment advisers and other institutional investors, whether on behalf of clients or on their own behalf, face decisions on how to vote the shares on a significant number of matters that are subject to a proxy vote, ranging from the election of directors and the approval of equity compensation plans to shareholder proposals submitted under Exchange Act Rule 14a-8.[173] These investment advisers and other institutional investors also face voting determinations when a matter is presented to shareholders for approval at a special meeting, such as a merger or acquisition or a sale of all or substantially all of the assets of the company. As described above, these firms play a large role in proxy voting because of their large aggregate percentage ownership stake in many U.S. public companies.[174] Voting can be resource intensive, involving organizing proxy materials, performing diligence on portfolio companies and matters to be voted on, determining how votes should be cast, and submitting proxy cards to be counted. To assist them in their voting decisions, investment advisers and other institutional investors frequently hire proxy voting advice businesses.[175]

Investment advisers and other institutional investors may retain proxy voting advice businesses to perform a variety of functions, including the following:

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[173] 17 CFR 240.14a-8; *see, e.g.*, Blackrock Letter, *supra* note 144, at 1 ("[A]s a fiduciary to its clients, Blackrock engages with portfolio companies and votes proxies globally at over 17,000 meetings annually."); NYC Comptroller Letter, *supra* note 17, at 4 ("For the year ending June 30, 2018, our office cast 71,000 individual ballots at 7,000 shareowner meetings in 84 markets around the world . . . ."); OPERS Letter, *supra* note 8, at 2 ("OPERS receives in excess of 10,000 proxies in any given proxy season.").

[174] *See supra* note 8 and accompanying text. As of the end of 2018, investment companies held approximately 30 percent of the shares of U.S.-listed equities outstanding. *See* 2019 *Investment Company Fact Book*, INVESTMENT COMPANY INSTITUTE (2019), https://www.ici.org/pdf/2019_factbook.pdf, at 37.

[175] *See* 2016 GAO Report, *supra* note 9, at 5.

- Analyzing and making voting recommendations on the matters presented for shareholder vote and included in the registrants' proxy statements;
- Executing proxy votes (or voting instruction forms) in accordance with their instructions, which may include voting the shares in accordance with a customized proxy voting policy resulting from consultation between a proxy voting advice business and its client,[176] the proxy voting advice businesses' proxy voting policies, or the client's own voting policy;
- Assisting with the administrative tasks associated with voting and keeping track of the large number of voting determinations; and
- Providing research and identifying potential risk factors related to corporate governance.

In the absence of the services offered by proxy voting advice businesses, investment advisers and other clients of these businesses may require considerable resources to independently conduct the work necessary to analyze and make voting determinations.

Proxy voting advice businesses generally are compensated on a fee basis for their services, and they are able to capture economies of scale for several of the services they provide, including supplying voting advice to clients.[177] As a consequence, investment advisers and other

[176] *See* ISS Letter, *supra* note 9, at 1 ("ISS enables our clients to receive customized proxy voting recommendations based on a client's specific customized voting guidelines. ISS implements more than 400 custom voting policies on behalf of institutional investor clients. As of January 1, 2018, approximately 85% of ISS' top 100 clients used a custom proxy voting policy. During calendar year 2017, approximately 87% of the total shares processed by ISS on behalf of clients globally were linked to such policies.").

[177] *See* CHESTER S. SPATT, MILKEN INSTITUTE, PROXY ADVISORY FIRMS, GOVERNANCE, FAILURE, AND REGULATION 7 (2019) ("Spatt 2019"), *available at* https://www.milkeninstitute.org/sites/default/files/reports-pdf/Proxy%20Advisory%20Firms%20FINAL.pdf .

institutional investors have found efficiencies in hiring these businesses to perform voting-related services, rather than performing them in-house.[178]

Institutional investors, who hold a majority of the votes cast in the U.S. public equity markets, use to some extent the voting advice provided by proxy voting advice businesses. In 2007, the GAO found that among 31 institutional investors, large institutions relied less than small institutions on the research and recommendations offered by proxy voting advice businesses. Large institutional investors indicated that their reliance on proxy voting advice businesses was limited because they: (i) conduct their own research and analyses to make voting determinations and use the research and recommendations offered by proxy voting advice businesses only to supplement such analyses; (ii) develop their own voting policies, which the proxy voting advice businesses are responsible for executing; and (iii) contract with more than one proxy voting advice business to gain a broader range of information on proxy issues.[179] In contrast, small institutional investors said they had limited resources to conduct their own research and tended to rely more heavily on the research and recommendations offered by proxy voting advice businesses.[180] The findings of a 2016 GAO study of 11 institutional investors were similar.[181]

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[178] *See* Concept Release, *supra* note 2, at 42983.

[179] *See* 2007 GAO Report, *supra* note 9, at 17–18; *see also* Blackrock Letter, *supra* note 144, at 6 ("Blackrock's Investment Stewardship team has more than 40 professionals responsible for developing independent views on how we should vote proxies on behalf of our clients."); NYC Comptroller Letter, *supra* note 17, at 4 ("We have five full-time staff dedicated to proxy voting during peak season, and our least-tenured investment analyst has 12 years' experience applying the NYC Funds' domestic proxy voting guidelines."); OPERS Letter, *supra* note 8, at 2 ("OPERS also depends heavily on the research reports we receive from our proxy advisory firm. These reports are critical to the internal analyses we perform before any vote is submitted. Without access to the timely and independent research provided by our proxy advisory firm, it would be virtually impossible to meet our obligations to our members."); 2018 Roundtable Transcript, *supra* note 40, at 194 (comments of Mr. Scot Draeger) ("If you've ever actually reviewed the benchmarks, whether it's ISS or anybody else, they're very extensive and much more detailed than small firm[s] like ours could ever develop with our own independent research.").

[180] 2007 GAO Report, *supra* note 9, at 17–18.

[181] *See* 2016 GAO Report, *supra* note 9, at 2.

Research on the role of proxy voting advice businesses in proxy voting has produced inconclusive results. For example, with respect to the amount of influence that proxy voting advice has on proxy votes, some studies suggest that proxy voting advice has substantial influence on proxy votes,[182] and some studies suggest a more limited influence.[183] Further, existing research has not attempted to characterize the amount of influence that one would expect proxy voting advice to have given the business purpose[184] of hiring a proxy voting advice business in the first place. As a result, existing research provides limited information on the extent to which proxy voting advice business clients incorporate proxy voting advice into their voting determinations relative to what would be expected given such an advice relationship.

Additionally, research on the role of proxy voting advice businesses in proxy voting has produced inconclusive results with respect to the quality of voting advice. For example, proxy voting advice businesses have been the subject of criticism for potentially being influenced by conflicts of interest,[185] producing voting advice that contains inaccuracies, and utilizing one-size-

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[182] *See* Cindy R. Alexander, Mark A. Chen, Duane J. Seppi, & Chester S. Spatt, *Interim News and the Role of Proxy Voting Advice*, 23 REV. FIN. STUD. 4419, 4422 (2010); ALON BRAV, WEI JIANG, TAO LI, & JAMES PINNINGTON, Columbia Business School Research Paper No. 18-16 , PICKING FRIENDS BEFORE PICKING (PROXY) FIGHTS: HOW MUTUAL FUND VOTING SHAPES PROXY CONTESTS 4 (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101473; JAMES R. COPLAND, DAVID F. LARCKER AND BRIAN TAYAN, Stanford Business School Closer Look Series, THE BIG THUMB ON THE SCALE: AN OVERVIEW OF THE PROXY ADVISORY INDUSTRY 3 (2018), *available at* https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-72-big-thumb-proxy-advisory.pdf; MANHATTAN INSTITUTE, *supra* note 24, at 6; ALBERT VERDAM, VU University of Amsterdam, AN EXPLORATION OF THE ROLE OF PROXY ADVISORS IN PROXY VOTING 23 (2006), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=978835.

[183] *See* Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 905–06 (2010); ALON BRAV, WEI JIANG, TAO LI, & JAMES PINNINGTON, Columbia Business School Research Paper No. 18-16 , PICKING FRIENDS BEFORE PICKING (PROXY) FIGHTS: HOW MUTUAL FUND VOTING SHAPES PROXY CONTESTS 35 (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101473. The authors find that larger mutual fund families cast votes "in ways completely independent from what are recommended by the advisors." ALON BRAV ET AL., *supra* note 182, at 35.

[184] For example, Spatt argues that the use of proxy advisory firms to produce relevant information for proxy voting and to make recommendations is an efficient market response to the cost of producing the relevant information oneself. Spatt 2019, *supra* note 177, at 8.

[185] For example, some proxy voting advice businesses provide consulting services to registrants on corporate governance or executive compensation matters, such as assistance in developing proposals to be submitted for shareholder vote. *See* Concept Release, *supra* note 2, at 42989. As a result, some proxy voting advice businesses

fits-all methodologies in evaluating a diverse array of registrants.[186] To assess the quality of voting advice, studies have sought to examine stock market reactions to announcements by registrants that the registrants will adopt policies consistent with those recommended by proxy voting advice businesses.[187] Such an approach, however, ignores the possibility that proxy voting advice business clients may have goals other than, or in addition to, share value maximization or may have investment objectives that would not be achieved solely on the basis of a positive market reaction.[188] Because investors may be willing to forgo share value to the extent that doing so allows the investor to achieve other goals, we are unable conclusively to infer recommendation quality from stock market reactions.

Finally, studies have shown theoretically that, given certain assumptions, investors could be led to rely too much on proxy voting advice.[189] The over-reliance stems from a collective action problem among shareholders with respect to voting because shareholders do not internalize

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provide voting recommendations regarding a registrant to their institutional investor clients on matters for which they may also provide consulting services to the registrant.

[186] *See supra* note 70.

[187] *See generally* David F. Larcker, Allan L. McCall & Gaizka Ormazabal, *Outsourcing Shareholder Voting to Proxy Advisory Firms,* 58 J.L. & ECON. 173 (2015). The authors find that when registrants adjust their compensation program to be more consistent with recommendations of proxy voting advice businesses, the stock market reaction is statistically negative.

[188] *See* Spatt 2019, *supra* note 177, at 4; PATRICK BOLTON, TAO LI, ENRICHETTA RAVINA, & HOWARD L. ROSENTHAL, Columbia Business School Research Paper No. 18-21, INVESTOR IDEOLOGY 37 (2019), *available at* https://www.nber.org/papers/w25717.pdf; Gregor Matvos & Michael Ostrovsky, *Heterogeneity and Peer Effects in Mutual Fund Proxy Voting*, 98 J. FIN. ECON. 90 (2010); MANHATTAN INSTITUTE, *supra* note 24, at 6; ALBERT VERDAM, *supra* note 182, at 12.

[189] *See generally* Andrey Malenko & Nadya Malenko, *Proxy Advisory Firms: The Economics of Selling Information to Voters*, 74 J. FIN. 2441 (2019). In their theoretical model, the authors assume shareholders have perfectly aligned incentives with all shareholders agreeing on share value maximization as the singular goal of the firm; proxy advice is provided by a single monopolistic proxy advisory firm; and, shareholders follow proxy advisory firm advice without exception. Additionally, the authors assume that when deciding whether to invest in their own independent research, shareholders believe that their votes will be pivotal to the vote outcome. The ownership structure of the company is key to the reported findings: the paper actually shows that proxy advisory services are valuable when ownership is sufficiently dispersed. The negative affect of the use of proxy advisors is likely to arise in companies with more concentrated ownership, but not very concentrated because in such cases shareholders again find proxy advisory services to be valuable.

the positive externality of their actions on other shareholders. We note, however, that this conclusion relies on the assumption that investors have the singular goal of share value maximization. The applicability of their results is limited by the extent to which investors have goals other than, or in addition to, share value maximization.

B. Economic Baseline

The baseline against which the costs, benefits, and the impact on efficiency, competition, and capital formation of the proposed amendments are measured consists of the current regulatory requirements applicable to registrants, proxy voting advice businesses, and investment advisers and other clients of these businesses, as well as current industry practices used by these entities in connection with the preparation, distribution, and use of proxy voting advice.

1. Affected Parties and Current Regulatory Framework

a. Clients of proxy voting advice businesses as well as underlying investors

Clients that use proxy voting advice businesses for voting advice would be affected by the proposed rule amendments. In turn, investors and other groups on whose behalf these clients make voting determinations would be affected. As discussed in greater detail below, to our knowledge, the proxy voting advice industry in the United States consists of five major firms.[190] Three of the five firms are registered with the Commission as investment advisers and as such, provide annually updated disclosure with respect to their types of clients on Form ADV. Table 1 below reports client types as disclosed by these three proxy voting advice businesses.

Table 1: Number of Clients by Client Type

	Number of Clients[a]		
Type of Client[b]	ISS[c]	ProxyVote Plus[d]	Segal Marco

[190] These firms are (1) Institutional Shareholder Services ("ISS"), (2) Glass Lewis & Co. ("Glass Lewis"), (3) Egan-Jones Proxy Services ("Egan-Jones"), (4) Segal Marco Advisors, and (5) ProxyVote Plus.

			Advisors[e]
Banking or thrift institutions	130	0	0
Investment companies	183	0	0
Pooled investment vehicles	356	0	24
Pension and profit sharing plans	189	131	63
Charitable organizations	113	0	0
State or municipal government entities	12	0	0
Other investment advisers	863	0	0
Insurance companies	49	0	0
Sovereign wealth funds and foreign official institutions	9	0	0
Corporations or other businesses not listed above	127	0	0
Other	208[f]	0	31[g]
Total	2,239	131	118

[a] Form ADV filers indicate the approximate number of clients attributable to each type of client. If the filer has fewer than five clients in a particular category (other than investment companies, business development companies, and pooled investment vehicles), they may indicate that they have fewer than five clients rather than reporting the number of clients.

[b] The table excludes client types for which all three filers indicated either zero clients or less than five clients.

[c] The current Form ADV filing for ISS is available at https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=111940.

[d] The current Form ADV filing for ProxyVote Plus is available at https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=122222.

[e] The current Form ADV filing for Segal Marco Advisors is available at https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=114687. We note that Segal Marco Advisors lists two bases for registration: (i) that they are a large advisory firm, and (ii) that they are a pension consultant with respect to assets of plans having an aggregate value of at least $200,000,000 that qualifies for the exemption in Rule 203A-2(a) under the Advisers Act. As a result, some of their clients may not use Segal Marco Advisors for proxy voting advice.

[f] ISS describes clients classified as "Other" as "Academic, vendor, other companies not able to identify as above." *See supra* note c.

[g] *See supra* note e.

Table 1 illustrates the types of clients that utilize the services of proxy voting advice businesses. For example, while investment advisers constitute a 39 percent plurality of clients for ISS, other types of clients include pooled investment vehicles (16 percent), pension and profit sharing plans (8 percent), and investment companies (8 percent). Other users of the services offered by proxy voting advice businesses include corporations, charitable organizations, insurance companies, and academic endowments. Together, these various users of proxy voting advice business services make voting determinations that affect the interests of a wide array of retail investors, beneficiaries and other constituents.

b. Proxy Voting Advice Businesses

Proxy voting advice businesses also would be affected by the proposed amendments. As the Commission has previously stated, voting advice provided by a business such as a proxy voting advice firm that markets its expertise in researching and analyzing proxy issues for purposes of helping its clients make proxy voting determinations (i.e., not merely performing administrative or ministerial services) generally constitutes a solicitation subject to federal proxy rules because it is "a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."[191] Proxy voting advice businesses engaged in activities constituting solicitations typically rely on two exemptions from the information and filing requirements of the federal proxy rules: Rules 14a-2(b)(1) and (b)(3).[192] Where a proxy voting advice business relies on 14a-2(b)(3), it must disclose to its clients any significant relationship with the registrant or any of its affiliates, or a security holder

[191] *See* Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 47417.

[192] 17 CFR 240.14a-2(b)(1), (b)(3).

proponent of the matter on which advice is given, as well as any material interests of the proxy voting advice business in such matter. Even if exempt from the information and filing requirements of the federal proxy rules, the furnishing of proxy voting advice remains subject to the prohibition on false and misleading statements in Rule 14a-9.[193]

As of August 19, 2019, to our knowledge, the proxy advisory industry in the United States consists of five major firms: ISS, Glass Lewis, Egan-Jones, Marco Consulting Group ("Marco Consulting"), and ProxyVote Plus.

- ISS, founded in 1985, is a privately-held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote execution, governance data, and related products and services.[194] ISS also provides advisory/consulting services, analytical tools, and other products and services to corporate registrants through ISS Corporate Solutions, Inc. (a wholly owned subsidiary).[195] As of June 2019, ISS had more than 1,800 employees in 30 offices in 13 countries, and covered approximately 44,000 shareholder meetings in 115 countries, annually.[196] ISS states that it executes about 10.2 million ballots annually on behalf of those clients.[197] ISS is registered with the Commission as an investment adviser and identifies its work as pension consultant as the basis for registering as an adviser.[198]

[193] 17 CFR 240.14a-9.

[194] *See* 2016 GAO Report, *supra* note 9, at 6.

[195] *Id*.

[196] *See supra* note 18.

[197] *Id*.

[198] *See* 2016 GAO Report, *supra* note 9, at 9.

- Glass Lewis, established in 2003, is a privately-held company that provides research and analysis of proxy issues, custom policy implementation, vote recommendations, vote execution, and reporting and regulatory disclosure services to institutional investors.[199] As of June 2019, Glass Lewis had more than 360 employees in the U.S., the United Kingdom, Ireland, Germany, and Australia that provide services to more than 1,300 clients that collectively manage more than $35 trillion in assets.[200] Glass Lewis states that it covers more than 20,000 shareholder meetings across approximately 100 global markets annually.[201] Glass Lewis is not registered with the Commission in any capacity.
- Egan-Jones was established in 2002 as a division of Egan-Jones Ratings Company.[202] Egan-Jones is a privately-held company that provides proxy services, such as notification of meetings, research and recommendations on selected matters to be voted on, voting guidelines, execution of votes, and regulatory disclosure.[203] As of September 2016, Egan-Jones' proxy research or voting clients mostly consisted of mid- to large-sized mutual funds[204] and the firm covered approximately 40,000 companies.[205] Egan-Jones Ratings Company (Egan-Jones'

[199] *See* 2016 GAO Report, *supra* note 9, at 7.

[200] *See* GLASS LEWIS, *supra* note 1869.

[201] *Id*.

[202] *See* 2016 GAO Report, *supra* note 9, at 7.

[203] *Id*.

[204] *Id*.

[205] *Id*. While ISS and Glass Lewis have published updated coverage statistics on their websites, the most recent data available for Egan-Jones was compiled in the 2016 GAO Report.

parent company) is registered with the Commission as a Nationally Recognized Statistical Ratings Organization.[206]

- The proxy advisory segment of Segal Marco Advisors was originally established in 1988 as Marco Consulting and is a privately-held company that provides investment analysis and advice and proxy voting services to a large number of Taft-Hartley pension and public benefit plans.[207] Marco Consulting was acquired by Segal Advisors in 2017.[208] As of July 2019, Segal Marco Advisors votes proxies for roughly 8,000 companies annually.[209] Segal Marco Advisors is registered with the Commission as an investment adviser and identifies its work as a pension consultant as one basis for registering as an adviser.[210]
- ProxyVote Plus is an employee-owned firm established in 2002 to provide proxy voting services to Taft-Hartley pension fund clients.[211] ProxyVote Plus conducts internal research and analysis of voting issues and executes votes based on its guidelines.[212] ProxyVote Plus reviews and analyzes proxy statements and other corporate filings and reports annually to its clients on proxy votes cast on their

[206] *See* Order Granting Registration of Egan-Jones Rating Company as a Nationally Recognized Statistical Rating Organization, Exchange Act Release No. 34-57031 (Dec. 21, 2007), *available at* https://www.sec.gov/ocr/ocr-current-nrsros.html#egan-jones.

[207] *See* 2016 GAO Report, *supra* note 9, at 7.

[208] *See History*, SEGAL MARCO ADVISORS, https://www.segalmarco.com/about-us/history/ (last visited Oct. 3, 2019).

[209] *See Corporate Governance and Proxy Voting*, SEGAL MARCO ADVISORS, https://www.segalmarco.com/services/corporate-governance-and-proxy-voting/ (last visited July 9, 2019).

[210] *See* 2016 GAO Report, *supra* note 9, at 9. Segal Marco Advisors also indicates assets under management as another basis for registering as an adviser. *See* Segal Advisors, Inc., Form ADV (July 1, 2019), *available at* https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=114687.

[211] *See* 2016 GAO Report, *supra* note 9, at 7.

[212] *Id*. at 7–8.

behalf.[213] ProxyVote Plus is registered with the Commission as an investment adviser and identifies its work as a pension consultant as the basis for registering as an adviser.[214]

Of the five proxy voting advice businesses identified, ISS and Glass Lewis are the largest and most often used for proxy voting advice.[215]

c. Registrants and Other Soliciting Persons

Registrants and other soliciting persons also would be affected by the proposed amendments. Registrants that have a class of equity securities registered under Section 12 of the Exchange Act as well as non-registrant parties that conduct proxy solicitations in respect to those registrants are subject to the federal proxy rules.[216] In addition, there are certain issuers that voluntarily file proxy materials with the Commission. Finally, Rule 20a-1 under the Investment Company Act subjects all registered management investment companies to the federal proxy rules.[217]

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[213] *Id.* at 8.

[214] *See* 2016 GAO Report, *supra* note 9, at 9.

[215] *See* 2016 GAO Report, *supra* note 9, at 8, 41 ("In some instances, we focused our review on Institutional Shareholder Services (ISS) and Glass Lewis and Co. (Glass Lewis) because they have the largest number of clients in the proxy advisory firm market in the United States."); *see also* Center on Exec. Comp. Letter, *supra* note 24, at 1 (noting that there are "two firms controlling roughly 97% of the market share for such services"); Soc. for Corp. Gov. Letter, *supra* note 24, at 1 ("While there are five primary proxy advisory firms in the U.S., today the market is essentially a duopoly consisting of Institutional Shareholder Services . . . and Glass Lewis & Co. . . . .").

[216] Foreign private issuers are exempt from the federal proxy rules under Rule 3a12-3(b) of the Exchange Act. *See* 17 CFR 240.3a12-3.

We are not aware of any asset-backed issuers that have a class of equity securities registered under Section 12 of the Exchange Act. Most asset-backed issuers are registered under Section 15(d) of the Exchange Act and thus are not subject to the federal proxy rules. Nine asset-backed issuers had a class of debt securities registered under Section 12 of the Exchange Act as of December 2018. As a result, these asset-backed issuers are not subject to the federal proxy rules.

[217] Rule 20a-1 under the Investment Company Act requires registered management investment companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy

As of December 31, 2018, there were 5,746 registrants that had a class of securities registered under Section 12 of the Exchange Act (including 98 Business Development Companies ("BDCs")).[218] As of the same date, there were 120 companies that did not have a class of securities registered under Section 12 of the Exchange Act that voluntarily filed proxy materials.[219] As of August 31, 2019 there were 12,718 registered management investment companies that were subject to the proxy rules: (i) 12,040 open-end funds, out of which 1,910 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share class; (ii) 664 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies.[220] The summation of these estimates yields

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solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act. *See* 17 CFR 270.20a-1.

"Registered management investment company" means any investment company other than a face-amount certificate company or a unit investment trust. *See* 15 U.S.C. § 80a-4.

[218] We estimate the number of registrants with a class of securities registered under Section 12 of the Exchange Act by reviewing all Forms 10-K filed during calendar year 2018 with the Commission and counting the number of unique registrants that identify themselves as having a class of securities registered under Section 12(b) or Section 12(g) of the Exchange Act. Foreign private issuers that filed Forms 20-F and 40-F and asset-backed issuers that filed Forms 10-D and 10-D/A during calendar year 2018 with the Commission are excluded from this estimate.

BDCs are all entities that have been issued an 814- reporting number. Our estimate includes BDCs that may be delinquent or have filed extensions for their filings, and it excludes 6 wholly-owned subsidiaries of other BDCs.

[219] We identify issuers that voluntarily file proxy materials as those (1) subject to the reporting obligations of Exchange Act Section 15(d) but that do not have a class of equity securities registered under Exchange Act Section 12(b) or 12(g) and (2) that filed any proxy materials during calendar year 2018 with the Commission. The proxy materials we consider in our analysis are DEF14A, DEF14C, DEFA14A, DEFC14A, DEFM14A, DEFM14C, DEFR14A, DEFR14C, DFAN14A, N-14, PRE 14A, PRE 14C, PREC14A, PREM14A, PREM14C, PRER14A and PRER14C. Form N-14 can be a registration statement and/or proxy statement. We manually review all Forms N-14 filed during calendar year 2018 with the Commission and we exclude from our estimates Forms N-14 that are exclusively registration statements.

To identify issuers reporting pursuant to Section 15(d) but not registered under Section 12(b) or Section 12(g), we review all Forms 10-K filed in calendar year 2018 with the Commission and count the number of unique issuers that identify themselves as subject to Section 15(d) reporting obligations but with no class of equity securities registered under Section 12(b) or Section 12(g).

[220] We estimate the number of unique registered management investment companies based on Forms N-CEN filed between June 2018 and August 2019 with the Commission. Open-end funds are registered on Form N-1A. Closed-end funds are registered on Form N-2. Variable annuity separate accounts registered as management investment companies are trusts registered on Form N-3.

18,584 registrants that may be affected to a greater or lesser extent by the proposed amendments.[221]

The abovementioned estimates are an upper bound of the number of potentially affected registrants because not all of these registrants may file proxy materials related to a meeting for which a proxy voting advice business issues proxy voting advice in a given year. Out of the 18,584 potentially affected registrants mentioned above, 5,690 filed proxy materials with the Commission during calendar year 2018.[222] Out of the 5,690 registrants, 4,758 (84 percent) were Section 12 or Section 15(d) registrants and the remaining 932 (16 percent) were registered management investment companies.[223]

Further, there were 95 other soliciting persons that submitted proxy materials with the Commission during calendar year 2018.[224]

The number of potentially affected Section 12 and Section 15(d) registrants is estimated over a different time period (i.e., January 2018 to December 2018) than the number of potentially affected registered management investment companies (i.e., June 2018 to August 2019) because there is no complete N-CEN data for the most recent full calendar year (i.e., 2018). Registered management investment companies started submitting Form N-CEN in September 2018 for the period ended on June 30, 2018 with the Commission.

[221] The 18,584 potentially affected registrants is the sum of:

- 5,746 registrants with a class of securities registered under Section 12 of the Exchange Act;
- 120 registrants without a class of securities registered under Section 12 of the Exchange Act that voluntarily filed proxy materials; and
- 12,718 registered management investment companies.

[222] For details on the estimation of companies that filed proxy materials with the Commission during calendar year 2018, *see supra* note 218.

[223] According to data from Forms N-CEN filed with the Commission between June 2018 and August 2019, there were 965 registered management investment companies that submitted matters for its security holders' vote during the reporting period: (i) 729 open-end funds, out of which 86 were ETFs registered as open-end funds or open-end funds that had an ETF share class; (ii) 235 closed-end funds; and (iii) 1 variable annuity separate account. *See* Form N-CEN Item B.10). The discrepancy in the estimated number of registered management investment companies submitting proxy filings (i.e., 932) and Form N-CEN data (i.e., 965) likely is attributable to the different time periods over which the two statistics are estimated.

[224] We estimate other soliciting persons as the number of unique CIKs of entities that submitted Forms DEFC14A, DEFN14A, and DFAN14A during calendar year 2018 with the Commission.

2. Certain Industry Practices

The proposed amendments would codify existing and create certain additional obligations for proxy voting advice businesses that rely on exemptions from the information and filing requirements of the proxy rules. The current practice of proxy voting advice businesses vary and to the extent industry participants may already provide similar information or offer similar review and comment opportunities under their own practices, such practices could affect our analysis of the benefits and costs of the proposed amendments.

For example, we are proposing to augment existing obligations by specifying that detailed disclosure of material conflicts of interest must be provided, as a condition to relying on the exemptions in Rules 14a-2(b)(1) and (3), in the proxy voting advice and in any electronic medium used to deliver the advice, including a discussion of the policies and procedures used to identify, and steps taken to address, potential and actual conflicts of interest. We are aware that some proxy voting advice businesses have disclosure practices and procedures regarding conflicts of interest that may be similar to these proposed disclosure requirements.[225] For example, Glass Lewis has noted that it adds a statement to the front cover of its proxy voting advice when it determines that there is a potential conflict of interest.[226] Further, ISS has noted that its proxy voting advice contains a legend indicating that the subject of the advice may be a client of ISS' subsidiary, ISS Corporate Solutions, Inc. (ICS).[227]

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[225] *See supra* note 76.

[226] *See* Glass Lewis Letter, *supra* note 16, at 9 ("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).").

[227] *See* Letter from Gary Retelny, President and Chief Executive Officer, Institutional Shareholder Services to the Committee on Banking, Housing and Urban Affairs, U.S. Senate (July 6, 2018), at 4, *available at* https://www.issgovernance.com/file/duediligence/20180706-iss-senate-hearing-statement.pdf (describing measures ISS has historically taken to ensure transparency of any potential conflicts associated with ISS Corporate Solutions,

We are also proposing conditions that would require that registrants and any other soliciting person covered by the proxy voting advice be provided the opportunity to review and provide feedback on the proxy voting advice that the proxy voting advice business intends to deliver to its clients before such advice is disseminated. The availability and length of the period for review and feedback would depend on how early the registrant filed its definitive proxy statement.[228] These amendments are intended to give registrants and other soliciting persons an opportunity to engage with the proxy voting advice business and identify factual errors or methodological weaknesses in the proxy voting advice before it is disseminated to clients.

We understand that Glass Lewis and ISS both currently provide some opportunities for registrants to review and respond to some aspects of their proxy voting advice. Glass Lewis offers a program that allows participating registrants to request, and be provided with, a data-only version of its proxy voting advice prior to Glass Lewis completing the analysis based on that data.[229] This process enables registrants to notify Glass Lewis of any factual mistakes in the data prior to Glass Lewis completing and publishing the analysis for its clients.[230] Under this program, registrants are provided 48 hours to review the draft analysis and provide corrections.[231] ISS

Inc. ("ICS"), which is a subsidiary of ISS that provides governance tools and services to client) ("ISS' institutional clients can readily identify any potential conflict of interest through ISS' primary client delivery platform, ProxyExchange (PX), which provides information about the identity of ICS clients, as well as the types of services provided to those registrants and the revenue received from them. Similarly, each proxy analysis and research report issued by ISS contains a legend indicating that the subject of the analysis or report may be a client of ICS. This legend also advises institutional clients about the way in which they can receive additional, specific details about any registrant's use of products and services from ICS, which can be as simple as emailing our Legal/Compliance department . . . .").

[228] *See* proposed Rule 14a-2(b)(9)(ii)(A)(*1*) and (A)(*2*). If the registrant files its definitive proxy statement at least 45 calendar days before the security holder meeting date, it will be given five business days to complete an initial review the proxy voting advice; if the registrant files less than 45 calendar days but at least 25 calendar days before the meeting, it will be given no less than three business days to review. If the registrant files 25 calendar days or fewer before the meeting, there would not be a requirement to provide a review opportunity.

[229] Glass Lewis Letter, *supra* note 16, at 6; *see supra* note 102.

[230] Glass Lewis Letter, *supra* note 16, at 6

[231] *See Issuer Data Report*, GLASS LEWIS, https://www.glasslewis.com/issuer-data-report/ (last visited July 30, 2019).

offers Standard & Poor's 500 companies and companies in comparable large capitalization indices in certain countries outside the United States an opportunity to review a draft analysis for factual errors prior to delivery of proxy voting advice to clients.[232] ISS provides registrants one to two business days to review draft proxy voting advice and provide feedback before ISS disseminates the voting advice to clients.[233]

The proposed amendments also would provide registrants and other soliciting persons with a final notice of voting advice. This notice, which must contain a copy of the proxy voting advice that the proxy voting advice business will deliver to its clients, including any revisions to such advice made as a result of the review and feedback period, must be provided by the proxy voting advice business no later than two business days prior to delivery of the proxy voting advice to its clients. We are not aware of any proxy voting advice business that provides registrants with such copies of proxy voting advice before it is provided to clients. Most registrants do not become aware of the data used in the proxy voting advice business's analysis or the recommendations derived therefrom until after the voting advice has been issued to the proxy voting advice business's clients, to the extent the registrant has access to the proxy voting advice at all.[234]

Finally, the proposed amendments would require that proxy voting advice businesses include in their proxy voting advice and in any electronic medium used to deliver the proxy voting advice, if requested by the registrant or other soliciting person, a hyperlink (or other analogous electronic medium) to the registrant's or other soliciting person's statement regarding the proxy voting advice. The statement would constitute a "solicitation" as defined in Rule 14a-1(1) and be

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[232] *See* 2018 Roundtable Transcript, *supra* note 40, at 231–32 (comments of Mr. Gary Retelny) ("[W]e distribute prior to publishing our final report, our draft report [to] the S&P 500 generally and other large global companies. We do not do it for everyone.")*; see also* ISS Letter, *supra* note 9, at 10.

[233] *See* 2016 GAO Report, *supra* note 9, at 28.

[234] *See, e.g.*, *supra* note 232.

subject to the anti-fraud prohibitions of Rule 14a-9, as well as the filing requirements of Exchange Act Rule 14a-2. Currently, if registrants have concerns with the recommendations of proxy voting advice businesses, registrants can file additional definitive proxy materials with the Commission to address their concerns with the recommendations or analysis, but such an effort may not be effective. Some registrants have asserted that a large percentage of proxies are voted within 24 to 48 hours of proxy voting advice being issued[235] and that it can be difficult to access and analyze the proxy voting advice, formulate a response, and file the necessary materials with the Commission within that time period.[236]

We do not have data that would allow us to examine with a meaningful degree of precision the timing of when proxies are voted. In 2016, 2017, and 2018, the number of unique registrants that filed proxy materials with the Commission was 5,690, 5,744, and 5,862, respectively.[237] Table 2 below reports the total number of times registrants filed additional definitive proxy materials in response to proxy voting advice in calendar years 2016, 2017, and 2018.[238] Table 2 also reports the number of instances registrants indicated particular concerns with respect to the proxy voting advice.[239]

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[235] *See, e.g.*, 2018 Roundtable Transcript, *supra* note 40, at 242 (comment of Mr. Adam Kokas) ("[W]ithin a day or so of the report coming out, depending on the firm, 30 to 45 percent of our shares are voted within 24 to 48 hours."); Soc. for Corp. Gov. Letter, *supra* note 24, at 3 ("Anecdotal evidence from some of our members consistently shows that as much as 30% of the total shareholder votes are cast within 24 hours of the ISS and Glass Lewis recommendations being released to their subscribers . . . ."); *see also* Placenti, *supra* note 40, at 8.

[236] *See* 2018 Roundtable Transcript, *supra* note 40, at 228 (comment of Mr. Adam Kokas) ("[F]or all of these things related to proxy advisory firm reports and voting, there's a before and there's an after. So once the report is issued, it is an uphill battle, to say the least, from a public company perspective, certainly from a small to mid-market cap company, filing SEC solicitation materials or doing other things to try to correct the record are very difficult.").

[237] *See supra* note 218 for details on the estimation of registrants that filed proxy materials with the Commission during a calendar year.

[238] *Id.*

[239] We divide registrant concerns into five categories: 1) factual errors, 2) analytical errors, 3) general or policy disputes, 4) amended or modified proposal, and 5) other. We classify a concern as "factual errors" when the registrant identifies what it considers to be incorrect data or inaccurate facts that the proxy voting advice business uses in some part as a basis for its negative recommendation. We classify a concern as "analytical errors" when the registrant

Table 2: Registrant Concerns Identified in Additional Definitive Proxy Materials

Year	Filings	Type of Registrant Concern				
		Factual errors	Analytical errors	General or policy dispute	Amended or modified proposal	Other
2016	99	24	40	54	18	11
2017	77	13	28	42	10	8
2018	84	17	28	58	6	2

Although not required, registrants sometimes indicate in their additional definitive proxy materials the date on which they first became aware of the proxy voting advice business's voting advice. The date may represent the date the proxy voting advice was issued or may represent the date an advance copy was provided to the registrant. For example, in 2018, in 14 of the 84 filings, the registrant indicated the date on which it first became aware of voting advice issued by a proxy voting advice business.[240] Among those 14 filings, the median (average) number of business days between the proxy voting advice business issuing its advice and the registrant filing amended proxy materials was 3 (3.8) business days.[241] The median (average) number of business days

identifies what it considers to be methodological errors in the proxy voting advice business's analysis that it used as a basis for its negative recommendation. We classify a concern as "general or policy disputes" when the registrant does not dispute the facts or the analytical methodology employed but instead generally espouses the view that specific evaluation policies or the evaluation framework established by the proxy voting advice business are overly simplistic or restrictive and do not adequately or holistically capture the merits of the proposal. We classify a concern as "amended or modified proposal" when the registrant responds to a current or prior year negative recommendation from a proxy voting advice business by indicating that it has amended or modified proposals or existing governance practices prior to the annual meeting and requests investor consideration of these facts in making their vote. Finally, we classify as "other" those concerns where the registrant objects to the proxy voting advice business's negative recommendation but does not specifically cite nor respond to the rationale for the negative recommendation and instead makes a generalized argument in favor of the proposal. Registrants may have more than one concern with a proxy voting advice business's voting advice, so the number of firms filing amended proxy materials may not equal the sum of concern types within a given year.

[240] For 2017 and 2016, the number of filings indicating the date on which the registrant became aware of a proxy voting advice business's voting advice was 14 of 77 and 21 of 99, respectively.

[241] The median (average) number of business days between the proxy voting advice business issuing its advice and the registrant filing additional definitive proxy materials for 2017 and 2016 was 4.5 (6.4) and 3 (5), respectively.

remaining until the shareholder meeting was to take place with regard to those 14 filings was 9.5 (10.3) business days.[242]

It may be the case that, as discussed above, some registrants expect a large percentage of proxies to be voted within a short period of time following the issuance of proxy voting advice.[243] As a result, some registrants may not file additional definitive proxy materials if they do not have the resources to do so quickly or if they do not think the effort would have a meaningful impact on votes.[244] This decision may deprive market participants of information that would reasonably be expected to affect a voting or investment decision.

C. Benefits and Costs

We discuss the economic effects of the proposed amendments below. For both the benefits and the costs, we consider each piece of the proposed amendments in turn. The proposed amendments include: (1) amendments to the definition of solicitation in Rule 14a-1(1); (2) conditioning availability of the exemptions in Rules 14a-2(b)(1) and (b)(3) on proxy voting advice businesses providing disclosure regarding conflicts of interest; (3) conditioning availability of those exemptions on proxy voting advice businesses providing registrants and certain soliciting persons the opportunity to review and respond to draft proxy voting advice, subject to the registrant or other soliciting persons filing definitive proxy statements at least 25 calendar days (45 calendar days, if the longer review and response period is desired) before the relevant meeting; and (4) an amendment to the examples in Rule 14a-9 of disclosure that, if omitted from a proxy solicitation, may be misleading.

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[242] The median (average) number of business days remaining until the shareholder meeting was to take place in 2017 and 2016 was 5.5 (8.4) and 8 (12.8), respectively.

[243] *See supra* note 235.

[244] *See supra* note 236.

1. Benefits

First, we are proposing to codify the Commission's interpretation that, as a general matter, proxy voting advice constitutes a solicitation within the meaning of the Exchange Act Rule 14a-1(l). Overall, we do not expect this proposed amendment to have a significant economic impact because it codifies an already-existing Commission interpretation. Nonetheless, at the margins, this proposed amendment may benefit proxy voting advice businesses and their clients to the extent that codifying this interpretation in the Commission's proxy rules provides more clear notice that Section 14(a) and the proxy rules apply to proxy voting advice. We also are proposing to amend Rule 14a-1(l)(2) to clarify that the furnishing of proxy voting advice by certain persons would not be deemed a solicitation. Specifically, voting advice from a person who furnishes such advice only in response to an unprompted request for the advice would not be deemed a solicitation. Again, we do not expect this proposed amendment to have a significant economic impact because it codifies the Commission's longstanding view that such a communication should not be regarded as a solicitation subject to the proxy rules.

Second, we are proposing to amend rule 14a-2(b) to make the availability of the exemptions in Rules 14a-2(b)(1) and (b)(3) for proxy voting advice businesses contingent on providing enhanced disclosure of conflicts of interest specifically tailored to proxy voting advice businesses and the nature of their services.[245] The proposed conflicts of interest disclosures are intended to augment existing requirements by specifying detailed disclosures about conflicts of interest that must be provided in proxy voting advice. The disclosures provided under the proposed amendments would need to be sufficiently detailed so that clients of proxy voting advice businesses can understand the nature and scope of the interest, transaction, or relationship and assess the objectivity and reliability of the proxy voting advice they receive. In addition, proxy

[245] *See supra* note 84.

voting advice businesses would be required to disclose any policies and procedures used to identify, as well as the steps taken to address, any material conflicts of interest, whether actual or potential, arising from such relationships and transactions. The proposed amendments also would specify that the enhanced conflicts disclosures must be provided in the proxy voting advice and in any electronic medium used to deliver the advice.

The proposed amendments could benefit the clients of proxy voting advice businesses by enabling them to better assess the objectivity of the proxy voting advice businesses' advice against potentially competing interests. The proposed amendment could also benefit clients of proxy voting advice businesses because they would receive the same information about potential conflicts of interest, regardless of which exemption the proxy voting advice business relies upon for its proxy voting advice (currently, only proxy voting advice businesses relying on the 14a-2(b)(3) exemption are required to provide disclosure about conflicts of interest). Furthermore, the requirement that conflicts of interest disclosures be included in the proxy advisor's voting advice could benefit clients of proxy voting advice businesses by making more standard the manner in which such information is disclosed and ensuring that the required disclosures receive due prominence and can be considered together with proxy voting advice at the time clients are making voting determinations. This may, in turn, make it easier or more efficient for such clients to review and analyze the conflicts disclosure. Disclosure of material conflicts of interest can lead to more informed decision making, and we anticipate that institutional investors would use information from disclosures of material conflicts of interest to make more informed voting decisions. Thus, to the extent they cause the clients of proxy voting advice businesses to make more informed voting decisions on investors' behalf, these disclosure requirements could also benefit investors. Further, these disclosures could make it easier and more efficient for clients that are investment advisers to evaluate and determine whether to retain proxy voting advice

businesses, in order to ensure that the investment adviser discharges its fiduciary duty to cast votes in the best interest of its clients.

As we discuss in Section II.B.1 above, we are aware that some proxy voting advice businesses have asserted that that they have practices and procedures that address conflict of interest concerns.[246] Even where certain proxy voting advice businesses may provide detailed disclosure about conflicts of interest under existing practices, requiring this disclosure as a condition to the proxy rule exemptions would help to ensure that the disclosure is more consistent across the proxy voting advice provided by proxy voting advice businesses, and would provide users of that advice with ready and timely access to such disclosure in the proxy voting advice and in any electronic medium used to deliver the advice. We believe this would allow clients of proxy voting advice businesses to more efficiently access and assess the conflicts disclosure. We note, however, to the extent that proxy voting advice businesses currently provide information that meets or exceeds the proposed disclosure requirements, the benefits we describe above would be more limited.[247]

Third, the proposed amendments to Rule 14a-2(b)(9) would, subject to the registrant or other soliciting persons filing definitive proxy statements at least 25 calendar days (45 calendar days, if the longer review and response period is desired) before the relevant meeting, require that proxy voting advice be provided to registrants and other soliciting persons before it is disseminated to clients of proxy advice businesses, in order to allow such registrants and other soliciting persons an opportunity for their review and feedback. The proposed amendments also would require that a proxy voting advice business, upon request, include in its proxy voting advice a hyperlink or other analogous electronic medium that leads to the registrant's or other soliciting

[246] *See supra* note 76.

[247] *See supra* note 76.

person's response to the advice. We believe the proposed amendments would benefit clients of proxy voting advice businesses—and thereby ultimately benefit the investors they serve—by enhancing the overall mix of information available to those clients as they assess voting recommendations and make determinations about how to cast votes. Providing a standardized opportunity for registrants and other soliciting persons to review and provide feedback could also help identify factual errors or methodological weaknesses in the proxy voting advice businesses' analysis that could undermine the reliability of their proxy voting recommendations. To the extent that proxy voting advice businesses refine their advice based on feedback from registrants and other soliciting persons, users of the advice and the investors they serve (if applicable) could benefit from more accurate and complete voting advice. Even where the proxy voting advice is not revised based on feedback received, clients of these businesses may still benefit from having ready and timely access to the registrant's and other soliciting person's perspective when considering the advice, such as where there are differing views about the proxy advisor's methodological approach or other differences of opinion that the registrant or other soliciting person believes are relevant to the voting advice. This is particularly true where, as may often be the case, clients of proxy voting advice businesses must make voting decisions in a compressed time period.

The proposed amendments also could benefit registrants and other soliciting persons by providing them the opportunity to identify any factual errors or methodological weaknesses that may underlie relevant proxy voting advice before it is disseminated and potentially relied upon by clients to make voting determinations. Similarly, by providing registrants and other soliciting persons the opportunity to include within the advice a link to their response, these parties would be able to communicate their views at the same time as the views of the proxy voting advice business are presented and in a manner they deem most appropriate or effective. Taken together, these

factors may give assurance to registrants and other soliciting persons that clients of proxy voting advice businesses have access to accurate and reliable information and to all views related to matters upon which they are asked to vote.

As we discuss in Section III.B.2, some proxy voting advice businesses have internal policies and procedures aimed at enabling feedback from registrants before their voting advice is issued. To the extent that proxy voting advice businesses currently enable feedback from registrants, the benefits we describe above would be more limited. While some proxy voting advice businesses provide opportunities for review and feedback, these existing practices may be inadequate to address registrants' or other soliciting persons' concerns and ensure that those who make proxy voting decisions receive information that is complete and accurate in all material respects. In addition, it does not appear that proxy voting advice businesses currently provide all registrants and other soliciting persons with an opportunity to review proxy voting advice.[248] The proposed requirements could benefit clients of proxy voting advice businesses by standardizing the review and feedback process so that all clients would benefit from changes that result from a registrant's feedback and also from the ability to access a registrant's response if the registrant chooses to provide one.

We note that the benefits described above also would be limited to the extent registrants already respond to proxy voting advice by filing additional definitive proxy materials and those additional definitive proxy materials are effective in informing voting determinations. As discussed above, however, due to timing considerations, it may be difficult for registrants or other soliciting persons to respond effectively to proxy voting advice by filing amended proxy materials.[249] We also note that to the extent the 45 and 25 calendar day filing thresholds

[248] *See supra* note 100.

[249] *See supra* Section III.B.2.

encourage registrants and other soliciting persons to file their definitive proxy statements earlier than they otherwise would, this could benefit investors generally as they would have more time to review the materials and, as discussed below to help mitigate potential costs for proxy voting advice businesses.

Finally, we are proposing to amend Rule 14a-9 to add as an example of what could be misleading, if omitted, certain disclosures that are relevant to proxy voting advice, specifically disclosures related to the proxy voting advice business's methodology, sources of information, conflicts of interest or the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves. There is a risk that, where such disclosures are omitted, clients of proxy voting advice businesses may make their voting determinations based on incomplete information regarding the basis of the proxy voting advice, or upon a misapprehension that a registrant is not in compliance with applicable laws or regulations.

We do not expect the proposed amendment to the list of examples in Rule 14a-9 to significantly alter existing disclosure practices, as it would largely codify existing Commission guidance on the applicability of Rule 14a-9 to proxy voting advice.[250] To the extent the proposed amendment prompts some proxy voting advice businesses to provide additional disclosure about the bases for their voting advice, the clients of these businesses—and the investors they serve—may benefit from receiving additional information that could aid in making voting determinations. For example, clients may benefit from more clarity about how proxy voting advice business standards or criteria differ from existing regulatory requirements. We note, however, that this benefit to clients of proxy voting advice businesses would be more limited to the extent the clients already are aware of, and incorporate in their consideration of proxy voting advice, existing

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[250] *See* Commission Interpretation on Proxy Voting Advice, *supra* note 19, at 11–13.

regulatory requirements and understand how such requirements differ from the standards and criteria applied by proxy voting advice businesses.

2. Costs

We expect that proxy voting advice businesses as well as registrants and other soliciting persons would incur direct costs as a result of the proposed amendments. We expect clients of proxy voting advice businesses and investors may incur indirect costs as well. In this section, we analyze these costs in terms of how the proposed amendments would change disclosure and engagement practices for proxy voting advice businesses relative to the baseline. We note that, to the extent that proxy voting advice businesses incur costs associated with the risk of a failure to comply with the proposed conditions, these costs may be mitigated by the proposed provision specifying that an immaterial or unintentional failure to comply with the new conditions would not result in a loss of the proxy rule exemptions. Further, to the extent that any of the proposed amendments impose direct costs on proxy voting advice businesses and to the extent those costs are passed along, the proposed amendments could create indirect costs for clients of proxy voting advice businesses, including investment advisers and other institutional investors, and the underlying investors they serve, if applicable.

First, with respect to the proposed amendments to Rule 14a-1(l), we do not expect these amendments to have a significant economic impact because they codify already existing Commission interpretations and views about the applicability of the federal proxy rules to proxy voting advice.

Second, the proposed conflicts of interest disclosure requirements would impose a direct cost on proxy voting advice businesses. For example, proxy voting advice businesses would bear any direct costs associated with: (i) reviewing and preparing disclosures describing their conflicts; (ii) developing and maintaining methods for tracking their conflicts; (iii) seeking legal or other

advice; and, (iv) updating their voting platforms. Proxy voting advisory businesses that are investment advisers are already required to identify conflicts and to eliminate or make full and fair disclosure of those conflicts.[251] Further, proxy voting advisory businesses that are retained by investment advisers to assist them in discharging their proxy voting duties may already provide such conflicts disclosure in connection with the investment advisers' evaluation of the capacity and competency of the proxy voting advice business. We are unable to provide quantitative estimates of these direct costs on proxy voting advice businesses for three reasons. The facts and circumstances unique to each proxy voting advice business and the nature of its material interests, transactions, and relationships will dictate the disclosure it provides. In addition, as discussed in Section II.B.1 above, boilerplate language would not be sufficient to satisfy proposed Rule 14a-2(b)(9)(i). Under the rule, a proxy voting advice business would have to provide conflicts disclosure with enough specificity to enable its proxy advisory clients to adequately assess the objectivity and reliability of the proxy voting advice. As a result, the disclosure provided by the proxy voting advice business could differ depending on the circumstances (e.g., depending on the scope of services they provide their clients and the subject registrant) and be subject to change in the future as both the business's and its clients' interests change. Finally, proxy voting advice businesses' direct costs will depend on the extent to which their current practices and procedures would meet or exceed the proposed disclosure requirements.[252]

Third, with respect to the proposed requirement that registrants and other soliciting persons be given an opportunity to review and provide feedback on the proxy voting advice and receive a final notice of voting advice, the business would bear direct costs. Specifically, such businesses

[251] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248 (June 5, 2019), 84 FR 33669, at 33671 (July 12, 2019).

[252] *See supra* note 89. We solicit comment and data on the extent to which current proxy voting advice business practices and procedures would meet or exceed proposed disclosure requirements.

would bear any direct costs associated with: (i) modifying current systems, or developing and maintaining systems to track the timing associated with these new requirements; (ii) modifying current systems and methods, or developing and maintaining new systems and methods to share the proxy voting advice with registrants and other soliciting persons; and (iii) delivering draft voting advice to registrants and other soliciting persons for their review and feedback. While some proxy voting advice businesses may already have systems in place to address some or all of these mechanics,[253] we are not able to estimate the costs associated with modifying or developing these systems and methods. To the extent proxy voting advice businesses already have similar systems in place, any additional direct cost may be limited. Because we lack data on the extent to which proxy voting advice businesses already have similar systems in place, we are unable to quantify this potential cost.

The requirement to provide proxy voting advice to registrants and other soliciting persons for their review and feedback would increase the risk that commercially sensitive information about proxy voting advice may be disseminated more broadly. To mitigate this risk, the proposed amendments to Rule 14a-2(b)(9) would allow proxy voting advice businesses to require that registrants and other soliciting persons agree to keep the information confidential as a condition of receiving the proxy voting advice. We believe this provision would mitigate potential costs to proxy voting advice businesses by allowing them to maintain control over the dissemination of their proxy voting advice and minimize the risk of unintentional or unauthorized release.

[253] *See, e.g.*, Glass Lewis Letter, *supra* note 16, at 5–6 ("Glass Lewis has a resource center 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 immediately by Glass Lewis, then reviewed, tracked and dealt with internally prior to responding to the company in a timely manner.").

The proxy voting advice business may also incur costs associated with processing and considering the registrant's or other soliciting person's feedback and making determinations as to whether changes to the proxy voting advice are necessary or appropriate based on such feedback. Further, allowing registrants and other soliciting persons time to review and provide feedback on voting advice could delay when the businesses deliver their advice to clients. This may require proxy voting advice businesses to renegotiate their agreements with clients to the extent that proxy voting advice businesses may be contractually obligated to deliver their advice by specified dates. Alternatively, the proxy voting advice businesses may need to expend greater resources to ensure delivery by the date on which they would have delivered the advice in the absence of the requirement to allow registrants and other soliciting persons the opportunity to review and provide feedback on the proxy voting advice. These additional costs could be mitigated by the proxy voting advice business receiving more time than it otherwise would to review the definitive proxy statements as a result of the incentives created by the 45 calendar days and 25 calendar days filing thresholds in proposed Rule 14a-2(b)(9)(ii). We lack the data necessary to quantify this cost. Additionally, allowing a registrant or other soliciting person to review and provide feedback on the voting advice before the proxy voting advice business provides it to its clients could impact perceptions about the independence and objectivity of the advice.[254] This, in turn, could affect the willingness of investment advisers and other clients to engage the services of proxy voting advice

[254] *See* ISS Letter, *supra* note 9, at 11 ("Although we understand that some issuers believe they should have the right to review and object to every vote recommendation ISS makes – and in some cases, even interject their views into ISS proxy research reports – granting issuers such extreme influence over independent proxy advice would interfere with a proxy adviser's fiduciary responsibility to its clients, and hurt both investors and the integrity of the voting process."); *see also* 2018 Roundtable Transcript, *supra* note 40, at 232 (comment of Gary Retelny) ("[M]any of our clients do not like us sharing our report with registrants prior to them seeing it. They want to be the first ones to see it. So there is a tension there between sharing the report itself with the registrant prior to sending it to the ones that actually pay for it. Right?"); Glass Lewis Letter, *supra* note 16, at 8 ("We believe that allowing an issuer to engage with us during the solicitation period may lead to discussions about the registrant's proxy, thereby providing registrants 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 . . . .").

businesses. Although the feedback process may give users of the advice more confidence that it is accurate and informed by the issuer's review, this consultation process has been noted by some as possibly affecting the independence and objectivity of the advice. This possible concern may be limited by the fact that the proposed rules would not require proxy voting advice businesses to make changes to the voting advice based on a registrant's feedback. Proxy voting advisory businesses also may develop other practices and policies to assure clients of their independence from the registrant.

Registrants and other soliciting persons also would incur direct costs associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice within a relatively compressed timeframe, and determining whether to offer feedback to the proxy voting advice business regarding factual or methodological issues or other matters pertaining to the proxy voting advice. Because the extent of the registrant or other soliciting person's engagement with the proxy voting advice business would depend upon the particular facts and circumstances of the proxy voting advice and any issues identified therein, as well as the resources of the registrant or other soliciting person, it is difficult to provide a quantifiable estimate of these costs.

To the extent proxy voting advice businesses do not deliver their voting advice by the date on which they would have delivered the voting advice in the absence of the requirement to allow registrants and other soliciting persons the opportunity to review and provide feedback on the voting advice, clients of proxy voting advice businesses would incur an indirect cost in that they would have less time to consider the business's voting advice prior to the proxy vote. This cost may be mitigated, however, to the extent that the advice they do eventually receive would be based on more accurate, transparent, and complete information.

If registrants and other soliciting persons choose to provide a statement regarding the proxy voting advice, registrants and other soliciting persons would incur costs of drafting a statement, providing a hyperlink (or other analogous electronic medium) to the proxy voting advice business, maintaining their statement online, and coordinating timing with proxy voting advice businesses for the filing of supplementary proxy materials.[255] We do not have data with respect to these costs. The proxy voting advice business would also incur a direct cost of including that hyperlink or other analogous electronic mechanism. We believe this cost would be small.

Finally, the proposed amendments to Rule 14a-9 may impose direct costs on proxy voting advice businesses to the extent the proposed amendment prompts some proxy voting advice businesses to provide additional disclosure about the bases for their voting advice. We expect any such costs to be minimal, especially given that most of the examples were already included in existing Commission guidance.[256]

D. Effects on Efficiency, Competition, and Capital Formation

1. Efficiency

As discussed in Section II.B above, proxy voting advice businesses perform a variety of functions for their clients, including analyzing and making voting recommendations on matters presented for shareholder vote and included in registrants' proxy statements. As an alternative to utilizing these services, clients of proxy voting advice businesses could instead conduct their own analysis and execute votes internally.[257]

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[255] Registrants are not required to respond to proxy voting advice nor are required to request that a hyperlink or other analogous electronic means be included in the proxy. Presumably, registrants would respond to proxy voting advice only when they believe doing so would have a net beneficial effect for them.

[256] *See supra* notes 45, 51 and accompanying text.

[257] Clients of proxy voting advice businesses may also rely on some combination of internal and external analysis.

We believe that, for purposes of general analysis, it is appropriate to assume that the cost of analyzing matters presented for shareholder vote would not vary significantly with the size of the position being voted. Given the costs of analyzing and voting proxies, the services offered by proxy voting advice businesses may offer economies of scale relative to their clients performing those functions themselves. For example, a GAO study found that among 31 institutional investors, large institutions rely less than small institutions on the research and recommendations offered by proxy voting advice businesses.[258] Small institutional investors surveyed in the study indicated they had limited resources to conduct their own research.[259]

By establishing requirements that promote accuracy and transparency in proxy voting advice, the proposed amendments could lead to an increased demand for voting advice from proxy voting advice businesses. To the extent proxy voting advice businesses offer economies of scale relative to their clients performing certain functions themselves, increased demand for, and reliance upon, proxy voting advice business services could lead to greater efficiencies in the proxy voting process. At the same time, as discussed above and below, the proposed amendments would impose certain additional costs on proxy voting advice businesses. As discussed above, these costs to proxy voting advice businesses could reduce compliance costs for their clients. To the extent these costs are greater than the related benefits (or vice versa) it could lead to decreased (or increased) demand for proxy voting advice business services, and there would be fewer (or more) efficiencies in the proxy voting process.

2. Competition

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[258] *See* 2007 GAO Report, *supra* note 9, at 2.

[259] *Id.*

As noted above, the proposed amendment could lead to increased demand for proxy voting advice business services. Increased demand for their services could, in turn, lead to increased competition among proxy voting advice businesses to meet that increased demand. Alternatively, the increased demand for advisory services could lead to an increase in the number of proxy voting advice businesses in the marketplace, also leading to an increase in competition among proxy voting advice businesses.

In addition to potentially increasing demand for voting advice from proxy voting advice businesses by establishing requirements that promote accuracy and transparency in proxy voting advice, the requirements that promote accuracy and transparency in proxy voting advice could stimulate competition among proxy voting advice businesses with respect to the quality of advice. In particular, clients of proxy voting advice businesses may be better able to assess conflicts and the accuracy of advice, which could, in turn, cause proxy voting advice businesses to compete more on those dimensions.[260]

It is also possible, however, that the proposed amendments could have the opposite effect on competition. The proposed amendments would cause proxy voting advice businesses to incur certain additional compliance costs as discussed in Section II.C.2 above that may or may not be offset by a reduction in compliance costs for their clients. It is difficult to predict how those costs and benefits would be shared among, or between, proxy voting advice businesses and their clients. If costs borne by proxy voting advice businesses are large enough to cause some businesses to exit the market or potential entrants to stay out of the market, the proposed rules could decrease competition. Alternatively, if proxy voting advice businesses do try to pass along the costs, or some component thereof, to their clients, it is possible that those costs would be large enough to

[260] Because disclosure under the proposed amendment occurs within the context of private business relationships rather than being public disclosure, this effect on competition is limited to the extent proxy voting advice business clients would use more than one proxy voting advice business.

cause some clients to develop internal functions to assist with proxy voting responsibilities, thereby reducing demand for, and potentially competition among, proxy voting advice businesses.

Additionally, it is possible that given certain industry practices, the increase in costs could affect proxy voting advice businesses differently. For example, we understand that the two largest proxy voting advice businesses, ISS and Glass Lewis, have processes in place for disclosing certain aspects of their analysis to certain registrants prior to making a recommendation to clients. It is possible that the costs associated with the proposed amendments could affect certain other proxy voting advice businesses more significantly than ISS and Glass Lewis.[261] A differential effect on costs across proxy voting advice businesses could, in turn, affect competition within the proxy advisory industry. Further, to the extent the costs associated with the proposed amendments would disproportionately affect proxy voting advice businesses other than ISS and Glass Lewis, the proposed amendments could lead to a reduction in competition among proxy voting advice businesses.[262]

[261] We note that one proxy voting advice business commenter recommended rulemaking that would provide registrants with a process by which they could appeal a proxy voting advice business's voting advice. *See* Letter from Saul Grossel, COO, Egan-Jones (Nov. 14, 2018), at 2. In particular, the commenter recommended that, "issuers should be given the opportunity to review a draft copy of reports prior to their release. *Id.* If issuers disagree with the analysis and/or recommendations of the proxy advisor, they should be provided the opportunity to state their dissent." *Id.* The fact that a proxy voting advice business other than Glass Lewis or ISS recommended that registrants should be offered the opportunity to review and provide feedback on proxy voting advice may suggest that the costs associated with the review and feedback process would not disproportionately affect certain proxy voting advice businesses.

[262] The 2007 GAO Report addresses several issues related to the proxy voting advice industry, including a lack of competition within the industry. *See* 2007 GAO Report, *supra* note 9, at 13–14 ("[P]roxy advisory firms must offer comprehensive coverage of corporate proxies and implement sophisticated technology to attract clients and compete. For instance, institutional investors often hold shares in thousands of different corporations and may not be interested in subscribing to proxy advisory firms that provide research and voting recommendations on a limited portion of these holdings. As a result, proxy advisory firms need to provide thorough coverage of institutional holdings, and unless they offer comprehensive services from the beginning of their operations, they may have difficulty attracting clients. . . . The initial investment required to develop and implement such technology can be a significant expense for firms.").

3. Capital Formation

In facilitating the ability of clients of proxy voting advice businesses to make informed voting determinations, the proposed amendments could ultimately lead to improved investment outcomes for investors. This in turn could lead to a greater allocation of resources to investment. To the extent that the proposed amendments lead to more investment, we could expect greater demand for securities, which could, in turn, promote capital formation. Additionally, more accurate information may improve the efficient allocation of capital. However, given the many factors that can influence the rate of capital formation, any effect of the proposed amendments on capital formation is expected to be small.

E. Reasonable Alternatives

1. Require proxy voting advice businesses to include full registrant response in the businesses' voting advice

Rather than including a hyperlink or any other analogous electronic medium directing the recipient of the advice to a written statement prepared by the registrant or other soliciting person, we could require proxy voting advice businesses to include a full response in the voting advice these businesses provide to their clients. Including a registrant's full response in the voting advice would benefit clients of proxy voting advice businesses by allowing them to avoid the additional step of "clicking through" to the response. Including a full response in the voting advice provided by proxy voting advice businesses also could benefit registrants and other soliciting persons by having their responses more prominently displayed, depending on where in the advice the response is included.

However, requiring inclusion of the registrant's full response in the voting advice provided by proxy voting advice businesses could disrupt the ability of such businesses to effectively design and prepare their reports in the manner that they and their clients prefer. Also, registrants would lose the flexibility to present their views in the manner they deem most appropriate or effective.

2. Different timing for, or number of, reviews

The proposed amendments require a five or three business day review and feedback period depending on how many days before the shareholder meeting the registrant files its definitive proxy statement. Alternatively, we could propose a shorter or longer period. A shorter period could hamper the ability of registrants and other soliciting persons to engage meaningfully with proxy voting advice businesses regarding their advice, whereas a longer period could disrupt the ability of proxy voting advice businesses to deliver their voting advice to clients in a timely fashion. The proposed period reflects a balancing of the ability of registrants and other soliciting persons covered by proxy voting advice to review and provide feedback on the advice before it is disseminated to the business's clients and the challenges typically faced by proxy voting advice businesses to prepare and deliver their voting advice to clients within very narrow timeframes. We believe the proposed timeframes for registrants and other soliciting persons to review and provide feedback on proxy voting advice strike an appropriate balance between those two competing considerations.

Also, the proposed amendments would require that a final notice of proxy voting advice be provided to allow registrants and other soliciting persons two business days to determine whether to provide a statement in response to the proxy advice and request that a hyperlink to the statement be included in the proxy voting advice. Alternatively, we could require that only the review and feedback period be provided, with no subsequent final notice of voting advice. Providing only the review and feedback period would reduce the potential disruptions for proxy voting advice businesses associated with the proposed engagement procedures. However, limiting registrants and other soliciting persons to the review and feedback period, with no subsequent final notice of voting advice also would make it difficult for them to know whether proxy voting advice businesses had incorporated their feedback prior to disseminating their proxy voting advice to clients. The ability for registrants and other soliciting persons to prepare a timely and accurate

response and to include in a hyperlink (or other analogous electronic medium) also would be limited.

3. Public disclosure of conflicts of interest

The proposed amendments require that proxy voting advice businesses include in their advice (and in any electronic medium used to deliver the advice) certain conflicts of interest disclosures. We could require that those conflicts of interest disclosures be made publicly rather than just to clients. Public disclosure of proxy voting advice businesses' conflicts of interest could allow beneficial owners to assess the conflicts for themselves. While there may be some benefit to beneficial owners from having access to this information, this benefit may be limited given that many beneficial owners have delegated investment management functions to others in the first place and thus would not be receiving the advice.

4. Require additional mandatory disclosures in proxy voting advice

In addition to requiring the proposed conflicts of interest disclosures, we could require that proxy voting advice businesses include in their proxy voting advice additional disclosures, such as disclosure regarding the proxy voting advice business's methodology, sources of information, or disclosures regarding the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves. Proxy voting advice businesses' clients may benefit from having consistent disclosure on such matters as they assess the voting advice and make decisions regarding their utilization of the voting advice. However, such disclosures may not be material or necessary to assess proxy voting advice in all instances, and would result in increased costs to proxy voting advice businesses. Certain information may also comprise proprietary information, disclosure of which, depending on the degree required, may result in competitive consequences to proxy advisory firm businesses. In light of these considerations, the proposed rules would not require such disclosures in all instances. However, we have requested

comment on whether these or other disclosures should be required as a condition to reliance on Rue 14a-2(b)(1) or (3) by proxy voting advice businesses.

5. Require disabling of pre-populated and automatic voting mechanisms

The proposed amendments do not condition the availability of the Rules 14a-2(b)(1) and 14a-2(b)(3) exemptions on a proxy voting advice business structuring its voting platform to disable the automatic submission of votes in instances where a registrant has submitted a response to the voting advice. Alternatively, we could require such a condition. Or, we could require proxy voting advice businesses to disable the automatic submission of votes unless a client of a proxy voting advice business clicks on the hyperlink and/or accesses the registrant's (or certain other soliciting persons') response, if one has been provided. Another alternative would be to require that the proxy voting advice business refrain from pre-populating voting choices for clients once a registrant or other soliciting person has submitted a response.

Disabling pre-populated or automatic submission of votes where registrants or other soliciting persons have submitted responses to voting advice could benefit these parties to the extent that it increases the likelihood that clients of proxy voting advice businesses would review their responses. At the same time, disabling these functions could increase costs for proxy voting advice businesses and increase the burdens on their clients by requiring those clients to devote greater resources to managing the voting process, which may in turn also reduce the value of the services of the proxy voting advice businesses. Alternatively, clients of proxy voting advice businesses may choose not to vote, which could make it difficult for registrants to meet quorum requirements for their shareholder meetings and cause delays for companies and shareholders.

6. Exempt smaller proxy voting advice businesses from the additional conditions to the exemptions

As discussed in Section III.C.2, it is possible that given certain industry practices, increases in costs resulting from the proposed amendments may be different for certain proxy voting advice businesses. For example, ISS and Glass Lewis have processes in place for disclosing certain aspects of their analysis to certain registrants prior to making a recommendation to clients. However, the remaining three proxy voting advice businesses, all of which are smaller than ISS and Glass Lewis, to our knowledge do not have such processes in place. It is possible, then, that the costs associated with the proposed amendments could affect those smaller proxy voting advice businesses more than ISS and Glass Lewis. To the extent the costs associated with the proposed amendments would disproportionately affect proxy voting advice businesses other than ISS and Glass Lewis, the proposed amendments could lead to a reduction in competition among proxy voting advice businesses.

As a means of addressing the potential adverse effect on competition among proxy voting advice businesses, we could exempt smaller proxy voting advice businesses from the additional conditions to the exemptions in Rules 14a-2(b)(1) and 14a-2(b)(3). Although exempting smaller proxy voting advice businesses from the additional conditions would reduce the cost of the proposed amendments for such businesses, it also would mean that their clients would not realize the same benefits in terms of potential improvements in the reliability and transparency of the voting advice they receive. This, in turn, could put smaller proxy voting advice businesses at a competitive disadvantage.

Request for Comment

Throughout this release, we have discussed the anticipated economic effects of the proposed amendments, including their benefits and costs and potential effects on efficiency, competition, and capital formation. We have used the data currently available in considering the

effects of the proposed amendments. We request comment on all aspects of this initial economic analysis, including on whether the analysis has: (1) identified all benefits and costs, including all effects on efficiency, competition, and capital formation; (2) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation; and (3) identified and considered reasonable alternatives to the proposed amendments.

We request and encourage any interested person to submit comments regarding the proposed amendments, our analysis of the potential effects of the proposed amendments and other matters that may have an effect on the proposed amendments. We request that commenters identify sources of data and information with respect to proxy voting in general, and the use of proxy voting advice businesses in particular, as well as provide data and information to assist us in analyzing the economic consequences of the proposed amendments. We are also interested in comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked. We urge commenters to be as specific as possible.

Comments on the following questions are of particular interest.

- Have we correctly characterized the demand for the services of proxy voting advice businesses? What alternatives are available, if any, to the advice of proxy voting advice businesses?
- To what extent would the benefits of more reliable and complete voting advice being provided to investment advisers and other clients of proxy voting advice businesses benefit investors? Please provide supportive data to the extent available.
- The benefits of the proposed amendments for institutional investors and their clients are linked to the extent to which current practices of proxy voting advice businesses would meet the requirements of the proposed conditions. Have we

correctly characterized the extent to which the current practices of proxy voting advice businesses would meet such requirements?

- We discuss the possibility that proxy voting advice businesses could attempt to mitigate the delay in delivering advice to clients caused by registrant and other soliciting persons' review by committing additional resources to producing proxy voting advice earlier than they do currently. Would proxy voting advice businesses take these steps? How costly would it be for proxy voting advice businesses to produce proxy voting advice faster than they do currently? Please provide supportive data to the extent available.
- We expect that the costs of the proposed review and feedback period and final notice of voting advice would be lower for proxy voting advice businesses that currently provide registrants with a mechanism for reviewing draft documents prior to proxy voting advice businesses issuing final drafts to their clients. Are we correct in that characterization? If other proxy voting advice businesses would be disproportionately affected, to what extent, and how would such effects manifest? What, if any, additional measures could help mitigate any such disproportionate effects? Please provide supportive data to the extent available.
- To what extent might the increased burdens to proxy voting advice businesses to comply with the proposed conditions be borne by proxy voting advice businesses clients?
- In response to the Commission's recent releases on proxy voting responsibilities and proxy voting advice, one commenter argued that the Commission's

interpretation and guidance[263] would likely create substantially increased costs and unnecessary burdens on the process by which proxy voting advice businesses render their advice.[264] According to that commenter, proxy voting advice businesses would face increased litigation, staffing and insurance costs that could be passed on to their institutional investor clients and their underlying retail clients. Would these concerns similarly apply to aspects of the proposed amendments, or is this concern overstated in that the aspects of the interpretation and guidance that are encompassed in the proposed amendments reflect current legal obligations regarding solicitation activities?

- If registrants and other soliciting persons choose to provide a statement regarding the proxy voting advice, registrants and other soliciting persons would incur costs of drafting a statement, providing a hyperlink (or other analogous electronic medium) to the proxy voting advice business, maintaining their statement online, and coordinating timing with proxy voting advice businesses for the filing of supplementary proxy materials. Please provide data with respect to these costs.
- To what extent do investors change their votes? To what extent do investors change their votes in response to a registrant filing additional definitive proxy materials? Please provide supportive data to the extent available.

IV. PAPERWORK REDUCTION ACT

A. Summary of the Collections of Information

Certain provisions of our rules, schedules, and forms that would be affected by the proposed amendments contain "collection of information" requirements within the meaning of the

[263] *See* Commission Guidance on Proxy Voting Responsibilities, *supra* note 9; Commission Interpretation on Proxy Voting Advice, *supra* note 19.

[264] *See* Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors (Oct. 24, 2019), at 3.

Paperwork Reduction Act of 1995 ("PRA").[265] We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[266] The hours and costs associated with maintaining, disclosing, or providing the information required by the proposed amendments constitute paperwork burdens imposed by such collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. The title for the affected collection of information is: "Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A)" (OMB Control No. 3235-0059).

We adopted existing Regulation 14A[267] pursuant to the Exchange Act. Regulation 14A and its related schedules set forth the disclosure and other requirements for proxy statements, as well as the exemptions therefrom, filed by registrants and other soliciting persons to help investors make informed voting decisions.[268] A detailed description of the proposed amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the proposed amendments can be found in Section III above.

B. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

Below we estimate the incremental and aggregate effect on paperwork burden as a result of the proposed amendments. These estimates represent the average burden for all respondents, both

[265] 44 U.S.C. § 3501 *et seq*.

[266] 44 U.S.C. § 3507(d); 5 CFR 1320.11.

[267] 17 CFR 240.14a-1 *et seq*.

[268] To the extent that a person or entity incurs a burden imposed by Regulation 14A, it is encompassed within the collection of information estimates for Regulation 14A. This includes registrants and other soliciting persons preparing, filing, processing and circulating their definitive proxy and information statements and additional soliciting materials, as well as the efforts of third parties such as proxy voting advice businesses whose voting advice falls within the ambit of the federal rules and regulations that govern proxy solicitations.

large and small. In deriving our estimates, we recognize that the burdens would likely vary among individual respondents based on a number of factors, including the nature and conduct of their business. Compliance with the proposed amendments would be mandatory for proxy voting advice businesses relying on the exemptions in Rules 14a-2(b)(1) or (b)(3). Utilization of the procedures specified in proposed Rule 14a-2(b)(9)(iii) would be voluntary for registrants and other soliciting persons. Information maintained, disclosed, or provided in connection with the proposed amendments may be subject to confidentiality agreements between the proxy voting advice businesses and any soliciting persons that choose to take advantage of the proposed procedures. There is no specified retention period for any information maintained, disclosed, or provided pursuant to the proposed amendments.

We believe that the proposed amendments would increase the number of responses to the existing collection of information for Regulation 14A. Although we do not expect registrants and other eligible soliciting persons to file any different number of proxy statements as a result of our amendments, we do anticipate that the number of additional soliciting materials filed under Rule 14a-12 may increase in proportion to the number of times that registrants and other soliciting persons choose to provide a statement in response to a proxy voting advice business's proxy voting advice under proposed Rule 14a-2(b)(9)(iii). For purposes of this PRA, we estimate that there would be an additional 174 annual responses to the collection of information as a result of the proposed amendments.[269]

[269] *See supra* notes 141, 142 and the accompanying discussion in the release. Because a registrant's or other soliciting person's decision to utilize proposed Rule 14a-2(b)(9)(iii) will be entirely voluntary, it is difficult to predict how frequently such parties will choose to avail themselves of this provision and prepare a response to proxy voting advice. For purposes of this PRA estimate, we use as our baseline the number of times firms filed additional definitive proxy materials in response to proxy voting advice in calendar years 2016 (99), 2017 (77) and 2018 (84), discussed in Section III.B.2 *infra* and reflected in Table 2 in that section. We then assume, given the relative convenience of the hyperlink mechanism in proposed Rule 14a-2(b)(9)(iii) and the opportunity to reach shareholders before their votes are cast, that a greater number of registrants and soliciting persons would utilize proposed Rule 14a-2(b)(9)(iii) than have historically filed additional soliciting materials. For purposes of this PRA analysis, we estimate that at least three times as many registrants and other soliciting persons will choose to prepare responses to

In addition to an increase in the number of annual responses, we expect that the proposed amendments would change the estimated burden per response. The burden estimates were calculated by estimating the number of parties we anticipate would expend time, effort, and/or financial resources to generate, maintain, retain, disclose or provide information in connection with the proposed amendments and then multiplying by the estimated amount of time, on average, such parties would devote in response to the proposed amendments. The following table summarizes the calculations and assumptions used to derive our estimates of the aggregate increase in burden corresponding to the proposed amendments.

PRA Table 1. Calculation of Increase in Burden Hours Resulting from the Proposed Amendments

	Affected Parties		
	Proxy Voting Advice Businesses (A)	Registrants (B)	Other Soliciting Persons (C)
Number of Respondents	5[a]	1,897[b]	32[c]
Burden Increase: Hours Per Respondent	500[d]	10[e]	10[e]
Column Total[f]	2,500	18,970	320
Aggregate Increase in Burden Hours	[Column A] + [Column B] + [Column C] = 21,790		

proxy voting advice and request that their hyperlink be provided to the recipients of the advice pursuant to proposed Rule 14a-2(b)(9)(iii) than otherwise would choose to file additional soliciting materials. As a result, we would expect that three times as many required filings under Rule 14a-12 would be made. Taking the average of the Rule 14a-12 filings made in years 2016, 2017, 2018 (87), we multiply by a factor of three (300%) for an estimate of 261 Rule 14a-12 filings, or an increase of 174 annual responses to the Regulation 14A collection of information.

[a] Represents the estimated number of proxy voting advice businesses that would be subject to the proposed amendments to Rule 14a-2(b). We are aware only of five such businesses at this time.

[b] Using 5,690 registrants that filed proxy materials with the Commission during calendar year 2018 as the upper bound (*see* Section III.B.1.c. and note 222 *supra*), we estimate that an average of one-third, or approximately 1,897, would be the subject of proxy voting advice each year, and therefore impacted by the proposed amendments to Rule 14a-2(b).

[c] *See supra* Section III.B.1.c. & note 224. According to our estimates, 95 other soliciting persons filed proxy materials with the Commission during calendar year 2018. Because it is unlikely that all 95 solicitations were the subject of proxy voting advice, we have assumed for purposes of this analysis that only one-third, or approximately 32, should be considered in our calculation of aggregate burden.

[d] This estimate, which is an average of the burden expected to be incurred by each proxy voting advice business, is intended to be inclusive of all burdens reasonably anticipated to be associated with the business's compliance with the conditions of proposed Rule 14a-2(b)(9), including, for example, identification and preparation of disclosure concerning conflicts of interest required by proposed Rule 14a-2(b)(9)(i) and communication with registrants and other eligible soliciting persons. Our assumption is that the burden would be greatest in the first year after adoption, as the businesses incorporate the new requirements into their existing practices and procedures. We estimate that the burden would be 1,000 hours in the first year and 250 hours in each of the following years for a three-year average of 500 burden hours.

[e] In addition to proxy voting advice businesses, we anticipate that registrants and other soliciting persons would incur some additional paperwork burden as a result of the proposed amendments. For example, if they choose to respond to the proxy voting advice,[270] these parties would likely incur some burden in preparing and communicating their responses. Nevertheless, we do not anticipate the corresponding burden would be significant in most cases, particularly when averaged among all affected parties. Therefore, we have estimated that registrants and other soliciting persons would each incur, on average, an increase of ten additional burden hours each year.

[f] Derived by multiplying the number of respondents in each column by either the burden per response or the estimated aggregate burden increase, whichever was applicable.

The table below illustrates the incremental change to the total annual compliance burden in hours and in costs[271] as a result of the proposed amendments. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA Table 2. Calculation of Increase in Burden Hours Resulting from the Proposed Amendments

Number of Estimated	Total Increase in Burden	Increase in Burden Hours	Increase in Internal Hours	Increase in Professional	Increase in Professional

[270] *See supra* note 255.

[271] Our estimates assume that 75% of the burden is borne by the company and 25% is borne by outside counsel at $400 per hour. We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

Responses (A)†	Hours (B)††	Per Response (C) = (B)/(A)	(D) = (B) x 0.75	Hours (E) = (B) x 0.25	Costs (F) = (E) x $400
5,760	21,790	4.0†††	16,478	5,493	$2,197,200

† This number reflects an estimated increase of 174 annual responses to the existing Regulation 14A collection of information. *See supra* note 269. The current OMB PRA inventory estimates that 5,586 responses are filed annually.

†† Calculated as the sum of annual burden increases estimated for proxy voting advice businesses (2,500 hours), registrants (18,970 hours), and other soliciting persons (320 hours). *See supra* PRA Table 1.

††† The estimated increases in Columns (C), (D), and (E) are rounded to the nearest whole number.

Finally, the table that follows summarizes the requested paperwork burden that will be submitted to OMB for review in accordance with the PRA, including the estimated total reporting burdens and costs, under the proposed amendments.

PRA Table 3. Requested Paperwork Burden under the Proposed Amendments

	Current Burden			Program Change			Revised Burden		
Reg. 14A	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Number of Affected Responses (D)±	Increase in Internal Hours (E)±±	Increase in Professional Costs (F) ±±±	Annual Responses (G) = (A) + (D)	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)
	5,586	551,101	$73,480,012	5,760	16,478	$2,197,200	5,760	567,579	$75,677,212

± From Column (A) in PRA Table 2.

±± From Column (D) in PRA Table 2.

±±± From Column (F) in PRA Table 2.

Given the number of variables that are highly specific to the unique circumstances of each proxy voting advice business, the matter for which they have been engaged to provide advice, and the course of that engagement, our ability to predict the magnitude of corresponding costs and burdens with any precision is limited. Therefore, we encourage public commenters to consider

our assessment and provide additional information and, where available, data that would be helpful in deriving our estimates for purposes of the Paperwork Reduction Act.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-22-19. Requests for materials submitted to OMB by the Commission with regard to the collection of information

should be in writing, refer to File No. S7-22-19 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[272] the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[272] 5 U.S.C. § 801 *et seq.*

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act ("RFA")[273] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act, to consider the impact of those rules on small entities. The Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") in accordance with Section 603 of the RFA.[274] It relates to the proposed amendments to: the proxy solicitation exemptions in Rule 14a-2(b); the definition of "solicitation" in Rule 14a-1(l); and the prohibition on false or misleading statements in solicitations in Rule 14a-9 of Regulation 14A under the Exchange Act.

A. Reasons for, and Objectives of, the Proposed Action

The purpose of the proposed amendments to Rule 14a-2(b) is to help ensure that investors who rely on the advice of proxy voting advice businesses receive more accurate, transparent, and complete information on which to make their voting decisions, in a manner that does not impose undue costs or delays that could adversely affect the timely provision of proxy voting advice. The proposed amendments are designed to enhance the accuracy and reliability of the proxy voting advice available to investors at the time they are casting votes, as well as disclosures about any interests or relationships that may have materially affected the voting advice. In addition, the proposed amendment to Rule 14a-1(l) would codify the Commission's interpretation that, as a general matter, proxy voting advice constitutes a solicitation subject to the federal proxy rules, which would provide more clear notice of the applicability of the protections afforded under these rules to those who receive proxy voting advice from persons marketing their expertise as a provider of such advice, separately from other forms of investment advice, and sell such advice for a fee. Finally, the proposed amendment to Rule 14a-9 would amend the list of examples of what

[273] 5 U.S.C. § 601 *et seq*.

[274] 5 U.S.C. § 603.

may be misleading within the meaning of the rule in order to help ensure that the recipients of proxy voting advice are provided the information they need to make fully informed decisions and to clarify the potential implications of Rule 14a-9. The reasons for, and objectives of, these proposed amendments are discussed in more detail in Sections I and II above.

B. Legal Basis

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 14, 16, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

C. Small Entities Subject to the Proposed Rules.

The proposed amendments are likely to affect some small entities; specifically, those small entities that are either: (i) proxy voting advice businesses (i.e., persons who provide proxy voting advice that falls within the definition of a "solicitation" under Rule 14a-1(l)(iii)(A), as proposed); and (ii) registrants or other eligible persons under proposed Rule 14a-2(b)(9) conducting solicitations covered by proxy voting advice.

The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[275] For purposes of the RFA, under our rules, an issuer of securities or a person, other than an investment company or an investment adviser, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year.[276] An investment company, including a business development company,[277] is considered to be a "small business" if it, together with other investment companies in the same

[275] 5 U.S.C. § 601(6).

[276] *See* Exchange Act Rule 0-10(a) [17 CFR 240.0-10(a)].

[277] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. § 80a-2(a)(48) and § 80a-53-64].

group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[278] An investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[279] We estimate that there are 1,171 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.[280] In addition, we estimate that, as of December 2018, there were 114 registered investment companies that would be subject to the proposed amendments that may be considered small entities.[281] Finally, we estimate that, as of September 30, 2019, there were 575 investment advisers that may be considered small entities.[282] As discussed above, three of the five major firms that comprise the proxy advisory industry are registered investment advisors.[283]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

If adopted, the proposed amendments would apply to small entities to the same extent as other entities, irrespective of size. Therefore, we expect that the nature of any benefits and costs

[278] *See* Investment Company Act Rule 0-10(a) [17 CFR 270.0-10(a)].

[279] *See* Advisers Act Rule 0-7(a) [17 CFR 275.0-7(a)].

[280] This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10-K, 20-F and 40-F, or amendments, filed during the calendar year of January 1, 2018 to December 31, 2018. The data used for this analysis were derived from XBRL filings, Compustat, and Ives Group Audit Analytics.

[281] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data filed with the Commission (Forms N-Q and N-CSR) for the second quarter of 2018.

[282] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[283] *See supra* Section III.B.1.b (Economic Analysis).

associated with the proposed amendments would be similar for large and small entities. Accordingly, we refer to the discussion of the proposed amendments' economic effects on all affected parties, including small entities, in Section III above.[284] Consistent with that discussion, we anticipate that the economic benefits and costs likely would vary widely among small entities based on a number of factors, including the nature and conduct of their businesses, which makes it difficult to project the economic impact on small entities with precision.[285] Compliance with the proposed amendments may require the use of professional skills, including legal skills.

As a general matter, however, we recognize that any costs of the proposed amendments borne by the affected entities, such as those related to compliance with the proposed amendments, or the implementation or restructuring of internal systems needed to adjust to the proposed amendments, could have a proportionally greater effect on small entities, as they may be less able to bear such costs relative to larger entities. For example, as discussed in Section III.B.2, ISS and Glass Lewis, currently the two largest proxy voting advice businesses, have existing processes in place for identifying and disclosing conflicts of interest to their clients, as well as providing some registrants access to versions of the businesses' proxy voting advice prior to making a recommendation to clients. If competing proxy voting advice businesses do not have such processes in place, they could be disproportionately affected by the proposed amendments. In particular, any small entities that provide proxy voting advice services, to the extent that their existing practices and procedures would not satisfy the conditions of proposed Rule 14a-2(b)(9), would incur additional compliance costs and, consequently, may be more likely than larger proxy

[284] In particular, we discuss the estimated benefits and costs of the proposed amendments on affected parties in Section III.C. (Economic Analysis) above. We also discuss the estimated compliance burden associated with the proposed amendments for purposes of the PRA in Section IV (Paperwork Reduction Act) above.

[285] *See supra* Section III.C.2. (Economic Analysis).

voting advice businesses to exit the market for such services or less able to enter the market in the first place.

We anticipate that any costs resulting from the proposed amendments would primarily relate to proposed Rule 14a-2(b)(9) and, as such, predominantly affect the proxy advice voting businesses that would be required to comply with Rule 14a-2(b)(9) in order to rely on the exemptions in Rule 14a-2(b)(1) or (b)(3).[286] These businesses would likely incur costs to ensure that their internal practices, procedures, and systems are sufficient to meet the conflicts of interest disclosure and review and feedback requirements under proposed Rule 14a-2(b)(9). The magnitude of such costs would depend on the extent to which the businesses are already meeting or exceeding these proposed requirements. However, we believe that, at most, there are currently only a limited number of proxy voting advice businesses that meet the definition of small entity for purposes of the RFA.[287] Accordingly, we do not expect the proposed amendments would have a significant economic impact on a substantial number of such businesses. However, we request comment on the number of proxy voting advice businesses that would be small entities subject to the proposed amendments.

As discussed in Section III.C.2., we do not expect that registrants or other soliciting persons that are small entities would incur significant costs as a result of the proposed amendments, although it is difficult to provide a quantifiable estimate of such costs. We request comment on how to quantify the impact on small entities that, while not directly subject to the proposed amendments, may be affected by the proposal.

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[286] We do not expect that the proposed amendments to Rule 14a-1(l) and Rule 14a-9 will have a significant economic impact on affected parties, including any small entities, because they codify already-existing Commission positions on the applicability of these rules to proxy voting advice.

[287] As discussed *supra*, at note 190, we understand that the proxy voting advice industry in the United States consists of five major firms. At this time, we do not know of any proxy voting advice businesses that would be considered small entities as defined by the RFA, but acknowledge that there may be some such firms providing proxy voting advice of which we are unaware.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Exempting small entities from all or part of the requirements;
- Using performance rather than design standards; and
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities

We do not believe that establishing different compliance or reporting requirements for small entities in connection with our proposed amendments would accomplish the objectives of this rulemaking or minimize significant adverse impacts on small entities. The proposed amendments are intended to help ensure that investors who rely on the advice of proxy voting advice businesses receive accurate, transparent, and materially complete information on which to make their voting decisions. Our objective of improving the quality of proxy voting advice would not be as effectively served if we were to establish different conditions for smaller proxy voting advice businesses that wish to rely on the exemptions in Rules 14a-2(b)(1) or (b)(3). For similar reasons, we do not believe that exempting smaller proxy voting advice businesses from all or part

of the proposed amendments would accomplish our objectives.[288]

The proposed amendments generally would use design standards to assure clients of proxy voting advice businesses that all entities providing such advice are following a consistent approach to their disclosures of conflicts of interest and the review and feedback requirements for proxy voting advice. If the goal is accurate and reliable proxy voting advice, using design rather than performance standards minimizes the degree of uncertainty that proxy voting advice businesses and their clients would have regarding whether such businesses are in full compliance with the rules and could help to bolster their confidence in the quality of voting advice they receive. However, while we generally have used design standards for the proposed amendments, we have included features that are intended to minimize the disruption to proxy voting advice businesses, such as requiring the inclusion of a hyperlink to a response by the registrant or certain other soliciting persons. Such features would also provide greater flexibility to registrants and other soliciting persons, including small entities, in providing their response.

In proposing these amendments, we have undertaken to provide rules that are clear and simple for all affected parties. We do not believe that further clarification, consolidation, or simplification for small entities is necessary.

Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;

[288] *See also supra* Section III.E.6. Exempting smaller proxy voting advice businesses from the additional conditions of Rules 14a-2(b)(1) and (3) would reduce the cost of the proposed amendments for such businesses, but it also would mean that their clients would not realize the same benefits in terms of potential improvements in the reliability and transparency of the voting advice they receive. This, in turn, could put smaller proxy voting advice businesses at a competitive disadvantage.

- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the effects of the proposed amendments.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of that effect. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. STATUTORY AUTHORITY

We are proposing the rule amendments contained in this release under the authority set forth in Sections 3(b), 14, 16, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSED RULE AMENDMENTS

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l,* 78m, 78n, 78n-1, 78*o,* 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a-20, 80a-23, 80a-29,

80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5521(e)(3); 18 U.S.C. 1350, Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Sections 240.14a-1, 240.14a-3, 240.14a-13, 240.14b-1, 240.14b-2, 240.14c-1, and 240.14c-7 also issued under secs. 12, 15 U.S.C. 781, and 14, Pub. L. 99-222, 99 Stat. 1737, 15 U.S.C. 78n;

* * * * *

2. Amend § 240.14a-1 by revising paragraph (l)(1)(iii) and adding paragraph (l)(2)(v) to read as follows:

§240.14a-1 Definitions.

* * * * *

(l) *Solicitation.* (1) * * *

(iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy, including:

(A) Any proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.

(B) [Reserved]

(2) * * *

(v) the furnishing of any proxy voting advice by a person who furnishes such advice only in response to an unprompted request.

3. Amend § 240.14a-2 by:

a. Revising paragraph (b)(1) introductory text;

b. Revising paragraph (b)(3) introductory text; and

c. Adding paragraph (b)(9).

The revisions and addition read as follows:

§240.14a-2 Solicitations to which §240.14a-3 to §240.14a-15 apply.

* * * * *

(b) * * *

(1) Except as provided in paragraph (b)(9) of this section, any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization. *Provided, however*, That the exemption set forth in this paragraph shall not apply to * * *

* * * * *

(3) Except as provided in paragraph (b)(9) of this section, the furnishing of proxy voting advice by any person (the "advisor") to any other person with whom the advisor has a business relationship, if: * * *

* * * * *

(9) Paragraphs (b)(1) and (b)(3) of this section shall not be available to a person furnishing proxy voting advice covered by §240.14a-1(l)(1)(iii)(A) ("proxy voting advice business") unless all of the conditions in the following paragraphs (i), (ii), and (iii) are satisfied:

(i) The proxy voting advice business includes in its proxy voting advice and in any electronic medium used to deliver the proxy voting advice prominent disclosure of:

(A) Any material interests, direct or indirect, of the proxy voting advice business (or its affiliates) in the matter or parties concerning which it is providing the advice;

(B) Any material transaction or relationship between the proxy voting advice business (or its affiliates) and the registrant, another soliciting person, shareholder proponent, or affiliates of any of the foregoing (as determined using publicly available information) connected with the matter covered by the proxy voting advice;

(C) Any other information regarding the interest, transaction, or relationship of the proxy voting advice business (or its affiliates) that is material to assessing the objectivity of the proxy voting advice in light of the circumstances of the particular interest, transaction, or relationship; and

(D) Any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction, or relationship.

(ii) The proxy voting advice business provides the registrant or any other person conducting a solicitation (other than a solicitation exempt under §240.14a-2) covered by its proxy voting advice, prior to the distribution of that advice to its clients:

(A)(*1*) A copy of such proxy voting advice that the proxy voting advice business intends to deliver to its clients for a review and feedback period of no less than five business days, if the registrant or other soliciting person has filed its definitive proxy statement at least 45 calendar

days before the security holder meeting date, or if no meeting is held, at least 45 calendar days before the date the votes, consents or authorizations may be used to effect the proposed action; or

(2) A copy of such proxy voting advice that the proxy voting advice business intends to deliver to its clients for a review and feedback period of no less than three business days, if the registrant or other soliciting person has filed its definitive proxy statement less than 45 calendar days, but at least 25 calendar days, before the security holder meeting date, or if no meeting is held, less than 45 calendar days, but at least 25 calendar days, before the date the votes, consents or authorizations may be used to effect the proposed action; and

(B) No earlier than the expiration of the period described in paragraph (A)*(1)* or (A)(*2*) of this section, as applicable, and no later than two business days prior to delivery of the proxy voting advice to its clients, a final notice of voting advice which must include a copy of such proxy voting advice that the proxy voting advice business will deliver to its clients, including any revisions to such advice made by the proxy voting advice business after the review and feedback period provided pursuant to paragraph (A)*(1)* or (A)(*2*) of this section, as applicable.

Note 1 to paragraph (b)(9)(ii): Once the two business day period specified in paragraph (B) of this section has expired, the proxy voting advice business will be under no further obligation to provide the registrant or any other soliciting person with additional opportunities to review its proxy voting advice with respect to the same meeting.

Note 2 to paragraph (b)(9)(ii): A proxy voting advice business may require the registrant or other soliciting person, as applicable, to enter into an agreement to maintain the confidentiality of any materials it receives pursuant to paragraph (b)(9)(ii) of this section and refrain from publicly commenting on those materials, provided that the terms of such confidentiality agreement:

(A) Shall be no more restrictive than similar types of confidentiality agreements the proxy voting advice business requires of the recipients of the proxy voting advice; and

(B) Shall cease to apply once the proxy voting advice business provides its advice to one or more recipients. The proxy voting advice business is not required to comply with paragraph (b)(9)(ii) of this section if the registrant or other soliciting person does not enter into such an agreement.

(iii) If requested by the registrant or any other person conducting a solicitation (other than a solicitation exempt under §240.14a-2) prior to expiration of the period described in paragraph (b)(9)(ii) of this section, the proxy voting advice business shall include in its proxy voting advice and in any electronic medium used to deliver the proxy voting advice an active hyperlink or any other analogous electronic medium that leads to the registrant's or other soliciting person's, as applicable, statement regarding the proxy voting advice.

Note to paragraphs (b)(9)(ii) and (b)(9)(iii): A proxy voting advice business will be under no obligation to comply with the provisions of paragraphs (b)(9)(ii) and (b)(9)(iii) of this section if the registrant or other soliciting person has not filed its definitive proxy statement at least 25 calendar days before the security holder meeting date (or if no meeting is held, at least 25 calendar days before the date the votes, consents or authorizations may be used to effect the proposed action).

(iv) An immaterial or unintentional failure of a proxy voting advice business to comply with one or more conditions of §240.14a-2(b)(9) will not result in the loss of such proxy voting advice business's ability to rely on the exemptions in paragraphs (b)(1) and (b)(3) of this section, so long as:

(A) The proxy voting advice business made a good faith and reasonable effort to comply; and

(B) To the extent that it is feasible to do so, the proxy voting advice business uses reasonable efforts to substantially comply with the condition as soon as practicable after it becomes aware of its noncompliance.

* * * * *

4. Amend § 240.14a-9 by adding paragraph e. to the Note to read as follows:

§240.14a-9 False or misleading statements.

* * * * *

NOTE: * * *

e. Failure to disclose material information regarding proxy voting advice covered by § 240.14a-1(l)(1)(iii)(A), such as the proxy voting advice business's methodology, sources of information, conflicts of interest or use of standards that materially differ from relevant standards or requirements that the Commission sets or approves.

* * * * *

By the Commission.

Dated: November 5, 2019

Vanessa A. Countryman,

Secretary.