31 January 2020

Vanessa A Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090
rule-comments@sec.gov

Dear Ms Countryman

Amendments to Exemptions from Proxy Rules for Proxy Voting Advice (File No. S7-22-19)

Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (File No. S7-23-19)

On behalf of the Australian Council of Superannuation Investors (ACSI), I am pleased to make this submission in relation to the above-mentioned proposed rules.

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) investment issues on behalf of our members. Our members include 38 Australian and international asset owners and institutional investors who together manage over $2.2 trillion in assets on behalf of millions of beneficiaries.

Our members own an average of 10 per cent of every ASX200 company and we have around two decades experience analysing the practices of listed entities in the ASX300 and advising our members accordingly. While we are based in Australia, our members invest globally, and therefore the proposals will affect our members directly.

Our view is that the proposals represent an industry wide regulatory response to relatively uncommon instances of error or poor conduct, rather than drawing upon evidence of widespread issues that would merit a systemic response. Accordingly, our view is that the proposals are disproportionate to any issues identified, and we offer our view on the alternate approaches. Further detail on our views is set out over the page.

I trust that our comments are of assistance. Please contact me, or Kate Griffiths, ACSI's Executive Manager - Public Policy and Advocacy, should you require any further information on ACSI's position.

Yours sincerely

Louise Davidson
Chief Executive Officer

Amendments to Exemptions from Proxy Rules for Proxy Voting Advice (File No. S7-22-19)

If implemented, the SEC's proposed rules on proxy advisers would introduce significant impediments to investors' ability to access independent proxy voting advice, and consequently limit their ability for effective stewardship.

Requiring proxy advisory firms to allow companies to review and comment on recommendations before investors even see them, as the SEC has proposed, is unnecessary and will significantly limit investors' access to independent advice.

Proxy advisory firms play a vital role in providing impartial analyses of, and recommendations on, corporate issues that are important to investors. At a time in which trust in business is significantly diminished, impartial analysis and advice is crucial. Effective stewardship includes the active exercise of rights and responsibilities by investors and is key to a well-functioning capital market. It also can play an important role in restoring community trust in business.

The SEC's proposal appears to be a response to the suggestion of widespread errors in proxy reports, which is unfounded. Other reviews, such as the review conducted by the Council of Institutional Investors, highlight that such claims are not supported. The international experience is similar, with no evidence of widespread error established.

For example, in June 2018, the Australian Securities and Investments Commission (ASIC) released a report on its review of proxy adviser engagement practices[1]. ASIC reviewed:

- engagement policies of the major proxy advisers in Australia;
- 80 proxy adviser reports where an 'against' recommendation was made in relation to one or more resolutions considered at a meeting held during the relevant AGM season; and
- other information voluntarily provided by the proxy advisers on their engagement practices and activities during the relevant season. [2]

ASIC's report does not suggest that there are significant errors in proxy advisers' reports. Instead, ASIC found that the policies of all proxy advisers reflect:

- a willingness to engage with companies and make a copy of their report available to companies either prior to or after publication;
- a desire to ensure independence from the companies that are the subject of their reports; and
- a willingness to receive feedback from companies in relation to potential factual errors and to correct material factual errors[3].

ASIC's review also found that practice by the proxy advisers was consistent with their policies[4].

In addition, ASIC recognised that engagement between proxy advisers and companies can assist shareholders where the engagement improves the quality of information provided to shareholders[5] and accordingly, acknowledged the benefit of proxy advisers' work.

ASIC's observations are consistent with our experience. We have also observed that clients of proxy advisers carefully select their service providers, and monitor performance and contractual service delivery standards, consistent with their fiduciary duty to their beneficiaries. Clients carefully consider how to exercise their voting responsibilities, and do not 'blindly' follow recommendations.

Requiring proxy advisory firms to allow companies to review and comment on recommendations before investors see them is therefore unwarranted and would greatly limit investors' access to timely independent

[1] https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf

[2] There are four major proxy advisers operating in Australia, CGI Glass Lewis, ISS Australia, Ownership Matters and the Australian Council of Superannuation Investors and each was involved in the review by the regulator.

[3] https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf page 5

[4] https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf page 6

[5] https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf page 7

advice. Part IIID of the proposed rule suggests that the proposals promote accuracy and transparency. However, in practice, the logistics of preparing reports in enough time for companies to review them twice, along with the additional consultation would potentially be unworkable during the season when many companies have their meetings at similar times. Therefore, the proposals would actually serve to adversely affect the quality of reports and adversely affect efficiency.

The proposal would also act to compromise independence and encourage companies to inappropriately pressure proxy advisory firms to take a more company-friendly approach in their reports and voting recommendations. The timing constraints may also have the effect that investors are unable to critically evaluate proxy advisers' advice to inform their voting positions.

In the Australian context, ASIC's report specifically noted that '*it is up to the individual proxy adviser as to how it wishes to strike a balance between the sometimes competing priorities of engaging with companies (including fact-checking), maintaining independence from companies (including preventing receipt of non-public information and avoiding undue influence) and managing timing constraints in their engagement policies*.'[6]

The Australian regulator also encouraged proxy advisers to clearly explain their policies and voting guidelines to ensure there are no gaps in expectation[7]. This approach appears to be reasoned and practical, and more appropriately balances the relevant considerations. Accordingly, the SEC should consider whether similar guidance is more appropriate, in particular given the lack of evidence that regulation is required. We note that this approach is contemplated in section III E4 of the proposal, and our view is that any disclosure-related measures should be framed as guidance to allow flexibility and ensure only meaningful disclosure is made.

We also understand that the SEC is investigating reports that letters sent to the SEC by those posing as ordinary individual investors were actually originated by an advocacy group (the '60 Plus Association') funded by corporate supporters of tighter regulation for proxy advisers. If this is established, it would further suggest that the need for proxy advisers to be regulated in the manner contemplated by the proposal is unfounded.

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Around the world, there are calls for better stewardship (see, for example, the UK Financial Reporting Council's 2019 review of its Stewardship Code) and greater access to shareholder resolutions (see for example ACSI research 'Shareholder resolutions in Australia'). Effective communication between companies and investors is a cornerstone of sound corporate governance practice. Corporate governance structures and practices should protect and enhance the board's accountability and promote transparency.

Our experience is that investors carefully consider the exercise of their rights in respect of both shareholder proposals, as well as in respect of those resolutions proposed by companies. It takes significant resources to propose a shareholder resolution, which is generally only progressed when there is a failure of other processes (such as engagement or disclosure). Accordingly, to reduce this shareholder right in the manner proposed would be a significant step backwards and operate to undermine the integrity of the market.

Shareholder proposals are an important way to focus a company on a particular issue. While shareholders retain the right to appoint (or remove) directors, this can be limited in a number of ways (for example, shareholders would need to wait until the director faces election, or propose a shareholder resolution for the director's removal). Removal of a director can also be destablising or disproportionate. A shareholder resolution allows input from investors that is commensurate to the issue under consideration. Shareholder resolutions also provide boards with valuable information, providing the investor perspective on a broad range of views and are generally put on an advisory basis, which does not disrupt the board's role in governing the company.

Accordingly, the ability for shareholders to provide their views to a company through a shareholder proposal should be protected rather than eroded, as is proposed by the SEC. It is also important that, where appropriate

[6] https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf page 7

[7] https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf page 8

and subject to the relevant regulatory provisions, shareholders are able to act collectively where the issues are systemic or go to long-term value (for example in relation to environmental, social or governance issues). There are many appropriate protections in place governing appropriate collective action.

Accordingly, our view is that the SEC's proposal is flawed because:

- it limits the ability of a company's owners to state their views;
- a proposal could be excluded even where it has significant support; and
- it limits the collaborative process that can act to encourage entities to adopt good governance and take account of a broader set of stakeholders.