U.S. Chamber of Commerce

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November 30, 2021

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

Submitted via email: rule-comments@sec.gov

Re: File Number S7-17-21

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC") writes regarding the almost two-decade long examination of proxy advisors and the effect they have on the integrity and transparency of U.S. capital markets, as well as individual investors. Based on our long involvement in this issue, CCMC wrote Chair Gensler this summer[1] about his abrupt decision not to enforce the SEC's July 2020 Final Rule *Exemptions from the Proxy Rules for Proxy Voting Advice* (the "Final Rule") and his plan to conduct a review of the Final Rule before it had fully taken effect. We noted that this undertaking raised "serious concerns about the Commission's deliberative process and harms the SEC's reputation as an independent regulator that is free from political agendas."

<u>The SEC Should Rescind its Proposed Amendments to the Final Rule and Issue an Advanced Notice of Proposed Rulemaking</u>

These concerns were magnified by the Commission's recently published Notice of Proposed Rulemaking on *Proxy Voting Advice* ("the Proposal")[2] based on "feedback" the SEC received "from market participants." The CCMC and other important stakeholders in the proxy voting process were not granted an opportunity to view or respond to this "feedback" prior to the issuance of the Proposal. The apparent preferential access the unnamed "market participants" received and the influence it had on the Proposal invite scrutiny of this regulatory effort. If the Commission is serious about proceeding with proposed amendments to the Final Rule in an open fashion, it should rescind the Proposal and issue an Advanced Notice of Proposed Rulemaking (ANPRM). An ANPRM would permit all interested parties to provide input and inform the Commission's deliberations on whether to reopen the July 2020 Final Rule.

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[1] https://www.centerforcapitalmarkets.com/letter/ccmc-comments-to-the-sec-on-their-announcement-of-review-and-non-enforcement-of-proxy-advisor-rule/
[2] https://www.sec.gov/rules/proposed/2021/34-93595.pdf

If the Commission Declines to Rescind the Proposal and Issue an ANPRM, it Should Immediately Extend the Comment Period on the Proposal for at Least 60 Days

If the Commission declines to lend integrity and transparency to this rulemaking process by rescinding the proposal and issuing an ANPRM, it must at least permit more than a 30-day comment period. 30 days is simply inadequate for meaningful feedback on amendments to a rule grounded in over a decade of careful deliberations spanning the tenure of multiple SEC Chairs. Such a truncated timeline does not allow for the collection and development of the kind of empirical data and analysis the SEC requests in the Proposal. This minimal comment period supports the perception that this entire process is not intended to be a serious evaluation of the current regulations and the record on which it is based, but rather a political promise to be kept. To allow a meaningful comment period on the Proposal, we request the Commission *immediately* announce a 60-day extension of the initial 30-day comment period.

A 90-day Comment Period is Not Unusual for Important Financial Regulatory Proposals

It is not unprecedented for regulations on complex financial issues that require collection and analysis of empirical data, such as proxy voting, to have comment periods longer than 60 days. For example, earlier this year, when Acting Chair Lee requested public comment on the longstanding issue of climate disclosures, the public had 90-days to comment.[3] The Commission allowed a 90-day comment period on its March 24th interim final rule to implement a congressionally-mandated regulation on the Holding Foreign Companies Accountable Act.[4] In 2013, when the Obama-era SEC published a request for data and other information to assist the Commission in considering whether to make new rules about the standards of conduct and regulatory obligations for broker-dealers and investment advisers dealing with retail customers, it allowed a 120-day comment period.[5]

Comment periods of such duration are not unique to the SEC. Last September, when the Federal Reserve announced an Advanced Notice of Proposed Rulemaking on *Implementation of the Community Reinvestment Act*, it allowed a 120-day comment period.[6] The OCC, Federal Reserve, and FDIC allowed a 90-day comment period on their January 12, 2021 Joint Proposed Rule on *Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers*.[7] In December 2019, the CFTC allowed 75-days when it re-opened the comment period on its Proposed Rule on *Capital Requirements of Swap Dealers and Major Swap Participants*.[8] It is also very common for agencies to initially propose 60-day comment periods on financial regulations and then extend them to 90 days.[9]

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[3] https://www.sec.gov/news/public-statement/lee-climate-change-disclosures
[4] https://www.sec.gov/news/press-release/2021-53
[5] https://www.sec.gov/news/press-release/2013-2013-32htm
[6] https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200921a.htm
[7] https://www.govinfo.gov/content/pkg/FR-2021-01-12/pdf/2020-28498.pdf
[8] https://www.govinfo.gov/content/pkg/FR-2019-12-19/pdf/2019-27116.pdf
[9] See, e.g., Federal Reserve – Proposed Rule on "Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire (Regulation J)," published 6/11/21, 60-day comment period

