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December 27, 2021

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File No. S7-17-21**

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)<sup>1</sup> appreciates the opportunity to comment on the Commission’s proposed amendments to the federal proxy rules governing proxy voting advice (the “Proposal”).<sup>2</sup> Nasdaq operates regulated entities in the United States, Canada, the Nordics and Baltics including The Nasdaq Stock Market, which is home to over 4,100 listings that drive the global economy and provide investment opportunities for Main Street investors. We are a self-regulatory organization mandated to protect investors and the public interest. Nasdaq is also a listed company and is subject to the same regulations as other public companies, including the federal proxy rules. Thus, Nasdaq is able to bring a unique perspective to these issues.

At the core, proxy statements relate to shareholder votes and all elements of the voting process must be transparent and based on accurate information. We believe the Commission took an important step forward to enhance transparency and accuracy, and increase meaningful shareholder engagement, when it adopted the amendments to the exemptions from the proxy rules for proxy voting advice businesses (“proxy advisors”) on July 22, 2020 (the “Final Rule”),<sup>3</sup> which the Commission initially proposed on November 5, 2019 (the “2019 Proposed Rule”).<sup>4</sup> The Final Rule was overwhelmingly supported by public companies because it provided a review-and-comment mechanism that “would result in better informed voting decisions by SEC-registered investment advisers.”<sup>5</sup> A 2020 survey

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<sup>1</sup> Nasdaq (Nasdaq: NDAQ) is a Fortune 500 global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute their business vision with confidence. To learn more about the company, technology solutions and career opportunities, visit us on [LinkedIn](#), on Twitter [@Nasdaq](#), or at [www.nasdaq.com](http://www.nasdaq.com).

<sup>2</sup> *Proxy Voting Advice*, Securities Exchange Act Release No. 34-93595 (November 17, 2021), 86 FR 67383 (November 26, 2021).

<sup>3</sup> *Exemptions from the Proxy Rules for Proxy Voting Advice*, Securities Exchange Act Release No. 34-89372 (July 22, 2020), 85 FR 55082 (September 3, 2020).

<sup>4</sup> *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, Securities Exchange Act Release No. 34-87457 (November 5, 2019), 84 FR 66518 (December 4, 2019).

<sup>5</sup> U.S. Chamber’s Center for Capital Markets Competitiveness and Nasdaq, *2020 Proxy Season Survey* (October 5, 2020) at 6, available at: <https://www.centerforcapitalmarkets.com/resource/2020-proxy-season-survey/> (“2020 Chamber Survey”).

(attached as Appendix A) conducted by Nasdaq and the U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness (the “Chamber”) found that “81% of the companies reported that they were aware of the SEC rulemaking related to proxy advisory firms, with 99% of those companies saying they support the rule.”<sup>6</sup> It was also widely supported by retail investors, with 81% of retail investors surveyed by Spectrem Group supporting “increased SEC oversight of proxy advisors broadly.”<sup>7</sup> Other investors proposed modifications to the 2019 Proposed Rule that were considered by the SEC. For example, the Investment Company Institute<sup>8</sup> and AllianceBernstein<sup>9</sup> recommended that proxy advisors release reports to their clients concurrently with their release to companies for review-and-comment, and Wellington Management Company LLP concurred that this alternative “strikes a reasonable middle ground.”<sup>10</sup>

As a result, the Final Rule reflects the culmination of the Commission’s careful consideration of public comments submitted in response to the 2019 Proposed Rule, in addition to comments submitted in response to a 2010 Concept Release<sup>11</sup> and several roundtables held by the Commission over the past decade.<sup>12</sup> Nasdaq has strived to inform the Commission’s rulemaking on this issue at every step by sharing valuable feedback from our listed companies and companies seeking to access the public markets. We have repeatedly heard that the prevailing proxy advisory model unnecessarily increases the costs of being a public company and further distances companies from their shareholders through opaque intermediaries that have not historically been required to mitigate or disclose all conflicts of interests that may impact the credibility of their advisory information.

We have long supported proxy advisory reforms on the principle that transparency forms the bedrock of securities laws disclosures, including for companies and asset managers, and should equally apply to proxy advisory firms because institutional investors increasingly rely on them to inform their voting decisions. In comparing the Final Rule with the Proposal we are forced to conclude that the Proposal reverses many of the transparency gains in the Final Rule, which contained common sense solutions to enhance the dialogue between proxy advisors and companies. It is this dialogue that would enhance investor confidence that voting advice is based on factually correct, reliable information. Indeed, we believe the Final Rule benefitted proxy advisory firms themselves through that enhanced

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<sup>6</sup> See 2020 Chamber Survey at 7.

<sup>7</sup> See Spectrem Group, *Spectrem Group Study Reveals Wide Retail Investor Support for Proposed SEC Amendments* (January 10, 2020), available at: <https://www.prnewswire.com/news-releases/spectrem-group-study-reveals-wide-retail-investor-support-for-proposed-sec-amendments--january-10-2020-300984956.html> (“2020 Spectrem Group Survey”).

<sup>8</sup> See Letter from Paul Schott Stevens, President and CEO, Investment Company Institute to Ms. Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated February 3, 2020, available at: <https://www.sec.gov/comments/s7-22-19/s72219-6743669-207831.pdf>.

<sup>9</sup> See Letter from Sharon Fay, Co-Head Equities, and Linda Giuliano, Head of Responsible Investment, AllianceBernstein to Ms. Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated February 3, 2020, available at: <https://www.sec.gov/comments/s7-22-19/s72219-6746322-207988.pdf>.

<sup>10</sup> See Letter from Terrence M. Burgess, Wellington Management Company LLP to Ms. Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 3, 2020, available at: <https://www.sec.gov/comments/s7-22-19/s72219-6904014-211147.pdf>.

<sup>11</sup> *Concept Release on the U.S. Proxy System*, Securities Exchange Act Release No. 34-62495 (July 14, 2010), 75 FR 42981 (July 22, 2010).

<sup>12</sup> See Statement Announcing SEC Staff Roundtable on the Proxy Process (July 30, 2018), available at: <https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process>; SEC to Hold Roundtable on Proxy Voting (January 27, 2015), available at [https://www.sec.gov/news/pressrelease/2015-15.html#VNzh2yn6\\_ak](https://www.sec.gov/news/pressrelease/2015-15.html#VNzh2yn6_ak); SEC To Hold Roundtable On Proxy Advisory Services (November 5, 2013), available at <https://www.sec.gov/news/press-release/2013-236>.

confidence. Nasdaq is concerned that the Proposal undermines the transparency provided by the Final Rule by repealing carefully tailored mechanisms that balanced the need for accurate information with the demand for timely and objective voting advice. Any amendments that reduce transparency ultimately undermine the core mission of the Commission.

### **Analysis of the Proposal**

#### *Conflicts of Interest Disclosure*

Under the Final Rule, a proxy advisor would be required to disclose in its proxy voting advice: (1) any information regarding an interest, transaction or relationship of the proxy advisor or its affiliates that is material to assessing the objectivity of the proxy voting advice; and (2) any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest.<sup>13</sup> The Proposal would retain these requirements and Nasdaq supports this decision.

We commend the Commission for retaining this condition in the Proposal, and we believe voting decisions would be better informed if investors received sufficient information for them to understand and assess conflicts of interests and measures taken to address them. Our view is supported by data from the Chamber and Spectrem Group. In the 2020 Chamber Survey, 54% of issuers reported that they have been approached by the corporate consulting arm of one proxy advisor in the same year that the company received a negative vote recommendation.<sup>14</sup> This is largely unchanged from 2019, when 58% of issuers reported similar outreach.<sup>15</sup> Retail investors also support requiring proxy advisors to disclose conflicts of interest, with 83% and 78% of investors surveyed by Spectrem Group in reports released in 2019<sup>16</sup> and 2020,<sup>17</sup> respectively, supporting such disclosure.

Narratives we have heard from companies over the past decade further bear this out. Public companies have voiced concerns that certain activities and potentially conflicting commercial relationships of proxy advisors may affect the objectivity and reliability of their proxy voting advice, causing harm to companies and investors.<sup>18</sup> Nasdaq has heard that companies are concerned with proxy advisors providing voting advice to clients on proposals while at the same time soliciting companies for corporate consulting services on those same proposals.<sup>19</sup> Egan-Jones, a proxy advisor

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<sup>13</sup> See Final Rule at 55099.

<sup>14</sup> See 2020 Chamber Survey at 10.

<sup>15</sup> See 2019 Chamber Survey at 12.

<sup>16</sup> See Spectrem Group, *New Spectrem Group Study Reveals Significant Concern Among Retail Investors Over Role Of Proxy Advisors* (April 2, 2019), available at: [https://spectrem.com/Content\\_Press/press-release-new-spectrem-study-reveals-significant-concern-among-retail-investors-over-role-of-proxy-advisors.aspx](https://spectrem.com/Content_Press/press-release-new-spectrem-study-reveals-significant-concern-among-retail-investors-over-role-of-proxy-advisors.aspx) ("2019 Spectrem Group Survey").

<sup>17</sup> See 2020 Spectrem Group Survey.

<sup>18</sup> See Letter from Mr. Edward S. Knight, Executive Vice President, General Counsel and Chief Regulatory Officer, Nasdaq, to Ms. Elizabeth M. Murphy, Esq., U.S. Securities and Exchange Commission, dated October 8, 2013, available at: <https://www.sec.gov/rules/petitions/2013/petn4-666.pdf> ("Nasdaq 2013 Petition"); see also Letter from 1<sup>st</sup> Source Corporation et. al. to Elizabeth M. Murphy, Esq., Secretary, U.S. Securities and Exchange Commission, dated December 4, 2013, available at: <https://www.sec.gov/comments/4-666/4666-4.pdf> ("2013 Public Company Letter"); see also Letter from Mr. John A. Zecca, Executive Vice President, General Counsel and Chief Regulatory Officer, Nasdaq, to Ms. Vanessa Countryman, U.S. Securities and Exchange Commission, dated February 3, 2020, available at: <https://www.sec.gov/comments/s7-22-19/s72219-6744027-207891.pdf> ("Nasdaq 2020 Letter"); see also Letter from Nasdaq et. al., to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission, dated February 4, 2019, available at: <https://www.sec.gov/comments/4-725/4725-4872519-177389.pdf> ("2019 Public Company Letter").

<sup>19</sup> See Nasdaq 2020 Letter, Appendix A, Company 2.

itself, described this process “as a shakedown of corporations and should be stopped.”<sup>20</sup>

While Nasdaq recognizes that proxy advisors provide important research on public companies and can streamline the voting process for institutional investors, we believe that concerns regarding conflicts of interest have not abated since the adoption of the Final Rule. This aspect of the Proposal is a reasonable, principles-based approach to enhance the transparency of proxy advisory reports without being overly prescriptive.

### *Engagement Policies*

The 2019 Proposed Rule would have required proxy advisors to provide all companies with a review period of at least three to five business days.<sup>21</sup> After careful consideration of the concerns raised by proxy advisors, their clients, and other market participants, the Commission scaled back the Final Rule to require proxy advisors to adopt and disclose written policies and procedures designed to ensure that companies can access the voting advice *before or at the same time* the advice is disseminated to its clients, and that clients are notified if the company has filed, or intends to file, a response to the voting advice.<sup>22</sup> They were also required to provide clients with a link to the company’s response.<sup>23</sup> The Proposal would rescind these requirements by removing the conditions set forth in Rule 14a-2(b)(9)(ii).

We have long advocated for proxy advisors to have a transparent line of communication with the companies they analyze.<sup>24</sup> We were joined by 319 public companies calling for the Commission to require transparent processes and practices that allow all companies, regardless of their market capitalization, to engage with proxy advisors on mistakes, inaccuracies and other significant disputes to minimize the negative impacts that such mistakes can have on the company’s proxy voting outreach and its shareholders.<sup>25</sup>

Nasdaq has heard from companies, and knows from our own experience, that Glass Lewis and ISS have inconsistent mechanisms and timeframes to allow companies to correct factual errors in their voting advice. For example, while the Commission notes that Glass Lewis provides companies with “an opportunity to review and respond to its proxy voting advice after it has been disseminated to its clients pursuant to its Report Feedback Service,”<sup>26</sup> one Nasdaq-listed company was told that to be eligible for this service, it would need to purchase its annual report from Glass Lewis and pay a \$2,000 fee.<sup>27</sup>

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<sup>20</sup> See Letter from Saul Grossel, COO, Egan-Jones Proxy Services, to Mr. Brent J. Fields, Esq., U.S. Securities and Exchange Commission, dated November 14, 2018, available at: <https://www.sec.gov/comments/4-725/4725-4649190-176470.pdf>.

<sup>21</sup> See 2019 Proposed Rule at 66545.

<sup>22</sup> See Final Rule at 55108.

<sup>23</sup> See Final Rule at 55101.

<sup>24</sup> See Edward S. Knight, *Raising the Curtain on Proxy Advisers*, The Wall Street Journal, October 7, 2013, available at: <https://www.wsj.com/articles/raising-the-curtain-on-proxy-advisersraising-the-curtain-on-proxy-advisers-1381179479?ns=prod/accounts-wsj>; see also Nasdaq, *The Promise of Market Reform: Reigniting America’s Economic Engine*, May 2017, available at: <http://business.nasdaq.com/revitalize>; see also Letter from John A. Zecca, Senior Vice President, General Counsel, North America and Chief Regulatory Officer, Nasdaq, to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, dated July 18, 2019, available at: <https://www.sec.gov/comments/s7-26-18/s72618-5825362-187511.pdf>; see also Edward Knight and Tom Quaadman, *SEC’s Proxy Advice Reform Would Benefit Economy, Country*, Law360 (July 20, 2020), available at: <https://www.law360.com/articles/1293404>.

<sup>25</sup> See 2019 Public Company Letter.

<sup>26</sup> See Proposal at 67386.

<sup>27</sup> See Nasdaq 2020 Letter, Appendix B, Company 7.



Another company had to pay to see a copy of Glass Lewis' voting advice in order to correct a significant error—Glass Lewis recommended against its say on pay proposal in part because of a certain practice that the company allegedly followed, but in reality, the company never followed that practice. Glass Lewis did not share the draft report with the company in advance, and the company had to purchase the report after it was issued to even view it. Once the company pointed out the error to Glass Lewis, it corrected it and reissued the report. This error would have gone unrectified if the company had not proactively reached out to Glass Lewis and paid for the report.<sup>28</sup>

Companies have expressed similar frustrations with ISS, which the Commission notes “provides draft reports to registrants in certain markets prior to publication,”<sup>29</sup> which notably does not include United States registrants. Prior to the adoption of the Final Rule, ISS provided certain companies,<sup>30</sup> including Nasdaq, with 24-48 hours to review a draft report and provide factual corrections. However, it did not provide the same opportunities to small- or mid-cap issuers.<sup>31</sup> One small-cap issuer discovered a factual error in ISS's report that resulted in ISS recommending voting against all of the company's directors. ISS attributed the mistake to information it received from Equilar and refused to correct it. The company then had to conduct a major outreach effort to inform its institutional investors of the error so that they would not oppose the proposal.<sup>32</sup> In Nasdaq's own experience, we have been provided with as little as 24 hours to provide feedback on ISS voting recommendations, and requests to correct factual errors such as a director's age have been rejected. We are led to conclude from these representative issuer experiences that the status quo has been ineffective, and we must rely on this anecdotal evidence in the absence of hard data gleaned from clear disclosure provided under proper rulemaking.

Nasdaq is also concerned that the Proposal would decrease the availability of voting reports to companies, which would result in increased opacity and decreased accuracy, and ultimately undermine confidence in the proxy voting process. Following the adoption of the Final Rule, ISS notified S&P 500 companies that it would no longer provide them with the opportunity to review a draft report prior to publication,<sup>33</sup> whereas Glass Lewis continues to provide companies with an opportunity to review a data-only version of their report prior to publication.<sup>34</sup> In contrast, the Final Rule ensured that all companies, regardless of size, received a free copy of the voting advice and a mechanism to inform investors of their responses to such advice, in order to ensure that investors are relying on accurate and reliable information. This common-sense application of the principle that transparency improves the information available to investors should be retained in any new rule making. It should come as no surprise to the Commission that companies and retail investors overwhelmingly supported these mechanisms—97% of companies surveyed said they would utilize the review-and-comment procedure provided by the Final Rule,<sup>35</sup> and 79% of retail investors were in favor of providing companies with an opportunity to review and provide feedback on voting advice.<sup>36</sup> The Commission should consider this

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<sup>28</sup> See Nasdaq 2020 Letter, Appendix B, Company 10.

<sup>29</sup> See Proposal at 67387.

<sup>30</sup> See Nasdaq 2020 Letter, Appendix B, Company 7; see also Letter from Cameron Arterton, Vice President, Biotechnology Innovation Organization, to Ms. Vanessa Countryman, U.S. Securities and Exchange Commission, dated February 3, 2020, available at: <https://www.sec.gov/comments/s7-22-19/s72219-6738858-207645.pdf>.

<sup>31</sup> See Nasdaq 2020 Letter, Appendix B, Company 4 and Company 9.

<sup>32</sup> See Nasdaq 2020 Letter, Appendix B, Company 4.

<sup>33</sup> See FWCook, *ISS Discontinues S&P 500 Proxy Report Draft Review Process* (November 5, 2020), available at: <https://www.fwcook.com/Blog/ISS-Discontinues-SP-500-Proxy-Report-Draft-Review-Process/>.

<sup>34</sup> See Proposal at 67386.

<sup>35</sup> See 2020 Chamber Survey at 7.

<sup>36</sup> See 2020 Spectrem Group Survey.

overwhelming support from companies and retail investors before it acts to rescind the Rule 14a-2(b)(9)(ii) conditions, because it demonstrates that companies and investors were planning to rely on them.<sup>37</sup>

The Final Rule also reduced the information asymmetry between U.S. companies and companies in international jurisdictions where ISS provides a draft report. It is worrisome for U.S. companies, investors, and the economy that—despite U.S. securities laws being the gold standard for transparency generally—U.S. companies do not have the same opportunity to identify and correct factual errors as their foreign counterparts to enhance the integrity of their corporate elections. ISS states publicly on its website that it believes the review process provided to French companies “helps improving the accuracy and quality of its analyses, an outcome that is in the best interests of both the institutional investors for whom the analyses are prepared, as well as for the issuers that are the subject of these reports.”<sup>38</sup> U.S. companies and investors should benefit from similar checks and balances so that the U.S. capital markets provide the same fairness to investors as other jurisdictions.

### *Antifraud Rules*

The antifraud provisions of Rule 14a-9 prohibit any proxy solicitations, including those exempt from the information and filing requirements of the federal proxy rules, from containing or omitting any materially false or misleading statements. Currently, Rule 14a-9 includes a list of examples of what may be misleading. The Final Rules amended this list to add Note (e), which includes additional examples of information that a proxy advisor would need to disclose in its proxy voting advice to not be considered materially misleading, such as its methodology, sources of information, or conflicts of interest. The Proposal would remove the examples added to Rule 14a-9 by deleting Note (e).

The Commission states that it is proposing to delete the amendments to Rule 14a-9 to address the misperceptions and uncertainties introduced by Note (e). Proxy advisors and their clients voiced concerns that liability could extend to mere “differences of opinion” about voting recommendations, methodologies or sources of information, which could in turn “lead to increased litigation risks or the threat of litigation and impaired independence of proxy voting advice.”<sup>39</sup> Notwithstanding this deletion, the Commission reaffirmed its current view that “liability cannot rest on mere differences of opinion” and that proxy advisors “may, depending on the facts and circumstances, be subject to liability under Rule 14a-9 for a materially misleading statement or omission of fact, including with regard to its methodology, sources of information or conflicts of interest. That conclusion would not be altered by virtue of [the Commission’s] proposed deletion of Note (e).”<sup>40</sup>

Given that the Commission’s view of liability remains the same, Nasdaq encourages the Commission to retain Note (e)—doing so would promote transparency and the public interest by codifying the Commission’s view. Alternatively, the Commission could consider amending Note (e) to Rule 14a-9 to include the Commission’s view that liability does not extend to mere differences of

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<sup>37</sup> In Question 5, the Commission asks: “Have registrants or others relied on the Commission’s adoption of the Rule 14a-2(b)(9)(ii) conditions? How, and to what extent, should any such reliance interests factor into the Commission’s determination of whether to rescind those conditions?” See Proposal at 67388.

<sup>38</sup> See Institutional Shareholder Services Inc., *French Market Engagement Disclosure* (last accessed December 27, 2021), available at: <https://www.issgovernance.com/policy-gateway/french-market-engagement-disclosure/>.

<sup>39</sup> See Proposal at 67390.

<sup>40</sup> *Id.*

opinion. This view was expounded in both the Final Rule<sup>41</sup> and the Proposal,<sup>42</sup> and explicitly including it in Note (e) could enhance transparency while alleviating concerns that proxy advisors could be subject to additional liability for differences in opinion.

## **Conclusion**

Over the past decade, there have been calls for increased transparency, accuracy and accountability among proxy advisors voiced by four former SEC Commissioners,<sup>43</sup> Congress,<sup>44</sup> the U.S. Government Accountability Office,<sup>45</sup> academic researchers,<sup>46</sup> the press,<sup>47</sup> retail investors,<sup>48</sup> public companies and Nasdaq. We have long advocated for proxy advisors to transparently disclose conflicts of interest and provide companies with an opportunity to review and respond to their voting advice. Nasdaq believes that investors, issuers and other market participants, including proxy advisors, will benefit from healthy capital markets that promote trust and transparency. The Final Rule was an important step towards extending the protections afforded by transparency and accountability enforced by the Commission in other areas of the securities industry to proxy advisory firms. The proxy advisory industry is not an island; the same sound principles that have guided regulators and protected investors for nearly ninety years should apply with equal force to the process that ensures fair and accurate voting in corporate elections.

It is imperative that proxy advisors have complete and accurate information when crafting voting recommendations that impact the sound governance of public companies. It is equally important that institutional investors are aware of any conflicts of interest when using proxy voting reports to make voting decisions that ultimately impact millions of Main Street investors saving for retirement or a child's education. Nasdaq is concerned that the Proposal would deprive companies and investors of much of the transparency protections provided under the Final Rule, and encourages the Commission to

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<sup>41</sup> See Final Rule at 55121.

<sup>42</sup> See Proposal at 67390.

<sup>43</sup> See Statement by Chairman Jay Clayton, *Proxy Voting—Reaffirming and Modernizing the Core Principles of Fiduciary Duty and Transparency to Provide for Better Alignment of Interest Between Main Street Investors and the Market Professionals Who Invest and Vote on Their Behalf* (July 22, 2020), available at: <https://www.sec.gov/news/public-statement/clayton-open-meeting-2020-07-22>; see also Statement of The Honorable Harvey L. Pitt, *Examining the Market Power and Impact of Proxy Advisory Firms* (June 5, 2013), available at: <https://www.govinfo.gov/content/pkg/CHRG-113hhrg81762/pdf/CHRG-113hhrg81762.pdf>; see also Commissioner Daniel M. Gallagher, *Remarks before the Society of Corporate Secretaries & Governance Professionals*, 67th National Congress, July 11, 2013, available at: <http://www.sec.gov/News/Speech/Detail/Speech/1370539700301>; see also Commissioner Troy A. Paredes' remarks before the Society of Corporate Secretaries & Governance Professionals, 66th National Conference on "The Shape of Things to Come" (July 13, 2012), available at: <http://www.sec.gov/News/Speech/Detail/Speech/1365171490796>.

<sup>44</sup> U.S. Chamber's Center for Capital Markets Competitiveness and Nasdaq, *2019 Proxy Season Survey* (November 21, 2019) at 5-6, available at: [https://www.uschamber.com/sites/default/files/ccmc\\_proxyseasonsurvey2019\\_v1.pdf](https://www.uschamber.com/sites/default/files/ccmc_proxyseasonsurvey2019_v1.pdf).

<sup>45</sup> See U.S. Government Accountability Office, "Corporate Shareholder Meetings: Proxy Advisory Firms' Role in Voting and Corporate Governance Practices," *Report to the Chairman, Subcommittee on Economic Policy, Committee on Banking, Housing, and Urban Affairs, U.S. Senate* (November 2016), available at: <https://www.gao.gov/assets/690/681050.pdf>.

<sup>46</sup> See James R. Copland, David F. Larcker and Brian Tayan, *Proxy Advisory Firms: Empirical Evidence and the Case for Reform*, Manhattan Institute (May 2018), available at: <https://media4.manhattan-institute.org/sites/default/files/R-JC-0518-v2.pdf>; see also James K. Glassman and J.W. Verret, *How to Fix Our Broken Advisory System*, Mercatus Center (2013), available at: [http://mercatus.org/sites/default/files/Glassman\\_ProxyAdvisorySystem\\_04152013.pdf](http://mercatus.org/sites/default/files/Glassman_ProxyAdvisorySystem_04152013.pdf).

<sup>47</sup> See The Editorial Board, "The Proxy Advisors' Veto," *The Wall Street Journal*, August 10, 2018, available at: <https://www.wsj.com/articles/the-proxy-advisers-veto-1533941976>.

<sup>48</sup> See 2019 Spectrem Group Survey; see also 2020 Spectrem Group Survey.

reconsider rescinding the conditions set forth in Rule 14a-2(b)(9)(ii) and Note (e) to Rule 14a-9.

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Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "John A. Zecca". The signature is fluid and cursive, with the first name "John" and last name "Zecca" clearly distinguishable.

John A. Zecca

## **Appendix A**

### 2020 Chamber Survey



# PROXY SEASON SURVEY

# 2020



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS®





# 2020

## PROXY SEASON SURVEY

Presented by:



**CENTER FOR CAPITAL MARKETS**  
**COMPETITIVENESS**

The U.S Chamber of Commerce’s Center for Capital Markets Competitiveness (CCMC) and Nasdaq have again partnered to conduct our annual proxy season survey. This survey examines the interactions that public companies had with proxy advisory firms during the 2020 proxy season and is intended to inform policymakers and the general public about current practices within the proxy advisory industry.

Proxy advisors play an important role within the corporate governance ecosystem in the U.S. They analyze corporate governance matters at public companies and develop voting recommendations for institutional investors that are tasked with voting proxies in the best interests of Main Street investors. Given the thousands of proxy issues that institutional investors must consider in any given year, a well-functioning proxy advisory system helps ensure that votes are always cast in a manner that enhances the long-term performance of public companies.

However, the proxy advisory system has operated for years with a number of serious flaws. The industry is effectively controlled by two firms—Institutional Shareholder Services (ISS) and Glass Lewis—that make up over 90% of the market, giving them extraordinary influence over corporate governance standards. These two firms also have a history of being prone to making errors when drafting

vote recommendations and operate with significant conflicts of interest. These deficiencies have led to bipartisan calls for reform in Congress and a thorough examination of industry practices by the Securities and Exchange Commission (SEC) over the last decade.

In July 2020, the SEC finalized a rulemaking that will make the proxy advisory industry more transparent and enhance the quality of vote recommendations received by institutional investors.<sup>1</sup> The rule codifies the long-standing position of the SEC that proxy advice constitutes a “solicitation” under the federal proxy rules and establishes a mechanism for public companies to review draft vote recommendations in order to correct any errors or analytical flaws. The rule will also result in more robust disclosures regarding proxy advisory firm conflicts of interest. The SEC concurrently issued Commission-level guidance clarifying the duties of institutional investors that hire proxy advisory firms.<sup>2</sup> The guidance affirms that it would be a breach of fiduciary duty for an institutional investor to automatically rely on proxy advisor vote recommendations without performing its own due diligence and conducting sufficient oversight of a proxy advisory firm it has hired.

Additionally, the Department of Labor (DOL) recently proposed a rule regarding the proxy voting duties of fiduciaries under the Employee Retirement Income Security Act (ERISA).<sup>3</sup> The DOL’s rule would, among other provisions, require that ERISA fiduciaries take steps to affirm that the proxy advisory firms they hire have the ability to provide objective and informed voting advice and that recommendations are not tainted by conflicts of interest. The proposal would also reiterate that fiduciaries are never allowed to subordinate the economic interests of ERISA plan participants to non-pecuniary factors when voting proxies.

These regulatory actions have been informed by several SEC roundtables, requests for public comment, numerous academic studies, congressional hearings, and other forums stretching back over the last decade that have explored problems with proxy advisory firms along with potential reforms.

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1. Exemptions from the Proxy Rules for Proxy Voting Advice (July 22, 2020).

2. Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (July 22, 2020). Do you mean Supplement?

3. Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (August 31, 2020).

The CCMC and Nasdaq have long supported changes to the regulatory framework that applies to the proxy advisory industry. In May 2017, Nasdaq made proxy advisory reform a cornerstone of its blueprint to revitalize the capital markets.<sup>4</sup> We believe reforms are necessary to improve the public company model in the U.S. and help stem the drastic decline in public companies that has occurred over the last two decades. Fewer public companies translate to lower economic growth, less job creation, and fewer opportunities for Main Street investors to own the next generation of great American businesses.

This is the sixth year that the CCMC and Nasdaq have conducted the proxy season survey. A record 182 companies participated in this year's survey, which was conducted during the months of July and August. Participants included public companies of all sizes that cut across virtually every sector of the U.S. economy.

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4. The Promise of Market Reform Reigniting America's Economic Engine (May 2017). Available at [https://www.nasdaq.com/docs/Nasdaq\\_Blueprint\\_to\\_Revitalize\\_Capital\\_Markets\\_April\\_2018\\_tcm5044-43175.pdf](https://www.nasdaq.com/docs/Nasdaq_Blueprint_to_Revitalize_Capital_Markets_April_2018_tcm5044-43175.pdf)

# 2020

## PROXY SEASON SURVEY

The survey found that companies overwhelmingly support the ability to “review-and-comment” on draft proxy advisory firm recommendations, and the vast majority of companies were aware and supportive of the SEC’s rulemaking regarding proxy advisory firms. Over 80% of the companies believe that the review-and-comment mechanism contained in the SEC rulemaking would result in better informed voting decisions by SEC-registered investment advisers.

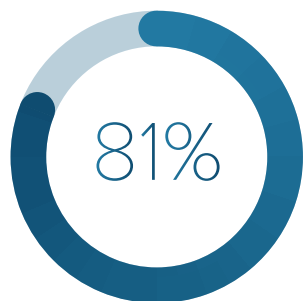
The survey also found that responsiveness and transparency on behalf of proxy advisory firms continues to decline. Over the last four years, proxy advisory firms have become increasingly likely to deny a request from a public company to meet or discuss a particular vote recommendation.

Troublingly, and consistent with the 2019 survey, over half of the companies report that they have been approached by the corporate consulting arm of ISS during the same year in which they received a negative vote recommendation from ISS’ proxy advice business. The ISS business model—in which it provides corporate governance consulting to the very issuers for which it issues vote recommendations—is inherently conflicted and creates potential biased voting advice. The recently adopted SEC rule should help public companies and investors better understand how particular vote recommendations may be improperly influenced by ISS business considerations.

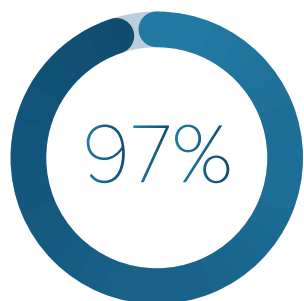


# SURVEY RESULTS

## Public Companies Overwhelmingly Support Aspects of the SEC's Rulemaking

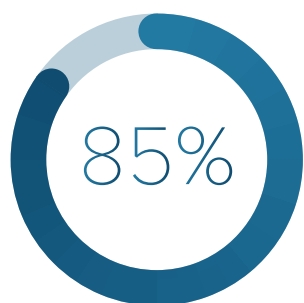


**81% of the companies reported that they were aware of the SEC rulemaking related to proxy advisory firms**, with 99% of those companies saying they support the rule.

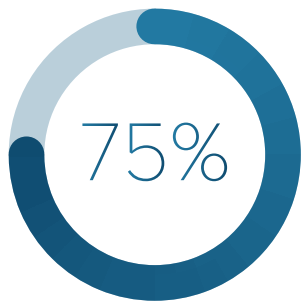


**97% of the companies reported that they would avail themselves of the review-and-comment mechanism** included in the SEC rule; interestingly, 85% said that such a mechanism would not create any unnecessary delays or confusion in the proxy voting process.

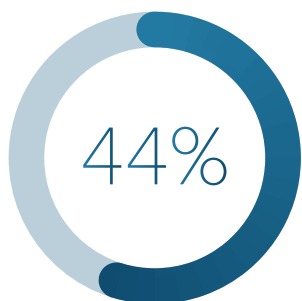
## Public Company Engagement With Proxy Advisory Firms: Ability to Communicate With Proxy Advisory Firms Remains a Significant Challenge



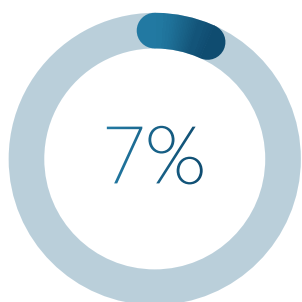
**85% of the companies surveyed had a proxy advisory firm make a recommendation** regarding an issue included in their proxy statement, a level slightly lower than in 2019 (87%) and 2018 (92%).



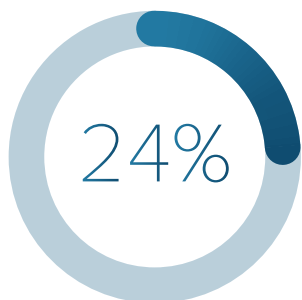
**75% of the companies carefully monitor proxy advisory firm recommendations** for accuracy or reliance on outdated information, a lower number than in 2019 (80%) and 2018 (83%).



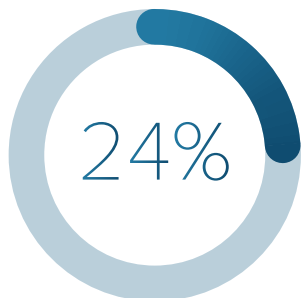
Only **44% of the companies responding believe that proxy advisory firms carefully research and consider all relevant aspects of a particular issue** on which it provides advice, higher than in both 2019 and 2018 (39% both years).



**7% of the companies formally requested that proxy advisory firms provide them with a preview of vote recommendations**, continuing a declining trend from 2019 (17%), 2018 (21%), and 2017 (30%).

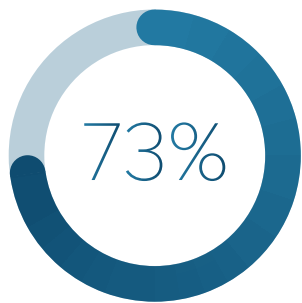


The number of companies asking proxy advisory firms for the opportunity to provide input before a vote recommendation is finalized continues to decline. In 2020, **24% of companies made such a request**, down from 30% in 2019 and 38% in 2018.

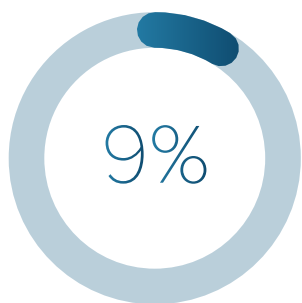


**24% of the companies pursued opportunities to meet with proxy advisory firms on issues subject to shareholder votes**, up from 21% in 2019 but down from 29% in 2018. For companies that asked for a meeting, that request was denied 69% of the time. This is the fourth year that the denial rate has increased, up from 60% in 2019, 57% in 2018, and 38% in 2017.

## Public Company Engagement With Investors and the SEC



While a majority **(73%) of the companies reported that they have in place a year-round regular communications program with institutional investors**, that number is down from 2019 (82%) and 2018 (78%). Companies that have such a program in place believe it is particularly beneficial for proxy-related matters.



If a company reported that it was not granted adequate opportunities for input on a proposed proxy advisor vote recommendation, **it notified proxy advisory firms and portfolio managers 9% of the time**, a sharp decline from 23% in 2019.



If a company encountered a vote recommendation it believes was based on inaccurate or stale data, **it alerted the proxy advisory firm, institutional investors, and/or the SEC staff 25% of the time**, down from 41% in 2019 and 46% in 2018.



**25% of the companies advised proxy advisory firms and their clients if a recommendation did not advance the best economic interests of shareholders**, down from 29% in 2019.

## Conflicts of Interest



A troubling **54% of the companies reported that they were approached by a representative of ISS Corporate Solutions during the same year in which they received a negative vote recommendation from ISS.** This is similar to last year when 58% of the companies reported they were contacted by ISS Corporate Solutions.

## Shares Voted Automatically In Line With Proxy Advisory Firms



For the last three years, this survey has sought to learn whether a significant portion of an issuer's shares are “robo-voted” in line with an ISS or Glass Lewis recommendation within 48 hours of that recommendation being issued. As in 2018 and 2019, several companies reported that anywhere from 20%–35% of their shares are voted automatically with proxy advisory firms once vote recommendations are issued.

## PROXY ADVICE BEST PRACTICES

The three constituency groups affected by the recently issued SEC guidance—proxy advisory firms, portfolio managers, and public companies—must focus their attention on five overarching principles:

### Fiduciary duty

Fiduciary duties permeate and govern all aspects of the development, dispensation, and receipt of proxy advice. Some investors use proxy advisory reports as one data point among many in an independent process to determine how or when they should vote their shares. Unfortunately, other investors may still outsource their voting to proxy advisory firms without any due diligence.

## Shareholder value

Enhancing and promoting shareholder value must be the core consideration in rendering proxy voting advice and in making proxy voting decisions.

## Freedom from conflicts

The proper role of proxy advisory firms vis-à-vis proxy voting is to provide accurate and current information to assist those with voting power to further the economic best interests of those who entrust their assets to portfolio managers and are the beneficial shareholders of public companies. If proxy advisory firms exceed that role—for example, by effectively exercising or being granted a measure of discretion over how shares are voted on specific proposals, or by failing to make proper disclosure regarding specific conflicts of interest afflicting a proxy advisory firm in connection with voting recommendations it is making—the proxy advisory firms so employed, and those engaging them, incur serious legal and regulatory consequences. The recently adopted SEC rule will increase information regarding conflicts of interest, while the July 2020 Commission guidance suggests that institutional investors should conduct proper oversight of proxy advisory firms that they hire.

## Portfolio manager discretion

Clarity is provided regarding the scope of portfolio managers' obligations to exercise a vote on proxy issues, and the obligations emphasize the broad discretion portfolio managers have—subject to appropriate procedures and safeguards—to refrain from voting on every, or even any, proposal put before shareholders for a vote.

## Compliance

In light of the newly adopted SEC rule and Commission guidance, proxy advisory firms and portfolio managers need to again reassess their current practices and procedures and adopt appropriate changes, while public companies should be aware of these actions and how they will impact proxy voting.





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