We know that the Commission's December 4, 2019 proposed rule *Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice* (the "2019 Proposed Rule"), had a 60-day comment period.[10] The 2019 Proposed Rule ultimately became the Final Rule[11] that the Proposal amends. The proposed changes to the Final Rule warrant a comment period of *at least* the same duration as the original proposed rule but should be subject to a longer comment period. The Commission's sudden reconsideration of the Final Rule has not been preceded by the kind of deliberative and inclusive process that led up to the 2019 Proposed Rule. That regulation was informed by a public roundtable held by the SEC in November 2018,[12] public comments submitted on a November 2019 rule proposal,[13] and countless meetings that commissioners and staff of the SEC held with investors, public companies, and other stakeholders in the proxy process.[14, 15] No equivalent process preceded the Proposal and its rewrite of the Final Rule. Accordingly, a longer comment period on the Proposal than on the Proposed Rule is justified.

<u>The Proposal Requests Comment on an Array of Complex Issues that Cannot be Properly Addressed within 30 Days</u>

The Proposal is allegedly grounded in "concerns about the potential adverse effects of the 2020 Final Rule on the independence, cost and timeliness of proxy voting advice" that are best addressed through the careful analysis of data. However, the proposed 30-day comment period does not permit adequate time to collect and assess relevant data from the most recent proxy season. This reinforces the perception that the comment period is a "check-the-box exercise" rather than an effort to obtain meaningful feedback to inform that Commission's actions.

The 30-day comment period also applies to comments on the proposed burden analysis for the information collections associated with the Proposal. As the SEC explains, to obtain the "materials submitted to OMB by the Commission regarding the collection of information" required by the Proposal, commenters are obliged to request it "in writing" from the SEC's FOIA office. There is no guarantee how quickly such requests will be processed. The SEC FOIA Services Office "by law" has 20 days to make an initial decision on a FOIA request, but this may be delayed if clarification is requested.[16] In addition, the 30-day

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slated to end 8/10/21; comment period extended until 9/9/21; Federal Reserve – Proposed Rule on "Debit Card Interchange Fees and Routing," published 5/13/21, 60-day comment period slated to end on 7/12/21; comment period extended until 8/11/21; OCC, Federal Reserve, FDIC, FCA, and NCUA – Joint Proposed Rule on "Loans in Areas Having Special Flood Hazards; Interagency Questions and Answers Regarding Flood Insurance," published 7/6/20, 60-day comment period slated to end 9/4/20; comment period extended until 11/3/20; and FDIC – Proposed Rule on "Parent Companies of Industrial Banks and Industrial Loan Companies," published 3/31/20, 60-day comment period slated to end 6/1/20; comment period extended until 7/1/20.

[10] https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf

[11] https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf

[12] Roundtable on the Proxy Process (11/15/18), available at: https://www.sec.gov/proxy-roundtable-2018

[13] Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (November 5, 2019)

[14] Release No. 34-62495, *Concept Release on the U.S. Proxy System* (7/14/10), available at: https://www.sec.gov/rules/concept/2010/34-62495fr.pdf.

[15] Roundtable on Proxy Advisory Services (12/5/13), available at: https://www.sec.gov/news/otherwebcasts/2013/proxy-advisory-services-roundtable-120513.shtml

[16] 17 CFR 200.80(d)(2) & (3).

comment period coincides with the holiday season when some SEC staff will be on leave, which may engender further delays.

The regulated community also has only 30 days to comment on whether the Proposal is a "major rulemaking" for purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 and, thus, subject to the Congressional Review Act. As the Commission acknowledges, such an assessment entails analyzing with "empirical data and other factual support" a range of complex issues. These include the potential effect of the Proposal 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. 30 days is simply not a sufficient period of time to adequately address such issues.

<u>Conclusion</u>

The Proposal emanates from a sudden and suspect decision that the Commission made through a process that lacked the transparency and input normally associated with SEC regulatory initiatives. It pales in comparison to the process that resulted in the Final Rule. This has raised serious concerns about the integrity and legal adequacy of the process surrounding the Proposal. These concerns and questions can be mitigated by the Commission rescinding the Proposal and proceeding to gather input from a wide range of participants and stakeholders in the proxy voting advice market through an ANPRM. Such a process would continue the Commission's thoughtful and even-handed deliberative approach that culminated in the Final Rule the SEC is now refusing to enforce and looking to revise. Absent such a change of direction, the SEC should at least immediately announce a 60-day extension of the comment period on the Proposal to allow for meaningful input that addresses the many issues on which it is requesting feedback. Failure to grant such an extension will heighten concerns about the probity of the Commission's regulatory activities and undermine confidence in its status as a market regulator that operates transparently based on data and analysis rather than political machinations.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce