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日本取引所金融商品取引法研究

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日本取引所グループ金融商品取引法研究会メンバー（五十音順）

2022年5月1日現在

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日本取引所グループ金融商品取引法研究会

議決権行使助言会社（1）－助言会社の実務－

2021年9月24日（金）15:00～16:49
オンライン開催

出席者（五十音順）

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【報　　告】

議決権行使助言会社（１）－助言会社の実務－

Institutional Shareholder Services Inc.　Managing Director
石　田　猛　行

目　　次

○川口　　それでは、定刻になりましたので、JPX 金融商品取引法研究会を始めたいと思います。

今月からしばらく、議決権行使助言会社についての検討をしたいと考えております。

本日は Institutional Shareholder Services（ISS）の石田様からご報告をいただきたいと思います。どうぞよろしくお願いいたします。

○石田（猛）　　ただいまご紹介いただきましたISS の石田でございます。本日はよろしくお願いいたします。

私の方からは、ISS の視点から議決権行使助言会社についてお話をしたいと思います。

１．ISS の概要

まず、資料の２ページをご覧ください。ISS の設立は 1985 年です。現在、ドイツ証券取引所がISS の支配株主です。世界で 2,200 名の従業員が在籍していまして、15 か国で 33 のオフィスを持っています。また、クライアント数は 3,100 ですが、その多くは機関投資家です。その中には発行企業も含まれていますので、利益相反への対応については、後ほど解説をしたいと思います。

２．ISS が提供しているサービス

次に、３ページは ISS が提供しているサービスを大きく５つに分類して説明しています。

まず「ISS GOVERNANCE」です。主に議決権行使に関するサービスを提供していまして、私が属しているのもこのビジネスです。ですので、本日は主にこの「ISS GOVERNANCE」についての解説ということになります。

最近は、ESG(環境、社会、ガバナンス)の話題が注目されていますので、機関投資家は ESG に関する情報を求めるようになっています。そこで、ESG に関するデータや分析のサービスを提供するのが「ISS ESG」です。

その次の「ISS CORPORATE SOLUTIONS(ICS)」は、企業をクライアントとして、ガバナンス改善のコンサルティングサービスを提供しているビジネスです。ここでは「利益相反」が指摘されることがあります。ISS のメインのクライアントは機関投資家ですが、一方で ICS は企業をクライアントとするので、利益相反が生じるのではないかということで、その管理の体制を説明したいと思います。

ここで具体的にどのような懸念が指摘されるかというと、発行企業が ICS のクライアントである場合、ISS はその企業の議案賛否の推奨に何らかの配慮をするのではないかという懸念です。この懸念は、ISS が ICS のクライアント企業を知って

しまうということから生じます。そこで、ファイヤーウォールを設けまして、ISS が ICS のクライアント企業を知ることができない仕組みをつくっています。

具体的には、ISS と ICS は物理的に隔離された別々の場所で業務を行っているということ。コンピューターシステムへのアクセスも ISS と ICS では別々に管理されているということ。さらに、内部の規定によりまして、ICS は個々の企業や特定の議案に関して ISS とコミュニケーションをとってはならないことが定められています。

また、利益相反を防ぐために、ICS とそのクライアント企業との契約には幾つかの規定があります。例えば、ISS は ICS のクライアント企業の議案の賛否の推奨に当たり、有利な判断は行わないということが契約に書かれています。さらに、議案賛否の推奨の作成は ISS のスタッフだけが行い、ICS のスタッフは関与しないことが書かれています。また、ICS のクライアントは ICS のサービスを受けているということを社外で話してはいけないということ。つまり、これは ISS が ICS のクライアント企業を知ることを避けるための工夫というわけです。こういったことが契約に明記されています。

また、利益相反を防ぐ別の仕組みとして、情報開示の充実があります。ISS の顧客である機関投資家は、発行企業が ICS からサービスを受けているかどうかをシステムで確認することができます。さらに、そのサービスの内容や、料金までも確認することができます。こういった点につきましても、ICS とクライアント企業との契約に明記されています。

このような情報開示によって、ISS の顧客である機関投資家は、ISS の行動をモニタリングすることができる。つまり、ICS のクライアント企業であることが ISS の助言に影響した可能性があるのか、本来であれば反対すべき議案なのに賛成しているのではないかといった点から、ISS の行動を監視することができるわけです。

最後のポイントとしまして、ポリシーの存在について話したいと思います。これは本日の重要なトピックの一つでもあるわけですが、ポリシーとは、議案ごとに定めた議決権行使の助言基準のことです。

ISS は、公表されたポリシーに基づき、議決権行使の助言を行っています。ですので、ポリシーを見れば、ISS がどのように議案の賛否を推奨するかが、誰でも事前に分かります。これは透明性だけではなく、利益相反を防止する点からも有意義であると思っています。といいますのは、ISS は公表されたポリシーに基づいて推奨を行うので、ICS のクライアント企業だけに有利な推奨をすれば、分かってしまうからです。

ポリシーについては、後ほどまた解説をしたいと思います。

さらに「ISS MI」と「ISS MEDIA」というビジネスがあります。これは機関投資家を対象としてデータや出版物、分析を提供するサービスです。全体として、最初に述べた３つのサービスが ISS の収入の 75%、そして最後に述べた２つのサービスが収入の 25%を占めています。

３．ISS GOVERNANCE

次に、「ISS GOVERNANCE」のサービスについて解説します。このサービスは、機関投資家を対象とします。

「PROXY RESEARCH & VOTING」というのは、株主総会の議案の分析や賛否の推奨、また投票に関する実務的なサポートを提供するサービスです。ここが、ISS と言ったときに皆様がイメージされる ISS のサービスかと思います。

「GLOBAL PROXY DISTRIBUTION」というのは、カストディアン銀行、つまり証券保管銀行などを対象として議決権行使に関する情報を提供するサービスです。

「SCAS」は、クラスアクションの事務処理に関するサービスです。

「LIQUID METRIX」というのは、トレーディングに関する分析を提供しています。

「15c」というのは、機関投資家に対してコン

プライアンスやデューデリジェンスに関するサービスを提供しています。

４．株主総会の議案に関するサービス

ここでは、「PROXY RESEARCH & VOTING」の内容をもっと細かく説明します。

「ISS BENCHMARK POLICY & RESEARCH」は、ISS が ISS 独自の基準に基づいて株主総会議案の賛否の推奨を提供するものです。メディアで、ISS がどこどこの会社の議案に賛成したとか反対したというように報道されることがあります。それは ISS の推奨、つまり ISS 独自の議決権行使基準に基づき「ISS BENCHMARK POLICY & RESEARCH」がクライアントに提供している議案賛否の推奨のことです。

「ISS THEMATIC POLICIES & RESEARCH」は、複数の事前に準備されたポリシーに基づいて賛否の推奨を行います。前述の BENCHMARK の方は ISS 独自のポリシーですが、このサービスでは、社会的責任投資、国連の PRI 原則、あるいは公的年金、労働組合、さらには教会系の年金などが持つ、様々な信条や考え方を反映したポリシーが準備されており、それらに基づき推奨を提供します。

「CLIENT CUSTOM RESEARCH BESPOKE IMPLEMENTATION」は、CUSTOM という言葉が入っているように、個々の機関投資家、つまり各クライアントが独自にもっている議決権行使のガイドラインに基づいて賛否の推奨を提供するサービスです。BENCHMARK は ISS の独自のポリシー、考え方です。それに対してこの CUSTOM は、機関投資家から各々の議決権行使のガイドラインをお預かりし、それに基づいて賛成、反対の推奨をするサービスということです。

今日では、ご存じのようにスチュワードシップ・コードが広く普及していまして、日本企業に投資する多くの機関投資家はスチュワードシップ・コードに署名しています。つまり、機関投資家は独自の考え方を反映した議決権行使を求められるようになっています。そういう背景もありまして、CUSTOM RESEARCH へのニーズは増えています。

ISS のクライアントのうち、大手クライアントの 200 の機関投資家のうちの 75%以上が何らかの CUSTOM RESEARCH のサービスを利用しています。つまり、彼らは ISS でなく、独自の考え方に基づくポリシーを利用して賛成、反対を決めているというわけです。議決権行使というのは、実務的には複雑な事務作業ですので、そういうオペレーション的なサービスは ISS を利用しても、賛成、反対については、機関投資家各々が持つ独自のポリシーに基づいて賛成、反対を決めている、ということです。

一例として、ストックオプション議案を考えてみます。ストックオプション議案への賛成、反対を決めるときに、よく使われる基準の一つが、オプション付与の対象者です。ISS の BENCHMARK POLICY、つまり ISS 独自のポリシーでは、日本企業におきまして、社外取締役や社外監査役に対するストックオプションには反対していません。しかし、機関投資家によっては、社外の役員に対するストックオプションには反対というケースがあります。このように、ISS 独自のポリシーでは社外役員へのストックオプション付与に対して反対はしないのですが、各機関投資家の考え方では社外役員に対してのストックオプション付与には反対なのであれば、後者に基づいて反対という推奨をおこなうもの、それが CUSTOM RESEARCH とご理解いただければと思います。

「SPECIAL SITUATIONS RESEARCH」は、まさに SPECIAL と書いてあるように、通常のガイドラインではカバーできないもの、例えば複雑な敵対的な買収とか、クロスボーダーの大型買収案件など、特別な案件に特化して賛否の推奨を行うサービスです。

５．ISS のポリシーの作成過程

以上が ISS の紹介ですが、先ほどから何度かポリシーに触れました。ポリシーに基づいて ISS は賛否の推奨を行うことが透明性を高めることとか、ICS との関連で利益相反が指摘されますが、それ

についても客観性を持たせるポリシーの存在が重要であると解説いたしました。このように、ポリシーは ISS の活動を理解するうえで重要になってきます。そこで、ポリシーがどのように作成されるのか、という話をしたいと思います。

６ページの図は、ポリシー作成のプロセスですが、まず ISS の立ち位置は、長期投資家の視点です。特に売買を前提としないパッシブ運用の立場から助言をいたします。となると、例えば株主提案で多額の配当を要求されるとします。短期の株主はそれを歓迎しても、会社の中長期的な成長に問題を生じさせるような懸念がある場合は賛成できないということになるわけです。ご理解いただきたいのは、私たちは長期投資家の視点に立って助言を行うということです。

ポリシーをどのようにつくるかですが、ポリシーは長年の機関投資家との対話を通じてつくられたものと説明できます。環境は変わりますので、毎年ポリシーを見直します。図にありますように、サーベイ、ラウンドテーブル、インタビューを通じて各国の機関投資家や企業など幅広い市場関係者から意見を求めて、その後、当社が実施するパブリックコメントを経て、最終的なポリシーを決定します。

今、2022 年、つまり来年から運用するポリシー変更のプロセスの最中なのですが、具体的にどのようなことを機関投資家と話しているかを説明したいと思います。

まず、一つが女性取締役です。今日、ダイバーシティとか、ESG の話題が多いわけですが、議決権行使においても女性取締役が話題となっています。

最近の動きとして、女性取締役の有無を議決権行使に反映する投資家が増えています。私たちがカウントしたところだと、グローバルの資産運用会社上位 10 社（AUM ベース）のうち７社が、日本向けの議決権行使助言の基準に女性取締役に関する基準を導入済みです。

さらに、日本経済新聞は、NASDAQ は米国の上場企業に対して、人種的マイノリティー、LGBT、女性の取締役、等の登用を義務付けると報道しています。また、ISS でも、北米や欧州、インドで女性取締役のポリシーを既に導入済みです。さらにアメリカでは、人種的マイノリティーのポリシーを導入することを決定しています。

今述べたことは、投資家の動きや取引所の動きですが、肝心の企業を見ても、日本企業における女性取締役は急速に増えています。ISS の調査対象企業約 3300 社のうち、2016 年には 26%の企業にしか最低１人の女性取締役がいませんでした。ところが、今年の６月末の数値だと、53%の企業で最低１人の女性取締役がいます。このような大きな変化が生じているときに、ISS としても、女性取締役の有無を議決権行使の助言基準にいれるべきか、が論点となるわけです。

そこで、どのように投資家に意見を聞いているかというと、こういう流れの中でもし ISS が、女性取締役がいなければ経営トップに反対、というポリシーを導入すると、機関投資家の目から見て違和感ありませんか、おかしくないでしょうかと、このように聞くわけです。その先には、細かい論点があって、例えばポリシーの適用は企業規模によって分けるべきと考える投資家がいます。東証の市場区分見直しでプライム市場が来年新設されるわけですが、例えばプライム市場に限定してこういったポリシーを導入するのも一つの考え方だと思います。また、すぐに 2022 年から運用するのではなくて、例えば一定の猶予期間、１年間とかを経た後に運用すべきか、というのもの重要な論点です。このようなことを多くの投資家に聞いて、投資家の最大公約数的な意見を理解することがインタビューの目的です。

ポリシーをつくる際に重視することは「納得感」です。投資家はもちろんそうなのですが、企業の視点からみても納得感があるようなポリシーになるよう努力しています。

そのときに世の中の動きが重要になりまして、例えば、日本企業の 20%でしか女性取締役がいない時代に、女性取締役がいなければ社長に反対するポリシーを導入しても、企業からはなかなか納

得感を得ることはできないと思います。しかし、53%の日本企業で既に最低一名の女性取締役がいるのが現実です。さらに、例えばプライム上場企業だけに限定するのであれば、さらに多くの会社に女性取締役はいるので、納得感はより高まると思います。ポリシーの基準に満たず、反対される企業の方にとっても、確かに世の中の流れとしてはこうなので、うちもやはり入れるべきではないかな、と建設的に捉えていただくことが期待できるのです。毎年私たちは多くの機関投資家と、このような話をしています。

女性取締役に関するポリシーのほかに何を聞いているかというと、一つには、市場区分の見直しに関連することです。来年４月に創設されるプライム市場では、ガバナンスコードの中でも一段高い水準の内容が適用されることになっています。プライム市場はインフラですので、企業としてそのルールを守ることは最低限のこととして当然です。機関投資家の議決権行使は、インフラのルールよりも厳しくなければ意味がありません。ということで、ISS も、法律や上場基準より少し厳し目に、ポリシーの考え方を設定しています。

さて、プライム市場で求められる基準は、原則として独立社外取締役を３分の１以上、さらに支配株主がいる場合は、独立社外取締役が過半数ということになっています。これはかなり厳しいですね。ところで、ISS のポリシーを来年はどうなるかというと、監査役設置会社に対してですが、３分の１の社外取締役を求めます。なお、これはすでに 2020 年に 1 年の猶予期間をつけて発表されていたものなので、新たに発表するものではありません。このポリシーは、独立性とは関係なく、社外取締役を３分の１求めるので、プライム市場は独立社外が３分の１、ISS は単なる社外が３分の１、ということになります。ISS の独立性基準と東証の独立役員制度に基づく独立性基準は異なるので、単純な比較はできないのですが、ポイントは、独立性が問われるかどうかです。独立性は重要なのですが、それを求め過ぎると、取締役会の質の低下など、問題が生じる恐れがあります。そこで、ISS はここでは独立性を求めません。

話を元に戻すと、ISS の基準がプライム市場の基準よりも緩くなってしまうことについてどうすべきか。先ほど述べたように、ISS は法律や上場基準より少し厳し目にポリシーを設定します。ですので、そのような背景を説明した上で、プライム市場の基準よりも厳しくするべきか、あるいは合わせるべきか、ということを機関投資家に聞いています。そうすると、興味深いことに合わせるべきという考え方もあれば、市場編成の動きとは関係なく考えるべきだとか、いろいろな考え方があります。

別の論点として、バーチャルオンリー総会があります。今日、日本でもバーチャルオンリー総会が認められ、日本ではそれをよいものとして受け止めているようです。しかし、海外の投資家はバーチャルオンリー総会をネガティブに見ることがあります。

そのような投資家は、株主総会をバーチャルで行うことを問題視しているのではなく、バーチャルオンリーであることを問題視しています。バーチャルオンリー総会は、ネット上でのみ開催されるわけですから、その環境を会社に都合のよいように利用して、会社が答えたくない質問に答えないのではないか、そういったことが懸念されます。ですので、ハイブリッド型の総会が理想だと思うわけです。

６月には、複数の会社がバーチャルオンリー総会を可能とする定款変更を提案しましたが、ISS は、個別判断で推奨したのですが、結果として武田薬品工業以外の全ての企業で反対を推奨しました。武田薬品工業は、定款の中に感染症の拡大、又は天変地異の発生などによって株主総会が開催できない場合にはバーチャルオンリー総会を開催すると定款に明記しました。他の会社はそうではありませんでした。バーチャルオンリー総会を可能とする定款変更をどのように考えるかについて投資家の考えを伺いました。

その他には、株主提案に関連して、定款変更の形で株主提案が提案されることの是非をどう考え

るか、ということも投資家と意見交換をしました。日本では、定款変更の形式で多くの株主提案が提案されます。企業の方は、定款を変更することに対して一様に否定的です。しかし、投資家はそこまで一致した意見はありません。まず、海外の投資家ですが、彼らは定款変更かどうかということよりも、中身で考えることが多いと思います。国内の投資家については、以前は定款変更ということに対して違和感を持っていた投資家が、今日では、内容で考えるべきではないか、というように、考えがすこしずつ変化しているように思います。

定款変更について投資家の意見を聞いたのは、近年気候変動に関する株主提案が提案され、それに対してどのようにアプローチすべきかという論点があるからです。そこで、気候変動に関する株主提案が定款変更として出ることの是非をどう考えるかと、そういうことを投資家に聞きました。それで、話が元に戻るのですが、やはり提案の内容で考えるべきだというふうに考える投資家が最近は増えているということです。

すこし時間が早いかもしれませんが、私が準備してきたものの説明は以上で、一旦ここで説明を終了させていただきたいと思います。

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【討　　論】

○川口　　ありがとうございました。ISS についての組織、そしてよく言われる利益相反の問題にどう対処しているのか、そしてポリシーや近年の課題について、非常に分かりやすくご説明いただいたかと思います。

本日は、参考資料として ISS の議決権行使助言基準やポリシーを皆さんにお配りしていますが、これも含めて議論してもよいということです。どこからでも結構ですので、ご質問あるいはご意見があれば、ご発言いただきたいと思います。よろしくお願いします。

【ISS の日本での人員】

○川口　　ご報告の冒頭で、ISS は 2,200 名ほどのスタッフが世界にいるとおっしゃっていましたが、日本で対応にあたる人数というのはどれぐらいでしょうか。

○石田（猛）　　その質問は一言では答えにくいです。日本企業への賛否推奨レポートの作成にあたる人数はどれくらいか、ということだと思いますが、一つのレポートを作成するには、様々な人の手を経ています。東京にオフィスがありますが、東京オフィスのスタッフだけでレポートが作成できるわけではありません。レポート作成には多くのデータが必要ですが、その入力には東京事務所だけではなく、海外オフィスのサポートも得ています。さらに、データ入力は 6 月にだけ行うわけではなく、一年を通じてデータのアップデートやメンテナンスをしています。また、議案の内容によっては海外の専門のスタッフが関与します。ですので、東京事務所に何人いるかということは、レポートの質を考える上でミスリーディングな情報になることが心配なので、申し訳ありませんがお答えすることが困難かと思います。

○川口　　ありがとうございます。日本の株主総会は特定の時期に集中していることから、個別に対応しなければならないケースで、人員が十分に確保できているのかということをお聞きしたかったわけです。

○石田（猛）　　そういう意味では、十分に確保されていると思います。

○川口　　それは、そういう答えになりますよね。（笑）

○石田（猛）　　以前から東京事務所の人数をよく聞かれましたが、その際にはスタッフが世界のどこにいてもインターネットでレポート作成に参加することができる、と答えてきました。納得されない方もいたようですが、今日コロナ禍でテレワークが進展し、会社にいかなくとも仕事ができることを多くの人が実感していると思います。それと同じように、私たちがレポートをつくる際に、ISS の世界中のオフィスから、レポート作成の必要に応じて適切なスキルを持つリサーチのスタッ

フがインターネットを利用してバーチャルに参加しています。ですので、人員は十分に確保できています。

○川口　　ありがとうございます。

【ポリシーの作成過程】

○久保　　興味深いお話をありがとうございました。私が伺いたいのは、ポリシーメイキングの過程についての話です。

先ほどご説明いただいたところでは、女性取締役の例を挙げて、ある程度機関投資家が女性取締役の有無を考慮するようになってからポリシーメイキングの過程でいろいろな意見聴取をしていくというようなお話であったかと思います。私が質問したいのは、半ば確認的な質問になるのかもしれませんが、ISS が行っているポリシーメイキングというのは、基本的に受動的な形で動いていくものなのか。それとも、ある程度能動的に動くこともあるのか、ということです。例えば最近女性取締役の人数というのを NPO とかが言い始めているから、それについてポリシーメイキングの過程に入れようというふうに判断するのか。それとも、機関投資家がそのようなことを考慮に入れはじめているからやるというような形でいっているのか。どういう形でそのポリシーの中に考慮されていくのかというのが第１点です。

第２点は、ポリシーメイキングの過程のなかで、社会問題なんかですと特に、ステークホルダーというか、NPO であったり、NGO であったり、活動家であったり、そういった人たちが発言して、議決権行使に影響を与えたいと思っているのだろうと思うのです。あるいは気候変動問題でもそうだと思うのですが、ISS としては、そういう人たちとの対話というのをやっているのかということを教えていただけたらと思います。

ちょっと分かりにくい質問で恐縮ですが、よろしくお願いいたします。

○石田（猛）　　まず最初の点ですが、受動的だと思います。ISS は主に機関投資家をクライアントとして、サービスを提供する民間企業です。つまり、クライアントはコストに見合うベネフィットがあると思うから ISS のサービスを購入するわけです。当たり前ですが、ISS のサービスを購入する義務はありませんので、ISS のポリシーがクライアントの考え方と 180 度異なるものであれば、購入しないでしょう。ISS のポリシーが機関投資家から見て納得感を得られないものであれば、レポートは売れず、民間企業として存続できません。メディアなどでは、ISS は、企業に対峙し世論に訴える圧力団体かのようなニュアンスで報道されることがあるのが、ご質問の背景にあるのだと思いますが、ISS はクライアントにレポートを提供することが目的の民間企業である、とご理解頂ければと思います。

賛否の推奨にあたり、ISS は長期投資家の立場から考えます。例えばインデックス投資家をイメージして頂けば良いかと思います。そのような投資家のニーズに応えるのが私たちの第一の目的ですので、そのような投資家の意見は重要です。私たちは世界各国の機関投資家と話す機会があるので、様々な情報や知識を持っています。そのような面ではクライアントに積極的に情報を発信して、クライアントの意思決定をサポートしますが、ポリシー改定においては、受動的に意見を聞きます。

今の回答で２つ目の質問の半分ぐらいの答えになるかもしれませんが、世の中で社会的な動きはいろいろとあります。長期の機関投資家が、そういった社会的な動きをサポートするのであれば、それは当然私たちもポリシーに入れるべきだと思いますが、ESG には様々な論点があり、現在進行中ですので、ポリシーに入れるかどうかを検討するまでには、一定の時間が必要です。先ほど、女性取締役の論点がありましたが、これもここまで来るのに随分と時間がかかっています。どちらにしても、長期の機関投資家の考え方を重視していくことになります。

ただし、気候変動の問題に関しては、その重要性を多くの機関投資家は認識しているので、そういう意味では、環境団体の人たちの考え方や知見から学ぶことは多いと思います。

○久保　　ありがとうございました。

【ISS の日本での活動】

○梅本　　大変詳細な説明をいただき、知識が深まりました。ありがとうございました。

２点質問させていただきたいのですけれども、１点目は、ちょっとしつこいようですが、川口先生が最初に質問された、日本ではどうなのかという点です。先ほどのお答えですと、ISS 全体で対応しているということでしたけれども、英文開示が充実したとはいえ、日本企業の総会関連資料やそれ以外の資料というのは、依然として日本語で書かれているものが多く、それなりの日本固有の知識・経験のある人しか対応できないのではないかと思うのです。それで６月に集中する株主総会では 2 千前後もの会社の資料を読み解いて推奨内容を決めるとすると、一時的に相当なアルバイト的というか、臨時的な仕事をする人も入ってこなきゃいけないのではないのかなと。そういったところが、ISS の活動を見ていて、どのように対応されているのかが、外部からは分からないところです。

スチュワードシップ・コードの ISS によるコンプライアンスステートメントについて、今日はお話しにならなかったですけれども、日本のスチュワードシップ・コードでは、原則８のところで助言会社の情報開示等について定めが置かれ、それに基づいて ISS でも 2020 年に開示していらっしゃいます。これを拝見しても、ISS 本体でどれだけのスタッフがいるかということしか開示していなくて、唯一、日本で事務所が何年かに開設されたという情報が提供されているぐらいです。また、11 月の研究会で報告させて頂く EU の規制におきましても、同じように ISS ヨーロッパの方でどういう活動をしているかという当該地域固有の情報ではなくて、ISS 本体の情報についてだけ提供されています。

議決権行使助言会社に情報開示の規制を加える趣旨は、基幹産業の担い手でもある自国の上場会社の重要事項を決める株主総会において、大きな影響力を持つに至った助言会社が、正確で十分な情報に基づいて、また、能力を兼ね備えた十分な数の人的リソースの調査・分析等に基づいて賛否の推奨がなされているのかという点について、経済界のみならず国民が重要な関心を持っているためではないかなと思うのです。

ですから、われわれとしましても、アメリカやヨーロッパでどうしているかはともかく、日本の上場会社の株主総会における調査・分析はどういう態勢で行っているのか。ここら辺がある程度開示されないと、ちょっとどうなのだろうかという気がするわけです。これが一点、国内の活動についてもう少し工夫して情報開示できないのかなということです。

もう一点が……

○川口　　まずはそこについてお聞きしませんか。

○梅本　　はい。

○川口　　石田様、お願いします。

○石田（猛）　　先ほどポリシーの考え方を説明しましたが、ポリシーの運用には、データが必要です。例えば、現在のポリシーでは、支配株主がいない監査役設置会社では社外取締役２名を求めます。その条件が満たされない場合、経営トップに反対を推奨します。また、社外取締役の取締役会における比率を利用するポリシーもあります。となると、株主総会の後に何人取締役がいて、そのうち何人が社外取締役かというデータが必要になります。事前の開示資料で概ね予測はできますが、やはり株主総会の招集通知が決定的な情報源ですので、招集通知を見て初めて確認できるデータも少なくありません。そのようなデータの入力に関しては、おっしゃるとおり、職員だけではできませんので、繁忙期には臨時に人を採用して、データ入力を行います。

入力するデータは、役員候補者の名前、生年月日、性別、役職、社外役員としての指定の有無、独立役員としての指定の有無、社外役員の場合は出席率や出身組織などに関するものですが、それらは誰が見えても同じように判断できる内容です。そこには価値判断が入る余地は少なく、日本語招

集通知に基づき、正確にデータを入力することが重要です。正確性の担保には、システムを利用した確認や、他の担当者によるダブルチェックを通じて、精度を高める努力を行なっています。そのように集められたデータにより、株主総会の議案のかなり多くの割合の議案において、ポリシーに基づき、賛否の推奨を決めることができるのです。

ですので、ISS にとってポリシーは重要なのです。形式的だと批判されることがありますが、ポリシーを良いものにする、納得感を持って頂けるものにするため、先に説明したようなプロセスでポリシーを作っているのです。また、ポリシーに基づく賛否の推奨は、透明性を高めることでもあります。

ただ、ポリシーの適用では対応できない議案や状況はあります。例えば今年の 6 月の東芝の定時総会の取締役役選任議案は、議案は普通の議案でしたが、その背景には特別なものがあります。ポリシーを適用するだけでは不十分なので、個別のアプローチが必要です。M＆Aの議案なども個別に対応します。数年前の武田薬品工業とシャイアーの経営統合はクロスボーダーの大型案件でしたので、海外の専門チームと共同で対応しました。また、株主提案についても、個別に判断します。今年は気候変動に関する株主提案が話題となりましたが、これはグローバルな問題なので、ISS の海外の環境を専門にするチームと共同で対応しました。多くの議案はポリシーで対応できますが、そうではないそれらの少数の議案については、ISS の海外のリソースを、その時々の議案の内容に応じて利用して、レポートを作成している、ということです。

また、6 月の株主総会の集中期に短期間で、どのようにレポートを作成するのか、と質問されることがありますが、総会は集中していても、リサーチの準備のタイミングは事前に分散できるのです。招集通知の発送まで待つ必要はありません。私たちは、一年を通してデータベースのアップデートを行いますので、ポリシーを適用するのに必要なデータの多くが、株主総会の招集通知を受け取る前の段階で準備できているのです。さらに、企業不祥事や何か特別な議案がある場合、例えばM＆Aや株主提案ですが、招集通知を開いて初めてそれを知るわけではなくて、企業の開示やニュースから、事前に準備できます。そのようなものを準備しておいて、招集通知で最終確認をして、データや準備したものをまとめて、レポートを作成しているわけです。

【事後的な情報開示の必要性】

○川口　　ありがとうございます。梅本先生、２つ目の質問をお願いします。

○梅本　　先ほど、ポリシーを適用したら賛成推奨か反対推奨かという結論はほぼ一義的に分かるとおっしゃっていました。そうであれば、例えば各機関投資家がスチュワードシップ・コードに基づいて個別の議決権行使結果を公表しているように、助言会社が事後的に、BENCHMARK POLICY に基づいて推奨した賛成、反対について開示するということは可能でしょうか、それとも難しいことでしょうか。

○石田（猛）　　つまり、そういうことによって透明性を高めるということですか。そのような開示は行なっておりませんが、個々の企業に対しては、私たちは事前に開示しています。例えば A 社が自社、つまり A 社のレポートを見たいと希望すれば、登録することによって、A 社のレポートが配信された際に無料で見ることができます。それは透明性の向上になっていると思います。

○梅本　　分かりました。ついでのお願いで恐縮ですが、日本のスチュワードシップ・コードのコンプライアンス・レポートは、できれば日本語で公表していただければありがたいです。どうもありがとうございます。

○加藤　　ご報告ありがとうございました。

梅本先生とのやりとりの最後の方とも関わるのですけれども、今年度のアイ・アールジャパンホールディングスを初めとするバーチャル株主総会の関連の議案について、ISS からの反対推奨がありましたが、それに際して、アイ・アールジャパ

ンホールディングスがプレスリリースで反論をしています。その際、反論の中では、当然 ISS がどのような点に懸念を持っているかということについては触れられているのですけれども、ISS のレポートは一般には開示されていません。

○石田（猛）　　はい。

○加藤　　このような状況はアイ・アールジャパンが何に反論しているかというのが分かりにくく、開示の方法として、改善の余地がないのかと思います。

一方、もう大分前になるのですけれども、2015年にトヨタが AA 型種類株式を出したときのトヨタの株主総会に対する ISS のレポートについては、ISS のウェブサイトに公表されているかと思います。こういうレポートを、ビジネスモデルからして事前の開示は難しいと思いますが、事後的に開示するかどうかについて、何か基準みたいなものが ISS にはあるのでしょうか。

非常に重要な株主総会の議案について、ISS が反対、グラスルイスは賛成ということもたまにあるかと思います。そういった場合に、研究者としては、なぜ２つの助言会社の意見が分かれたかということを非常に知りたいわけです。しかし、やはりレポート自体が公表されているわけではなくて、難儀することがあります。もし、レポートを公表するかを判断する何か基準というものがもし内部であるのであれば、差し支えない範囲で教えていただければと思います。

私からは以上です。

○石田（猛）　　当方は日本企業のリサーチの責任者であるだけなので、そのようなご質問にお答えすることは難しいです。

ただ、ISS のメディアへの対応に関して一点述べると、ISS の推奨が出た後に、メディアから ISS に問い合わせが来ることがあります。そのような時は、ISS のレポートをメディアに送ります。それは、憶測や誤った情報に基づいて、記事が書かれることを防ぐことが目的です。正しくメディアに ISS の推奨の背景にある考え方を理解してもらうことが大切です。

○加藤　　ご回答ありがとうございます。メディアに対してはレポートは提供し、レポートを踏まえてオピニオンを出すことは許すけれども、レポート自体はConfidentially Agreementに基づきレポート自体の公表は許可しないという理解でよろしいでしょうか。

○石田（猛）　　ISS は機関投資家からフィーを頂いてその対価としてレポートを提供するわけですから、本来、レポートはそのような位置付けだと思います。

○加藤　　ただ、ISS が賛成したかどうかということだけが報道されると、ISS の判断が ISS の顧客ではない機関投資家や株主に対しても一定の影響力を持ってしまうと思うのですね。こういう状況が果たして健全なのかということについて問題意識を持っています。

また、アイ・アールジャパンのような会社は、反論する際に、ISS のレポートの要点をまとめた上で適切に反論していると思うのですね。ただ、その反論の仕方が適切ではない事例もあるように思います。そういった場合、こういう企業からのプレスリリースという形でレポートに対して反論があった場合に、ISS として何か公的に反論するという仕組みはあるのでしょうか。

○石田（猛）　　それはないですね。

○加藤　　なるほど、分かりました。

○石田（猛）　　例えば、企業が反論のリリースを出した際、その内容に納得できるものであれば、私たちはそれに基づいて推奨を変えることもあります。ただ、その点について、ISS がパブリックにコメントを出すわけではなく、推奨を変えたレポートをクライアントに新たに配信するだけです。また、推奨は変えないとしても、クラインアントにとって重要な情報だと判断すれば、その内容を加えた追加のレポートをクライアントに配信します。ただし、それらはクライアントに対しての発信ですので、公的なものではありません。

○加藤　　そこで推奨が変わったかどうかは、顧客は分かるけれども、パブリックは分からないということも多分あるということですね。

○石田（猛）　そうですね。メディアから後から問い合わせがあった場合は、推奨を変えたレポートをメディアに提供するかもしれませんが、そうでなければ分からないです。
○加藤　分かりました。どうもありがとうございます。

【経営トップの選任に対する反対推奨】
○前田　助言のやり方に関する基本的な事柄を質問させていただきたいと思います。
ISS から見て好ましくない措置を会社がとろうとしているときに、その措置が定款変更のような株主総会決議事項であれば、直接にその議案への反対推奨をすればいいと思うのですけれども、それ以外のケース、ほとんどがそうではないかと思うのですが、例えば取締役会の構成がまだ不十分であるとか、あるいは政策保有株式を大量に保有し続けて処分しようとしないとか、そのような場合には、議決権行使の助言としては、経営トップの再任議案への反対推奨という形をとらざるを得ないのだと思います。これはある程度やむを得ないとは思うのですけれども、ただ、今の例で言いますと、経営トップは取締役会の構成だとか政策保有株式について改善しようと尽力したけれども、例えば、取締役会の決議事項になっていて、取締役会で多数の賛同を得られなかった、そのため結果的に改善されなかったというようなケースも十分あり得ると思うのですね。
そうしますと、いろいろなケースがある中で、多くの事項について、とにかく経営トップが悪い、つまり経営トップが取締役として適任でないという評価をすることが果たして適切なのか、という疑問を持つのですけれども、いかがでしょうか。
○石田（猛）　そうですね、難しい問題ですね。ご参考までに、海外だと、例えば取締役会の構成に問題があるときに誰に反対すべきか、という議論でまず出てくるのは指名委員会のメンバーです。中でも一番責任があるのは、指名委員長ということになるのですが、そのアプローチは日本では難しいです。指名委員会等設置会社は別として、ほとんどの日本企業には法定の指名委員会がないので、反対する人がわかりません。任意で指名委員会などを持つ会社はありますが、情報開示が安定せず、積極的に情報開示をしている会社に反対すると、情報開示のインセンティブを削いでしまいます。ですので、任意の委員会の情報に基づくポリシーは運用が難しい。そこで、反対するとなると、現職の取締役全員はやりすぎと感じるクライアントは多いと思うので、誰か1人を選ぶとなると、どうしても経営トップになってしまいます。議決権行使では反対せず、企業とのエンゲージメントで懸念を伝える、という方法をとるのであれば、それで良いですが、議決権行使で何らかの意思表示をすべきと考えるクライアントにサービスを提供するのが ISS ですので、そうなってくると、どうしても経営トップになってしまいがちです。
あとは、例えば企業の不祥事などで、責任の所在が明確な場合、例えばコンプライアンスの問題が起きたときに、コンプライアンス担当の取締役が候補者であればその取締役に反対するのが合理的です。また、第三者委員会の報告書などで、具体的に責任の所在が言及されている人物が取締役候補者であれば、その人に反対すれば良い。ですが、そのように明確にわかることはあまりありません。そうなってくると、誰に反対すべきかとなると、やはり最終的には社長とか会長になってしまうと思います。
○前田　今のお話をお聞きして、日本でも、指名委員会等設置会社については、指名委員の再任議案に反対の推奨をすることとする余地はあるのでしょうね。現在は指名委員会等設置会社でも、社外取締役が3分の1未満であれば、やはり代表執行役の取締役再任議案に反対という形になっているのですよね。
○石田（猛）　現在でもすでに、指名委員会等設置会社については、一定のポリシーの基準に満たない場合、ISS の独立性基準を満たさない指名委員には反対しています。つまり、取締役会の構成に問題があるとした場合ですね。
○前田　指名委員会等設置会社の取締役会の構

成については、すでに適切に対応されているのですね。ありがとうございました。

【助言会社を利用するメリット】

○伊藤　　今日はご報告ありがとうございました。

最初に久保先生から質問された点に関連して、もう少しそのあたりの話の先を伺いたくて質問をさせていただきます。

久保先生の質問へのご回答としては、ポリシーメイキングにおいて ISS は基本的に受動的だということだったかと思います。あるいは、重要なのは機関投資家の間の納得感であるというお話が出てきています。そうしますと、ISS というのは、機関投資家に代わって何かものを考えるというよりは、機関投資家の平均的な感覚をくみ上げて、ポリシーに落とし込んでいっているというようなイメージかなと私はお話を伺っておりました。そうだとすると、クライアントであるそれぞれの機関投資家からしますと、根本的に何をメリットだと感じて ISS を利用しているのだろうかというところが気になるわけです。

ISS のような議決権行使助言会社を機関投資家が使うということは、機関投資家からすると、議決権行使に関する判断の一部をアウトソーシングしている、あるいは議決権行使の手間を一部省くということなのかなとも思っていましたので、少し勉強していたイメージと違いまして、そのあたりをちょっと伺えればと思います。よろしくお願いします。

○石田（猛）　　機関投資家の手間を省く、これはまさに ISS の役目であり、助言会社を利用するメリットだと思います。また、セカンドオピニオンとして、助言会社の助言を活用することもメリットかと思います。大きな機関投資家で、議決権行使に多くの経営資源を投入している機関投資家であったとしても、論争を呼ぶような株主総会のとき、例えば今年 6 月の東芝の総会議案などは、いろいろな考え方があり得るわけで、正解はありません。機関投資家はポリシーを持っていますが、そのような有事にはあまり役に立たず、個別判断するはずですから、当然悩みます。最終的には賛成か反対かの二択しかないわけですが、大切なのはそこに至る過程です。どのような前提の元に、どの要素に重きをおくか、などを考えてロジックを組み立てていくわけですが、議案の推奨レポートにはその詳細が書かれています。クライアントである機関投資家はそのような判断に至る過程を考慮して、最終的に自社の判断をすると思います。

ですので、機関投資家が、ISS 以外の議決権行使助言会社からもレポートを購入することは当然だと思います。議案を分析するのに必要な様々な考え方を知ることができるので、機関投資家は自分たちの考え方をより深め、自信を持つことができると思います。

先ほど、手間を省く話がありましたが、機関投資家の議決権行使の日々の実務に携わる方々にとっての ISS の価値というのは、インフラ的というか、議決権行使の様々な事務処理や、煩雑な実務がありますので、それらに対するサポートにあると思います。機関投資家が難しい議案への賛否を決める際に、考え方を提示してサポートすることはもちろん重要ですが、それらは全体の議案数から見れば、ほんの一部です。それよりも、大量の議案へきちんと議決権行使をすることが重要です。まずはやはり実務的なニーズがあると思います。

一方、グローバルな知識を提供できるのも ISS の強みです。日本の機関投資家は、当然日本企業への議決権行使は詳しいです。そのような機関投資家は日本株と同時に外国株にも投資をしていることが普通ですが、どうしても、日本株と同じようなフレームワークで外国株の議決権行使にアプローチしがちです。しかし、それはうまく機能しません。言葉が違うのは当たり前ですが、同じような議案のタイトルでも、市場ごとの制度のもとでは、インプリケーションが全く異なったりするからです。そういうときに、グローバルに株主総会を分析してきた ISS の利用価値があります。ISS には複数の市場に詳しいスタッフが大勢いるので、市場間の違いのニュアンスを説明することができます。グローバルなリサーチネットワーク

はISSの強みだと思います。

○伊藤　　ここ 10 年などで機関投資家の方に求められることはいろいろと増えてきている、あるいは機関投資家が議決権行使を真剣に行わなければならないという要請がどんどん強くなってきていると思います。それもあって、今おっしゃったような利用のされ方なのだろうとも思うのですけれど、例えば５年前、10 年前に比べて、ISS を利用している機関投資家の側の、利用に際しての心構えといいますか、利用のやり方といいますか、そのあたりは特に変化はないというふうに考えておいてよろしいでしょうか。

○石田（猛）　　スチュワードシップ・コードは大きな影響力があったと思います。クライアントの ISS への見方が格段に厳しくなりました。レポートの質やサービスまで、細かくチェックされるようになっています。５年、10 年だと、概ねスチュワードシップ・コード導入の前後だと考えると、かなり違っていると思います。

○伊藤　　なるほど。ありがとうございました。

【賛成推奨と反対推奨がある場合】

○川口　　ほかにいかがでしょうか。

先ほどの前田先生の質問と関係するのですが、ISS の場合は、たしか政策保有株式が 20%を超えると経営者の選任に反対するとされています。他方でその会社は、株主還元をしっかりやっていて、機関投資家にとっていい会社だといった場合に、経営者の選任について、やはり×を推奨するのですか。

○石田（猛）　　そうですね、そこは別の論点として考えますので、政策保有株式、つまり純資産、株主から預かったお金の 20%も政策保有株式に当てるのはおかしいという考え方で反対というポリシーですので、そのようにします。

○川口　　ありがとうございます。その経営者のもと良い経営であると評価できる項目と、ダメという評価の項目があり得ると思うのですね。先ほど前田先生がおっしゃったように、助言の内容が経営者の選任に集約されるということですので、その場合はどのような価値判断で２つを比較されるのかなと思ったのですが。

○石田（猛）　　そこはポリシー通りに推奨を行います。確かに、ご指摘頂いた論点もあるので、だからこそ先ほどお伝えしたように、ISS にとってポリシーは重要なので、ポリシーの改定には慎重で、時間をかけて投資家の意見を聞いているのです。ただし、特別な議案、株主提案、また、プロキシーファイトのような場合をポリシーは想定していません。ですので、そういう場合はポリシーではなくて、個別に判断します。そこでは、ご指摘いただいたように、評価できる項目、そうでない項目を積み上げていって、全体的に判断するしかありません。そうではない場合はルールどおりにやります。

○川口　　ルールどおりというのは、１つでも×がついたら、その経営者はだめだということですか。

○石田（猛）　　だめだというか、再任に反対すると。

○川口　　反対推奨するということですか。

○石田（猛）　　ええ、そうです。

○川口　　分かりました。トータル的に良い経営者と評価できるのに、一部×がつくだけで、反対するというのはどうか、と思ったのですが、ISS の実務は良く分かりました。

【女性取締役と社外取締役の選任】

○齊藤　　大変勉強になりました。本日のご講演で、私の中の議決権行使助言会社のイメージが随分変わったと申しますか、もちろんよりよいガバナンスを目指しておられるという点をあらためて確認させていただきましたが、それと同時に、思っていたほどアグレッシブではないといいますか、非常に微妙な立ち位置で仕事をされているのだということが分かりました。

特に、最初に触れておられました環境や女性登用などの社会的課題に対する向き合い方がとても興味深かったのですけれども、ご報告のニュアンスでは、例えば女性登用の話は、少なくとも最初

はかなり慎重に、だんだん受け入れる方向で、他方、環境問題への対応はもうスタンダードだという、そういう表現は使われなかったのですが、そのような見極めの仕方もおもしろいなと思いました。その点について、私の理解で正しいかどうかお伺いしたいと思います。

基本的に、株主価値や企業価値を高める方向になるかという形で基準を考えておられるということは、ポリシー等を拝見しても分かるのですけれども、環境や女性登用の話は、長期的に見れば、理念的には、持続的な社会と企業価値の向上の両方につながってほしいとみんな思っているわけです。でも、実際の個々の企業にとっては難しい選択を迫られるような事柄も多いときに、社会的には望まれているけれども、個々の対象会社の株主価値や企業価値に直結するかどうかというのをどのように判断されているのか。

一つの例えですけれども、経営学のイノベーター理論の中で、あるサービスやアイディアが社会に普及していくのには幾つかの段階があることを説明する理論的な図式がありまして、具体的には、最初にその考え方を提唱するイノベーターがいて、その次に、一般にはオピニオンリーダーなどと呼ばれるアーリーアダプターと名付けられた人たちがそれを取り入れて拡散し、それから業界の50%ぐらいに至るまでの段階がアーリーマジョリティ、半分ぐらい普及した後に取り入れるのをレイトマジョリティーと名付けられています。先ほどの環境問題は個々の会社によって様々な事情があるので難しいけれどもこれくらいはとか、例えば女性取締役１人ぐらいはもう入れないとだめですよとか、そういう面でのISSの立ち位置というのは、レイトマジョリティー的な、もう半分ぐらいの会社がやっているから、もうこれは業界において標準ですということになって初めて推奨しますというような立ち位置なのかしらと思われたのですけれども、感覚的なものかもしれませんが、それはそういう理解でよろしいでしょうか。

○石田（猛）　女性取締役のポリシーに関してはそうですね。このトピックを過去数年、投資家と議論してきたのですが、国内の機関投資家はずっと慎重でした。海外ではそこまでではないのですけれども、国内の投資家も当然重要なクライアントベースですので、彼らが納得しないとポリシーにはできません。

ところが、今年はかなり風向きが変わったというか、私たちは同じ人たちに毎年インタビューできることが多いのですが、これは国内の投資家の話ですが、去年までは「まだ時期ではない」と言っていた人たちが、今年は「世論や企業の動きを見れば、ISSが日本企業で女性取締役のポリシーを入れることを考慮する段階にきているのではないか」というふうに変わってきています。

今述べたように、ISSは女性取締役のポリシーについてはパッシブな、受け身的な行動をしているのです。ですが、2011年秋に発表して2013年に運用を開始した、社外取締役が１人もいなければ経営トップに反対というポリシーを導入した時は少し違います。このときは色々と反発があったのですけれども、当時は今のようなパッシブな姿勢ではなかったですね。もっと積極的に発言していたと思います。メディアなどはかなり過激にそれを取り上げた印象があります。

ただ、それから時間はたち、スチュワードシップ・コードも導入され、日本の機関投資家のガバナンスや議決権行使に関する認識や議論は格段に深くなってきているのです。つまり、昔と違ってもう十分に考え抜いた機関投資家が、女性取締役については慎重に考えている状況がずっと続いたところに、前述した変化があったのです。ですので、女性取締役に関しては、世の中の流れを追っている状況です。

○齊藤　ありがとうございます。今ご説明いただいた、女性登用の問題と社外取締役の問題とのご対応の違いが非常に興味深かったので、もう一点だけお伺いしたいのですけれども、社外取締役の議論は、その経緯に照らしても比較的企業価値とか株主価値につながりやすい議論ではないかと個人的には考えておりまして、つまり、社外取締役を入れ、その会社のガバナンスが向上されれば、

企業価値につながるという議論として、これまでも日本では議論されてきたところがあります。女性登用の問題は、一応、各種の指標で、女性が入っている会社の方がパフォーマンスがいいというようなデータもありますけれども、社外取締役のように企業価値に直結するような議論がまだ十分になされていない。その違いによる、というのではなく、10年前と今との時代の違いということでしょうか。

○石田（猛）　ですが、時代の違いだけだと、時代が間違った方に行くかもしれませんので、そこはよく考える必要があると思います。今日はESGの議論が盛んで、動きが早いですね。

ただ、社外取締役の議論も女性取締役の議論も根っこのところは結構近いのではないかと思っていまして、「意見や価値観の多様性」がその目的かと思います。社外取締役の議論で言われるのは、同じ考え方をしている人々が会議体を構成しているのであれば、会議体を持つ意味がないことです。社内の取締役は価値観が似ていることが多いと思います。意見や価値観を多様化させることによって、リスクを低減することがポイントです。それを社外取締役という視点からか、あるいはジェンダーという視点からアプローチするか、だけの違いだと思います。目的は多様性を高めて、リスクを低減することです。リスクが低下すれば企業価値のプラスになります。

○齊藤　ありがとうございます、大変よく分かりました。

○久保　今の齊藤先生とのやりとりで一点、話しづらければお話しいただかなくてもいいのですが、社外取締役のときはかなり積極的にいったというようなお話がありまして、なぜそこで積極的になったのかという歴史的なところに少し興味があります。

女性取締役問題とか環境問題というのは、かなり価値観の違いといったところがあって、トレンドになるまで待つというか、齊藤先生の説明であればレイトマジョリティーになるまで待ったというところがあったのかもしれませんが、なぜ社外取締役のときにはかなり積極的に行くという判断がされたのでしょうか。

○石田（猛）　結果として、今思うと積極的になっているというふうに言えるかと思うのですが、例えば20年くらい前だと日本で機関投資家による議決権行使はそれほど重視されていなかったと思います。ところが、だんだんとアメリカを起点として、ガバナンスの話題や、機関投資家の議決権行使の重要性が次第に認識されるようになってきました。私は当時ワシントンD.C.にあったIRRCという会社で働いていました。それはISSの競合相手だったのですが、ISSに買収されました。そのIRRCでの経験から、株主価値を考える上で、社外取締役の重要性を知ったので、ISSの東京事務所に来てから、いろいろ積極的に発信しました。今思うとそうだということですね。

○久保　つまり、日本の当時の海外投資家とかの要望内容とかから見ると、これが実現するような未来なんだというような予測があったと、そんなような感触だったという感じですかね。

○石田（猛）　今みたいに世の中が変わっていくということですか。

○久保　そうです。

○石田（猛）　コーポレートガバナンス・コードのインパクトが大きかったと思います。コーポレートガバナンス・コードが出る前は、ここまで変わるとは思いませんでした。一番の変化は取締役会の構成の変化だと思います。かつては、取締役会に何十人も取締役がいた時代があったわけですから、それも全部内部者で、これがボードだというと、海外の人たちはびっくりするわけですね。それが、今は日本の取締役会は平均で10名以下で、今年の6月時点ですが、社外取締役が3分の1以上を占める企業がISS調査対象企業の73%もあるのです。形式的な変化だと非難する声はありますが、形がこれだけ変われば、取締役会の運営のパラダイムは変わらざるを得ません。社外者が増加すれば、彼らを無視することはできず、彼らが貢献できるような取締役会のあり方を探ることになるからです。議題も日々の細かいオペレーシ

ョンに関する意思決定から、全社的な戦略的な内容に次第に変化するでしょう。そうなれば、日本企業の長年の課題である取締役会の監督機能の強化が期待できます。ここまで変わるとは思わなかったです。

○久保　　分かりました。ありがとうございます。

【経営権の争奪事案】

○片木　　大変興味深いご報告をいただきまして、若干素人からの質問で失礼いたします。よろしくお願いいたします。

普通の議決権行使基準につきましては、先ほどからお話がありますように、例えば社外取締役が１人もいないとか、あるいは政策保有株式を何％以上持っているとか、ポリシーそのものの作成は難しい政策判断が入ってくるのだろうと思います。そのプロセスについて今日はお話しいただいたわけですけれども、個々の議決権行使の判断については、ある意味、数値基準に従って機械的にできるところはあると思うのです。これに対して、行使基準のところで読ませていただく中で、経営権の争いがある場合にどちらの陣営を支持をするのかということについては、かなり総合的な判断といいましょうか、そういった非常に難しい問題が起こるかと思います。

昨今の有名な経営権の争いの事案なんかにおきましても、ISS と他の議決権行使助言会社とで判断が違っていたり、あるいは ISS の方はこちらをというふうにされたけれども、ふたを開けてみると、多くの機関投資家が別の人を支持していたということが後で判明したというような事案なんかも拝見しております。

経営権の争いがある場合についての判断というのは非常に難しいところが出てくるかと思うのですけれども、このあたり、差し支えのない範囲で結構ですけれども、やはりかなり特殊なプロセスを経て判断をされていかれるのでしょうかという質問です。

○石田（猛）　　プロキシーファイトのような場合は、まずプロキシーファイトを起こした側の話を聞きます。次に会社の話を聞きます。必要があれば、さらに反対側を聞くこともあるのですけれども、まずは両者の考え方を聞くことから始めます。

プロキシーファイトを起こした側が経営権を取得しようとするには、理由があります。例えば表向きはコンプライアンスの問題があって、コンプライアンスの改善を目的に経営権を取るのだと言っているのですが、本心は、本当は TOB をすればいいのですが、TOB はお金がかかるので、プロキシーファイトの方が安いのでプロキシーファイトを起こす、という場合もあったりします。つまり、まず重要なのは理由です。それが納得できるものかを考えます。

例えば会社の業績が悪く、経営陣は会社の資源を有効に活用できていない。なので、現経営陣をやめさせて、新しい経営陣に交代することによって会社の価値が上がる、という議論の場合は、企業の業績が本当に悪いのか、ということを判断します。

その結果として、確かに現経営陣には問題があるという判断の場合は、次の段階として、では、その問題がある会社に一体誰を取締役として送り込もうとしているのか、その送り込もうとしている人がどういうスキルを持って、その会社のどういう経営課題に対応できるのかということを考えます。取締役の候補者にインタビューをすることもあります。

その調査の結果として、現在の経営陣よりもその提案されているプロキシーファイト側の取締役候補者の方が企業価値が上がる、と判断された場合は、会社側の提案者に反対を推奨して、プロキシーファイトを起こした側をサポートします。また、会社の経営課題に照らして、会社側とプロキシーファイト側と両方の候補者からそれぞれ個別に選んで、賛成を推奨することもあります。このような感じで、かなり時間をかけて両者の意見を聞くようにしています。

ただ、最近は様々な株主提案が提案されます。意図がよくわからない提案も少なくありません。

ですので、全てのケースで時間をかけて調査することはできません。そこは情報開示などを見極めて、対応しています。

○片木　　ありがとうございます。

【カスタムメイドの基準】

○飯田　　本日はありがとうございました。

資料の５ページでご紹介いただいたCLIENT CUSTOM RESEARCHのところですけれども、カスタムメイドな議決権行使基準を希望する顧客もいるということだったと思います。そういう場合も、数値基準、つまり、ポリシーを見れば基本的には賛否は機械的に出せるものを助言するというか、結論を出してあげるというか、そういう作業をされているのでしょうか。それとも、詳細な総合判断、つまり、様々な情報を考慮してケース・バイ・ケースで判断するといった、質的な基準のような、カスタムメイドの希望というのはあり得るのか、というあたりを教えていただければと思いますが、いかがでしょうか。

○石田（猛）　　CLIENT CUSTOM RESEARCHの場合ですが、例えば出席率のように、変数を調整することによってISSがBENCHMARKで出している推奨とは違うものにする、というものです。

ですので、ケース・バイ・ケースの意味でのCUSTOMではなくて、プロセスの中で変数をカスタマイズして、それによって出す推奨がクライアントの求める数値基準に応じて賛成、反対が違うというニュアンスでご理解いただければと思います。先ほど、機関投資家は、ストックオプションの対象者を賛否の判断に考慮するとお伝えしました。ISSは日本企業において、社外役員へのオプションは反対を推奨しません。しかし、クラインアントが、社外役員へのオプションは反対したい、と希望すれば、そのようにそのクラアント向けに個別の推奨を作成するわけです。ISSは議案判断に必要なデータポイントを多く準備しているので、クライアントはそれらのデータポイントを自由に組み合わせて、カスタマイズしたポリシーを作成できます。

○飯田　　よくわかりました。

議決権行使助言会社に対して、one-size-fits-allの判断方法はけしからんという批判がよくあると思うのですが、そのような判断方法がとられる背景には、むしろ、クライアントの方にコストベネフィット的な観点からそのような数値基準のようなものを望んでいるという事情があるのかなというように理解しました。このような理解でよろしいでしょうか。

○石田（猛）　　議決権行使は多くの議案に対して賛否の判断を正確に行うことが求められるわけですが、その実務作業をサポートすることがISSの役割です。例えば、1社の総会で10の議案があると仮定します。それで100社に対して議決権行使の判断をするとします。そうすると、合計で1,000の議案があるわけですけれども、その1,000議案のうちかなりの部分をお伝えしたような数値基準で賛否の判断ができるわけです。

ところが、少数の総会に関しては、先ほどお伝えしたような、例えばM&A、不祥事、株主提案、プロキシーファイトなどがあり、個別判断が必要となります。それらは、ポリシーをどのようにカスタマイズしようとも、ポリシーの適用だけで対応することは困難です。そういったものに関しては、ISSは最初からクライアントに、これはどうしますか？とリファーします。このように、数値基準で正確に判断すべきである多くの議案と、個別に対応すべき少数の議案とに整理することにより、クライアントは、繁忙期にリソースをかけて取り組むべき少数の総会に集中し、それ以外のルールベースで正確に行使すればよいものについては、そのサポート役としてISSを利用する、そのようなクライアントが多いのではないかと思います。

○飯田　　よく分かりました。ありがとうございました。

○川口　　カスタマイズした場合の報酬は、通常の場合と異なるのですか。

○石田（猛）　　カスタマイズすれば、当然その分の報酬が発生します。

○川口　　分かりました。

【再び経営権の争奪事案など】

○梅本　　先ほどの片木先生のお話絡みですけれども、経営権争いがある場合の役員選任議案の賛否の推奨についてです。

先ほどのお話で、株主が真摯に行なったわけではない株主提案やプロキシーファイトであれば、反対推奨すればよい、ということは分かるのです。しかし、本格的な経営権争いがある場合はどういう判断をされるのでしょう。個別事案を挙げるのはどうかと思うのですが、LIXIL の 2019 年 6 月の株主総会のように５名、10 名程度の役員候補が会社側・株主側の双方から出されて、それに対して賛成・反対の推奨をする場合、どのような事情を踏まえて判断するのでしょう。私は LIXIL の株主の方からレポートを見せていただいたのですけれども、個別候補についてこの人が適任か否か、独立性があるか否かという判断をしておられて、それはそれで方針に基づいた判断をしているということは理解できます。が、最終的に会社側か、株主側か、どちらが取締役会のマジョリティーをとるのかという点は評価対象にされるのでしょうか。会社側にせよ対立する株主側にせよ１人でも取締役会において数が多い方が執行役等の選任も含めてその後の経営の主導権をとれるわけです。そういった場合、個別に判断するだけなのか、それとも、結果的にこちらがマジョリティーになるよねというところも考慮するのか、どちらなのでしょう。

○石田（猛）　　それは個別判断ですので、議案内容によってですね。

一番シンプルなのは、経営側、株主側、どちらかを完全にサポートすることです。どちらかの言い分に明らかに説得力があり、一方はそうではない、というケースです。ですが、いつもそのようなわかりやすい構造とは限りません。例えば LIXIL のような事例はあるわけです。そのような場合は、その会社の課題を考えます。その会社に欠けていると思われるもの、例えばあるビジネスの問題がネックになっているのに、その専門家が取締役会にいないときに、株主から提案された取締役の候補にそのような弱さをカバーできるスキルや経験を持っていれば、その人を入れるべきという結論になります。このように、会社側、株主側の両方の候補者から、個別に賛成を推奨、つまり混ぜ合わせて推奨することもあります。会社の経営課題に照らして必要なスキルを求める、という意味ではスキルマトリックス的なアプローチと言えるかもしれません。

○梅本　　ありがとうございます。

もう一点、先ほど飯田先生の質問で話に出ましたのは CLIENT CUSTOM RESEARCH ですが、もう１つの THEMATIC POLICIES についての質問です。以前、私も機関投資家の議決権行使について調べていて、外国だと教会が株式等で資産運用を行い、議決権行使について特有の基準を持っているという話を知りおもしろいなと思いました。それで、答えにくい質問であれば結構なのですが、日本国内でこれを利用している団体というのはあるのでしょうか。国内の学校法人や宗教法人も上場会社の大株主になっているところがありますが、これら団体の中にはそういうやや特殊な方針の適用を求めているところはあるのでしょうか、それとも THEMATIC POLICIES というのは、主として海外の投資家が利用する基準なのでしょうか。

○石田（猛）　　それについては、申し訳ありませんが、お答えできるほどの知識はありません。

○梅本　　どうもありがとうございます。

【ISS の助言の影響力】

○行澤　　よく分かっていないところがあると思うのですけれども、特に経営権争いが現実化しているような状況で、今お話がありましたように、ISS としてはプロキシーファイトを出している側の話を聞く、また経営者側の話を聞く、そして、判断の難しい場合には精査して個別の候補者ごとに賛成、反対の助言をするという、そういうことだったと思います。それが先ほどのお話ですと、当該会社には議決権行使の如何というものが報告

されるということでよろしいのですね。

○石田（猛）　はい、そうです。

○行澤　そうすると、ISS の事実上の影響力ということを考えますと、最初に加藤先生がお話しいただいたように、やはり株主総会で ISS の提言、助言そのものについて会社側が反論したい、あるいは株主側も反論したいというところがあると思うのです。逆に、そのことによって株主総会における議論が深まっていくということもあると思うのです。そうすると、提言・助言の内容や根拠をある程度公表するというか、そういう形にしないと、議決権行使、そして結果の帰趨に不公平な影響を与えかねないのかなと思ったのです。その辺について、考え方も含めて教えていただければ幸いです。

○石田（猛）　それは ISS のグローバルなアプローチに関することなので、私からはお答えすることは困難です。ただ、影響力という点でコメントすると、ISS の影響力があり過ぎると時々言われますが、それはどうかと思います。賛否に影響を与えるような大手の運用機関は、彼ら自身のポリシーによって賛否を決めています。先ほど、ISS のクライアントのうち、大手クライアントの 200 の機関投資家のうちの 75％以上が CUSTOM RESEARCH のサービスを利用していることはお伝えした通りです。投資家にとって ISS の主要な利用目的は、サポートサービスや、セカントオピニオンを得ることだと思います。ISS に賛否まで全て任せる、という投資家がいるとするなら、それは例えば、海外の小さい機関投資家で、日本企業への議決権行使にあてる自社のリソースがないので ISS に任せる、というイメージではないかと思います。そのような投資家の議決権行使が賛否に影響を及ぼすとは考えにくいです。

○行澤　そうすると、世間の耳目を集めるような重要なケースについては、大手の機関投資家が独立して判断しており、ISS の助言というのは参考程度にとどまるから、ISS の提言や根拠を開示しなくても格別不公平になることはないのではないか、というご判断なのですね。

○石田（猛）　はい、そのとおりです。

○行澤　分かりました。

○石田（猛）　先ほどお伝えしたように、多くの機関投資家がスチュワードシップ・コードにサインをしています。機関投資家の議決権行使結果は開示され、精査されています。メディアが報道することも少なくありません。スチュワードシップ・コード導入の前後で、機関投資家の議決権行使に対する意識が大きく異なったことは先ほど述べた通りです。

○行澤　なるほど。

○石田（猛）　そのような状況の時に、誰もが注目する議案に対して、自社ではあまり考えることなく、ISS の推奨に従っただけです、と言う投資家がいるとは考えにくいです。

○行澤　そうすると、先ほど言ったコストパフォーマンスという点で言うと、議決権行使に関して、ある程度定型的な判断が可能な問題と、定型的な判断になじまないような問題について、やはり機関投資家の側で上手に仕分けするといいますか、ISS の助言をどの範囲において求め、どの程度聞くかということに独自の判断をしてもらうという、そういうことになるのですね。

○石田（猛）　そうですね。機関投資家はフィーを払って ISS を利用しているのです。その結果、機関投資家がスチュワードシップ責任を果たしていない、と疑われるのであれば、ISS を利用するはずがありません。くどいようですが、彼らはスチュワードシップ・コードに署名しているのです。ISS をご利用頂いていることは、機関投資家が自らのスチュワードシップ責任を果たすにあたり、ISS は役立つと考えるからだと思います。つまり、議案賛否の判断にあたり、投資家は ISS ではなく、独自の判断で投票している、ということを意味しているのです。

○行澤　分かりました。ありがとうございました。

○川口　ほかにいかがでしょうか。よろしいですか。

それでは、ご質問、ご意見等がなければ、本日

の研究会はこれで閉じさせていただこうかと思います。

ISS についていろいろ教えていただきまして、ありがとうございました。大分イメージが変わったという方もおられたのではないでしょうか。本日のご報告と質疑を今後の研究会の議論に活かしていきたいと思います。どうもありがとうございました。

ISS empowers investors and companies to build for long-term and sustainable growth by providing high-quality data, analytics, and insight.

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3

ISS GOVERNANCE

Institutional clients have long turned to ISS to apply their corporate governance views, identify environmental, social and governance risk, and manage their complete proxy voting needs on a global basis.

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115 COUNTRIES	3.9 TRILLION SHARES

PROXY RESEARCH & VOTING	Offerings include objective governance research and recommendations, and end-to-end proxy voting solutions.
GLOBAL PROXY DISTRIBUTION	Provides custodians or intermediaries services for generating and delivering ballots, taking receipt of vote instructions, and distribution or execution into local markets.
SCAS	Provides clients an outsourced solution to maximize securities class action claim recoveries
LIQUID METRIX	Provides clients actionable analysis on trade execution quality, cost analysis, pre trade analysis and market surveillance
15c	Provides management and fund board of directors with 15(c) compliance and due diligence services and analysis

4

UNPARALLELED RESEARCH EXPERTISE
FOR INFORMED INSIGHT + ACTION

EXPERTISE

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Industry-leading global expertise and research services. Based on annual updates, policy reflects investor and market views, accepted good governance practices, and the inclusion of local regulatory changes.

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Specialty policies that address a range of investor viewpoints from socially-responsible investors, PRI-aligned investors, public funds, labor unions, mission and faith-based investors. Vote recommendations are created in line with each policy.

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Comprehensive, independent research on high-profile economic proposals and contentious situations. Leverages ISS' unique vantage at the nexus of issuers, advisors and shareholders.

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- EVA (Economic Value Added)-based Financial Performance Assessment as part of Pay for Performance analysis for the U.S. and Canada
- Climate Awareness Scorecard considers public data and ISS proprietary analysis on a company's climate change-related disclosures, practices, and performance record.

- Climate specific policy to support greater disclosure of a company's performance record on (GHG) emissions and other climate risks.

- Leveraging subject-matter expertise across ISS ESG and governance research teams, clients can create voting guidelines to address a company's climate change disclosers and performance and they can use detailed director independence definitions to refine their approach to board composition.

- Ongoing review of marketplace. Expansion of contentious pipeline as significant events arise.

5

ISS Benchmark Policy Formulation Process

6

2021 年版 ISS 議決権行使助言方針（ポリシー）改定に関するコメント募集

コメント募集期間: 2020 年 10 月 14 日から 10 月 26 日まで

ISSGOVERNANCE.COM

PROPOSED POLICY CHANGES FOR 2020
REQUEST FOR FEEDBACK

2020 年 10 月 14 日

各位

Institutional Shareholder Services
日本リサーチ

Institutional Shareholder Services Inc. (ISS) はこのたび、2021 年 2 月から施行する各国の議決権行使助言方針（ポリシー）の改定案を発表しました。

ISS は、国や地域の法令、上場規則、コーポレートガバナンス、文化、慣習など市場毎の特性を勘案して作成したポリシーに基づき、議決権行使の助言を行っています。ISS はポリシーを改定するにあたり、多様な意見を反映する機会を設けることによって、プロセスの透明性を確保することが重要だと考えています。そのため、各国の機関投資家、上場企業、規制当局など幅広い市場関係者の意見を反映するため、ヒアリングやサーベイ、ラウンドテーブルの実施、およびコメントの募集を毎年実施しています（ISS のポリシー改定プロセスの詳細は https://www.issgovernance.com/policy-gateway/policy-formulation-application/を参照のこと）。

2021 年の日本向けポリシー改定では下記の 2 点を検討しています。

1. 監査役設置会社において取締役の 3 分の 1 以上を社外取締役とすることを求めること（2022 年 2 月より適用予定）
2. いわゆる政策保有株式を過度に保有する会社の経営トップに反対すること（2022 年 2 月より適用予定）

ISS はポリシー改定案についてコメントを募集します。ご意見は 2020 年 10 月 26 日までに所属組織名と氏名を明記の上、jp-research@issgovernance.com までお送り下さい（日本語又は英語）。また、日本以外の各国のポリシー改定案についても ISS ウェブサイトでコメントを募集しています（英語のみ）。提出されたご意見に対して個別に回答する予定はありません。

幅広い市場関係者の皆様からのご意見をお待ちしております。

ISS の 2021 年版日本向けポリシー改定については、正式決定後、ISS ウェブサイトで公開する予定です。

以上

~~Redlined~~ = deleted; green = added

日本

現行ポリシー	ポリシー改定案
ISS は会社の機関設計（監査役設置会社、指名委員会等設置会社、監査等委員会設置会社[1]）により、異なる助言基準を持つ。	ISS は会社の機関設計（監査役設置会社、指名委員会等設置会社、監査等委員会設置会社 [1]）により、異なる助言基準を持つ。
監査役設置会社 監査役設置会社においては、下記のいずれかに該当する場合、原則として反対を推奨する。 › 資本生産性が低く（過去 5 期平均の自己資本利益率(ROE)が 5%を下回り）かつ改善傾向[2]にない場合[3]、経営トップ[4]である取締役 › 株主総会後の取締役会に最低 2 名の社外取締役[5]がいない場合、経営トップである取締役 › 親会社や支配株主を持つ会社において、株主総会後の取締役会に占める ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合もしくは最低 2 名いない場合、経営トップである取締役前会計年度における取締役会の出席率が 75%未満の社外取締役[6]	**監査役設置会社** 監査役設置会社においては、下記のいずれかに該当する場合、原則として反対を推奨する。 › 資本生産性が低く（過去 5 期平均の自己資本利益率(ROE)が 5%を下回り）かつ改善傾向 [2]にない場合 [3]、経営トップ [4]である取締役 › 2022 年 2 月以降に開催される株主総会において、いわゆる政策保有株式の過度な保有が認められる場合（政策保有株式の保有額[12]が純資産の 20%以上の場合）、経営トップである取締役[13] › 株主総会後の取締役会に最低 2 名の社外取締役 [5]がいない場合、もしくは 2022 年 2 月以降に開催される株主総会において社外取締役の割合が 3 分の 1 未満の場合、経営トップである取締役 › 親会社や支配株主を持つ会社において、株主総会後の取締役会に占める ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合もしくは最低 2 名いない場合、経営トップである取締役 › 前会計年度における取締役会の出席率が 75%未満の社外取締役 [6]

[1] 不動産投資法人(REIT)の役員選任議案には監査等委員会設置会社の基準を準用し、執行役員には監査等委員ではない「それ以外の取締役」、監督役員には監査等委員である社外取締役の基準をそれぞれ適用する。
[2] 過去 5 期の平均 ROE が 5%未満でも、直近の会計年度の ROE が 5%以上ある場合を指す。
[3] この ROE 基準は最低水準であり、日本企業が目指すべきゴールとの位置づけではない。
[4] 経営トップとは通常、社長と会長を指す。
[5] 独立性は問わない。
[6] 加えて指名委員会等設置会社の監査委員である社外取締役の監査委員会の出席率が 75%未満の場合、監査等委員会設置会社の監査等委員である社外取締役の監査等委員会の出席率が 75%未満の場合にも、反対を推奨する。
[12] 「保有目的が純投資目的以外の目的である投資株式」の貸借対照表計上額を指す。
[13] ただし、企業再編などにより新たにその企業に入社したばかりの経営トップなど例外的な状況においては、反対を推奨しない事も検討される。

› 少数株主にとって望ましいと判断される株主提案が過半数[7]の支持を得たにもかかわらず、その提案内容を実行しない、あるいは類似の内容を翌年の株主総会で会社側提案として提案しない場合、経営トップである取締役	› 少数株主にとって望ましいと判断される株主提案が過半数 [7] の支持を得たにもかかわらず、その提案内容を実行しない、あるいは類似の内容を翌年の株主総会で会社側提案として提案しない場合、経営トップである取締役
指名委員会等設置会社 指名委員会等設置会社においては、監査役設置会社向け基準に加え、さらに下記のいずれかに該当する場合、原則として反対を推奨する。 › 株主総会後の取締役会の過半数が独立していない場合、ISS の独立性基準を満たさない社外取締役 › 株主総会後の取締役会に占める社外取締役[8]の割合が 3 分の 1 未満の場合、経営トップである取締役 › 親会社や支配株主を持つ会社において、株主総会後の取締役会に ISS の独立性基準を満たす社外取締役が最低 2 名いない場合、指名委員である取締役[9]	**指名委員会等設置会社** 指名委員会等設置会社においては、監査役設置会社向け基準に加え、さらに下記のいずれかに該当する場合、原則として反対を推奨する。 › 株主総会後の取締役会の過半数が独立していない場合、ISS の独立性基準を満たさない社外取締役 › 株主総会後の取締役会に占める社外取締役 [8] の割合が 3 分の 1 未満の場合、経営トップである取締役 › 親会社や支配株主を持つ会社において、株主総会後の取締役会に ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合もしくは最低 2 名いない場合、指名委員である取締役 [9]
監査等委員会設置会社 監査等委員会設置会社においては、監査役設置会社向け基準に加え、さらに下記に該当する場合、原則として反対を推奨する。 › ISS の独立性基準を満たさない監査等委員である社外取締役[10] › 株主総会後の取締役会に占める社外取締役[11]の割合が 3 分の 1 未満の場合、経営トップである取締役	**監査等委員会設置会社** 監査等委員会設置会社においては、監査役設置会社向け基準に加え、さらに下記に該当する場合、原則として反対を推奨する。 › ISS の独立性基準を満たさない監査等委員である社外取締役 [10] › 株主総会後の取締役会に占める社外取締役 [11] の割合が 3 分の 1 未満の場合、経営トップである取締役

[7] 日本では、多くの株主提案が特別決議事項である定款変更として提案されるため、過半数ではなく 3 分の 2 の支持を得なければ、株主提案は可決しない。
[8] 独立性は問わない。
[9] ただし、指名委員が独立性基準を満たす社外取締役の場合を除く。
[10] 監査等委員ではない「それ以外の社外取締役」については、ISS の独立性基準を満たさない場合でも、それを理由に反対を推奨しない。
[11] 独立性は問わない。

1. 監査役設置会社の取締役会の構成

ISS は監査役設置会社の取締役会構成基準について、社外取締役を 2 名以上求める現行の基準を改定し、社外取締役を 2 名以上かつ取締役に占める社外取締役の割合が 3 分の 1 以上であることを求める基準を 2022 年 2 月から導入することを検討しています。

改定の背景

2015 年に導入され 2018 年に改定されたコーポレートガバナンス・コードで 2 名以上の独立社外取締役の選任が求められ、一定の企業では独立社外取締役の割合を 3 分の 1 以上とすることを推奨されている影響もあり、日本企業の取締役会において社外取締役の占める割合は増加傾向にあります。こうした状況を鑑み、ISS は監査等委員会設置会社及び指名委員会等設置会社に対して、社外取締役が取締役の 3 分の 1 以上であることを求める基準を 2019 年 2 月に導入しました。

一方で ISS は監査役設置会社に対しては、社外取締役が取締役の 3 分の 1 以上であることは求めず、社外取締役を 2 名以上求める基準のみを適用してきました。これは指名委員会等設置会社や監査等委員会設置会社の取締役会は経営の「監督」が主な役割であるのに対し、多くの監査役設置会社の取締役会は経営の「執行」が主な役割であるという前提に立っていました。2019 年時点では、ISS 調査対象の監査役設置会社のうち、取締役に占める社外取締役の割合が 3 分の 1 以上の企業は 40%でした。しかしながら、2020 年 6 月現在では社外取締役の割合が 3 分の 1 以上である企業の割合は 53.7%と大きく増加しています。これは監査役設置会社においても、従来は経営の「執行」が主な役割であった取締役会の役割が変化していることを示唆しているとも言えます。

ポリシー改定の意図と予想される影響

2022 年 2 月からの導入を検討している新基準案では、現行の社外取締役 2 名以上を求める基準に加え、新たに取締役に占める社外取締役の割合を 3 分の 1 以上とすることを求めます。新基準案でも従前どおり、社外取締役の独立性は問いません。独立性は重要な概念です。しかし、現在の日本のコーポレートガバナンスの状況で社外取締役の独立性を重視しすぎると、企業が資質ではなく独立性の確保に過度に注力し、弁護士、会計士、学識経験者などマネジメント経験の少ない人物のみに社外取締役への就任を求めることにつながりかねません。取締役会の多様性の観点から、社外取締役がそのような人物のみで占められることは望ましいとは言えません。

もし 2020 年 6 月に新基準案を適用した場合、ISS 調査対象の監査役設置会社のうち 46.3%の企業が新基準案に抵触していました。しかしながら社外取締役の増加傾向を考えると新基準が施行される 2022 年 2 月までにはより多くの企業が基準を満たすことが予想されます。もし全ての監査役設置会社が社外取締役を 1 名追加で選任した場合、新基準案に抵触する ISS 調査対象の監査役設置会社は 23%にまで低下します。

2. いわゆる政策保有株式を過度に保有する企業への対応

ISS は、いわゆる政策保有株式の過度な保有が認められる企業（政策保有株式の保有額が純資産の 20%以上の場合）は、経営トップである取締役に対して反対を推奨する基準を 2022 年 2 月から導入することを検討しています。

改定の背景

資本の非効率的な配分や資本の空洞化など株式持ち合いに起因する問題は、日本のコーポレートガバナンス上最も大きな問題だと考えられています。日本では事業上の関係維持のため、顧客、調達先、借入先などの他の企業の株式を純投資以外の目的で保有する慣習が広く見られます。株式持ち合いのために投入された資本は本業の設備投資、事業買収、配当や自社株式取得などに充当することができず、株式を持ち合う行為は株主の長期的な利益に反する懸念があります。さらに常に会社提案議案に賛成する一方で株主提案には反対するように議決権が行使されるため、市場による規律の低下が懸念されます。また、政策保有株式の保有は資本生産性の低下を招くことがあります。資本生産性の低さが、数十年にわたる日本の株式投資の収益性の低さに影響しているとも指摘されます。

ポリシー改定の意図と予想される影響

2022 年 2 月からの導入を検討している新規基準案では、「保有目的が純投資目的以外の目的である投資株式」の貸借対照表計上額が純資産の 20%以上の場合、経営トップである取締役に反対を推奨します。いわゆる政策保有株式の情報が掲載される有価証券報告書は通常、定時株主総会後に提出されるため、判断に利用する情報は 1 年前のものです。例えば 2022 年 6 月に開催される定時株主総会を分析する際には、2021 年 6 月に提出された有価証券報告書の政策保有株式の情報を利用します。

なお、ISS が日本企業 1500 社を無作為に抽出し有価証券報告書を調査したところ、政策保有株式の保有額が純資産の 20%以上の企業は母集団の 7%であり、これらの企業が反対推奨の対象となる事が考えられます。

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日本取引所金融商品取引法研究　第 23 号 (2022.10)

0. 新型コロナウイルス感染症の影響を踏まえた対応

ISS は新型コロナウイルス感染症の世界的流行が議決権行使基準に与える影響を発表し、日本向けの議決権行使基準についても 2020 年 6 月 1 日より一部変更している。具体的には取締役選任議案における ROE 基準の適用停止、及び株主総会で継続会を選択した場合の剰余金処分、取締役選任、監査役選任、会計監査人選任、報酬の各議案の対応を変更している[1]。

詳細は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」[2]を参照の事。

1. 計算書類の承認

下記のいずれかに該当する場合を除き、原則として賛成を推奨する。

- 会計監査人が意見を表明しない、もしくは懸念を表明した場合
- 監査役（もしくは監査委員会や監査等委員会）が意見を表明しない、もしくは懸念を表明した場合
- 計算書類や監査手続きに懸念がある場合

解説

多くの市場において計算書類は株主総会決議事項だが、日本では通常は決議事項ではなく報告事項である。そのため、計算書類の承認が議案になることは特別な事態を示唆しており、議案を精査する必要がある。特別な事態とは、たとえば監査が招集通知の発送に間に合わない場合や、会計監査人や監査役が懸念を表明した場合等が挙げられる。

[1] ISS がこれらの対応を変更する場合は事前に発表する予定である。
[2] https://www.issgovernance.com/file/policy/active/asiapacific/Japan-Policy-Guidance-Impacts-of-COVID-19-Japanese.pdf

2. 剰余金の処分

下記のいずれかに該当する場合を除き、原則として賛成を推奨する[3]。

- 十分な説明がなく、配当性向が継続的に低い場合
- 配当性向があまりに高く、財務の健全性に悪影響を与えうる場合

解説

剰余金の処分は、多くの場合は株主総会決議事項だが、定款変更により剰余金処分を取締役会に授権することも可能であり、その場合は剰余金処分議案は総会議案として提案されない。また配当を支払わない場合も、多くの場合は剰余金処分議案が提案されない。

配当性向が 15%から 100%の場合、通常は賛成を推奨する。配当性向がその範囲にない場合、個別判断を行う。特に配当性向が 100%を超える場合は財務の健全性への影響を考慮し、議案の内容を精査する。

[3] ただし、新型コロナウイルス感染症の流行に伴い継続会を選択した場合は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき判断する。

3. 取締役選任

経営権の争いがない場合

ISS は会社の機関設計（監査役設置会社、指名委員会等設置会社、監査等委員会設置会社[4]）により、異なる助言基準を持つ。

監査役設置会社

監査役設置会社においては、下記のいずれかに該当する場合、原則として反対を推奨する。

- 資本生産性が低く（過去 5 期平均の自己資本利益率[ROE]が 5%を下回り）かつ改善傾向[5]にない場合[6]、経営トップ[7]である取締役[8]
- 株主総会後の取締役会に占める社外取締役[9]が 2 名未満の場合、経営トップである取締役
- 親会社[10]や支配株主[11]を持つ会社において、株主総会後の取締役会に占める (1) ISS の独立性基準を満たす社外取締役が 2 名未満の場合、または (2) ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合、経営トップである取締役
- 前会計年度における取締役会の出席率が 75%未満の社外取締役

なお、社外取締役が ISS の独立性基準を満たさないと判断された場合に、それのみを理由に ISS が当該社外取締役の選任に原則として反対の推奨をすることはない。

[4] 不動産投資法人(REIT)の役員選任議案には監査等委員会設置会社の基準を準用し、執行役員には「監査等委員ではない取締役」、監督役員には「監査等委員である社外取締役」の基準をそれぞれ適用する。
[5] 過去 5 期の平均 ROE が 5%未満でも、直近の会計年度の ROE が 5%以上ある場合を指す。
[6] この ROE 基準は最低水準であり、日本企業が目指すべきゴールとの位置づけではない。
[7] 経営トップとは通常、社長、会長を指す。
[8] ただし、現在は ROE 基準は「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき適用を一時的に停止している。
[9] 独立性は問わない。
[10] 原則として財務諸表等規則で定義される「親会社」を指す。
[11] 原則として上場規則で定義される「支配株主」を指す。

指名委員会等設置会社

指名委員会等設置会社においては、下記のいずれかに該当する場合、原則として反対を推奨する。

- 資本生産性が低く（過去 5 期平均の自己資本利益率[ROE]が 5%を下回り）かつ改善傾向にない場合、経営トップである取締役
- 株主総会後の取締役会に占める社外取締役[12]の割合が 3 分の 1 未満の場合、経営トップである取締役
- 親会社や支配株主を持つ会社において、株主総会後の取締役会に占める (1) ISS の独立性基準を満たす社外取締役が 2 名未満の場合、または (2) ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合、経営トップ及び指名委員である取締役[13]
- 株主総会後の取締役会の過半数が独立していない場合、ISS の独立性基準を満たさない社外取締役
- 前会計年度における取締役会の出席率が 75%未満の社外取締役、及び監査委員会の出席率が 75%未満の監査委員である社外取締役

監査等委員会設置会社

監査等委員会設置会社においては、下記のいずれかに該当する場合、原則として反対を推奨する。

- 資本生産性が低く（過去 5 期平均の自己資本利益率[ROE]が 5%を下回り）かつ改善傾向にない場合、経営トップである取締役
- 株主総会後の取締役会に占める社外取締役[14]の割合が 3 分の 1 未満の場合、経営トップである取締役
- 親会社や支配株主を持つ会社において、株主総会後の取締役会に占める (1) ISS の独立性基準を満たす社外取締役が 2 名未満の場合、または (2) ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合、経営トップである取締役
- ISS の独立性基準を満たさない監査等委員である社外取締役[15]
- 前会計年度における取締役会の出席率が 75%未満の社外取締役、及び監査等委員会の出席率が 75%未満の監査等委員である社外取締役

[12] 独立性は問わない。
[13] ただし、指名委員が独立性基準を満たす社外取締役の場合を除く。
[14] 独立性は問わない。
[15] 「監査等委員ではない社外取締役」については、ISS の独立性基準を満たさない場合でも、それを理由に反対を推奨しない。

業績不振・企業不祥事・株主の利益に反する行為など

また、特別な状況においては、機構設計に関わらず、下記のような理由から、個別の取締役、委員会の委員、あるいはすべての取締役に反対を推奨することがある。

- ガバナンス、受託者としての責任、リスク管理などに重大な問題が認められる場合[16]
- 経営陣の入れ替えが必要とされるにもかかわらず、それを怠った場合
- 他社での取締役や監査役としての行動に重大な懸念があるなど、当会社の取締役としての適性に大きな懸念がある場合
- 少数株主にとって望ましいと判断される株主提案が過半数の支持を得たにもかかわらず、その提案内容を実行しない、あるいは類似の内容を翌年の株主総会で会社側提案として提案しない場合、経営トップである取締役

独立性基準

ISS の独立性の基本的な考え方は「会社と社外取締役や社外監査役の間に、社外取締役や社外監査役として選任される以外に関係がないこと」である。日本企業においては、たとえば、下記のケースでは多くの場合、独立していないと判断される。

- 会社の大株主である組織において、勤務経験がある
- 会社の主要な借入先において、勤務経験がある
- 会社の主幹事証券において、勤務経験がある
- 会社の主要[17]取引先である組織において、勤務経験がある
- 会社の監査法人において、勤務経験がある
- コンサルティングや顧問契約などの重要な[18]取引関係が現在ある、もしくは過去にあった
- 親戚が会社に勤務している
- 会社に勤務経験がある
- 会社が政策保有目的で保有すると判断する投資先組織[19]において、勤務経験がある

[16] 株価の極端な下落や業績の大幅な悪化など経営の失敗が明らかな場合、企業不祥事が発生した場合、株主の利益に反する行為に責任があると判断される場合をさす。
[17] 主要かどうかは、会社と取引先の双方から見た取引の規模から判断する。取引が売上に占める比率等、具体的に開示されることが望ましい。そのような開示がない場合（たとえば取引の有無しか言及されない、取引規模が単に「僅少」としか開示されない）は、独立性があるとは判断できない。
[18] 重要かどうかは、会社と取引先の双方から見た取引の規模から判断する。取引額等、具体的に開示されることが望ましい。そのような開示がない場合（たとえば取引の有無しか言及されない、取引規模が単に「僅少」としか開示されない）は、独立性があるとは判断できない。
[19] 政策保有株式の定義には有価証券報告書掲載の「保有目的が純投資目的以外の目的である投資株式」を用いる。

経営権の争いがある場合

経営権の争いがある場合[20]は、下記の観点に基づき、会社提案・株主提案とも個別判断する。

- 同業種他社と比較した、長期で見た会社の経営成績
- 現経営陣の実績
- 経営権に争いが生じた背景
- 候補者の経歴・資格・資質
- 株主が提案する経営戦略及び現経営陣に対する批判の妥当性
- 両サイド（現経営陣及び提案株主）の提案の実現可能性
- 株主構成（現経営陣及び提案株主の株式保有状況）

[20] たとえば経営権の争いを理由とする株主提案による取締役選任議案が提案され、プロキシー・ファイトの状態にある場合などを指す。

解説

資本生産性基準

日本企業の資本生産性は欧米企業と比較して一般的に低く、これは日本における株式投資の収益性が数十年にわたり低く推移している一因とも言われる。資本生産性が低い要因として、過大な内部留保、株式持合い、不採算事業からの撤退などの事業再編への消極姿勢などが挙げられる。日本の規制当局や、ROE を取締役選任議案の賛否判断に勘案する機関投資家は、資本生産性の低迷を深刻な問題と認識している。

ISS が ROE の基準を 5%と定めたのは、日本企業に投資する機関投資家との議論に基づき、日本の株式市場のリスクプレミアム等を考慮し、投資家が許容できる最低限の資本生産性の水準との判断による。ROE5%は最低水準であり、日本企業が目指すべきゴールとの位置づけではない。

政策保有株式保有基準（2022 年 2 月導入予定）

資本の非効率的な配分や資本の空洞化など株式持ち合いに起因する問題は、日本のコーポレートガバナンス上最も大きな問題だと言われている。日本では事業上の関係維持のため、顧客、調達先、借入先などの他の企業の株式を純投資以外の目的で保有する慣習が広く見られる。株式持ち合いのために投入された資本は本業の設備投資、事業買収、配当や自社株式取得などに充当することができず、株式を持ち合う行為は株主の長期的な利益に反する懸念がある。さらに常に会社提案議案に賛成する一方で株主提案には反対するように議決権が行使されるため、市場による規律の低下が懸念される。また、政策保有株式の保有は資本生産性の低下を招くことがある。資本生産性の低さが、数十年にわたる日本の株式投資の収益性の低さに影響しているとも指摘される。

そのため、いわゆる政策保有株式の過度な保有が認められる企業（政策保有株式の保有額が純資産の 20%以上の場合）は、経営トップである取締役に対して反対を推奨する基準を 2022 年 2 月から導入する。

具体的には、「保有目的が純投資目的以外の目的である投資株式」の貸借対照表計上額が純資産[21]の 20%以上の場合、経営トップである取締役に反対を推奨する。いわゆる政策保有株式の情報が掲載される有価証券報告書は通常、定時株主総会後に提出されるため、判断に利用する 情報は 1 年前のものである。例えば 2022 年 6 月に開催される定時株主総会を分析する際には、2021 年 6 月に提出された有価証券報告書の政策保有株式の情報を利用する。

なお、ISS が日本企業 1500 社を無作為に抽出し有価証券報告書を調査したところ、政策保有株式の保有額が純資産の 20%以上の企業は母集団の 7%であり、これら の企業が反対推奨の対象となる事が考えられる。

[21] 会計基準として IFRS を採用している場合は資本合計を用いる。

取締役会構成

他市場との比較において、日本の取締役会の独立性の低さは際立っている。しかしコーポレートガバナンス・コードの導入や会社法の改正により、この状況は近年大きく変化している。図 2 が示すように、2020 年 1～6 月に株主総会を開催した ISS 調査対象の日本企業（約 2600 社）のうち、89.8%で複数の社外取締役が選任された。大企業ではその傾向が顕著であり、TOPIX 100 構成企業では全企業で社外取締役が複数選任され、88.0%の企業では社外取締役が取締役会の 3 分の 1 以上を占めている。

図 1: 取締役会独立性の国際比較[22]

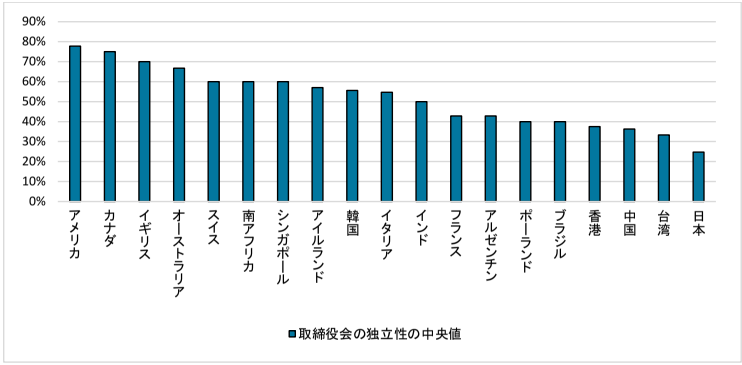
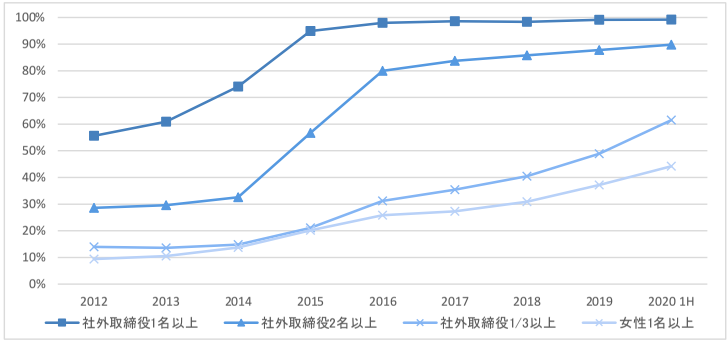


図 2: 日本における社外取締役及び女性取締役の導入の推移[23]



[22] 母集団は ISS が 2020 年に調査対象とした企業のうち一定数以上の顧客が保有する企業。
[23] 母集団は ISS が調査対象とした日本企業。2020 年は 6 月末時点。

2018 年に改訂されたコーポレートガバナンス・コードは全ての企業に最低 2 名の独立社外取締役を求めている。また機関設計を含む個々の企業の置かれた状況を勘案した上で、3 分の 1 以上の独立社外取締役の選任についても言及している。そのため、ISS は最低限の基準として全ての上場企業において社外取締役を最低 2 名求め、基準を満たさない場合は経営トップである取締役に反対を推奨する。

また、機関設計として指名委員会等設置会社及び監査等委員会設置会社を採用した企業は、監督と経営の分離を目指していると解釈でき、それらの企業に監査役設置会社よりも多くの社外取締役を求めることは合理的である。そのため、指名委員会等設置会社及び監査等委員会設置会社では、株主総会後の取締役会に占める社外取締役の割合が 3 分の 1 未満である場合、経営トップである取締役に反対を推奨する。

なお、前述した基準では社外取締役の独立性は問わない。独立性は重要であるが、現在の日本のコーポレートガバナンスの状況で独立性を重視しすぎると、企業が資質ではなく独立性の確保に過度に注力し、弁護士、会計士、学識経験者などマネジメント経験の少ない人物のみに社外取締役への就任を求めることにつながる懸念がある。そのような背景を持つ人物が社外取締役に選任されることを否定するものではないが、取締役会の多様性の観点から、社外取締役全員がそのような人物のみで占められることは望ましいとはいえない。

監査役設置会社の取締役会構成基準（**2022** 年 **2** 月改定予定）

前記の通り、現在 ISS は監査役設置会社に対しては、社外取締役が取締役の 3 分の 1 以上であることは求めず、社外取締役を 2 名以上求める基準のみを適用している。これは指名委員会等設置会社や監査等委員会設置会社の取締役会は経営の「監督」が主な役割であるのに対し、多くの監査役設置会社の取締役会は経営の「執行」が主な役割であるという前提に立っていた。

実際、2019 年時点では、ISS 調査対象の監査役設置会社のうち、取締役に占める社外取締役の割合が 3 分の 1 以上の企業は 40%であった。しかしながら、2020 年 6 月現在では社外取締役の割合が 3 分の 1 以上である企業の割合は 53.7%と大きく増加している。これは監査役設置会社においても、従来は経営の「執行」が主な役割であった取締役会の役割が変化していることを示唆しているとも言える。さらに、今年予定されるコーポレートガバナンス・コードの改訂では、独立社外取締役の割合を 3 分の 1 以上とすることを求める方向で議論が進んでいる。

そのため、監査役設置会社においても、2022 年 2 月より、指名委員会等設置会社や監査等委員会設置会社と同様に株主総会後の取締役会に占める社外取締役の割合が 3 分の 1 未満である場合、経営トップである取締役に反対を推奨する。

もし 2020 年 6 月に新基準案を適用した場合、ISS 調査対象の監査役設置会社のうち 46.3%の企業が新基準案に抵触していた。しかしながら社外取締役の増加傾向を考えると新基準が施行される 2022 年 2 月までにはより多くの企業が基準を満たすことが予想される。もし全ての監査役設置会社が社外取締役を 1 名追加で選任した場合、新基準案に抵触する ISS 調査対象の監査役設置会社は 23%にまで低下する。

独立性基準を満たさない社外取締役及び社外監査役への賛否推奨

一部の機関投資家は、独立性に懸念のある社外取締役に一律に反対する。社外取締役は独立性を有するべき、との原則論に基づく判断と推察されるが、それはむしろ逆効果といえる。日本の現状を考えると、全ての社外取締役に独立性を求めると、「取締役会構成」で述べた問題が生じる。一方で投資家が、監査を担当する社外取締役及び社外監査役に独立性を求めることは、経営から独立した立場を求められる監査の性質上、妥当である。

監査役設置会社

そのため、ISS は監査役設置会社において、独立性がないという理由だけでは、社外取締役に反対しない。社外取締役に独立性を求めると、企業が候補者を選ぶにあたり形式上の独立性にのみ注力し、候補者の資質が軽視される懸念があるからである。

一方、監査役設置会社で監査を担当する監査役には独立性を求め、ISS の独立性基準を満たさない社外監査役に反対を推奨する。

指名委員会等設置会社

指名委員会等設置会社は海外で普及した制度であるため、海外の投資家に理解されやすい利点がある。この統治形態を採用すれば、最低でも 2 名の社外取締役を選任する法的義務が生じる。指名委員会等設置会社で監査を担当するのは社外取締役が過半数を占める監査委員会であるが、監査委員は株主総会後の取締役会で選定され、株主総会時点ではわからない。そのため、全ての社外取締役に独立性を求めることは妥当である。ISS は株主総会後の取締役会の過半数が独立していない場合、ISS の独立性基準を満たさない社外取締役に反対を推奨する。

監査等委員会設置会社

監査委員会のみを設置し、指名委員会や報酬委員会を設置しない委員会型の企業統治機構は新興国を中心に普及している。監査委員会のみを設置するスタイルは、日本特有の制度ではない。よって、監査等委員会設置会社の取締役会を、たとえば"board with an audit committee"のように実態面に着目して翻訳して説明すれば、海外で普及した制度と類似の制度であることが明確となり、海外投資家の混乱を避けることが期待できる。

監査等委員会設置会社では、「監査等委員である取締役」と「監査等委員でない取締役」を区別して選任することが求められる。「監査等委員である取締役」のうち最低でも 2 名は社外取締役を選任する義務があるのに対して、「監査等委員でない取締役」に社外取締役を選任する義務はない。

そのため、監査を担当する「監査等委員である社外取締役」には独立性に懸念がある場合は反対を推奨する。一方、「監査等委員でない社外取締役」に対して独立性の懸念を理由に反対を推奨することは、「監査等委員でない取締役」に社外取締役を選任するインセンティブを減じ、ガバナンスの向上には逆効果となる。よって、反対を推奨しない。

独立性基準

取締役や監査役の独立性は、経営陣からの独立を意味する。ISS の独立性に対する基本的な考え方は「会社と社外取締役や社外監査役の間に、社外取締役や社外監査役として選任される以外に関係がないこと」である。どのような関係が独立性に影響を与えるかは、国や地域の法令、上場規則、文化、習慣などによって異なる。そのため、ISS は市場ごとに異なる独立性の基準を定めている。一部の市場では、投資家・発行体・規制当局のコンセンサスを得た独立性基準が存在する。そのような場合 ISS はその基準に準拠して独立性を判断することもある。しかし日本にそのような基準は存在しない[24]。

取引・コンサルティング

大株主や主要な借入先については、投資家が求める一定の情報が開示ルールに基づき招集通知に開示されているが、取引やコンサルティングの関係についてはそのような開示は義務付けられていない。よって、投資家が独立性を判断できるように、具体的な取引規模を開示することが重要である。単に取引の有無しか言及していない場合や規模が「僅少である」など具体的に開示されていない場合は、株主に必要な情報が開示されておらず独立性があると判断できない。

クーリングオフ期間

独立性の判断にあたり、投資家がクーリングオフ期間の考え方を適用するには社外役員の候補者が母体企業を退社した時期に関する情報が不可欠である。しかし会社が開示する略歴には退社年月が明記されていないことが多く、それがクーリングオフ期間の適用を困難にする。よって、退社後の経過期間を理由に独立性に疑念はない、と企業が主張するには退社年月の明記が重要である。

ISS はクーリングオフ期間について、一律の数値基準は用いずに個々の候補者の経歴を総合的に勘案し、個別判断を行う。

投資家がクーリングオフ期間の妥当性を検討するにあたっては、市場毎の働き方の違いを考慮することが重要である。米国のように労働市場の流動性が高い市場であれば、母体企業から退社後数年で独立性に懸念がなくなるとの議論は一定の説得力がある。他方、日本の労働市場は流動性が低く、経営幹部のほとんどが大学新卒で企業に入社し退職するまでその同じ企業に勤めることが多い。そのような習慣が一般的である日本においては、社外取締役や社外監査役が母体企業から退社後数年から十数年で独立性の懸念がなくなるとは考えにくい。[25]

会社独自の独立性基準

コーポレートガバナンス・コードの要請もあり、会社が独自の独立性基準を設けるケースが増えている。会社が独自に社外役員の独立性を検討することは望ましいが情報開示に改善の余地がある。たとえば、取引やコンサルティングの規模のような投資家が独立性の判断に必要とする数値基準を、会社独自の独立性基準のみに記載し、参考書類の候補者の欄には具体的な内容を記載せず、「当社の独立性基準を満たしている」旨のみを記載するケースがある。

[24] 東京証券取引所は独立役員制度に基づく独立性基準を設けているが投資家が違和感を持つ基準が含まれるため、投資家の利用は広がっていない。たとえば、大株主出身者でも親会社出身者でない限りは独立役員に指定することが可能である、などの問題が指摘される。
[25] 一方で、例えば 20 代で母体企業を退職し、母体企業とは無関係なキャリアを経たような人物の場合、十数年のクーリングオフ期間があれば、独立性の懸念は低いと考えられる。

このような情報開示の問題は、会社独自の独立性基準と投資家の独立性基準が一致しないことに起因する。たとえば投資家と企業が適切と考えるクーリングオフ期間は異なる。企業による独立性基準は当該事業年度のみ、あるいは過去 3 事業年度程度までを対象とするのが一般的だが、その程度のクーリングオフ期間を十分と考える投資家は少ない。つまり会社独自の独立性基準を満たす候補者が、投資家にとって独立性を有するとは限らないのである。投資家は自社の独立性基準に照らして候補者の独立性を判断するため、「会社独自の独立性基準を満たしている」旨の記載だけに基づきその候補者が独立性を有すると判断できない[26]。そのため、参考書類の個々の候補者の欄に具体的な取引規模を記載することが重要である。

政策保有株式基準

コーポレートガバナンス・コードは政策保有株式の縮減と、資本コストと個別の政策保有株式の保有便益・リスクが見合っているか、その検証を求めている。政策保有株式に投入された資本は、本業の投資活動に活用されず株主還元にも充填されない。政策保有株式は資本生産性の低下を招くことがある。資本生産性の低さが、数十年にわたる日本の株式投資の収益性の低さに影響しているとも指摘される。

日本では事業上の関係維持のため、純投資目的以外の目的で他企業の株式を保有する慣習が広く見られるが、このような株式の政策保有、特に株式の持ち合いの元では資本の空洞化が生じる。また、常に会社提案議案に賛成する一方で株主提案には反対するように議決権が行使されるため、市場による規律の低下が懸念される。政策保有株式の相手企業出身の社外役員に独立性があると判断することは困難である。そのため、政策保有銘柄企業出身の社外取締役及び社外監査役は独立性がないと判断する。

なお、政策保有株式の判断には、有価証券報告書掲載の「保有目的が純投資目的以外の目的である投資株式」を用いる。有価証券報告書は通常、定時株主総会後に提出されるため、判断に利用する情報は当該決算期末から 1 年前の情報である。例えば 2020 年 6 月に開催される定時株主総会議案を分析する際には、2019 年 6 月に提出された有価証券報告書の政策保有株式の情報を利用する。

独立役員届出書の取扱い

ISS はこれまで独立性の判断にあたり、重要な資料として独立役員届出書を可能な範囲で参照してきた。しかし下記の理由により、独立役員届出書を参照することに否定的な意見を持つ投資家は少なくない。

- 株主総会での賛否決定にあたり投資家が考慮すべき情報はすべて招集通知に記載すべきである。
- 正式な機関決定を経ている招集通知と異なり、独立役員届出書は情報の確度が低く、独立役員届出書を参照すると適切な判断が出来ない懸念がある。
- 半数以上の企業が独立役員届出書を招集通知より後に提出するため、議決権行使の時点で、最新の独立役員届出書を参照できないことが多い。

また、東京証券取引所の上場規則は「上場内国株券の発行者は独立役員に関する情報及び（中略）社外役員の独立性に関する情報を株主総会における議決権行使に資する方法により株主に提供するよう努めるものとする」と規定し、招集通知の役員選任議案に独立役員届出書に記載した内容の概要を記載することが推奨されている。その結果、97%の企業では招集通知に独立役員に関する記載をしている[27]。

[26] このような理由から、ISS は会社独自の独立性基準に書かれた情報は考慮せず、参考書類の個々の候補者に記載された情報に基づき独立性を判断する。
[27] 旬刊商事法務 no.2216 (12 月 5 日号) p78 2019 年版株主総会白書 図表 60 による。

こうした投資家の意見、取引所の規定や企業の開示動向をふまえ、ISS は 2020 年 2 月以降、社外役員の独立性の判断にあたり独立役員届出書を参照しないこととした。

親会社や支配株主を持つ会社

親会社や支配株主を持つ会社の場合、少数株主の保護が特に重要である。また、日本政府の成長戦略実行計画や経済産業省の「グループ・ガバナンス・システムに関する実務指針」でも、「取締役会における独立社外取締役の比率を高めること(1/3 以上や過半数等)」が求められている。

そのため、2020 年 2 月より基準を強化し、親会社や支配株主を持つ会社において、総会後の取締役会に占める、ISS の独立性基準を満たす社外取締役が 2 名未満の場合、または ISS の独立性基準を満たす社外取締役の割合が 3 分の 1 未満の場合、経営トップである取締役の選任に反対を推奨する。さらに、親会社や支配株主を持つ指名委員会等設置会社が上記の基準を満たさない場合、指名委員である取締役[28]の選任にも反対を推奨する。

出席率

社外取締役が経営に対する監督として効果的に機能するには、積極的に取締役会の議論に参加する必要がある。そのため、ISS は社外取締役の取締役会への出席率に注視する。合理的な理由[29]がなく、社外取締役の取締役会への出席率が 75%未満の場合、原則として再任に反対を推奨する。

また、指名委員会等設置会社の監査委員である社外取締役の監査委員会の出席率が 75%未満の場合、監査等委員会設置会社の監査等委員である社外取締役の監査等委員会の出席率が 75%未満の場合にも反対を推奨する。

業績不振や企業不祥事

株価の極端な下落や業績の大幅な悪化など経営の失敗が明らかな場合や、不正や犯罪行為などの不祥事があった場合など、株主価値が毀損したと判断される場合は、取締役選任議案に反対を推奨することを検討する。その際は財務への影響、当局や証券取引所による処分、株価の反応や企業の評判への影響などを考慮する。

株主の利益に反する行為

取締役選任議案を検討する際には、下記のような株主の利益に反する行為も考慮する。

- 株主総会決議のない買収防衛策の導入
- 株主総会決議のない過大な希薄化を伴う第三者割当増資
- 合理的な説明のない大規模な公募増資
- 過半数の支持を得た株主提案を無視した場合

[28] ただし、指名委員が独立性基準を満たす社外取締役の場合を除く。
[29] 「多忙」や「海外在住」などは合理的な理由とは判断できない。

4. 監査役選任

下記のいずれかに該当する場合を除き、原則として賛成を推奨する。

- ISS の独立性基準[30]を満たさない社外監査役
- 前会計年度における取締役会もしくは監査役会の出席率がどちらか一方でも 75%未満である社外監査役
- 株主の利益に反する行為に責任があると判断される監査役
- 他社での取締役や監査役としての行動に重大な懸念があり、当会社の監査役としての適性に大きな懸念がある場合

解説

ISS は、独立した監査役が経営を監督することは、より良い日本のコーポレートガバナンスに不可欠であると考える。約 4 分の 3 の上場企業は、監査役設置会社を選択しており、その場合は社外取締役の選任義務はない。コーポレートガバナンス・コードの導入により、社外取締役を導入する企業は増加しているが、多くの日本企業においては、取締役会は実質的に業務執行者による経営会議体として位置づけられている。よって、経営に対する監督機能は不十分ではあるが、監査役会が担うことになる。

日本企業の取締役会に独立社外取締役が少ないことを考慮すれば、独立した社外監査役の役割は重要である。そのため、ISS の独立性基準を満たさない社外監査役の選任には反対を推奨する。取締役と異なり、監査役の半数は社外監査役で構成される義務があるため、社外監査役の選任が否決された場合、企業は別の社外監査役の確保を迫られる[31]。監査役会の最小構成人数は 3 名なので、企業は最低でも 2 名の社外監査役をおく必要がある。

社外取締役と同様に、社外監査役についても出席率は重要である。合理的な理由がなく、社外監査役の取締役会もしくは監査役会への出席率がどちらか一方でも 75%未満である場合、原則として再任に反対を推奨する。

また、株主価値の毀損を伴う不正や犯罪行為などの企業不祥事があった場合や本人の適性に大きな懸念がある場合は、反対の推奨を検討する。

[30] 監査役の独立性基準は取締役の独立性基準と同様である。
[31] 独立していない社外監査役の選任が否決され、代わりに独立している社外監査役が選任された事例がある。

5. 定款変更

定款変更は複数の変更内容がある場合でも、ほとんどの場合、それらは単一の議案にまとめられる。反対を推奨すべき内容がひとつでも含まれる場合、ISS は原則としてその議案に反対を推奨する[32]。下記は主な定款変更への助言基準である。

目的事項の変更
下記に該当する場合を除き、原則として賛成を推奨する。
- 継続して企業の業績に問題があり、本業と無関係のリスクの高い分野への参入を求める場合
- あらゆる事業分野への参入を求める場合

指名委員会等設置会社への移行
原則として賛成を推奨する。

監査等委員会設置会社への移行
原則として賛成を推奨[33]する。ただし指名委員会等設置会社から監査等委員会設置会社に移行する場合、個別に判断する。

授権資本の増加
授権枠増加の具体的な理由[34]が開示されている場合、個別に判断する。そうでなければ、下記のいずれかに該当する場合、原則として反対を推奨する。
- 提案された授権枠の増加分が現在の授権枠の 100%を越える場合
- 発行済株式総数が増加後の授権枠の 30%未満となる場合
- ISS が反対を推奨する買収防衛策を目的とする場合

種類株式の創設、変更
個別に判断する。

[32] 定款の変更内容が複数におよぶ場合、特に機関投資家が問題視することが多い変更内容（たとえば配当の取締役会授権関連、買収防衛策関連や授権枠関連など）がある場合、定款変更をそれぞれ個別の議案として提案するほうが株主の意見がより適切に反映される。
[33] 監査等委員会設置会社における重要な業務執行の決定の取締役への委任については、原則として賛成を推奨する。
[34]「機動的な資本政策」のような抽象的な説明ではなく、具体的な理由の説明が求められる。たとえば買収、合併、第三者割当増資に伴う授権資本の増加の場合はそれらの妥当性に基づき判断を行う。

自己株式取得の取締役会授権
下記の観点に基づき、個別判断する。
- バランスシートの状況
- 資本生産性と ROE
- 過去の自社株取得と配当の状況
- 取締役会構成
- 株主構成
- その他考慮すべき事項

ただし自己株式取得の株主提案権が排除される場合は、原則として反対を推奨する。

株主の権利行使の手続き
株主の権利行使の手続きを株式取扱規程に委ねることには、原則として反対を推奨する。

単元未満株主の権利制限
原則として賛成を推奨する。

株主総会の定足数の緩和
原則として反対を推奨する。

買収防衛策関連の変更
買収防衛策に関連する定款変更は、その企業の買収防衛策に賛成を推奨する場合を除き、原則として反対を推奨する。

取締役会の定員の減少
下記に該当する場合を除き、原則として賛成を推奨する。
- 株主総会後の取締役の人数と員数が同数となる場合[35]

取締役解任の要件加重
原則として反対を推奨する。

取締役の任期の短縮
原則として賛成を推奨する。

取締役の期差任期制の導入
原則として反対を推奨する。

[35] 取締役の実際の人数と定員数が同じであれば、株主が推薦する取締役候補を新たに選任させるには、現在の取締役をまず解任する必要が生じる。よって、株主提案による取締役選任が困難になるため、買収防衛目的と解される。

取締役、監査役の責任減免の取締役会授権及び責任限定契約
原則として賛成[36]を推奨する。

相談役[37]制度の新設
下記に該当する場合を除き、原則として反対を推奨する。
- 取締役の役職として提案される場合

会計監査人の責任減免の取締役会授権及び責任限定契約
原則として反対を推奨する。

剰余金配当の取締役会授権
下記に該当する場合を除き、原則として反対を推奨する。
- 指名委員会等設置会社もしくは監査等委員会設置会社（それら形態への移行が提案される場合も含む）で、かつ配当の株主提案権が排除されない場合

株主総会の分散化を目的とする定時株主総会の基準日の変更
原則として賛成を推奨する。

非公開化（Management Buyout 等）関連の定款変更
個別に判断する。

解説

日本企業の企業統治構造は大部分が定款により定められている。定款変更議案では、授権資本枠の増加などの資本構造や、取締役会の規模や構成に関する変更など、様々な内容が提案される。買収防衛策に関連する変更が提案されることがある。定款により取締役会に（剰余金処分、自社株取得などの）特定事項の権限が授権された場合、そのような事項は通常は株主総会の議案にならない。そのため、取締役会に権限を授権する議案は精査が必要とされる。

[36] 2015 年会社法改正で新たに導入された、非業務執行取締役及び社外監査役でない監査役に対する責任限定契約を含む。
[37]「相談役」に限らず、活動の実態が見えにくい名誉職的なポストが本ポリシーの対象である。たとえば、顧問、名誉会長、ファウンダーなど。

6. 役員賞与

下記に該当する場合を除き、原則として賛成を推奨する[38]。

- 株価の極端な下落や業績の大幅な悪化など経営の失敗が明らかな場合や、株主の利益に反する行為に責任があると判断される者が対象者に含まれる場合

解説

取締役や監査役の賞与支給は取締役会で決定できるが、あえて株主の承認を求める企業もある。そのため、株主承認を求めること自体をプラスに評価すべきである。さらに、日本では賞与額が過大であることはほとんどなく、通常 ISS は賛成を推奨する。しかし、業績が極端に悪い場合、株価が大幅に下落した場合、企業不祥事がある場合は、反対の推奨を検討する。

[38] ただし、新型コロナウイルス感染症の流行に伴い継続会を選択した場合は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき判断する。

7. 退職慰労金／退職慰労金制度廃止に伴う打ち切り支給

下記のいずれかに該当する場合を除き、原則として賛成を推奨する。

- 対象者に社外取締役もしくは社外監査役が含まれる場合[39]
- 個別の支給額もしくは支給総額が開示[40]されない場合
- 株価の極端な下落や業績の大幅な悪化など経営の失敗が明らかな場合や、株主の利益に反する行為に責任があると判断される者が対象者に含まれる場合

解説

社外取締役や社外監査役が退職慰労金の支給を期待すれば、経営陣に厳しい発言をすることが困難になる。そのため、ISS は社外取締役や社外監査役への退職慰労金の支給には反対を推奨する。さらに、個別の支給額もしくは支給総額が開示されない場合、ISS は反対を推奨する。また、極端な業績の悪化や株価の下落、企業不祥事などの株主価値の毀損に責任があると認められる対象者への支給は好ましくない。

[39] ただし、社外取締役や社外監査役の支給額が個別開示され、それが過大でない場合は、例外的に賛成の推奨を検討する。
[40] 具体的な個別開示が望ましいが、総額開示や「最大○万円」のような記述も、開示されていると判断する。

8. ストックオプション／報酬型ストックオプション／株式報酬

ストックオプション

下記のいずれかに該当する場合を除き、原則として賛成を推奨する[41]。

- 提案されているストックオプションと発行済ストックオプション残高を合計した希薄化[42]が、成熟企業で 5%、成長企業で 10%を超える場合
- 対象者に取引先や社外協力者など、社外の第三者[43]が含まれる場合
- 提案されるオプションの対象となる上限株数が開示されない[44]場合

報酬型ストックオプション[45]／株式報酬[46]

下記のいずれかに該当する場合を除き、原則として賛成を推奨する[47]。

- 提案されているストックオプションや株式報酬と発行済ストックオプション残高を合計した希薄化が、成熟企業で 5%、成長企業で 10%を超える場合
- 対象者に取引先や社外協力者など、社外の第三者が含まれる場合
- 提案されるオプションや株式報酬の対象となる上限株数が開示されない場合
- 行使条件として、一定の業績を達成すること[48]が条件となっていない場合（ただし行使条件として、付与から 3 年間未満は行使が禁止されている場合、あるいは退職前の行使が禁止されている場合は、業績条件がなくとも例外的に反対を推奨しない）

解説

日本の役員報酬は固定報酬が多くの割合を占めるため、役員の利益と株主利益との連動性が低い。そのため、原則的にはストックオプション制度のような業績連動型報酬の導入は促進されるべきである。しかし、ストックオプションは制度設計次第で、少数株主に不利益をもたらすことがある。ISS はストックオプションを評価する際、希薄化・対象者・行使期間・行使価格・行使を可能とする業績条件などを考慮する。

希薄化は重要な評価ポイントであるが、日本企業、特に大企業において希薄化が過度であるケースは皆無である。重要な点は、ストックオプションの付与対象者と少数株主の利益が同じ方向に連動される仕組みかどうかである。そのため、特に報酬型ストックオプションを評価する際は、行使を可能とする業績条件が設定され、それが開示されているかに注視する。

[41] ただし、新型コロナウイルス感染症の流行に伴い継続会を選択した場合は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき判断する。
[42] 1 年間に限定されることなく、取締役会決議のみで毎年継続的にストックオプションを発行できるように、役員報酬枠として承認を求める議案の場合、今後 10 年間にわたり毎年付与可能最大数が付与されると仮定し、希薄化を計算する。
[43] 社外取締役や社外監査役は社外の第三者とは扱わない。
[44] 役員報酬枠として承認を求める議案で、新株予約権の価額のみが記載され、新株予約権の目的である株式の上限が開示されない場合を指す。
[45] 行使価格が 1 円のストックオプションを指す。
[46] 信託や譲渡制限株式などを利用する報酬を指す。
[47] ただし、新型コロナウイルス感染症の流行に伴い継続会を選択した場合は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき判断する。
[48] たとえば、経営計画における目標が考えられる。

9. 取締役報酬枠の増加

下記のいずれかに該当する場合は、原則として賛成を推奨する。

- 増加の具体的な理由が説明されている
- 業績連動報酬の導入や増加を目的とする

下記のいずれかに該当する場合は、株価パフォーマンスや資本の効率性を考慮し、個別判断する[49]。

- 固定報酬の増加を目的とする
- 業績連動報酬の導入や増加を目的とするかどうかが不明である

また、原則として、株価の極端な下落や業績の大幅な悪化など経営の失敗が明らかな場合や、株主の利益に反する行為があると判断される場合は、反対を推奨する。

解説

日本の報酬の問題は絶対額ではなく、株主価値創造との連動性の低さにある。業績には連動しない現金による月例の固定報酬や退職慰労金が取締役の報酬の大きな部分を占める[50]。一方で、業績連動報酬の比率は低い。さらに、日本ではストックオプションのような株式ベースのインセンティブ報酬はまだ一般的とは言えない。

ISSの基準は業績連動報酬の促進を意図する。したがって、業績連動報酬の導入や増加を目的とする報酬枠の増加は、基本的に支持する。しかし、固定報酬枠の増加を求める場合、あるいは業績連動報酬の導入や増加を目的とするかどうかが不明な場合は、自己資本利益率（ROE）に代表される資本の生産性やその傾向、株主総合利回り（Total Shareholder Return）等を考慮し、個別判断する。

[49] ただし、新型コロナウイルス感染症の流行に伴い継続会を選択した場合は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき判断する。
[50] 2019 年のペイガバナンスの調査によれば、日本の TOPIX Core 100 企業の CEO 報酬の 52%が固定報酬であり、これは日本の役員報酬の問題点である株主価値創造との連動性の低さを示す。

10. 監査役報酬枠の増加

下記に該当する場合を除き、原則として賛成を推奨する。

- 株主の利益に反する行為に責任があると判断される場合

11. 会計監査人の選任

下記に該当する場合を除き、原則として賛成を推奨する[51]。

- 会計監査人の変更に関して重大な懸念がある

[51] ただし、新型コロナウイルス感染症の流行に伴い継続会を選択した場合は、「新型コロナウイルス感染症の世界的流行を踏まえた ISS 日本向け議決権行使基準の対応」に基づき判断する。

12. 自己株式の取得

下記のいずれかに該当する場合を除き、原則として賛成を推奨する。

- 具体的な理由の説明がなく、発行済株式総数の 10%以上の自己株式を取得しようとする場合
- 自己株式の取得が、株主価値の毀損につながることが懸念される場合

13. 買収防衛策（ポイズンピル）

経営権の争いがない場合

買収防衛策の導入及び更新は、下記の条件を全て満たす場合を除き、原則として反対を推奨する。

（第 1 段階：形式審査）

- 総会後の取締役会に占める出席率[52]に問題のない独立社外取締役[53]が 2 名以上かつ 3 分の 1 以上である
- 取締役の任期が 1 年[54]である
- 特別委員会の委員全員が出席率[55]に問題のない ISS の独立性基準を満たす社外取締役もしくは社外監査役である
- 買収防衛策の発動水準が 20%以上である
- 有効期限が 3 年以内である
- 総継続期間[56]が 3 年以内である
- 他に防衛策として機能しうるもの[57]がない
- 株主が買収防衛策の詳細を検討した上で、経営陣に質問する時間を与えるために、招集通知が総会の 4 週間前までに証券取引所のウェブサイトに掲載されている

（第 2 段階：個別審査）

- 買収されやすい状況の改善を目的とする具体的な株主価値向上施策に加え、買収防衛策導入により与えられる一時的な保護が、どのようにしてその施策の実行に役立つのかを招集通知で説明しており、その内容が妥当であると結論付けられる

経営権の争いがある場合

経営権の争いがある場合[58]は、取締役選任における「経営権の争いがある場合」の基準[59]を準用する。

[52] 出席率の基準は取締役選任を参照。
[53] 独立性基準は取締役選任を参照。
[54] 監査等委員会設置会社の取締役の任期は 1 年と見なす。
[55] 出席率の基準は取締役選任・監査役選任を参照。
[56] 買収防衛策の導入時点から、今回提案されている買収防衛策の有効期間終了までの合計期間を指す。
[57] たとえば、取締役解任に特別決議を要する、安定株主が 3 割程度以上の株式を保有している、取締役定員上限まで取締役を選任している、等の状況を指す。
[58] たとえば経営権の争いを理由とする株主提案による取締役選任議案が提案され、プロキシー・ファイトの状態にある場合などを指す。
[59] 8 ページを参照。

解説

多くの投資家は買収防衛策を経営者の保身手段と考える。投資家の視点から買収防衛策が正当化されるのは、企業の本質的価値を下回る金額で企業を買収しようとする買収提案者が現れた場合、取締役会が提案者と有利に交渉を行う手段として買収防衛策を用いる場合である。

そのようなシナリオには、業績悪化などで企業評価が一時的に下がり、本質的価値を下回る金額で株式が取引されているときに敵対的買収に対する脆弱性が高まり、買収防衛策による一時的な保護が必要とされる場合が該当する。買収防衛策はそのような特別な状況に対応するための、あくまでも一時的な手段である。しかし、日本で現在導入されている買収防衛策の 9 割は導入からすでに 10 年以上経過している。

一方、ISS の調査によれば、2009 年には 570 社を超える日本企業が防衛策を保有していたが、2020 年 12 月時点において、株主総会決議なしで防衛策を導入・更新した企業（9 社）を含めても、買収防衛策を保有する企業数は 284 社にまで減少している。本ポリシーは、各々の企業の経営環境の変化に関わらず、企業が買収防衛策を当然のように更新する現状に警鐘を鳴らし、買収防衛策廃止の流れを加速することを意図する。

ISS は買収防衛策議案を最終的には個別に判断するが、その第 1 段階として上記の形式審査を設けている。それらの審査条件を全て満たして、はじめて ISS は賛否の推奨を個別に検討する。形式審査条件を全て満たす買収防衛策は少数だが、その場合にかぎり第 2 段階の個別審査を行う。個別審査ではその企業が持つ株主価値向上計画を評価する。買収防衛策を求めること自体が、株価バリュエーションが低く買収のターゲットになりやすいことを取締役会が認めていると解釈される。よって、株主の興味は、株主価値向上の施策であり、それがない場合、業績不振の経営陣が保身のために買収防衛策を求めていると判断される。

日本の買収防衛策の主な問題点は、買収防衛策を実質的に運用する取締役会が社内者で占められ、取締役会の独立性に懸念があること、及び情報開示の少なさである。買収防衛策の運用が経営陣の保身ではなく、株主価値の向上に寄与するには、取締役会に一定数の独立社外取締役が存在することが不可欠である。

また、買収防衛策が株主総会決議なしで導入されている場合、ISS は経営トップへの反対を検討する。

14. 買収、合併、第三者割当増資

個別判断する。

ISS は開示情報に基づき、買収、合併や第三者割当増資等[60]の企業再編のメリットとデメリットを比較し、主として下記の観点から議案を評価する。

- バリュエーション：被買収者側の株主への対価は妥当か。
- 株価の反応：企業再編の発表後、市場がどのように反応したか。株価の反応が悪い場合は、企業再編の内容をより精査する必要がある。
- 戦略の妥当性：戦略の観点から、企業再編が妥当か。どのようにして付加価値が創出されるのか。企業再編による売上高やコストシナジーは過度に楽観的な予測ではなく、現実的な想定か。経営陣の過去の企業再編の実績はどうか。
- 利害相反：企業再編により、（少数株主の利益の犠牲の上に）関係者が不当に利益を得ないか。関係者の利害関係に影響され、経営陣や取締役が（少数株主の利益に反する）企業再編を支持していないか。
- コーポレートガバナンス：企業再編後のコーポレートガバナンスは、再編前の個々の企業のそれと比べて改善するのか、悪化するのか。企業再編によりコーポレートガバナンスが悪化する場合、それでも企業再編が株主にとって望ましい（たとえば十分な対価が株主に支払われる）ことを説明する必要がある。

[60] 第三者への自己株式処分もしくは新株発行の形式を取る「財団」等への自己株式寄付を含む。

15. 株主提案

個別判断する。

合理的なコストの範囲内で、コーポレートガバナンスの改善が期待できる株主提案については、原則として賛成を推奨する。

事業活動や範囲を制約するような提案や、実行に多大なコストを伴う株主提案については、原則として反対を推奨する。

また、株主提案が対案となるような会社提案がある場合、それら会社提案について、上記 1 から 14 までに記した助言基準を適用せず、個別判断することがある。

16. 社会問題・環境問題

提案が株主価値の向上もしくは保護に資するかどうか、に基づき個別判断する。その際には下記の要素もあわせて考慮する。

- 提案が対象とする事柄が、個々の企業によってではなく、法律もしくは政府の規制により対応されるべき問題か
- 提案が対象とする事柄に対して、企業がすでに適切で十分な対応を取っているか
- 提案が企業に（範囲、時間、費用の面で）過度な負担を強いたり、過度に企業行動を制約しないか
- 提案が対象とする事柄に対して業界水準で求められる対応と、その企業の対応状況の比較
- その企業の社会・環境問題への対応に関して、大きな問題、罰金や処分、訴訟などがあるか
- 情報開示の拡充や透明性の確保を求める提案の場合は、すでに十分な情報が株主もしくは公衆に開示されているか
- 情報開示の拡充や透明性の確保を求める提案の場合は、会社の機密情報を開示させ、会社を競争上不利な状況に追い込むことはないか

解説

社会問題・環境問題の範疇には、商品の安全性、環境問題、エネルギー問題、労働問題、人権問題、従業員の多様性、取締役会の多様性、政治献金をはじめとして、幅広い分野の事柄が含まれる。株主提案を分析する際には、上記の様々な要素が考慮されるが、その提案が短期及び長期の株主価値の向上、もしくは保護に資するかどうかが重要である。

（日本語 2021 年 2 月 2 日版）

（参考 1）ISS 反対・棄権推奨率

ISS は日本版スチュワードシップ・コードの考え方に基づき、議案別の反対・棄権推奨率を公表している。下記は 2020 年に開催された日本企業の株主総会で、ISS の反対・棄権推奨率を議案別に集計した結果である。役員選任については、議案数ではなく候補者総数を母集団として、ISS が反対推奨を行った候補者数の比率を示す。

会社提案議案	反対推奨率	棄権推奨率
取締役選任	7.1%	0.0%
監査役選任	22.9%	0.0%
剰余金処分	0.1%	1.4%
定款変更	7.3%	0.0%
役員賞与	0.0%	0.0%
役員報酬枠	0.8%	0.3%
退職慰労金	88.5%	0.0%
株式型報酬	25.7%	1.5%
買収防衛策	99.1%	0.0%
会計監査人選任	5.1%	1.7%
M&A	33.3%	0.0%

（参考 2）ISS 分析レポートの入手方法

ISS は透明性の観点から、調査対象企業に対してその企業の株主総会の分析レポートを無料で提供している。
詳細は https://www.issgovernance.com/file/policy/how-to-get-copy-of-proxy-analysis-japanese.pdf を参照の事。

日本取引所グループ金融商品取引法研究会

議決権行使助言会社（２）－利用者の実務－

2021年10月22日（金）15:00～16:58
オンライン開催

出席者（五十音順）

飯田　秀総　東京大学大学院法学政治学研究科准教授
石田　眞得　関西学院大学法学部教授
伊藤　靖史　同志社大学法学部教授
梅本　剛正　甲南大学共通教育センター教授
片木　晴彦　広島大学大学院人間社会科学研究科実務法学専攻教授
加藤　貴仁　東京大学大学院法学政治学研究科教授
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【報　　告】

議決権行使助言会社（２）－利用者の実務－

「機関投資家における議決権行使・エンゲージメント活動について」

ブラックロック・ジャパン株式会社
インベストメント・スチュワードシップ部
部長　マネージング・ディレクター
江　良　明　嗣　氏
ディレクター　藤　木　　彩　氏

目　　次

○川口　　それでは、定刻になりましたので、JPX 金融商品取引法研究会を始めたいと思います。

本日は、「議決権行使助言会社」の２回目として、「利用者の実務」について、ブラックロック・ジャパン株式会社のインベストメント・スチュワードシップ部の江良部長と藤木様からご報告をいただきます。

それでは、どうぞよろしくお願いいたします。

○江良　　本日は貴重な機会にお招きいただきまして、ありがとうございます。改めまして、ブラックロックの江良と申します。

資料に基づいて、我々の活動内容、どのような考え方で議決権行使をしているのか、その中で議

決権行使助言会社をどのように活用しているのか、ご説明させていただければと思っております。

全体では４つのパートをご用意しております。まずは活動の全体像、議決権行使のプロセスをご紹介して、その後にエンゲージメントの実務、この３つを私の方から説明させていただきまして、最後に議決権行使の考え方と実際の議決権行使ガイドラインについて、藤木よりご説明をさせていただければと思います。

１．ブラックロックのスチュワードシップ活動

ブラックロックの概要

ブラックロックは、米国ＮＹＳＥに上場している運用会社でして、世界中のお客様から資金をお預かりし、それを運用させていただいております。

運用資産残高は 900 兆円を超え、お預かりした資金を様々な資産に投資をさせていただいています。投資先資産の規模として大きいのは株式でして、半分ぐらいを全世界の株式に投資をしており、その内訳ではパッシブ投資戦略の規模が大きいという特徴がございます。また、アクティブのボトムアップで様々な投資判断をしているものについても、パッシブに比べて 10 分の１ではありますが、絶対額で見ると 4,100 億ドルということで、それなりの規模がございます。

ブラックロックというと、パッシブ投資家でしょうと言われることが非常に多いのですが、一歩引いて見ていただくと、確かにパッシブが大きいのはそのとおりですが、アクティブ投資もかなり積極的に展開しております。また、そのほかの資産、債券であったり、プライベートエクイティ投資であったり、ファンド・オブ・ファンズといった様々な運用戦略というものも提供してございまして、資産運用においてのデパートのようなラインナップをしているという会社でございます。

ブラックロックのスチュワードシップ体制

その中で、私と藤木が属している部といいますかチームは、インベストメント・スチュワードシップ部です。スチュワードシップ活動は、議決権行使とそれに伴う対話・エンゲージメントの大きく２つがございます。

我々の特徴としては、世界中で各国市場ごとに、その市場に精通した人間を専任担当者として置くということでございます。例えば、日本企業についての議決権行使やエンゲージメントは、全てこの東京オフィスに拠点を置くチームで実施しています。

議決権行使と対話については我々が一括してスチュワードシップ活動を担うことで、ブラックロックとして一つの声といいますか発信力を持つことが可能となります。

そのような同様の考え方で、ほかの拠点についても設計されているということでございます。したがって、アメリカ企業への議決権行使やエンゲージメントであれば、米国のチームが担当するという、そのような考え方に基づいて運用しております。

活動状況ですが、後ほど詳細はお話しますが、全体像をつかんでいただくために数字面で申し上げますと、全世界で年間 16 万 5,000 件、会社提案及び株主提案について議決権を行使しており、同期間、世界中で 2,300 社以上の企業と 3,600 回以上のエンゲージメントを実施しています。

日本における投資先企業の収益力の強化に向けたスチュワードシップ活動についても少しお話させていただきます。

日本においてスチュワードシップ活動を実施するにあたって、株主総会議案に議決権行使をするというのは当然ですが、そのテーマに限って対話を実施しているわけではありません。当然、議案として上程されるもの、例えば意思決定の仕組み（機関設計、取締役会構成、社外役員等）、執行を兼ねた取締役の選解任、買収・合併の承認、役員報酬などの総会議案について議決権行使でどのように判断するのかというのは非常に重要です。一方、より広範なトピックにまたがる長期的な経営に関するテーマについて対話をすることも非常に重視しています。

例えば、個別企業とエンゲージメントをする際

には、人事制度、経営者の育成など、長期的な経営に非常に重要だと考えられるテーマに基づいて対話をしますし、それに限らず市場全体に関わるような課題についても、積極的に議論します。したがって、我々のエンゲージメントは、個別企業に対して実施するものが主たるものですが、それに限らず、政府関係者や業界のイニシアチブ等を通じてよりよい市場設計のあり方についても投資家としての考えを申し上げ、市場としての価値が高まることも期待して実施しています。このようなかなり広範な活動を、総称してスチュワードシップ活動と呼んでいます。

日本における議決権行使の状況（2020 年７月～2021 年６月）

日本における議決権行使の状況ということでございます。2,400 社ぐらいの日本企業に投資をさせていただいております。１社当たりの議案数は10いかないぐらいであるということですので、そうしてみると、日本だけで年間２万 4,000 件程度の議案判断を実施しているということでございます。こういったかなり多くの数の議案を、時間が限られる中で、議決権行使するという状況に置かれているチームであるということをご理解いただければ幸いです。

サステナビリティ関連テーマについての対話を強化

グローバル共通の動向ですが、近年ですと、サステナビリティのテーマについて議論することが増えています。

ESG すなわち環境、社会、ガバナンスのテーマについて対話することが多く、我々としては、特に環境面についても力を入れています。また依然としてガバナンスが対話の中心であるというところは変わらないという状況です。

日本におけるエンゲージメントの状況

去年はコロナの関係もありまして、対話社数は横ばいでしたが、ここ数年、毎年エンゲージメントの企業数も対話件数も右肩上がりになっているというのが一つ特徴的と思います。

参考までに 10 年前は、年間約 80 社、件数にして約 100 件のエンゲージメントをしていれば、かなり多いという規模感でございました。

２．議決権行使プロセス

ここから、少しプロセスのお話に入りたいと思います。

議決権行使の体制及びプロセス等

実際のプロセスはやや複雑ですので、概要だけをご紹介いたします。議決権行使は当然当社だけで完結するものではなくて、受託銀行（信託銀行）と、助言会社がパートナーとして我々と連携しながら、初めて成立します。したがって、受託銀行、助言会社が我々から見た場合の外部のキープレーヤーということでございます。

受託銀行については、我々の票を企業に届けてくださる主体という位置づけです。助言会社については、議決権行使の助言サービスも受けてはいるのですけれども、加えて、同社が提供する議決権行使の電子行使プラットフォームをインフラとして活用しています。具体的には、招集通知を集めて、これらを我々の判断に使います。また、我々の行使結果を同社が提供するプラットフォームに入力することによって、同社から受託銀行に対して伝達してもらえる、そういったシステムを導入しております。

次に、社内のガバナンス体制でございます。インベストメント・スチュワードシップ部が実際に議決権の個別の判断や対話を実行する部隊です。議決権行使に当たっての考え方や基準を定めるために、議決権行使ガイドラインを作成しております。このガイドラインは公表しております。

議決権行使ガイドラインの作成プロセスについては、我々インベストメント・スチュワードシップ部が原案を作成し、社内のインベストメント・スチュワードシップ委員会という組織体においてガイドラインの原案が妥当なのかどうか、あるい

は改定が必要なのかを議論します。そのうえで、最終的に委員会に承認をいただくというプロセスになっております。

インベストメント・スチュワードシップ委員会構成メンバーは、様々な運用戦略における運用担当者、コンプライアンス・リーガル、我々インベストメント・スチュワードシップ部から代表者を出して、ブラックロックとしてこういった考え方でよいのかということを決めたうえでガイドラインを定めております。

そして、ガイドラインに基づいて議決権行使、エンゲージメントをした結果や、特徴的な議案やエンゲージメントについて定期的に委員会に報告しています。委員会では、議決権行使やエンゲージメントの考え方やアプローチ、実際の結果がガイドラインに整合的なものであったのか、あるいは整合的であったとしても、実務を経て改良点が見つかった場合には、次回の改定はどのようなことが考えられるのか、そのような議論をしております。

議決権行使とエンゲージメントの一体的運用

議決権行使とエンゲージメントをどういう流れで実際に業務として担当しているのかをご説明いたします。当然ながら、株主総会が起点となるわけですけれども、株主総会の３週間前ぐらいに招集通知が開示されるのが一般的でして、そこでまず議案を確認し、個別の議案の分析をしていきます。また、助言会社に我々の議決権行使ガイドラインを渡したうえで、１次判断を推奨として受けています。そういった推奨も参考にしながら、最終的には我々のチームで判断しております。

その判断に当たって、当然ながら、招集通知を読み込む、あるいはそのほかの開示物を参考にするというのが基本にはなるのですが、それだけですと、必要な情報が得られないケースが多々ございます。したがって、我々はエンゲージメントを非常に重視しております。議案内容を確認し、必要だと思えばその会社にコンタクトをとって話を聞いています。あるいは最近は、会社側としても議案、経営戦略について投資家に説明したいというミーティングも非常に多くございます。対話を通じて得た情報をなるべく活かしながら、実質的な判断をする、我々としては、議決権行使とエンゲージメントの一体的運用というのを心がけております。

株主総会の特定日の集中

ただ、やはり課題も多くございます。一つは、全ての会社とエンゲージメントできるわけではないことです。丁寧に招集通知を読み込んで判断をしていきたいという思いは変わらないのですけれども、ご存じのとおり、株主総会が５、６月に集中するという状況は依然として変わりありません。特定日の集中は緩和したのですが、我々の投資先企業への議決権の行使期限について、一定のピークがある中で、時間的制約が非常に大きい状況は続いています。

電子行使プラットフォームの導入

その時間的制約を緩和するために、ICJ 社が提供している電子行使プラットフォームを活用しております。これは、発行体企業が電子行使プラットフォームを導入していて、そのうえで投資家もこの電子行使プラットフォームを使うという双方の活用が必須条件となりますが、我々も導入いたしました。その結果、議案判断にかけられる日数が約２日程度延びたということで、電子行使プラットフォームについては実務的に非常に有益であると考えております。

ICJ 未対応の会社については、先ほどの信託銀行に議案を渡すというプロセスを通るので、総会の５営業日前までに議決権行使をしなければいけないという制約が出てしまいます。電子行使プラットフォームを入れると、１日前まで判断する時間ができるので、追加的な余裕ができます。ですので、より多くの会社に電子行使プラットフォームを積極的に使っていただけますと、議案判断にかけられる時間がより多くなるので、大変ありがたいと考えております。

議決権行使助言会社の活用

既に少しお話しさせていただいたところもあるのですが、まず、我々として基本的にどのような形で議決権行使助言会社を活用させていただいているかご説明いたします。

１つは、先ほど申し上げたとおり、我々の議決権行使ガイドラインを助言会社に提供して、これに基づいて議案の一次判断をもらうというサービスを利用しております。

２つ目が、助言会社自身の調査レポート、基準に基づいて議案を分析しているレポートがあるのですけれども、そちらも購入をしています。

そして３つ目としては、先ほども少し申し上げましたとおり、彼らが提供する議決権のための電子行使プラットフォームというものも活用しております。

議決権行使助言会社を使っている理由というのは、先ほど来ご説明しているとおり、議決権行使においては、とにかくたくさんの企業の議案をかなり短期間で判断しなければならないこと、そして、全てのリサーチを我々の体制で担当することは現実的には難しいということです。したがって、我々としては、重視すべき議案にきちんとフォーカスする形でエンゲージメントや調査にリソースを使いたいと考えております。そのため、助言会社を活用すると、非常に効率的に対応できます。

もう一つの助言会社の活用方法は、利益相反が考えられるような投資先企業、例えばブラックロック自身の議案に対して我々が行使をするというケースについては、我々のガイドラインを渡した助言会社に判断を委ねるといった利用方法もございます。

なお、一般的には大手運用会社ですと、自社で我々のような担当者を採用し、社内でリサーチして議決権行使判断をしています。したがって、議決権行使助言会社の推奨をそのまま採用して行使をする場合もないわけではないと思いますが、判断内容や理由が異なることも多いと考えています。

３．ブラックロックのエンゲージメント活動

エンゲージメントの重点項目

議決権行使に付随する業務として、先ほど来ご紹介しております企業との対話・エンゲージメント活動というのを非常に重要しております。このセクションでは、我々はどういったテーマでエンゲージメントを実施しているのか、どのような点を重視しているのか簡単にご紹介いたします。

グローバル全体で我々が重点項目として、共通して重視している項目は、ガバナンス、長期的な経営戦略、気候変動、人的資本という４つに集約できるのと思います。

日本における重点対話項目

日本についても重点対話項目というのを定めております。

基本的には、長期経営戦略について我々の投資先企業にまず確認します。その中で、例えば、グローバル展開を一層進めたいという会社があった場合には、それができるような体制が整っているのか、例えば人的資本について、そういったビジネスを開拓していけるような人がいるのか、あるいはその市場に提供する商材をきちんと開発できる人がいるのか、などを重視します。

ガバナンスについては、経営戦略や長期的な方向性について取締役会できちんと議論しているのか、あるいは、これら長期戦略に基づく計画は妥当なものなのかどうか、また、そのとおりに執行がうまくいっているのかといった進捗管理について取締役会がきちんと役割を果たしているのか、といった点に非常に関心があり、エンゲージメントを通じて確認しております。

また、近年ですと、サステナビリティ、特に気候変動リスクについての事業リスクと機会について、長期戦略においてどのような位置付けで議論しているのか、気候変動に関する情報開示についても強く求めており、そういったテーマに基づくエンゲージメントも実施しています。

エンゲージメントにおける優先度の決定プロセス

このような考え方・テーマに基づいて、我々として約 2,300 社の投資先企業の全てと対話するのは現実的に難しいため、対話にきちんと向きあう姿勢があり、企業価値を最も上げられそうである企業に対して重点的にエンゲージメントをしています。どういうプロセスでそのエンゲージメントの優先順位をつけているのかということをお示ししております。

先ほど申し上げた４つの大きなテーマに基づいて、我々として様々な指標を活用しながら企業をリストアップし、ウォッチリストを作成し、これに基づいて 400 社ぐらいまで絞り込んでいます。

我々のアプローチがどの程度の影響があるのかということで、保有比率の高い会社、あるいは、我々が関わった結果、その会社の企業価値が上がるといった変化の可能性が高いと考えられる企業や、改善の余地が見出せるような企業について重点的にエンゲージメントを行っております。

株主提案への対応

私からは最後のご説明になりますが、近年、特に株主提案を行った株主との対話も増えています。

例えばアクティビストのアプローチが、昔は 30%とか 40%、場合によっては 100%という支配権を取りにいくような戦略が、日本のみならず、世界的にも非常に顕著でした。しかし、近年は、どちらかというと我々と同程度の保有率、あるいは場合によっては我々よりも低い保有率でいわゆる同じ少数株主として株主提案をする戦略が増えているというのが一つ特徴としてございます。

そうなりますと、提案者からすると、当然自分の力だけでは提案を通すことはできないので、ほかの株主から賛同を得られないと提案自体は成功しないという構図になります。したがって、提案者には我々に対して自らの考え方・提案内容を説明するというインセンティブもありますし、我々としては、会社側と提案株主側の双方とエンゲージメントをいたします。そして両者の考え方、背景等も確認したうえで、長期的な投資家の観点から実質的な判断を実施していくということを非常に重視しております。

もう一つ特徴としてあるのが、客観的な視点を得るために、社外役員の方々との対話も非常に重視している点です。したがって、こういった局面になると、かなり広範なステークホルダーの方から実際に話をお伺いしたうえで、実質的な判断をしていくということでございます。

ただ、これをやるに当たっても、先ほど来申し上げているとおり、こういった案件が６月総会中に何十件も来てしまうと、リソースの制約が非常に大きくなっていまします。当然我々としては、こういった状況になった場合は、必要なリソースを手当てして調査をするのですけれども、やはり６月の総会集中期には時間的な制約が大きいというのが、現実問題としてかなり厳しいと考えております。

私の担当としては以上でございます。この後は藤木の方からご説明させていただきます。

４．議決権行使方針の主な方針

○藤木　　私の方からは、実際の弊社の議決権行使ガイドラインの中身の方を少しご紹介させていただければと思います。

議決権行使ガイドラインの基本的な考え方

具体的な中身に入る前に、まず基本的な考え方についてご説明させていただきます。

当社では、株主価値に基づくガバナンスのあり方を経営に浸透させていく手段の一つとして、議決権行使を位置付けております。その中で、基本的な考え方として次の３つが挙げられます。

－ 内部統治に関する内発性尊重のアプローチ
－ インセンティブ報酬の重視
－ 投資家にとっての透明性の重視

まず、内部統治に関する内発性尊重アプローチは、個々の企業が置かれている状況によって望ましいコーポレート・ガバナンスの形態は異なるといった見方から来ております。ただ、これで現状を全て認めるというわけではなくて、企業において株主全体の利益と一致した経営規律が働いてい

ないと判断される場合は、経営規律を高める内部統治上の施策をとるように、議決権行使の範囲内で会社に促していきます。

また、企業に法令違反などの経営上の不祥事が生じて、株主価値が棄損しているような場合には、経営者の責任を明確にして、適法性維持が図れるように議決権を行使します。

次に、インセンティブ報酬の重視ですが、これは中長期的な株主価値増大を経営者が株主と共に享受する報酬制度を肯定的に評価し、また、投資家の利益にかなう積極的な情報開示・説明責任を企業に求めていく、経営者が投資家と同じ方向を見ていくことを重視しています。

最後に、投資家にとっての透明性の重視ですが、やはり企業価値が資本市場で正当に高く評価されていくためには、財務、非財務共に透明性が重要になってきております。リスク管理態勢や、非財務の分野では特に、重要なサステナビリティ課題の情報開示も重要性を増しており、企業による適切な情報開示を対話や議決権を通じて要請しているという状況です。

また、これらの基本的な考え方の背景として、議決権とエンゲージメントの一体的な運用があります。対話を通じて投資先企業の状況をきちんと把握できる前提で、個別の状況に応じた、実質的な議決権判断を行うことができます。ここが、議決権行使助言会社との違いではないかと考えております。

取締役選任議案（2022 年１月以降）

ここからは具体的な議決権行使基準の例をご紹介します。

一番多い議案として、取締役選任議案があります。コーポレートガバナンス・コードの改定や東証市場区分再編等を勘案しまして、投資先企業の取締役会の独立性に関する当社からの要請を引き上げることが妥当だと判断しまして、2021 年２月に改定いたしました。ただし、こういった要請というのは、周知徹底していくことが必要ですし、企業側の対応のための準備期間も考慮しまして、この基準は、2021 年２月に改定したのですが、2022 年１月からの適用となります。

具体的に変更点を見ていきますと、まず、監査役設置会社につきましては、少数株主との利益相反の懸念が大きい企業及び東証プライム上場企業については、独立社外取締役３分の１以上を求め、不在の場合には、有責性のある取締役の選任に反対します。また、こういった場合については、社外取締役の独立性を精査し、独立と認められない候補者の選任に反対します。

ここで言う利益相反の懸念が大きい企業というのは、具体的には、買収防衛策を導入済み、またはこれから導入する予定の会社、または支配力を有する大株主が存在する企業と定義しています。

逆にこういった利益相反の懸念が大きくない企業については、独立社外取締役２名を求めて、不在の場合には、有責性のある取締役の選任に反対しています。

一方、監査等委員会設置会社につきましては、独立社外取締役３分の１以上を求め、不在の場合は有責性のある取締役の選任に反対しています。社外取締役の選任については、監査等委員であるかどうかにかかわらず、独立と認められない候補者の選任には反対します。

さらに、指名委員会等設置会社になりますと、制度設計の趣旨も考慮し、独立社外取締役半数以上を求め、不在の場合には、有責性のある取締役の選任に反対しています。社外取締役の選任については、こちらも独立と見られない取締役の候補者の選任には反対をしています。

ただ、形式的な議決権行使にならないように、基準の適用に当たっては、企業のコーポレート・ガバナンスの充実を図るための取組み、具体的には、指名委員会及びそれに準ずる委員会の状況等を勘案しまして、実質的な議決権行使判断を行っております。

社外取締役・社外監査役の当社の独立基準

今回の改定において、当社の独立性に係る定量基準開示を向上させました。

具体的には、大株主が 10%以上、取引関係は２%程度を目途、弁護士の顧問契約がないこと、会計監査人が監査法人の代表社員の経験者でないこと、その他として主幹事証券会社、取締役の相互派遣等、独立性基準を明示しました。

助言会社の基準との主な相違点は、借入先（メインバンク）出身であるかを独立性の判断要件とはしていないことや、クーリングオフ制度として、関係機関退職後５年を過ぎている場合については、独立性があるとみなすことなどが挙げられます。また、買収防衛議案と有事に関わる議案のときには、より厳密に独立性基準を精査する場合もあります。

また、それ以外にも、出席率や在任年数の目安も明確にしました。近年新たに導入した基準として、自社を含む５社以上の上場企業の取締役・監査役を兼務している場合、過度な兼職として反対行使を検討しています。ただ、これは前年度の有価証券報告書に基づくデータベースしか存在しないため、直近の招集通知等で確認する必要があり、事前準備が難しい議決権行使基準となっております。

買収防衛策議案－３つの視点で検討

我々は主に３つの視点で検討しております。１つ目が、買収防衛策の内容・スキームの正当性と取締役会の構成の関係、もう一つが特別委員会の要件、そして最後に、その他の買収防衛があるかどうかといったところを見ています。

まず、１つ目の取締役会構成ですが、まず、買収防衛策のスキームとして発動要件が限定的か、つまり、経営陣による恣意的な運用が排除されているかいう観点でまず評価します。基本的に、高裁四類型及び強圧的二段階買収など発動条件が限定され、経営陣の恣意性が働く余地が小さいことが望ましいと考えております。

したがって、発動における取締役会の裁量が大きい場合、例えば、その他の発動要件の条項として、根源的な企業価値、ステークホルダー全体の利益等の解釈の余地が大きい文言が含まれている場合には、取締役会の独立性50%以上と、高い透明性がある取締役会の構成を求めます。

２つ目の特別委員会の構成ですが、こちらは、独立した社外役員で構成されている委員会を設置しているかどうかというところを見ております。社外有識者ではなく、買収防衛策の是非を判断するうえで、平時より取締役会に参加して、企業の経営戦略や置かれている事業環境をよく理解したうえで、独立した立場で判断して頂きたいと考えているためです。

そして最後に、その他の防衛的な仕組みがないかというところで、例えば、大株主の存在、追加選任余地のない取締役会の員数、取締役の任期が2 年、こういった防衛的効果となりうるものがあるかどうかといったところを見ております。

なお、買収防衛策の判断においては、こういった外形的なスキームに関わらず、実態面も重要と考えておりまして、日頃から対話を通じて取締役会の実効性や、社外取締役の独立性だけでなく、最近はスキルマトリックスの開示とかも始まっておりますので、専門分野の多様性・バランス等、多面的な視点から、本当に買収防衛策が長期的な企業価値に資するものかどうかといったところの視点をもって対話を行っております。

議決権行使ガイドラインの直近の主な改定

直近の主な改定点について簡単にご紹介します。最近の動きとしては、サステナビリティに関する基準（気候変動に関連する基準）の追加、ジェンダー・ダイバーシティの基準の導入が挙げられます。ジェンダー・ダイバーシティの基準では、TOPIX100 構成銘柄をまずは対象としており、女性の取締役または監査役がひとりも選任されていないなど、取締役会のジェンダー・ダイバーシティの取組みが著しく不十分な場合、責任を負う取締役の選任議案に反対を検討します。

最後に、ROE 基準を厳格化しました。従前はROE が低下傾向にあり、かつ直近が低位の場合といったことを見ていたのですが、長く低迷しているような企業、ROE３%未満が継続しているよう

な企業についても反対行使の対象という形で追加しました。（2022 年１月に改定し、同基準を ROE ３％から５％に引き上げました。）

2021 年の議決権行使における気候変動の取組み

2021 年議決権行使シーズンで今回一番大きく変更した部分なので、具体的な取組みについて少し詳しくご紹介させていただければと思います。

ブラックロックのスチュワードシップ活動としては、従前から気候変動リスクを重点課題としてきましたが、2021 年には従来の取組みをさらに加速しまして、具体的には、気候変動リスクの影響が大きいと考えられる企業を世界中で約 1,000 社超選定し、情報開示を初めとした着実な対応を求める活動を強化しました。その前の年は 200 社程度で、少し小さいユニバースで始めたのですが、今年度はかなり拡大したという状況です。

具体的にどういった企業が対象になるかというと、やはり排出量の大きいセクターが中心になっておりまして、素材・エネルギーセクターの企業が最も多く含まれておりますが、一部大手の金融機関も含めています。地域別ですと、APAC が一番多く、約 40%、次に Americas で約 34%、あと EMEA 地域で約 26%という内訳になっております。

このように取組みを強化していく中で、結果として、多くの会社で取組みの進展が見られました。2020 年に気候変動ユニバースに選定された約 200 社の中で、約 65%の企業の気候変動に関する取組みや、特に TCFD を中心とする気候変動の情報開示の改善が実現しました。

一方で、取組みや情報開示が不十分と判断した企業も、約 1,000 社中 319 社あり、こうした会社においては、取締役選任議案への反対、又は気候変動に関する適切な対応を求める株主提案への賛成も通じて懸念を表明しました。

まとめ

議決権行使プロセス、エンゲージメント、最後に議決権行使の具体的な基準についてご説明しましたが、改めて個別企業の特性、経営環境などを十分考慮したうえで、形式的でなく、実質的に判断を行うことが最も重要だと考えております。一方で、特に日本の株主総会は６月に集中しており、時間的制約もある中、議案判断を効率的に行う必要もあります。このような中、議決権行使とエンゲージメントを一体的に運用して、長期的な企業価値向上に資する、スチュワードシップ活動を最大限工夫しながら実施しています。

以上が、ブラックロックの議決権行使及びエンゲージメント活動のご紹介でした。

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【討　　論】

○川口　　どうもありがとうございました。

それでは、質疑応答に移ります。どこからでも結構ですので、挙手のうえご発言をいただければと思います。いかがでしょうか。

【資金の供給者との関係】

○久保　　本日は非常に興味深いお話を伺えて感謝しております。ありがとうございます。

私からの質問は、例えば議決権行使であるとかエンゲージメントを行う際に、インベストメント・スチュワードシップ委員会を通じて決定するというようなご説明をいただきましたが、このときに外部からのインプットがどれぐらいあるのかということに関するものです。

先ほどのご説明の中では、voting choice という制度を今度導入するのだということで、資金供給元の方のご意見をいろいろ取り入れる手段というのもあるかというふうに伺ったのですが、そうは言っても、お任せという場合も多分あるのだろうと思います。そういったときに、例えば出資者というか、御社に資金をお預けになっている方とのミーティングであるとか、あるいは外部の意見団体みたいなところからのインプットがあるのか。あるとして、アクティブ運用の場合とパッシブ運用の場合で違うような影響というのがあるのか。

アクティブ運用なんかの場合ですと、投資する人、資金を出す人が例えばSDGsであるとかESGであるとかに興味があって、そういうところに熱心な会社に投資してくださいということで、より議決権行使といったところにアクティブに動いてくるという可能性があるかと思うのですけれども、パッシブの場合には、どういうふうになっているのか。そういった御社の投資先とのエンゲージメントのほかに、資金供給面との間のエンゲージメントというか交流というのがどういう感じで行われているのかということを教えていただけると、非常にありがたく思います。

すみません、ちょっと分かりづらい質問かと思いますが、よろしくお願いいたします。

○江良　　いえ、大変重要なポイントかと思います。

我々のお客様、資金提供者の方々との接点には大きく２つございます。

まず、我々がこのような方針で議決権行使および対話を実施していきますという方針の説明をさせていただき、そちらの内容についてフィードバックをいただきます。その方針に基づき、我々がお客様から委託を受けて、実際に方針どおりに実行していきます。

二つ目としては、当然、活動結果、実績について、代表的な事例などもご紹介する形で、我々のお客様にご報告します。もう少し具体的に申し上げると、四半期ごとに議決権行使結果とその個別の行使理由についても公表しています。

したがって、事前に方針の共有、活動に関する事後のご報告ということで、議決権行使と対話について共有し、インプットも頂戴しています。

我々の議決権行使ガイドライン、スチュワードシップ活動の原則についても、全体的に公表している状態ですので、このような方針で実施していきますということと、実際の活動結果についての透明性を重視しています。これが１つ目のご回答かと思います。

続くご質問は、委員会においてどういった形で実際に議案判断をしているのか、その中でアクティブとパッシブという運用戦略ごとに差異があるのかという点だったかと思います。

こちらについては、説明では割愛いたしましたが、資料の 31 ページにインベストメント・スチュワードシップ委員会の構成メンバーを記載しております。株式インデックス運用部長というのがいわゆるパッシブと言われているものを代表する者、ファンダメンタル株式運用部長（中小型株）とファンダメンタル株式運用部長（大型株）、中小と大型株でそれぞれ運用戦略があるのですけれども、これがいわゆるアクティブと言われているものを代表するメンバーとして入っております。また、この委員会については、議長はCIO（Chief Investment Officer）で、運用周りを統括する人間が議長を務めております。

このインベストメント・スチュワードシップ委員会において、議決権行使ガイドラインとスチュワードシップ原則、活動実績などについて議論して、最終的にこの会議体で方針の改廃についても決議します。

したがって、我々は同委員会からスチュワードシップ活動に関する執行権限を受ける形で実務をしています。そして、結果を委員会に報告して、方針と結果が整合的になっているか、チェックを受けるような体制になっています。こちらには現在、社外の人間は入れていない状況でございます。

このように、アクティブとパッシブについて、方針レベルで見解をすり合わせることによって、個別の議案で判断になるべく差異が出ないような仕組みを採用しています。ただ、例えば、M&A に関連する買収防衛策等、運用戦略の時間軸や考え方によって判断が分かれるケースというのも当然あります。その場合は、アクティブ運用の担当者については、自分たちが運用しているファンド分の議決権行使については、最終的に自分たちが判断する権限があります。したがって、非常に稀なケースになりますが、ブラックロック内でアクティブ運用とパッシブが異なる判断をするケースもございます。

○久保　　ありがとうございます。

資金提供元の方とも結構やりとりをしているというのは、今のお答えでよく分かったのですけれども、これは肌感覚でお答えいただければいいのかなと思いますが、その資金提供元がこういう議決権行使であるとかエンゲージメントについてどれほどの関心を抱いているのか。あるいは、こういう資金受託に関して、資金受託市場のようなところで競争の要素というものになっているのかというところについては、どのような感覚をお持ちですか。

○江良　　お客様からの関心の度合いということで申し上げますと、年々強くなってきているというのが実態でございます。その一つの背景は、スチュワードシップ・コードの存在が非常に大きいと思います。お客様自身が機関投資家としてスチュワードシップ・コードに署名しており、議決権行使と対話について運用会社に対するモニタリングすることを重視されています。ですので、我々がお客様に活動についてご報告する機会も年々増えている状況でございます。

資金受託における差別化要因となっているかというご質問ですが、お客様によって評価軸が異なりますが、スチュワードシップのクォリティーによって実際に加点・減点するというようなお客様もおられます。また、多くのお客様が運用方針を検討されるにあたって、スチュワードシップ活動についてもヒアリングされることが一般的になっております。

ただ、評価が難しい点はあろうかと思います。定量化するのが非常に難しい部分がございまして、例えば議決権行使の結果についても、反対票が高ければ高いほどよいのかというと、我々としてはむしろ、建設的な対話をすればするほど、株主総会前に我々として本来反対するような内容の議案が適切に修正され、実際の株主総会の議案については賛成ということがあります。したがって、対話がうまくいけばいくほど反対比率は下がる構造にあります。ただし、議決権行使の反対比率のみで判断されるケースもございまして、活動方針と議決権の行使結果について、丁寧にご説明することの重要性を認識しております。

○久保　　大変詳しくお答えいただきまして、ありがとうございました。

【投資先の株式の売却について】

○前田　　本日は大変貴重なご報告をいただきまして、どうもありがとうございました。

議決権行使、それからエンゲージメントについてよく理解できたのですけれども、投資先企業によっては、幾らコストをかけてエンゲージメントをしても、企業価値向上の見込みが全くない、コストをかけても仕方がないという企業もあると思います。そういう企業については、エンゲージメントの優先度が低くなるのだと思うのですけれども、さらに進んで、コスト面から考えて、スチュワードシップのご担当者としても、そのような企業の株式は手放してしまって、もうその企業とは手を切りたいということがあると思うのです。確かにパッシブ運用では、銘柄の入れ換えがそう簡単にできないのかもしれませんが、その問題も含めて、スチュワードシップご担当者の立場から、株式の売却についてどのようなスタンスといいますか考え方を持っておられるかについて、お教えをいただけますでしょうか。

○江良　　聞く耳を持っていただけない、あるいはそもそも投資家との対話に関心がないという会社もあります。このような会社にスチュワードシップとしてコストをかける意義が低いと思うことも多々ございますので、対話ができない場合は、議決権行使で反対します。

さらなる手段として、今ご指摘のとおり、その会社の株を手放すということができれば、我々としてはそういったアクションも検討しますが、そもそもそのような会社はアクティブ投資では選択されていないことが多いため、基本はパッシブ運用での保有となります。パッシブでは売却に運用戦略上制約がかかっている部分がありますので、これらについては議決権で対応していくしか、現実的な手段としてはないのかなと思います。

ただ、我々としてここ数年強化している活動と

して、我々が対話をした企業の経営力、ガバナンス力の評価、評点をつけています。評価については、運用担当者に共有しています。それが投資判断に結びつくようなケースも実際にございます。

○前田　　よく分かりました。どうもありがとうございました。

○川口　　売却という判断をする前に、まずは、議決権行使で対応するということですが、その場合、取締役の選任議案に反対するということになるのでしょうか。

○江良　　おっしゃるとおりです。その要因によって異なるのですけれども、例えば業績が長期低迷しているような場合であれば、これは執行のトップということで、通常ですと社長・会長、CEOといったトップに反対票を入れるという対応になります。

○川口　　会社としてエンゲージメントに十分に対応してくれないという場合にも、責任者であるトップの取締役選任にバツをつけるという話になるということでしょうか。

○江良　　重要な課題があり、それについて十分な説明責任が果たされていないというケースではそのようになります。日本もこれからどんどん増えていくと思いますが、海外ですと、取締役会議長が社外である場合も珍しくありません。このような場合、その議長の責任ということで、議長に反対票を入れます。議長が社外の場合ですと社外取締役になるので、社外取締役に反対票を入れるということになります。

【コモン・オーナーシップについて】

○梅本　　今日はどうもありがとうございました。

２点質問させていただきます。１点目はちょっとやじ馬根性的なお話ですけれども、アメリカでは、ブラックロックを初め大手の資産運用者が多くの上場企業の株式を保有するようになって、実は同業者の間で競争が制限的になっているのではないかというコモン・オーナーシップの問題が時々新聞なんかで報道されています。スチュワードシップ活動、エンゲージメントというのも、重要提案行為に至らなくても、やりようによっては、そういった方向に誘導できるような気もしないではない。私自身はコモン・オーナーシップというのは事実に反するのではないかという考え方ですけれども、それについて確認させていただければ、というのが１点目です。

○江良　　コモン・オーナーシップの前提条件となっている論文も分析しまして、我々としての見解をペーパーにまとめたものもございますので（BlackRock Viewpoint Mar 2017 『Index Investing and Common Ownership Theories』）、後ほどご参照いただければと思いますが、結論から申し上げると、ご指摘のとおり、事実ではないと考えております。コモン・オーナーシップに関する事実認定や因果関係についての分析に欠陥がありますし、また実態と全く反していると思います。

【企業買収の事例について】

○梅本　　ありがとうございます。２点目は、これは思いつきでうまくご質問できるかどうか自信がないのですが、先ほど前田先生がおっしゃった、パッシブ運用の場合は売却のオプションがないですよねという話と関わるのですけれども、資料で言うと24ページの買収防衛策との関係です。

企業買収との関係では、パッシブ運用は公開買付けには応募しないという話を私は聞いたことがあるのですが、そうでない、アクティブ運用者であれば、敵対的買収にせよ、そうでないものにせよ、条件が合えば公開買付けに応募するはずで、買収防衛策に賛成するか、反対するかについても、エグジットを意識した考え方というのがあると思うのです。他方、パッシブ運用の場合に公開買付けに応募しないということを前提として、例えば最近の有事発動型で、買収防衛策を発動するか否かを問う株主総会において、賛否を決めるに当たってどういうところを考慮されるのでしょうか。

例えば全部買付けであれば、公開買付けに応募しなくても、ほぼ確実にスクイーズアウトに移りますから、その段階でエグジットするということ

になりますよね。それに対して部分買付けであれば、そのまま、例えば敵対的買収が成功したとして、子会社となった会社の株式をずっと保有するということになると思うのです。先ほどご説明になったのは、株主総会で買収防衛策が事前に諮られた場合のお話だったと思うのですが、発動するかどうかという場合の賛否判断において、どのような材料を判断要素にされるのか、例えば部分買付けかどうか、全部買付けかどうかというあたりのことは考慮されるのでしょうか。

そもそも議論の前提として、私の事実認識が間違っているのかもしれませんが、パッシブ運用の場合は公開買付けには全く応じないという認識で正しいのかどうかというところもご教示いただければと思います。

以上です。

○江良　　パッシブ投資について TOB に応じないという点については、当社の場合ですと、異なりまして、個別判断をして応じるケースもございます。

有事発動型買収防衛策など、公開買付けに対して何か対案がある場合、どのように検討比較するのかというご質問かと思いますが、我々としては、運用戦略の違いはありますが、基本的には長期投資家目線の観点から、その会社の長期的な企業価値にとってどちらがプラスなのかを重視しております。

ですので、買収者がさらなる関与をすることがその会社にとってプラスなのかどうか、それに対して現経営陣はそれを上回るような対案を出せているのかどうか、そういったことを考慮しながら、そして提示されている価格の評価を行い、最終的に決断しています。

部分買付けか全部買付けかも非常に重要な要素ですが、それだけで賛否を決めるのではなく、企業価値の観点からどちらの主張がより価値が上がるのか、あるいは妥当な評価が得られるのか、総合的に判断して決めています。

○梅本　　よく分かりました。どうもありがとうございました。

○飯田　　今の点は非常に興味深い点で、理論的に言うと、例えば MBO のときのキャッシュアウトについては、長期的な投資家の目線で考えてどちらの方が会社にプラスになるのかという視点もあり得るのかもしれませんけれども、キャッシュアウトされてしまうから、もう買取価格の値段だけを考えることになるように思いますので、いろいろ考えると難しい問題もあるのかなと思いました。もし何かそういうキャッシュアウトの場面に特有のお話があればご教示いただけますでしょうか、というのが１点目です。いかがでしょうか。

○江良　　キャッシュアウトの場合、当然価格が最も重要となります。提示価格が本質的な価値と照らし合わせて妥当なものなのか、判断は簡単ではありませんが、丁寧に分析します。

その評価にあたって、どのようなプロセスで価格が決められたのかが重要となります。私も参加させていただいたのですが、経産省様のほうで MBO 指針（公正な M&A の在り方に関する指針）をまとめていただいており、特に利益相反が強いような局面において、少数株主利益をどのように保護するのかという観点から、例えば社外取締役によって構成される独立委員会の充実、あるいは他の利益相反対応措置について検討したか否か、価格の算定基準の根拠、価格交渉の有無も含めた価格決定プロセスについても重視します。

ただ、現実的にはこのあたりの情報開示はどうしても不足することも多く、また、マネジメント側から出てきている数字を前提条件としていることはあるので、あらゆる要素を勘案しながら総合評価しているのが実態です。

【議決権行使助言会社との関係】

○飯田　　ありがとうございます。

別の点ですけれども、議決権行使助言会社の意見をどのくらい参考にしているかというところで、今日のお話を伺っていると、あまり参考にされていないというような感触で伺いました。しかし、一応読んではいるし、参考にもしているとおっしゃったと思います。それは特定の案件において参

考にしているというよりかは、どちらかというとブラックロック社としての議決権行使の基準を定めるときの、例えば来年度の基準をどうしようかといったときに、大きな方向性を見直すときのものとして参照されているのでしょうか。それとも個社ベースで、議決権行使助言会社が反対だと言っているからここは議決権行使を変えようというかたちで参照されているのでしょうか。あるいはそういう個別ベースで参照されるというのは極めて例外的なのでしょうか。その辺の参考のされ方というのをもう少し教えていただければと思いますが、いかがでしょうか。

○江良　　助言会社自身の考え方に基づく助言レポートを購入はしておりますが、参照する場合としない場合、はっきりしています。

参照する場合は、判断が分かれる余地がありうる場合、例えばMBOの案件、株主提案など、我々として判断をより丁寧に多面的にすべきであろうという場合です。

その場合の利用方法ですが、まずは我々が集めた情報の正確性を検証するために、違うソースの情報として活用するというのが１つ目でございます。

２つ目は、我々が見落としている情報がないか、追加的な情報を取得するために利用しているということもございます。

３つ目としては、彼らがどういう根拠で判断に至っているかを参考にしますが、最終的な賛否は我々が必ず決めます。なぜなら、我々は企業と対話をしているためです。先ほども少しご説明したとおり、企業の経営者だけではなくて、社外取締役との議論も含めて、あらゆるステークホルダーにヒアリングをし、形式面だけではなくて実質的な評価も重視します。したがって、結果として助言会社と考え方や判断が異なることは珍しくありません（参考： BlackRock Viewpoint July 2018『The Investment Stewardship Ecosystem』Exhibit 8）。

○飯田　　ありがとうございます。

○川口　　投資家とのエンゲージメントはあるということですが、議決権行使助言会社とのエンゲージメント、対話というのはないのですか。

○江良　　日常的に対話しています。ただ、我々だけが彼らの顧客ではないので、投資家の意見も人によって様々あるということかと思います。

○川口　　ありがとうございます。

【スチュワードシップ活動へのインセンティブ】

○松尾　　本日はどうもありがとうございました。

アメリカの論文等を見ていると、パッシブファンド（インデックスファンド）の運用者というのは、スチュワードシップ活動が過少になるとされています。それはパッシブの場合は、投資先の企業価値を一生懸命上げて、それで株価が上がったとしても、他の同じ構成のインデックスファンドを利することになってしまって、スチュワードシップ活動に費用をかければかけるだけ、自分たちは他のインデックスファンドと比べると競争上不利になってしまう。だから、そもそもスチュワードシップ活動をするインセンティブを持たないのではないかと言っている論文が割とあると思うのですね。

それと比べると、今日お話しいただいたことは、随分積極的にスチュワードシップ活動をやっておられるなという印象ですけれども、それはなぜなのか。

投資家としてやはりこういうことをした方がトータルのリターンは高くなることがあるかと思いますし、スチュワードシップ・コードができて、義務的にというか、やっておられるのかもしれない。あるいは、冒頭の久保先生のお話にもありましたけれども、アセットオーナーから選ばれるためには、スチュワードシップ活動に注力した方がいいのだというようなこともあるのかもしれません。

もう一つ、アメリカの論文等でパッシブファンドのスチュワードシップ活動が過少になる問題を解決するための一つの方策として、アクティブ運用のファンドと共通してスチュワードシップ活動をやればいいのではないかといわれています。ア

クティブの方は、個別の企業に働きかけるというのは投資家として合理的だという前提です。今日のお話を伺っていると、そこはまさにそのようにやっておられるのかなと思いました。アクティブ運用のファンドの投資先とパッシブの投資先と特に区別することなく、スチュワードシップ活動の内容を決めておられるように拝聴しましたので、そういうこともひょっとしたら積極的なスチュワードシップ活動の要因になっているのかなと思いました。

それで、もし今のようにアクティブの投資先とパッシブの投資先で区別せずにスチュワードシップ活動を行っているとしますと、スチュワードシップ活動にかかる費用というのは最終的にどのようにアセットオーナーに賦課されているのか、どういう割付けをしていらっしゃるのかということをお尋ねしたいです。

アクティブの方からすると、すごくいいことをやってくれていて得をしているとなる一方で、パッシブからすると、余計なことをしていてやめてほしいということになるのかもしれないので、どういう割付けをされているのかということをお伺いしたいと思います。よろしくお願いします。

○江良　　スチュワードシップ活動のインセンティブ、活動に注力する理由でございますが、我々の場合ですと、スチュワードシップ・コードができる前からスチュワードシップ活動を実施しておりまして、少なくとも 1999 年ぐらいから展開しています。もともとのきっかけは、パッシブ運用は売却ができないので、長期的な観点から企業と向き合って、企業価値を上げるインセンティブがあり、極めて重要な活動であるという認識でした。加えて、市場全体に投資するという観点から、市場自体をよくすることについて、きちんとリーダーシップを発揮できる投資家としての責任を強く感じています。

ご指摘のとおりスチュワードシップ・コードが日本においても正式に制定されて、また特にアジアの国々でも非常に広がってきているという状況がございます。社会の要請としても非常に高まってきている、そしてそれに対する責任を果たすという意味でも非常に重要性が上がってきましたし、また、先ほどもご説明したとおり、スチュワードシップ・コードに我々のお客様が署名することも増えてきております。

ですので、我々としてはもともと重要な活動だと考え、責任感を持ってやってきたというところで、スチュワードシップ・コードの制定等の外部環境が進展し、お客様からも評価される項目の一つとして位置づけされることも増えてきたため、差別化要因にもつながってきているというのが実態と感じています。

アクティブと一緒にやっているというところは、まさにそのとおりです。ただ、アクティブは、調査対象とする企業数（カバレッジ）は、限定的です。選別して集中して投資するというスタイルですので、どうしてもカバーできる会社の数とは、狭くなります。一方で、パッシブ運用は広く、浅くという、という運用手法でございますので、我々としては、この中間、良いところどりをする発想を持っているのが実態です。

アクティブと比べて四半期報告を分析しながら判断するという定点観測することはできないかもしれませんが、会社のビジネスモデル、経営陣、その目指す経営の方向性というのを理解したうえで、実質的な判断する。そういった中間的な組み合わせを意識して、スチュワードシップ活動に従事しています。

コスト、主に人件費ですが、かなりのリソースがかかっています。ただ、特定の運用戦略のお客様を背負っているというよりは、むしろ全てのお客様を代弁しているという意識ですし、そのように活動するほうが企業に対する交渉力、影響力という部分にもつながるメリットもあります。そのため、個別の運用戦略ごとに活動内容もコストもわけてというアプローチも非常に難しいので、現時点では、スチュワードシップにかかるコスト負担は運用会社が負担していますので、特に小規模の運用会社にとっては重い負担かと思います。したがって、スチュワードシップ活動にかけられる

コスト、人員、リソースは、どうしても運用会社の規模、あるいは運用戦略との整合性、例えば投資先企業のバリューアップを付加価値とする運用戦略などに依存すると思います。

○松尾　　大変よく分かりました。ありがとうございます。

【対話のアプローチおよびフェア・ディスクロージャー・ルールの影響】

○片木　　本日はありがとうございます。

私はこういう方面は専門ではございませんので、基本的なところの質問になりますけれども、８ページで、近年エンゲージメントとしての対話先の企業が非常に増えてきているとお話しいただきました。この増えてきたというのは、ブラックロック様から会社に対して働きかけて、その結果として伸びているのか、逆に会社の方からぜひ話を聞いてほしいという感じでアプローチしてきて、その結果として伸びているのか、どちらなのでしょうかというのが１つ目の質問です。

2018年の本研究会で、金商法に新たに取り入れられたフェア・ディスクロージャー・ルールについて取り扱いました。そのときにも、このルールによって機関投資家と会社との間のまさにエンゲージメントといいましょうか、あるいは対話がどの程度の影響を受けるのかというのが注目されると伺ったのですけれども、実際のところ、こういうルールの導入によって、企業とのエンゲージメントというものについてどのような影響があったのでしょうかというのが２つ目の質問です。よろしくお願いいたします。

○江良　　明確な区分けも難しいのですが、企業様からお声がけをいただくという方が割合としては多くて、６割程度。ただ、そのきっかけが、例えばですけれども、こういった研究会やセミナーで発信した結果、それだったらブラックロックの話をちょっと聞いてみようと思っていただいた会社さんからお声がけをいただくというパターンも含まれているので、こういった場合、我々から働きかけているのか、相手から来ているのかというのは分類としてなかなか難しいというところはあります。

また、我々の方から働きかける場合ですと、何か具体的な課題がある場合など深いエンゲージメントをする必要があると判断したケースが多くなりますので、社数を増やすというよりは、その同じ会社に何回も働きかけるというような傾向があります。したがって、会社数は増えにくいという傾向があります。

また、セミナーだけではなくて、我々の創業者でもあるのですが、米国本社の CEO のラリー・フィンクが投資先企業に対して毎年お手紙をお送りしている状況でございます。この活動はもう 10年近く継続していますが、投資先企業の CEO に対して、その時々の、基本的には長期的な目線で経営してほしいというような、長期的な投資家としての期待値を示すようなレターの内容になっているのですけれども、それを毎年お送りしております。

その中に、我々としては長期目線で中長期的な経営を期待しているのだということを述べて、そういったことについてぜひ対話をしたいということも呼びかけているので、そういった活動に応じていただくような CEO、トップの方も多々いらっしゃるということがあります。

２点目、フェア・ディスクロージャー・ルールの影響ですが、実際に日本においてフェア・ディスクロージャー・ルールが議論されていたときも、私も議論に実際に関わらせていただいた立場でありましたので、ご指摘の点を心配している部分もありました。フェア・ディスクロージャー・ルールを会社側が対話を拒否する理由として使われることになってはいけないこと、投資家と企業の対話の機運といいますか、よい方向にあるモメンタムを停滞させてしまうような結果になってはいけないという観点から、議論をさせていただいたことがございました。その結果、基本的には、長期的な目線についての対話については、フェア・ディスクロージャー・ルールに抵触するような可能性は限りなく低いという目線をきちんとお示しい

ただけたのかなと思いますので、結論としては、現時点ではあまり影響は出ていない状況です。

我々が対話するテーマは、非常に長期のテーマが多いということもあります。したがって、四半期の業績がどうなるかとか、その年度の決算の着地がどうなるかというような、短期的な業績についての議論はむしろ少ない状況です。

どのような考え方で経営しているか、重視する経営目標指標は何か、ROE なのかとか、売上の成長率とか、あるいは事業ポートフォリオの考え方とか、そういった基本的な考え方について議論します。これらは多くの形で公表されていますし、それらをベースに、それでは実際にそれをどのように実現していくのか、どのような課題があるのか、対話の中身は、実は極めて定性的な要素が多いことも要因としてあると思います。

○片木　　ありがとうございました。

○川口　　今の話に関連して、エンゲージメントを深めていくと、インサイダー情報にも接する機会が増え、それによってインサイダー取引規制の適用を受ける可能性があるというようなことが言われていました。この点は、いかかですか。

○江良　　大半のエンゲージメントではそういった心配はありません。ただ、まれにそういったケースもあります。ですので、そのような場合は、情報管理に加えて、株式の売買を止める等の、インサイダー情報を取得してしまった場合の対応を我々の社内の手続に沿って、コンプライアンス部と相談しながら、適切に対応していくということになります。ただ、数としてはかなり限定的です。

【株主提案権の行使】

○行澤　　今日は本当に興味深いお話をありがとうございます。

実はあまり分かっていないのかもしれませんが、一つお伺いしたいのが、先ほど前田先生のお話だったかと思いますが、随分努力して何回もエンゲージメントをやったけれども、なかなか会社が言うことを聞こうとしないというときに、売却してしまうことも考えなくはないということでした。その際、逆に少数株主権行使ということで例えば株主提案するということは、戦略の中には入っていないのでしょうか。

特に ESG の観点からしましても、場合によっては定款変更などを積極的に提案して、力でそれを動かした方が企業価値も高まるという判断ができる場合に、株主提案権の行使ということも視野に入ってくるのでしょうか。もちろんコスト・ベネフィットを分析してベネフィットが上回ると判断した場合の話ですけれども。それとも、そういうアクティビストみたいなことはやらないということを前提にしておられるのでしょうか。また、実際にそういう少数株主権を行使したことがあるのでしょうか。ちょっとその辺、もし的外れでしたら恐縮ですけれども、お教えいただきたいと思います。よろしくお願いします。

○江良　　結論から申し上げると、我々として株主提案を実施したことはありません。ただ、選択肢として排除しているというわけではありません。

ただ、実務においては手続面での課題というのもございますし、また提案を出して、それによって企業行動が変わるという側面も場合によってはあろうかと思いますが、それよりも、我々としては株主総会前に対話を通じて変化を促したほうが成功確率が高いというのが、正直な実感としてあります。

企業側としても、総会の直前に株主提案が来て、それに応じて軌道修正するというのもなかなか難しいというのが現実としてございますので、例えば我々の場合ですと、１年とか２年ぐらいかけて一つのアジェンダについて改善を要求するということもよくやっています。少し時間はかかるのですが、本質的変化の実現可能性を考えると、対話の方が実効性があると考えています。

○行澤　　ありがとうございました。

○川口　　機関投資家同士で相談して、共同するというような動きはないのでしょうか。株主提案も一つでしょうし、いろいろプレッシャーをかけていくうえにおいて、機関投資家同士で協調するという動きというのはないのでしょうか。

○江良　　個別企業については、大量保有報告制度との関係で、現実には実施することは難しい状況です。共同保有者になってしまうと、投資業務に関連して実務的な制約が非常に大きくなります。なお、これは米国においても全く同じ状況です。

ただ、個別企業ではなくて、テーマごと、例えばジェンダー・ダイバーシティ、気候変動についての情報開示についてどのように考えるべきなのか、このような目線合わせについては、業界団体等を通じて横の連携を強化するというのはございます。

○川口　　ありがとうございます。

もう少し時間がありますが、ほかにいかがでしょうか。

【社会的に関心の高いテーマ】

○久保　　今ちょうどジェンダーの問題とかダイバーシティの問題が出てきたので、１点質問いたします。前回 ISS の方にお伺いしたところと照らし合わせるような質問ということになるかと思いますが、前回 ISS の方に伺ったときに、そういった社会的イシューのテーマを議決権行使助言会社がどのように取り上げるのかといった場合に、基本的には顧客の関心に従って取り上げるのだというような形の回答があったかと記憶しています。

そうすると、同じことは御社のような運用会社の中でも出てくるわけで、そういう社会的なテーマというものに関してより積極的に取り上げていくのだというのはどういう形で出てくるのか、やはり顧客がそういうところに関心を抱くようになるから、それについて積極的に見ていこうという形なのか、それとも、御社の哲学とか考え方、そういったところでこれは積極的に取り上げるのだという取り上げ方をなさるのか、どちらの方が強いのかというところをお教え願えると幸いです。

○江良　　両方だと思います。我々もお客様の関心については耳を真摯に傾け、様々な方がどういう意見をお持ちなのか、どのような部分に強い関心をお持ちなのか、きちんと理解するように努めています。

当然、いろんなお客様がいらっしゃるので、いろんな意見がありますが、共通項を見出し、それについては当社のプロセスに反映することを心がけています。

一方でそのようなテーマは、もともと我々も重要だと考えるテーマも多いです。例えばジェンダー・ダイバーシティの話であれば、イノベーションをどう促していくのか、あるいは従業員の活性化ということも含めて非常に重要なテーマです。気候変動についても、これはお客様からどういう対応をしているのかということを近年最も聞かれるテーマの一つになっており、我々としては、さらに活動のペースを加速させる部分は当然ございますが、もともと重要だと考えて取り組んでいる分野です。

○久保　　分かりました。ありがとうございます。

○川口　　もう少し時間がありますが、よろしいでしょうか。

それでは、大体時間になりましたので、本日の研究会はこれで終わりたいと思います。

本日は、本当に貴重なお話をありがとうございました。議決権行使とエンゲージメントが一体で運用されているということがよく分かりましたし、特に議決権行使助言会社との関係について貴重な情報を与えていただいたかと思います。どうもありがとうございました。

日本取引所グループ　金融商品取引法研究会　勉強会資料

BlackRock

機関投資家における議決権行使・エンゲージメント活動について

ブラックロック・ジャパン株式会社

2021年10月22日

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1. ブラックロックのスチュワードシップ活動

ブラックロックの概要

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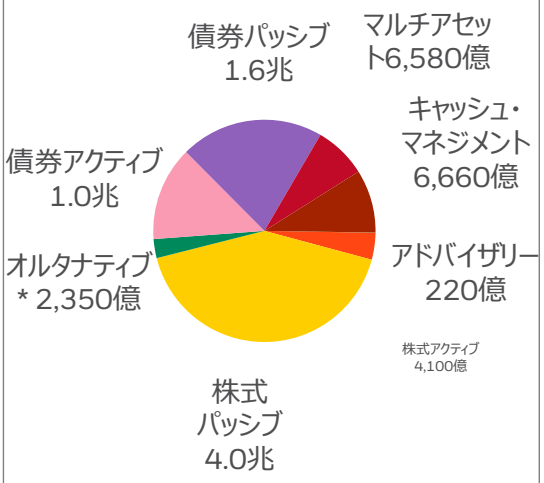
- 1988年設立
- ニューヨーク証券取引所上場（ティッカー: BLK）
- 運用資産残高約 8.68兆ドル（約896兆円）
- 社員数 16,000名超
- 運用プロフェッショナル数 2,400名超
- 35ヶ国以上で展開
- 主要運用拠点25ヶ所
- 100ヶ国以上に広がる顧客基盤

約8.68兆ドル（約896兆円）に及ぶ様々な資産を運用



2020年12月末　適用レート：WMロイター 1ドル =103.245円

運用資産は2020年12月末現在（単位：ドル）
*：コモディティ及び通貨マンデートを含む

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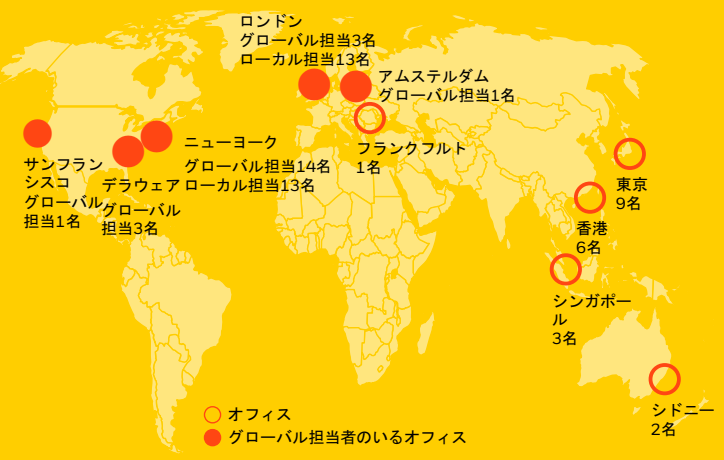
ブラックロックのスチュワードシップ体制

- グローバルかつローカル
- 世界で最大級のスチュワードシップチーム
- エンゲージメントと議決権行使はブラックロック・インベストメント・スチュワードシップ部門（**BIS**）のスチュワードシップ活動の両輪
  - **2020年7月1日から2020年6月30日の1年間で、BISは165,000件以上の会社提案及び株主提案に議決権を行使**
  - 同期間で、**BIS**は世界の**2,300**社以上の企業と**3,600**回以上のエンゲージメントを実施
- **BIS**では、**2020**年にグローバルで**230**以上の業界イベントで講演
- **BIS**は、当社及びブラックロック・グループ内の様々な運用担当者と連携し、当社及びブラックロック・グループとしての統一的意見に集約する役割を担う。



65+	70+	18	25	31	40+	
人の専任担当者のチーム	の市場で議決権を行使	の言語に対応	の専門的な資格を取得	の専門領域	の各種関連団体に参画	当社及びブラックロック・グループのインベストメントアナリスト、スペシャリスト、リサーチャー、アクティブ・インベスターのグローバルな専門知識を活用

As of August 1, 2021

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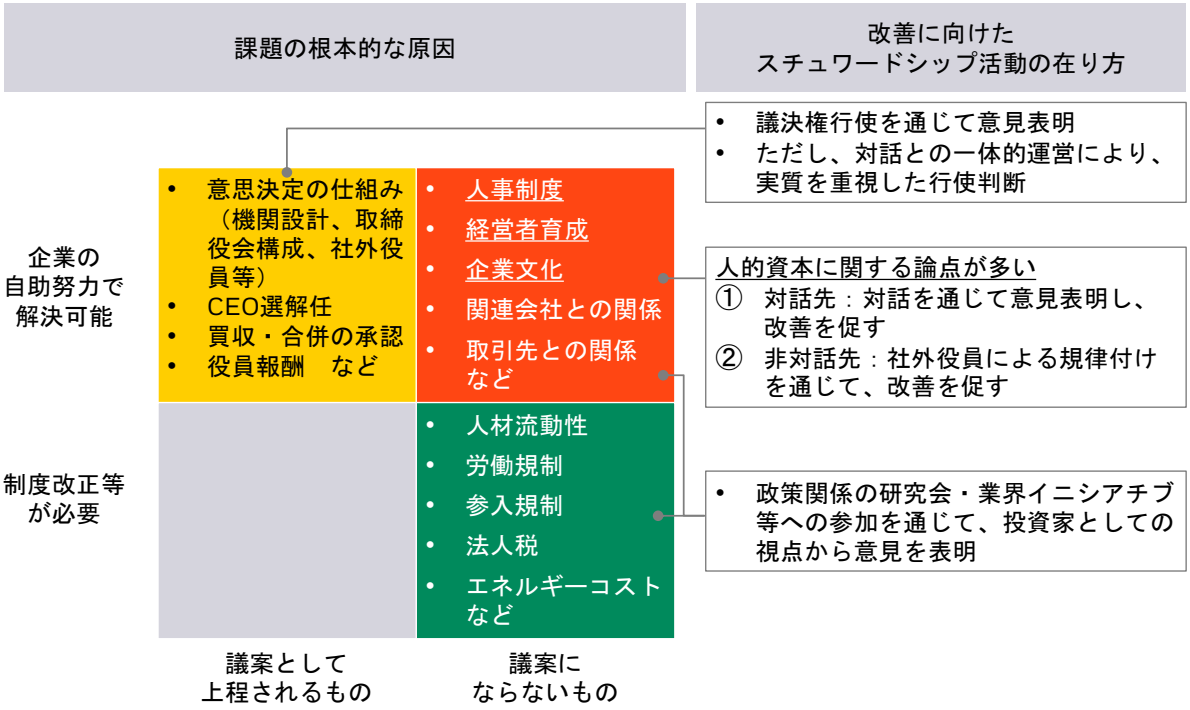
日本における投資先企業の収益力の強化に向けたスチュワードシップ活動の方針



日本における議決権行使の状況（2020年7月～2021年6月）

・　。

会社提案

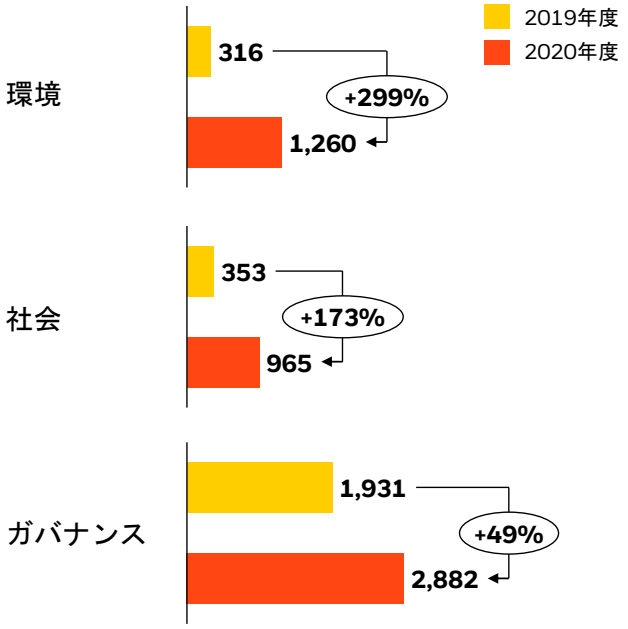
議案名称	賛成	反対	棄権	白紙委任	合計
取締役の選解任	16,972	1,029	0	0	18,001
監査役の選解任	1,640	192	0	0	1,832
会計監査人の選解任	75	2	0	0	77
役員報酬	890	102	0	0	992
退任役員の退職慰労金の支給	86	47	0	0	133
剰余金の処分	1,464	2	0	0	1,466
組織再編関連	59	0	0	0	59
買収防衛策の導入・更新・廃止	3	56	0	0	59
その他資本政策に関する議案	82	2	0	0	84
定款に関する議案	517	42	0	0	559
その他の議案	2	6	0	0	8
合計	21,790	1,480	0	0	23,270

株主提案

	賛成	反対	棄権	白紙委任	合計
合計	11	195	0	0	206

サステナビリティ関連テーマについての対話を強化

対話内容の内訳



429件の対話において新型コロナウィルスの影響を議論

経営戦略に関する対話が**52%増加**。その多くで新型コロナウィルスを受けた中長期の経営戦略について議論

昨年比3倍以上の**750件**の対話において人的資本に関して議論

各年度は7月から6月までの12か月間を指す（2020年度：2019年7月～2020年6月）。

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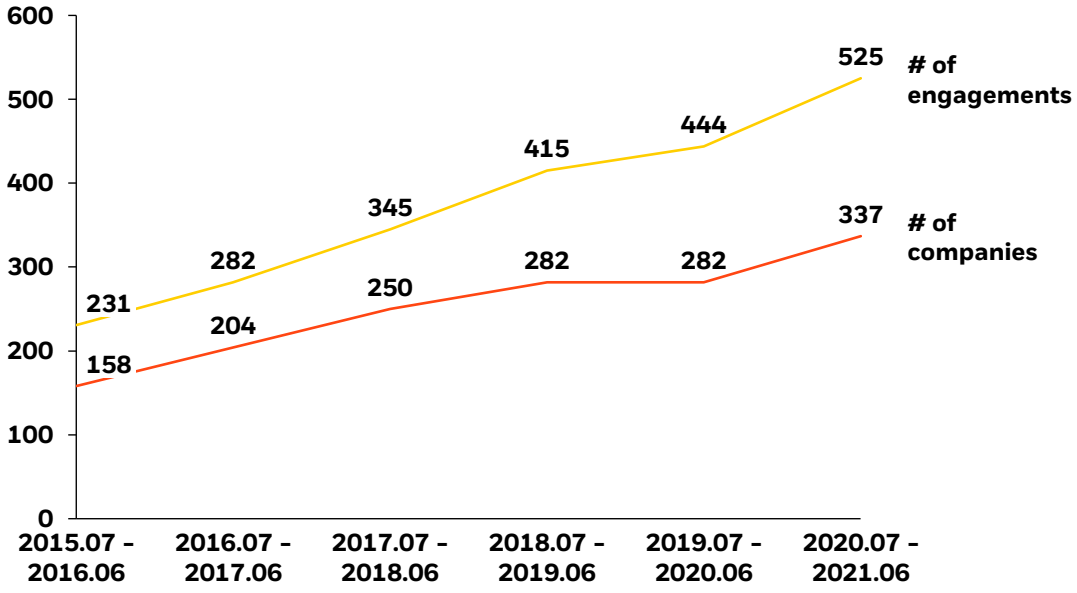
日本におけるエンゲージメントの状況

エンゲージメントMTG数と企業数の推移



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2. 議決権行使プロセス

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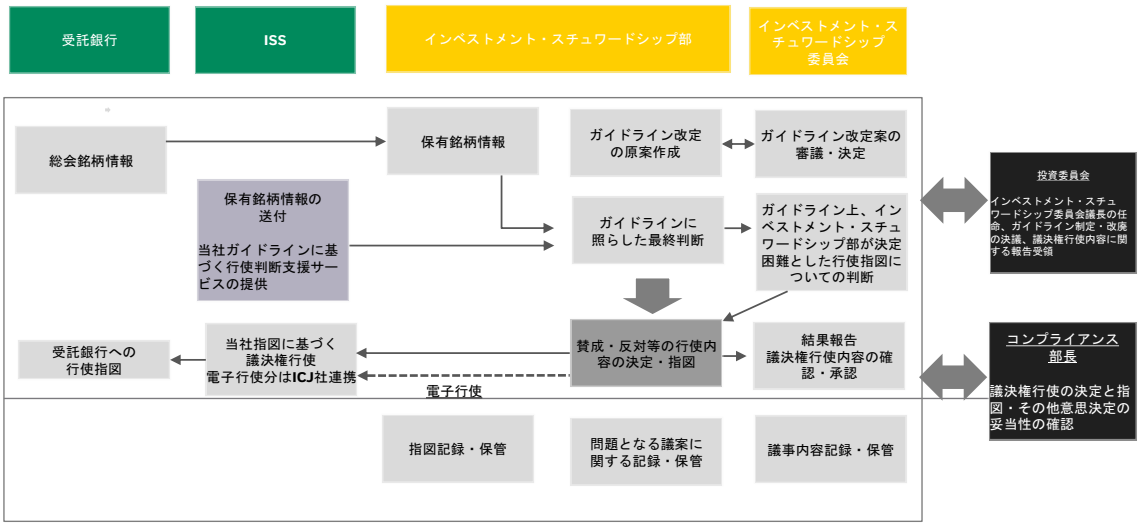
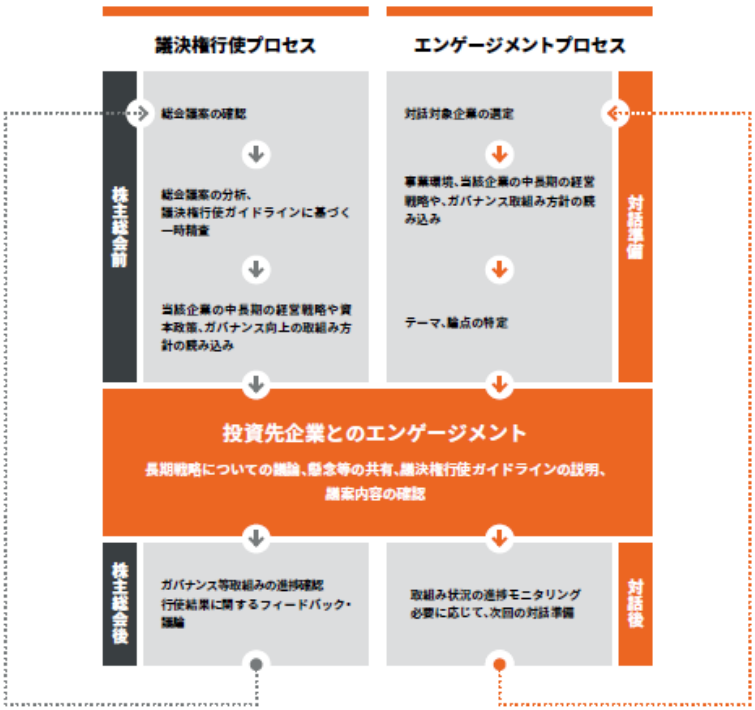
議決権行使の体制及びプロセス等

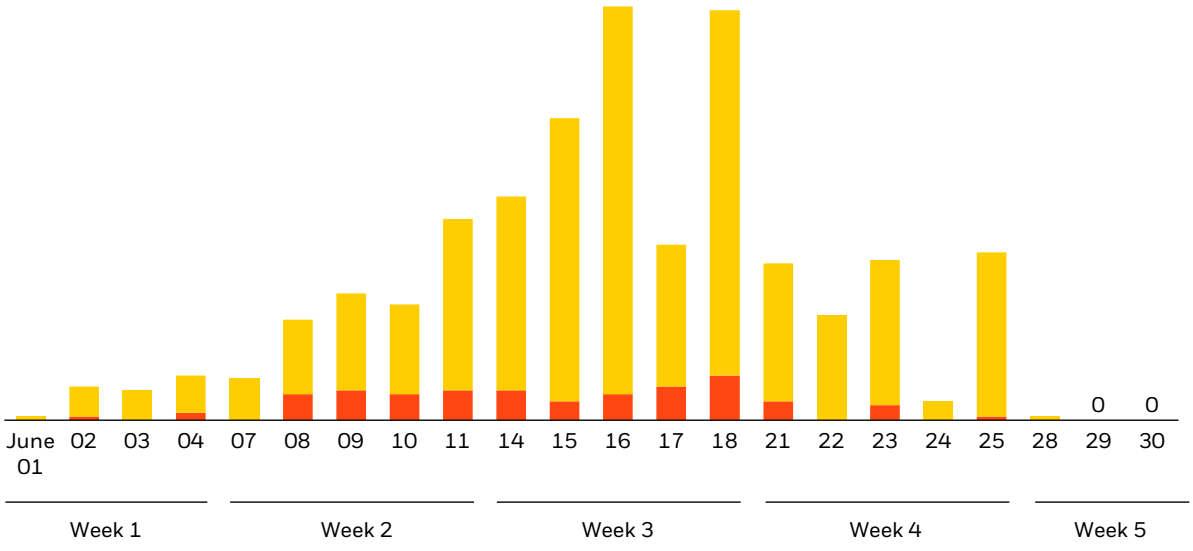
- インベストメント・スチュワードシップ部において議決権行使の決定と指図を行うことが困難と判断される議案について、インベストメント・スチュワードシップ部は当該議案の内容をインベストメント・スチュワードシップ委員会に報告のうえ、同会議の行使指図の判断を仰ぎます。
- インベストメント・スチュワードシップ部による議決権行使の決定と指図の内容はインベストメント・スチュワードシップ部がインベストメント・スチュワードシップ委員会に報告し、確認・承認を求めます。また、議決権行使の決定と指図の内容はインベストメント・スチュワードシップ部が定期的に投資委員会に報告します。



議決権行使とエンゲージメントの一体的運用



株主総会の特定日の集中は緩和したものの、株主総会の集中に起因する時間的制約はあまり変わっていない。

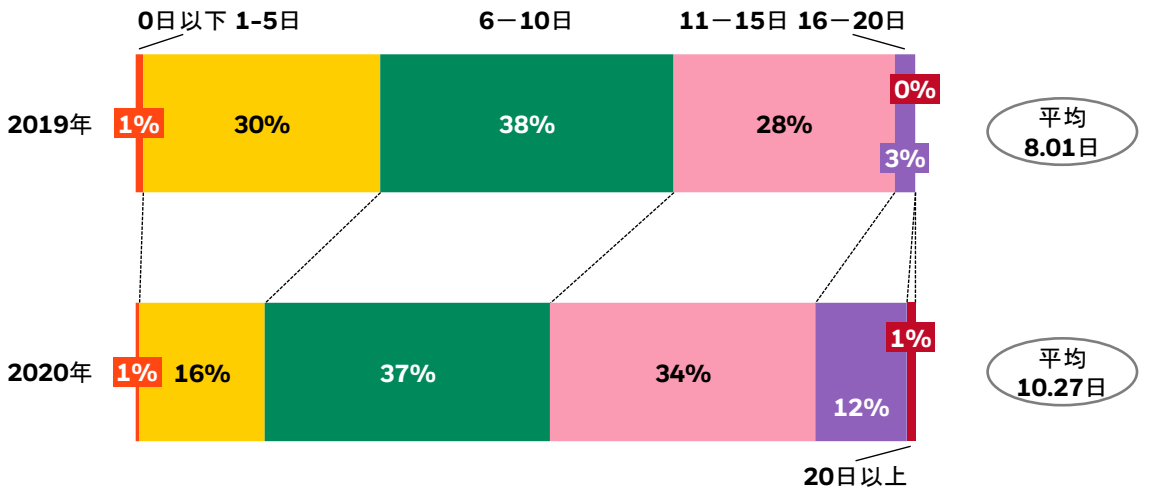


出所：ブラックロック・ジャパン調べ

ICJ社の電子行使プラットフォーム導入等で実務的な工夫はしているが、依然として判断にかけられる時間は多くはない

- 当社は、本年2月よりICJ社が提供する議決権電子行使プラットフォームの活用開始
- 多くの企業で議決権行使締切が後ろ倒しになり、検討期間が延長されることで、より実質的な判断が可能に
- 本プラットフォーム活用推進のため、未参加の企業には対話の際に参加の検討を呼びかけ。本来は義務化が望ましい。

6月総会における招集通知入手から議決権行使締切までの日数（営業日ベース）



出所：ブラックロック・ジャパン調べ

議決権行使助言会社の活用

外部の議決権行使助言会社の利用状況

- 個別の議決権行使やエンゲージメントの実施にあたっては、BISが公開情報、議決権行使助言会社、証券会社の分析調査等を活用しながら、独自に会社議案を精査したうえ、判断している。さらに、必要と考えられる場合には、当社の運用担当者と協議する場合もある。
- 前述の通り、議決権行使における時間的制約は依然として大きいため、すべてのリサーチをインハウスで行うことは実質不可能。
- 議決権行使に当たっては、当社のガイドラインに従った行使指図に係る業務を委託する場合があります。ブラックロック・グループの業務委託先としてISS社、Glass Lewis社等を活用。
- 具体的には、ISS社については議決権行使の補助業務（指図書原案作成）を委託、及び当社基準に基づく議決権行使判断支援サービスおよびISS社独自の基準に基づく議案分析レポートも購入。
- Glass Lewis社（GL社）独自の基準に基づく議案分析レポートの購入。
- 議決権行使の対象となる会社と当社との間に利益相反が生じる潜在的可能性が懸念される場合に、当社ガイドラインに基づいた行使判断をGL社等の独立の第三者機関に委託することも稀にある。

3. ブラックロックのエンゲージメント活動

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エンゲージメントの重点項目

エンゲージメントにおける議題設定、ESG情報の活用

- 当社及びブラックロック・グループは、企業の持続的成長の実現のためには、企業経営者と投資家双方が、事業に直結する環境・社会・ガバナンス（ESG）要素について、考慮することが重要であると認識しています。このような観点から、当社及びブラックロック・グループでは、エンゲージメントにおいて重点的に取り組む5つの議題を設定し、下記に掲げたれらの議題について積極的に対話する方針をグローバルで共有しています。さらに、各国の市場環境や固有の課題、投資先企業の事業環境や個別事情を十分に考慮した上で、個別のエンゲージメント議題を決定しています。

- また、エンゲージメントや議決権行使を通じて収集した、企業のESG情報を、当社及びブラックロック・グループの様々な運用チームと共有するなど、さらなる社内連携を強化していく方針です。

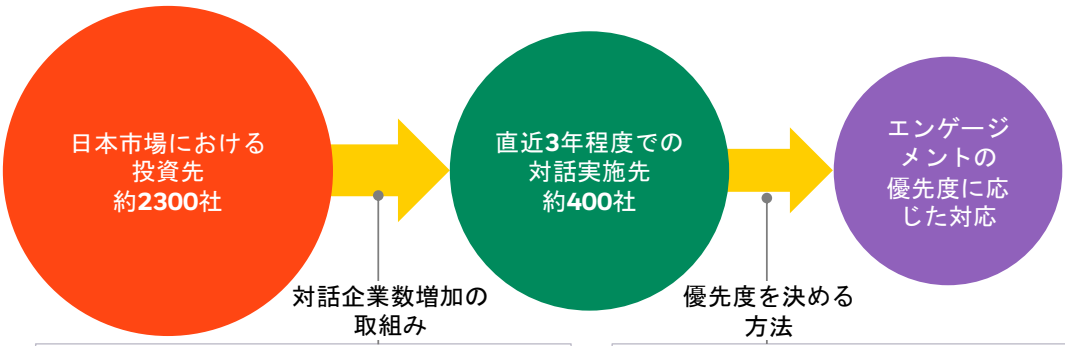
2021年のグローバルのエンゲージメントの重点項目

1	2	3	4	5
取締役会の質と実効性	気候変動	戦略、パーパスおよび財務のレジリエンス	価値創造と整合的な役員報酬	人的資本
質の高いリーダーシップは優れた業績を上げるために不可欠である。取締役会の構成、実効性、多様性への取り組み、そして説明責任を引き続き最も重視する。	目標設定を伴った気候変動に関する行動計画が低炭素経済への移行を促進する。自然資本への依存と影響を持続可能なビジネスモデルを通じて管理。	健全なに資本管理に裏打ちされた、パーパスを重視する長期的な戦略が、財務のレジリエンスを支える。	適切な報酬制度によって、持続的で長期的な価値創造を実現する役員にインセンティブを与える。	持続可能なビジネスモデルがすべてのステークホルダーにとっての長期的な価値創造につながる。

日本における重点対話項目

	主な議題
パーパス 長期経営戦略	▸ パーパス(企業理念、存在意義)に裏打ちされた経営方針（長期ビジョン・経営戦略） ▸ 経営方針の策定・評価プロセス（KPI） ▸ 経営方針と整合的な企業文化の醸成、 組織内へのコミュニケーション、浸透 ▸ 事業ポートフォリオマネジメント（事業の評価、最適な資源配分、M&A戦略） ▸ グループ・マネジメントの強化（グループ全体としての分権化と主権化のバランス） ▸ 技術革新への対応 （マネジメント・ツール、ビジネスモデル） ▸ 経営戦略の実現に向けた機動的な資本政策
人的資本の 質・量	▸ 経営戦略と整合的な人事制度（事業、地域、職種の多様性への対応） ▸ 多様な働き方・キャリアパス提供を通じた従業員エンゲージメント ▸ 経営人材の育成・確保（オーナー企業の事業継承、経営人材育成システム、タレント・マネジメント） ▸ ダイバーシティ
ガバナンス	▸ 取締役会の役割の明確化（監督機能と執行機能のバランス、監査役会・経営会議との関係性） ▸ 中長期の会社業績に対する経営責任の明確化 ▸ 適正な役員任期 （大きな変革に取り組む場合の経営の継続性） ▸ 機能する独立社外役員の人材育成、人材データベースの充実 ▸ 経営陣に対する適切なインセンティブ設計 （報酬水準と連動性は表裏一体） ▸ 不祥事対応 ▸ 買収防衛策、資本市場とのコミュニケーション不足 ▸ 政策保有株式への対応
サステナビリティ 気候変動リスクへの対応	▸ 気候変動による事業リスク・機会への対応、情報開示 • 移行リスク：規制強化等により事業が大きく影響を受ける業種の企業 • 物理リスク：気候変動により、主力事業に大きな影響があると思われる業種の企業

エンゲージメントにおける優先度の決定プロセス：対話実施企業の中から、課題解決のインパクトが大きい企業を選定



ウォッチリストの活用

財務指標やガバナンス指標により重大な課題がある企業を選定し、対話

重大な企業イベント

合併、大型M&A、不祥事などがあった企業との対話実施

アクティブ運用チームとの連携

IR取材先（中小型株中心に年間約500社）からエンゲージメントによる企業価値向上余地が大きい会社を選定

ポートフォリオへのインパクト

TOPIXに占めるウェイトが大きく、市場全体への影響が大きい企業

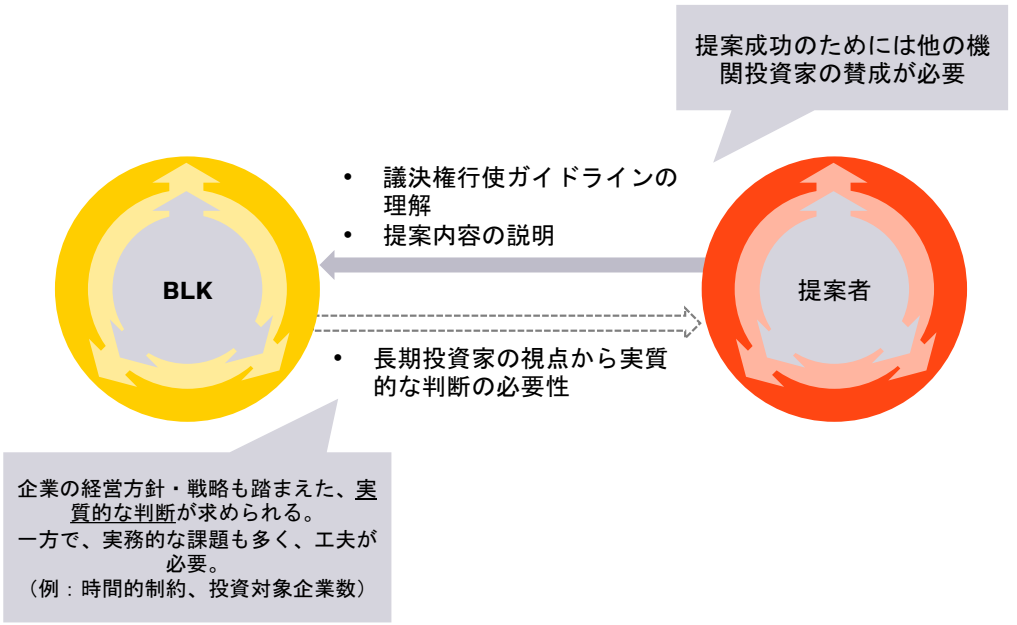
変化の可能性

ブラックロック・グループの保有率が高く、経営陣との直接のアクセスがある企業

エンゲージメントによる改善余地

対話を通じて企業のESG課題を独自評価し、改善余地が大きい企業

株主提案への対応（イメージ）



4. 議決権行使方針の主な方針

議決権行使ガイドラインの基本的な考え方

内部統治に関する内発性尊重アプローチ

インセンティブ報酬の重視

投資家にとっての透明性の重視

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取締役選任議案　（2022年1月以降）

	監査役設置会社	監査等委員会設置会社	指名委員会等設置会社
社外取締役の独立性（独立でない社外取締役の選任に反対）	利益相反の懸念が大きい企業[1] • 非独立社外取締役の選任に反対 ※上記に該当しない企業においては、社外取締役の独立性を精査しない	• 独立でない社外取締役の選任に反対（監査等委員でない社外取締役含む）	• 独立でない取締役の選任に反対
取締役会構成（基準を満たさない場合、原則経営トップに反対）[2]	利益相反の懸念が大きい企業[1] • 独立した社外取締役が3分の1以上が選任されていること	• 独立した社外取締役が3分の1以上が選任されていること	• 独立した社外取締役が半数以上選任されていること
	独立社外取締役２名選任		

1）買収防衛策導入済みもしくは導入予定の企業、または20%以上の支配力を有する大株主が存在する企業、東証プライム市場に上場している企業（予定）
2）任意を含む指名委員会およびそれに準ずる委員会の構成や実効性等を確認できた場合は、その限りではない

社外取締役・社外監査役の当社の独立性基準

独立性基準

- 大株主：10%以上
- 取引関係：一定規模（2%程度）を目途
- 弁護士：顧問契約がないこと（過去も含む）
- 会計監査人：監査法人の代表社員（パートナー）経験者
- その他：主幹事証券会社、取締役相互派遣等
- 借入先（メインバンク）：原則、独立性の判断要件としない。（ただし、買収防衛議案等の有事にかかわる議案には考慮する場合あり）
- クーリングオフ制度：関係機関退職後5年程度

社外取締役・監査役の出席率

- 原則75%以上

社外取締役・監査役の在任年数

- 16年以上

社外取締役・監査役の兼職数

- 自社を含む５社以上の上場会社の取締役・監査役

買収防衛策議案 – 3つの視点で検討

1 取締役会構成

- 発動要件が限定型的
  - ✓ 高裁四類型
  - ✓ 強圧的二段階買収

取締役会の独立性：20%以上

- 発動要件が拡大
  - ✓ 高裁四類型
  - ✓ 強圧的二段階買収
  - ✓ その他の条項
    （例：「根源的な企業価値…」「ステークホルダー全体の利益…」）

取締役会の独立性：50%以上

2 特別委員会

- 全員が独立社外取締役もしくは独立社外監査役で構成されていること。

※　３名以上は上述の独立社外取締役・監査役であること。それ以上の構成の場合、社外有識者（利害関係がないが独立社外取締役もしくは独立社外監査役の選任も可）

3 その他

その他、防衛的な仕組みがないか？

- ✓ 取締役任期が1年
- ✓ 大株主（20%以上）が存在しない
- ✓ 追加選任の余地がない（定款上の上限員数と現職の取締役員数が一致）
- ✓ 過度な持ち合い株式が見られない

※すべての基準を満たすこと
※有事発動型買収防衛策等については個別に判断

議決権行使ガイドラインの直近の主な改定

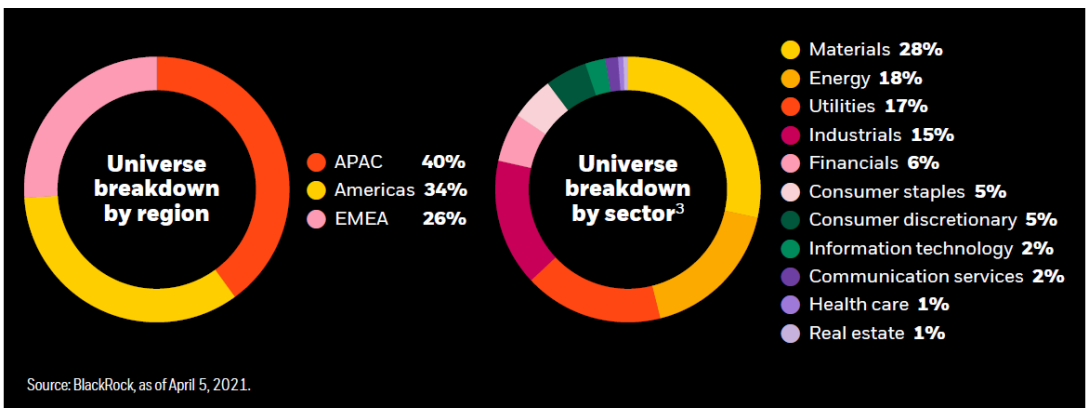
サステナビリティに関する基準の追加	• 「気候変動関連の開示対応」を取締役選任議案において対応する旨の基準を明記。 • 対象企業は、GHG排出量等を勘案し、気候変動リスクが特に大きい企業 • TCFDに基づいた情報開示や当該情報開示や気候変動リスクへの取り組み・改善が不十分な場合、責任を負う取締役の再任に反対
ジェンダーダイバーシティの基準の導入	• 「ジェンダー・ダイバーシティの推進にかかる対応」を取締役選任議案において対応する旨の基準を導入。 • 対象企業はTOPIX100構成企業 • 取締役会・監査役会において女性の取締役または監査役が選任されておらず、その理由に合理的な説明がなされない場合や、女性の活躍推進に向けた取り組みや改善が見られない場合、責任を負う取締役の再任に反対。
ROE基準の厳格化	• ROEが低下傾向にあり、かつ直近が低位（3%未満）の場合 • ROEが過去3年間連続して3%未満の場合

2021年の議決権行使における気候変動の取り組み

気候変動ユニバース対象企業に対する評価

2021年には、気候変動の影響が大きいと考えられる企業を世界で1000社超選定し、気候変動リスクと機会への対応に関する情報開示をはじめとした対応を求める活動を本格化しました。

- 2020年から気候変動ユニバースに含まれる企業のうち約65%の企業の気候変動に関する取り組みや情報開示の改善が実現しました。
- 今年度の株主総会においては、長期的な株主価値向上の観点から気候変動に関わる取り組みや情報開示が不十分と判断し、319社の投資先企業に懸念を表明しました。



まとめ

議決権行使プロセス	• 株主総会の集中、投資対象企業数が多いことから、株主総会における議案判断において効率的に判断する必要がある。 • そのために、議決権行使ガイドラインの制定、自社のガイドラインに基づく議決権行使助言会社による助言サービス等も活用するが、あくまで行使判断は自社の哲学、考え方に基づくものであり、助言サービスはあくまで参考情報。 • 個別企業の特性や経営環境に十分に考慮したうえで形式的判断ではなく実質的判断を行うことも極めて重要である。ただし時間的制約等の現実的な制約も考慮しながら実務的には工夫を重ねている。
エンゲージメント	• 環境（E）、社会（S）等を含む企業の長期的な経営戦略に直結する課題についていかに戦略的に把握し、対応しているか、経営者のリーダーシップ、そしてそれを支えるコーポレート・ガバナンス（G）の実効性を重視。したがって株主総会議案よりトピックは広範 • ビジネスの持続可能性を考えるにあたって、社会構造・価値観の変化等を踏まえ、主要なステークホルダー（株主、顧客、従業員、地域コミュニティ等）を適切に考慮することの重要性が増していることから、サステナビリティ、とりわけ気候変動リスクを投融資リスクと急速に認識しつつある。 • ただし、高水準の経済的リターンが最も重要であることは変わらず、高度なバランス経営が求められる。
議決権行使	• エンゲージメントと議決権行使を一体的に運用することで、投資先企業の長期的な企業価値向上の実現が可能であると考えている。 • 企業において株主全体の利益と一致した経営規律が働いていないと判断される場合、経営規律を高める内部統治上の施策をとるように議決権行使の範囲内で会社に促す。

Appendix

業界・市場全体の底上げに向けた取り組み

グローバル全体で、各種イニシアティブや業界関連団体への参画、政策当局との意見交換を通じて、業界、市場全体の底上げに向けて積極的に働きかけています

230+
健全なコーポレート・ガバナンスやサステナビリティの取り組みの推進のための活動に参画

40+
業界関連団体に参画

7
政策当局との意見交換

グローバル

- 30% Investor Club Group (2011 in the UK / 2014 in the U.S. / 2015 Australia / 2019 Brazil / 2020 Japan)
- CECP's Strategic Investor Initiative (2017)
- Financial Stability Board (2013)
- International Integrated Reporting Council (2008)
- International Capital Markets Association – AMIC Sustainable Finance Working Group and Green Subcommittee of the Board (2019)
- Sustainability Accounting Standards Board (2011)
- UN Principles for Responsible Investing (2008)
- IFC Operating Principles for Impact Management (2020)
- Global Impact Investing Network (2020)
- CDP (2007)
- CICERO Climate Finance (2016)
- Climate Action 100+ (2020
- Climate Bonds Initiative (2015)
- Ellen MacArthur Foundation (2019)
- Green Bond Principles (2015)
- GRESB (2011)
- One Planet Asset Managers Initiative (2019)
- TCFD – Taskforce on Scaling Voluntary Carbon Markets (2020)
- The Terrawatt Initiative (2017)
- Vatican Energy Transition and Care for Our Common Home (2019)
- World Economic Forum's Future of Energy Council (2016)
- International Corporate Governance Network (2008)
- UN Global Compact (2020)

APAC

- Asian Corporate Governance Association (2011)
- Asian Investor Group on Climate Change (2016)
- Financial Services Council Australia (2009)
- Investor Group on Climate Change (2009)
- Responsible Investment Association Australasia (2011)
- Hong Kong Investment Fund Association (2007)
- Hong Kong Green Finance Association (2018)
- KRX Market Advisory Committee (2018)
- Keidanren (Japan Business Federation) (2010)
- Public Shareholders Group (2015)
- The Investment Trusts Association of Japan (1998)
- Taiwan Stock Exchange Stewardship Code (2020)

EMEA

- The UK Investment Association (2005)
- Corporate Governance Forum (1992)
- European Fund and Asset Managers Association (2006)
- Institutional Investors Group on Climate Change (2004)
- Pensions and Lifetime Savings Association (2015)
- FRC Investor Advisory Group (2018)
- The UK Investor Forum (2015)
- Eumedion Corporate Governance Forum (2010)
- Institut du Capitalisme Responsable (2017)
- UK HMT Asset Management Taskforce (2017)

AMERS

- Commonsense Principles of Corporate Governance (2016)
- Business Roundtable (2010)
- Ceres Investor Network on Climate Risk & Sustainability (2008)
- Associação de Investidores no Mercado de Capitais (2009)
- Broadridge Independent Steering Committee (1999)
- The Harvard Law School Institutional Investor Forum (2013)
- Council of Institutional Investors (2006)
- Canadian Coalition for Good Governance (2005)
- Investor Stewardship Group (2017)

As of January 2021. Not comprehensive of all BlackRock sustainability partnerships.

利益相反管理の方針

- 当社は、スチュワードシップ活動、すなわち議決権行使や「目的を持った対話」（以下、「エンゲージメント」）の対象となる会社との間に利益相反が生じる潜在的可能性が懸念される場合、具体的にはブラックロック・グループの関係会社やブラックロック・グループの運用するファンド等との関係などの理由により、当社内で議決権行使判断を行うことが利益相反管理の観点から適切でないとみなされた場合に、以下の体制によって、利益相反の回避に努めています。
- ブラックロックは特定の企業グループに属さない（及び系列会社を持たない）独立した専業の資産運用会社の為、多くの潜在的な利益相反の可能性は排除されると考えております

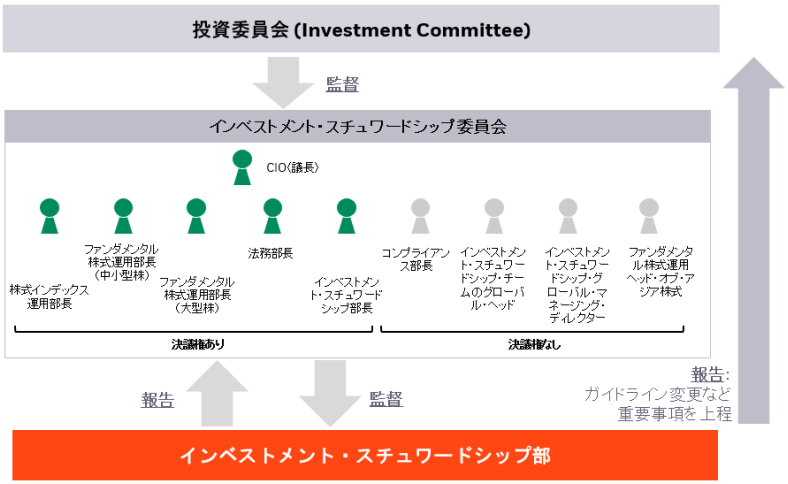
具体的には、下記の取り組み・プロセスを通じて、利益相反を管理しています。

- “A FIDUCIARY TO OUR CLIENTS”。独立系運用会社として、お客様の利益が何より優先するという行動規範を徹底することで、顧客利益を最優先する企業文化を醸成しています。
- 議決権行使業務の専任部署（インベストメント・スチュワードシップ部）を設置し、同部による議決権行使を独立した会議体（インベストメント・スチュワードシップ委員会）が監督する体制を採用しています。
- そして、企業との対話や議決権行使に、対話先、行使先企業とブラックロック自体との利害関係を考慮することがないように、専任部署を営業責任から隔離する、すなわち営業面での責任を負うことがないような組織体制を採用しています。原則として議決権行使判断を、株主総会前に特定の顧客と共有いたしません。
- さらに、強い利益相反が懸念される場合、例えば、当社社員が役員として就任している企業などに対する議決権行使については、第三者の専門機関に行使判断を委ねます。この場合、当社の議決権行使ガイドラインに基づき、第三者の専門機関は行使判断を実施します。
- 定期的に利益相反管理のさらなる徹底のため、その方針と体制を点検し、必要に応じて強化しています。本年度は、利益相反の類型をスチュワードシップ活動にかかわるものに特化する形で再整理し、各類型に応じて対応方針を強化しました。

議決権行使に関する議案の審査体制・プロセス等

- インベストメント・スチュワードシップ委員会（以下「スチュワードシップ委員会」という）は、投資委員会が任命する議長により運営されています。その他のメンバーについては議長が選任し、投資委員会が承認します。スチュワードシップ委員会は、ガイドラインに従って議決権行使の決定と指図を行う権限を有します。また、ガイドラインの改定に際して改定案を審議、決定し、投資委員会に改定を上程します。スチュワードシップ委員会はガイドラインに従って議決権行使の決定と指図を行う権限をインベストメント・スチュワードシップ部（以下「スチュワードシップ部」という）に委譲し、スチュワードシップ部はガイドラインに照らして議案を審議し、議決権の行使指図について判断します。

スチュワードシップ活動監督体制図



免責事項

ブラックロック・ジャパン株式会社
金融商品取引業者　関東財務局長（金商）第375号
加入協会：一般社団法人日本投資顧問業協会　一般社団法人投資信託協会　日本証券業協会　一般社団法人　第二種金融商品取引業協会
ホームページ http://www.blackrock.com/jp
〒100-8217　東京都千代田区丸の内一丁目8番3号　丸の内トラストタワー本館
Tel. 03-6703-4100（代表）

BlackRock Investment Stewardship

議決権行使に関するガイドライン
（日本株式）

2021 年 2 月

BlackRock

1. 株主議決権行使の目的

ブラックロック・ジャパン株式会社（以下、「当社」という。）は、受託者責任にもとづき、株主である顧客に代わって顧客利益最大化の観点から株主議決権を行使する。すなわち、当社は議案判断に当たって、株主価値の観点にもとづくコーポレート・ガバナンスを重視し、それによって長期投資家としての顧客の利益の増進を図ることを目指す。こうした行動を通して、一般の投資家にとって投資し易い市場環境が生まれることを当社は期待する。また、当社として基本的な考え方やアプローチを確立して、日本における議決権行使の取り組みの深化に貢献する。

以上の目的を達成するために、当社は株主価値の観点にもとづくコーポレート・ガバナンスを企業に促す重要性を認識し、また自己または顧客以外の第三者の利益を図る目的や系列もしくは取引関係等を理由に判断を歪めることなく、中長期的な株主価値の増大、またはその毀損防止を唯一の判断基準として議決権の行使に当たる。

2. 議決権行使ガイドラインの位置付け

議案はケース・バイ・ケースで検討される。議決権行使に関するガイドライン（以下、「ガイドライン」という。）は、あくまでも原則であり、インベストメント・スチュワードシップ委員会（以下、「スチュワードシップ委員会」という。）において必要と考える場合には、ガイドラインと異なる議決権行使指図を行う場合もありうる。この場合には、スチュワードシップ委員会はその理由を書面もしくは電子媒体等により記録し、保存する。ガイドラインは市場変化やコーポレート・ガバナンス方針の変更等に応じ、スチュワードシップ委員会において随時見直され、改定される。

議決権行使の対象となる会社と当社との間に利益相反が生じる潜在的可能性が懸念される場合は、スチュワードシップ委員会はガイドラインにもとづいた行使判断を独立の第三者機関に委ね、その判断に従って行使指図を行う。具体的には、①ブラックロック・グループの関係会社に対する議決権行使について、また②当社の役員・従業員、あるいはブラックロック・グループに属する会社の役員・従業員が他社の取締役を兼務する場合、その会社に対する議決権行使について、第三者機関の行使判断に従う。

3. 議決権行使に関するガイドライン

(1) 基本的な考え方

株主議決権行使は中長期的な株主利益をコーポレート・ガバナンスの在り方に反映させるための手段・方法の 1 つである。当社の考え方の特徴は次の 3 点に集

約される。すなわち、1） 内部統治に関する内発性尊重アプローチ、 2） インセンティブ報酬の重視、 3） 投資家にとっての透明性の重視、である。なお、市場の効率性の見地から、議決権行使に当たっては市場に未公表の情報の利用を前提としない。

内部統治に関する内発性尊重アプローチは、個々の企業が置かれている状況によって望ましいコーポレート・ガバナンスの形態が異なる、という見方から来ている。実際、ビジネスモデルの特徴や置かれている競争環境によって企業を取り巻く状況は千差万別である。ある企業ではうまく機能するガバナンスの形態が他の企業でも同様に有効であるとは限らない。

ただし、これは現状をすべて認めることではない。例えば買収防衛策の導入により株主権限に制約が課せられ、現状の内部統治形態の下では一般株主利益が損なわれる懸念があると判断されれば、株主利益を擁護するために最も適切な内部統治形態を採用することを会社に求める。また、株主利益と一致した経営規律が働いていないと判断される会社においては、中長期的な株主価値を重視する内部統治上の施策を議決権行使の範囲内で会社に促す。さらに、法令違反など企業に経営上の不祥事が生じると、株主価値が毀損する。この場合も、経営者の責任を明確にして、適法性維持が図られるよう仕向ける。

経営者が中長期的な株主価値を共有することにより、株主重視のガバナンスの在り方がさらに経営に浸透することになる。インセンティブ報酬制度が重要だと考える。また、適正に運用された株価連動型報酬体系を肯定的に評価する。

企業価値が資本市場で正当に高く評価されるためには、財務・非財務情報の透明性が重要である。企業は投資家利益にかなう積極的な情報開示を行い、説明責任を遂行するよう努めなければならない。

企業は適切なリスク管理態勢、すなわち主要なリスクを特定・監督・管理するための適切なプロセスを有し、さらに独立した社外取締役並びに社外監査役が適切にリスク管理状況を監督できる体制（適切な情報へのアクセスや社外アドバイザーの活用等）を整備する必要があると考える。そして、リスク管理態勢は事業戦略や事業環境等の変化に応じて、常に最適なものであるかを見直されるべきである。また、投資家は、企業による適切な情報開示を通じて、企業のリスク管理態勢、さらには取締役会の実効性を把握することが可能となる。したがって、十分な情報開示や説明が行われていない場合には、主に取締役会にその責任があり、企業は実効的なリスク管理態勢を有していないと判断せざるを得ない。

実効的なガバナンスを有する企業は、当該事業に影響する気候変動リスクを含むサステナビリティ課題（環境及び社会課題）についても、適切に対応できると考えている。ただし、当該課題に対する企業の対応についても、株主が適切に取り

組みを評価するためには、企業による適切な情報開示が不可欠であると考える。[1]

貸株取引と議決権行使との関係の評価においては、顧客の経済的利益の最大化という観点から判断する。 すなわち、議決権の行使を目的に貸出中の株式をリコール（返還請求）すべきか否かの判断は、議決権を行使することで得られる経済的利益と、貸株取引から得られる経済的利益を比較し、判断する。そして、議決権を行使することで得られる経済的利益が貸出中の株式をリコールするコストを上回ると判断した場合には、権利確定前に貸出中の株式をリコールすることで、議決権行使の権利を確保する場合もある。

（2）議案判断のプロセス

当社は本ガイドラインをもとに議案判断を行う。また、当社は効果的な議決権の指図行使に資するために必要と判断した場合には、以下の基準に従って抽出した銘柄を、ガイドラインに照らしたうえで、個別事情も十分に鑑み、判断を行う。当該基準には以下のような項目を考慮し、必要に応じて項目を追加する。

1）行政処分または刑事訴追を受けた会社

2）コーポレート・ガバナンス及びサステナビリティに関する指標

3）資本生産性指標（ROE等）の傾向および水準

（3）対話方針 （エンゲージメント）

議決権行使の対象となる会社との対話（エンゲージメント）は、投資家が投資先の会社との相互理解を醸成する有用な手段である。当社は、企業の内発性を尊重しながら、議決権行使を通して中長期的な株主利益をコーポレート・ガバナンスの在り方に反映させることを目指すが、そのために対象会社との対話は不可欠の活動と考える。

（4）議決権行使基準

[1] 詳細は〈別紙〉サステナビリティ課題（環境および社会に関する課題）への対応を参照。

当社は以下に定める基準に従い、株主議決権を行使する。

A. 執行監督機関に関する議案
個々の企業が置かれている状況によって、企業は会社法上認められている各機関設計の特徴を踏まえて、最適な機関設計を選択することが望ましい。その上で、取締役会の監督機能の強化を通じて、また任意の仕組みなども採用することで実効性のあるコーポレート・ガバナンスの実現に取り組むことを強く期待する。このような考えに基づき、投資先企業に対し次の共通事項及び各機関設計に応じた基準を設置する。ただし、基準の適用にあたっては形式的に判断するのではなく、投資先企業との対話の状況も踏まえ、株主価値の観点から望ましいかどうかという観点から判断する。その際には、指名委員会及びそれに準ずる委員会の状況（委員長が社外取締役である等）や社外取締役による監督の実効性（取締役会議長が社外取締役、筆頭社外取締役の任命が公表されている等）などコーポレート・ガバナンスの充実を図るための取り組みについても十分に勘案する。

1）取締役会の構成

（共通事項）

- 指名委員会等設置会社および監査等委員会設置会社への移行は原則これに賛成する。
- 指名委員会等設置会社から監査等委員会設置会社または監査役設置会社への移行は、それにより社外取締役の数が大きく減少するなど、経営陣への牽制機能が大きく後退するようであれば、反対する。
- 会社の機関設計にかかわらず、独立した社外取締役が 2 名以上選任されていない場合は、取締役会構成に責任を有する取締役の選任に反対する。但し、選任しない合理的な理由がある場合はその限りではない。
- 株主価値の観点から適切と認められなければ、取締役の増員に反対することがある。
- 一定規模を有する企業[2]において、取締役会の多様性確保の取り組みが著しく不十分な場合、すなわち女性の取締役もしくは監査役が選任されていない場合、その理由に関して合理的な説明がなされない場合、取締役会構成に責任のある取締役の再任に反対する[3]。

[2]TOPIX100 構成銘柄に属する企業を対象とする。

[3]詳細は〈別紙〉サステナビリティ課題（環境および社会に関する課題）への対応を参照。

（監査役設置会社）[4]

- 一般株主の利益が損なわれる懸念が大きいと考えられる、以下に示す状況に該当する場合には、独立と認められない社外取締役の選任に反対し、かつ独立した社外取締役が 3 分の 1 に満たない場合、取締役会構成に責任を有する取締役の選任に反対する。
    - 買収防衛策を新規に導入するか、あるいは既に導入している場合。
    - 大株主が会社に対する支配力を有すると認められる場合。

（監査等委員会設置会社）[5]

- 独立した社外取締役の数が 3 分の 1 に満たない場合、取締役会構成に責任を有する取締役の選任に反対する。

  社外取締役の選任については、監査等委員であるかどうかにかかわらず、独立と認められない候補者の選任に反対する。

（指名委員会等設置会社）[6]

- 指名委員会等設置会社においては、執行に対する監督機能の強化という観点から、独立と認められる社外取締役が取締役全体の半数以上を占めることが望ましい。したがって、独立した社外取締役の数が取締役総数の半数に満たなければ、取締役会構成に責任を有する取締役の選任に反対する。社外取締役の選任については、独立と認められない候補者の選任に反対する。

2）取締役選任

- 法令違反、刑事訴追、不正会計、公序良俗に反する行為など重大な社会的不祥事が発生し、社会的信用が失墜して経営上影響が生じている場合は、責任があると認められる取締役の再任に反対する。ただし、速やかかつ適

[4]東京証券取引所の市場再編に伴い、プライム市場に該当する企業にも同様の条件を付与する予定。施行は 2022 年 1 月とし、それまでは「2021 年開催株主総会に係る注記」に記載の旧基準を適用する。

[5] 施行は 2022 年 1 月とし、それまでは「2021 年開催株主総会に係る注記」に記載の旧基準を適用する。

[6] 施行は 2022 年 1 月とし、それまでは「2021 年開催株主総会に係る注記」に記載の旧基準を適用する。

切な社内対応や処分が公表され、社会的信用の回復が図られている場合は、必ずしもこの限りでない。

- 当期を含む過去数期連続して資本生産性指標が低下傾向にあり、かつその水準が低迷している、あるいは一定期間資本生産性指標が低水準に留まっており、株主価値が毀損していると考えられる場合、過去の経営実績に加えて将来の事業計画、資本政策（株式持ち合いを含む）等を勘案し、取締役の再任に反対する。[7]
- さらに、例えば長期にわたる業績不振や株主承認を得ない大規模増資の実行、多数の株主の支持を得た株主提案の未実行など、在任取締役の決定が株主の利益を明確に損なっていたと判断されるときには、取締役の再任に反対することがある。何れの場合も将来へ向けて株主全体の利益最大化を実現する能力が再任取締役にあるかを検討する。
- 剰余金配当の処分が議案として提出されない場合、取締役会が決議した配当水準に賛成できなければ、取締役の再任に反対することを考慮する。
- 買収防衛策を株主総会の承認を得ずに導入した場合、導入を決議した取締役の全てないし一部の再任へ反対する。
- 事業への影響が大きいと考えられるサステナビリティ課題についての情報開示の重要性がより明確となっている状況を鑑みて、事業への影響が大きいと考えられるサステナビリティ課題についてのリスクと機会に関する情報開示が不十分であると考えられる場合、責任があると考える取締役に反対する[8]。

3）社外取締役選任

- 取締役会への出席率が 75%に満たない場合、納得できる説明がなければ、そのような社外取締役の再任に反対する。
- 社外取締役の在任年数が著しく長期にわたり経営陣からの独立性に疑念が生じる場合、継続的な任命について株主価値の観点からの明確な説明がなければ、そのような社外取締役の再任に反対する。
- 独立社外取締役とは当該会社または役員との関係やつながりが一切なく、一般株主の利益を代表しうる者をいう。当該会社に対する経営監督機能を

[7] 自己資本当期純利益率が低下傾向にあり、かつ直近が 3%未満、あるいは自己資本当期純利益率が過去 3 期連続して 3%未満である場合

[8] 詳細は〈別紙〉サステナビリティ課題（環境および社会に関する課題）への対応を参照。

阻害する利害関係が認められる者は該当しない。具体的には、一定期間にわたり当該会社の親会社ないし子会社の役員・従業員であった者、主要取引先（証券会社等を含む）の役員・従業員、その他大株主会社の役員・従業員、社外役員が相互就任している会社の役員・元役員、当該会社の監査を行う会計監査法人の役員・従業員、そして当該会社に外部サービス（法務、監査・税務、コンサルティングを含む）を提供する個人は独立取締役と認められない。なお、主要取引先や大株主会社、あるいは当該会社の監査を行う会計監査法人において過去に役員・従業員であった者については、経歴や出身母体に照らして、一般株主利益の代表者としての適格性を判断する。[9]

- 大株主が会社に対する支配力を有すると認められる場合において、積極的な情報開示や企業との対話の状況等を踏まえて、大株主から派遣された社外取締役が企業価値の向上に資する場合は非独立である社外取締役に賛成する場合がある。
- 利害関係者となりうる重要な関係先から退任後、当該企業への関与まで 5 年を経過している候補者については、上述の独立性に係る利害関係については原則として考慮しない（クーリングオフ期間）。
- 4社を超える上場会社役員を兼務する社外取締役候補者については、合理的な説明がなければ、そのような社外取締役の選任に反対する。

4）監査役選任

- 法令違反、刑事訴追、不正会計、公序良俗に反する行為など重大な社会的不祥事が発生し、社会的信用が失墜して経営上影響が生じている場合は、責任があると認められる監査役の再任に反対する。ただ、不正摘発における在任者の大きな貢献が認められる場合は、この限りでない。
- また、会社に重大な社会的不祥事が発生している場合には、新任候補者に

[9] 以下の基準に抵触する場合、当社の独立性基準を満たさないと判断する可能性が高い。

- 主要株主（持株比率 10%以上）の出身者
- 一定規模の取引を有する企業の出身者
- 役員を相互派遣している企業の出身者
- 当該企業の会計監査人である監査法人代表社員（もしくはパートナー）出身者
- 当該企業から役員報酬以外に、個人として年間約 1,000 万円を超える金銭その他の財産を得ている弁護士、公認会計士、税理士、コンサルタント等
- 当該企業から年間約 1,000 万円を超える寄付を受領する団体等の出身者
- 在任期間が著しく長期（16 年以上）の候補者。
- 当該企業の役職員の親族である候補者

関しても監査役としての適任性の観点から個別に検討して反対することがある。

- 監査役の減員は明確な理由がなければ反対することがある。

5）社外監査役選任

- 独立と認められない候補者は反対する。
- 監査役会や取締役会への出席率が 75%に満たない場合、納得できる説明がなければ、そのような社外監査役の再任に反対する。
- 社外監査役の在任年数が著しく長期にわたり経営陣からの独立性に疑念が生じる場合、継続的な任命について株主価値の観点からの明確な説明がなければ、そのような社外監査役の再任に反対する。
- 独立社外監査役とは当該会社または役員との関係やつながりが一切なく、一般株主の利益を代表しうる者をいう。当該会社に対する経営監督機能を阻害する利害関係が認められる者は該当しない。具体的には、一定期間にわたり当該会社の親会社ないし子会社の役員・従業員であった者、主要取引先（証券会社等を含む）の役員・従業員、その他大株主会社の役員・従業員、社外役員が相互就任している会社の役員・元役員、当該会社に対して監査を行う会計監査法人の役員・従業員、そして当該会社に外部サービス（法務、監査・税務、コンサルティングを含む）を提供する個人は独立監査役と認められない。なお、主要取引先や大株主会社、あるいは当該会社の監査を行う会計監査法人において過去に役員・従業員であった者については、経歴や出身母体に照らして、一般株主利益の代表者としての適格性を判断する[10]。
- 但し、利害関係者となりうる重要な関係先から退任後、当該企業への関与まで 5 年を経過している候補者については、上述の独立性に係る利害関係については原則として考慮しない（クーリングオフ期間）。
- 4社を超える上場会社役員を兼務する社外監査役候補者については、合理的な説明がなければ、そのような社外監査役の選任に反対する。

6）会計監査人選任

[10] 社外取締役と同様の独立性基準を適用する。

- 独立性に疑念をもつ場合は反対する。
- 会社が前任の会計監査人と意見を異にするため監査人を変更すると考えられる場合は、新任の監査人のもとで監査の客観性が担保され得るか否かを慎重に検討する。

B. 報酬に関する議案

1）役員報酬

- 業務執行を担当する取締役の報酬は、業績連動であることが理想的である。取締役の報酬の大幅な増額が提案されている場合、理由が明確であるか、あるいは業績との連動性が明確に説明されていれば賛成する。また、監査役については、報酬の大幅な増額が提案されている場合、理由が明確であれば賛成する。
- 一方、当期を含む過去数期連続して資本生産性指標が低下傾向にあり、かつその水準が低迷し、株主価値が毀損していると考えられる場合など、厳しい財政状況に陥っているにもかかわらず、取締役や監査役の報酬を増額する提案には反対する。
- さらに報酬額の水準が既に過大であると判断される場合に増額に反対する。

2）役員賞与

- 業績不振等の理由により株主配当が見送られている場合や重大な社会的不祥事が発生し著しく株式価値が毀損したにもかかわらず、役員賞与が支給されている場合は反対する。

3）役員退職慰労金

- 社外取締役および監査役への退職慰労金贈呈に反対する。ただし賛否判断に当たって制度の改廃等の個別事情を加味する場合もある。
- 贈呈の対象者が在任2年未満である場合は原則として支持できない。
- 法令違反、刑事訴追、不正会計、公序良俗に反する行為など重大な反社会的不祥事が発生し、贈呈の対象者に責任があると認められる場合は、退職慰労金贈呈に反対する。
- 資本効率性が低位であるなど株主価値が毀損している場合、退任取締役

への退職慰労金贈呈に反対する。ただその際、適切と考えられれば、賛否判断に当たって産業動向や業種動向等の個別事情を加味する場合もある。

4）株式報酬

- 以下の条件が満たされれば原則として賛成する。
  - 潜在希薄率が既割当分を含めて 5%以下。ただし、ハイテク等、成長企業は 10%以下。なお、会社の情報開示が不十分で、その結果、株式希薄化の影響を評価できない場合は、会社提案を支持することは出来ない。
  - 行使価格が適正市場価格を上回る。
- 行使価格の引き下げは反対する。
- 行使の据え置き期間が不十分であるなど、株主価値の観点から制度設計に問題が認められる場合にも反対する。
- さらに、買収防衛の手段として用いる意図があると判断される場合に反対する。
- 付与対象が当該会社の役員（監査役を除く）・従業員の場合は賛成する。子会社の役員（監査役を除く）・従業員である場合も賛成する。しかし当該会社の監査役への付与は反対する。また、取引先の役員・従業員への付与も反対する。外部サービスの提供者、例えば顧問弁護士、会計監査人、コンサルタントへの付与も反対する。

C. 資本政策に関する議案

1）剰余金の配当

- 業績動向やバランスシートの状態、会社の成長見通し、自己株式取得の状況などを勘案し、また同業他社とも比較して、配当水準が過小でないと判断されれば賛成する。
- 一方で、適切な事業計画がなく、必要以上の資金を内部留保として積み増している場合は反対する。具体的には、企業のバランスシートにおける現金及び預金、有価証券および投資その他有価証券の合計が総資産対比で50%以上に該当する場合、株主還元状況や投資計画等の財務戦略を勘案し、配当水準が過少である場合は反対する。また、配当額が純利益の 100%

を超える場合は、会社の財務状況を勘案して判断する。
- 会社が損失を計上した場合（一過性の特別損失計上を除く）、中長期的な財務の健全性の観点から、資金の過大な社外流出が懸念される増配や配当据え置きの提案に反対することがある。

2）自己株式取得

- 過大でなく理由が明確であれば賛成する。
- ただし、自己株式取得が適切でないと判断される場合には反対する。例えば、キャッシュフローが十分でないと判断される場合、買い戻し株数および浮動株数を考慮すると流動性の面で既存株主に不利益がもたらされると懸念される場合、有力株主による段階的な株式公開買い付けにつながると考えられる場合、自己資本比率が著しく低い場合などが該当する。
- また特定の株主からの有利な条件での取得に反対する。
- 一方、会社に適切な事業計画がなく、内部留保を積み増している場合には、積極的な自己株式を促す株主提案に賛成することがある。

3）資本準備金・利益準備金減少

- 目的が明確であれば原則賛成する。

4）減資

- 企業再建計画との関連で提案されている場合や、倒産の危機が切迫していると考えられる場合には、株主価値の観点から賛成する。

5）第三者割当増資

- 買収防衛策としてではなく、事業再編の一環として実施する場合は、時価に比べて割当価格や権利行使価格が割当先に著しく有利になっていないか、株式の大幅な希薄化が生じていないか、不適切な割当先に発行されていないか、といった要因を考慮し、個別に検討する。
- 持ち合いを形成する意図から行われる場合は、株主価値毀損につながる可能性等を勘案して個別に判断する。

6）合併契約、営業譲渡・譲受、会社分割

- 会社の競争力向上が期待される、あるいは、主力事業への一層の注力が期待されると判断されるのであれば、取引プロセスが全株主にとって公平である限り賛成する。しかし、以下の場合は支持できない。
  - 幹事金融機関に利益相反の懸念があり株主利益の最大化を妨げると考えられる。
  - 明らかに存続会社の株主にとって利益にならず、対象企業を救済するために親会社、取引金融機関または監督機関などから圧力がかかっていると判断される。
  - 合併比率等について中立的な第三者による算定に従って決定が行われていない。ただし、完全子会社の合併など合併比率等が既存株主の経済的利益や法的権利を左右しない場合を除く。

D. 買収防衛策に関する議案

- 経済の活性化につながる支配権移動取引をむしろ阻害すると考えられる買収防衛策は、肯定的に評価できない。
- 特に、株主平等原則を侵害する恐れがある措置は原則として支持できない。具体的には、株主総会での拒否権など特別な権利を一部の株主に与える種類株式や複数議決権を付与する種類株式に原則として反対する。
- 買収防衛策は、株式公開買付への法的規制が十分整っていないとの理由から導入される。こうした防衛策の個別検討に当たっては、以下の条件を精査する。
- 発動条件に幅広い解釈の余地があり、取締役会の独立性や独立委員会の構成に鑑みて恣意的な運用の懸念が残る買収防衛策は、支持できない。
- 独立と認められる複数の社外取締役が選任され、さらに取締役の任期が 1 年に短縮されることで、取締役会の経営監督機能が十分高められていなければ、買収防衛策の導入は支持できない。
- 防衛策の発動を検討する独立委員会は会社から独立した社外取締役あるいは社外監査役で構成されていることが望ましい。
- 株主総会での承認を一切得ずに導入する場合は否定的に評価する。
- 支配権市場を取り巻く情勢は変化していくので、防衛策は有効期間が限定されていなければならない。また 3 年以内に維持の適否について再検討することが求められる。
- 既に導入されている他の防衛的措置（追加選任の余地なく取締役の数の上限を設定する等）や株主構成（大株主、安定株主の存在）も勘案し、過剰防衛と判断されれば反対する。
- 以上に定めた条件を満たす場合は、次に掲げる観点などを踏まえて個別判断する。とりわけ重大な社会的不祥事の発生や長期にわたる業績不振などにより著しく株式価値が毀損している企業において、買収防衛策を導入・継続することがさらに株式価値を毀損しないことが合理的に説明されていなければ、肯定的に評価できない。

E. 定款の変更等

定款変更の内容は様々であり、以下に項目を設けるものはその一部である。項目を設けていないものに関しては個別に判断する。その際、株主の権利を必要以上に制約することはないか、株主価値の増大あるいは毀損防止の観点から懸念はないか、という基準に照らして判断する。

1）取締役の定員

- 会社の営業規模の拡大に伴って取締役の員数の上限を適度に引き上げることや、社外取締役を新規に選任して取締役会を拡大することに関しては原則として賛成する。取締役会の役割の見直しにより取締役の員数の削減を図り、それに伴って員数の上限を引き下げる提案も原則として賛成する。

2）監査役の定員

- 監査役の員数の上限引き下げに関しては、理由が明確に説明されていず、しかも株主利益増進に貢献すると判断されなければ、反対する。

3）取締役の任期

- 任期年数の引き上げに原則として反対する。

4）取締役解任の決議要件

- 株主総会における取締役解任の決議要件を過半数以上に引き上げる提案

に原則として反対する。

5）取締役の期差選任制の導入

- 株主価値毀損につながる可能性があると認められれば反対することがある。

6）取締役・監査役の責任減免

- 取締役・監査役については、株主価値の観点から問題が認められなければ、原則として賛成する。

7）会計監査人の責任減免

- 会計監査の規律が緩み、監査の質が低下する恐れがあるので、導入の理由が明確に説明されていなければ、原則として反対する。

8）特別決議に関する定足数緩和

- オーナー一族、親会社、企業グループ会社、主要取引先金融機関等、主要株主ですでに議決権数の 3 分の1を占める場合は反対する。
- 3 分の 1 に満たなくとも、この水準に近く、該当大株主が取締役を送り込む等、会社に対する支配力を有する場合も反対する。

9）剰余金配当の取締役会授権

- 剰余金の配当について株主総会での決議を定款により排除することに原則として反対する。但し、配当を含む資本政策や取締役会の機能、配当に関する株主提案権が確保されているなど、その他のコーポレート・ガバナンスに係る事項等に懸念が認められなければ、賛成する。

10）取締役会決議による自己株式取得

- 自己株式取得が適切でないと判断される場合には反対する。例えば、キャッシュフローが十分でないと判断される場合、買い戻し株数および浮動株数を考慮すると流動性の面で既存株主に不利益がもたらされると懸念される場合、有力株主による段階的な株式公開買い付けにつながると考えられる

場合、自己資本比率が著しく低い場合などが該当する。

11）授権株式数増加

- 発行株式数が授権株式数の 3 分の 2 を超えていること、および現在の授権株式数の 100%以内の増加であることを支持の原則とする。これらの条件が満たされ、授権株式数の増加が長期的な株主利益に適う旨の十分な説明がなされ、かつ株主価値毀損を懸念する特段の事情が認められなければ、賛成する。
- 既存株主利益を希薄化するような第三者割当増資を会社が過去に実施している場合や、授権株式数の増加の意図と株主利益が相反する懸念がもたれる場合は、個別検討する。
- 深刻な財務状況にある会社が、第三者割当を行う目的で授権株式数の増加を図る場合は、割当実施により見込まれる株主価値の希薄化と、実施しなかった場合の影響を比較検討し判断する。

12）種類株式の新設および発行

- 優先株式を含む種類株式を新設・発行する提案については、目的、付帯する権利や期間、普通株式への転換可能性を考慮して判断する。その際、購入者の条件、既存株主の権利に及ぼす影響、過去の濫用の有無なども勘案する。
- 普通株式に転換可能な優先株式の場合、転換比率が発行時に明記されていなければならない。

13）組織再編決議等の決議要件

- 合併等企業再編に関する株主承認の要件を厳しくする等の目的から株主総会における特別決議の要件を加重することについては、株主価値に資する旨の明確な説明がなければ原則として反対する。

14）事業目的

- 営業目的の拡大は、会社の専門領域より大きく外れるものでない限り賛成する。

15）決算期変更

- 正当な理由なく決算期を 3 月に移す提案には反対する。

F. 株主提案

- 株主提案を評価する際は提案内容が企業の長期的な価値創造に寄与するかどうかに着目し、提案内容を評価する。その際、提案された課題の重要性及び緊急性に加えて、事業上および経済上の関連性を考慮し、長期的価値創造に寄与すると考えられるかどうか、過度に経営を制約するものではないかどうかを精査する。
- 株主提案が対処すべき問題に焦点を当て、且つ提案の履行が投資先企業の長期的な価値創造に寄与すると考える場合、投資先企業が当該提案の趣旨に合致した対応を実施しているか、当該企業の取締役会及び経営陣を精査する。
- 当社による精査および当該企業との対話を通じて、企業の当該問題に対する対応に改善の余地があると判断される場合、長期的な価値創造に寄与する株主提案を支持する。また、取締役会が十分にまたは緊急性をもって適切に当該問題に対処していないと判断される場合、取締役選任議案に反対することも検討する。

〈別紙〉サステナビリティ課題（環境および社会に関する課題）への対応

当社は投資先企業に対し、確固たる企業理念を掲げ、株主、顧客、従業員、地域など、あらゆる重要なステークホルダーのニーズに十分に配慮した上で、長期的に持続的な企業価値並びに株主価値の向上に向けた長期的な経営を実践することを期待する。

このような観点において、気候変動リスクを含むサステナビリティ課題（環境及び社会課題、以下サステナビリティ課題）が、企業活動、ひいては長期的な企業価値に対して及ぼす影響は大きくなっていると考える。この様な状況認識が浸透するにつれ、長期的な企業価値に重大な影響を及ぼすサステナビリティ課題に対する企業の対応についての透明性が投資家を惹きつけるための重要な要素となりつつある。したがって、これらサステナビリティ課題が事業環境や長期経営戦略に与える影響、および当該課題に対する企業の対応方針についての情報開示は、長期的な株主利益の観点からより一層重要なものとなると考える。

当社は、実効的なガバナンスを有する企業は、長期的な企業価値に重大な影響を及ぼすサステナビリティ課題についても、適切に対応できると考えている。同時に企業のこれらサステナビリティ課題に対する取り組み姿勢や活動内容を投資家が適切に評価するためには、透明性のある情報開示が不可欠であると考えている。これらサステナビリティ課題に関する情報開示が不十分な場合、当社を含む投資家は、当該企業が当該課題についての適切なリスク管理を怠っていると判断せざるを得ない可能性が高い。

サステナビリティ課題に関する情報開示にあたって、既存の報告に関する枠組みを参照することは、当該課題の特定・管理・報告という企業の取り組み自体の発展という観点からも有益であると考える。

気候変動関連財務情報開示タスクフォース（TCFD）の推奨事項は気候変動リスクに係る事業への影響のみならず、他のサステナビリティ課題についての情報開示の際にも活用しうるものである。TCFD は、気候変動リスクの開示を目的として作成されているが、ガバナンス、戦略、リスク管理、及び指標と目標の 4 つの項目は企業が様々なサステナビリティ課題に関連したリスクと機会を発見、評価、管理、及び監督するのに有益である。

また米国サステナビリティ会計基準審議会（SASB）が推奨する業種別に固有の開示項目を定めるアプローチは、企業のサステナビリティ課題の様々な側面において、業種別に、財務的に重要かつ意思決定に有益であると考えられるガバナンス、リスク評価、及び主要評価指標（KPI）に対する達成度を図る観点から有益であると考え

られる。このような考え方に基づき、当社は投資先企業に TCFD、SASB が推奨する基準に沿った情報開示を期待する。

- TCFD の 4 つの項目に沿ったサステナビリティ課題に関連するリスクの特定、評価、管理、及び監督方法の開示
- 業種別のマテリアリティ基準及び目標を記載した SASB に基づく開示

（気候変動リスク）

当社は、気候変動リスクを企業の長期的な成長見通しに対する決定的な要因として認識している。

公的セクターに加え民間セクターも、気候変動による負の影響を抑制し、今世紀半ばまでにカーボンニュートラルを達成するという気候変動に関する現在の科学的知見に沿った、温室効果ガスの削減の取り組みにおいて果たすべき重要な役割がある。例えば、企業は、現在および今後実現予定の低炭素化技術を活用することで気候変動リスクの低減に貢献することを事業機会として見出すことも可能である。これは排出量の削減ペースを考える上でも重要である。したがって、当社は企業が長期戦略と温室効果ガスの排出削減に向けた取り組みの中で、これらの課題についての検討状況に加え、新たな成長の機会となりうるイノベーション創出の取り組みについても積極的な開示を期待する。

すなわち、気候変動のリスクと機会という観点から、事業に対する影響度合い、ならびに長期的な経営戦略における考慮の状況についての開示を投資先企業に求める。具体的には、地球温暖化を 2 度以下に抑制し、2050 年までに温室効果ガス排出量をネットゼロにするというグローバルな意欲的な目標[11]を踏まえた経営戦略を明確にすることを期待する。

このような取り組みを適切に促すためにも、気候変動リスクなどの事業への影響が大きいと考えられるサステナビリティ課題についてのリスクと機会に関する情報開示が不十分であると考えられる場合、責任があると考える取締役に反対する。

[11] 意欲的な目標は、世界中の集約された努力を前提としている。したがって、先進国市場と新興市場における企業の対応状況は異なることから、同じ割合で排出量を削減することは想定していない。一般的には、先進国の時価総額が大きい企業が、ビジネスモデルを加速的に適応することに適していると考えられる。また、政府の政策と地域の目標は、これらの現実を反映している可能性もある。

（ダイバーシティ）

当社は、企業のダイバーシティの推進は多様な考え方を促進することから、中長期的な観点で企業価値向上に重要であると考える。ダイバーシティの観点には、ジェンダー、年齢、教育、職歴、スキルセット、国際性等、多面的な要素が含まれる。その中でも、とりわけ企業の重要意思決定機関におけるジェンダーダイバーシティの確保は重要であり、中長期的な取組みが必要な課題である。したがって、当社は投資先企業に対して、取締役会・監査役会における女性の取締役・監査役の選任を期待することに加えて、女性の執行役員や管理職等についても、さらなる登用を中長的に実現するための戦略を策定し、目標や実施に向けた計画、およびその取り組みの進捗管理体制等の重要事項に関して、積極的な開示がなされることを期待する。

「2021 年開催株主総会に係る注記」

- 指名委員会等設置会社において、株主構成が分散している場合には、独立と認められる社外取締役が取締役全体の過半を占めることが望ましい。独立社外取締役の数が取締役総数の半数に満たなければ、社外取締役のうち独立と認められない者の選任に反対する。
- 指名委員会等設置会社、監査等委員会設置会社であるか否かにかかわらず、独立社外取締役の選任は一般株主の利益の擁護につながる。したがって、一般株主の利益が損なわれる懸念が大きい次の①から④の場合には、上記の指名委員会等設置会社と同様の基準を適用し、独立と認められない社外取締役の選任に反対する。
    - 買収防衛策を新規に導入するか、あるいは既に導入している場合。
    - 会社定款に基づき取締役会が剰余金配当の決定権限をもつ場合。
    - 直接間接の株式保有や取締役選任を通して大株主が会社に対する支配力を有すると認められる場合。
    - 当期において重大な社会的不祥事が発生し、経営上影響が生じている場合。
- さらに上記の①から④の何れかの場合が該当するとき、社外取締役が一人も選任されていなければ、在任取締役の再任に反対する。
- 監査等委員会設置会社においては、監査等委員となる独立社外取締役については、独立と認められない候補者の選任に反対する。

以　上

令和 3 年 2 月 26 日改定

日本取引所グループ金融商品取引法研究会

議決権行使助言会社（３）－理論的検討（その１）－
アメリカ・EUにおける議決権行使助言会社の規制

2021年11月26日（金）15:00～16:39
オンライン開催

出席者（五十音順）

飯田　秀総　東京大学大学院法学政治学研究科准教授
石田　眞得　関西学院大学法学部教授
伊藤　靖史　同志社大学法学部教授
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片木　晴彦　広島大学大学院人間社会科学研究科実務法学専攻教授
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【報　　告】

議決権行使助言会社（３）－理論的検討（その１）－

「アメリカ・ＥＵにおける議決権行使助言会社の規制」

甲南大学共通教育センター教授
梅　本　剛　正

目　　次

○川口　　定刻になりましたので、JPX 金融商品取引法研究会を開催したいと思います。

本日は、甲南大学の梅本先生から「議決権行使助言会社（３）－理論的検討（その１）－「アメリカ・EU における議決権行使助言会社の規制」」と題してご報告いただきます。

それでは、よろしくお願いいたします。

○梅本　　よろしくお願いします。甲南大学の梅本でございます。

９月に ISS の石田様より助言会社のご報告をいただきまして、また 10 月に、ブラックロックの江良様、藤木様より助言会社の利用者の立場からご報告をいただきました。これらを踏まえて、「議決権行使助言会社の理論的検討」というテーマで今月と来月の 2 回にわたりまして研究報告をさせていただきます。

今月は、議決権行使助言会社の規制で先行しま

すアメリカと EU について検討することとしまして、来月は主として日本法について検討したいと考えております。

Ⅰ．議決権行使助言会社と規制上の論点について

１．はじめに

まず、「議決権行使助言会社とは」ということですが、定義規定として、日本では明確な定義は、なされておりませんが、EU の株主権ディレクティブによりますと、「専門職かつ商業ベースで、議決権行使に関するリサーチ・助言・議決権推奨を提供することを通じて投資家の議決権判断に資することを目的に、上場会社の情報開示やその他の情報を分析する法人のこと」を指すと定義されており、わが国でも参考になるかと思われます。

世界における議決権行使助言業というのは、ISS（Institutional Shareholder Services）とグラスルイスの２社が事実上の寡占状態にあって、わが国でも同じであるということは皆様ご承知のとおりです。

２．議決権行使助言会社が利用される背景

議決権行使助言会社が利用される背景につきましては、これも言い古されたことですけれども、1985 年にアメリカの厚生省の元幹部が、コーポレートガバナンスと機関投資家の議決権行使の質の向上を目的として ISS を設立したことに始まります。その後、1980 年代後半に ERISA 法解釈通牒エイボンレターや 1940 年投資顧問法規則改正など一連の規制改正において、保有する株式の議決権を資産保有者や資産運用者が適正に行使することも受託者責任の一内容であることが示されて、それ以降、機関投資家らによる議決権行使の外部委託が増加するようになりました。

アメリカでは、法規制によって受託者責任の一内容として保有する株主の議決権行使が求められるようになっていますが、アメリカ以外の国においても、法規制によるかスチュワードシップ・コードなどのソフトローによるかは別としまして、機関投資家の議決権行使は規範として確立していると言ってよい状況かと思われます。

日本はイギリスと同様、スチュワードシップ責任、スチュワードシップ活動の一内容として、事実上、議決権行使が求められているという理解になるかと思われます。

３．議決権行使助言会社の影響力の源泉

（１）機関投資家の株式保有数・比率の拡大

アメリカにおいて議決権行使助言会社の上場会社に対する影響力が大きくなった主たる理由は、助言会社の利用者である機関投資家の株式保有数、株式保有比率が拡大したことが挙げられるかと思います。

欧米諸国のみならずわが国におきましても、投資信託や保険会社、年金基金など機関投資家による上場会社の株式保有数・保有比率は上昇傾向にあります。これは確定拠出年金や確定給付年金などの年金制度の拡充や人口の高齢化などを背景としていますけれども、機関投資家による上場会社株式の保有比率が大きくなるに従って機関投資家が上場会社の株主総会の議案の成否を握るとともに、会社経営陣に対して影響力が増大していくのは必然的なことと言ってよいかと思われます。

（２）機関投資家の事務作業の議決権行使助言会社へのアウトソーシング

他方、保有資産に含まれる株式の議決権行使を求められるようになった機関投資家は、効率的にその作業を行う必要があります。わが国の上場会社は６月下旬に定時株主総会を開催するものが極めて多く、多数の銘柄を保有する機関投資家がそれらの会社の議案全てに目を通して賛否を決定するのは困難で、事実上、議決権行使助言会社にアウトソースしているものと考えられます。アメリカにおきましても、上場会社の株主総会は４月、５月の時期に相当程度集中しているということで、程度の差こそあれ、事情は似ているように思われます。

自ら個々の上場会社の議案について情報収集・分析して判断する能力を有している大手機関投資

家におきましても、大きな争点のない議案についてはおおむね議決権行使助言会社の判断に従うのが合理的であることは、先月の研究会でのご報告からわかるとおりです。

このように、機関投資家の株式保有が拡大し、同時に保有株式の議決権行使を適正に行うことが義務付けられるようになったため、業務の一部が助言会社にアウトソースされ、その結果、助言会社の推奨内容が上場会社の株主総会における議案に影響力を持つようになったという言えるかと思います。

４．議決権行使助言会社の規制上の論点

助言会社の推奨内容が株主総会の議案の成否を決めるほど大きな影響があるとすると、当該推奨内容は正しい情報と適切な評価に基づいて形成されることが望ましく、国・地域を問わずそのために何らかの規制が必要だという主張がなされるのは合理的なことです。それは単に個々の機関投資家の判断が正しくあるべきだということを超えて、国内産業の根幹を担っているような上場会社の重要な意思決定が不正確な情報に基づいて左右されるべきではないという、より高度な要請に基づいているのではないかと思われます。

議決権行使助言会社に対する規制は、欧米において近年ようやく整備が進められてきたところで、アメリカでは、ご承知のように依然として紆余曲折を経ているところです。

議決権行使助言会社の規制の必要性を解く見解は、次のような理由を挙げています。

第１に、助言会社の利益相反問題です。ISS のようにコンサルティング業務をグループ内で提供している場合、子会社の取引先の株主総会議案に対する推奨内容がゆがめられるおそれがあります。また、助言会社の役員や親会社の関係会社が上場会社であれば、同じように評価がゆがみかねない。また、機関投資家が上場会社であれば、助言会社が推奨サービスを締結している機関投資家とそうでない機関投資家とで評価が異なる可能性もあります。

第２に、助言会社の物的・人的資源が十分か否かもしばしば問題になるところです。限られた期間内に多くの上場会社の様々な議案を分析し推奨するものですから、助言業務を適正に行うためにはスタッフの質と量を一定以上確保するなど十分なリソースが求められるはずです。仮にそれが不十分であれば、提供されるサービスの信頼性が低下することになります。

第３に、助言会社の推奨内容が事実誤認等に基づいているのではないかということも、評価対象となった会社から指摘されることがあります。助言会社は、公表資料以外にも直接会社を訪問したり、メール・電話等の手段でインタビュー等を行ったりしていますが、必ずしも全ての会社で実地調査を行っているわけではありません。調査を行ったとしても、事実誤認や評価の誤りが残ることもあります。対象会社が助言会社の推奨内容や分析に異議を申し立てることがわが国でも少なくないところです。

第４に、似たようなことですけれども、助言会社の推奨内容が形式的・画一的な基準の適用に終始しがちで、実質面を評価していないという不満も対象会社から聞かれるところです。基本的に助言会社は、事前に定めた議決権行使方針に従って個々の会社の議案を評価しますが、会社の置かれた状況によっては、形式基準を当てはめることが適当でない場合もあるということです。

これに対して、議決権行使助言会社を規制すること自体に否定的な見解も強く主張されているところです。その理由は、顧客である機関投資家は洗練された投資家であり、推奨に盲目的に従うとは限らないこと。助言会社が果たしている役割が重要で、規制で縛るべきではないこと。規制により増加するコストが顧客に転嫁されるため、関係者の利益にならないこと、などです。

本日紹介しますアメリカと EU につきましても、規制の趣旨、あるいはそれに対する批判というものが背景にあった結果、現在のような規制が加えられているということではないかと考えられます。

Ⅱ．アメリカの規制状況

それでは、アメリカの規制の状況について見ていきたいと思います。

１．法規制の試み

アメリカでは、2007 年６月の会計検査院（GAO）の報告において議決権行使助言会社の問題点が様々に指摘され、その後、助言会社に対する規制の是非について盛んに議論がなされてきました。2017 年 10 月、2018 年 11 月に助言会社の規制を含む法案が議会に提出されましたが、これら法案の内容は、助言会社を SEC への登録制にすること、助言会社に関する情報開示を図ること、スタッフ等の確保を求めその人数等を SEC に年次報告すること、助言方針等を届け出て公表すること、対象会社の事前レビューとコメントの機会提供をすることなど、GAO の報告書以後問題とされてきた論点を踏まえたものでした。ところが、いずれの法案も、前述した規制そのものに対する批判などを理由に、会期終了に伴い廃案となっています。

皆さまご承知のとおり、インサイダー取引規制の改正法案が何度も連邦議会で廃案になっていることからも分かりますように、意見対立の大きな事項について連邦証券諸法を改正することは容易ではありません。議決権行使助言会社の規制についてもそのように言うことができるかと思われます。

２．SEC による規則改正

証券諸法の改正が無理となると、SEC の規則制定権限でできる限りのことをしようとするのがアメリカの規制当局の常套手段でありまして、議決権行使助言会社の規制についても、SEC 規則の改正で対応していくことに方針を変更しました。具体的には、1934 年証券取引所法の委任状勧誘規則改正で対応しようとしました。その成果の一つが、2020 年 SEC 規則改正による議決権行使助言会社の規制だと言えるかと思います。

1934 年証券取引所法の委任状勧誘規則では、「勧誘」（規則 14a-1(l)(1)(iii)）に該当する行為を行う場合、SEC に対して一定の書式に基づく情報提供を義務付けられるなど煩雑な手続が必要となっています（規則 14a-2～規則 14a-6)。議決権行使助言会社の助言行為は、詐欺禁止規定（14a-9）は適用されるものの、委任状勧誘規制については適用除外されると従来解されてきました。しかしながら、前述のように、近年では資産運用者の保有株主について議決権行使が求められるようになるなど、かつてに比べて議決権行使助言会社の影響力が大きくなったため、従来の適用除外規定は当てはまらなくなるのではないかという見解が SEC 内では有力となってきました。

2019 年 11 月５日に SEC は、委任状勧誘規則の改正案を公表しました。改正案においては、原則として議決権行使助言会社の助言行為は委任状勧誘の「勧誘」に該当するものと明記されることになりました。もちろん、議決権行使助言会社の助言内容を委任状勧誘規則に基づいて公衆開示等をさせようということではありません。そのようなことをすれば、議決権行使助言会社のビジネスモデルそのものを否定することになってしまいます。規則改正の主たる目的は、助言会社が同規則の適用除外を受ける要件を幾つか定めることにより、一定のルールを遵守させることにありました。つまり、利益相反などを開示すること、評価対象会社との対話手続等のルールに従うこと等を求めることにしたわけです。

2020 年に最終的に決まった規則（以下「2020 年規則」）は、2019 年の規則案に対するパブリックコメントを受けて、要件の細目を定めていたものなどをプリンシプルベースの規制に改める修正を経るなどしたうえで、次のようなものとなりました。

（１）「勧誘」の定義規定の変更（規則 14a-1(l)(1)(iii)(A)）

議決権行使助言は、委任状勧誘規則の勧誘に該当するとの規定が設けられました。株主が議決権行使の前にその判断に関連する情報を十分に取得し、これを評価したうえで議決権を行使すること

が可能となるよう、当該事業者に委任状勧誘規則を通じた規制を及ぼす必要があると、その趣旨が示されています。

具体的には、「証券保有者の承諾が求められている特定事項に関する議決権行使、同意、授権で、証券保有者に対する推奨となる全ての議決権行使助言で、かつ当該議決権行使助言が議決権行使助言の提供者として専門的技能を販売する者により提供され、他の形式の投資助言とは別に提供されるもので、かかる議決権行使助言を有償で販売するもの」が、委任状勧誘規則の「勧誘」に含まれるものとしました。

翻訳がちょっとこなれていないところがありますが、以上の定義が「議決権行使助言ビジネス」と他の条文でも称されているところです。

この改正につきましては、ISS が証券取引所法 14 条 a 項の立法趣旨に反する等々、訴訟を提起するなどして議論になっているところですけれども、アメリカ法特異のテクニカルな議論なので深入りせず、委任状勧誘規則を根拠に SEC は議決権行使助言会社の規制をしようとしているということを確認すれば、さしあたりは足りるかと思われます。

（２）利益相反の開示（規則 14a-2(b)(9)(ｉ)）

2020 年規則におきましては、議決権行使助言会社は自らの利益相反状況を明らかにするために、以下の情報を開示することが求められています。

・特定の利害関係、取引関係、関わり（relationship）の状況に照らして、議決権助言の客観性を評価するに当たり重要となる議決権助言ビジネス（関連会社を含めて）との利害関係、取引関係、関わりに関する全ての情報（規則 14a-2(b)(9)(ｉ)(A)）

・利害関係、取引関係、関わりの重要な利益相反の問題に対応する手段のみならず、それを認識するために用いられる全ての方針・手続（規則 14a-2(b)(9)(ｉ)(B)）

具体的に開示される内容につきましては、後ほど見ます EU 法の開示内容と似たものになるのではないかと推測されます。ここでは一点、利益相反の開示の仕方について、2019 年の規則案では、助言会社に対して助言の文書と助言に用いる電磁的手段のいずれにおいても、利益相反に関する情報の開示を求めていました。ところが、2020 年規則では、利益相反の開示を助言文書、あるいは助言を提供する電磁的手段のいずれかにおいて開示すれば足りるという形で、より柔軟な対応となりました。

規則の説明では、助言会社に過剰な負担がかからないよう配慮したのはもちろんであるが、新規参入を阻害しないこともその目的であると説明されています。しかし、実際には、これは ISS の実務に配慮したものではないかという気がします。といいますのも、ISS の石田様が９月に報告されたところによりますと、ISS がガバナンス改善のコンサルティングサービスを提供する ICS という事業部門を有しており、助言ビジネスとの間で利益相反が生ずる可能性が指摘され、管理を行っている旨、説明されました。

ISS の利益相反の管理につきましては、コンサルティング部門と議決権行使助言部門との間にファイヤーウォールを設けて対応していること、顧客である機関投資家に対しては、議決権行使プラットフォームで、評価対象の会社が ICS のコンサルティング契約を締結しているのか否か、契約関係があればその金額等の詳細まで開示される、とのことでした。

プラットフォーム上で開示されるだけでしたら、プログラムを工夫することで ISS の議決権行使助言事業部との間のファイヤーウォールは維持されるのですが、助言部門にまでコンサルティング部門と顧客企業との契約関係を文書の上で開示してしまいますと、助言事業部の担当者が個々の評価対象と自社との利害関係を認識してしまい、ファイヤーウォールが台なしになってしまう。だから一方だけ、つまりプラットフォームの開示をすれば足りるというふうに改正したのではないかと推察されます。

（３）助言内容の正確さの担保　会社への事前通知など（規則 14a-2(b)(9)(ⅱ)(A).(B)）

助言会社による評価対象に対する助言内容の通知と対象会社の対応を顧客に通知させる規制については、それぞれの方法について 2019 年規則案はかなり細かな要件を定めていました。しかし、これに対しては、助言会社の推奨内容に事実誤認、誤りが含まれることはほとんどないことなどを理由に、助言会社や機関投資家から異論が出ていました。それらの意見を反映させて、より柔軟なプリンシプルベースのルールに変更することにしたと説明されています。

具体的には、議決権行使助言ビジネスは、次の事項を合理的に確保するための書面による方針と手続きを定め、公衆開示するということです。

①議決権行使助言の対象となった会社が、助言会社の顧客に伝えられると同時に、あるいは事前に当該助言内容を知ることができるようにすること（規則 14a-2(b)(9)(ⅱ)(A)）

②議決権行使助言会社は顧客に対して、株主総会等の前に、助言対象の会社が助言に関して書面で述べている内容を合理的に知り得るための仕組みを提供すること（規則14a-2(b)(9)(ⅱ)(B)）。

非排他的セーフハーバーを見れば何となくイメージができるのですけれども、①につきましては、助言会社が自らの会社の方針として、顧客に対してレポート等を提供する前に、評価対象の会社に対して無償で議決権行使のレポートを一部提供することと定めていることなどです。そういったことを定めていれば、①の要件を満たすということです。もちろん、非排他的セーフハーバーですから、これに限らないということではあります。

②につきましては、内容を伝えられた評価対象の会社の反応について、それを顧客に知らせるということですけれども、非排他的セーフハーバーとしまして、顧客に対して議決権行使のプラットフォームにおいて対象会社が何らかの情報を届け出た場合にはそれを通知すること等により対象会社と顧客との間のコミュニケーションをとるべきだというルールです。

（４）詐欺禁止規定の改正（規則 14a-9）

これは細かなものですが、詐欺禁止規定の改正です。従来から詐欺禁止規定 14a-9 は適用対象だということですが、その Note の(e)に若干注意文言を入れたということです。

以上が 2020 年の SEC 規則の内容ですけれども、ご承知のように 2021 年に政権交代がありまして、新たに選任されたゲンスラーSEC 委員長が 2020 年規則を見直す旨、公表していました。

３．政権交代と SEC 規則の再改正

2020 年の SEC 規則は既に施行されているのですけれども、議決権行使助言会社の適用除外に関する部分（14a-2(b)(9)）、つまり利益相反の開示と対象会社と顧客とのコミュニケーションに関する部分は、実務上の混乱を避けるために 2021 年 12 月１日まで施行が延期されて、まだ施行されていない状態でした。そして 2021 年 11 月 17 日に、ゲンスラー委員長は予告どおり、2020 年規則を大幅に見直す規則改正案を公表しました。

見直しの背景には、2020 年規則制定後に議決権行使助言会社の利用者である機関投資家から、議決権行使助言会社から適時に独立した推奨を受けられるのかの懸念が表明されたことや、議決権行使助言会社自身が、改正規則が問題とした事項を解消する努力を続けてきたことがあるとされています。

今回の改正目的は、議決権行使助言会社の提供するサービスに対する投資家の信頼を維持しつつ、議決権行使助言の適時性や独立性を阻害するおそれがあり、不当な訴訟リスクやコンプライアンスコストを助言ビジネスに課すおそれのある、議決権行使助言ビジネスへの負担を回避することにあると説明されています。

今回の改正案の主たるポイントは、対象会社に対する助言内容の通知と対象会社の見解を投資家

に伝えることを求めた規則 14a-2(b)(9)(ⅱ)の削除です。これらについては、議決権行使助言会社の規制遵守コストが高くなることが批判されていたことに応えたものだというふうに言われています。

ただ、改正案では、それ以外の点については大幅に変更されておらず、とりわけ議決権行使助言会社の助言行為が委任状勧誘規則の「勧誘」に該当するという規定は維持されている点は注目されます。SEC は、かつてのように議決権行使助言会社を法律の枠外に置くのではなくて、今後は委任状勧誘規則の中で規制対象に組み入れるという姿勢を今後も続けていくということではないかと推測されます。また、利益相反の開示部分（規則 14a-2(b)(9)）についても、基本的に規制内容は維持されています。

詐欺禁止規定を定める規則 14a-9 の Note に加えられた部分につきましては、訴訟リスクが高くなるということで削除されました。

以上が最近の規則改正の内容ですけれども、補足としまして、2020 年に ISS はドイツ取引所の子会社となりました。本社は依然としてメリーランド州のロックビルにありますので、アメリカの会社であることは変わらないということです。

Ⅲ．EU 株主権ディレクティブ（Shareholder Rights Directive）

１．規制趣旨

2017 年に EU 株主権ディレクティブが改正されまして、新たに 3j 条「議決権行使助言会社の透明性」という規定が設けられました。

規制趣旨につきましては、前文において次のように記されています。すなわち、「多くの機関投資家及び資産運用者は、上場会社の株主総会の議決権行使について調査・助言・推奨を提供する議決権行使助言会社のサービスを利用している。議決権行使助言会社は、会社情報に関する分析コストの低減に貢献することによりコーポレートガバナンスで重要な役割を果たしているが、同時に彼らは投資家の議決権行動において大きな影響力を有している。とりわけ高度に分散したポートフォリオを持つ投資家や多くの海外投資家は、議決権行使助言会社の助言により多く依拠することになる」（preamble(25)）。「その重要性に鑑みると、議決権行使助言会社は透明性が求められている。加盟国は議決権行使助言会社が行動規範に従い、規範の適用状況を報告するよう確保する必要がある。また、議決権行使助言会社は調査・助言・議決権行使推奨の準備に関する重要な情報及び調査・助言・議決権行使推奨の準備に影響を及ぼし得る全ての事実上ないし潜在的利益相反、あるいは営業上の関係に関する一定の重要情報を開示する必要がある。当該情報は、機関投資家が議決権行使助言会社の過去のパフォーマンスを考慮して議決権行使助言会社のサービスを選択できるように、最低３年間、公衆開示を継続する必要がある」（preamble(26)）とするものです。

２．適用対象

具体的には、規制対象となる助言会社については、 EU 域内に登記された事務所・本店を持たなくても、域内の施設（establishment）を通じて活動を行う助言会社に対しては適用されることになると定められています(3j 条４項)。

この適用対象に関するところは前文にその趣旨が書いてありまして、EU 域内に本社等を持たない第三国の議決権行使助言会社が EU 域内の会社について議決権行使の助言等を提供することがあり得るが、EU 域内と域外の議決権行使助言会社の公平性を確保するために、ディレクティブは施設の形態を問わず EU 内の施設で活動する第三国の助言会社に対しても適用されるべきであるとしています（preamble(27)）。

ISS やグラスルイスが世界中でほぼ独占的にサービスを提供している現状を踏まえますと、当然の規定と言えるのではないかと思われます。

３．行動規範

規制概要についてですけれども、助言会社は自らが適用を受ける「行動規範」を公表し、適用状

況につき報告することが第１項に定められています。この行動規範につきましては、2014 年に ESMA の要請を受けて欧米の大手議決権行使助言会社を構成員とする Best Practice Principles Group（BPPG）という組織が共通の行動規範を作成していまして、EU ディレクティブ等の改正を受けて、現在は 2019 年版の最良慣行原則が作成されています。具体的には後ほど見ることにします。

４．助言業務に関する利益相反等の開示

助言会社は、調査・助言・議決権推奨の準備に関して、少なくとも次の情報を年次ベースで公衆開示することが求められています（２項）。すなわち、適用する方法論・モデルの骨子、利用する主要な情報源、調査・助言・議決権推奨の質やスタッフの質を確保するために導入している諸手続、市場や法律上・規則上の違いや会社固有の事情を考慮に入れているか否か、また考慮に入れている場合にはその方法、各市場に適用する議決権行使方針の骨子、調査・助言・議決権推奨の対象とする会社及び会社のステークホルダーと対話しているか否か、対話している場合にはその程度・特質、潜在的利益相反の防止及び管理に関する方針などです。また、顧客に対して利益相反への対応状況を開示すること等も求められています（３項）。

これらの記載事項は、後に見ます行動規範で開示が求められているところですので、具体的にはそこで見てみたいと思います。

５．最良慣行原則の概要と ISS のコンプライアンスステートメント

さて、2019 年度最良慣行原則は３つの原則を示しています。これだけではイメージをつかみにくいので、具体的にどういう内容が開示されているのか、ISS がこれに基づいてコンプライアンスステートメントを公表していますので、それで目ぼしいところを確認していきたいと思います。

ちなみに、この最良慣行原則は、遵守することを前提として説明する「アプライ・アンド・エクスプレイン」という形をとっていまして、ISS のステートメントもそういう形になっています。

（１）原則１「サービスの質」

BPP 署名者――これは「議決権行使助言会社」と読み替えていいかと思いますが――は、顧客と合意した内容に対応したサービスを提供する。BPP 署名者は、リサーチの方法論及び、もしあれば、自らの議決権行使方針（house voting policies）を有し、開示する必要がある。

BPP 署名者は、以下を開示するものとする。

・適用する方法論とモデルの骨子
・利用する主要な情報源
・調査・助言・議決権推奨の質を確保するための諸手続
・関与するスタッフの経験・資格
・署名者は市場の違いや法律・規則の違い、会社固有の事情を考慮に入れているか否か、また考慮にいれている場合にはその内容。それがコーポレートガバナンスのグローバルスタンダードや投資家のスチュワードシップの枠組みとどのように関連するか
・各市場に署名者が適用する議決権行使方針の骨子（顧客固有のカスタムポリシーの開示は不要）
・署名者は、顧客に対して調査報告書を公表した後に、事実の誤りや調査・分析・議決権推奨の重要な変更についてどのように通知しているのか

適用する方法論とモデル云々の部分は、ディレクティブでも記載が求められている事項で、何を指しているのか分かりにくいのですが、助言会社の場合、事前に議決権行使方針・ガイドラインを公表し、それを上場会社の議案に適用することで賛否推奨がなされるという手続をとっていますので、その概要を説明することが求められているのではないかと思われます。

ISS のコンプライアンスステートメントでも、調査・分析のアプローチは、議決権行使方針・ガ

イドラインに基づいていると説明されています。ISS は機関投資家の多様なニーズに対応して幅広い議決権行使方針を有していると記されていますけれども、議決権行使方針につきましては、既に９月に ISS の石田様より、クライアント・カスタムポリシー、ベンチマークポリシー、それからスペシャリティーポリシーというものがあるという説明を受けておりますので、省略させて頂きます。

利用する情報源につきましては、定款や年次報告書、参考書類や会社のリリースなど、原則的に公開情報をベースにしています。分析をより深くして質の高いリサーチを行うために、会社の代表者や機関投資家などの関係者と面談することもあり得るが、未公開情報を共有しないように行われているとのことです。会社の面談相手等の情報は、透明性確保等のために顧客にも開示することとされています。

ISS では、顧客は議決権行使プラットフォーム「Proxy Exchange」(PX)を利用することができ、多様な見解の参照可能性を確保するために、PX において他のサービスプロバイダーの見解も閲覧可能にしているということです。これは多分、顧客がグラスルイスと ISS の両方と助言提供の契約をしていれば、そのプラットフォームに両方の推奨内容が出てくるということではないかと思われます。

細かな話ですけれども、ISS の議決権行使プラットフォームとわが国の ICJ の議決権行使プラットフォームの接続がどうなるかですが、ブラックロックの江良様の 10 月の報告では、両者が連携されており、それを使っていると説明されていました。ICJ の HP で確認したところ、２年前の 2019 年 12 月 12 日に、ICJ と ISS の議決権行使プラットフォームのシステムが連携したということです。

ISS の議決権行使方針につきましては、前述のように９月に石田様より説明があったとおりです。

ISS の議決権行使方針（ハウスポリシー）――ISS ではベンチマークポリシーと呼んでいますが――については、各地域の法規制や最良慣行などに基づいて作成され、機関投資家や発行会社など関係者の意見を募ったうえで議決権行使方針を毎年改訂しているということですが、これも、９月に石田様より日本の議決権行使方針の作成プロセス等について説明があったとおりです。

・従業員スタッフ

従業員・スタッフの経験・資格については、ISS は世界 30 か所に 2,000 名以上の専門家を配置している云々というふうに説明があるのですけれども、これも９月に議論したとおり、ちょっと概括的過ぎないかなという気はします。全体の数値や世界・グローバルでどのようなスタッフが活動しているかということを知りたいのではなくて、恐らくどの国も、自分の国に対応しているスタッフはどうなっているのかということを知りたいのではないかと思います。

数値を出すと誤解を招くとの説明が石田様よりありましたけれども、例えば 10 月にご報告のありましたブラックロックでは、ブラックロックのスチュワードシップ活動体制について説明する中で江良様は、各地域のスタッフについても実数を挙げて説明しておられました。東京事務所は９名だと具体的に説明しておられたのですけれども、それで誤解を招くとか、数字がひとり歩きするということにはならないのではないかという気がしまして、私は各国別で何名程度のスタッフが張り付いているのかを開示してもらった方が望ましいと考えます。少なくとも現在の ISS の開示につきましては、本体全てについてどれだけのスタッフがいるのかということを開示しているにすぎないということです。

・適時性

顧客へのリサーチ・推奨の提供については、株主総会の２週間前を最低限の目標に設定しており、2019 年においては、アメリカ企業では平均 19 日前、非アメリカ企業でも 16 日前にレポートを提供しているということです。日本では２週間前ま

でに招集通知送付というのが法定要件ですので、最近はかなり前倒しされていますけれども、会社による総会関係資料の提供時期に連動して、助言会社による調査レポートの提供も日本は遅い部類に属すではないかというふうに推測します。

それから、原則１の中で「署名者は、顧客に対して調査報告書を公表した後に、事実の誤りや調査・分析・議決権推奨の重要な変更についてどのように通知しているのか」という点は、アメリカの 2020 年の規則、2021 年の規則改正案でも重要な論点になっていたところですけれども、ISS のコンプライアンスステートメントでは、ここではなくて、プリンシプルの３の方で記載しているとされています。ただ、プリンシプルの３の方でもあまり十分な開示はなされていないような気がしました。これは後ほどまたコメントします。

（２）原則２「利益相反」

BPP 署名者の主たる使命は投資家の利益に資することである。BPP 署名者はサービス提供に伴い生ずる可能性のある潜在的ないし事実上の利益相反を回避し、あるいは対応する手続の詳細を記した利益相反方針を有する必要があり、またそれを公衆開示する必要がある。

一般的方針を開示するだけではなく、BPP 署名者は、個別的に、調査・助言・議決権推奨の準備に影響し得る事実上ないし潜在的な利益相反や営業上の関係、及び事実上ないし潜在的利益相反を解消し緩和し管理するために署名者がとった行動を確認し、遅滞なく顧客に開示する手続を整備する必要がある。

・ISS の利益相反

ISS が公表している「検討すべき利益相反」は、次の３つのものがあると記載されています。

①ISS の支配株主と関係した者が ISS の方針の作成や適用に影響を及ぼすこと

②機関投資家の顧客が他の機関投資家顧客への助言に影響を持つこと

③ISS の完全子会社である ICS の発行会社の顧客が機関投資家顧客への助言に影響を持つこと

・利益相反の管理及び緩和

利益相反の管理の仕方ということですけれども、①については、親会社である Genstar Capital 及び関連ファンドに関連した潜在的利益相反緩和方針を採用しているということです。このコンプライアンスステートメントは 2021 年１月に作成されたものですが、2020 年 11 月に ISS はドイツ取引所の子会社になっています。ただ、ドイツ取引所の持分は 80％で、Genstar はまだ 20％を持っているので、ドイツ取引所との利益相反はあまり認識していないようですけれども、Genstar Capital との間の利益相反は問題だということではないかと理解しました。

②につきましては、ISS は公表された議決権行使方針に基づいて推奨を行うもので、職員らのコンプライアンスなど内部統制については外部監査を受けているということです。

③については、石田様の報告にもありましたように、ISS と ICS との間にファイヤーウォールを設けて、顧客には対象会社との契約関係について情報提供をしているということです。

・利益相反の開示

利益相反の開示につきましては、議決権行使プラットフォームで顧客に開示しているということは前述のとおりです。

（３）原則３「コミュニケーション方針」

BPP 署名者の主たる使命は投資家に奉仕することである。BPP 署名者は、投資家である顧客が株主総会の前の議決権行使期限までに、調査と分析を吟味できるようにハイクオリティの調査を適時に提供する必要がある。この投資家に対する主たる責任は、原則３を適用するうえで、 BPP 署名者にとって最も優先されるべき事項である。

サービスの提供については、BPP 署名者は発行会社、提案権行使株主、その他のステークホルダ

ー、メディア及び公衆とのコミュニケーションについて、自らのアプローチを説明する必要がある。BPP 署名者は、発行会社、提案権行使株主、その他のステークホルダーと対話に関する方針を開示する必要がある。発行会社とのコミュニケーションがなされた場合には、BPP 署名者は顧客に対して関連当事者との対話の性質について調査報告書において通知することが求められ、対話の結果についても報告書に記載することがあり得る。

ISS のリサーチチームは、定期的に対象会社の代表者や機関投資家、株主提案権行使者などと接触し、リサーチに関連する重要事実をチェックしているということです。ただ、議案の公表される時期のエンゲージメント活動は制約があるということで、これがどういうことなのか、いま一つよく分からないのですけれども。

・公開情報

ISS の調査分析の基礎は公開情報であるため、対象会社や株主提案権行使者その他のステークホルダーがレポートに反映されることを希望する重要事実がある場合、その事実は公衆開示することを求めるというふうに記載されていまして、この部分から推測しまして、先ほどの原則１の最後、事実の誤認等があったらどうするのかというところについては、ISS は、評価対象の会社から事実誤認等の申し出があっても、自分たちがそれに対して何か配慮するということではなくて、当事者が公衆開示すればよいというスタンスではないかと推測されます。

また、評価内容の変更につきましては、議決権行使プラットフォームで顧客に開示すれば足りるということではないかと推測するのですが、ただ、原則１の最後の項目につきましては、もう少し丁寧に説明があってもいいのではないかという気がしました。

ISS は、好意的な議決権推奨を得る方法について伝えることはしないし、伝えるつもりもない。ISS の調査報告書と推奨内容は、我々の議決権行使ガイドラインに基づき、そのときの事実を適用した結果得られるものである。それゆえ、背景となる議決権行使の方針や根拠について議論することはあっても、賛成推奨を得るために何をすべきかということは教えてあげないよということです。

それから、評価対象の会社との関係ですけれども、発行会社は、顧客に配布された後に ISS レポートの提供を求めることができる。つまり、原則として事前の提供は認められないということだそうです。

・メディア・公衆とのコミュニケーション

要望があり、当該情報について一般に利益があると認める場合には、メディアに対して ISS のリサーチレポートを提供している。

株主総会の議決権調査レポートや推奨内容は顧客のための私的な情報であり、そのため、ISS が提供するのは上記条件を満たした場合であり、またメディアの公表も、顧客に情報が提供された後に限定される。また、そのリサーチレポートの内容等については、ISS は個別にコメントをしないということですが、これは９月に ISS の石田様が詳細に報告しておられたのと一致する内容ではないかと思われます。

６．EU 規制の評価

最後に、簡単に EU の規制についてコメントしておきますと、EU の規制は、法規制とはいえ多くの規制内容を自主規制団体の規制に委ねているものと見ることができるのではないかと思われます。

この自主規制団体 BPPG は、大手助言会社の自主規制団体ですから、規制内容が当事者に都合よく作成されるリスクがあるという点は注意する必要があるとは思います。しかしながら、BPPG の組織運営には、発行会社や機関投資家の代表者も入っており、規範の内容を全体的に見ましても、妥当性を欠いているなどの問題は見当たらないようです。

ただ、先ほどのレポート公表後の事実誤認等があった場合の対応などにつきまして、ISS の公表

内容、ステートメントの内容が十分かなと疑問に思うところもありますので、自主規制のリスクというものを過少評価することはできないのかなという気がいたしました。

大ざっぱですけれども、私の報告は以上です。よろしくご教示をお願いいたします。

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【討　　論】

○川口　　ご報告ありがとうございました。

本日は、最初に議決権行使助言会社の規制についての論点をまとめていただき、その後、最近の動きとしてアメリカと EU の最近の状況を詳細にご報告いただきました。

それでは、まずは、規制の論点、意義について何かご発言、ご質問があれば、まずそこからお受けしたいと思います。よろしくお願いします。

【SEC の規則制定権限と議決権行使助言会社の規制根拠】

○伊藤　　ご報告ありがとうございます。

レジュメのⅠとⅡのアメリカの規制にまたがって疑問に思うことがあって質問したいのですが、それで大丈夫でしょうか。

４ページにアメリカの規制について書かれていまして、アメリカの規制は、要するに議決権行使助言を「勧誘」に含むことで、委任状勧誘規則による開示を主とする規制を課すという形をとっているのですね。しかしながら、この 2020 年の規則ができる以前は、助言というのはそもそも勧誘に該当しないと考えられていたわけですから、そのことが明らかにしているように、議決権行使助言が勧誘だということは、議決権行使助言を規制対象にするための方便でしかないように思います。

それで、こういうことから、例えばアメリカで 2020 年規則が SEC の規則制定権限を超えるものだといった議論がされていないのかが気になるところで、もし何かあれば教えていただきたいのが１点目です。

２点目は、その前の根本的な話に関係することですけれども、こういったことが示唆しているのは、議決権行使助言会社への法的規制の理論的な根拠が薄弱であるということだと私は思います。私個人は、そのような理論的根拠はないのではないかと疑っています。そこで、２ページから３ページに記されているような、これまで議論されてきた議決権行使助言会社への規制の根拠の合理性について、梅本先生のご見解を伺いたいと思います。これが２点目です。

よろしくお願いします。

○梅本　　１点目の SEC の規制権限との関係ですけれども、規制するとすれば連邦証券諸法の委任状勧誘規制以外はないよねということで、ここに引っかけているという点は確かにそのとおりだと思います。

規制権限を超えるという点も確かに争われていて、ISS は SEC に対して訴訟を提起していたと思います。詳細はフォローしていませんが、それがどうなるのか次第で、もしかしたら委任状勧誘規則のところについても今後また変わるのではないかという気はいたします。

ただ、委任状勧誘規則そのものが、株主が受け取る情報が不正確であってはならない、それについてちゃんとチェックしなきゃいけないという趣旨で、大きく捉えるなら議決権行使の助言についても正確さが担保される点は変わらないわけで、規制趣旨からすると助言会社の規制をここに入れても悪くはないのかなという気もします。

○伊藤　　その点ですけれども、委任状勧誘規則による規制の趣旨というのは、委任状勧誘を行う者が不正確な情報を投資者に渡して、投資者の議決権行使をゆがめたり、自らに都合いいように議決権行使をさせたりしてはいけないということかと思います。私としては、議決権行使助言会社についての規制が、そこに含まれるかが若干怪しいなと思っているというところです。

○梅本　　従来、適用除外されていたというのは、ファイナンシャルプランナーとか投資顧問とかがその投資顧問の業務に関連して議決権行使につい

ても助言を与えることがあり、そのようなケースは適用除外するということで、念頭に置いていたのは投資助言に付随して行われる議決権行使助言行為だったのですね。

それで従来、議決権行使助言会社はそれを根拠に適用除外だと言われていたけれども、いやいや、そんな付随的な助言行為じゃなくて、機関投資家を対象とした議決権行使助言行為そのものを主たる業務として、世界的に活動している ISS の議決権行使の助言行為についても同じように言えるのかという批判が高まってきて、従来の適用除外が念頭に置いていない状況が生じたので規制範囲に組み入れようということになったと私は理解しています。

○伊藤　　それはそうかもしれないですね。ありがとうございます。

○梅本　　もう一点の議決権行使助言会社を規制する理論的根拠ですけれども、私はどちらかというと、基本的に議決権行使助言会社は便利なサービスを機関投資家に提供していて、またコーポレート・ガバナンスにおいても有益な存在であるという点は十分に認識し評価しています。ただ、助言会社の提供するサービスにおいて、事実誤認だとか評価の間違いは全くないかというと、そうではないだろうと。で、何らかの規制というのはあってもいいのではないか、多くの機関投資家が助言会社の推奨に従い株主総会の議案の成否に影響がある以上、少なくとも規制の外に置いておくというのはどうだろうかという気がするということです。具体的にどういった規制が必要なのかについては、色々と議論がありうるとは思いますが。

○伊藤　　規制に反対する論者は、事実誤認があるからといって直ちに規制を行うことが正当化できるわけではないというふうに考えていると思うのですね。質のよくないサービスなのであれば使わなければよいという話、あるいはユーザーに支持されないという話にすぎないので、この理屈がどこまで説得的かは議論のあるところかと思います。ありがとうございました。

○川口　　今の点は、議決権行使助言会社が２社で寡占状態になっていて、顧客が実質的に選べないというところも影響しているのかもしれないですね。

○伊藤　　そうですね。

○黒沼　　今の論点に関連することですけれども、SEC は 2019 年８月 21 日に解釈リリースを公表していまして（SEC Rel.No.34-86721）、そこでは、議決権行使助言会社の行為が勧誘に該当するということに一応理屈を付けているのですね。

どういう理屈かというと、34 年法の規則の 14a-1(1)は、勧誘は委任状の付与につながるあらゆるコミュニケーションを含むと定義していて、SEC はこれを勧誘者が代理人として行動しようとしているか否かに関わらず適用してきた。議決権行使助言会社が機関投資家の代理人として行動しない場合にも、助言が証券保有者による委任状の付与等につながる以上、原則として勧誘に該当することになると述べています。

また、投資顧問といいますか投資運用業者が委任状勧誘規則の適用を受けるかという点についても、SEC は長年、投資顧問は議決権行使の助言をもって投資者にアプローチをするという点で、委任状勧誘規則の適用を受ける勧誘に従事していると解釈してきているようです。

そして、そのうえで投資顧問については適用除外にし、私が調べたのは 2019 年の段階ですけれども、SEC も議決権行使助言会社については、規制は適用除外にするけれども、一般的な詐欺禁止規定である規則 19a-9 条は適用される。そのうえで、当時それが詐欺的にならないためのガイドラインを公表したという経緯があります。

ですから、ISS が反対しているかもしれませんけれども、SEC はもともと委任状勧誘規則の適用対象であったと考えているのではないでしょうか。そしてそれは、日本とアメリカで委任状勧誘の適用対象が違うといいますか、日本は議決権の代理行使に着目して規制の適用範囲を考えていますけれども、アメリカでは、広く勧誘につながるものは全て入るのだと、そういう考え方がとられている点に違いがあるのではないかと私は考えていま

す。
○川口　　梅本先生、何かコメントはありますでしょうか。
○梅本　　いえ、特にございません。勉強になりました。
○川口　　実は、私も黒沼先生と同じように考えていまして、委任状勧誘規制がアメリカと異なる点が気になっていました。この点は、次回、ご検討いただければと思います。

【機関投資家との関係における利益相反】
○川口　　ほかはいかがでしょうか。
それでは、一点だけ確認させていただきたいと思います。２ページの利益相反のところで述べられているのですけれども、グループ内に別の事業をやっている会社があって、それに配慮したような形で助言がゆがむというのは、確かに利益相反としてあり得るのですが、その次に、「さらに、機関投資家が上場会社であれば、推奨サービスを締結している機関投資家とそうでない機関投資家とで評価が異なる可能性もあり得る」というのはどういうことなのか、もう少しご説明いただけますでしょうか。
○梅本　　ISS と契約関係にありサービスの提供を受けている顧客である機関投資家とそうでない機関投資家、これが上場会社であれば、例えば第一生命の評価をするに当たって、第一生命が ISS の顧客であれば評価を甘くする、それ以外の上場会社で ISS ではなくてグラスルイスと契約している上場会社の資産運用者であれば、その評価を厳しくするということはあるのかなという程度の話です。あまり本質的な利益相反とは言えないので、敢えて挙げる必要はなかったかもしれません。
○川口　　分かりました。ありがとうございます。
それでは、どこからでも結構ですので、ご意見、ご質問をいただければと思います。よろしくお願いします。

【利益相反の管理と開示】
○前田　　貴重なご報告、どうもありがとうございました。
今の利益相反のところと関わるのですけれども、２ページでご説明くださいましたように、利益相反の典型の一つは、助言会社の子会社がコンサルティングのサービスを対象会社に提供しているというような場合なのだと思います。
そして、利益相反問題への対処として、アメリカでも EU でも、利益相反関係を開示させるという、開示規制になっているわけですね。アメリカでは、先ほどお話しになりましたように、SEC の委任状勧誘規則にのせるのであれば、開示にとどめざるを得ないという面もあるのかもしれないのですけれども、前に ISS の石田様がご報告くださり、また今日梅本先生がご説明くださいましたように、ISS はファイヤーウォールを利益相反問題への対処方法にしているということでした。
ファイヤーウォールによる対処は、利益相反問題の全部ではないにしても、重要な部分についての効果的な対処方法だと思うのですが、ファイヤーウォールの構築は、今日ご説明くださいましたアメリカの規制、あるいは EU の規制のどこに該当することになるのでしょうか。
あるいは、ファイヤーウォールの構築は、構築自体は全く任意で開示規制だけになっているのか、アメリカ・EU における規制とのつながりがよく分からなかったので、ご説明いただければありがたく思います。
○梅本　　アメリカはあまりはっきりしていないですけれども、EU の規制では、「事実上ないし潜在的利益相反を解消し緩和し管理するために署名者がとった行動を」というふうにありますので、利益相反の管理がなされていることが前提じゃないかと思います。
いずれの場合も、規制以前から ISS などが事実上行っている利益相反の管理を前提にしたものなので、管理は当然の前提とした規定振りなのかと推測します。
○前田　　ファイヤーウォールを構築せよというのではなくて、構築していたら、それを開示しなさいということなのでしょうね。

○梅本　　規制自体は、先生の仰るとおりだと思います。
○前田　　分かりました。ありがとうございました。

【ファイヤーウォールと利益相反の開示】
○洲崎　　私もファイヤーウォールの問題と利益相反の開示の問題についてよく分からないところがありました。４ページの真ん中下あたりの※のところですが、規則案では助言文書や助言に用いる電子手段の全てに情報開示を求めていたけれども、規則ではどちらかでよくなった、それが ISS のファイヤーウォールの実務に配慮したものではないかというご説明があったように思います。

文書か電子手段のどちらかであればファイヤーウォール構築に支障がなくなるというご説明が、私はちょっとうまく理解できなかったのですが、この点、もう一度ご説明いただけますでしょうか。
○梅本　　すみません、説明が大ざっぱ過ぎました。

まず、議決権行使の助言文書というのは助言部門が作成するもので、恐らくその文書の最後のところに、当社はこの会社とコンサルティング契約を結んでいて年間１億円もらっている、みたいなものが記載されると思うのです。そういった文書を必ず作れとなると、助言部門とコンサルティング部門がわざわざファイヤーウォールを設けて別々に仕事をやっていたのに、助言部門が認識できる形で利益相反についての開示が出てくると、助言部門は自社とコンサルティング契約を締結している会社を知ってしまいファイヤーウォールが意味を無くしてしまうということです。これが議決権行使のプラットフォームであれば、顧客がそこで例えば評価対象の会社、賛成推奨で利益相反状況のところをクリックすると、そこにこの顧客とはコンサルティング契約を締結して、去年はこれだけの契約額だったというのが出てくる。これは助言部門には分からない、見えないということだと思うのです。

ですから、PX で開示する分にはいいけれども、文書に入れてしまうとファイヤーウォールが台なしになっちゃうよねという話じゃないかと思うのです。
○洲崎　　私が想像したところでは、助言部門が文書を作成し、その文書を発送をする部署があって、発送するときに、この会社にはコンサルティング業務をしてますよというスタンプを押せばそれで済むのかなと思ったのです。あるいは、文書としては同一ではないけれども、発送するときに、この会社にはコンサルティング業務をやってます、契約がありますという書類をもう１枚追加すればそれで済むのかなと思ったのですが、それではうまくいかないのでしょうかね。
○梅本　　確かに先生のおっしゃるとおり、文書であっても、分けようと思えば分けられるのは確かだと思います。ただ、アナリストレポートなんかを見ますと、あれも最後のところに、当社はこういった利益相反を持っているみたいなものがざあっと出てきますので、文書として一体として提示するものなのかなと私はイメージを持っていたのですけれども。
○洲崎　　なるほど、ご説明はよく分かりました。

【詐欺禁止規定の改正について】
○石田　　ありがとうございました。勉強になりました。

５ページから６ページのアメリカの詐欺禁止規定のところをお伺いしたいと思います。

改正案ではルール 14a-9 の Note (e)が削除されたけれども、削除後も詐欺禁止規定の適用はあるというご説明をいただきまして、そういうことになっているのかというのが分かりました。

一点お伺いしたのは、今日ご紹介いただかなかった点なので大変申し訳ないのですが、議決権行使助言会社の情報開示に関して詐欺的行為があるという場合、一体どういうケースを想定しているのでしょうか。例えば利益相反開示で必要な事項を開示していないというような場合は、恐らくこの規定にのっかってくるのだろうなとは思うのですが、推奨とかの意見に係る部分で、合理的な根

拠がなく推奨をしていた、推奨意見を表明したというようなところまで詐欺的行為の内容に含まれていると考えてよいのかどうかということです。

もう一点は、６ページの２行目から３行目にかけて「重要な情報が開示されなければ、誤導的だと解される余地が」あるということですけれども、これは結局、Note(e)があろうとなかろうと変わらないという理解でよろしいのでしょうか。

○梅本　　まず、最初の議決権行使助言会社の詐欺的行為というところですけれども、実は私もこの規定に基づいて議決権行使助言会社が訴えを提起された事例というのは存じません。ただ、あり得るとすれば、機関投資家ではなく発行会社が、自分のところの評価が思ったものと違うということで、これが詐欺的だと訴える可能性があるのではないかという気がします。恐らく詐欺的な開示を理由に機関投資家が訴えを提起することはないような気がします。

２点目ですけれども、Note(e)は、議決権行使助言に関連して重要な情報を提供しない場合に該当しうるという定めですが、削除した場合としない場合とでそれほど違いがあるのかというと、確かに先生おっしゃるとおりです。ただ、あえてこれを削除したということは、会社に関する事実で重要なものを見落として調査レポートを作成し、議決権推奨をした場合を念頭に、解釈上念のために注記したということはあり得るのでしょうかね。

○石田　　14a-9 の(a)にいうところの False or misleading、この辺にかかってくるのでしょうかね。

○梅本　　ええ、ええ。訴訟リスクが高まるので、これを削除すると説明されていましたので、恐らくこれがある場合には責任を追及する側が訴訟を提起しやすくなる等の事情があるのだろうと推察します。ただ、私も深く考えたことはありませんので、もし先生に何かお考えがあれば、むしろお聞かせいただきたいところですけれども。

○石田　　ありがとうございます。私も勉強してみます。

【対象会社が意見を述べる機会の確保】

○川口　　ほかにいかがでしょうか。

今の５ページのところで、SEC の規則の重要な部分であると思われていた、対象会社に対する助言内容を通知して、対象会社からの反論の機会を与えるという制度を定めた規定が今回削除されたということですけれども、それに対してアメリカではどのように評価されているのでしょうか。あるいは、梅本先生ご自身ははどのように評価されていますでしょうか。

○梅本　　ここを削除されたと知ったのが先週の水曜日ですので、どう考えればいいのかよく分かりませんというのが正直なところです。ただ、EU のルールを見ますと、EU の方はかなり大ざっぱというか、いや、そんな事実誤認だ何だと言うなら、自分のところで情報開示しろと、公衆縦覧の情報にしてしまえばいいだろうということで、EU はこのあたりはあまり厳格に規制しようとしていない。それに対してアメリカの場合は、ここのところをプリンシプルベースであれルールを設けるということですから、重視していたということなのでしょう。

ただ、理論的な話ではありませんけれども、共和党政権下で、恐らく発行体、企業側の要請というものがかなり強く反映された規定ではないのかなという気がいたしました。つまり、事実誤認があるとか、議決権行使助言会社を規制すべきだという強い声を持っていたのは発行体側、発行会社の側で、むしろサービスを受ける機関投資家側は、無駄なコストがかかるだけだから規制は要らないということでしたので、この規定が恐らく最も争われたというふうな見方はできるのではないかという気がいたしました。お答えになっているかどうか分かりませんが。

○川口　　いえ、ありがとうございました。

○黒沼　　今の点についての補足の発言ですけれども、今回の改正の経緯はよく知りませんが、先ほど紹介した 2019 年のリリースを発表したときにも SEC 委員の間で意見が分かれていたそうです。そのときの基本的な考え方の対立は、一方には、

議決権行使助言会社に対する規制を強化することが株主を保護することにつながるという考え方があり、他方には、規制を強化すると既に寡占化している助言会社の市場に新たな業者が参入するのを妨げることになるという意見があり、そういう規制反対派との対立があったということが論じられていました。

○川口　　ありがとうございます。ほかにいかがでしょうか。

議決権行使助言会社が２社で寡占状態にあるということについては、諸外国で議論があるのでしょうか。

○梅本　　調べ方が不十分かもしれませんが私が見ました限り、弊害というのは指摘されていませんけれども、２社寡占の状況に関連しまして、日本以外の国では、ローカルな助言会社がぽつぽつとあるにもかかわらず、日本にはそういった助言サービスを提供する会社がこの２社以外にないというのはなぜかなというふうに常々考えているところではあります。

ただ、こういったサービスというのは、国内だけ見ていればいいわけではなくて、海外の投資家も顧客にしなきゃいけないので、かなり規模の経済が働くもので、寡占化しやすい事業なのかなという気はいたします。

【EU ディレクティブと自主規制の関係】

○川口　　ありがとうございます。ほかはいかがでしょうか。

非常に基本的なことで恐縮ですけれども、EU でディレクティブが出されていて、他方で自主規制団体による規制も行われています。まず、自主規制団体である BPPG の方が先にあって、その後ディレクティブが出て、そのディレクティブを受けて、またこの自主規制が変更されたという経緯があると思います。この２つの関係は、制度上はどうなっているのでしょうか。

先ほどは、自主規制団体に丸投げなのではないかという評価もされていました。その意味は、ディレクティブの中でこれらの規制は自主規制団体が決めるというふうに定められているのか、あるいは両方の制度が並立していて、細かいところは自主規制団体が決めているというようなものなのか。非常に基本的な話ですけれども、両者の関係をお聞かせいただけますでしょうか。

○梅本　　EU の規制の背景につきましては、私も十分勉強しているわけではないのですけれども、最初に、2014 年にディレクティブができる前に、ESMA から求められて自主規制で対応しろという形になりまして、そこで BPPG の組織が行動規範を定めていました。これはまだ自主規制のみの規制段階だったのですけれども、2017 年になってからディレクティブに基づいて、――国によってはもっと厳格な規制を加えているとは思うのですけれども――、議決権行使助言会社が適用を受ける行動規範を公表して遵守状況について報告せよという形をとるようになりました。

3j 条２項以下に利益相反など開示すべき事項は一応例示されています。ただ、それは BPPG のプリンシプルの３つの原則の中に入っており、実質上、自主規制に丸投げと言っては変ですが、自主規制を遵守すればディレクティブの要請を満たし各国のルールも、ミニマムの規制である限りはそれを遵守したということになると思うのです。

最低限の開示事項を除けば、若干プリンシプルの中で上乗せの開示項目も入っているのですけれども、その開示項目については自主規制で全て決めているわけです。この関係をどう理解するのかというのは私もよく分からないです。ただ、EU でも、規制すべきか否かというところの議論があったうえで、とりあえず自主規制に規制を設け、その後でディレクティブで規制するという形で、規制が進んできている、しかし規制内容はというと、依然として自主規制によるところが非常に大きいというのが現状で、規制の在り方を模索中とみることができるのかな、という印象を持っております。

すみません、不十分ですけれども。

○川口　　ありがとうございました。

【再び規制根拠について】

○白井　　梅本先生、ご報告ありがとうございました。大変勉強になりました。

伊藤先生がご質問された最初の点に戻ってしまうのですけれども、梅本先生のレジュメの２ページで、議決権行使助言会社の規制上の論点について丁寧に整理されております。具体的には、１点目で利益相反の問題があげられ、２点目から４点目は基本的には同じような話であるように思うのですが、そこでは、利益相反の問題を懸念しなくてもよい場面において、議決権行使助言会社から提供されるサービスの水準をどのように確保するかという問題であるように思われます。その上で、１点目の利益相反の問題について規制する必要があるというのは私もよく理解できるところです。利益相反の問題については、市場に任せておいても最適な状態が導かれない、すなわち問題が解決されない可能性が高いわけですから。これに対して、伊藤先生がご質問された点とも関係するのですが、２点目から４点目のサービスの水準を確保するための規制に関しては、利益相反の問題を懸念しなくてよい場面であるとすれば、市場に委ねるというのではなぜ駄目なのだろうかというあたりは、立ち止まって考えるに値する問題であるようにも思われました。

私の理解が誤っていれば恐縮ですが、梅本先生のお立場は、どちらかというと、２点目から４点目の議決権行使助言会社のサービス水準の確保という点に関しても、法による何らかの規制が必要ではないのかというご見解であるようにうかがっておりました。

確かに、ISS とグラスルイスの２社で議決権行使助言サービスの市場は寡占状態にはあるのですけれども、サービス水準や内容について過度な行為規制が設けられますと、新規参入の業者にとって要求される水準のサービスを実現するための負担が増え、新規参入を阻害する要因になりかねないという問題が生じうるように思われます。つまり、寡占状態が規制の存在を通じてより固定化してしまうという問題が引き起こされることが懸念されるわけです。さらには、議決権行使の助言というのは、投資家にとって例えば株主であり続ける上で必要不可欠なサービスというわけでは必ずしもないのですから、もし議決権行使助言会社が提供するサービスのクォリティーが十分でないと多くの投資家が判断するのであれば、今後は利用しないという形で、寡占状態ではあっても、議決権行使助言のマーケット全体のパイが縮小していくという形を通じた不利益があり得るので、そのような観点からも、利益相反の問題を懸念しなくてよい場面についてのサービス水準に関しては、議決権行使助言の市場競争における規律付けというのが働く余地があるようにも感じました。

もし梅本先生のお立場が、利益相反の問題を懸念しなくてよい場面で、議決権行使助言のサービス水準について法による一定の行為規制が必要であるというものだといたしますと、市場に委ねるのでは足りないということを、どのようにご説明されるのか、先生のお考えをお聞かせいただければと思います。

例えばですが、仮に、機関投資家としては、その背後にいる顧客に対して議決権行使内容について説明がつきさえすればよいので、実はそこまで議決権行使助言のサービス水準については関心を持っていないという、ある種のエージェンシー問題があったりするのであれば、確かに市場に委ねるのでは議決権行使助言会社が提供するサービス水準が最適にならない可能性はあるのかもしれないとは思うのですが、実態の把握の問題として、そのように断言してよいかどうか確証が持てないこともあり、梅本先生のお考えをお聞かせいただければありがたいです。

○梅本　　利益相反以外については市場に委ねて構わないのではないかというご質問につきましては、先ほど川口先生もおっしゃっていましたように、議決権行使助言ビジネスが寡占状態になるという前提で考えると、ISS のサービスの提供姿勢についてもう少し透明化してほしいという要請はあるのだろうと思います。

ISS が独占的地位を確立する以前であれば、お

っしゃるとおり市場に委ねていればでよかったと思いますが、ISS が一旦マーケットを全部押さえてしまったという状況で、じゃあ、こっちに変えようと思っても、もう選択肢がなくなってしまっているわけですね。新規参入も難しい。そうなってくると、既にサービスを独占している者に対して一定の透明性を確保してもらいたいという趣旨の開示規制であれば、大きな負担にならないのではないか。アメリカの「事前に発行会社にレポートを提出して審査を受けろ」みたいなルールであればコストが高くなるのですけれども、自分たちの提供しているサービスについて、その内容や手続きを開示するだけであれば、コスト負担はさほど大きくないと思うのです。

そうであれば、利益相反なんて狭い範囲ばっかりじゃなくて、どんな形でサービスを提供しているのですかということぐらいの開示は求めてもいいのではないのかなという気はいたします。また、規制方法について、それを法的に求めるべきなのか、あるいは自主規制に求めるべきなのか、スチュワードシップ・コードのようなソフトローに求めるべきなのかというところは議論があり得ると思います。

不十分ですが、以上です。

○白井　　梅本先生の考えていらっしゃる規制というのが寡占状態にある企業に対する開示規制にとどまるということであれば、私もおっしゃるとおりだと思います。先生が本日ご紹介くださったアメリカで導入された規制では、単なる開示規制を超えていると思われるような内容の規制もありましたので、そこまでの規制の導入を意図されているのだろうかとも思ったのですが、そうではないということで、承知いたしました。ご説明くださいまして、ありがとうございました。

○梅本　　いえいえ、先生と意見が異ならずに幸いです。

【アメリカの規制における利益相反の扱い】

○小出　　大変勉強になりました。どうもありがとうございます。

ちょっと私、不勉強ですのでよく分かっていないところが多いのですけれども、まず１点目は、利益相反に対する規制で、米国においては基本的に開示をせよというルールだというふうに拝聴しました。EU の方については、2019 年の最良慣行原則の原則２では、利益相反の回避とか緩和とか、そこまでやるべきであるというようなことが書いてあるように見えます。

アメリカの証券法の世界でも、例えばブローカーディーラーなんかの利益相反については緩和、mitigate とするというところまで規制を及ぼすような議論もあったところだと思うのですが、現時点、アメリカではまだ議決権行使助言会社に関しては、利益相反は開示さえすればよく、緩和の議論まではいっていないという理解でよろしいのでしょうかというのが１点目の質問です。

○梅本　　私もルールを見る限りは、アメリカにおいて利益相反について、そもそも管理をせよということが求められているかというと、どうもそういうわけではないように思えました。

ただ、これは推測でしかありませんけれども、既に ISS やグラスルイスが行っているファイヤーウォールを初めとする利益相反の管理というものを前提としたうえで、開示をせよということではないかと思います。もし現状で管理がちゃんとできていなかったら、「管理をすること」というのがルールに入っていたのではないかという気もしますので、現状を前提にして、これで足りるという判断なのではないかなという気がいたします。お答えになっているかどうか分かりませんが。

【国際的な規制収れんの可能性】

○小出　　ありがとうございます。やはりこの業界というのは寡占といいますか、少数の会社が大きなシェアを持っているという前提があるので、そこの実態に合わせて規定も作られているということだと思うのですが、それとも関係するところで、EU もアメリカも、それぞれ規制を置いているのですが、対象としている会社はかぶっていて、結局 ISS だったりグラスルイスだったりするとい

うことになると、それぞれの法域で規制が異なっていたとしても、結局 ISS は、EU 向けにはこうやって、アメリカ向けにはこうやってみたいなことをわざわざ分けているかというと、そうじゃないような気もします。そうすると、この領域というのは、厳しい方にだんだん収れんしていくような方向で実務は動いていくということが見込まれるのでしょうか。

そう考えますと、利益相反の緩和に関しては、EU の規則というよりは自主規制ルールだと思いますけれども、こういった厳しいルールにどんどんグローバルのレベルで合わせていく形で実務が動いていくと、日本も今後規制を作るうえでは、EU とか米国においてこのような規定があるということを前提としてルールを考えていけばいいという感じになるでしょうかというのが２点目の質問です。

○梅本　　なかなか難しい質問ですが、先生のご趣旨は、規制が厳格なところにそろっていくということなのでしょうか。

○小出　　結局、どの国の規制も対象はかぶっていますので、議決権行使助言会社はどちらの規制も守らなければいけないとすると、先ほどお話ししたように、国によって対応を変えるということを議決権行使助言会社はするのかどうかというとそうでない気がするので、そうすると、結局アメリカにおいても、先ほど梅本先生は利益相反は実務では既に管理されているとおっしゃいましたけれども、厳しい方にそろっていくというような形になって、それが日本における実務にも影響を及ぼしていくのかなというふうに思って。質問というよりもコメントかもしれません。

○梅本　　確かに、ある国で厳しい規制をして開示が詳細になされていれば、ほかの国でもそれをしないわけにはいかないということもあり得ると思います。

先生がおっしゃるように、外国の規制状況を見ながらわが国の規制を考えなければいけないというのは、そのとおりだろうと思います。

○川口　　今の点を踏まえて日本でどうあるべきか、というのは、次回にご報告いただけるということで期待しております。

ほかにいかがでしょうか。それでは、少し早いですが、今日の研究会はこれで終わりにさせていただきたいと思います。

梅本先生、どうもありがとうございました。

議決権行使助言会社(3)　理論的検討その 1

アメリカ・EU における議決権行使助言会社の規制

2021/11/26

甲南大学　梅本剛正

Ⅰ議決権行使助言会社と規制上の論点について

1　はじめに

議決権行使助言会社は，EU 株主権ディレクティブの定義によると「専門職かつ商業ベースで，議決権行使に関するリサーチ，助言，議決権推奨を提供することを通じて，投資家の議決権判断に資することを目的に上場会社の情報開示やその他の情報を分析する法人のこと」を指す。日本も含めて世界における議決権行使助言業は，ISS(Institutional Shareholder Services)とグラスルイスの二社が事実上の寡占状態にある[1]。

2　議決権行使助言会社が利用される背景

・議決権行使助言会社の歴史はさほど古いものではなく，1985 年にアメリカの厚生省幹部がアメリカのコーポレートガバナンスと機関投資家の議決権行使の質の向上を目的として ISS を設立したことに始まる。その後，1980 年代後半の ERISA 法解釈通牒エイボンレターや 1940 年投資顧問法規則改正など一連の規制改正において，保有する株式の議決権を資産保有者や資産運用者が適正に行使することも受託者責任の一内容であること等が示されて以後，機関投資家らによる助言業務の外部委託が増加するようになった。

アメリカ以外の国においても，法規制によるかスチュワードシップ・コードなどのソフトローによるかは別として，機関投資家の議決権行使は規範として確立しているといってよい。

3　議決権行使助言会社の影響力の源泉

(1)機関投資家の株式保有数・比率の拡大

アメリカにおいて議決権行使助言会社の役割が大きくなった主たる理由は，助言会社の利用者である機関投資家の株式保有が拡大したことである。

欧米諸国のみならずわが国においても，投資信託や保険会社，年金基金など機関投資家による上場会社の株式保有数・保有比率は上昇傾向にある。これは確定給付年金・確定拠出年金制度の拡充や人口の高齢化などを背景としているが，機関投資家の上場会社の株式の保有比率が大きくなるに従って，機関投資家が上場会社の株主総会の議案の成否を握るとともに，会社経営陣に対して影響力が増大するのは必然的といってよい。

(2)機関投資家の事務作業の議決権行使助言会社へのアウトソーシング

保有資産に含まれる株式の議決権行使を求められるようになった機関投資家にとって効率的に作業を行う必要があった。わが国の上場会社は 6 月下旬に定時株主総会を開催するものが極めて多く，多数の銘柄を保有する機関投資家がそれらの会社の総会議案すべてに目を通して賛成・反対を決定することは困難であり，事実上の必要から作業の一部を助言会社にアウトソースしているものと考えられる。日本ほどではないにせよ，アメリカにおいても上場会社の株主総会は 4 月・5 月の時期にある程度集中している。

機関投資家の株式保有が拡大し同時に，保有株式の議決権行使を適正に行うことが義務付けられるようになったため，業務の一部が助言会社にアウトソーシングされ，その結果，助言会社の推奨内容が上場会社の株主総会における議案に影響力を持つようになったといえる。

4　議決権行使助言会社の規制上の論点

・助言会社の利益相反

ISS のようにコンサルティング業務をグループ内で提供している場合には，子会社の取引先の株主総会議案に対する推奨内容が(会社に有利に)歪められる恐れがある。また，助言会社の役員や親会社の関係会社が上場会社であれば，同じように評価が歪みかねない。さらに，機関投資家が上場会社であれば，推奨サービスを締結している機関投資家とそうでない機関投資家とで評価が異なる可能性もありうる。

・助言会社の物的・人的資源が十分か

限られた期間内に多くの上場会社の様々な議案を分析し推奨するのであるから，助言業務を適正に行うためにはスタッフの質と量を一定以上確保するなど十分なリソースが求められるはずである。かりにそれが不十分であれば，提供されるサービスの信頼性が低下することになる。

・推奨内容が事実誤認等に基づくことも

しばしば評価対象となった会社から指摘されることがある。助言会社は公表資料以外にも直接会社を訪問したりメール・電話等の手段でインタビュー等を行ったりしているが，必ずしもすべての会社で実地調査を行っているわけではない。調査を行ったとしても事実誤認や評価の誤りが残ることもある。対象会社が助言会社の推奨内容や分析に異議を申し立てることがあるが，推奨内容に会社の反論等をどの程度反映させるかも問題となりうる。

・議決権行使助言会社の推奨内容が形式的・画一的な基準の適用に終始しがち

助言会社は事前に定めた議決権行使方針に従って個々の会社の議案を評価するが，会社

[1] ISS は 2020 年 11 月にドイツ証券取引所に傘下に入り，従来の親会社でプライベートエクイティの Genster Capital は 20%の株式を保有している。9 月の報告で紹介されたように，ISS はグループ会社を通じてガバナンスのコンサルティング業務を行うなど，助言業以外の業務も幅広く行っている。ちなみに，グラスルイスは助言業のみを行っている。

の置かれた状況によっては形式基準を当てはめることが適当でない場合も少なくない。

⇔議決権行使助言会社を規制すること自体に否定的な見解

顧客である機関投資家は洗練された投資家であり推奨に盲目的に従うとは限らないこと，助言会社が果たしている役割が重要であり規制で縛るべきでないこと，規制により増加するコストが顧客に転嫁されるため関係者の利益にならないことなど。

Ⅱ　アメリカの規制状況

1　法規制の試み

2007 年 6 月の会計検査院(GAO)の報告において議決権行使助言会社の問題点が指摘され[2]，その後，助言会社に対する規制の是非について盛んに議論されてきた。2017 年 10 月，2018 年 11 月には助言会社の規制を含む法案が議会に提出された。これら法案の主たる内容は，助言会社を SEC への登録制として，助言会社に関する情報開示を図るとともに，スタッフ等の確保を求めその人数等を SEC に年次報告することや，助言方針等を届け出て公表すること，対象会社の事前レビューとコメントの機会提供など，GAO 報告書以後問題とされてきた論点を踏まえたものであった。ところが，いずれの法案も前述した規制そのもの対する批判などを理由に会期終了に伴い廃案となった。

2　SEC による規則改正

1934 年証券取引所法の委任状勧誘規則では，「勧誘」（規則 14a-1(l)(1)(ⅲ)）に該当する行為を行う場合，一定の書式に基づく情報提供義務や SEC への届出が求められるなど煩雑な手続きが必要となっている（規則 14a-2～規則 14a-6)。議決権行使助言会社の助言行為は，詐欺禁止規定(14a-9)は適用されるものの，委任状勧誘規制については適用除外されると解されていた[3]。

2019 年 11 月 5 日に SEC は，委任状勧誘規則の改正案を公表した[4]。改正案においては，原則的に議決権行使助言会社の助言行為は委任状勧誘の勧誘の該当するものと明記され，適用除外を受ける要件という形で，議決権行使助言会社について，利益相反などの新たな開示規制義務と評価対象会社との対話手続きのルールの新設を提案した。

[2] GAO, CORPORATE SHAREHOLDER MEETINGS: ISSUES RELATING TO FIRMS THAT ADVISE INSTITUTIONAL INVESTORS ON PROXY VOTING (2007)

[3] 助言会社の助言は規則 14a-2(b)(1)「勧誘」に該当しないとされ，同時に助言会社自身は規則 14a-2(b)(3)の事業関係に基づく適用除外(　)を受けるものと解されてきた。

[4] SEC, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-87457 (Nov. 5, 2019) [84 FR 66518(Dec. 4. 2019)]

2020 年に最終的に決まった規則(以下，「2020 年規則」)は，規則案に対するパブリックコメントを受けて，要件の細目を定めていたものをプリンシプルベースの規制に改めるなどの修正を経たうえで，次のようなものとなった[5]。

(1)「勧誘」の定義規定の変更（規則 14a-1(l)(1)(ⅲ)(A)）

「証券保有者の承諾が求められている特定事項に関する議決権行使，同意，授権で，証券保有者に対する推奨となるすべての議決権行使助言で，かつ，当該議決権行使助言が議決権行使助言の提供者として専門的技能を販売する者により提供され，他の形式の投資助言とは別に提供されるもので，かかる議決権行使助言を有償で販売するもの」(＝「議決権行使助言ビジネス」)が，委任状勧誘規則の「勧誘」に含まれるものとした。

(2)利益相反の開示(規則 14a-2(b)(9)(ⅰ))

議決権行使助言会社は自らの利益相反状況を明らかにするために，以下の情報を開示することが求められている。

・特定の利害関係，取引関係，関わり(relationship)の状況に照らして，議決権助言の客観性を評価するにあたり重要となる議決権助言ビジネス(関連会社を含めて)との利害関係，取引関係，関わりに関するすべての情報(規則 14a-2(b)(9)(ⅰ)(A))

・利害関係，取引関係，関わりの重要な利益相反の問題に対応する手段のみならず，それを認識するために用いられるすべての方針・手続き(規則 14a-2(b)(9)(ⅰ)(B)

※利益相反の開示の仕方について，規則案では助言会社に対して助言の文書や助言に用いる電子手段すべてに利益相反に関する情報開示を求めていたが，2020 年規則では利益相反の開示を助言文書，あるいは，助言を提供する電子手段の，いずれかにおいて，開示されれば足りるとされており，より柔軟な対応となっている。

助言会社に過剰な負担がかからないよう配慮するとともに，新規参入を阻害しないこともその目的であると説明される[6]。

←しかし，ISS の実務に配慮したものではないだろうか？

※ISS 石田氏の 9 月報告参照

(3) 助言内容の正確さの担保　会社への事前通知など(規則 14a-2(b)(9)(ⅱ)(A).(B))

議決権行使助言ビジネスは，次の事項を合理的に確保するための書面による方針と手

[5] SEC, Exemption from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082-55155 (Sept. 3, 2020)　以下，Final Rule で引用。邦語の紹介として，高橋真弓「米国委任状規則による議決権行使助言会社の規制」一橋法学 20 巻 1 号 103 頁(2021)参照。

[6] Final Rule at 55101.

続きを定め，公衆開示すること[7]。
①議決権行使助言の対象となった会社が，助言会社の顧客に伝えられると同時にあるいは事前に当該助言内容を知ることができるようにすること(規則 14a-2(b)(9)(ⅱ)(A))
②議決権行使助言会社は顧客に対して，株主総会等の前に，助言対象の会社が助言に関して書面で述べている内容を合理的に知りうるための仕組みを提供すること（規則 14a-2(b)(9)(ⅱ)(B))。
それぞれについて非排他的セーフハーバーが定められている[8]

(4)詐欺禁止規定の改正(規則 14a-9)

委任状勧誘の詐欺禁止規定である規則 14a-9 の Note に（e)として， 議決権行使助言会社の情報開示に重要な過誤や不記載がある場合を付け加えた。

3　政権交代と SEC 規則の再改正

2021 年に民主党政権に代わり，新たに選任されたゲンスラーSEC 委員長は，2021 年 11 月 17 日に，SEC は 2020 年の規則を見直す規則改正案を公表した[9]。

見直しの背景には，2020 年規則後に議決権行使助言会社の利用者である機関投資家らが，議決権行使助言会社から適時に独立した推奨を受けられるのか懸念が表明されたことや，議決権行使助言会社自身が,改正規則が問題とした事項を解消する努力を続けてきたことがある[10]。

今回の改正目的は，議決権行使助言会社の提供するサービスに対する投資家の信頼を維持しつつ，議決権行使助言の適時性や独立性を阻害するおそれがあり，不当な訴訟リスクやコンプライアンスコストを助言ビジネスに課すおそれのある，議決権行使助言ビジネスへの負担を回避することにある。

今回の改正案の主たるポイントは，対象会社に対する助言内容の通知と対象会社の見解を投資家に伝えることを求めた規則 14a-2(b)(9)(ⅱ)の削除である。これらについては，議決権行使助言会社の規制遵守コストが高くなることが批判されていたことを受けたものである。

ただし，改正案では，それ以外の点については大幅に変更されておらず，とりわけ議決権行使助言会社の助言行為が，委任状勧誘の勧誘に該当するとの規定は維持している点は注目される。また，利益相反の開示部分(規則 14a-2(b)(9))についても規定は維持されている。

詐欺禁止規定を定める規則 14a-9 の Note に加えられた議決権行使助言会社が提供した情

[7] ただし，カスタムポリシーに基づく助言については適用されない(規則 14a-2(b)(9)(ⅴ))
[8] Final Rule at 55110.
[9] SEC, Proposed Rule. Proxy Voting Advice, Release No. 34-93595; File No. S7-17-21
[10] Proposed Rule at 9.

報に重要な過誤や不記載がある場合を例示する(e)は削除された。もちろん，削除後も助言会社に適用があることは変わらないが，Note(e)は議決権行使助言会社の助言に関して重要な情報が開示されなければ，誤導的だと解される余地があり，議決権行使助言会社が訴訟リスクに晒される可能性が高くなるためとか。

※補足：2020 年に ISS はドイツ取引所の子会社となったが，本社は依然としてメリーランド州のロックビルにあるのでアメリカの会社であることは変わらない。

III　EU 株主権ディレクティブ（Shareholder Rights Directive）[11]

1　規制趣旨

2017 年に EU 株主権ディレクティブが改正され[12]，新たに 3j 条「議決権行使助言会社の透明性」という規定が設けられた。

規制趣旨については，前文において次のように記されている。すなわち，「多くの機関投資家および資産運用者は，上場会社の株主総会の議決権行使について調査，助言，推奨を提供する議決権行使助言会社のサービスを利用している。議決権行使助言会社は，会社情報に関する分析コストの低減に貢献することにより，コーポレートガバナンスで重要な役割を果たしているが，同時に彼らは投資家の議決権行動において大きな影響力を有している。とりわけ，高度に分散したポートフォリオを持つ投資家や多くの海外投資家は議決権行使会社の助言に，より多く依拠することになる」(preamble(25))。「その重要性に鑑みると，議決権行使助言会社は透明性が求められている。加盟国は議決権行使助言会社が行動規範に従い，規範の適用状況を報告するよう確保する必要がある。また，議決権行使助言会社は調査，助言，議決権行使推奨の準備に関する重要な情報および調査，助言，議決権行使推奨の準備に影響を及ぼしうるすべての事実上ないし潜在的利益相反あるいは営業上の関係に関する一定の重要情報を開示する必要がある。当該情報は，機関投資家が議決権行使助言会社の過去のパフォーマンスを考慮して議決権行使助言会社のサービスを選択できるように，最低 3 年間，公衆開示を継続する必要がある」(preamble(26))。

2　適用対象

規制対象となる助言会社については，EU 域内に登記された事務所・本店を持たなくても，域内の施設(establishment)を通じて活動を行う助言会社に対しては適用されることになる（3j 条 4 項)。

この趣旨は，前文によると EU 域内に本社等を持たない第三国の議決権行使助言会社が EU 域内の会社について議決権行使の助言等を提供することがありうるが，EU 域内と域外の議決権行使助言会社の公平を確保するために，ディレクティブは施設の形態を問わず EU 内の施設で活動する第三国の助言会社に対しても適用されるべきであるとしている(preamble(27))。

ISS やグラスルイスが世界中でほぼ独占的にサービスを提供している現状を踏まえると，

[11] DIRECTIVE (EU) 2017/828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement　2017 O.J.（ L 132/1）.

[12] 改正ディレクティブは，2019 年 6 月までに国内法化することが求められている。

当然の規定だと思われる。

3　行動規範

規制概要は，助言会社は自らが適用を受ける「行動規範」を公表し適用状況につき報告することが求められている(1 項)。この行動規範については，2014 年に ESMA の要請を受けて欧米の大手議決権行使助言会社を構成員とする Best Practice Principles Group という組織が，共通の行動規範を作成しており，EU ディレクティブ等の改正を受けて現在は 2019 年版最良慣行原則[13]が作成されている。具体的な内容は後述。

4　助言業務に関する利益相反等の開示

助言会社は調査・助言・議決権推奨の準備に関して少なくとも次の情報を年次ベースで公衆開示することが求められる(2 項)。すなわち，適用する方法論・モデルの骨子，利用する主要な情報源，調査・助言・議決権推奨の質やスタッフの質を確保するために導入している諸手続き，市場や法律上・規則上の違いや会社固有の事情を考慮に入れているか否か，また考慮にいれている場合にはその方法，各市場に適用する議決権行使方針の骨子，調査・助言・議決権推奨の対象とする会社および会社のステークホルダーと対話しているか否か，対話している場合にはその程度・特質，潜在的利益相反の防止および管理に関する方針などである。また，顧客に対して利益相反への対応状況を開示すること等も求められている(3 項)。

5　最良慣行原則の概要と ISS のコンプライアンスステートメント

2019 年度最良慣行原則は，3 つの原則を示している。これだけではイメージをつかみにくいので，具体的にどのような内容が開示されているのかについて原則のガイダンスとともに ISS が同原則に基づいて開示しているコンプライアンスステートメントで確認しておくこととしたい。

(1)原則 1「サービスの質」

BPP 署名者は，顧客と合意した内容に対応したサービスを提供する。BPP 署名者はリサーチの方法論および，もしあれば，自らの議決権行使方針(house voting policies)を有し開示する必要がある。

BPP 署名者は以下を開示するものとする。

・適用する方法論とモデルの骨子
・利用する主要な情報源
・調査・助言・議決権推奨の質を確保するための諸手続き

[13] 2019 Best Practice Principles for Providers of Shareholder Voting Research & Analysis）https://bppgrp.info/the-2019-principles-detail/

・関与するスタッフの経験・資格
・署名者は市場の違いや法律・規則の違い，会社固有の事情を考慮に入れているか否か，また考慮にいれている場合にはその内容：それがコーポレートガバナンスのグローバルスタンダードや投資家のスチュワードシップの枠組みとどのように関連するか
・各市場に署名者が適用する議決権行使方針の骨子(顧客固有のカスタムポリシーの開示は不要)
・署名者は，顧客に対して調査報告書を公表した後に，事実の誤りや調査，分析，議決権推奨の重要な変更についてどのように通知しているのか

ISS の分析のアプローチは，議決権行使方針・ガイドラインに基づいている。ISS は機関投資家の多様なニーズに対応して幅広い議決権行使方針を有している。

利用する情報源については，定款や年次報告書，参考書類や会社のリリースなど，原則的に公開情報をベースにする。分析をより深くして質の高いリサーチを行うために，会社の代表者や機関投資などの関係者と面談することもありうる(重要な未公開情報を共有しないよう行われる)。会社の面談相手等の情報は，透明性確保のために，顧客に開示することにしている。

ISS では顧客は議決権行使プラットフォーム「ProxyExchange」(PX)を利用することができるが，多様な見解の参照可能性を確保するために，PX において他のサービスプロバイダーの見解も閲覧可能にしている(顧客が他のプロバイダーと契約している限り)。
※ブラックロック江良氏 10 月報告の説明では，日本の場合は ISS の PX と ICJ とが接続しているとのことであったが，必ずしも連携しているとはいえない話もあり確認したところ，2019 年 12 月 12 日にシステムが連携しているとのこと[14]。とはいえ，ICJ に参加していない会社については問題外。

・ISS の議決権行使方針は，顧客の方針に対応したものと(client custom policies)，ISS 自身のもの(ISS benchmark policy) と 2 つがある。後者が原則 1 のいうハウスポリシーに該当する。サステナビリティなどに特化した専門的方針(specialty policies)もアリ
※すでに ISS 石田氏の 9 月報告で紹介済み

ISS の議決権行使方針(ハウスポリシー)については，各地域の法規制や最良慣行などに基づいて作成され，機関投資家や発行会社など関係者の意見を募ったうえで，議決権行使方針を毎年改訂している。

[14] ICJ，「ICJ と ISS、国内機関投資家の日本株株主総会における議決権電子行使プラットフォームのシステム連携を実現しました」https://www.icj.co.jp/news/information/2591/

・従業員スタッフ
ISS は，世界 30 か所に 2000 名以上の専門家を配置している。280 名以上のリサーチアナリスト等の専門家と 25 以上の言語に精通したスタッフ，多くは金融学，経営学，法律学の高度な学位を有している云々
提供するサービスにつきアウトソースしているか等の開示も求められるが，ISS はリサーチ業務についてアウトソーシングは行っていない。

※概括的すぎないか？

・適時性
顧客へのリサーチ・推奨の提供については，株主総会前 2 週間前を最低限の目標に設定しているが，2019 年においてはアメリカ企業では，平均 19 日前に，非アメリカ企業でも 16 日前にレポートを提供している。

(2)原則 2「利益相反」

BPP 署名者の主たる使命は投資家の利益に資することである。BPP 署名者はサービス提供に伴い生ずる可能性のある潜在的ないし事実上の利益相反を回避し，あるいは対応する手続きの詳細を記した利益相反方針を有す必要があり，また，それを公衆開示する必要がある。

一般的方針を開示するだけではなく，BPP 署名者は，個別的に，調査，助言，議決権推奨の準備に影響しうる事実上ないし潜在的な利益相反や営業上の関係，および，事実上ないし潜在的利益相反を解消し緩和し管理するために署名者がとった行動を確認し遅滞なく顧客に開示する手続きを整備する必要がある。

・ISS の利益相反
主として 3 つのタイプの潜在的利益相反を認識している。
①ISS の支配株主と関係した者が ISS の方針の作成や適用に影響を及ぼすこと
②機関投資家の顧客が他の機関投資家顧客への助言に影響を持つこと
③ISS の完全子会社である ICS の発行会社の顧客が機関投資家顧客への助言に影響を持つこと

・利益相反の管理および緩和
①については，親会社である Genstar Capital および関連ファンドに関連した潜在的利益

相反緩和方針を採用している[15]
②については，ISS は公表された議決権行使方針に基づいて推奨を行うものである。職員らのコンプライアンスなど内部統制については外部監査を受けている。
③については，石田氏の報告にあったように，ISS と ICS との間にファイアーウオールを設定するとともに，顧客には対象会社との契約関係について情報提供している。

・利益相反の開示
議決権行使プラットフォームの「ProxyExchange」(PX)において，顧客に開示
PX での利益相反に関する開示事項は，主として評価対象の会社がコンサルティング業務を行う ICS の顧客か否か（9 月報告 ISS 石田氏説明参照)。プラットフォームを利用しない顧客には個別にメールで通知。

(3)原則 3「コミュニケーション方針」
BPP 署名者の主たる使命は投資家に奉仕することである。BPP 署名者は，投資家である顧客が株主総会の前の議決権行使期限までに，調査と分析を吟味できるようにハイクオリティの調査を適時に提供する必要がある。この投資家に対する主たる責任は，原則 3 を適用するうえで， BPP 署名者にとって最も優先されるべき事項である。

サービスの提供については，BPP 署名者は発行会社，提案権行使株主，その他のステークホルダー，メディアおよび公衆とのコミュニケーションについて，自らのアプローチを説明する必要がある。BPP 署名者は，発行会社，提案権行使株主，その他のステークホルダーと対話に関する方針を開示する必要がある。発行会社とのコミュニケーションがなされた場合には，BPP 署名者は顧客に対して関連当事者との対話の性質について調査報告書において通知することが求められ，対話の結果についても報告書に記載することがありうる。

ISS のリサーチチームは，定期的に対象会社の代表者や機関投資家，株主提案権行使者などと接触し，リサーチに関連する重要事実をチェックする等している。ただし，議案の公表される時期のエンゲージメント活動は制約がある。
・公開情報
ISS の調査分析の基礎は公開情報であるため，対象会社や株主提案権行使者その他のステークホルダーがレポートに反映されることを希望する重要事実がある場合，その事実は公衆開示することを求める。
・ISS は，好意的な議決権推奨を得る方法について伝えることはないし，伝えるつもりもない。ISS の調査報告書と推奨内容は，われわれの議決権行使ガイドラインに基づき，そのときの事実を適用した結果得られるものである。それゆえ，背景となる議決権行使の方針や根拠について議論することはあっても，「賛成」推奨を得るために何が求められているのかを告げることはしない。
発行会社は顧客に配布された後に，ISS レポートの提供を求めることができる。原則的に事前の提供は認められない。
・メディア・公衆とのコミュニケーション
要望があり，当該情報により一般に利益があると認める場合に，メディアに対して ISS のリサーチレポートを提供している。
株主総会の議決権調査レポートや推奨内容は顧客のための私的な情報である。そのため，ISS が提供するのは，上記条件を満たした場合であり，またメディアの公表も顧客に情報が提供された後に限定される。また ISS はそれらについて個別にコメントをしない(ISS 石田氏 9 月報告参照)。

6　EU 規制の評価

[15] 2021 年のコンプライアンスレポートであるが，2020 年 11 月から親会社は Deutsche Börse ドイツ取引所(80%)。しかし，Genstar もまだ 20%を保有しているからか。

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–89372; File No. S7–22–19]

RIN 3235–AM50

Exemptions From the Proxy Rules for Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to its rules governing proxy solicitations so that investors who use proxy voting advice receive more transparent, accurate, and complete information on which to make their voting decisions, without imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice. The amendments add conditions to the availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules that are commonly used by proxy voting advice businesses. These conditions require compliance with disclosure and procedural requirements, including conflicts of interest disclosures by proxy voting advice businesses and two principles-based requirements. In addition, the amendments 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 amendments clarify when the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the antifraud provision of the proxy rules, depending upon the particular facts and circumstances.

DATES: *Effective date:* The rules are effective November 2, 2020.

Compliance dates: See Section II.E.

FOR FURTHER INFORMATION CONTACT: Daniel S. Greenspan, Senior Counsel, Office of Rulemaking, at (202) 551–3430 or Valian Afshar, Special Counsel, Office of Mergers and Acquisitions, at (202) 551–3440, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting 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]

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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. The applicable laws are set by the state in which the corporation is incorporated. For various reasons, including the widely dispersed nature of public share ownership, most shareholders do not attend these meetings in person. Rather, most shareholders of publicly traded companies exercise their right to vote on corporate matters through the use of proxies.[2] Congress vested in the Commission the broad authority to oversee the proxy solicitation process when it originally enacted the Securities Exchange Act of 1934 (the ''Exchange Act'').[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]

In today's financial markets, which are characterized by significant intermediation and institutional investor participation,[6] proxy voting advice businesses[7] have come to play an important role in the proxy voting process by providing an array of voting services that can help investment advisers and institutional investor clients manage their substantive and procedural proxy voting needs.[8] Investment advisers and institutional investors often retain proxy voting advice businesses to assist them in making their voting determinations on behalf of their own clients and to handle other aspects of the voting process, which for certain investment advisers has become increasingly complex and demanding over time.[9] Investment advisers voting on behalf of clients (including retail investors) and institutional investors, by virtue of their holdings in many public companies, including as a result of indexing and other broad portfolio management strategies, 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.[10]

Proxy voting advice businesses typically provide investment advisers, institutional investors, and other clients with a variety of services that relate to the substance of voting decisions, such as: Providing research and analysis regarding the matters subject to a vote; promulgating their generally applicable benchmark voting policies (a ''benchmark policy'') or specialty voting policies (a ''specialty policy''), such as a socially responsible policy, a sustainability policy, or a Taft-Hartley labor policy,[11] that their clients can use; and making specific voting recommendations to their clients on matters subject to a shareholder vote, either based on the proxy voting advice business's benchmark or specialty policies or based on custom voting policies that are proprietary to a proxy voting advice business's clients (''custom policy'').[12] This advice is often an important factor in the clients' proxy voting decisions. Clients may use the proxy voting advice business's recommendations in a variety of ways, including as an alternative or supplement to their own internal resources in analyzing matters when deciding how to vote.[13]

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]

Although estimates vary, each year proxy voting advice businesses provide voting advice to thousands of clients that exercise voting authority over a sizable number of shares.[16] Because proxies have become the predominant means by which shareholders of publicly traded companies exercise their right to vote on corporate matters,[17] and institutional investors hold a significant and increasing number of shares, proxy voting advice businesses have become uniquely situated in today's market to influence,[18] and in many cases directly execute, these investors' voting decisions.[19]

In recognition of the important and unique role that proxy voting advice businesses play in the proxy voting process[20] and in the voting decisions of investment advisers and institutional investors[21] who often vote on behalf of retail investors, the Commission proposed amendments to the Federal proxy rules in November 2019 to enhance the transparency, accuracy, and completeness of the information provided to clients of proxy voting advice businesses in connection with their voting decisions.[22]

Specifically, the Commission proposed amendments to codify its interpretation that proxy voting advice generally constitutes a solicitation within the meaning of Exchange Act Section 14(a) and therefore is subject to the Federal proxy rules. In addition, the Commission proposed to condition the

[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.

[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 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 Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice,* Release No. 34–87457 (Nov. 5, 2019) [84 FR 66518 (Dec. 4, 2019)] (''Proposing Release'') at 66519.

[7] For purposes of this release, we refer to firms that advise investment advisers and institutional investors on their voting determinations, and any person who markets and sells such advice, as ''proxy voting advice businesses.'' 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, and the analysis and research underlying the voting recommendations that are 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. The reference to ''proxy voting advice,'' as used in this release, is not intended to encompass (1) administrative or ministerial services, (2) data or research that is not used by a proxy voting advice business to formulate its voting recommendations, or (3) the identity of any of the proxy voting advice business's clients that receive such advice. To the extent any data or research underlies a proxy voting advice business's voting recommendations but is not delivered to its clients (such as internal work product), such data or research also would not constitute that business's proxy voting advice. Further, we recognize that, in formulating its voting recommendations, a proxy voting advice business may use data and research that was prepared by another party, such as market intelligence and database providers. For the avoidance of doubt, the fact that a third party's data and research is used by the proxy voting advice business would not, by itself, cause such third party to be a proxy voting advice business. However, if a proxy voting advice business uses a third party's data and research in formulating its voting recommendations and delivers such data and research to its clients, then the data and research would constitute part of the proxy voting advice business's proxy voting advice.

[8] *See* Proposing Release at 66520, n.17.

[9] *Id.* at 66519, n.9.

[10] *Id.* at n.8.

[11] For example, the various benchmark and specialty policies of one proxy voting advice business, Institutional Shareholder Services (ISS), are set forth on the following web page: *https://www.issgovernance.com/policy-gateway/voting-policies/.* The various benchmark and specialty policies of another proxy voting advice business, Egan-Jones, are set forth on the following web page: *https://www.ejproxy.com/methodologies/.*

[12] *See* Proposing Release at 66519. As discussed *infra* Section II.C.3.c.i., we are excluding from the requirements of new Rule 14a–2(b)(9)(ii) proxy voting advice to the extent that such advice is based on custom policies. Custom policies would not include the proxy voting advice businesses' benchmark or specialty policies, even if those benchmark or specialty policies were to be adopted by proxy voting advice businesses' clients. *See infra* note 394 for a discussion of how a proxy voting advice business may satisfy the requirements of new Rule 14a–2(b)(9)(ii) in situations in which a client's custom policy is identical to the benchmark or specialty policies.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 66520, n.18.

[17] *Id.* at 66518, n.2.

[18] *See, e.g.,* letter from Council of Inst. Investors (Nov. 14, 2019) (''CII I'') (noting that proxy voting advice businesses' ''recommendations and related analysis'' may be ''market-moving'').

[19] *See also infra* note 36 for a discussion of the increased institutional investor holdings in the U.S. markets.

[20] *Id.* at 66520.

[21] *Id.*

[22] *See generally* Proposing Release.

availability of certain existing exemptions from the information and filing requirements of the Federal proxy rules commonly used by proxy voting advice businesses upon compliance with additional disclosure and procedural requirements. Finally, the Commission proposed to amend Exchange Act Rule 14a–9, the antifraud provision of the Federal proxy rules, to clarify that, depending upon the particular facts and circumstances at issue, the failure to disclose certain information in proxy voting advice may be considered materially misleading within the meaning of the rule.

We received many comment letters in response to the Proposing Release.[23] After considering the public comments, we are adopting the proposed rules with certain modifications as described, and for the reasons set forth, below. Consistent with the proposal, we are adhering to—and adopting an amendment to Rule 14a–1(l) to codify—our longstanding view that proxy voting advice generally constitutes a ''solicitation'' under Section 14(a).[24] Absent an applicable exemption, a person providing such proxy voting advice would be subject to the Federal proxy rules' information and filing requirements, including the obligation to file and furnish definitive proxy statements. For reasons previously stated in the Proposing Release, we believe that proxy voting advice businesses should be eligible to rely on an exemption from such information and filing requirements for their proxy voting advice, but only to the extent that such exemption is appropriately tailored to their unique role in the proxy process and facilitates the transparency, accuracy, and completeness of the information available to those making voting decisions. As such, under the new rules that we are adopting, persons furnishing proxy voting advice constituting a solicitation as defined in new 17 CFR 240.14a–1(l)(1)(iii)(A) (''Rule 14a–1(l)(1)(iii)(A)'') will be eligible to rely on the exemptions in 17 CFR 240.14a–2(b)(1) (''Rule 14a–2(b)(1)'') and 17 CFR 240.14a–2(b)(3) (''Rule 14a–2(b)(3)'')[25] only upon satisfaction of the conditions of new 17 CFR 240.14a–2(b)(9) (''Rule 14a–2(b)(9)'').

As described in more detail below, we have modified these conditions in a number of respects in response to comments received to provide appropriate flexibility to proxy voting advice businesses to meet the principles that underlie the objectives of the rule, and to avoid unnecessary potential disruptions to their ability to provide their clients with timely voting advice. In addition, consistent with the amendments to 17 CFR 240.14a–2(b) (''Rule 14a–2(b)''), we are amending Rule 14a–1(l) to make clarifying changes to the definition of solicitation as it relates to proxy voting advice and amending Rule 14a–9 to add to the list of examples provided in the Note to that rule. We are adopting these amendments to Rule 14a–1(l) and Rule 14a–9 substantially in the form proposed, with certain modifications as described in the discussion that follows.

We recognize that for some shareholders, the services provided by proxy voting advice businesses can be an important component of the larger proxy voting process and, as such, help facilitate the participation of shareholders in corporate governance through the exercise of their voting rights.[26] We are also mindful that the efficacy and effectiveness of the proxy voting system depend on the ability of shareholders to obtain transparent, accurate, and materially complete information from an array of relevant parties before making their proxy voting decisions. To enable shareholders to make informed voting decisions, Congress and the Commission have placed varying obligations on participants in the proxy voting process, including through Commission rulemakings pursuant to the broad authority granted by Congress to regulate proxy solicitation.[27]

For example, registrants and others who engage in a proxy solicitation generally must furnish shareholders with a definitive proxy statement containing numerous specified disclosures.[28] They must also generally file all of their additional soliciting materials with the Commission, which ensures that all shareholders and interested parties have access to their soliciting statements and have an ability to consider such statements as part of their voting decisions and, in certain situations such as in a proxy contest, respond to them.[29] The Commission, however, has long recognized that these general requirements applicable to registrants and others engaged in a proxy solicitation may not be necessary under certain circumstances and, throughout the years, has tailored the application of these requirements as needed. For example, shareholders who beneficially own more than $5 million of securities and who do not seek proxy voting authority are exempt from the requirement to file a definitive proxy statement when they engage in a solicitation, but they still must publicly file with the Commission any written soliciting materials sent to security holders and are subject to the antifraud provisions of Rule 14a–9 with respect to the content of those soliciting materials.[30] Parties conducting certain other solicitation activities, including the furnishing of proxy voting advice, have relied on other exemptions from the requirement to file proxy statements.[31] Still other activity has been entirely exempt from the proxy rules, including Rule 14a–9.[32]

The Commission has periodically adjusted the proxy rules in response to market developments, including to provide shareholders with additional sources of information.[33] In calibrating the rules and exemptions, the Commission has generally sought to avoid unnecessary burdens that may deter the expression of views on matters presented for a vote while ensuring that shareholders have transparent, accurate, and materially complete information upon which to make their voting decisions.[34] In this regard, the Commission has been guided by the ''fundamental conclusion that the interests of shareholders are best served by more, and not less, discussion of matters presented for a vote.'' [35] This same principle guides us again as we update the Commission's rules in light of current market practices and circumstances.

As explained in the Proposing Release, proxy voting advice businesses have become an increasingly important and prominent part of the proxy voting process as institutional investors, who own a majority of the outstanding shares in today's market,[36] often retain proxy voting advice businesses to assist them in making their voting determinations and voting their shares on behalf of clients. In recent years, registrants, investors, and others have expressed concerns about the role of proxy voting advice businesses. These concerns include the accuracy and soundness of the information, and the transparency of the methodologies, used to formulate proxy voting advice businesses' recommendations. Concerns have also focused on potential conflicts of interest that may affect the recommendations made by the proxy voting advice businesses.[37] In addition, questions have been raised about whether registrants have an adequate opportunity to review and respond to proxy voting advice before votes, informed by such advice, are cast and whether shareholders have an adequate opportunity to review the proxy voting advice, including in the context of any response from the registrant or others, before casting their votes.[38] These concerns and changing market conditions, as discussed above, prompted the Commission to consider amendments to the exemptions commonly used by proxy voting advice businesses, which had been crafted 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 institutional investors.[39] A number of the comment letters we received in response to the Proposing Release continue to express these concerns.[40]

In updating our rules to facilitate better informed proxy voting, we do not believe that it is necessary to subject proxy voting advice businesses to the Federal proxy rules' information and filing requirements applicable to registrants and certain others, such as the filing and furnishing of definitive proxy statements, as long as they satisfy certain requirements tailored to their role in the proxy process. In particular, we believe that concerns raised regarding the increase in intermediation and complexity in the market and the increased dependence on proxy voting advice can be addressed, and the goal of ensuring that shareholders receive more transparent, accurate, and complete information can be furthered, without the full set of disclosures that would be required with a definitive proxy statement. We also recognize that a requirement to publicly file proxy voting advice with the Commission and disseminate proxy materials to the shareholders of every registrant covered by the advice could result in the addition of significant substantive and procedural changes in the current operations of proxy voting advice businesses and could adversely impact their business models. For example, such a requirement would effectively allow investment advisers, institutional investors, and other investors who do not subscribe to the services of proxy voting advice businesses to obtain certain proxy voting advice services free of charge.

For these reasons, we believe that as a general matter these businesses should continue to be eligible for the benefits of conditional, tailored exemptions from the information and filing requirements of the Federal proxy rules generally applicable to registrants and others. In light of the significant role proxy voting advice plays in the voting decisions of institutional investors and others, however, we also believe that the exemptions need to be fashioned both to elicit adequate disclosure and to enable proxy voting advice businesses' clients to have reasonable and timely access to transparent, accurate, and complete information material to matters presented for a vote—thereby ensuring that the continued use of the exemptions facilitates informed voting decisions and does not undermine the purposes of the Federal proxy rules.

Some commenters argued that the Investment Advisers Act of 1940 (the ''Advisers Act'') is the proper regulatory regime for proxy voting advice businesses, and that the Advisers Act and an investment adviser's fiduciary duty already address the stated

[23] *See generally* letters submitted in connection with the Proposing Release, *available at https://www.sec.gov/comments/s7-22-19/s72219.htm*. Unless otherwise specified, all references in this release to comment letters are to those relating to the Proposing Release. In addition, the SEC's Investment Advisory Committee adopted recommendations asking the Commission to: prioritize improvements to the proxy system (end-to-end vote confirmations, reconciliations, and universal proxies); improve conflict-of-interest disclosure generally; enhance the discussion about the value of proxy advisors and shareholder proposals; and expand the economic cost-benefit analysis. *See* U.S. Securities & Exchange Commission Investor Advisory Committee, Recommendation of the SEC Investor Advisory Committee Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals (Jan. 24, 2020) (''IAC Recommendation''), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf*. These recommendations were not unanimously approved by the members of the Investor Advisory Committee; *see* letters from Stephen Holmes (Jan. 27, 2020) (''S. Holmes''); Paul G. Mahoney and J.W. Verret (Jan. 30, 2020) (''P. Mahoney and J.W. Verret''); Heidi Stam (Jan. 27, 2020). We address the substance of the IAC Recommendation, together with related public comments, in the discussion that follows. Finally, the 2019 Small Business Forum Report included a recommendation that the Commission provide ''for effective oversight of proxy advisory firms under Rule 14a–2(b), with a focus on conflicts of interest, accuracy, transparency, and issuer-specific decision making.'' This recommendation was tied for first place in the priority ranking assigned by the participants of the breakout group session. *See* Final Report of the 2019 SEC Government-Business Forum on Small Business Capital Formation (December 2019) (''2019 Small Business Forum''), *available at https://www.sec.gov/files/small-business-forum-report-2019.pdf*.

[24] *See infra* Section II.A.3.

[25] Proxy voting advice businesses have typically relied upon the exemptions in Rule 14a–2(b)(1) and (b)(3) to provide advice without complying with the filing and information requirements of the proxy rules. *See* Proposing Release at 66525 and n.68.

[26] *See* Proposing Release at 66525.

[27] *See infra* notes 55–60 and accompanying text for a discussion of the multifaceted nature of the Federal securities laws' security holder voting and ownership disclosure regulatory framework.

[28] 17 CFR 240.14a–3; 17 CFR 240.14a–101.

[29] 17 CFR 240.14a–6(b).

[30] 17 CFR 240.14a–2(b)(1); 17 CFR 240.14a–6(g).

[31] 17 CFR 240.14a–2(b). Rules 14a–2(a) and (b) set forth a number of activities that fall within the definition of a solicitation but for which the requirement to file a definitive proxy statement does not apply. This includes, for example, the delivery of registrants' proxy materials by securities intermediaries to their clients and the securities intermediaries' request for voting instructions from their clients (Rule 14a–1(a)(1)), solicitations by or on behalf of a person who does not seek proxy authority (Rule 14a–2(b)(1)), solicitations of no more than ten persons (Rule 14a–2(b)(2)), the furnishing of proxy voting advice by advisors to their clients under certain circumstances (Rule 14a–2(b)(3)), the publication or distribution by a broker or a dealer of research reports under specified conditions (Rule 14a–2(b)(5)), and the solicitations through electronic shareholder forums by persons who do not seek proxy voting authority (Rule 14a–2(b)(6)).

[32] 17 CFR 240.14a–2(a).

[33] For example, the Commission has recalibrated the exemptions ''to provide shareholders with additional sources of information, opinions and views'' to inform their voting decisions, and to remove impediments that it determined ''unduly hindered free discussion'' among registrants, shareholders, and other interested parties. Communications Among Shareholders Adopting Release; *see also* Concept Release (''The Commission has actively monitored the proxy process since the 1930s and has made changes when the process was not functioning in a manner that adequately protected the interests of investors.'').

[34] *See* Communications Among Shareholders Adopting Release (noting concerns about ''secret'' solicitations, as well as concerns about the burden on shareholders).

[35] *Id.*

[36] *See, e.g.*, A. De La Cruz et al., OECD, Owners of the World's Listed Companies 22 (2019), *available at https://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.pdf* (''In the United States, institutional investors hold around 72% of the domestic stock market value.'').

[37] *See* Proposing Release at 66525.

[38] *See id.* at 66529.

[39] See *id.* at 66519–21.

[40] *See, e.g.*, letters from Mark A. Bloomfield, President and CEO, American Council for Capital Formation (Jan. 27, 2020) (''ACCF''); Kyle Isakower, Senior Vice Pres. of Reg. & Energy Policy, American Council for Capital Formation (July 7, 2020) (''ACCF II''); Cameron Arterton, Vice President, Biotechnology Innovation Organization (Feb. 3, 2020) (''BIO''); Business Roundtable (Feb. 3, 2020) (''BRT''); Tom Quaadman, Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (Jan. 31, 2020) (''CCMC''); Henry D. Eickelberg, Chief Operating Officer, Center on Executive Compensation (Feb. 3, 2020) (''CEC''); Corporate Governance Coalition for Investor Value (Feb. 3, 2020) (''CGC''); Neil A. Hanson, Vice President, Investor Relations and Secretary, Exxon Mobil Corporation (Feb. 3, 2020) (''Exxon Mobil''); Rick E. Hansen, Assistant General Counsel and Corporate Secretary, General Motors Company (Feb. 25, 2020) (''GM''); Clifton A. Pemble, President and CEO, Garmin International, Inc. (Jan. 27, 2020) (''Garmin''); Brian S. Roman, Global General Counsel (Feb. 3, 2020) (''Mylan''); Chris Netram, Vice President, Tax & Domestic Economic Policy, National Association of Manufacturers (Feb. 3, 2020) (''NAM''); Tony M. Edwards, Senior Executive Vice President, and Victoria P. Rostow, Senior Vice President & Deputy General Counsel (Feb. 3, 2020) (''Nareit''); John A. Zecca, Executive Vice President, Chief Legal and Regulatory Officer, Nasdaq, Inc. (Feb. 3, 2020) (''Nasdaq''); Gary A. LaBranche, President & CEO, National Investor Relations Institute (Feb. 3, 2020) (''NIRI''); Darla Stuckey, President and CEO, Society for Corporate Governance (Feb. 3, 2020) (''SCG'') .

objectives of the proposed rules.[41] We disagree. The Advisers Act and Section 14(a) serve distinct, though overlapping, regulatory purposes. The Advisers Act is a principles-based regulatory framework, at the center of which is a federal fiduciary duty to clients that is based on equitable common law principles.[42] Section 14(a) grants the Commission broad power to adopt rules to control the conditions under which proxies may be solicited in order to address a Congressional concern that the solicitation of proxy voting authority be conducted on a fair, honest, and informed basis.[43]

As a preliminary matter, we note that proxy voting advice businesses differ as to whether they believe they fall within the definition of an investment adviser under the Advisers Act and should be registered as investment advisers. The Commission has stated previously that when proxy voting advice businesses provide certain services, they meet the definition of investment adviser under the Advisers Act and thus are subject to regulation under the Act.[44] Specifically, a person is an ''investment adviser'' if the person, for compensation, engages in the business of providing advice to others as to the value of securities, whether to invest in, purchase, or sell securities, or issues reports or analyses concerning securities.[45] Proxy voting advice businesses provide analyses of shareholder proposals, director candidacies, or corporate actions and provide advice concerning particular votes in a manner designed to assist their institutional clients to achieve their investment goals with respect to the voting of securities they hold.[46] In other words, proxy voting advice businesses, for compensation, engage in the business of issuing reports or analyses concerning securities and providing advice to others as to the value of securities and would therefore meet the definition of an investment adviser unless an exclusion applies.[47]

One such exclusion from the definition of an investment adviser under the Advisers Act is the ''publisher's exclusion.'' Specifically, Section 202(a)(11)(D) of the Advisers Act excludes from the definition of an investment adviser a ''publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.'' [48] At least one large proxy voting advice business has taken the position that if it was deemed to be an investment adviser, it could rely on the exclusion for publishers contained in Section 202(a)(11)(D) of the Advisers Act.[49]

Regardless of the applicability of the Advisers Act, however, we believe the concerns motivating the rules we are adopting are squarely subject to, and appropriately addressed through, regulation under Section 14(a).[50] As we noted in the Proposing Release, proxy voting advice businesses provide voting advice to clients that exercise voting authority over a sizable number of shares that are voted annually, and these businesses are uniquely situated in today's market to influence investors' voting decisions.[51] This advice also implicates interests beyond those of the clients who utilize it when voting. Because these clients vote shares they hold on behalf of thousands of retail investors, this advice affects the interests of these underlying investors. Further, in light of proxy voting advice businesses' clients' ability to affect the outcome of the vote on a particular matter through their voting power, the proxy voting advice guiding the clients' votes potentially affects the interests of all shareholders [52] of the registrant, the registrant, and the proxy system in general.[53]

In the areas of proxy voting, proxy solicitation, and related activities, the Advisers Act, Section 14(a), and various other statutes and Commission rules do not operate independently from each other and are not mutually exclusive. Rather, depending on the activity and status of the person involved, more than one statutory provision and related rules may apply, with the various provisions complementing each other. For example, Section 13(d) of the Exchange Act and the related rules [54] are designed to ensure that market participants are informed when any shareholder (or group of shareholders) acquires more than five percent of a class of equity securities registered under Exchange Act Section 12.[55] Section 13(d) and the related rules generally require these holders to disclose publicly their ownership and other information mandated by the Commission, such as any plans that the holders may have to change the board of directors or management or to engage in extraordinary transactions (such as mergers or material asset sales), for so long as the holdings exceed the five percent threshold as well as any material changes to these disclosures.[56] These mandated disclosures, which are provided in Schedule 13D, along with the short-form Schedule 13G adopted pursuant to Exchange Act Section 13(g),[57] have proven important to investor protection by providing public notice of significant accumulations of securities by a person that may affect the control of the company and, ultimately, the interests of all security holders in the company, including in the context of proxy voting.

Yet, the obligation for a shareholder to file Schedules 13D or 13G does not obviate the shareholder's obligation to comply with Section 14(a) and the Federal proxy rules to the extent that the shareholder engages in activities that constitute a proxy solicitation. For example, a dissident shareholder seeking to solicit proxy authority to elect its own director nominees to a registrant's board in a contested election must still file and furnish a definitive proxy statement even though the dissident shareholder may have previously disclosed in its Schedule 13D the plan to change the board of directors. This is the result of Congress establishing these two separate statutory provisions with different purposes, with Section 13(d) focused on providing notice about concentration of voting power and the use of that power, including to change or influence the control of the issuer, and Section 14(a) focused on providing information needed for informed shareholder voting, and the fact that a shareholder may engage in an activity that triggers obligations under both provisions.

The two statutory obligations often complement each other. For example, Exchange Act Rule 13d–1 provides certain shareholders, including many classes of institutional shareholders, with a tailored, conditional exemption from the general requirements of Section 13(d) if the shareholder has acquired the securities ''in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer.'' [58] In various circumstances where shareholders are voting by proxy, and solicitation activity is ongoing—for example, the election of directors or the approval of an extraordinary corporate transaction—the information required to be disclosed publicly by Section 13(d) may be material to a voting decision and, accordingly, important to the regulation of the proxy voting process. Similarly, the Commission—noting that Section 13(d) already sets forth the circumstances for when public disclosures of such plans, proposals, or agreements are needed—adopted the Rule 14a–2(b)(1) exemption despite concerns from some commenters that proxy filings are needed for disclosure of a shareholder's plans or proposals regarding the registrant or shareholders' voting agreements on a particular matter.[59] At the same time, the exemption is not available for solicitations by any person who, while not seeking proxy authority, is nevertheless required to file a Schedule 13D or has disclosed in the Schedule 13D an intent (or reserved the right) to engage in a change of control transaction or a contested director election, given the heightened need for the proxy disclosures from a person contemplating such transformative transactions or contests.

Other statutes that often play an important and complementary role in furthering all aspects of the Commission's mission in the context of proxy voting and proxy solicitation include Sections 5, 11, and 12 of the Securities Act of 1933 (the ''Securities Act''), in particular in circumstances where the vote being solicited is in connection with a significant transaction, such as a merger, in which new securities may be issued to the shareholders who are voting on the transaction. In such a situation, both the registration and prospectus requirements of Securities Act Section 5 and the proxy solicitation requirements of Exchange Act Section 14(a) apply, with public companies often filing a joint proxy statement/prospectus to fulfill both statutory obligations.

This framework—complementary and overlapping statutes and rules that are based on principles, facts and circumstances, and each participant's actions as well as status—applies similarly in other key areas of the Commission's mandate, including the offer and sale of securities in both the public and private markets, securities trading, and the provision of investment advice to retail and institutional investors. Moreover, this framework is consistent with Congressional intent as reflected in the enactment of the Securities Act, the Exchange Act, the Advisers Act, and various other key statutes, including Section 14(a), and has proven to be an effective and efficient means to regulate an important, multi-faceted and ever-evolving aspect of commerce. Accordingly, given the importance of a properly functioning proxy system to investors and the capital markets, even if other provisions of the federal securities laws may apply to certain of their activities, it is appropriate for voting advice furnished by proxy voting advice businesses to be subject to the rules under Section 14(a), which are designed specifically to enhance the transparency and integrity of the proxy voting process, with the ultimate aim of facilitating informed voting decisions.[60]

II. Discussion of Final Amendments

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

Exchange Act Section 14(a) [61] 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.[62] The purpose of Section 14(a) is to prevent ''deceptive or inadequate disclosure'' from being made to shareholders in a proxy solicitation.[63]

[41] *See, e.g.*, letter from Gary Retelny, CEO, Institutional Shareholder Services, Inc. (Jan. 31, 2020) (''ISS'').

[42] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA–5248 at 6 (June 5, 2019), 84 FR 33669, 33670 (July 12, 2019) (''Standard of Conduct for Investment Advisers''); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (noting that the Advisers Act ''reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested'').

[43] *See* Communications Among Shareholders Adopting Release at 48277; Proposing Release at n.3.

[44] *See* Concept Release at 43010.

[45] Advisers Act Section 202(a)(11) [15 U.S.C. 80b–2(a)(11)]. Sections 202(a)(11)(A) through (G) of the Advisers Act address exclusions to the definition of the term ''investment adviser.'' [15 U.S.C. 80b–2(a)(11)(A) through (G)].

[46] See Concept Release at 43010.

[47] *Id.*

[48] *Lowe* v. *SEC*, 472 U.S. 181 (1985). The U.S. Supreme Court has interpreted the ''publisher's exclusion'' to include publications that offer impersonal investment advice to the general public on a regular basis. To qualify for the section 202(a)(11)(D) exclusion, the publication must be: (1) Of a general and impersonal nature, in that the advice provided is not adapted to any specific portfolio or any client's particular needs; (2) ''bona fide'' or genuine, in that it contains disinterested commentary and analysis as opposed to promotional material; and (3) of general and regular circulation, in that it is not timed to specific market activity or to events affecting, or having the ability to affect, the securities industry.

[49] *See* letter from Katherine Rabin, CEO, Glass Lewis & Co., LLC (Nov. 14, 2018), *available at https://www.glasslewis.com/wp-content/uploads/2018/11/GL-SEC-Roundtable-Statement-111418.pdf.* The Government Accountability Office in its Report about proxy advisory firms to the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate in 2016 also took note of the differences in registration status of proxy advisory firms. The Report observed that one large proxy voting advice business is not registered with the SEC as an investment adviser, while another is, and a third is registered as a nationally recognized statistical rating organization. *See* Report to the Chairman, Subcommittee on Economic Policy, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Corporate Shareholder Meetings, Proxy Advisory Firms' Role in Voting and Corporate Governance Practices from the U.S. Government Accountability Office (Nov. 2016), *available at https://www.gao.gov/assets/690/681050.pdf.*

[50] Whether an entity meets the definition of an investment adviser or is eligible for an exclusion does not impact the analysis of whether it is engaged in ''solicitation'' for purposes of Section 14(a). Relatedly, the retention of a proxy voting advice business does not relieve an investment adviser of its obligations under the Advisers Act to its clients. *See* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA–5325, pp. 5–6 (Aug. 21, 2019) [84 FR 47420, 42421 (Sept. 10, 2019)] (''Commission Guidance on Proxy Voting Responsibilities''), Question No. 2 at 12, 84 FR 47423 (discussing steps that an investment adviser that has assumed the authority to vote proxies on behalf of clients could take to demonstrate that it is making voting determinations in a client's best interest); *see also Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, Release No. IA–5547 (July 22, 2020) (''Supplemental Proxy Voting Guidance'').

[51] *See* Proposing Release at 66520.

[52] *See supra* note 18.

[53] *Cf. J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964) (''The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group.'').

[54] 17 CFR 240.13d–1 through 13d–102 (''Rules 13d–1 through 13d–102'').

[55] 15 U.S.C. 78m(d).

[56] 17 CFR 240.13d–101.

[57] 15 U.S.C. 78m(g).

[58] 17 CFR 240.13d–1(b)(1)(i).

[59] *See* Communications Among Shareholders Adopting Release at 48278 (''When and under what circumstances a large shareholder, or group of shareholders acting together, must reveal to the SEC, the company, other shareholders, and the market its plans and proposals regarding the company has been addressed by Congress, but not through the provisions governing proxy solicitations. Section 13(d) of the Exchange Act, as implemented by the Commission in its regulations adopted thereunder, sets forth the circumstances when public disclosure of plans and proposals by significant shareholders, as well as agreements among shareholders to act together with respect to voting matters, must be disclosed to the market.''). *See also* Release No. 34–39538 (Jan. 12, 1998) [63 FR 2854 (Jan. 16, 1998)] (stating the Commission's views on when a significant shareholder's proxy soliciting activities and communications could be viewed as having the purpose or effect of changing or influencing control of the company and thereby triggering the obligation to file a Schedule 13D). Under Section 13(d) and Section 13(g), a ''group'' is formed when two or more persons act together for the purpose of acquiring, holding, voting or disposing of the securities. Congress created the ''group'' concept to prevent persons who seek to pool their voting or other interests in the securities of an issuer from evading the Section 13(d) or 13(g) obligations because no one person owns more than five percent of the securities. Use of a proxy voting advice business by investors as a vehicle for the purpose of coordinating their voting decisions regarding an issuer's securities without complying with the filing obligations of Section 13(d) or 13(g) would raise compliance concerns under the beneficial ownership reporting requirements.

[60] *See* Proposing Release at 66520.

[61] 15 U.S.C. 78n(a).

[62] 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).

[63] *Borak*, 377 U.S. at 432; *see* S. Rep. No. 1455, 73d Cong., 2d Sess., 74 (1934) (''In order that the

Continued

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.''[64]

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 in the public interest and to protect investors in the proxy voting process.[65] 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.[66] Since then, the Commission has amended the definition as needed to respond to new and changing market practices that have raised the concerns underlying Section 14(a).[67]

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.''[68] 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.[69]

Since 1956, the Commission has recognized that its definition of a solicitation was broad and applicable regardless of whether persons communicating with shareholders were seeking proxy authority for themselves.[70] In light of the breadth of this definition, the Commission adopted an exemption from the information and filing requirements of the Federal proxy rules for communications by persons not seeking proxy authority, but continued to include such communications within the definition of a ''solicitation.''[71] 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.[72] By adopting these tailored exemptions, the Commission removed certain filing and other requirements that were considered unnecessary for such solicitations in order to facilitate shareholder 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 definition of a solicitation for purposes of Section 14(a) may result in proxy voting advice businesses 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 thus, as a general matter, the furnishing of proxy voting advice constitutes a solicitation.[73] In 2019, the Commission issued an interpretative release regarding the application of the Federal proxy rules to proxy voting advice.[74] As the Commission explained in that release, the determination of whether a communication is a solicitation for purposes of Section 14(a) depends upon both the specific nature, content, and timing of the communication and the circumstances under which the communication is transmitted.[75] The Commission noted several factors that indicate proxy voting advice businesses generally engage in solicitations when they provide 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 voting advice businesses 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 voting advice businesses 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 for which shareholder approval is sought; and
- Proxy voting advice businesses typically provide their recommendations shortly before a shareholder meeting or authorization vote,[76] enhancing the likelihood that their recommendations will influence their clients' voting determinations.[77]

The Commission observed that where these or other significant factors (or a significant subset of these or other factors) are present,[78] the proxy voting advice businesses' 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 revocation of a proxy.''[79] Furthermore, the Commission explained that such advice generally would be a solicitation even if the proxy voting advice business is providing recommendations based on the client's own custom policies, and even if the client chooses not to follow the advice.[80] In addition, the fact that proxy voting advice businesses may provide additional services, such as consulting services to investment advisers and issuers and general market commentary, does not diminish their role in the proxy solicitation process.

1. Proposed Amendments

In the Proposing Release, the Commission proposed to amend 17 CFR 240.14a–1(l)(1)(iii) (''Rule 14a–1(l)(1)(iii)'') to add paragraph (A) 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.[81] The proposed amendment would codify the long-held Commission view that the furnishing of proxy voting advice generally constitutes a solicitation governed by the federal proxy rules.

In connection with the proposed amendment to Rule 14a–1(l)(1)(iii), the Commission recognized that the major proxy voting advice businesses may use more than one voting policy or set of guidelines in formulating their voting recommendations on a particular matter to be voted 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 various specialty policies. Under the proposal, the voting recommendations formulated under the benchmark policy and each of the specialty policies would be considered to be a separate communication of proxy voting advice under proposed Rule 14a–1(l)(1)(iii)(A). In addition to voting recommendations formulated pursuant to a proxy voting advice business's benchmark and specialty policies, the Commission also proposed to include voting recommendations formulated pursuant to a proxy voting advice business's client's own custom policies within the scope of the term ''solicitation,'' consistent with its prior interpretation.[82]

Lastly, the Commission proposed to amend Rule 14a–1(l)(2), which currently lists activities and communications that do not constitute a solicitation, to add paragraph (v) to make clear that the terms ''solicit'' and ''solicitation'' exclude any proxy voting advice furnished by a person who furnishes such advice only in response to an unprompted request.[83] Doing so would codify the Commission's historical view that such a communication should not be regarded as a solicitation subject to the proxy rules.[84]

2. Comments Received

Commenters expressed a mix of views on the Commission's proposed amendments to the definitions of ''solicit'' and ''solicitation'' in 17 CFR 240.14a–1(l)(1) (''Rule 14a–1(l)(1)''). A number of commenters supported codifying the Commission's interpretation of those definitions as proposed.[85] Some of these commenters described the proposed amendments as consistent with the Commission's existing interpretation of the term ''solicitation'' [86] and noted that the advice provided by proxy voting advice businesses is the kind of information that Congress intended Section 14(a) to address.[87] Two commenters agreed with the Commission's position that the definition of ''solicitation'' should not be limited to a request to obtain proxy authority or to obtain shareholder support for a preferred outcome.[88] Those two commenters also agreed with the Commission's view that each voting recommendation formulated pursuant to a benchmark policy or a specialty policy should be considered a separate ''solicitation.''[89] Other commenters added that the analysis of what constitutes a ''solicitation'' should not turn on whether the proxy voting advice business's voting recommendations are based on an investor's custom policy or the proxy voting advice business's benchmark policy.[90] Finally, a few commenters that supported the proposed amendments recommended that the Commission include in the definition of ''solicitation'' any reports and ratings by environmental, social, and governance ratings firms or environmental and sustainability rating firms.[91]

Other commenters opposed codifying the Commission's interpretation of ''solicit'' and ''solicitation.''[92] Some

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.''); Communications Among Shareholders Adopting Release at 48277.

[64] 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)).

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

[66] *See Order Execution Obligations*, Release No. 34–378 (Sept. 24, 1935) 1935 WL 29270.

[67] 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, 1938)], 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. *See infra* notes 141–146 and accompanying text.

[68] 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.'').

[69] *See generally* Communications Among Shareholders Adopting Release.

[70] *Id.* at 48276 (adopting Exchange Act Rule 14a–2(b)(1)).

[71] *See id.*

[72] *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.

[73] *See* Concept Release at 43009. *See also* Proposing Release at 66522; Broker-Dealer Release at 341.

[74] *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'').

[75] *See* Commission Interpretation on Proxy Voting Advice at 47417. *See also* Proposing Release at 66522; Concept Release at 43009 n.244.

[76] *See, e.g.*, letter from Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (June 3, 2019) 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*; Frank Placenti, *Are Proxy Advisors Really A Problem?*, American Council for Capital Formation 3 (Oct. 2018), *available at http://accfcorpgov.org/wp-content/uploads/2018/10/ACCF_ProxyProblemReport_FINAL.pdf*.

[77] Commission Interpretation on Proxy Voting Advice at 47418. *See also* Proposing Release at 66522.

[78] Such other factors may include the fact that many proxy voting advice businesses' recommendations are typically distributed broadly.

[79] *See* Commission Interpretation on Proxy Voting Advice at 47418. *See also* Proposing Release at 66522.

[80] *See* Commission Interpretation on Proxy Voting Advice at 47418. *See also* Proposing Release at 66522.

[81] Proposing Release at 66522, 66557.

[82] Proposing Release at 66522.

[83] *Id.* at 66523, 66557.

[84] Commission Interpretation on Proxy Voting Advice at 47419 (''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.''); 1979 Adopting Release at 68766. *See also* Broker-Dealer Release 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'').

[85] *See* letters from BIO; BRT; CCMC; CEC; CGC; Michael McCormick, Executive Vice President, General Counsel Secretary, Ecolab Inc. (Feb. 3, 2020) (''Ecolab''); Exxon Mobil; Dennis E. Nixon, President, International Bancshares Corporation (Jan. 23, 2020) (''IBC''); NAM; Nareit; Nasdaq; David Dixon, President, and David L. Dragics, Advocacy Ambassador, NIRI Capital Area Chapter (Feb. 6, 2020) (''NIRI-Capital''); Phil Gramm (Feb. 3, 2020) (''P. Gramm''); Niels Holch, Executive Director, Shareholder Communications Coalition (Feb. 3, 2020) (''SCC I''); SCG; Stakeholders Empowerment Service (Jan. 31, 2020) (''SES'').

[86] *See* letters from BRT; CCMC; NAM; Nasdaq; NIRI-Capital.

[87] *See* letters from BRT; CCMC; Exxon Mobil; NAM; Nareit; SCC I.

[88] *See* letters from NAM; SCG.

[89] *See* letters from NAM; SCG.

[90] *See* letters from Exxon Mobil; NAM; SCG.

[91] *See* letters from Exxon Mobil; Garmin; NAM.

[92] *See* letters from Anat Admati, George G.C. Parker Professor of Finance and Economics, Stanford Graduate School of Business, et al. (Jan. 15, 2020) (''62 Professors''); Brandon Rees, Deputy Director, Corporations at Capital Markets, AFL–CIO (Feb. 3, 2020) (''AFL–CIO II''); Robert Arnold and Matthew Aquiline, Trustees, Bricklayers & Trowel Trades International Pension Fund (Jan. 31, 2020) (''Bricklayers''); Marcie Frost, Chief Executive Officer, CalPERS (Feb. 3, 2020) (''CalPERS''); Aeisha Mastagni, Portfolio Manager, California State Teachers' Retirement System (Feb. 3, 2020) (''CalSTRS''); Marcia Moffat, Board Chair, Canadian Coalition for Good Governance (Feb. 3, 2020) (''Canadian Governance Coalition''); James Allen, Head, and Matt Orsagh, Senior Director, Capital Markets Policy, CFA Institute (Feb. 3, 2020) (''CFA Institute I''); Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Jan. 30, 2020) (''CII IV''); Rob Collins, Council for Investor Rights and Corporate Accountability (Feb. 3, 2020) (''CIRCA''); Ron Baker, Executive Director, Colorado Public Employees' Retirement Association (Feb. 3, 2020) (''Colorado Retirement''); Duane Roberts, Director of Equities, Dana Investment Advisors (Dec. 5, 2019) (''Dana''); Richard B. Zabel, General Counsel and Chief Legal Officer, Elliott Management Corporation (Jan. 31, 2020) (''Elliott I''); Hans-Christoph Hirt, Executive Director and Head, Hermes Equity Ownership Services Limited (Feb. 3, 2020) (''Hermes''); ISS, Josh Zinner, CEO, Interfait Center on Corporate Responsibility (Feb. 3, 2020) (''Interfaith Center II''); Kevin Cameron, Executive Chair, Glass Lewis (Feb. 3, 2020) (''Glass Lewis II''); Jonathan Grabel, Chief Investment Officer, LACERA (Feb. 3, 2020) (''LA Retirement''),

Continued

commenters asserted that the Commission does not have the authority to regulate proxy voting advice businesses under Section 14(a) [93] or other provisions of the Exchange Act.[94] Some described the proposal as inconsistent with the Commission's historical treatment of Section 14(a).[95] Some commenters added that proxy voting advice differs from proxy solicitation and should not be treated as such under the proxy rules.[96] Specifically, these commenters asserted that proxy solicitation differs from proxy advice in that proxy solicitors play an advocacy role on behalf of an interested party, whereas proxy voting advice businesses are independent third parties, hired by shareholders to provide objective advice that the recipients are not required to follow.[97] One commenter also asserted that the proposal incorrectly equates proxy voting advice with the right to vote on another's behalf and in a manner that would benefit a particular party.[98] Two other commenters, which were identified as proxy voting advice businesses in the Proposing Release,[99] asserted that even if the Commission amends the definition of ''solicitation'' as proposed, their activities will not constitute ''solicitations'' under the revised definition because they vote on behalf of their clients rather than providing them with research reports and voting recommendations.[100]

In addition, some commenters stated that the proposed codification of ''solicitation'' would increase proxy voting advice businesses' costs [101] or interfere with their ability to provide services to their clients.[102] Specifically, these commenters asserted that the proposed amendments would increase litigation risks facing proxy voting advice businesses [103] and interfere with the relationship between investors and proxy voting advice businesses in a way that would increase costs and complexity and bias voting recommendations in favor of corporate management.[104] Two commenters further expressed concern that treating proxy advice as a solicitation could have a chilling effect on shareholder communication.[105]

Some commenters asserted that the Commission has not provided reliable evidence that existing communications between proxy voting advice businesses and their institutional investor clients present a significant risk to investor protection to justify the proposed amendment.[106] Several commenters expressed concern that the Commission disregarded the findings and views of its 2018 Roundtable on the Proxy Process, the Office of Investor Advocate, and the Investor Advisory Committee and called into question the legitimacy of other comment letters.[107] One commenter requested that the Commission clarify the benefits of treating proxy advice as a solicitation.[108] Two commenters also expressed concern that the proposal would overlap with regulations that proxy voting advice businesses are already subject to, including as ''investment advisers'' under the Advisers Act and as fiduciaries under the Employee Retirement Income Security Act of 1974.[109]

Finally, some commenters that generally opposed the proposal recommended that, if the Commission ultimately decides to amend Rule 14a–1(l), it should make the following revisions to narrow the scope of the proposals: [110]

- Clarify whether ''proxy voting advice'' under Rule 14a–1(l)(1)(iii)(A) would include data and research that may inform a proxy analysis or be described in a proxy research report but that is marketed separately to investors; [111]
- Exclude advice based on investors' custom policies from the definition of ''solicitation''; [112]
- Modify the proposal to recognize the difference between proxy voting advice businesses and proxy voting agent businesses, the latter of which ''vote solely on behalf of clients, in accordance with such clients' preset voting guidelines, based upon third-party research'' and should not be subject to regulation as a proxy voting advice business; [113] and
- Clarify that the reference to ''other forms of investment advice'' in Proposed Rule 14a–1(l)(1)(iii)(A) is not intended to exclude only advice from an ''investment adviser'' and thereby sweep into the scope of the term ''solicitation'' communications made in the normal course of business by other professionals (*e.g.*, management-consulting firms, lawyers, accountants, broker-dealers, etc.).[114]

With respect to the proposed amendment to Rule 14a–1(l)(2), some commenters supported the proposal to exclude from the definition of a ''solicitation'' any proxy voting advice furnished by a person only in response to an unprompted request.[115] Another commenter, however, opposed the proposal, asserting that it would be unworkable because investment advisers and broker-dealers may be hesitant to announce a willingness to provide voting advice out of concern that the Commission would determine they had ''invited and encouraged'' their clients to ask for advice.[116] This commenter added that the proposed amendment would be counterproductive to investor protection goals because the Commission would be regulating experts with proxy advice-related skills and resources (*i.e.*, proxy voting advice businesses), but would not regulate parties with no relevant expertise who engage in the same activities (*i.e.*, any person that furnishes proxy voting advice in response to an unprompted request).[117] Finally, one commenter recommended that the Commission narrow the proposed exclusion to cover only proxy voting advice provided pursuant to an unprompted request ''and not for compensation.''[118]

3. Final Amendments

We are adopting the amendments to Rule 14a–1(l)(1)(iii) and 17 CFR 240.14a–1(l)(2) (''Rule 14a–1(l)(2)'') as proposed, with some minor changes to the proposed amendment to Rule 14a–1(l)(1)(iii).

With respect to Rule 14a–1(l)(1)(iii), consistent with the Proposing Release, we are adding paragraph (A) [119] to make clear that the terms ''solicit'' and ''solicitation'' include any proxy voting advice [120] 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.

As noted above, the determination of whether a communication is a solicitation ultimately depends on the specific nature, content, and timing of the communication and the circumstances under which the communication is transmitted.[121] A number of factors illuminate that determination, and, as set forth above, application of those factors indicate that the advice that proxy voting advice businesses provide to their clients generally constitutes a ''solicitation.'' [122] This amendment, therefore, codifies the Commission's interpretation that proxy voting advice generally constitutes a ''solicitation'' under Rule 14a–1(l).[123] As we noted in the Proposing Release, 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 concerns about inadequate or materially misleading disclosures that Section 14(a) and the Commission's proxy rules are intended to address.[124] We also 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 the voting process, are 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.[125]

In addition, we are aware of at least two proxy voting advice businesses, ISS and Egan-Jones, that use more than one proprietary voting policy or set of guidelines—oftentimes, a benchmark policy and one or more specialty policies—in formulating proxy voting advice as to 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).[126] Consistent with the Proposing Release, we view the proxy voting advice formulated pursuant to each separate policy or set of guidelines as distinct solicitations under Rule 14a–1(l)(1)(iii)(A). Similarly, as discussed in more detail below,[127] proxy voting advice formulated pursuant to a custom policy constitutes a distinct solicitation under the final rule as well.

We recognize that some commenters opposed our amendments to Rule 14a–

Sarah Wilson, CEO, Minerva Analytics (Jan. 2, 2020) (''Minerva I''); Thomas P. DiNapoli, New York State Comptroller (Feb. 3, 2020) (''New York Comptroller II''); Karen Carraher, Executive Director, and Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System (Feb. 3, 2020) (''Ohio Public Retirement''); PIRC, on behalf of Local Authority Pension Fund Form (LAPFF) (Feb. 3, 2020) (''PIRC''); Fiona Reynolds, Chief Executive Officer, Principles for Responsible Investment (Feb. 3, 2020) (''PRI II''); Konstantinos Sergakis, Professor of Capital Markets Law and Corporate Governance, University of Glasgow (Dec. 26, 2019) (''Prof. Sergakis''); Craig M. Rosenberg, President, ProxyVote Plus, LLC (Feb. 3, 2020) (''ProxyVote II''); Hank Kim, Executive Director & Counsel, National Conference of Public Employee Retirement Systems (Feb. 3, 2020) (''Public Retirement Systems''); Maureen O'Brien, Vice President, Corporate Governance Director, Segal Margo Advisors (Feb. 3, 2020) (''Segal Marco II''); Andrew E. Oster, CFP, AIF, President & CCO, Triton Wealth Advisors LLC (Feb. 22, 2020) (''Triton''); Nell Minow, Vice Chair, ValueEdge (Jan. 31, 2020) (''ValueEdge I''); Theresa Whitmarsh, Executive Director, Washington State Investment Board (Jan. 22, 2020) (''Washington State Investment'').

[93] *See* letters from AFL–CIO II; CII IV; Elliott I; Glass Lewis II; ISS; Richard A. Kirby and Beth-ann Roth, RK Invest Law, PBC (Feb. 3, 2020) (''RK Invest Law''); ProxyVote II.

[94] *See* letter from ISS.

[95] *See* letters from CalPERS; CII IV; Elliott I; Glass Lewis II; ISS; ProxyVote II.

[96] *See* letters from Bricklayers; CalPERS; CII IV; CIRCA; Elliott I; Glass Lewis II; ISS; New York Comptroller II; Segal Marco II.

[97] *See* letters from Bricklayers; CII IV; CIRCA; Glass Lewis II; ISS; New York Comptroller II; Segal Marco II.

[98] *See* letter from CalPERS.

[99] *See* Proposing Release at 66542, n.190.

[100] *See* letters from ProxyVote II; Segal Marco II. Similarly, another commenter noted that it executes votes directly on behalf of—but does not provide voting recommendations to—its clients. *See* letter from Mary Beth Gallagher, Executive Director, Investor Advocates for Social Justice (Feb. 3, 2020) (''IASJ''). *See also* letters from Sean P. Bannon, Chief Financial Officer, Felician Sisters of North America (Feb. 3, 2020) (''Felician Sisters II''); Toni Palamar, Province Business Administrator, Sisters of the Good Shepherd (Feb. 3, 2020) (''Good Shepherd''); Interfaith Center II; Patricia A. Daly, Corporate Responsibility Representative, Sisters of St. Dominic of Caldwell (Feb. 3, 2020) (''St. Dominic of Caldwell'').

[101] *See* letters from 62 Professors; CalSTRS; Elliott I; Interfaith Center II; New York Comptroller II; Public Retirement Systems; Washington State Investment.

[102] *See* letters from CalSTRS; CIRCA; Elliott I; Interfaith Center II; New York Comptroller II; Ohio Public Retirement; Prof. Sergakis; Public Retirement Systems.

[103] *See* letters from CIRCA; Elliott I; New York Comptroller II; Ohio Public Retirement; PRI II.

[104] *See* letters from New York Comptroller II; PRI II.

[105] *See* letters from CalPERS; Washington State Investment.

[106] *See* letters from CII IV; Elliott I.

[107] *See* letters from CII IV; Elliott I; Glass Lewis II; ISS.

[108] *See* letter from CalPERS.

[109] *See* letters from ISS; ProxyVote II.

[110] *See* letters from CII IV; ISS; New York Comptroller II; PRI II; ProxyVote II; Segal Marco II.

[111] *See* letter from ISS. The commenter further opined that the inclusion of such data and research in the scope of ''proxy voting advice'' would be ''highly inappropriate.'' *Id.*

[112] *See* letters from ISS; New York Comptroller II; Matthew DiGuiseppe, Head of Asset Stewardship, Americas, and Benjamin Colton, Head of Asset Stewardship, Asia Pacific, State Street Global Advisors (Feb. 3, 2020) (''State Street'').

[113] *See* letter from Segal Marco II.

[114] *See* letter from Hermes.

[115] *See* letters from Andrew Cave, Head of Governance and Sustainability, Baillie Gifford & Co (Feb. 3, 2020) (''Baillie Gifford''); BRT; CCMC; Exxon Mobil; IBC.

[116] *See* letter from ISS.

[117] *Id.*

[118] *See* letter from Exxon Mobil.

[119] The 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).

[120] As noted above, one commenter requested clarification as to whether the term ''proxy voting advice'' would include data and research that may inform a proxy analysis or be described in a proxy research report but that is marketed separately to investors. *See supra* note 111 and accompanying text. We have clarified the scope of that term. *Compare supra* note 7, *with* Proposing Release at 66519 & n.11.

[121] *See supra* note 75 and accompanying text.

[122] *See supra* notes 75–79 and accompanying text; *see also infra* note 144.

[123] As noted above, some commenters expressed concern that the amendments are not supported by the relevant evidence and that the Commission may have disregarded the findings and views of more reliable observers, and called into question the legitimacy of other comments. *See supra* notes 106–107 and accompanying text. Very shortly after learning of the concerns raised about these comment letters, the Chairman referred the matter to the SEC's Office of Inspector General to investigate. That investigation is ongoing. We have now learned that some of the commenters who submitted certain of the letters appear to have signed declarations provided to Members of Congress regarding the authenticity of those letters. Our decision to adopt the amendments to Rule 14a–1(l), is not predicated upon the input we received with respect to the quality of the services provided by proxy voting advice businesses or the independence thereof. Rather, these amendments largely codify the Commission's longstanding interpretations of the scope of the terms ''solicit'' and ''solicitation,'' which, as discussed below, are based on an assessment of the text, structure, history, and purpose of Section 14(a) of the Exchange Act, as well as judicial precedent. *See infra* notes 132–156 and accompanying text. Moreover, although certain members of the Commission may have cited some of the letters described above during the Commission's open meeting at which the amendments discussed herein were proposed, neither the Commission's interpretations of the scope of the terms ''solicit'' and ''solicitation,'' nor our decision to adopt the other amendments herein, rest on those letters or their validity. Further, as discussed below, the Commission's interpretations of the scope of the terms ''solicit'' and ''solicitation'' are longstanding and far predate the cited comment letters. *See infra* notes 150–154 and accompanying text.

[124] 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 unprompted or prompted (such as in the case of a client or prospective client that has asked the adviser for its views on a particular transaction). For example, a mutual fund board may request that a prospective subadviser discuss its views on proxy voting, including votes on particular types of transactions such as mergers or corporate governance. As noted in the Proposing Release, the amendment is not intended to include these types of communications as solicitations for purposes of Section 14(a). In response to certain comments we received, we also are clarifying the amendment is not intended to include communications made in the normal course of business by other professionals to their clients that may relate to proxy voting. Instead, the amendment is 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 and sell such advice for a fee.

[125] 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, including 17 CFR part 275. 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. *See supra* notes 41–60 and accompanying text for a discussion of why we believe Section 14(a), together with the Commission's proxy rules, is an appropriate regulatory regime for such communications by proxy voting advice businesses, regardless of whether they are registered under the Advisers Act.

[126] *See supra* note 11 and accompanying text.

[127] *See infra* notes 165–169 and accompanying text.

1(l)(1). As noted above, some commenters stated that the Commission is not authorized to regulate proxy voting advice as a ''solicitation'' under the Exchange Act.[128] One commenter specifically asserted that the amendments would be contrary to (1) the legislative history of Section 14(a), (2) the case law that has construed the terms ''solicit'' and ''solicitation'' under Section 14(a) and Rule 14a–1(l), and (3) the plain meaning of the term ''solicit.'' [129] According to some opposing commenters, the scope of Section 14(a) is limited to soliciting activities by management, other corporate insiders, dissident shareholders seeking to take control of a company, or parties otherwise having an interest in the outcome of a shareholder vote. These commenters asserted, therefore, that as a matter of statutory interpretation, Section 14(a) cannot extend to communications or activities by persons who do not have an interest in the outcome of the matter being voted upon at the shareholder meeting or who do not seek proxy authority for themselves.[130] These commenters further assert that, as a matter of fact, proxy voting advice businesses satisfy both of these criteria (*i.e.,* no interest in the outcome of a vote and no request for authority to vote).[131]

We reject this narrow interpretation of Section 14(a). The Commission's longstanding view that a ''solicitation'' includes any communication reasonably calculated to result in the procurement, withholding, or revocation of a proxy—and that this encompasses the furnishing of proxy voting advice—accords with the text, history, and structure of Section 14(a) of the Exchange Act, as well as judicial precedent and our own rules.

The structure of Section 14(a) grants the Commission broad authority. It authorizes the Commission to prescribe rules and regulations to govern proxy solicitations ''as necessary or appropriate in the public interest or for the protection of investors,'' and it makes it unlawful for any person to ''solicit any proxy'' with respect to any security registered under Section 12 of the Exchange Act in contravention of such rules and regulations.[132]

Furthermore, rather than defining what constitutes a proxy solicitation, the Exchange Act leaves those terms undefined, while at the same time specifically empowering the Commission to define such terms consistent with the Act's ''provisions and purposes'' [133] and, more broadly, to make rules and regulations, including rules that classify ''transactions, statements, applications, reports, and other materials.'' [134]

In light of that context, the phrase ''solicit any proxy'' is not as narrow or mechanical as some commenters have claimed. Citing a dictionary definition, one commenter suggested that the ordinary meaning of the term ''solicit'' is ''to endeavor to obtain.'' [135] Under this definition, what matters is the subjective intent of the person engaging in the solicitation, and thus no person would be soliciting a proxy unless they intend to obtain proxy authority. Some commenters likewise claimed that no person would be soliciting a proxy unless they intend to obtain a shareholder's support for a preferred outcome.[136] However, dictionaries at the time Section 14(a) was enacted indicate that the term ''solicit'' had other meanings that did not depend on the interest or subjective intent of the person engaging in the solicitation. The term ''solicit'' also meant ''[t]o move to action.'' [137] Under this definition, what matters is not the subjective intent to obtain a proxy, but rather the effect on a recipient's proxy vote. A person solicits a proxy by influencing a shareholder to act. As between these two meanings, we view the latter as more consistent with Section 14(a)'s provisions and purposes, as any inducement that may move a shareholder to vote a proxy in a certain way implicates the Commission's charge to ensure that necessary and appropriate regulations are in place for the protection of investors. That is why the Commission has recognized since 1956 that persons who do not seek proxy authority themselves nevertheless engage in solicitation when they communicate with shareholders in a manner reasonably calculated to ''result'' in a proxy vote.

The context and history of Section 14(a) accord with this conclusion. Congress considered different versions of the Exchange Act that set forth the applicable proxy standards with more specificity in the analog to Section 14(a) and rejected them in favor of the broad authority granted to the Commission in Section 14(a), as enacted.[138] While Congress may have been motivated to enact Section 14(a) in 1934 due to the particular abuses by corporate insiders or dissident shareholders that occurred during that time, nothing in either the text or legislative history of Section 14(a) indicates that Congress intended to limit its scope to solicitations conducted by those parties. Rather, where Congress intended to exempt certain classes of market participants, transactions, or activities from the statutory provisions of the Securities Act and the Exchange Act (as enacted in 1933 and 1934, respectively) or limit the Commission's rulemaking authority with regard to those market participants, transactions or activities, it generally did so by expressly including language in the relevant statutory provision.[139]

Indeed, Section 14(a) itself excludes any ''exempted security'' from its scope, but otherwise facially applies to ''any person'' without carving out any class of market participants.[140]

Nor does the case law construing Section 14(a) mandate that a party must have an ''interest'' in the outcome of a shareholder vote in order for a solicitation to occur, as certain commenters contended.[141] Courts have articulated a broad definition of the term ''solicit'' such that the proxy rules ''apply not only to direct requests to furnish, revoke, or withhold proxies, but also to communications which may indirectly accomplish such a result *or* constitute a step in the chain of communications ultimately designed to accomplish such a result.'' [142] Moreover, relying on the ''subjective intent of the person furnishing the communication'' to determine whether a particular communication constitutes a solicitation ''is at odds with the plain and unambiguous meaning of the regulation.'' [143] Instead, the phrase ''reasonably calculated to result in the procurement, withholding or revocation of a proxy'' in Rule 14a–1(l)(1)(iii) requires an objective inquiry that focuses ''on the *manner* in which the communicator attempted to influence a shareholder's proxy decision from the perspective of the shareholder who received the material.'' [144] Courts also have broadly understood a ''solicitation'' to encompass ''communications which may indirectly [result in a proxy being furnished, revoked or withheld],'' [145] an interpretation that does not, by its terms, require inquiry into the speakers' interest or subjective intention. To inject a subjective element into the test of whether a communication is a ''solicitation'' under Rule 14a–1(l)(1)(iii) as argued by one commenter (*i.e.,* determining whether the speaker is ''completely indifferent to the outcome of the matter as to which shareholder approval was sought'' [146]) runs counter to this case law.

Relying on its broad rulemaking authority, the Commission has since 1956 defined a solicitation to include any ''communication to security holders under circumstances reasonably calculated to result in the procurement, execution, or revocation of a proxy.'' [147] This definition advances Section 14(a)'s overarching purpose of ensuring that communications to shareholders about their proxy voting decisions contain materially complete and accurate information.[148] It would be inconsistent with that goal if a person 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). The fact that shareholders may retain providers of proxy voting advice to advance their own interests does not obviate these concerns.

As described above, some commenters also asserted that the proposed amendment to Rule 14a–1(l)(1)(iii) conflicts with well-established practice in the proxy voting advice business industry and the Commission's historical treatment thereof.[149] As an initial matter, and as noted in the Interpretive Release and the Proposing Release, the amendment to Rule 14a–1(l)(1)(iii) is in accordance with, and represents a codification of, the Commission's longstanding view that proxy voting advice generally constitutes a ''solicitation.'' This view was originally set forth in a 1964 release [150] and reiterated by the Commission in 1979 [151] and 2010.[152] The cited releases did not limit the scope of the term ''solicitation'' so as to

[128] *See supra* notes 93–94 and accompanying text.

[129] *See* letter from ISS.

[130] *See, e.g., supra* notes 96–97 and accompanying text.

[131] *Id.*

[132] *See* 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'').

[133] 15 U.S.C. 78c(b).

[134] 15 U.S.C. 78w(a)(1).

[135] *See* letter from ISS.

[136] *See, e.g., supra* notes 96–97 and accompanying text. In arguing that the plain meaning of ''solicit'' supports its view, one commenter relied on the dictionary definition ''to endeavor to obtain,'' even though the commenter elsewhere acknowledged that Section 14(a) has long been understood to encompass communications that do not seek to obtain a proxy—and thus would not meet that narrow definition. *See* letter from ISS.

[137] *See* Webster's New International Dictionary (2d ed. 1934) (providing multiple definitions of the term ''solicit,'' including ''[t]o move to action'' or ''[t]o urge'' or ''insist upon'').

[138] *See* Louis Loss et. al., Securities Regulation, § 6.C.2 (6th ed. 2018) (''In § 14(a) of the Exchange Act, Congress, abandoning the more specific standards of the original bills, left the solicitation of proxies to the SEC under broad public interest standards.'') (citing S. 2693, H.R. 7852, 73d Cong., 2d Sess. § 13(a) (1934)).

[139] *See, e.g.,* Securities Exchange Act of 1934, Public Law 73–291, 48 Stat. 881, § 3(a)(4) (1934) (''Exchange Act (as enacted in 1934)'') (stating that the definition of the term ''broker'' ''does not include a bank''); Exchange Act (as enacted in 1934) § 3(a)(5) (stating that the definition of the term ''dealer'' ''does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as part of a regular business''); Exchange Act (as enacted in 1934) § 3(a)(10) (defining the term ''security'' but expressly stating that the term ''shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited''); Exchange Act (as enacted in 1934) § 15(l) (restricting broker-dealers' over-the-counter market activity, but expressly exempting from these restrictions certain exempt securities, commercial paper, and other instruments); Exchange Act (as enacted in 1934) § 24(a) (limiting the Commission's authority to require the ''revealing of trade secrets or processes in any application, report, or document filed with the Commission under this title''); Securities Act of 1933, Public Law 73–22, 48 Stat. 74, § 2(a)(10) (1933) (''Securities Act (as enacted in 1933)'') (defining the term ''prospectus'' and expressly excluding certain written communications from this definition); Securities Act (as enacted in 1933) § 2(a)(11) (carving out from the statutory definition of ''underwriter'' any ''person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission''); Securities Act (as enacted in 1933) § 2(a)(3) (carving out from the statutory definition of the terms ''sale'', ''sell'', ''offer to sell'', and ''offer for sale'' ''preliminary negotiations or agreements between an issuer and any underwriter'').

[140] *See* 15 U.S.C. 78n(a).

[141] *See, e.g.,* letter from ISS. Although we do not believe that Section 14(a) requires that a party have an interest in the outcome of a vote, we also do not accept commenters' assertion that, as a matter of fact, proxy voting advice businesses necessarily do not have an interest in the outcome of matters being voted upon at shareholder meetings or do not seek proxy authority for themselves. While this may be true in many instances, we do not think this is always the case. *See* U.S. Gov't Accountability Office, GAO–17–47, Report to the Chairman, Subcommittee on Economic Policy, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Corporate Shareholder Meetings: Proxy Advisory Firms' Role in Voting and Corporate Governance Practices, 18 (2016), *available at https://www.gao.gov/assets/690/681050.pdf* (''2016 GAO Report'') (''Officials from one proxy advisory firm with whom we spoke stated that they agree that proxy advisory firms have influence on corporate governance practices. . . . They noted that such influence is good and ultimately they want to have a positive influence on their clients because they view that as part of their responsibility—to promote good governance.''); Kevin E. McManus, *CEO Compensation was a Joke Before Covid–19, Now It is Just Obnoxious,* Egan-Jones Proxy Services (June 11, 2020), *available at https://www.ejproxy.com/weekly-wreck/36/ceo-compensation-was-joke-covid-19-now-it-just-obnoxious/* (criticizing executive compensation at certain registrants and making policy-based recommendations to regulate executive compensation). *See also infra* Section II.B.1. (noting examples of circumstances where the interests of a proxy voting advice business may diverge materially from the interests of the clients who utilize their advice, including a proxy voting advice business providing 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 or actively supported by that client).

[142] *Long Island Lighting Co.* v. *Barbash,* 779 F.2d 793, 796 (2d Cir. 1985) (emphasis added); *see also Capital Real Estate Inv'rs Tax Exempt Fund Ltd. P'ship* v. *Schwartzberg,* 917 F.Supp. 1050, 1059 (S.D.N.Y. 1996).

[143] *Gas Natural Inc.* v. *Osbourne,* 624 Fed. Appx. 944, 950 (6th Cir. 2015) (unpublished).

[144] *Id.* (citing Broker-Dealer Release at 342 (noting that communications from broker-dealers to shareholders ''may constitute a solicitation requiring compliance with the proxy rules'' depending ''upon the content of the material, upon the conditions under which it is transmitted, and upon surrounding circumstances'')). *See also Long Island Lighting Co.,* 779 F.2d at 796 (''Determination of the purpose of the communication depends upon the nature of the communication and the circumstances under which it was distributed.''); *Sargent* v. *Genesco, Inc.,* 492 F.2d 750, 767 (5th Cir. 1974) (''Whether or not a particular communication is a solicitation within the meaning of 14(a) is a question of fact dependent upon the nature of the communication and the circumstances under which it is transmitted.''); *Dyer* v. *SEC,* 291 F.2d 774, 777–78 (8th Cir. 1961) (indicating that the determination of whether a communication constitutes a solicitation depends on the ''nature and circumstances'' of a communication and whether it can be rationally inferred that the speaker ''knew or could be expected to foresee that the things which he said might on their implication and innuendo affect the action of a stockholder in his granting of proxy authority,'' regardless of ''whatever [the speaker] may have had in his mind''); *Schwartzberg,* 929 F.Supp. at 113–14 (noting that if a statement ''presents the transaction in a manner objectively likely to predispose security holders toward or against it . . . it must comply with the proxy rules''). Among the factors relevant to the objective inquiry into whether a communication constitutes a ''solicitation'' are (1) ''the contents of the communication,'' (2) ''the conditions under which the communication is distributed,'' and (3) ''[t]he timing of the communication in relation to the relevant surrounding circumstances.'' *Gas Natural Inc.,* 624 Fed. Appx. at 950. As described above, the proxy voting advice that proxy voting advice businesses send their clients generally constitutes ''solicitations'' under each of those three factors. *See supra* notes 75–79 and accompanying text.

[145] *Long Island Lighting Co.,* 779 F.2d at 796.

[146] *See* letter from ISS.

[147] 17 CFR 240.14a–1(l)(1)(iii).

[148] *Barak,* 377 U.S. at 432; *see also* 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 at 48277.

[149] *See supra* note 95 and accompanying text.

[150] *See* Broker-Dealer Release at 341 (''Material distributed during a period while proxy solicitation is in progress, which comments upon the issues to be voted on or which suggests how the stockholder should vote, would constitute soliciting material.'').

[151] *See* 1979 Adopting Release at 68766; Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Release No. 34–16104 (Aug. 13, 1979) [44 FR 48938 (Aug. 20, 1979)], at 48941 n.25.

[152] Concept Release at 43009 (''As a general matter, the furnishing of proxy voting advice constitutes a 'solicitation' subject to the information and filing requirements in the proxy rules.'').

exclude proxy voting advice provided by ''disinterested persons.'' Instead, the Commission articulated its view that proxy voting advice generally constitutes a ''solicitation,'' without reference to a particular class of market participants that must be providing such advice.[153] Any suggestion otherwise requires reading into the releases an additional qualification that the Commission did not articulate.[154]

We further note that these commenters' position is inconsistent with the treatment of other disinterested parties under the current proxy regulatory scheme. Shareholders today exercise their voting rights through an intricate proxy process involving numerous intermediaries, such as broker-dealers, that each play an important role. Most shareholders own their securities in ''street name,'' with their broker-dealers and banks generally holding the securities in their name on behalf of their customers and possessing the legal authority to vote those shares. Under the current proxy process and rules, these broker-dealers and banks must forward a company's proxy materials to their customers and seek voting instructions (often called ''voting instruction forms'') from the customers on whose behalf they hold those shares. These activities are currently treated as solicitations under the proxy rules, with the Commission generally exempting them from the informational and filing requirements, despite the fact that the broker-dealers and banks have no interest in the outcome of the matters being presented for a vote and no involvement in the preparation of the materials being sent to the customers.[155] Those who have considered the issue, including at least one court, have recognized that the forwarding of a company's proxy materials and requests for voting instructions by broker-dealers constitute a form of soliciting activity subject to the Commission's rules.[156]

In addition, market observers, including proxy voting advice businesses themselves, have long recognized that the provision of proxy voting advice may constitute a ''solicitation'' subject to the proxy rules.[157] Notably, one proxy voting advice business that now argues that the Commission lacks authority to regulate proxy voting advice as a ''solicitation'' submitted a letter to the Division of Corporation Finance in 1988 requesting no-action relief from the Commission's proxy filing rules.[158] The proxy voting advice business did not request relief on the basis that its proxy voting advice should not be considered a ''solicitation.'' Instead, the letter appears to implicitly assume that such advice could be a ''solicitation'' by requesting relief from the proxy filing rules under the predecessor exemption to current Rule 14a–2(b)(3) on the basis that its proxy voting advice was provided to persons with whom it had a business relationship.[159] Further, as recently as 2016, the CEO of another proxy voting advice business testified that ''[p]roxy advisory firms also are subject to the Securities and Exchange Commission's proxy solicitation rules under the [Exchange Act].''[160] The CEO further testified that ''proxy voting advisors operating today . . . are generally deemed by the SEC as qualifying for the exemptions based on rules 14a–2(b)(1) and 14a–2(b)(3).''[161] These statements suggest that the proxy voting advice business industry has understood for over 30 years that its proxy voting advice constitutes a ''solicitation'' under Rule 14a–1(l), or at least that the Commission may consider their proxy voting advice to constitute a ''solicitation.''

Some commenters also asserted that our amendments to Rule 14a–1(l)(1)(iii) will increase proxy voting advice businesses' costs or interfere with their ability to provide services to their clients. Specifically, commenters indicated that the amendments could increase litigation risks for proxy voting advice businesses or have a chilling effect on shareholder communications.[162] Although we acknowledge that compliance with the new conditions we are adopting to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3) may increase the resources that proxy voting advice businesses apply to ensuring compliance with applicable law and regulation,[163] we disagree that our amendments to Rule 14a–1(l)(1)(iii), taken in isolation, will have a material impact on the operation of a proxy voting advice business.[164] To the contrary, the fact that both the Commission and the market generally, including proxy voting advice businesses, have long recognized that proxy voting advice generally constitutes a ''solicitation'' indicates that any impact from codifying this aspect of the definition of a solicitation likely is already reflected in the manner in which proxy voting advice businesses' provide their services and the pricing thereof.

Finally, in the Interpretive Release, we stated our view that proxy voting advice based on a proxy voting advice business's application of custom policies generally should be considered a ''solicitation'' under Rule 14a–1(l).[165] We continue to hold that view for the reasons stated in the Interpretive Release. As a result, such proxy voting advice is subject to Rule 14a–9, and persons who provide such advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must comply with the conflicts of interest disclosure requirements set forth in new 17 CFR 240.14a–2(b)(9)(i) (''Rule 14a–2(b)(9)(i)'').[166] Some commenters recommended that we amend Rule 14a–1(l) to exclude from the definitions of ''solicit'' and ''solicitation'' proxy voting advice that is based on investors' custom policies.[167] These commenters' concerns, however, focused largely on subjecting investors' custom policies, and the proxy voting advice that is based thereon, to the proposed review and response mechanism outlined in the Proposing Release.[168] As discussed in more detail below, new 17 CFR 240.14a(b)(9)(v) (''Rule 14a–2(b)(9)(v)'') excludes from the notice requirement of new 17 CFR 240.14a–2(b)(9)(ii) (''Rule 14a–2(b)(9)(ii)'') proxy voting advice to the extent such advice is based on custom policies.[169] As such, notwithstanding the fact that we are not excluding from the definitions of ''solicit'' and ''solicitation'' proxy voting advice that is based on custom policies, we believe that we have appropriately taken into account the substance of these commenters' concerns.

As noted above, one commenter asserted that proxy voting *agent* businesses should not be subject to the same regulations as proxy voting advice businesses.[170] The commenter's position that its services differ from a proxy voting advice business's and should not be considered a ''solicitation'' appears to be based, in part, on the fact that it only votes its clients' shares in accordance with its clients' custom policies.[171] As with any other person, including any proxy voting advice business, to the extent a business is providing proxy voting advice to a client—regardless of whether such advice is based on its proprietary benchmark or specialty policies or its client's custom policies—such advice will constitute a ''solicitation'' under Rule 14a–1(l)(1)(iii)(A). However, the commenter and another commenter—both of which are investment advisers and were identified as proxy voting advice businesses in the Proposing Release—also asserted that their activities do not constitute ''solicitations'' because they vote their clients' shares on behalf of their clients rather than providing them with voting recommendations.[172] We agree that to the extent a business that provides proxy voting services is not providing any voting recommendations and is instead exercising delegated voting authority on behalf of its clients, such services generally will not constitute ''proxy voting advice''—and, therefore, not be a ''solicitation''—under Rule 14a–1(l)(1)(iii)(A).[173]

With respect to Rule 14a–1(l)(2), we are also amending this provision as proposed to add paragraph (v) to make clear that the terms ''solicit'' and ''solicitation'' do not include any proxy voting advice provided by a person who furnishes such advice only in response to an unprompted request. This amendment codifies the Commission's historical view that such a communication should not be regarded as a solicitation subject to the proxy rules.[174] As we explained in the Proposing Release, we believe that a proxy voting advice business providing voting advice to a client where the client's request for the advice has been invited and encouraged by such business'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. In our view, the information and filing requirements of the proxy rules (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 new conditions we are adopting to the exemptions described below, are appropriate for a person who chooses to actively market and sell its proxy voting advice as that person's actions are reasonably designed to result in the procurement, withholding, or revocation of a proxy. Those requirements, however, are ill-suited for a person who receives an unprompted request from a client for its views on an upcoming matter to be presented 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 its client is unlikely to anticipate the need to establish the internal processes necessary to comply with the new conditions we are adopting to the exemptions in Rules 14a–2(b)(1) and 14a–2(b)(3).

We also believe, based on our understanding of the dynamics of the proxy voting advice market as it currently operates, that a person that provides proxy voting advice only in

[153] Although the Commission's view was originally articulated in the context of an opinion by its General Counsel regarding participation by broker-dealer firms in proxy solicitations, nothing in the language of that release indicates that its position could not also be extended to other independent, disinterested parties engaged in the same activity. *See* Broker-Dealer Release.

[154] The commenters also cite the 1979 and 1992 releases as evidence that the Commission intended to narrow the scope of the term ''solicitation'' so as to avoid including communications by disinterested fiduciaries. *See, e.g.*, letter from ISS (citing Communications Among Shareholders Adopting Release; 1979 Adopting Release). However, those releases reinforced the Commission's view of the breadth of the term by creating additional exemptions from the proxy filing rules. *See* Communications Among Shareholders Adopting Release at 48278 (creating an exemption from the proxy filing rules for solicitations by persons not seeking proxy authority who do not have a substantial interest in the matter subject to a vote); 1979 Adopting Release at 68766–67 (creating an exemption from the proxy filing rules for voting advice provided to persons with whom a financial advisor has a business relationship). In other words, the Commission recognized that certain classes of market participants were conducting activities that constituted ''solicitations,'' but sought to grant them relief from the proxy filing rules by adopting applicable exemptions. Had the Commission interpreted the term ''solicitation'' as not applying to those market participants' activities, no such exemption from the proxy filing rules would have been necessary in the first place. Also, had the Commission intended to narrow the scope of the term ''solicitation'' to avoid its application to those classes of market participants, it would have amended the definition thereof in Rule 14a–1(l) appropriately. In fact, in the 1992 release, the Commission acknowledged that even though it considered (but did not ultimately adopt) proposed amendments exempting from the proxy filing rules all communications by '''disinterested' persons who are not seeking proxy authority,'' such communications under that proposal would still have constituted ''solicitations'' and ''remained subject to antifraud standards.'' Communications Among Shareholders Adopting Release at 48278.

[155] *See* 17 CFR 240.14a–2(a)(1); *see also* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 120 Minn. L. Rev. 11, 40–41 (2017) (noting that broker-dealers' requests for voting instructions from their customers ''fall[] within the SEC's definition of a proxy solicitation'' and that Rule 14a–2(a)(1) ''exempts the broker from the filing requirements and the obligation to furnish a proxy statement'').

[156] *See, e.g., Walsh & Levine* v. *The Peoria & E. R. Co.*, 222 F.Supp. 516, 518–19 (S.D.N.Y. 1963) (''[I]f brokers transmit some but not all proxy solicitations to those for whose benefit they hold in street name, they are acting in contravention of the Commission rules if they fail to fulfill the duties required of active proxy solicitors.''); Broker-Dealer Release at 342 (''[I]t is quite clear . . . that the transmission to customers of proxy material furnished by the issuer or any other person who is soliciting a proxy, is clearly itself the solicitation of a proxy, since the material is transmitted under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.''); Fisch, *supra* note 155 at 40; Council of Institutional Investors, *Client Directed Voting: Selected Issues and Design Perspectives* (August 2010) (''Rule 14a–(l) under the Exchange Act defines solicitation to include 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,' subject to certain exceptions. Communications sent by brokers to encourage participation in a [client directed voting] model would appear to fall within this definition absent an exemption, and the SEC staff agrees with this conclusion. As such, brokers would have to comply with the proxy solicitation rules, including principally the disclosure and SEC filing requirements applicable to proxy materials.'').

[157] *See, e.g.*, Sagiv Edelman, *Proxy Advisory Firms: A Guide for Regulatory Reform*, 62 Emory L.J. 1369, 1378 (2013) (''Due to the expansive definition of solicitation, proxy advisory firms would be subject to federal proxy rules if not for the exemption found in Exchange Act Rule 14a–2(b)(3).''); Douglas G. Smith, *A Comparative Analysis of the Proxy Machinery in Germany, Japan, and the United States: Implications for the Political Theory of American Corporate Finance*, 58 U. Pitt. L. Rev. 145, 201 n.284 (1996) (''Furnishing of proxy voting advice by an investment advisor is exempt [from the proxy filing rules] under certain circumstances.''); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 Colum. L. Rev. 1277, 1358 (1991) (''The legal issue is whether the provision of proxy advice amounts to a proxy 'solicitation' under SEC Rule 14a–1. Clearly, the definition of solicitation reaches this far. . . .''); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 Mich. L. Rev. 520, 530 (1990) (''Nor are the Proxy Rules limited to communications by the contestants. A third party who proffers voting advice is 'soliciting' votes.''). *See also infra* notes 158–161 and accompanying text.

[158] Institutional Shareholder Services, Inc., 1991 SEC No-Act. LEXIS 17 (Dec. 15, 1988).

[159] *See id.*

[160] Katherine H. Rabin, Chief Executive Officer, Glass, Lewis & Co., Statement to the U.S. House of Representatives Committee on Financial Services: Markup of H.R. 5983, the ''Financial CHOICE Act of 2016,'' at 3 (September 13, 2016), *available at https://www.glasslewis.com/wp-content/uploads/2016/09/2016_0912_Glass-Lewis-Statement-re-H.R.-5983_final.pdf.*

[161] *Id.*

[162] *See supra* notes 101–105 and accompanying text.

[163] *See infra* Section IV.

[164] To the extent that some proxy voting advice businesses did not previously understand their proxy voting advice to constitute a solicitation and thus subject to Rule 14a–9 liability, it is possible that the codification of the Commission's longstanding view could have some economic effects. See *infra* Section IV.B.

[165] Commission Interpretation on Proxy Voting Advice at 47418. For a description of the services that one major proxy voting advice business offers in connection with its clients' custom policies, *see* ISS, Custom Pol'y & Res., *available at https://www.issgovernance.com/solutions/governance-advisory-services/custom-policy-research/(last visited Jun. 19 2020).*

[166] *See infra* Section II.D. for a discussion of the amendments we are adopting to Rule 14a–9 and Section II.B *infra* for a discussion of new Rule 14a–2(b)(9)(i).

[167] *See supra* note 112 and accompanying text.

[168] *See, e.g.*, letter from ISS (expressing concern about disclosing ''clients' proprietary custom voting policies and the recommendations based thereon'' and doubt as to the ''investor protection to be gained by allowing issuers to vet the methodologies and assumptions institutional investors choose to implement for their own portfolios'').

[169] *See infra* Section II.C.3.c.i.

[170] *See supra* note 113 and accompanying text.

[171] *See* letter from Segal Marco II.

[172] *See supra* notes 99–100 and accompanying text.

[173] Separately, we note that the Commission has provided guidance to investment advisers which discusses how the fiduciary duty and rule 206(4)–6 under the Advisers Act relate to an investment adviser's exercise of voting authority. *See infra* note 400.

[174] *See supra* note 84.

response to unprompted requests and does not market its expertise in such services is less likely to present an investor protection or market integrity concern. For example, we believe such one-off advice to individual clients lacks the system-wide significance of advice provided by proxy voting advice businesses who, as described above, have come to occupy a unique and important position in that process.[175] Although one commenter recommended that 17 CFR 240.14a–1(l)(2)(v) (''Rule 14a–1(l)(2)(v)'') be narrowed to exclude only proxy voting advice furnished pursuant to an unprompted request if such advice is also provided ''not for compensation,''[176] we consider that amendment unnecessary. In our view, any compensation that may be received for such unprompted proxy voting advice does not present the same investor protection or regulatory concerns because such persons are less likely to engage in widespread marketing of their expertise in providing proxy voting advice.

As noted above, one commenter opposed the amendment to Rule 14a–1(l)(2) on the basis that investment advisers and broker-dealers may avoid announcing their willingness to provide voting advice on Forms ADV and CRS out of concern that they would fall outside the scope of new Rule 14a–1(l)(2)(v) and be deemed to be prompting a request for proxy voting advice.[177] We believe, however, that the text of new Rule 14a–1(l)(1)(iii)(A) is sufficiently precise to avoid this concern. Where an investment adviser or broker-dealer is describing the services it provides to its clients or customers, which may include proxy voting advice, we believe that such investment adviser or broker-dealer should not be deemed to be ''market[ing] its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sell[ing] such proxy voting advice for a fee.''[178] This same commenter also expressed concern that the amendment to Rule 14a–1(l)(2) could be counterproductive from an investor protection standpoint as the proxy rules would apply to experts with proxy advice-related skills and resources but not to individuals with less relevant expertise who engage in the same activities.[179] We disagree. As we noted in the Proposing Release,[180] we believe that those persons providing voting advice in response to unprompted requests likely will be furnishing such advice to a client with whom there is an existing business relationship. As noted above, proxy voting advice provided under these circumstances does not present 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 institutional investors who are often voting on behalf of other investors.[181]

B. Amendments to Rule 14a–2(b): Conflicts of Interest

1. Proposed Amendments

Over the years, many observers have noted that some proxy voting advice businesses engage in activities or have relationships that could reasonably be expected to affect the objectivity or reliability of their advice.[182] Examples of circumstances where the interests of a proxy voting advice business may diverge materially from the interests of the clients who utilize their advice 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 (or is seeking to earn fees) from that registrant for providing advice on corporate governance and compensation policies;[183]
- A proxy voting advice business providing voting advice on a matter in which its affiliates or one or more of its clients has a material interest, such as a business transaction or a shareholder proposal put forward by or actively supported by that client or group of clients;
- A proxy voting advice business providing ratings to institutional investors of registrants' corporate governance practices while at the same time consulting for, or seeking to consult with, registrants that are the subject of the ratings for a fee to help increase their corporate governance scores;
- A proxy voting advice business providing voting advice with respect to a registrant's shareholder meeting while affiliates of the proxy voting advice business hold a significant ownership interest in the registrant, sit on the registrant's board of directors, or have relationships with a shareholder presenting a proposal covered by the proxy voting advice; and
- A proxy voting advice business providing voting advice on a matter on which it or its affiliates have provided advice to a registrant, a proponent, or other party regarding how to structure or present the matter or the business terms to be offered in such matter.

These and similar types of circumstances create a risk that the proxy voting advice business's voting advice could be influenced by the business's own interests, which may call into question the objectivity and independence of its advice.[184] The clients of the proxy voting advice business would generally need to be informed of such activities and relationships in order to be in a position to reasonably assess the impact and materiality of any actual or potential conflicts of interest with respect to the proxy voting advice they receive.[185] 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, and any measures taken to mitigate such conflicts, these clients may not have sufficient information to reasonably understand and adequately assess these potential conflicts and remedial measures when they evaluate the voting advice and make their voting determinations.[186] A range of proxy voting advice business clients may find it important to have sufficient information to support their understanding and assessment, including, for example, investment advisers that undertake proxy voting duties on a client's behalf.[187]

In light of these concerns, the Commission proposed amendments to further ensure that sufficient information about material conflicts of interest would be provided consistently across proxy voting advice businesses and in a manner readily accessible to the clients of the proxy voting advice businesses. Accordingly, the proposed amendments included a requirement that persons who provide proxy voting advice,[188] in order to rely on the exemptions contained in Rule 14a–2(b)(1) and (b)(3), must include in such advice (and in any electronic medium used to deliver the advice) the following disclosures specifically tailored to proxy voting advice businesses and the nature of their conflicts of interest:

- Any material interests, direct or indirect, of the proxy voting advice business (or its affiliates[189]) in the matter or parties concerning which it is providing the advice;
- 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[190]), (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 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
- 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.[191]

In the Proposing Release, the Commission stated that the disclosures provided under these provisions should be sufficiently detailed so that clients of proxy voting advice businesses could 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.[192] This might include, for example, 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, including language stating that ''such relationships or interests may or may not exist,'' would be insufficient for purposes of satisfying this condition to the exemptions.

2. Comments Received

Many commenters agreed with the general principle that providing clients of proxy voting advice businesses with adequate conflicts of interest disclosure helps to ensure transparency and fairness in the voting process and is vital to the clients' ability to make informed voting decisions.[193] Some commenters expressed the view that proxy voting advice businesses currently do not satisfactorily mitigate the risk that conflicts of interest may impair their objectivity and, consequently, that their ability to provide impartial voting advice is often undermined by the prevalence of conflicts.[194]

Some commenters opposed the proposed amendments,[195] asserting that additional conflict disclosure requirements were not justified[196] and, therefore, would impose unnecessary additional costs and burdens on proxy voting advice businesses and their clients.[197] These commenters challenged, among other things, the claims that proxy voting advice businesses' conflicts of interest disclosures were materially deficient,[198] and contended that the businesses' existing policies and procedures (such as their disclosure practices and maintenance of internal firewalls to guard against conflicts) adequately addressed the risk of conflicts.[199] In support of this view, commenters noted that the predominant opinion among the

[175] *See supra* notes 6–10 and accompanying text.

[176] *See* letter from Exxon Mobil.

[177] *See* letter from ISS.

[178] 17 CFR 240.14a–1(l)(1)(iii)(A); *see also supra* notes 124–125.

[179] *See supra* note 117 and accompanying text.

[180] *See* Proposing Release at 66523.

[181] *See supra* text accompanying note 176.

[182] *See* Proposing Release at 66525 n.73.

[183] *See id.* at n.74.

[184] *See id.* at n.75.

[185] *See id.* at n.72.

[186] *See id.* at 66526 n.78 and *infra* note 193.

[187] Commission Guidance on Proxy Voting Responsibilities at 47425 (''[A]n investment adviser's decision regarding whether to retain a proxy advisory firm should also include a reasonable review of the proxy advisory firm's policies and procedures regarding how it identifies and addresses conflicts of interest.'').

[188] Consistent with the Commission's proposed amendments to the definition of solicitation under the proxy rules, the requirement would apply only to proxy voting advice falling within the scope of amended Rule 14a–1(l)(1)(iii)(A). *See supra* Section II.A., ''Codification of Commission's Interpretation of Solicitation.''

[189] The term ''affiliate,'' as used in proposed Rule 14a–2(b)(9)(i), would have the meaning specified in Exchange Act Rule 12b–2.

[190] The Commission recognized 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 information to determine whether an entity is an affiliate of registrants, other soliciting persons, or shareholder proponents.

[191] This would 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.

[192] Proposing Release at 66526.

[193] *See* letters from commenters generally opposed to the proposals, *e.g.*, CalSTRS (''We agree that conflict of interest disclosure is important for a well-functioning and unbiased proxy voting system. Investors should be informed when there may be potential conflicts of interest that could affect proxy advisor recommendations. Investors need confidence that the research being considered when voting is unbiased and fact based . . . .''); CFA Institute I; CII IV; ISS; and the IAC Recommendation. *See also* letters from commenters generally supporting the proposals, *e.g.*, ACCF (''Investors need to be fully informed of the biases and conflicts inherent in [the] powerful vote recommendations [of proxy voting advice businesses].''); BRT (''. . . conflicts of interest that may arise for proxy advisors should be disclosed in order for their clients to assess for themselves the effect and materiality of any actual or potential conflicts of interest with respect to a voting recommendation . . . We agree with the Commission's assessment that institutional investors and investment advisers who rely on proxy advisors for voting guidance cannot identify potential risks 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.''); Exxon Mobil Corp., (Feb. 3, 2020) (''ExxonMobil''); Tao Li, Ph.D., Assistant Professor of Finance, University of Florida (Jan. 30, 2020) (''Prof. Li'') (''. . . it remains imperative that market participants are aware of any potential conflicts of interest within the industry and whether those conflicts are impeding the role of proxy advisors as independent providers of information and recommendations.''); NAM; Nareit; Nasdaq; SCG; CCMC.

[194] *See, e.g.*, letters from ACCF (citing its May 2018 research paper: ''The Conflicted Role of Proxy Advisors''); BIO; BRT; CEC; CCMC; ExxonMobil; Jason Ward, Managing Partner, Amrop Industrial Search LLC (Feb. 3, 2020) (''J. Ward''); NAM; Nareit; Nasdaq; SCG. To substantiate their claims that conflicts of interest are pervasive in proxy voting advice, several commenters pointed to the results of various opinion surveys of selected companies and individuals reflecting significant concerns about conflicts of interest. *See, e.g.*, letters from CCMC; Ashley Baker, Director of Public Policy, The Committee for Justice, (Feb. 3, 2020) (''Committee for Justice''); J. Ward; Nareit; Nasdaq; P. Mahoney and J.W. Verret; SCG; Seven Corners Capital Management, LLC (Apr. 8, 2020) (''Seven Corners'').

[195] *See, e.g.*, letters from CalPERS; Canadian Governance Coalition; CII IV; JoAnn Hanson, President and CEO, Church Investment Group (Jan. 29, 2020) (''Church Investment Group''); Colorado PERA; Henry Beck, Maine State Treasurer, et al., Democratic Treasurers Association (Jan. 30, 2020) (''DTA''); Holly A. Testa, Director, Shareowner Engagement, First Affirmative Financial Network (Jan. 3, 2020) (''First Affirmative''); Jeffery W. Perkins, Executive Director, Friends Fiduciary Corporation (Feb. 2, 2020) (''Friends''); Glass Lewis II; ISS; Interfaith Center II; J. Coates, Professor of Law and Economics, Harvard Law School, and Barbara Roper, Consumer Federation of America (Jan. 30, 2020) (''Prof. Coates''); New York Comptroller II; PIAC II; Public Retirement Systems; ValueEdge I.

[196] *See, e.g.*, letters from Colorado PERA (''PERA utilizes research reports from Glass Lewis and ISS to assist with its evaluation of items on a proxy ballot. PERA has analyzed each firm's disclosures and management of conflicts of interest. We concluded that the potential conflicts are harmless to the independence of the research, would not sway an investor's opinion, and the existing firewalls to prevent contamination of objectivity—where applicable to specific proxy advisors—are sufficient''); CalSTRS; Glass Lewis II; ISS.

[197] *See, e.g.*, letters from CalPERS; Canadian Governance Coalition; CII IV; Church Investment Group; DTA; First Affirmative; Friends; Glass Lewis II; ISS; Interfaith Center II; New York Comptroller II; Colorado PERA; PIAC II; Prof. Coates; Public Retirement Systems; ValueEdge I.

[198] *See, e.g.*, letters from CalPERS (''We see no evidence that conflicts of interest with proxy advisors have led to voting advice that conflicts with our voting policies . . . It is not clear to what extent the SEC has reviewed all of the disclosures that proxy voting advice businesses already provide.''); CalSTRS; CII IV; Glass Lewis II; ISS; New York Comptroller II; Colorado PERA; PIAC II; ValueEdge I.

[199] *See, e.g.*, letters from CalSTRS (stating that while it is generally supportive of conflict of interest disclosure, it does ''not believe the SEC needs to create a new regulatory structure to enforce such [conflict of interest] disclosure'' and its general belief ''that proxy advisors are currently providing adequate disclosures that meet the needs of investors, and any modifications to disclosures can be enforced through existing SEC authority.''); ISS; Glass Lewis II; CalPERS; New York Comptroller II.

businesses' own clients was that the measures taken to mitigate conflicts of interest were satisfactory.[200] Moreover, commenters argued that adding new disclosure requirements to the proxy rules was unnecessary in light of existing provisions in the Advisers Act and in Rule 14a–2(b) under the Exchange Act that already address conflicts of interest, as well as inappropriate because the Advisers Act generally governs the activities of investment advisers, including proxy voting advice businesses.[201] In addition, some commenters believed that the proposed conflicts disclosure requirements would likely compromise the internal firewalls designed by proxy voting advice businesses to mitigate their risk of conflicts,[202] and could have a detrimental effect on competition in an industry that is already cost-prohibitive for new entrants.[203]

Both those supporting and those opposing the proposed Rule 14a–2(b)(9)(i) recommended modifications to the proposed new disclosure requirements,[204] ranging from very specific suggestions intended to standardize the presentation of conflicts disclosures,[205] expand the breadth of required disclosure,[206] and capture certain detailed information,[207] to those that were less prescriptive and leaned toward a more principles-based approach,[208] with an emphasis on materiality.[209] Other commenters recommended certain substantive changes that would have widened the scope of the proposed amendments beyond conflicts disclosure.[210]

3. Final Amendments

We are adopting amendments to Rule 14a–2(b) to require that persons who provide proxy voting advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must include in their voting advice to clients the conflicts of interest disclosure specified in new Rule 14a–2(b)(9)(i). The Commission is adopting these amendments substantially as proposed, but with certain modifications as discussed below, to clarify and streamline the rule in response to commenters' concerns and suggestions.

As adopted, Rule 14a–2(b)(9)(i) establishes a principles-based requirement, based on a standard of materiality, that will apply to all proxy voting advice that is provided in reliance on the exemptions in Rules 14a–2(b)(1) and (b)(3). Contrary to the views of some commenters, we do not see this requirement as imposing an entirely new regulatory regime or structure.[211] Rather, we view Rule 14a–2(b)(9)(i) as enhancing the existing conflicts of interest disclosures that proxy voting advice businesses currently provide in order to rely on the exemptions from the proxy rules' information and filing requirements. By articulating a standard for disclosure that focuses on information that would be material to assessing the objectivity of the proxy voting advice, the new rule is expected to result in disclosure that is more tailored and comprehensive than would be required under either Rule 14a–2(b)(1) or (b)(3).[212] Given the significant role played by proxy voting advice businesses in the voting process, we believe that the articulation of clear minimum disclosure standards is appropriate to better ensure transparency, accuracy, and completeness in the information provided, as well as the integrity of the proxy voting process. Rule 14a–2(b)(9)(i) is intended to harmonize the conflicts of interest disclosure that proxy voting advice businesses provide to their clients, helping to ensure that sufficient information about material conflicts of interest is disclosed more consistently across proxy voting advice businesses and in a manner readily accessible to the clients of such businesses. As a consequence, we believe the rule will enable clients of proxy voting advice businesses to make more informed voting decisions, including with regard to how proxy voting advice businesses identify and address conflicts of interest on a business-specific and relative basis and help in Commission oversight of the proxy voting process.[213]

Although some proxy voting advice businesses and others have asserted that the businesses' existing practices and procedures adequately address conflicts of interest concerns,[214] we believe that the absence of a disclosure requirement specifically contemplating the conflicts of interest that can arise for proxy voting advice businesses in relation to proxy voting advice means that there has not been a sufficient standard against which clients may assess the quality of the conflicts disclosures they receive. Conditioning the exemptions in Rules 14a–2(b)(1) and (3) for proxy voting advice on the proxy voting advice business's adherence to a set of minimum, principles-based disclosure standards will make clear what constitutes basic information regarding conflicts of interest that all parties can expect when receiving voting advice and will bolster the completeness and consistency of such disclosure by making it a regulatory requirement. This should in turn foster greater confidence in the services proxy voting advice businesses offer to their clients and provide greater assurance to market participants that shareholders' interests are being properly considered through a well-functioning proxy system.[215]

To that end, Rule 14a–2(b)(9)(i) sets forth a concise framework that applies to any person providing proxy voting advice within the scope of proposed Rule 14a–1(l)(1)(iii)(A) who wishes to utilize the exemption in either Rule 14a–2(b)(1) or (b)(3). Such persons must include in their voting advice (or in any electronic medium used to deliver the advice) prominent disclosure of:

- Any information regarding an interest, transaction, or relationship[216] 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; [217] 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.[218]

The rule, as adopted, reflects our intent to avoid an overly prescriptive disclosure requirement with specific monetary thresholds, in favor of a more principles-based rule that is sufficiently flexible to encompass a wide variety of circumstances that may not fall within pre-determined parameters but nevertheless could materially impact a client's assessment of the proxy voting advice business's objectivity. This approach also is consistent with the views of several commenters who favored a principles-based disclosure requirement that could more easily accommodate a variety of different facts and circumstances.[219] As such, Rule 14a–2(b)(9)(i) establishes a general standard for conflicts of interest disclosure, but allows the proxy voting advice business to apply its judgment and unique knowledge of the facts to determine the materiality of conflicts that might pose a risk to the objectivity of its advice.

The final rule also gives the proxy voting advice business flexibility to determine the precise level of detail needed about any identified conflicts of interest,[220] or whether a relationship or interest that has been terminated should nevertheless be disclosed.[221] In each particular case, the rule gives the proxy voting advice business the discretion to determine which situations merit disclosure and the specific details to provide to its clients about any conflicts of interest identified. The key determinant will be whether the information is material to an evaluation of the proxy voting advice business's objectivity.

A more prescriptive disclosure requirement, while relying less on the proxy voting advice business's judgment, risks being either under- or over-inclusive. For instance, there may be scenarios or relationships of which we are not aware or that, at this point in time, do not exist that present or would present material conflicts.[222]

[200] *See, e.g.*, letters from ISS (". . . the fact that the most vocal critics of ISS in this area [regarding conflicts of interest] are those who speak on behalf of corporate management, and not the investors who rely on ISS' research and vote recommendations, indicates that ISS is managing this potential conflict extremely well."); CalPERS; CalSTRS; Glass Lewis II; New York Comptroller II.

[201] *See, e.g.*, letter from ISS (asserting that "the proposal ignores the relevance of the Advisers Act regime and makes no attempt to explain why this framework is inadequate to address the Commission's purported concerns about proxy advice"). As noted above, 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. *See supra* notes 41 through 60 and accompanying text for a discussion of why we believe it is appropriate that proxy voting advice businesses be subject to applicable rules under Section 14(a) when they provide proxy voting advice, regardless of whether they are registered under the Advisers Act.

[202] For example, according to ISS, it maintains a firewall between ISS Global Research, its core institutional business, and ISS Corporate Solutions, Inc. ("ICS"), a subsidiary which provides governance tools and services to corporate issuer clients. In its comment letter, ISS states that "a key goal of the firewall is to keep the ISS Global Research team from knowing the identity of ICS' clients," which could be jeopardized by disclosure of the details of ICS' business and potentially result in vote recommendations that are biased in favor of corporate management. As part of its conflicts of interest policies, Glass Lewis blocks its research analysts from any access to the holdings, custom policies and/or voting activity of its two co-owners, the Ontario Teachers' Pension Plan Board and Alberta Investment Management Corp. *See e.g.*, letters from CII IV; Glass Lewis II; ISS. *See also* IAC Recommendation.

[203] *See, e.g.*, letters from CalPERS; CII IV; ISS; PERA ("This disclosure of . . . anything that may potentially be deemed a conflict of interest could result in advisors losing their competitive advantage."); and the IAC Recommendation. *See also* letter from CFA Institute I ("We do not object to such increased transparency as long as these further disclosures do not compromise the competitiveness of a proxy adviser by forcing them to divulge trade secrets or other proprietary information, the disclosure of which would be deleterious to the specific adviser").

[204] *See, e.g.*, letters from Lynette C. Fallon, EVP HR/Legal and General Counsel, Axcelis Technologies, Inc. (Jan. 20, 2020) ("Axcelis"); Baillie Gifford; BRT; CEC; CII IV; CIRCA; Exxon Mobil; Garmin; Glass Lewis II; ISS; Jonathan Chanis, New Tide Asset Management, LLC (Jan. 30, 2020) ("J. Chanis"); Mylan; Ann McGinnis, Co-President et al., Los Angeles Chapter, National Investor Relations Institute, Los Angeles Chapter (Feb. 3, 2020) ("NIRI–LA"); David Erickson, President, et. al., National Investor Relations Institute, Orange County Chapter (Feb. 4, 2020) ("NIRI–OC"); June M. Vecellio, President, and James B. Bragg, Advocacy Ambassador, National Investor Relations Institute, Connecticut/ Westchester County Chapter (Feb. 6, 2020) ("NIRI–Westchester"); Nasdaq; Prof. Li; SCG; Seven Corners; SES; Linda Moore, President and CEO, TechNet, (Feb. 3, 2020) ("TechNet").

[205] *See, e.g.*, letters from Nasdaq; NIRI–LA; NIRI–OC; NIRI–WC; TechNet (calling for conflicts of interest to be disclosed on the front page of proxy voting advice).

[206] *See, e.g.*, letters from ExxonMobil (supporting a requirement for specific disclosures about proxy voting advice businesses' specialty reports that are driven by goals other than maximizing shareholder value); SCG (recommending that proxy voting advice businesses be required to disclose "any interest, transaction or relationship that may present a conflict of interest, and the dollar amount thereof").

[207] *See, e.g.*, letters from ExxonMobil (recommending that required conflict disclosures cover details similar to the requirements of Item 404(a) of Regulation S–K and enumerating a list of specific items that should be addressed by disclosure); PIRC (suggesting that disclosure of specific amounts of compensation received from various clients could be helpful).

[208] *See, e.g.*, letters from Baillie Gifford (cautioning that requiring disclosure of policies and procedures would lead to boilerplate disclosure); CII IV (asserting that allowing proxy voting advice businesses to choose the vehicle by which they disclose conflicts of interest would mitigate the widespread distribution of information that could affect competitive or other concerns); CIRCA (stating that a principles-based approach "would prevent proxy advisors from giving boilerplate disclosures . . . without creating unprecedented and excessive burdens."); ISS (stating that "there is no reason to treat conflict disclosure by proxy advisers any differently from the way conflict disclosure by portfolio managers or any other type of investment adviser is treated."); S. Holmes.

[209] *See, e.g.*, letter from Baillie Gifford.

[210] *See, e.g.*, letters from Garmin (recommending that the Commission require proxy voting advice businesses to separate their proxy advisory businesses from their consulting businesses); J. Chanis (recommending that the Commission prohibit proxy voting advice businesses from also providing consulting services to companies that are the subject of their proxy voting advice).

[211] *See, e.g.*, letters from CalSTRS ([W]e do not believe the SEC needs to create a new regulatory structure to enforce such disclosure."); Glass Lewis II ("Accordingly, this issue [of conflicts of interest disclosure] does not present a basis for a wholesale new and burdensome regulatory regime . . . .").

[212] 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). It should be noted that both exemptions 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 institutional investors.

[213] Currently, proxy voting advice businesses differ in how they disclose their conflicts of interest. For example, 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 appear 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 (2019) ("ISS FAQs"), *available at https://www.issgovernance.com/file/faq/ISS_Guidance_FAQ_Document.pdf*. *See also* Proposing Release at 66527, n. 90; letter from Glass Lewis II.

[214] *See supra* note 200 and Proposing Release at 66544 n.226.

[215] *See infra* Section IV.A.

[216] Such information may include disclosure about certain business practices in which the proxy voting advice business engages that might reasonably be expected to call into question its objectivity and the independence of its advice. For example, it may be appropriate in some circumstances under the rule for a proxy voting advice business to disclose its practice of selectively consulting with certain clients before issuing its benchmark voting recommendation on a specific matter (*e.g.*, a contested director election or merger). This may particularly be the case in situations in which the clients with whom the proxy voting advice business consults are not directly involved as a party to the specific matter but are expected to receive proxy voting advice on the matter. Such a practice could allow for those consulted clients' voting preferences to influence recommendations given to other clients that were not consulted and importantly, without the knowledge of those clients not consulted.

[217] Rule 14a–2(b)(9)(i)(A).

[218] Rule 14a–2(b)(9)(i)(B).

[219] *See, e.g.*, letters from Baillie Gifford; CII IV; CIRCA, Glass Lewis II; ISS ("Proxy advisers should be governed by a principles-based regulatory regime. For this reason, the Commission should not require such firms to disclose specific qualitative or quantitative information or impose prescriptive standards regarding the method of conflict disclosure.").

[220] For example, the proxy voting advice business would have the discretion, on a case-by-case basis, to determine whether specific monetary amounts related to any potential and/or actual conflicts identified should be disclosed. *See* letter from CII IV ("We do not believe that proxy voting advice businesses should be required to disclose the specific amounts that they receive from the relationships or interests covered by the proposed conflicts of interest disclosures . . . there is no reliable evidence indicating that institutional investor clients believe that level of detail is necessary in all circumstances. To the extent that investors want this information, they are at liberty to seek it from the proxy advisory firm(s) they hire, and make it a condition for hiring a proxy advisor."). We note, however, that Rule 14a–2(b)(9)(i) should not be interpreted to mean that disclosure of specific amounts would never be necessary. There may be situations, depending on the particular facts and circumstances, in which this information would be material to assessing the objectivity of the proxy voting advice and therefore should be disclosed. Similarly, the proxy voting advice business would have the discretion to determine whether the number of instances of substantive engagement it has had with existing clients as well as any other third parties providing substantive input to the proxy voting advice business as it develops its advice may have created a material conflict of interest that should be disclosed.

[221] *See, e.g.*, letter from Baillie Gifford ("A more principles-based requirement is preferable because whether a matter is material to the proxy advice will depend on the facts and circumstances. For example, in some situations it may be relevant that a proxy advisor had an historical relationship with a registrant, albeit that the relationship is no longer live, if the relationship were very significant in terms of duration or value. In other cases, less significant relationships will cease to be relevant as soon as they come to an end. It should be for the proxy advisors to make the assessment and for their clients to understand how the advisor makes this determination as part of regular due diligence.").

[222] *See* discussion *supra* pp. 51–52.

Instead, by adopting a rule with materiality as its focus, we have opted for an approach that is more adaptable to varied circumstances. The concept of materiality is at the core of our disclosure framework and has served our markets and investors well. Therefore, we believe that requiring proxy voting advice businesses to base their conflicts of interest disclosures on assessments of materiality is a more effective way to ensure that their clients have sufficient information to weigh the voting advice they are given.

Substantively, Rule 14a–2(b)(9)(i) is consistent with the Commission's proposal, but we have modified the wording in an effort to further simplify the requirement. We agree with a commenter who suggested that the proposed regulatory text could be streamlined to both capture the full scope of conflicts-related disclosure and retain the focus on principles of materiality.[223] Therefore, consistent with the suggestions of these commenters, the rule condenses proposed subsections (A), (B), and (C) of paragraph (b)(9)(i) into a single subsection (A) that requires disclosure of ''any information regarding an 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.'' [224]

We note that some commenters recommended ways to improve the proposal by including additional substantive requirements or specific parameters designed to more clearly indicate the disclosure obligations of proxy voting advice businesses under the rule.[225] For example, one commenter suggested that more guidance was needed regarding the timeframe for which the disclosure of conflicts should be provided.[226] As discussed above, however, we believe that a more principles-based approach will best serve to provide the clients of proxy voting advice businesses with adequate disclosure regarding conflicts while balancing the varied and unique circumstances of such businesses. We are therefore not persuaded that more prescriptive modifications are necessary or preferable to the rule, as adopted, which describes a general principle rather than delineating particular disclosure items.

Because our concern is with ensuring that proxy voting advice business clients have the ability to assess the objectivity, and ultimately the reliability, of proxy voting advice, we believe it would not serve the interests of those who depend on voting advice to place precise limits on what would be considered material information. For example, if a proxy voting advice business has been retained by a shareholder to provide voting advice regarding a registrant for which the business once provided consulting services, and if it has had no business relationship with the registrant for some years and is not seeking a business relationship with the registrant, it may be unlikely that the nature of its relationships with the registrant would be deemed material to an assessment of the business's ability to objectively advise its client. In that circumstance, the proxy voting advice business, which is in the best position to make such a judgment, would need to consider, based on the relevant facts and circumstances, whether that prior engagement is currently material and should be disclosed to clients.

Another benefit of the principles-based nature of Rule 14a–2(b)(9)(i) is that it will provide proxy voting advice businesses significant flexibility over the manner in which conflicts information is disclosed, so long as the basic requirements are met. The rule requires that prominent disclosure of material conflicts of interest be included in the voting advice to ensure that this information is readily accessible to clients and facilitates their ability to consider such disclosure together with the proxy voting advice at the time they make their voting decisions.[227] It does not, however, dictate the particular location or presentation of the disclosure in the advice or the manner of its conveyance as some commenters recommended.[228] Doing so would undermine our intent to give latitude to proxy voting businesses to fashion their disclosure as they judge best, in recognition of the varied circumstances in which they provide their services.

Along these lines, the final rule differs from the proposal regarding the conveyance of conflicts disclosure. As proposed, the rule would have required a proxy voting advice business to include conflicts of interest disclosure ''in its proxy voting advice *and* in any electronic medium used to deliver the advice,'' [229] to ensure that the information is prominently disclosed regardless of the means by which the advice is disseminated. However, some commenters were concerned that this was overly prescriptive and would interfere with proxy voting advice businesses' existing conflict management policies and procedures designed to safeguard information and prevent it from undermining the objectivity and independence of the businesses' voting advice.[230] These commenters pointed out that displaying conflict disclosures in every piece of proxy advice, including written proxy research reports, would compromise the ability of proxy voting advice businesses to mitigate their risk of conflicts and expressed concern that the proposal would increase compliance costs for proxy voting advice businesses.[231]

We agree that proxy voting advice businesses should have the latitude to convey their conflict disclosures to clients in a manner that does not run afoul of the businesses' own mechanisms for mitigating the risk of biased advice, such as establishing internal firewalls to maintain the objectivity of the advice, so long as their conflict disclosures are readily accessible to their clients and provided as part of the proxy voting advice they receive. Accordingly, the rule we are adopting gives a proxy voting advice business the option to include the required disclosure either in its proxy voting advice *or* in an electronic medium used to deliver the proxy voting advice, such as a client voting platform, which allows the business to segregate the information, as necessary, to limit access exclusively to the parties for which it is intended.[232]

Similarly, 17 CFR 240.14a–2(b)(9)(i)(B) (''Rule 14a–2(b)(9)(i)(B)''),[233] which requires proxy voting advice businesses to disclose ''any policies and procedures used to identify, as well as the steps taken to address,'' any material conflicts of interest identified pursuant to subsection (A), does not specify the extent to or manner in which the required disclosure must be presented. As with the disclosures required by subsection (A), proxy voting advice businesses are given wide latitude to determine what information would best serve their clients' interests. Moreover, Rule 14a–2(b)(9)(i) is not intended to supplant or interfere with a business's course of practice and standard operating procedures if it is already providing disclosure to its clients sufficient to enable them to understand the business's processes and methodology for identifying and addressing material conflicts, as well as any measures taken in light of specific conflicts identified. In addition, by giving proxy voting advice businesses the flexibility to satisfy the principle-based requirement with their existing methods of disclosure, we believe the costs of implementation should not be unduly burdensome.[234] Similarly, while the adoption of Rule 14a–2(b)(9)(i) will create an expanded compliance obligation, we do not believe it will have a detrimental effect on competition as the flexibility afforded under the final rule should allow new businesses to adapt the required disclosures to their specific business models and thus avoid imposing a significant new barrier to entry for the proxy voting advice business market.[235]

Contrary to the concerns expressed by some commenters about certain implications of the proposed amendments,[236] we note that Rule 14a–2(b)(9)(i)(B) does not require proxy voting advice businesses to include detailed compliance manuals in their proxy advice [237] or duplicative disclosures in both their proxy voting advice and in the electronic medium used to deliver such advice regarding the businesses' policies and procedures describing how they identify and address conflicts.[238] Provided the disclosure is conveyed either in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice (such as a client voting platform), such that its client is able to readily access the information as it reviews and considers the voting advice, a proxy voting advice business has the discretion under the rule to choose the solution it deems suitable for each particular client. This may include, for example, a proxy voting advice business providing an active hyperlink or ''click-through'' feature on its platform allowing clients to quickly refer from the voting advice to a more comprehensive description of the business's general policies and procedures governing conflicts of interest.[239]

More generally, we believe that increased transparency regarding a proxy voting advice business's conflicts of interest may prompt a more informed dialogue between such businesses and their clients. For example, as a result of the increased transparency of a proxy voting advice business's conflicts of interest, clients of the business, including investment advisers, would be in a better position to understand these conflicts and how they may affect the business's proxy voting advice and other services. If this information improves the ability of the proxy voting advice business's clients to identify the kinds of information and details that would be valuable to them in assessing the business's conflicts, this dialogue may also result in a proxy voting advice business enhancing its approach to disclosure of conflicts of interest in response. Such a dynamic regarding conflict disclosure among investors (those who ultimately bear the costs and benefits of voting), clients of proxy voting advice businesses, and proxy voting advice businesses, each of which have different incentives, may increase the benefits of the rule to the shareholder voting process more generally.

C. Amendments to Rule 14a–2(b): Notice of Proxy Voting Advice and Response

The ability of investors to make informed decisions, on the basis of disclosure of material information, is a bedrock tenet on which the federal securities laws were founded. This principle informs not only our consideration of this rulemaking, but also, more broadly, the proxy rules we administer [240] and, as a more general matter, the Commission's interest in the continued vitality, fairness, and efficiency of our capital markets.[241] Given the importance of the shareholder proxy in today's markets,[242] it is imperative that proxy solicitations be conducted on a fair, honest, and informed basis. Consistent with these

[223] *See* letter from ISS.

[224] Rule 14a–2(b)(9)(i)(A), as adopted, substantially resembles proposed subsection (C) that was designed as a catch-all to elicit disclosure of any information not otherwise captured by the other provisions of the rule regarding an interest, transaction, or relationship that would be material to a reasonable investor's assessment of the objectivity of the proxy voting advice. In addition, we note that the final amendment does not retain the concept from proposed subsection (B) providing that required disclosures would be determined using publicly available information. Although this provision was intended to limit the scope of a proxy voting advice business's disclosure obligation, we agree with commenters that any interest, transaction or relationship of which a proxy voting advice business is not already aware logically could not bias the business's proxy advice. *See* letter from ISS (''If such a search [of publicly available information] uncovers a possible affiliation ISS was not otherwise aware of, there would be no benefit to offset the cost and delay because any such relationship could not have compromised the integrity of the proxy advice in the first place.'').

[225] *See, e.g.*, letters from CEC (recommending that the rule include examples of *per se* conflicts of interest and illustrations of compliant disclosures); Mylan (recommending that disclosure be required for ''every instance of substantive engagement'' between a proxy voting advice business and existing clients, as well as any other third party providing substantive input regarding the proxy voting advice business's recommendations); PIRC; Prof. Li; SCG (recommending that disclosure of the dollar amount of any interest, transaction, or relationship that may present a conflict of interest for the proxy voting advice business should be required and asking for clarification of what constitutes a ''material'' interest, transaction, or relationship (*e.g.*, revenue, terms of the contracts, etc.)).

[226] *See, e.g.*, letter from Prof. Li.

[227] A proxy voting advice business that only provides such disclosures upon request from the client would not be in compliance with the required disclosure in Rule 14a–2(b)(9)(i) and, therefore, would not satisfy the conditions of the exemptions in Rules 14a–2(b)(1) or (b)(3). We believe that imposing an affirmative duty on proxy voting advice businesses to provide the required disclosures of material conflicts of interest is consistent with obligations to disclose potential conflicts of interest in other contexts. *See* Proposing Release at 66527, n. 88.

[228] *See, e.g.*, letters from BRT; Exxon Mobil; Nasdaq; NIRI–LA; NIRI–OC; SCG; SES; TechNet.

[229] Proposed Rule 14a–2(b)(9)(i).

[230] *See, e.g.*, letters from Glass Lewis II (discussing the restrictions in place to prevent its analysts from accessing information about the interests and voting activities of Glass Lewis' owners); ISS (discussing the firewall that it maintains between its core institutional proxy advisory business and its subsidiary that provides governance tools and services to corporate issuer clients and stating that ''ISS has implemented a comprehensive and robust set of conflict controls . . . which would be compromised if conflict information were required to be publicly disclosed, or if disclosure were required to be displayed in or on a research report, instead of 'around' the report as is currently the case'').

[231] *See id.*

[232] Rule 14a–2(b)(9)(i). This approach also accords with the views of commenters who requested that the Commission permit the proxy voting advice businesses flexibility over the manner in which they convey their proxy advice to clients. *See, e.g.*, CII IV: (''[W]e would not object to the SEC permitting the proxy voting advice businesses flexibility in the vehicle used to disseminate the disclosures to clients if the Commission believes such flexibility is appropriate to limit the competitive or other concerns that could accompany the widespread distribution of the information.'').

[233] Subsection (B) of Rule 14a–2(b)(9)(i) was proposed as subsection (D), but has been re-designated in the final rule and is otherwise adopted as proposed.

[234] *See supra* note 197.

[235] *See supra* note 203 and accompanying text.

[236] *See, e.g.*, letters from CII (''We believe such a provision is overly broad and may in fact detract from the more important conflict information currently provided by proxy advisors.''); Glass Lewis. *See also* IAC Recommendation.

[237] *See, e.g.*, IAC Recommendation.

[238] *See, e.g.*, letter from Glass Lewis (expressing concern that ''including a 'discussion' of Glass Lewis' conflict policies and procedures twice with each conflict disclosure,'' once in the proxy voting advice report and again in the electronic medium used to deliver such advice, ''would be wasteful and potentially obscure the important information investors expect and would want to focus on'').

[239] Such hyperlinked description of the proxy voting advice business's general policies and procedures governing conflicts of interest could, for example, be maintained on the business's publicly available website. *See id.* (''Glass Lewis has one set of policies and procedures that describes how it identifies and addresses conflicts, which it makes available on its website.'').

[240] *See, e.g., 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' . . . .'').

[241] *See supra* notes 2–5 and accompanying text.

[242] *Id.*

aims, and in light of the unique role played by proxy voting advice businesses in many investors' voting decisions,[243] it is important that clients of these businesses, when making their voting decisions, have access to transparent, accurate, and materially complete information. We believe proxy voting is improved by robust discussion among parties in advance of the voting decision, similar to the vigorous engagement that may occur if all parties attended an annual or special meeting in person.

As the Commission has noted, however, a number of commenters, particularly within the registrant community, have expressed concern about the current system for providing proxy voting advice under the Commission's rules, and the resulting effect on the mix of information available to shareholders, including the ability of shareholders to benefit from robust discussion. While proxy voting advice businesses can play an influential role in shareholders' proxy voting decisions, the present proxy rules exempt them from the requirement to publicly file their recommendations with the Commission, as registrants and certain other soliciting parties must do for their own solicitations. As a result, some commenters have expressed concern that registrants lack an adequate opportunity to engage with and respond to influential proxy voting advice before shareholders vote, potentially inhibiting the accuracy, transparency, and completeness of the information available to those making voting determinations.[244] They also highlight what they characterize as the limited ability to address any deficiencies in proxy voting advice such as factual errors, incompleteness, or methodological weaknesses that could materially affect the reliability of proxy voting advice businesses' voting recommendations and adversely impact voting outcomes.[245]

1. Proposed Amendments

With the foregoing background in mind, the Commission proposed review and response mechanisms for proxy voting advice, as discussed below, that would apply any time proxy voting advice businesses provide voting advice to their clients in reliance on either the Rule 14a–2(b)(1) or (b)(3) exemptions from the proxy rules. By conditioning the availability of these proposed exemptions in this way, the Commission intended to (1) facilitate dialogue between proxy voting advice businesses and registrants (and certain other soliciting persons, such as dissident shareholders engaged in a proxy contest) before the dissemination of proxy voting advice to clients of the proxy voting advice business, when most shareholder votes have yet to be cast, and (2) provide a means for registrants and certain other soliciting persons to timely communicate their views about the advice to shareholders, thereby assuring that the proxy voting advice businesses' clients could consider this information along with any other data and analysis they use to make their voting decisions. More generally, these actions were intended to enhance transparency, accuracy, and completeness.

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

The Commission proposed new Rule 14a–2(b)(9)(ii) to require, as a condition to the exemptions in Rules 14a–2(b)(1) and (b)(3), that a 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 proxy statement.[246] This review and feedback period would be followed by a final notice of voting advice, which would include any revisions to such advice made by the proxy voting advice business as a result of the review and feedback period, thereby allowing the registrant and/or soliciting person time to determine whether to respond to the advice before it is delivered to clients of the proxy voting advice business.[247] By providing a standardized opportunity for registrants and certain other soliciting persons to review proxy voting advice before it is finalized and delivered to clients of proxy voting advice businesses, the Commission believed that these proposed amendments had the potential to greatly improve the overall mix of information available to the businesses' clients, who use proxy voting advice as an important, often critical, element in formulating their voting decisions.[248]

To address concerns that allowing registrants or other soliciting persons advance access to the proxy voting advice could result in premature release of the advice to unauthorized and unintended parties, the proposed rules specified that proxy voting advice businesses could require that registrants and other soliciting persons agree to keep the information confidential, and refrain from commenting publicly on it, as a condition of receiving the proxy voting advice.[249]

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

In addition to the review and feedback mechanism, the Commission proposed that registrants and certain other soliciting persons also be given the option 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 (or other soliciting person, as applicable) that sets forth its views on the advice.[250] As proposed, registrants and other eligible soliciting persons would be able to exercise this right by notifying the proxy voting advice business no later than the expiration of the minimum two-business day period corresponding to the final notice of voting advice.[251] If so requested, the proxy voting advice business would then be required to include in its proxy voting advice the relevant hyperlink or analogous electronic medium directing the client to the registrant's or other soliciting person's respective statement regarding the voting advice.[252]

In addition to the other proposed amendments to Rule 14a–2, proposed 17 CFR 240.14a–2(b)(9)(iii) (''Rule 14a–2(b)(9)(iii)'') was intended to enable those who rely on proxy voting advice, whether for their own interests or on behalf of shareholders who have entrusted them with proxy voting authority, to have information available to them to effectively assess the recommendations provided by proxy voting advice businesses and thereby make more informed voting decisions.

2. Comments Received

a. Comments on Proposed Review of Proxy Voting Advice by Registrants and Other Soliciting Persons

A number of commenters supported the proposed amendments and asserted that the changes would improve the completeness, accuracy, and reliability of the information underlying the voting advice,[253] which in turn would facilitate more informed decision-making by investors and investment advisers.[254] Many of these commenters stated that a review and feedback mechanism was warranted to ameliorate the incidence of errors, mistakes, and deficiencies in voting advice that they believe exists.[255] Several commenters also expressed the opinion that registrants and other soliciting persons had been disadvantaged under the existing system because very few were afforded the opportunity to review proxy voting advice in advance[256] or were given meaningful opportunities to engage with proxy voting advice businesses to remedy any perceived deficiencies they identified in voting advice.[257] Commenters supporting the proposal also stated that even when registrants do receive draft voting advice from proxy voting advice businesses in advance of its publication, they typically are not given sufficient time for a thorough review and response.[258]

In many cases, commenters who supported the opportunity for advance review provided by proposed Rule 14a–2(b)(9)(ii) disagreed with the suggestion of other commenters that the proposal would compromise the independence of proxy voting advice businesses, with some pointing to the fact that a number of registrants were already participating in advance review programs offered by proxy voting advice businesses.[259]

Several commenters that were in favor of the proposal offered suggested modifications intended to increase the rule's efficacy,[260] such as giving registrants more time to review reports than was proposed;[261] explicitly including within the scope of the advanced review process proxy voting advice based on custom policies[262] and mandating that proxy voting advice businesses make certain public disclosures to enhance transparency (*e.g.*, publishing proxy voting advice following shareholder meetings).[263]

While many commenters supported the proposed review and feedback provisions, a substantial number of commenters were opposed.[264] Many

[243] *See* Proposing Release at 10.

[244] *See* Proposing Release at 41–2.

[245] *See* Proposing Release at 39, n. 94.

[246] *See* proposed Rule 14a–2(b)(9)(ii).

[247] *See* proposed Rule 14a–2(b)(9)(ii)(B). Under the proposed rules, this final notice would contain a copy of the proxy voting advice that the proxy voting advice business would deliver to its clients and be provided by the proxy voting advice business no later than two business days prior to delivery of the proxy voting advice to its client.

[248] *See* Proposing Release at 44.

[249] *See* Note 2 to paragraph (ii) of proposed Rule 14a–2(b)(9), providing that the terms of such agreement 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.

[250] *See* proposed Rule 14a–2(b)(9)(iii). Consistent with the proposed review and feedback process, the proposed right to request inclusion of a statement would only have extended to registrants and certain other soliciting persons (*i.e.*, persons conducting non-exempt solicitations). *See id.* (''If requested by the registrant or any other person conducting a solicitation (other than a solicitation exempt under § 240.14a–2). . .'').

[251] *Id.*

[252] *Id.*

[253] *See, e.g.*, letters from BIO; BRT; CCMC; CEC; CGC; ExxonMobil; Mark R. Allen, Executive Vice President, FedEx Corporation (Feb. 3, 2020) (''FedEx''); GM; IBC; Nasdaq; SCG.

[254] *See, e.g.*, letters from BRT; CCMC; CEC (''The ability of issuers to review and provided feedback on both draft and final proxy reports prior to publication is an important step in preserving the integrity of the proxy voting process. . . .''); NIRI (''Overall, we believe the proposed rules . . . address and rectify significant issues that have hindered investment advisers in making informed determinations on investors' behalf.''); ExxonMobil; Mylan; SCG; Bernard S. Sharfman, Chairman, Advisory Council, Main Street Investors Coalition (Dec. 20, 2019) (''B. Sharfman I'') (asserting that the proposed review process ''should be a good thing for shareholders because the back and forth between the company and the proxy advisor . . . should make each party better informed, allowing them to make sure that factual errors and inadequate analytics are not tainting their respective voting recommendations.'').

[255] *See, e.g.*, letters from ACCF (referring to its 2018 paper exploring the analytical and methodological errors in proxy advisors' recommendations: *Are Proxy Advisors Really a Problem?*); ACCF II (referring to its 2020 paper, *Are Proxy Advisors Still a Problem?);* BIO; BRT (''Business Roundtable has long been concerned that proxy advisors produce reports that frequently include errors, factually inaccurate information and incomplete analysis.''); CCMC (citing ''frequent and significant errors in analysis and methodology'' and a ''high incidence of factual and analytical errors in proxy advisor reports.''); CEC; CGC (''[The proposal to allow review of proxy voting advice] would help address one of the biggest flaws of the current proxy advice system, which is the tendency of proxy advisory firms to make egregious errors in vote recommendations''); ExxonMobil; Garmin; NAM (asserting that ''Proxy firm reports and recommendations feature a profusion of errors and misleading statements''); Nareit; Nasdaq (''Factual errors have . . . been identified by 95% of Business Roundtable members and 'all raise concerns regarding the rigor and integrity of the proxy advisory firms' internal fact-collection and analysis processes' . . . The ability to identify and correct errors is crucial for accuracy and accountability.''); NIRI; SCG.

[256] *See, e.g.*, letters from CGC; CEC (''[T]he lack of any reasonable access by all issuers—not just the largest issuers—to draft and final proxy reports and the inability of those issuers to adequately review both reports before publication is highly problematic . . . . Providing all companies with the ability to review the draft proxy report is an important step to ensuring the integrity of the data within the proxy report.''); Richard R. Dykhouse, Executive Vice President, General Counsel & Corporate Secretary, Charter Communications, Inc. (Feb. 3, 2020) (''Charter''); Penny Somer-Greif, Chair, and Gregory T. Lawrence, Vice-Chair, Committee on Securities Law, Maryland Bar Association (Feb. 3, 2020) (''MSBA''); Nareit; Nasdaq (describing current opportunities available to registrants for review of draft proxy voting advice as ''an uneven playing field''); NIRI.

[257] *See, e.g.*, letters from ACCF; BRT; CCMC; CEC; GM, Mylan; NAM; Nareit; Nasdaq, NIRI; SCG.

[258] *See, e.g.*, letters from BRT (noting the limited window that ISS allows for comment on draft reports that it provides to S&P 500 companies); CCMC; CEC; CGC; Charter; GM; NAM; Nasdaq; NIRI; SCG (''ISS provides its reports to S&P 500 companies in advance and takes comment on any factual errors in a 48-hour timeframe, although companies are sometimes given less response time.''). In support of their views on needed improvements to proxy voting advice, several commenters cited the results of various surveys. *See, e.g.*, letters from ACCF; BRT; CCMC; Nareit; Nasdaq; SCG. *But see, e.g.*, letters from CII IV; Elliott I; Glass Lewis II; SWIB (questioning the rigor, and therefore the usefulness, of such surveys).

[259] *See, e.g.*, letters from SCG (''It is difficult to understand how, if ISS' voluntary review and comment processes do not currently compromise the independence of their advice the Proposed Rule's review and comment period for all public companies would do so.''); BIO; ExxonMobil.

[260] *See, e.g.*, letters from ExxonMobil; GM; MSBA; Nasdaq; SCG I.

[261] *See, e.g.*, letters from BIO; BRT; Nasdaq.

[262] *See, e.g.*, letter from BRT (''The majority of our member companies surveyed indicated that voting advice formulated under a clients' custom policies should be subject to the proposed review and feedback period. Member companies noted that the same need to correct factual inaccuracies exists with these reports. . . .''). *But see, e.g.*, letters from CII IV; Heidi W. Hardin, Executive Vice President and General Counsel, MFS Investment Management (Feb. 3, 2020) (''MFS Investment'') (stating that advice based on custom policies should be excluded from the review framework as any research provided by proxy voting advice businesses under the MFS internal proxy voting is ''proprietary and commensurate with [MFS'] overall investment approach''); PIAC II.

[263] *See, e.g.*, letters from BRT (suggesting a requirement that proxy voting advice businesses issue final reports tallying final voting figures and comparing the results to the businesses' voting recommendations to clients); SCC I (asserting that publication would facilitate and encourage more public discussions about corporate governance standards and permit more informed feedback about the analyses and conclusions in company reports prepared by proxy voting advice businesses).

[264] *See, e.g.*, letters from 62 Professors; AFL–CIO II; Sharon Fay, Co-Head Equities, and Linda Giuliano, Head of Responsible Investment, AllianceBernstein (Feb. 3, 2020) (''AllianceBernstein''); Chelsea J. Linsley, Staff Attorney, and Danielle Fugere, President & Chief Counsel, As You Sow (Feb. 3, 2020) (''As You Sow II''); Baillie Gifford; Dennis M. Kelleher, President & CEO, et al., Better Markets, Inc. (Feb.3, 2020) (''Better Markets''), David Sneyd, Vice President, Analyst, Responsible Investment, BMO Global Asset Management (Jan. 31, 2020) (''BMO''); Lauren Compere, Managing Director, Boston Common Asset Management (Feb. 3, 2020) (''Boston Common'') (asserting that the proposal would ''allow corporations to intercept recommendations critical of the corporation or its management[, undermining] the checks and balances necessary for functioning markets''); Amy D. Augustine, Director of ESG Investing, and Timothy H. Smith, Director of ESG Shareowner Engagement, Boston Trust Walden (Nov. 20, 2019) (''Boston Trust''); Bricklayers; CalPERS (''While the release suggests that the Proposed Rule is necessary to protect investors from potentially incomplete or conflicted advice, the reality is that there has been no investor demand for the Proposed Rule.''); CalSTRS; CFA Institute I; CII IV; CIRCA (characterizing the proposed review and feedback process as ''an unprecedented intrusion into proxy voting''); Kevin E. McManus, Director of Proxy Services, Egan-Jones Proxy Services (Feb. 3, 2020) (''Egan-Jones''); Glass Lewis II; ICI; ISS; Cynthia M. Ruiz, Board President, Los Angeles City Employees' Retirement System (LACERS) (Feb. 18, 2020) (''LACERS''); MFS Investment; Scott M. Stringer, New York City Comptroller (Nov. 20, 2019) (''NYC Comptroller'');

Continued

such commenters argued that there was an absence of compelling evidence of frequent errors or significant deficiencies in proxy voting advice to warrant such a requirement.[265] Moreover, commenters emphasized that the clients of proxy voting advice businesses generally have been satisfied with the quality of the advice they receive.[266] In support of this view, commenters pointed to the absence of complaints from clients of proxy voting advice businesses, as distinguished from the large volume of complaints from registrants and their advocates.[267]

Commenters opposing the proposal also expressed their concern that requiring advance review of proxy voting advice by registrants would confer an unfair advantage to company management in disputed proxy matters[268] and would compromise the ability of proxy voting advice businesses to provide disinterested, independent advice.[269] Several such commenters stated that giving registrants the priority to review voting advice before the clients of proxy voting advice businesses was incompatible with the Commission's own published views,[270] as well as the principle behind FINRA Rule 2241, which governs conflicts of interest in connection with the publication of equity research reports and public appearances by research analysts.[271]

Some commenters were also concerned that the right of advance review would increase the risk of insider trading of material, non-public information[272] and, more generally, expressed doubts about the effectiveness of the proposal's framework for safeguarding the confidentiality of materials provided by proxy voting advice businesses to registrants.[273] Along these lines, some commenters asked for clarification about how the proposed confidentiality provision would work in practice,[274] and others suggested ways the provision and its implementation could be improved, including by reconsidering the duration of confidentiality and setting specific standardized terms.[275]

A substantial number of commenters opposed the proposed review and feedback process on the grounds that it would significantly impede the ability of proxy voting advice businesses to deliver timely and high quality advice to their clients[276] and, as a consequence, would weaken the ability of their clients to thoughtfully consider the advice and make informed decisions.[277] Many such commenters were doubtful that the proposed rules governing the advance review and feedback of proxy advice was a viable framework[278] and expressed concern that it would create numerous logistical and practical challenges that would be highly disruptive to the proxy voting system.[279] Commenters also noted the likelihood of significant costs associated with the proposal that would be incurred by proxy voting advice businesses, which many asserted would ultimately be borne by the businesses' clients.[280]

In addition to addressing practical challenges of the review and feedback process, commenters identified a number of potential unintended consequences that might result,[281] including diminished competition among proxy voting advice businesses,[282] limitation of market choice for consumers of proxy voting advice,[283] reduction in shareholder voting,[284] and a decline in the utility of proxy voting advice,[285] which some commenters warned might be watered down to lessen the risk of litigation[286] and would be influenced by the self-interested views of registrants before the advice was seen by clients.[287] Some commenters also raised the possibility that the proposal was unconstitutional because it violated the right of free speech under the First Amendment[288] and the takings clause of the Fifth Amendment.[289]

Many of the commenters who generally opposed the proposals also offered suggested modifications to the extent that the Commission elected to proceed to adoption of final rules.[290] This included shorter mandatory review periods provided to registrants,[291] limiting advance review to the factual information included in proxy voting advice,[292] allowing issuers to opt-in to the review and feedback procedures,[293] adjusting the timeline contemplated by the rule to require that proxy statements be filed a certain number of days in advance of the meeting in excess of what was proposed,[294] concurrent review by registrants and clients rather than advance review by registrants,[295] and other changes designed to make the review and feedback process more cost-effective and efficient.[296] In addition, several commenters asked for more clarification with regard to certain interpretive issues, including a more

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New York Comptroller II; Ohio Public Retirement; Richard Stensrud, Executive Director, School Employees Retirement System of Ohio (Jan. 30, 2020) ("Ohio School Retirement"); Olshan Shareholder Activism Group (Feb. 3, 2020) ("Olshan LLP"); PIAC II; PRI II; Seven Corners; Segal Marco II; Amy M. O'Brien, Senior Managing Director, Head of Responsible Investing, and Yves P. Denize, Senior Managing Director, Division General Counsel, Teachers Insurance and Annuity Association of America (TIAA) (Feb. 3, 2020) ("TIAA"); William J. Stromberg, President and CEO, T. Rowe Price (Jan. 29, 2020) ("TRP"); Third Point LLC (Feb. 3, 2020) ("Third Point LLC"); Jonas D. Kron, Senior Vice President, Trillium Asset Management, LLC (Feb. 3, 2020) ("Trillium"); ValueEdge I. *See also* IAC Recommendation.

[265] *See, e.g.*, letters from AFL–CIO II ("The Commission has not made any showing of factual errors or methodological weaknesses in proxy voting advice [that] need correction by companies before it is distributed to clients."); AllianceBernstein; As You Sow II ("The Commission has failed to evidence any problem with the current state of affairs. . . ."); Better Markets; BMO; Bricklayers; CalPERS; CalSTRS; CFA Institute I; CII IV ("[T]he paucity of evidence of pervasive factual errors by proxy advisors suggests that, in fact, no regulatory intervention is necessary or justified."); CIRCA; Glass Lewis II; Michael W. Frerichs, Illinois State Treasurer (Jan. 16, 2020) ("Illinois Treasurer"); ISS; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; PERA; PRI II; Jeffrey S. Davis, Executive Director, and Jason Malinowski, Chief Investment Officer, Seattle City Employees' Retirement System (SCERS) (Jan. 31, 2020) ("Seattle Retirement System"); Segal Marco II; TIAA; Trillium; TRP; Third Point LLC; ValueEdge I. One commenter also noted that at the Commission's 2018 Roundtable on the Proxy Process, "not one single participant . . . saw a need to impose additional regulation on proxy advisers . . . ." *See* letter from ISS. *See also* IAC Recommendation.

[266] *See, e.g.*, letters from Better Markets ("There is little evidence to support [the] claim [that the proposed changes are for the benefit of investors] . . . . To the contrary, institutional investors who manage trillions of dollars of Americans' savings and retirement funds are urging the SEC not to proceed with the misguided policies set forth in the Release."); CalPERS ("It is worth noting that no institutional investors have suggested that [mandatory review periods for registrants] would enhance the quality, quantity, or timeliness of advice.").

[267] *See, e.g.*, letters from CalPERS ("[T]he reality is that there has been no investor demand for the Proposed Rule. The push for reforms in this area is not from investors who are obtaining the advice . . . but instead is from the companies that are subjects of the advice sought." . . . Existing clients have few complaints about the quality of proxy voting advice . . . ."); ValueEdge I.

[268] *See, e.g.*, letters from Olshan LLP; PRI II (asserting that the proposal "biases advice towards favoring managers, reducing the accuracy and independence of proxy voting advice," because it imposes costs only on recommendations that management opposes); SES (expressing concern regarding the possibility that the right of advance review creates information asymmetries favoring registrants).

[269] *See, e.g.*, letters from AFL–CIO II; AllianceBernstein; Baillie Gifford; CalPERS; CFA Institute I.; CII IV ("[W]e believe the proposed requirement will be reasonably perceived as impairing the independence of the proxy advisor research, particularly since the proxy advisor is required to seek review and receive feedback from self-interested companies before sharing the draft report with their own paying client . . . ."); MFS Investment; New York Comptroller I; Ohio Public Retirement; PRI II; TRP.

[270] *See, e.g.*, letters from CII IV; ISS; New York Comptroller II; Sanford Lewis, Director, Shareholder Rights Group (Feb. 3, 2020) ("Shareholder Rights II"), referring to Communications Among Shareholders Adopting Release at 48279. In that release, the Commission stated: "A regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment, particularly where no proxy authority is being solicited by such persons. This is especially true where such intrusion is not necessary to achieve the goals of the federal securities laws." [48279]

[271] *See, e.g.*, letters from AFL–CIO II; As You Sow II; BMO; Boston Trust, CII IV; NYC Comptroller; New York Comptroller II; PIAC II; TRP.

[272] *See, e.g.*, letters from CII IV; ISS.

[273] For example, some commenters thought the confidentiality provision in Note 1 to proposed Rule 14a–2(b)(9)(ii) would be unwieldy and exacerbate delays. *See, e.g.*, letters from Baillie Gifford; CalPERS; CCMC; Glass Lewis II; ISS; Olshan LLP (stating that the proposals significantly underestimate the time and expense of negotiating confidentiality agreements and providing detailed reasons as to why the proposals would be so time consuming and costly); SES (asserting that needing to sign individual confidentiality agreements between every registrant and proxy voting advice business would be cumbersome "without any tangible benefit"). *See also* letter from ExxonMobil (advocating in favor of a "simple and straightforward confidentiality notice with a consent" and against a "complex or signed contractual agreement [which] could undermine the review process or registrants' other legal rights"). Other commenters were critical of the proposed stipulation that any confidentiality agreements could be "no more restrictive than similar types of confidentiality agreements" the proxy voting advice business uses with its clients." These commenters asserted that it was not feasible to use client agreements as a model for the terms of confidentiality with registrants. *See, e.g.*, letters from Glass Lewis II; ISS.

[274] *See, e.g.*, letter from Baillie Gifford.

[275] *See, e.g.*, letters from CII IV (suggesting that more consideration be given to the duration of confidentiality over proxy voting advice businesses' proxy advice and the businesses' permitted recourse when the terms of confidentiality are violated); Nasdaq (asserting that "standardizing and streamlining this process would reduce legal costs and time spent negotiating each confidentiality agreement and help ensure that such agreements contain standardized restrictions and disclaimers").

[276] *See, e.g.*, letters from AFL–CIO II; As You Sow II; Baillie Gifford; BMO; Boston Trust; CalPERS; CII IV; Elliott I; NYC Comptroller (stating its view that under the proposed review and feedback framework proxy voting advice businesses "will have less time to collect, verify, analyze and present data and provide their research reports to clients well in advance of the annual meeting"); New York Comptroller II; PIAC II; TIAA; TRP (asserting that the time periods allotted for the review and feedback process "have the very real potential to diminish the time needed for registered investment advisers to fulfill essential fiduciary obligations related to proxy voting").

[277] *See, e.g.*, letters from As You Sow II; BMO; Bricklayers; CalPERS; CII IV; PERA; TRP.

[278] *See, e.g.*, letters from CIRCA; Paul Schott Stevens, President and CEO, Investment Company Institute (Feb. 3, 2020) ("ICI") (stating that the proposed framework "would affect substantially and adversely the timeliness and cost of proxy advisory firms' advice, and thus its overall value to funds and their shareholders"); Interfaith Center II; TRP (stating, among other criticisms, that the review and feedback process would be logistically impracticable and "unworkable within the current time constraints of the intensely seasonal proxy voting cycle").

[279] This included the impracticability of applying the rules in the context of proxy contests or M&A transactions. *See, e.g.*, letters from CII IV; Olshan LLP (providing detailed reasons why the proposals would be challenging in proxy contests).

[280] *See, e.g.*, letters from 62 Professors; AFL–CIO II, Baillie Gifford; BMO; Bricklayers; CalPERS; CFA Institute I; CII IV; Egan-Jones; ICI; MFS Investment; NYC Comptroller; New York Comptroller II; Ohio Public Retirement; Ohio School Retirement; Olshan LLP; Segal Marco II; TIAA; Mark D. Epley, Executive Vice-President & Managing Director, General Counsel, Managed Funds Association, and Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment (Feb. 3, 2020) ("MFA & AIMA").

[281] *See, e.g.*, letters from 62 Professors; AFL–CIO II, Fran Seegull (Feb. 2, 2020) ("Alliance"), As You Sow II, BMO, Bricklayers; CalPERS, CFA Institute I; CII IV; Shawn T. Wooden, Connecticut State Treasurer (Jan. 31, 2020) ("CT Treasurer"); Egan-Jones; Elliott I; Diandra Soobiah, Head of Responsible Investment, NEST—National Employment Savings Trust (Jan. 27, 2020) ("Employment Savings"); Hermes; ISS; LA Retirement; MFA & AIMA; New York Comptroller II; TIAA.

[282] *See, e.g.*, letters from 62 Professors; Baillie Gifford ("It seems likely that the proposed amendments would be perceived as onerous and deter new entrants to the proxy advisory industry"); AFL–CIO II ("The additional burdens created by the proposed regulations and increase in market concentration if smaller proxy voting providers cannot stay in the business will significantly increase costs for investors. By limiting competition and creating barriers to entry, the Commission's proposed rulemaking is likely to result in an even greater reliance by investors on Institutional Shareholder Services and Glass Lewis"); BMO; Bricklayers; CalPERS, CII IV (arguing that mandatory "pre-review" requirements will be prohibitively costly for proxy voting advice businesses and therefore "likely to preclude new entrants, eliminate one or more incumbents, and potentially lead any survivor to follow a business model that includes providing consulting services to issuers, compounding concerns on influencing of proxy advisor reports"); Prof. Sergakis; TIAA.

[283] *See, e.g.*, letters from CII IV (noting that some of its members switched from ISS to Glass Lewis because they believed ISS's practice of providing some companies the right to pre-review reports compromised the independence of the ISS analysis); Elliott I.

[284] *See, e.g.*, letters from Alliance, As You Sow II ("The Proposed Rule may increase the liability of proxy advisory services, or the perception of legal liability, causing proxy advisors to decline to issue recommendations where issuers challenge findings, thereby limiting the number of shareholders willing or able to conduct their own research sufficient to vote for a shareholder proposal"); BMO; CII IV.

[285] *See, e.g.*, letters from Bricklayers (stating that the additional burdens imposed by the proposal "would almost certainly lead to . . . . shrinking the overall market for proxy advisory services . . . , the Proposed Amendments thus would burden competition without serving the Exchange Act's purposes"); CalPERS; CII IV; ICI; New York Comptroller II; MFA & AIMA.

[286] *See, e.g.*, letters from BMO (discussing its concern that the proposal would "significantly increas[e] the regulatory burden on proxy advisers through increasing litigation risk); CalPERS ("We recognize that the proxy advisors are not required to revise advice, but a heavy hammer is placed over their heads by the added emphasis on Rule 14a–9 liability . . . Although the Release states there is no new private right of action created by the new Rule 14a–2(b)(9), the process and greater focus on Rule 14a–9 will make it more likely that proxy voting advice businesses will be sued under the new rules."); CFA Institute I (noting the possible consequence that commentary from analysts, who might be encouraged to self-censor, would be "less forthright"); Ohio Public Retirement (questioning whether Rule 14a–9 liability might be used "to threaten or pressure proxy advisory firms to incorporate issuer feedback or accept revisions to their voting advice"); NYC Comptroller; PRI II.

[287] *See, e.g.*, letters from Baillie Gifford ("In relation to the influence of registrants, allowing registrants to also comment on analysis and dispute methodology and opinion, in conjunction with the proposed anti-fraud amendments, could render proxy advisors vulnerable to litigation if these matters are not incorporated into the advice. This is clearly inappropriate as these matters are necessarily subjective. This could result in the watering down of advice to avoid potential actions, rendering the advice too bland to be of use."); Bricklayers ("Another potential negative impact of the Proposed Amendments would be to advantage the viewpoints of corporate management.").

[288] *See, e.g.*, letters from CFA Institute I; CII IV (noting the "potential implications of the First Amendment on the independence of the research reports of proxy advisors if subject to required company review and feedback"); CIRCA (arguing that establishing a mandatory registrant review process of proxy voting advice would constitute an unconstitutional restraint on the speech of proxy advisory firms"); Elliot; Glass Lewis II; ISS; Interfaith Center II; New York Comptroller II; Mari C. Schwartzer, Director of Shareholder Activism and Engagement, NorthStar Asset Management, Inc. (Feb. 3, 2020) ("NorthStar"); Shareholder Rights II; Nell Minow, Vice Chair, ValueEdge Advisors (Mar. 10, 2020) ("ValueEdge III"); Washington State Investment. We discuss our response to certain Constitutional objections to the proposed amendments in Section II.C.3.d. *infra*.

[289] *See, e.g.*, letters from CalPERS ("Enabling a non-client to review the work product before actual clients . . . arguably violates the Constitution by taking private property for public use without compensation"); ISS. We discuss our response to certain Constitutional objections to the proposed amendments in Section II.C.3.d. *infra*.

[290] *See, e.g.*, letters from AFL–CIO II; AllianceBernstein; Baillie Gifford; BMO; CII IV; CIRCA; Elliott I; Glass Lewis II; ICI; Illinois Treasurer; Interfaith Center II; MFS Investment; Ohio Public Retirement; Olshan LLP; PIAC II; Seven Corners; TIAA. *See also* IAC Recommendation.

[291] *See, e.g.*, letters from IAA; PIRC.

[292] *See, e.g.*, letters from Baillie Gifford; BMO; CII IV; CIRCA; Elliott I; ICI; ISS; MFA & AIMA; Ohio Public Retirement. *See also* IAC Recommendation.

[293] *See, e.g.*, letter from Glass Lewis II (asserting that this would enable proxy voting advice businesses to collect important information before the process begins, potentially reducing some of the burden on the proxy voting advice businesses).

[294] *See, e.g.*, letters from CII IV (suggesting a timeline requiring registrants to file 50 or more days prior to the annual meeting; ICI; Interfaith Center II; ISS; Christopher Gerold, President, North American Securities Administrators Association (NASAA) (Feb. 3, 2020) ("NASAA"); TIAA.

[295] *See, e.g.*, letters from AllianceBernstein; Kevin A. Beaugez (June 3, 2020) ("K. Beaugez"); BMO; James Allen, Head, and Matt Orsagh, Director, Capital Markets Policy, CFA Institute (May 13, 2020) ("CFA Institute II"); CII IV; CIRCA; ICI; MFS Investment; SES (stating that its business model is to provide its voting advice report to clients and companies simultaneously 15 days prior to the meeting, and then provide an addendum should any corrections, changes, etc. be required). *See also* IAC Recommendation. *But see* letter from Niels Holch, Executive Director, Shareholder Communications Coalition (May 1, 2020) ("SCC II") ("The Coalition strongly opposes the concurrent review recommendation.").

[296] *See, e.g.*, letters from IAA (recommending that the proposed review and feedback process be replaced with a single review of the facts); ICI (recommending that proxy voting advice businesses be permitted to provide a draft of their reports to registrants and other soliciting persons for comment while simultaneously publishing it for public review).

precise understanding of which persons would be subject to the rule.[297]

As an alternative to the proposed framework for review and feedback, which they viewed as too rigid and prescriptive, some commenters urged the Commission to consider a more flexible, principles-based, and less intrusive solution.[298] One commenter noted that many of the practical concerns it expressed in its letter regarding the proposed review and feedback mechanism "could be addressed by moving to a principles-based rule and using Commission or Staff guidance to ensure that the mechanisms are being administered in a fair and efficient manner." [299] Several commenters also pointed out that there already were existing mechanisms in place sufficient to address the concerns raised in the Proposing Release, including existing proxy voting advice business programs and policies for registrants to provide feedback,[300] antifraud liability under Rule 14a–9,[301] and "counter-speech" measures for registrants (such as filing additional proxy soliciting materials).[302]

[297] *See, e.g.,* letters from AFL–CIO II; CII IV; Glass Lewis II; ISS.

[298] *See, e.g.,* letters from Baillie Gifford; Canadian Gov. Coal; CII IV; Glass Lewis II; ISS; Prof. Sergakis (describing the treatment of proxy voting advice businesses under the proposal as too "formalistic" and stringent" by comparison to the regulation of such businesses in different parts of the world and recommending a more flexible, principles-based system).

[299] Glass Lewis II ("For example, the exemptive condition could be as concise as a requirement that proxy advisors 'maintain policies and procedures that provide registrants (and certain other soliciting persons) a meaningful opportunity to comment on proxy advice and final notice of any proxy advice,' with Staff or Commission guidance filling in the timing and other elements.").

[300] *See, e.g.,* letters from Better Markets ("Both Glass Lewis and ISS already have systems in place to allow companies to correct factual errors in their reports and recommendations 'and respond to some aspect of their proxy voting advice' before they are sent to their clients."); BMO; CII IV; Glass Lewis II; Ohio Public Retirement; Segal Marco II.

[301] *See, e.g.,* letters from AllianceBernstein; As You Sow II; Better Markets; Elliott I; ISS; Glass Lewis II; CalPERS; CII IV; New York Comptroller II; Segal Marco II; Seven Corners; Shareholder Rights II. *See also* IAC Recommendation.

[302] *See, e.g.,* letters from AllianceBernstein; As You Sow II ("Companies have the ability to make arguments in a variety of ways including in their proxies, by calling investor meetings, or sending out information to shareholders, among others. There is no reason to afford issuers yet another avenue to provide their views, especially when it is likely to dramatically interfere with what is already a time-constrained and difficult process for proxy advisory firms and shareholders"); Better Markets; CalPERS; CFA Institute I (noting that "registrants already have many opportunities to communicate with investors," including the registrant's own proxy materials and "the full array of social media avenues to reiterate and confirm their positions . . ."); CII IV; Elliott I; Glass Lewis II; SS; New York Comptroller II; PIAC II ("Issuers already provide their views via proxy statements and other communications from management that are easily accessible should they be needed. Giving companies the opportunity for additional participation in the recommendations of proxy advisors would detract from, rather than contribute to, the objectivity of those recommendations."); Segal Marco II; Seven Corners; Shareholder Rights II. *See also* IAC Recommendation.

b. Comments on Proposed Response to Proxy Voting Advice by Registrants and Other Soliciting Persons

A number of commenters supported the proposal as a means to improve the overall mix of information available to investors.[303] Commenters argued that registrants do not have a timely and effective method for conveying their views and assessments about proxy voting advice to clients of proxy voting advice businesses before many clients vote in reliance on such advice.[304]

Other commenters, however, opposed the proposal.[305] A number of these commenters raised concerns about costs and delays in the timely receipt of advice that they asserted would result from the proposal.[306] Many commenters asserted the proposal is unnecessary given the ability of registrants to conduct investor outreach and file supplemental proxy materials to address any concerns with the voting advice.[307] Some commenters also objected on the grounds that the proposed amendment was unconstitutional under the First Amendment.[308]

Supporters and opponents of the proposal provided a variety of suggested modifications to proposed Rule 14a–2(b)(9)(iii).[309] For example, some supporters recommended allowing registrants more time than the proposed two business days in which to provide their statement of response.[310] Others were in favor of requiring proxy voting advice businesses to include the full written statement of registrants in the proxy advice, rather than just a hyperlink.[311] Other commenters requested that the Commission clarify certain points, such as whether a proxy voting advice business would be subject to Rule 14a–9 liability for omissions of a registrant's response,[312] and whether it would be a violation of an investment adviser's fiduciary duty if it chose not to review a registrant's hyperlinked response.[313] Because of concerns that clients may not take the time to review registrants' hyperlinked statements, commenters also recommended that the Commission require proxy voting advice businesses to disable pre-populated voting mechanisms or the automatic

[303] *See, e.g.,* letters from Baillie Gifford; BIO; Michele Nellenbach, Director of Strategic Initiatives, Bipartisan Policy Center (Feb. 3, 2020) ("BPC") (stating that the hyperlink is a cost-effective way to provide current information to investors), BRT; CEC ("The Commission's proposed changes ensure investors will have a full picture of the information from which they can then make an informed, proposal-specific voting decision."); CCMC; CEC; CGC; ExxonMobil ("Timely access to both of these viewpoints [in the proxy voting advice and the registrant's response to the advice] each proxy season is critical for investors to make informed decisions at minimal cost."); FedEx; GM; NAM; Nareit; Nasdaq (noting its belief that the hyperlink would improve the accuracy of proxy voting advice and the overall mix of information available to investors, especially given the lack of a requirement in the proposed rules that proxy voting advice businesses revise their recommendations based on registrant feedback); NIRI ("Shareholders will be better informed as a result of the inclusion of [the registrant's] response. Doing so will result in greater transparency in the proxy voting advice process, allowing investors to see both sides of the issue . . ."); SCG (asserting that "factual errors have frequently been found after the voting recommendation has been disseminated" and that "the impact of additional proxy materials can be limited"); TechNet.

[304] *See, e.g.,* letters from BRT; CEC ("The problems facing issuers and the wider market occur due to the extreme difficulty in engaging with proxy advisory firms during the proxy season and the immediate and near irrecoverable impact the issuance of the proxy report has on voting results"); Charter; ExxonMobil ("Timely access to both of these viewpoints each proxy season is critical for investors to make informed decisions at minimal cost. Our experience is that supplemental proxy materials filed with the SEC after the release of the proxy advisors' reports, which are intended to supplement such reports, are ineffective.").

[305] *See, e.g.,* letters from AFL–CIO II; CII IV; Elliott I; Glass Lewis II; ISS; Lars Dijkstra, Chief Investment Officer, and Eszter Vitorino, Senior Responsible Investment Advisor, Kempen Capital Management (Jan. 6, 2020) ("Kempen") (asserting that such requirement would be duplicative of the information already filed in company proxy statements and meeting notices, adding burden without additional value); New York Comptroller II; Ohio Public Retirement; PERA; PRI II; Public Retirement Systems; ValueEdge III.

[306] *See, e.g.,* letter from CII IV (arguing that the proposed requirement would delay the timely receipt of proxy voting advice because proxy voting advice businesses will need to coordinate timing of the filing of supplementary proxy materials with registrants and that it would increase the businesses' direct costs (*e.g.,* costs to include a hyperlink in reports), which would likely be passed on to clients and their beneficiaries).

[307] *See, e.g.,* letters from Glass Lewis II; Public Retirement Systems.

[308] *See, e.g.,* letters from AFL–CIO II; CII IV; CIRCA; Elliott I; Glass Lewis II (characterizing the proposed requirement for a proxy voting advice business to publish a registrant's response to proxy voting advice in the form of a hyperlink as compelled speech and citing to legal precedent for the proposition that compelling a party to publish or otherwise provide access to speech with which the party may disagree violates the First Amendment); ISS ("Supreme Court precedent is clear that the government may not 'co-opt' a person's speech 'to deliver [a] message' from someone else."); New York Comptroller II. We discuss our response to certain Constitutional objections to the proposed amendments in Section II.C.3.d. *infra.*

[309] *See, e.g.,* letters from BIO; ExxonMobil; Nasdaq; CII IV; CFA Institute II; Hermes; ISS.

[310] *See, e.g.,* letter from BIO.

[311] *See, e.g.,* letters from BIO; NAM.

[312] *See* letters from BRT; ExxonMobil.

[313] *See* letter from Nasdaq.

submission of votes in instances where companies respond to a proxy voting advice business's adverse voting recommendation, along the lines of the alternative described in the Proposal.[314]

Some commenters who objected to the proposal nevertheless recommended changes should the Commission adopt a response mechanism. Several such commenters encouraged the Commission to codify the view that a proxy voting advice business will not be held liable for the content of a registrant's response, whether provided as a hyperlink or included in the proxy statement in its entirety.[315] Additional suggestions included setting reasonable guidelines and limitations on the content of a registrant's response,[316] requiring that registrants provide their hyperlink to the proxy voting advice business before the end of the review period (not just request that it be included) to ensure that the hyperlink is provided in a timely manner,[317] requiring that the hyperlink be active when provided,[318] and permitting proxy voting advice businesses to require registrants to indemnify them for any loss or claim arising out of the hyperlinked content, its transmission, or use.[319]

3. Final Amendments

a. Overview

Based on commenter feedback, we are adopting amendments to Rule 14a–2(b) that we believe achieve the important objectives of the proposal but are modified in a number of respects to do so in a less prescriptive, more principles-based manner. We recognize the practical challenges faced by market participants—investors, registrants, investment advisers, proxy voting advice businesses, and others—to participate in, and fulfill their respective obligations in respect of, the proxy process. To varying extents, market participants must convey, assimilate, and give thoughtful consideration to relevant information from various parties on a potentially wide range of topics in what is generally viewed as a short time frame. In light of this, we believe a more principles-based approach is appropriate.

As reflected in the large number of public comments received, there is a wide range of opinions and competing views about the most effective way to ensure that market participants, including users of proxy voting advice, have access to adequate information when making their voting decisions. Although some commenters argued that there was insufficient evidence of inaccuracies or other problems with proxy voting advice to justify regulation, and asserted that clients of proxy voting advice businesses are satisfied with the quality of the advice they receive, the proposed amendments were not motivated solely by the Commission's interest in the factual accuracy of proxy voting advice. As we explained in the Proposing Release, even where proxy voting advice is not adverse to the registrant's recommendation or where there are no errors in the advice, facilitating investor access to enhanced discussion of proxy voting matters contributes to more informed proxy voting decisions.[320] Indeed, the principle that more complete and robust information and discussion leads to more informed investor decision-making, and therefore results in choices more closely aligned with investors' interests, has shaped our federal securities laws since their inception and is a principal factor in the Commission's adoption of these amendments. Regardless of the incidence of errors in proxy voting advice, we believe it is appropriate to adopt reasonable measures designed to promote the reliability and completeness of information available to investors and those acting on their behalf at the time they make voting determinations. In particular, we reiterate the far-reaching implications that proxy voting advice can have in the market [321] and accordingly continue to believe that measured changes designed to facilitate more complete and robust dialogue and information sharing among proxy voting advice businesses, their clients, and registrants would improve the proxy voting system, and ultimately lead to more informed decision-making, to the benefit of all participants, including shareholders that do not use proxy voting advice and yet may be affected by the recommendations of proxy voting advice businesses. We also believe that such measured changes, while not an exact substitution, would more closely approximate the discussion that could occur at a meeting with physical attendance and participation by shareholders and other parties. We therefore believe that ensuring that registrants have timely notice of proxy voting advice and that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of any written response by registrants to that advice—in a timely manner—will increase confidence across participants in the proxy system that clients of proxy voting advice businesses, whether those clients are investors or are acting on behalf of investors, have timely access to transparent, accurate, and complete information material to their voting decisions.

The Commission is aware of the risk that introducing new rules into a complex system like proxy voting, which has evolved over many years in response to changes in the marketplace as well as the interests and needs of market participants, could inadvertently disrupt the system and impose unnecessary costs if not carefully calibrated. For example, we understand the timing pressures and logistical challenges faced by shareholders, investment advisers, registrants, and, as a result, proxy voting advice businesses and their clients, particularly during the peak of proxy season.[322] We also acknowledge the concerns expressed by a number of commenters that the adoption of an overly prescriptive framework governing aspects of the proxy voting advice system could, depending on various facts and circumstances, impede the ability of proxy voting advice businesses to provide their clients with timely voting advice.[323] Ultimately, we are guided by the principle that informed decision-making by shareholders is the foundation on which the legitimacy of the proxy voting system rests [324] and believe that a well-functioning proxy system benefits from the ability of clients of proxy voting advice businesses to obtain more complete information on which to base their voting decisions.[325]

[314] *See, e.g.,* letters from BIO ("Accordingly, [we] support measures that would increase the likelihood that the registrant's statement is taken into account, such as disabling the auto-submission of votes when a registrant has submitted a response, or disabling auto-submission unless the client accesses the registrant's response or otherwise confirms the pre-populated voting choices."); BRT; CGC; ExxonMobil (asserting that the failure to address automatic submissions would render the proposed rules ineffective, with "limited practical impact."); NAM; Nareit; SCC II.

[315] *See, e.g.,* letters from Baillie Gifford; CII IV; Glass Lewis II; ISS.

[316] *See, e.g.,* letter from Glass Lewis II.

[317] *Id.*

[318] *Id.*

[319] *Id.*

[320] *See* Proposing Release at 66530.

[321] *See supra* notes 51–53 and accompanying text.

[322] *See* Proposing Release at 52, n. 134.

[323] *See, e.g.,* letters from Baillie Gifford; Canadian Gov. Coal; CII IV; Glass Lewis II; ISS; Prof. Sergakis.

[324] *See supra* notes 2–5 and accompanying text.

[325] This is consistent with the Commission's views regarding steps an investment adviser could take when it retains a proxy voting advice business and it becomes aware of potential factual errors, potential incompleteness, or potential methodological weaknesses in the proxy voting advice business's analysis that may materially affect one or more of the investment adviser's voting

Continued

As noted above, some commenters asserted that certain existing mechanisms in the proxy system suffice to address the concerns raised in the Proposing Release and obviate the need for the proposed rules.[326] Those mechanisms include proxy voting advice businesses' existing programs and policies for registrants to provide feedback, ''counter-speech'' measures already available to registrants (*e.g.*, filing supplemental proxy materials), and antifraud liability under Rule 14a–9.[327] Contrary to the views of those commenters, however, we do not believe that those mechanisms, as currently implemented, suffice to achieve our goal of ensuring that clients of proxy voting advice businesses have timely access to a more complete mix of relevant information and exchange of views. Although it is encouraging that some proxy voting advice businesses have programs in place pursuant to which some registrants have the opportunity to review and provide feedback on or responses to proxy voting advice, those programs have not been universally adopted by proxy voting advice businesses and do not uniformly provide registrants (and their investors) with the same opportunities for (and benefits of) review, feedback, and response.[328]

As to ''counter-speech'' measures, under current market practices registrants are not systematically informed of proxy voting advice in a timely manner such that they can provide investors a response to such advice, let alone a response sufficiently in advance of the relevant meeting to allow investors to consider the response prior to casting their vote.[329] In addition, while the potential for liability under Rule 14a–9 helps to ensure that proxy voting advice is not materially false or misleading, it does not address the need for investors to have timely access to transparent, accurate, and complete information—including any written response by the registrant to the advice—that is material to their voting determinations.[330]

As we explained in the Proposing Release, under existing mechanisms, it can be difficult to ensure that those making voting decisions have timely access to materially complete information prior to voting.[331] Without notice of the proxy voting advice business's recommendations, registrants are often unable to provide a response prior to votes being cast. Also, given the high incidence of voting that takes place very shortly after a proxy voting advice business's advice is distributed to its clients, without a mechanism by which clients can reasonably be expected to become aware of any response in a timely manner (as they and other investors would if the discussion were taking place at a meeting where shareholders are physically attending and participating), votes may be cast on less complete information. Because proxy voting advice businesses have control over the timing of the dissemination of their proxy voting advice, we believe they are the best-positioned parties in the proxy system to both (1) make their proxy voting advice available to registrants and (2) provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written response to their proxy voting advice in a timely manner.

Although we do not believe the existing voluntary forms of outreach to registrants and other market participants discussed above are alone sufficient, we have carefully considered the views of a number of commenters, including the two largest proxy voting advice businesses. Those commenters indicated that a more principles-based approach would be appropriate and one of whom specifically indicated that such an approach would achieve the Commission's goals while avoiding many of the complexities and practical concerns arising from the approach taken in the proposal.[332] We agree and are therefore adopting amendments that articulate a set of principles, distilled from the proposed rules, upon which a proxy voting advice business may design its own policies and procedures. We believe this approach will provide proxy voting advice businesses the flexibility to satisfy their compliance obligations in a customized and cost-effective manner and avoid exacerbating the challenges posed by timing and logistical constraints,[333] while achieving the objective of ensuring that proxy voting advice businesses' clients have timely access to more transparent, accurate, and complete information upon which to base voting decisions. We believe such an approach addresses a number of concerns raised by commenters, is better equipped to fit the needs of participants in the proxy voting process, and will be adaptable as circumstances change.

b. Policies and Procedures To Facilitate Informed Decision-Making by Clients of Proxy Voting Advice Businesses [Rule 14a–2(b)(9)(ii)]

Consistent with the discussion above, we are adopting new Rule 14a–2(b)(9)(ii) to require, as a separate condition to the availability of the exemptions in Rules 14a–2(b)(1) and (b)(3), that a proxy voting advice business[334] adopt and publicly disclose written policies and procedures reasonably designed to ensure that:

(A) Registrants that are the subject of proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business's clients; [335] and

(B) The proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the shareholder meeting (or, if no meeting, before the votes, consents, or authorizations may be used to effect the proposed action).[336]

While we appreciate the input of commenters that recommended we adopt the more prescriptive requirements of the proposed rule with modifications,[337] we believe that the objectives of the rule are better achieved through a principles-based requirement that is firmly rooted in our historic and proven disclosure framework and will provide proxy voting advice businesses with the ability to tailor their policies and procedures to ensure compliance with the requirements on a basis that is efficient and best serves the evolving needs of their clients and the practical realities of their individual business models.

i. Notice to Registrants and Safe Harbor

Paragraph (A) of Rule 14a–2(b)(9)(ii) reflects the Commission's judgment that effective engagement between proxy voting advice businesses and registrants, in which registrants are timely informed of proxy voting advice that bears on the solicitation of their shareholders, will further the goal of ensuring that proxy voting advice businesses' clients have more complete, accurate, and transparent information to consider when making their voting decisions. This will, by extension, benefit the shareholders on whose behalf those clients may be voting.

As adopted, 17 CFR 240.a–2(b)(9)(ii)(A) (''Rule 14a–2(b)(9)(ii)(A)'') does not dictate the manner or specific timing in which proxy voting advice businesses interact with registrants, and instead leaves it within the discretion of the proxy voting advice business to choose how best to implement the principles embodied in the rule and incorporate them into the business's policies and procedures. The rule does not require that proxy voting advice businesses provide registrants or other soliciting persons [338] with the opportunity to review proxy voting advice in advance of its dissemination to the businesses' clients, although providing registrants with the opportunity to review their proxy voting advice in advance would satisfy the principle and is encouraged to the extent feasible.[339] The rule requires that proxy voting advice businesses must have adopted and publicly [340] disclosed policies and procedures reasonably designed to ensure that proxy voting advice [341] is made available to registrants ''at or prior to the time when such advice is disseminated to the proxy voting advice business's clients.'' [342] The rule does not, however, require proxy voting advice businesses to ensure that proxy voting advice be made available to registrants after being initially provided to clients, if it is later revised or updated in light of subsequent events, as we recognize that

determinations. *See* Commission Guidance on Proxy Voting Responsibilities at 21–22 (''In reviewing its use of a proxy advisory firm, an investment adviser should also consider the effectiveness of the proxy advisory firm's policies and procedures for obtaining current and accurate information relevant to matters included in its research and on which it makes voting recommendations . . . As part of this assessment, investment advisers should consider . . . [t]he proxy advisory firm's engagement with issuers, including the firm's process for ensuring that it has complete and accurate information about the issuer and each particular matter, and the firm's process, if any, for investment advisers to access the issuer's views about the firm's voting recommendations in a timely and efficient manner. . . .'').

[326] *See supra* notes 300–302 and accompanying text.

[327] *See, e.g.*, letters from AllianceBernstein; As You Sow II; Better Markets; Elliott I; ISS; Glass Lewis II; CalPERS; CII IV; New York Comptroller II; Segal Marco II; Seven Corners; Shareholder Rights II. *See also* IAC Recommendation.

[328] *See supra* notes 256–258 and accompanying text; Proposing Release at 66529–30 (''[S]ome 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.'').

[329] *See* Proposing Release at 66533 (''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.'').

[330] *Id.* at 66530 (noting that ''[t]he registrant . . . may have disagreements that extend beyond the accuracy of the data used, such as differing views about the proxy advisor's methodological approach or other differences of opinion,'' the communication of which ''could improve the overall mix of information available when the clients make their voting decisions'').

[331] *Id.* at 66528–30.

[332] *See supra* notes 298–299 and accompanying text.

[333] *See* Proposing Release at 52, n. 135.

[334] As adopted, Rule 14a–2(b)(9) defines ''proxy voting advice business'' as ''a person furnishing proxy voting advice covered by § 240.14a–1(l)(1)(iii)(A).'' Some commenters opposed the use of this term. *See* letters from ISS (stating generally with respect to proposed Rule 14a–9 that the Commission should refer to entities subject to the rules as ''proxy advisers'' or ''proxy advisory firms,'' rather than creating a new term (''proxy voting advice business'')); CII IV (asserting that there is no evidence that the current terminology is inadequate). While we acknowledge commenters' concern about introducing a new term to the proxy rules, we believe that it is appropriate to clarify the type of proxy voting advice that the new rules are intended to address and accordingly scope in businesses that provide such advice, rather than basing application of the rules on the types of businesses that currently provide such services. We believe this avoids inadvertently scoping in other services that such businesses may provide, and also provides flexibility for the rule to address future business models that may involve the type of advice the rules are intended to address.

[335] Rule 14a–2(b)(9)(ii)(A).

[336] Rule 14a–2(b)(9)(ii)(B). *See infra* Section II.C.3.c. for a discussion of Rules 14a–2(b)(9)(v) and (vi), which exclude certain types of proxy voting advice from the application of Rule 14a–2(b)(9)(ii).

[337] *See, e.g.*, letters from BRT; Exxon Mobil; GM; MFA & AIMA; MSBA; Nasdaq; Scott Hirst, Assoc. Prof., Boston University Law School (Feb. 3, 2020) (''Prof. Hirst''); Representatives Bryan Steil, et al., U.S. House of Representatives (Jan. 6, 2020) (''Rep. Steil''); SCC I.

[338] We believe that it could have been unduly burdensome on proxy voting advice businesses to extend the requirements of Rule 14a–2(b)(9)(ii)(A) to other soliciting persons (in addition to the relevant registrants). We are mindful of the costs and potential logistical complications that could arise if a proxy voting advice business were required to ensure that multiple soliciting persons were informed of its proxy voting advice in a timely manner. Notwithstanding such costs and potential complications, proxy voting advice businesses may structure their policies and procedures to inform other soliciting persons of their proxy voting advice if they wish to do so. Further, as we noted in the Proposing Release, neither shareholder proponents nor persons conducting exempt solicitations are required to file substantive disclosure documents with the Commission or to make public statements. Proposing Release at 66532. Because such disclosure documents and public statements generally contain substantive information that likely would form the basis of proxy voting advice businesses' analyses, there may be an information asymmetry as to proxy voting advice provided with respect to registrants' solicitations as compared to shareholder proponents' or exempt solicitations. Consistent therewith, we stated in the Proposing Release that proxy voting advice businesses would be required to extend the proposed 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. *Id.* However, as discussed below (*see infra* Section II.C.3.c.ii.), we are adopting Rule 14a–2(b)(9)(vi) that, in part, excludes from the requirements of Rule 14a–2(b)(9)(ii) the portions of the proxy voting advice that relate to solicitations regarding contested matters, regardless of who is making such solicitation. *See* Rule 14a–2(b)(9)(vi).

[339] As noted above, we understand that certain proxy voting advice businesses currently provide at least some issuers with the opportunity to review and respond to their proxy voting advice in advance of its dissemination to their clients. *See* Proposing Release at 66529 (''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. Glass Lewis has a program that allows registrants who participate to receive a data-only version of its voting advice before publication to clients.''). Although such advance review opportunity is not required by Rule 14a–2(b)(ii), we encourage proxy voting advice businesses that are currently providing registrants with this opportunity to continue doing so as it furthers the objectives of this rule.

[340] The requirement that such policies and procedures be ''publicly'' disclosed would be satisfied if, for example, they were publicly available on a proxy voting advice business's website. This is consistent with the approach that at least some proxy voting advice businesses are currently taking with respect to the opportunities they provide registrants to review their proxy voting advice. *See, e.g.*, Glass Lewis, Report Feedback Statement (last visited June 11, 2020), *available at https://www.glasslewis.com/report-feedback-statement/*; ISS, ISS Draft Review Process for U.S. Issuers (last visited June 11, 2020), *available at https://www.issgovernance.com/iss-draft-review-process-u-s-issuers/*. Given the flexibility that proxy voting advice businesses have with respect to the method by which they satisfy the principle set forth in Rule 14a–2(b)(9)(ii)(A), we believe that the public disclosure of such policies and procedures is critical to ensuring that registrants understand how they can become informed of the relevant proxy voting advice. We also believe that the transparency created by such public disclosure may yield ancillary benefits, including increased assurance of compliance by proxy voting advice businesses with Rule 14a–2(b)(9)(ii).

[341] *See supra* note 7 for the definition of ''proxy voting advice'' as used in this release.

[342] Rule 14a–2(b)(9)(ii)(A). The goal of the principle is to provide registrants with enough time to respond to the proxy voting advice, should they choose to, sufficiently in advance of investors casting their final votes. Practically speaking, the most efficient way for proxy voting advice businesses to achieve this goal is to disseminate the reports containing their proxy voting advice to registrants (or otherwise provide registrants with access to such reports) either at the same time or before they disseminate such reports to their clients. We recognize that some commenters that supported the proposed rules indicated that even when registrants do have the opportunity to review proxy voting advice in advance, they do not have sufficient time for a thorough review and response. *See supra* note 258 and accompanying text. Although the proposed advanced review and feedback process likely would have afforded registrants more lead time to review and respond to proxy voting advice, we are conscious of the corresponding costs that other commenters identified. *See infra* notes 351–355 and accompanying text. We further note that even if some clients of proxy voting advice businesses make their voting decision after receiving such businesses' recommendations but before the registrant has had the opportunity to respond thereto, those clients retain the ability to change their vote prior to the meeting date. Under the final rules, therefore, registrants should have the opportunity to respond to proxy voting advice sufficiently in advance of the meeting date. Accordingly, clients of proxy voting advice businesses are more likely to become aware of a registrant's response pursuant to Rule 14a–2(b)(9)(ii)(B) and should have the opportunity to consider whether to adjust their votes based thereon. *See infra* note 387 and accompanying text.

such a requirement could be unduly burdensome given the timing constraints of the proxy process. We believe the final rules continue to advance the Commission's interest in improving the mix of information available to shareholders in a manner that is compatible with the complex and time-sensitive proxy voting advice infrastructure that currently exists and, in particular, the proxy voting advice businesses that many shareholders or those acting on their behalf use in connection with proxy voting, including meeting their voting obligations to investors.

In addition, paragraph (iii) of Rule 14a–2(b)(9) includes a non-exclusive safe harbor provision that, if followed, will give assurance to a proxy voting advice business that it has met the principles-based requirement of new Rule 14a–2(b)(9)(ii)(A). In accordance with this safe harbor, a proxy voting advice business will be deemed to satisfy Rule 14a–2(b)(9)(ii)(A) if it has written policies and procedures that are reasonably designed to provide registrants with a copy of its proxy voting advice, at no charge, no later than the time it is disseminated to the business's clients.[343] Such policies and procedures may include conditions requiring that such registrants have:

(A) Filed their definitive proxy statement at least 40 calendar days before the shareholder meeting; [344] and

(B) Expressly acknowledged that they will only use the proxy voting advice for their internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant's employees or advisers.[345]

Under this safe harbor, the proxy voting advice business may structure its written policy however it wishes so long as the policy has been reasonably designed to provide [346] any registrant that meets the conditions of (A) and (B) above with a copy of the business's proxy voting advice with respect to that registrant at least concurrently with the delivery of such advice to its clients.[347]

We believe the 40 calendar-day aspect of the safe harbor [348] affords the proxy voting advice business a reasonable amount of time to provide the advisory materials to registrants, without adversely affecting the business's ability to provide timely voting advice to its clients. 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 and are subject to time pressure to deliver their research and analysis to their clients sufficiently in advance of the shareholder meeting.[349] Accordingly, we do not believe that it would be practicable to impose additional administrative and logistical burdens on proxy voting advice businesses in cases in which registrants' definitive proxy statements are filed closer to the date of the shareholder meeting.[350] However, if they wish to do so, proxy voting advice businesses may structure their policies to accommodate registrants that may file less than 40 calendar days before the shareholder meeting and remain within the safe harbor.

The concurrent dissemination of proxy voting advice to clients and registrants specified in the safe harbor addresses concerns expressed by commenters that the proposed review mechanism, which would have allowed registrants to review and provide feedback on voting advice before distribution to the clients of proxy voting advice businesses, could have undermined the ability of proxy voting advice businesses to provide impartial advice to their clients,[351] increased the risk of insider trading of material non-public information,[352] and impinged on proxy voting advice businesses' rights of free speech.[353] As discussed above, several commenters objected on the grounds that permitting registrants to review and comment on draft proxy voting advice in advance of a proxy voting advice business's clients would interfere in shareholders' communications with their advisors on matters subject to a vote.[354] In particular, some commenters argued that the review process, as proposed, gave preferential treatment to registrants over a proxy voting advice business's own clients and would tend to promote management's interests because it allowed registrants to influence the content of advice at a critical stage of its production without granting similar access to shareholders.[355]

Several commenters who were opposed to the concept of advance review suggested concurrent review as a preferable alternative.[356] In the view of such commenters, a concurrent review would provide registrants with access to proxy voting advice, but it would be on an equal footing with the clients of proxy voting advice businesses and therefore would avoid many of the potential adverse consequences that commenters associated with mandating an opportunity for registrants' advance review.[357] We agree with this approach and believe that, for example, the receipt of a copy of proxy voting advice by a registrant who is the subject of such advice no later than the date upon which it is distributed to the proxy voting advice business's clients would bring about many of the same benefits for which the proposed registrant review was intended, particularly in conjunction with (1) a registrant's ability to file additional soliciting materials to communicate their views regarding the advice to shareholders and (2) the new requirement, described below,[358] that proxy voting advice businesses adopt written policies and procedures reasonably designed to ensure that they provide clients with a mechanism by which they can become aware of a registrant's statements of its views about such advice in a timely manner.

Under the proposed rules, a proxy voting advice business would have been able to require registrants to enter into confidentiality agreements for materials provided during the proposed review and feedback period as a condition of receiving the proxy voting advice on terms "no more restrictive" than similar types of confidentiality agreements the business has with its clients, which would cease to apply once the business released its proxy reports to clients.[359] Some commenters suggested this formulation would be unworkable in practice because the confidentiality agreements used with clients were not comparable and therefore would not be a suitable template.[360] In addition, commenters objected to the mandated cessation of the registrant's confidentiality agreement, as the risk of harm that would be suffered by the proxy voting advice business due to misuse of its confidential information could continue well into the future.[361] Moreover, a number of commenters expressed concern that requiring confidentiality agreements between proxy voting advice businesses and registrants would necessitate the parties' negotiation over contractual terms, an additional complication that could mire the proposed review and feedback process, and therefore the timely provision of voting advice to shareholders, in unmanageable delays.[362] Some commenters also noted that such negotiation would be costly.[363]

We believe that shifting to a principles-based requirement, which allows the report to be provided to registrants at the same time it is provided to clients, should eliminate or mitigate many of the concerns expressed. In light of these changes, we believe that negotiating a formal confidentiality agreement may not be necessary in all circumstances. We therefore believe it is appropriate to make clear that a proxy voting advice business may receive assurances from a registrant regarding the use of the proxy voting advice through less prescriptive means. Accordingly, paragraph (B) of the safe harbor in Rule 14a–2(b)(9)(iii) permits proxy voting advice businesses to include in their policies and procedures conditions requiring registrants to limit their use of the advice in order to receive a copy of the proxy voting advice. Such written policies and procedures may, but are not required to, specify that registrants must first acknowledge that their use of the proxy voting advice is restricted to the registrant's own internal purposes and/or in connection with the solicitation and will not be published or otherwise shared except with the registrants' employees or advisers.[364] Such acknowledgement could take a variety of forms at the discretion of the proxy voting advice business, including with respect to the duration of the acknowledgment. For example, a policy under the safe harbor could specify that the acknowledgement can or must be in the form of a written representation or an oral acknowledgement, or the policy could prescribe that a registrant must check a box or provide another electronic means of confirming that the registrant agrees to standardized terms of service before the materials could be accessed. To qualify for the safe harbor, the terms of the acknowledgement could not be more restrictive than those set forth in paragraph (B); however, if a proxy voting advice business wishes to impose more tailored or restrictive conditions, it could do so outside of the safe harbor, provided the policies and procedures do not unreasonably inhibit timely notice to the registrant consistent with the principles-based requirements of 14a–2(b)(9)(ii)(A).

We also note that, unlike the proposal, the safe harbor does not mandate the provision of draft proxy voting advice to registrants before dissemination to clients of the proxy voting advice business, which, as commenters noted, poses a higher risk of unintentional or unauthorized release of the information and its potential misuse.[365] Instead, compliance with the safe harbor requires only that the proxy voting advice business provide its voting advice to registrants no later than the time it is released to the business's clients.

A proxy voting advice business that has a policy in place that satisfies the principles-based requirements of Rule 14a–2(b)(9)(ii)(A), such as a policy elucidated in, or that is consistent with, the safe-harbor in Rule 14a–2(b)(9)(iii), will be under no obligation to provide its proxy voting advice to registrants that fail to file a definitive proxy statement early enough to meet the 40-day stipulation, or fail to acknowledge the limitations on its use of the voting advice. Moreover, in order to qualify for

[343] Rule 14a–2(b)(9)(iii).

[344] Rule 14a–2(b)(9)(iii)(A). Where the registrant is soliciting written consents or authorizations from shareholders for an action in lieu of a meeting, a proxy voting advice business's written policies and procedures may require that the registrant must file its definitive soliciting materials at least 40 calendar days before the action is effective in order to receive a copy of its proxy voting advice.

[345] Rule 14a–2(b)(9)(iii)(B).

[346] In terms of the method by which a proxy voting advice business provides a copy of its advice to a registrant, it could do so by, for example, sending the registrant an email either attaching an electronic copy of the relevant report or including an active hyperlink to the report.

[347] Under the terms of the safe harbor, registrants are not required to reimburse proxy voting advice businesses for the cost of providing a copy of the proxy voting advice. *See* Rule 14a–2(b)(9)(iii). While some commenters favored a requirement that registrants reimburse proxy voting advice businesses for reasonable expenses associated with the proposed review and feedback period (*see* letters from CII IV; New York Comptroller II), others asserted that proxy voting advice businesses should not be able to seek reimbursement from registrants for the costs to provide their reports (*see* letters from Exxon Mobil; GM; NAM; SCG). For purposes of the safe harbor, we believe that the benefit to investors of more timely, complete, and reliable information upon which to make informed voting decisions should not be lessened by making a registrant's ability to review proxy voting advice dependent on the registrant's willingness to pay for it. See *infra* note 412 for our discussion of how the final rules address certain comments we received on the proposed rules expressing concern regarding the takings clause of the Fifth Amendment.

[348] Rule 14a–2(b)(9)(iii)(A).

[349] *See e.g.*, letters from CII IV; Glass Lewis II; ISS (describing the timing and processes involved in the preparation and delivery of their proxy voting advice to clients). *See also* Proposing Release at 66531, n. 119.

[350] Based on the information we received from commenters, it is our understanding that 40 calendar days prior to the shareholder meeting is well within the customary range when definitive proxy statements are filed. *See e.g.*, letters from CII IV; Glass Lewis II. By comparison, we note that the Commission's proposal would have required proxy voting advice businesses to provide registrants with an opportunity for advance review and feedback of the proxy voting advice if the registrant filed its definitive proxy statement at least 25 calendar days before the shareholder meeting. *See* proposed Rule 14a–2(b)(2)(9)(ii); Proposing Release at 66531. We also note that such 40 calendar day-period exceeds the minimum number of days that some proxy voting advice businesses currently require that registrants file their definitive proxy statements prior to the shareholder meeting in order to review at least a portion of their proxy voting advice in advance of its dissemination. *See, e.g.*, Glass Lewis, Issuer Data Report (last visited June 11, 2020), *available at https://www.glasslewis.com/issuer-data-report/* (noting that in order for a registrant to review an issuer data report in advance of the proxy voting advice being disseminated to clients, registrants must "disclose their meeting documents at least 30 days in advance of their meeting date"); ISS, ISS Draft Review Process for U.S. Issuers (last visited June 11, 2020), *available at https://www.issgovernance.com/iss-draft-review-process-u-s-issuers/* ("To ensure timely delivery of our analyses to our clients, we cannot provide a draft to any company that files its definitive proxy less than 30 days before its meeting.").

[351] *See supra* note 269. We believe that the concurrent dissemination of proxy voting advice to clients and registrants pursuant to the safe harbor will achieve the objectives of this rulemaking and address commenters' concerns regarding a registrant's practical ability to review, consider, and respond to proxy voting advice. *See supra* note 342.

[352] *See supra* note 272. Proxy voting advice may, depending on the facts and circumstances, constitute material, non-public information. We expect proxy voting advice businesses, their clients, and registrants receiving non-public information in this process to take reasonable measures to safeguard any material, non-public information in their possession by, for example, adopting and implementing effective policies and procedures to ensure that its use and dissemination is consistent with applicable law. *See also infra* note 400; *Institutional S'holder Servs. Inc.*, Release No. IA–3611, 106 SEC. Docket 1681, 2013 WL 11113059, at *5 (May 23, 2013) ("In this case, ISS violated Section 204A [of the Advisers Act] because it failed to establish and enforce policies and procedures reasonably designed to prevent the misuse of ISS' shareholder advisory clients' material, nonpublic proxy voting information.").

[353] *See supra* note 288.

[354] *See supra* notes 276–277.

[355] *See supra* note 268.

[356] *See supra* note 295.

[357] *Id.*

[358] *See infra* Section II.C.3.b.ii.

[359] *See* Note 2 to paragraph (b)(9)(ii) of proposed Rule 14a–2(b)(9); Proposing Release at 66532.

[360] *See, e.g.*, letter from SES (asserting that needing to sign individual confidentiality agreements between every issuer and proxy voting advice business would be cumbersome "without any tangible benefit").

[361] *See, e.g.*, letter from Glass Lewis II (recommending that the Commission remove the statement in the proposal that any confidentiality agreement "shall cease to apply once the proxy voting advice business provides its advice to one or more recipients").

[362] *See, e.g.*, letter from Olshan LLP (stating that the proposal significantly underestimates the time and expense of negotiating confidentiality agreements and providing detailed reasons as to why the proposal would be so time consuming and costly).

[363] *See infra* note 613.

[364] A registrant's advisers would include, for example, its attorneys and proxy solicitors.

[365] *See, e.g.*, letters from Clem Geraghty, Ardevora Asset Management LLP (Nov. 27, 2020) ("Ardevora"); CII IV; Elliott I; ISS (expressing concern that the proposal would require a proxy voting advice business to disclose material non-public information to any registrant or eligible soliciting person who signs a confidentiality agreement, even if that party is a known insider trader, and stating that such an outcome would interfere with the proxy voting advice business's obligations under the Investment Advisers Act to establish, maintain, and enforce policies and procedures reasonably designed to ensure compliance with insider trading laws); SES (noting that the proposal could result in certain company statements and information being made available to proxy voting advice businesses and their clients, but not to other shareholders).

the safe harbor, the proxy voting advice business's policy is not required to contemplate that the business repeat the process of providing a copy of its proxy voting advice to registrants if its advice is later revised or updated in light of subsequent events. The safe harbor does not impose any obligation on the proxy voting advice business to provide registrants with additional opportunities to review its proxy voting advice with respect to the same shareholder meeting. In response to concerns raised by commenters, in order to limit the logistical and other burdens imposed on proxy voting advice businesses, as well as to lessen potential uncertainty over questions of compliance,[366] proxy voting advice businesses may, but will not be required to, provide the registrant with additional materials that update or supplement proxy voting advice previously provided.

So long as the proxy voting advice business meets the conditions of the safe harbor in Rule 14a–2(b)(9)(iii), it will be deemed to satisfy Rule 14a–2(b)(9)(ii)(A). Assuming it also satisfies the principles-based requirement in new 17 CFR 240.14a–2(b)(9)(ii)(B) (''Rule 14a–2(b)(9)(ii)(B)''); discussed below and otherwise meets the requirements of Rule 14a–2(b)(9), the proxy voting advice business would be eligible to rely on the exemptions in Rules 14a–2(b)(1) or (3) (subject to the satisfaction of the other conditions of those exemptions).

By adopting this approach, as discussed above, we believe we have addressed the concerns raised by commenters regarding the potential unintended consequences of requiring a proxy voting advice business to engage with a registrant in connection with its proxy voting advice, including those related to timing[367] and the risk of affecting the independence of the advice[368] or diminishing competition in the proxy voting advice business industry.[369] Specifically, because Rule 14a–2(b)(9)(ii) does not require proxy voting advice businesses to adopt policies that would provide registrants with the opportunity to review and provide feedback on their proxy voting advice before such advice is disseminated to clients, the rule does not create the risk that such advice would be delayed or that the independence thereof would be tainted as a result of a registrant's pre-dissemination involvement.[370] Similarly, because proxy voting advice businesses are not required to adopt policies that would provide notice to, or otherwise require interaction with, registrants until they disseminate advice to their clients, any concerns that commenters had regarding increased marginal costs—and, correspondingly, diminished competition—associated with preparing proxy voting advice as a result of the proposed advance review and feedback process should be alleviated. Commenters also identified potential unintended consequences that could result from a heightened litigation risk that proxy voting advice businesses could face as a result of the proposed rules,[371] which may have been viewed as more significant in circumstances where differing views persisted following engagement with the registrant. As with the other unintended consequences discussed above, this concern is mitigated by the fact that under the principles-based approach we are adopting, proxy voting advice businesses will not be required to give registrants the opportunity to provide feedback on their proxy voting advice before it is disseminated to clients.

It is not a condition of this safe harbor, nor the principles-based requirement, that the proxy voting advice business negotiate or otherwise engage in a dialogue with the registrant, or revise its voting advice in response to any feedback. The proxy voting advice business is free to interact with the registrant to whatever extent and in whatever manner it deems appropriate, provided it has a written policy that satisfies its obligations. Although the Commission encourages cooperation and an open dialogue between the parties to the extent that it facilitates productive efforts to improve the quality of proxy voting advice for the benefit of shareholders, the rule that we are adopting does not prescribe the manner in which the parties conduct themselves in this regard, and leaves the content of proxy voting advice, as well as the specific methods and processes used to produce it, within the proxy voting advice business's discretion.

As noted above, the safe harbor is intended to provide a proxy voting advice business with a non-exclusive means to meet the requirements of Rule 14a–2(b)(9)(ii)(A). Proxy voting advice businesses may nonetheless choose to structure a policy that, though not within the parameters of the safe harbor, is reasonably designed to ensure that proxy voting advice is made available to registrants at or prior to the time when the advice is disseminated to clients. We acknowledge that there are different ways that a proxy voting advice business could structure such a policy consistent with the rule, and the safe harbor is not intended to become the *de facto* means by which the requirement of Rule 14a–2(b)(9)(ii)(A) may be met.

ii. Mechanism To Become Aware of Registrant's Response and Safe Harbor

The Commission's proposal to require that proxy voting advice businesses, at the request of a registrant, include in their voting advice a hyperlink (or other analogous electronic medium) to the registrant's statement about the voting advice was intended as an efficient and timely means of providing the businesses' clients with additional information that would assist them in assessing and contextualizing the voting advice.[372] In particular, the inclusion of the hyperlink with the proxy voting advice would have permitted clients, including investment advisers voting shares on behalf of other shareholders, to consider the registrants' views at the same time as the proxy voting advice and before making their voting determinations. As the Commission has noted, although registrants are able under the existing proxy rules to file supplemental proxy materials to respond to proxy voting recommendations that they may know about and to alert investors to any disagreements with such proxy 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.[373]

As with the Commission's proposed review and response mechanism, however, commenters have raised practical challenges and limitations that the parties would face in implementing processes and systems necessary to comply with the proposed rule's prescriptive requirements.[374] Accordingly, we believe that our objectives are better addressed by a principles-based requirement, particularly in light of the complexities and time pressures inherent in the proxy system. By broadly outlining the overarching principles and allowing the proxy voting advice businesses themselves to design a system of compliance best suited to their operations, our aim is to promote adherence to these principles in a flexible and minimally intrusive manner.

Consequently, paragraph (B) of Rule 14a–2(b)(9)(ii) sets forth an additional principle that a proxy voting advice business must observe in order to avail itself of the exemptions found in Rules 14a–2(b)(1) and (3). Specifically, a proxy voting advice business must adopt and publicly[375] disclose written policies and procedures reasonably designed to ensure that it provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner[376] before the shareholder meeting (or, if no meeting, before the vote, consent, or authorization may be used to effect the proposed action).

By shifting to a principles-based requirement, the rule allows the proxy voting advice business to determine its specific manner of compliance, while preserving the Commission's objective to facilitate the ability of the business's clients to benefit from more complete information when considering how to vote their proxies. As such, it reflects the Commission's view that shareholders should have ready access to a more complete mix of information to make informed voting decisions. Rule 14a–2(b)(9)(ii)(B) is thus intended to help ensure that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of and access more complete information, including the input and views of registrants on proxy voting advice, in the compressed time period between when they receive the advice and vote their proxies.

We believe access to the registrant's views on proxy advice may benefit a proxy voting advice business's clients regardless of whether the voting recommendation is adverse to the registrant's recommendation. The registrant may have disagreements that extend beyond the voting recommendation itself, such as noting factual errors in the advice, differing views about the proxy voting advice business's methodological approach or other perspectives that it believes are relevant to the voting advice.[377] Or the registrant may wish to emphasize a particular point that the proxy voting advice business may have noted or may not have noted in its advice. In circumstances where the registrant largely or entirely agrees with the proxy voting advice business's methodology or conclusions, that fact would likely be relevant to and enhance a client's decision-making.

A number of commenters argued that registrants' ability to file supplemental proxy materials is sufficient to facilitate informed shareholder voting decisions.[378] Commenters have indicated, however, that the clients of proxy voting advice businesses often cast their votes before registrants can file such materials.[379] Rule 14a–2(b)(9)(ii)(B) requires that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware that a registrant has filed such materials about the proxy voting advice in time to consider the materials before they cast their final vote. Due to the existing time constraints that proxy voting advice business clients have identified in their comments to the proposed rule,[380] the rule will ensure that such clients have an efficient means by which they can reasonably be expected to become aware of additional information that may affect their analysis of the proxy voting advice, and thereby their voting decisions, in the manner that each proxy voting advice business determines is most cost-efficient and best serves its clients.

As with Rule 14a–2(b)(9)(ii)(A), we recognize that proxy voting advice businesses may benefit from greater legal certainty about how to satisfy this general principle. We are therefore providing a non-exclusive safe harbor in new 17 CFR 240.14a–2(b)(9)(iv) (''Rule 14a–2(b)(9)(iv)'') pursuant to which proxy voting advice businesses will be deemed to satisfy the principle-based requirement of paragraph (ii)(B). To satisfy this safe harbor, a proxy voting advice business must have written policies and procedures reasonably designed to inform clients who have received proxy voting advice about a particular registrant in the event that such registrant notifies the proxy voting advice business that the registrant either intends to file or has filed additional soliciting materials with the Commission setting forth its views

[366] For example, if proxy voting advice businesses were required under the safe harbor to redistribute proxy voting advice to registrants as a result of any updates or addenda to the advice, in many cases it might pose a difficult logistical challenge for the businesses to meet their production deadlines, satisfy rapid turn-around times and fulfill their delivery obligations to clients, thereby exacerbating the businesses' difficulty in meeting an already aggressive timeline so close to the date of the shareholder meeting. In addition, the determination of which kinds of materials would be covered by such a rule could lead to confusion and make administration of the rule unnecessarily complex and time-consuming.

[367] *See supra* notes 276–279 and accompanying text.

[368] *See supra* note 287 and accompanying text. A number of commenters expressed concerns that the proposed advance review and feedback process would conflict with FINRA Rule 2241, which prohibits review of an analyst's research report by a subject company for purposes other than factual verification. *See* letters from AFL–CIO II; As You Sow II; BMO; Boston Trust; CII IV; NYC Comptroller; New York Comptroller II; PIAC II; TRP. The final rules address these concerns, as neither Rule 14a–2(b)(9)(ii)(A) nor Rule 14a–2(b)(9)(iii) requires that registrants be given the opportunity to review or provide feedback on proxy voting advice before proxy voting advice businesses provide such advice to their clients.

[369] The competition-based unintended consequences that commenters identified included diminished competition among proxy voting advice businesses, a limitation in the market choice for consumers of proxy voting advice, and a decline in the utility of proxy voting advice. *See supra* notes 282, 283, 285 and accompanying text.

[370] Some commenters challenged the proposition that proxy voting advice businesses currently provide disinterested, independent advice. *See, e.g.*, letters from BIO; BRT; CEC; CCMC; J. Ward; NAM; Nareit; Nasdaq; SCG. As to commenters' concerns that the proposed advance review mechanism could compromise the ability of proxy voting advice businesses to provide disinterested, independent advice, we note that according to its current procedures governing registrants' advance review of its draft proxy analysis, rating, or other research report, ISS states that it retains sole discretion whether to accept any change recommended by the registrant. *See infra* note 530 and accompanying text.

[371] *See supra* notes 284, 286 and accompanying text.

[372] Proposing Release at 66533.

[373] *Id.* at n.136. As we noted in the Proposing Release, although shareholders have the ability to change their vote at any time prior to a meeting—including as a result of supplemental proxy materials filed by registrants in response to proxy voting advice—to our knowledge, this seldom occurs. *Id.* at 66530 n.107. It is possible, however, that under the final amendments, as a result of proxy voting advice businesses' compliance with Rule 14a–2(b)(9)(ii)(B), clients of proxy voting advice businesses will be made aware of a registrant's response to proxy voting advice and, therefore, more likely to change votes that were cast after receiving such advice.

[374] *See, e.g.*, letters from CII IV; Glass Lewis II.

[375] See *supra* note 340 for an example of how proxy voting advice businesses may satisfy the requirement that such policies and procedures be ''publicly'' disclosed and a discussion of the reasons why we believe such requirement is important in the context of paragraph (A) of Rule 14a–2(b)(9)(ii). With respect to paragraph (B), it is likely that the clients of proxy voting advice businesses would be provided with such policies and procedures even absent a requirement that they be publicly disclosed. That said, in addition to the ancillary transparency-based benefits discussed *supra* note 340, we believe that the public disclosure of such policies and procedures will assist potential clients of proxy voting advice businesses in evaluating the service offerings that the various providers make available. Similarly, such public disclosure may assist the investors on whose behalf such clients act in evaluating whether any proxy voting decisions made on their behalf are informed by both the relevant proxy voting advice and any registrant response thereto.

[376] In this context, a proxy voting advice business will have become aware of a registrant's response to the proxy voting advice in a ''timely manner'' if such client has sufficient time to consider such response in connection with a vote.

[377] *See, e.g.*, IAC Recommendation (''The very differences in such judgments [between corporate managers and proxy advisors] are part of the value that independent advisors add to the proxy system . . . . By advancing their views . . . proxy advisors create meaningful public discussion of such topics. . . .'').

[378] *See, e.g.*, letters from Public Retirement System; AFL–CIO 2; CII IV; Glass Lewis II; ISS; New York Comptroller I. *See also* note 373.

[379] *See, e.g.*, letters from NAREIT, NAM, Exxon Mobil. *See also* Proposing Release at 53, n. 136.

[380] *See, e.g.*, letters from ACSI; BMO; CII VI; Florida Board; Glass Lewis II; Hermes; ICI; New York Comptroller II; Ohio Public Retirement; Olshan LLP; PRI II; Stewart; TIAA; TRP.

regarding such advice.[381] The safe harbor sets forth two methods by which the proxy voting advice business may provide such notice to its clients. It may either:

(A) Provide notice on its electronic client platform that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available); [382] or

(B) Provide notice through email or other electronic means that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available).[383]

The safe harbor in Rule 14a–2(b)(9)(iv) establishes a convenient mechanism by which the clients of a proxy voting advice business can stay informed of, and timely consider, additional information with respect to the proxy voting advice that the registrant believes is material to the shareholders' voting determination. The safe harbor provides a direct and simple means of alerting clients to the availability of the views of the registrant as they consider the voting advice.

The inclusion of the hyperlink required under Rule 14a–2(b)(9)(iv) would not, by itself, make the proxy voting advice business liable for the content of the hyperlinked registrant's statement. 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.[384] As we explained in the Proposing Release, we believe our view is consistent with this framework as a proxy voting advice business likely would not be involved in the preparation of the hyperlinked statement and likely would be including the hyperlink to comply with the requirements of the Rule 14a–2(b)(9)(iv) safe harbor, and not to endorse or approve the content of the statement. Our view also extends to a proxy voting advice business that chooses to satisfy the principle-based requirement of Rule 14a–(b)(9)(ii)(B) outside of the Rule 14a–2(b)(9)(iv) safe harbor by adopting written policies and procedures that contemplate the delivery of a hyperlink to the registrant's statement to its clients.

We note that proxy voting advice businesses will retain a significant amount of discretion to formulate their own policies and procedures and dictate the mechanics of notification in ways they believe are most suitable to meet their clients' needs and compatible with their operations, including specifying the preferred channel by which registrants must notify the proxy voting advice business of supplemental proxy filings, provided they comply with the broad outlines of the safe harbor.

As discussed above, although proxy voting advice businesses may prefer the legal certainty afforded by the safe harbor in Rule 14a–2(b)(9)(iv), these provisions are not the exclusive means by which such businesses may satisfy the principle-based requirement set forth in Rule 14a–2(b)(9)(ii)(B). Proxy voting advice businesses may instead develop their own policies and procedures outside of the safe harbor that are reasonably designed to ensure that they provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written response to the proxy voting advice in a timely manner. We acknowledge that there are different ways that a proxy voting advice business could structure such a policy consistent with the rule, and the safe harbor is not intended to become the *de facto* means by which the requirement of Rule 14a–2(b)(9)(ii)(B) may be met.

The proposed rules included a provision that would have excused immaterial or unintentional failures to comply with the conditions of Rule 14a–2(b)(9).[385] This provision was motivated by our recognition of a potentially significant adverse result for a proxy voting advice business if it were to lose the ability to rely on the exemptions set forth in Rules 14a–2(b)(1) or (b)(3) and be required to comply with the federal proxy rules' information and filing requirements.[386] Although we recognize those potentially adverse results, we no longer view that provision as necessary in light of the principles-based approach of the final rules. Rule 14a–2(b)(9)(ii), as adopted, requires proxy voting advice businesses to adopt written policies and procedures that are reasonably designed to ensure satisfaction of paragraphs (A) and (B) thereof. We believe the framework we are adopting is sufficiently flexible to accomplish the Commission's objectives in ensuring shareholders have available to them more transparent, accurate, and complete information on which to base their voting determinations and thereby promote informed decision-making, without unnecessarily interfering with or burdening the complex infrastructure that is important to the proper functioning of the proxy system. We also believe that the principle of ensuring that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of registrants' written statements regarding the proxy voting advice in a timely manner will facilitate in particular the use and review of such advice by investment advisers.[387]

[381] If a registrant notifies a proxy voting advice business that the registrant intends to file additional soliciting materials setting forth its views regarding the proxy voting advice business's advice, then proxy voting advice business should consider whether, for purposes of complying with this safe harbor requirement, it needs to send two separate notices to the business's clients: (1) One notice regarding the registrant's intent to file and (2) another notice regarding the registrant's actual filing. Depending on the particular facts and circumstances, the first notice may be needed to inform clients of the fact that the registrant may be providing views that could be material to their voting decisions and to allow the clients to determine whether they wish to await these views before submitting their votes, and with the second notice providing the clients with the hyperlink to the registrant's soliciting material once it is filed on EDGAR. We note that Rule 14a–2(b)(9)(ii)(B), which is a principles-based requirement, gives proxy voting advice businesses the option of formulating alternatives to this approach as long as those alternatives achieve the principle set forth in the rule.

[382] Rule 14a–2(b)(9)(iv)(A).

[383] Rule 14a–2(b)(9)(iv)(B).

[384] *See* Use of Electronic Media, Release No. 34–42728 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)].

[385] Proposing Release at 66535 ("[T]he 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 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.").

[386] *Id.* at n.146 ("[W]ithout 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.").

[387] The Commission previously issued guidance discussing how the fiduciary duty and rule 206(4)–6 under the Advisers Act relate to an investment adviser's exercise of voting authority on behalf of clients and also provided examples to help facilitate investment advisers' compliance with their proxy voting responsibilities. *See* Commission Guidance on Proxy Voting Responsibilities. We expect that Rule 14a–2(b)(9)(ii)(A) will result in registrants being made aware of recommendations by proxy voting advice businesses in a timeframe that will permit those registrants to make any views regarding those recommendations available in a more timely manner than was previously the case. We therefore are concurrently supplementing that guidance to investment advisers in a separate Commission release. *See* Supplemental Proxy Voting Guidance.

We wish to emphasize that the principles-based approach we are adopting in Rule 14a–2(b)(9)(ii) is intended to be adaptable to a variety of circumstances and business models. Various policies and procedures, beyond those in the safe harbors set forth in Rules 14a–2(b)(9)(iii) and (iv), may be used to satisfy these principles. Whether a proxy voting advice business has complied with the principles-based requirements will be determined by the particular facts and circumstances of the business's adopted written policies and procedures and whether such facts and circumstances support the conclusion that the particular policies and procedures are reasonably designed to ensure that (1) registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business's clients and (2) the proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware that registrants have filed additional proxy materials that are responsive to the proxy voting advice in a timely manner before the shareholder meeting. Some relevant factors to be used in the analysis include:

- The degree to which a registrant has time to respond and whether the policy ensures prompt conveyance of information to the registrant.
- The extent to which the mechanism provided to clients is an efficient means by which they can reasonably be expected to become aware of the registrant's written response, once it is filed, such that the client has sufficient time to consider such response in connection with a vote.
- The reasonableness, based on facts and circumstances, of any fees charged by a proxy voting advice business to a registrant as a condition to receiving a copy of its proxy voting advice and the extent to which such fees may dissuade a registrant from seeking to review and provide a response to such proxy voting advice.

We reiterate that these factors are not exclusive and no single factor or combination of factors will control the determination of whether a proxy voting advice business has complied with the principles-based requirements.

c. Exclusions From Rule 14a–2(b)(9)(ii) [Rules 14a–2(b)(9)(v) and (vi)]

Notwithstanding the benefits that we expect will accrue to clients of proxy voting advice businesses, as well as the proxy voting system as a whole, we recognize that the requirements of Rule 14a–2(b)(9)(ii) may not be appropriate in all contexts. As such, pursuant to new Rules 14a–2(b)(9)(v) and (vi), respectively, proxy voting advice businesses need not comply with Rule 14a–2(b)(9)(ii) in order to rely on either the Rule 14a–2(b)(1) or (b)(3) exemption (1) to the extent that their proxy voting advice is based on a custom policy [388] or (2) if they provide proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.[389]

i. Custom Policies

As noted above,[390] some commenters recommended—in the context of our proposed amendments to Rule 14a–1(l)—that we amend the definitions of "solicit" and "solicitation" to exclude proxy voting advice based on custom policies.[391] Specifically, one commenter that is a proxy voting advice business noted that it "does not own, and is prohibited from disclosing, clients' custom policies and the recommendations based thereon." [392] That commenter also expressed doubt as to the efficacy, from an investor protection standpoint, of "allowing issuers to vet the methodologies and assumptions institutional investors choose to implement for their own portfolios." [393] Although we reaffirm our prior interpretation of the scope of the terms "solicit" and "solicitation" and decline to amend their definitions as those commenters suggested, we find these points to be compelling with respect to the application of certain requirements of Rule 14a–2(b)(9). We also understand these commenters' concerns regarding the potential costs that would be imposed upon investors, as well as their doubts regarding the corresponding investor protection-based benefits, if the requirements of Rule 14a–2(b)(9)(ii) were to be applied to proxy voting advice based on a custom policy.

In light of these concerns, we are adopting new Rule 14a–2(b)(9)(v), which excludes from the scope of Rule 14a–2(b)(9)(ii) proxy voting advice to the extent that such advice is based on custom policies that are proprietary to a proxy voting advice business's client.[394]

Our adoption of new Rule 14a–2(b)(9)(v) is not only motivated by the potential costs that commenters identified, it also reflects our belief that many of the goals of this rulemaking will still be achieved with respect to proxy voting advice that is based on a custom policy, notwithstanding the fact that such advice will not be subject to Rule 14a–2(b)(9)(ii). For example, as noted above and consistent with prior Commission statements,[395] such proxy voting advice will constitute a "solicitation" subject to Rule 14a–9, and persons who provide such advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must comply with the conflicts of interest disclosure requirements set forth in new Rule 14a–2(b)(9)(i). We further note that proxy voting advice businesses generally use substantially the same data to produce most of their voting advice (including reports containing proxy voting advice based on benchmark, specialty, or custom policies).[396] In addition, it is our understanding of the proxy voting advice market as it currently operates that proxy voting advice businesses' clients that receive proxy voting advice pursuant to their custom policies generally also receive the businesses' voting advice based on the businesses' benchmark policies. Such benchmark policy proxy voting advice contains the bulk of the data, research, and analysis underlying custom policy proxy voting advice. Thus, because the proxy voting advice based on the benchmark policies—including the data, research, and analysis therein—would be subject to Rule 14a–2(b)(9)(ii), clients that receive proxy voting advice pursuant to their custom policies generally will

[388] *See* Rule 14a–2(b)(9)(v).

[389] *See* Rule 14a–2(b)(9)(vi).

[390] *See supra* note 112 and accompanying text.

[391] *See* letters from ISS; New York Comptroller II; State Street. *See also supra* note 165 for a link to a description of the services that one major proxy voting advice business offers in connection with its clients' custom policies.

[392] Letter from ISS. *See also* letter from Glass Lewis II ("Mandating that custom voting recommendations go through the issuer review and feedback mechanisms would expose these investors' confidential, proprietary information and force Glass Lewis to breach its commitments to these clients.").

[393] Letter from ISS.

[394] Rule 14a–2(b)(9)(v). The term "custom policies" for purposes of Rule 14a–2(b)(9)(v) would not include a proxy voting advice business's benchmark or specialty policies, even if those benchmark or specialty policies were to be adopted by a proxy voting advice business's client as its own policy. *See supra* note 12. If, however, a proxy voting advice business's client adopts a benchmark or specialty policy as its own policy, then the proxy voting advice business would have to satisfy the requirements of Rule 14a–2(b)(9)(ii) only with respect to the proxy voting advice that is based on the benchmark or specialty policy. For the avoidance of doubt, Rule 14a–2(b)(9)(ii)(A) does not require that the proxy voting advice business make available to the registrant multiple copies of the same voting advice, and for purposes of Rule 14a–2(b)(9)(ii)(B), the proxy voting advice business's policies and procedures should be reasonably designed to provide such client with a mechanism by which the client could reasonably be expected to become aware of any written statement regarding the benchmark or specialty policy.

[395] *See supra* text accompanying note 166.

[396] *See* letter from ISS ("Because substantially the same data are used to produce all ISS voting reports . . . .").

benefit from an awareness of any responses that the registrants may file thereto.

ii. Merger and Acquisition Transactions and Contested Solicitations

Solicitations involving merger and acquisition ("M&A") transactions or contested matters, such as contested director elections where a dissident soliciting party proposes its own slate of director-nominees, are generally fast-moving and can be subject to frequent changes and short time windows.[397] This often results in proxy voting advice businesses having to deliver their advice to clients on a tighter deadline, and with less lead time before the applicable meeting, than they would under normal circumstances.[398] As noted above, some commenters expressed concerns regarding the practical challenges and potential disruptions that the proposed review and feedback mechanism, with its specified time frames for each step of the process, would have caused in the context of M&A transactions or contested solicitations.[399] Commenters also expressed concerns about the heightened risk that the proposed review and feedback mechanism, which would involve reviews of proxy voting advice before it is disseminated to clients, could pose regarding the disclosure of market-moving or material, non-public information in the context of M&A transactions or contested solicitations.[400] We expect that these concerns will be significantly alleviated, if not eliminated entirely, by the fact that Rule 14a–2(b)(9)(ii), as adopted, does not include the proposed advance review and feedback mechanism and, with its principles-based requirements, provides proxy voting advice businesses with added flexibility. For example, absent the proposed advanced review and feedback mechanism, Rule 14a–2(b)(9)(ii)(A) does not increase the risk that proxy voting advice businesses will disseminate potentially market-moving or material, non-public information selectively to registrants (or any other soliciting persons) before they otherwise would disseminate such information to their clients.

To further address concerns raised by commenters, we are also adopting new 17 CFR 240.14a–2(b)(9)(vi) ("Rule 14a–2(b)(9)(vi)"), which excludes from the requirements of Rule 14a–2(b)(9)(ii) any portion of the proxy voting advice that makes a recommendation, as well as any analysis and research underlying such recommendation that is furnished along therewith, as to a solicitation subject to Rule 14a–3(a)[401]:

(A) To approve any transaction specified in Rule 145(a) of the Securities Act; [402] or

(B) By any person or group of persons for the purpose of opposing a solicitation subject to Regulation 14A by any other person or group of persons.[403]

As a result of new Rule 14a–2(b)(9)(vi), proxy voting advice businesses would be permitted (but not required) to adopt written policies and procedures pursuant to which the businesses would not make available to registrants any portion of the proxy voting advice relating to M&A transactions and contested matters at or prior to the time such advice is disseminated to clients and to exclude the registrant's response to such advice from the requirement of Rule 14a–2(b)(9)(ii)(B). To be eligible to rely on Rule 14a–2(b)(9)(vi), a proxy voting advice business must be providing advice with respect to a solicitation subject to Rule 14a–3(a). This requirement is intended to limit the scope of Rule 14a–2(b)(9)(vi) to proxy voting advice with respect to solicitations that are subject to the Federal proxy rules' information and filing requirements, including the requirement to file and furnish a definitive proxy statement. By contrast, proxy voting advice businesses providing advice with respect to any exempt solicitations (including solicitations as to M&A transactions or contested matters) would be ineligible to rely on the exception in Rule 14a–2(b)(9)(vi).

For the avoidance of doubt, this exception from the requirements of Rule 14a–2(b)(9)(ii) applies only to the portions of the proxy voting advice relating to the applicable M&A transaction [404] or contested matters and not to proxy voting advice regarding other matters presented at the relevant meeting. If, therefore, there is a shareholder meeting at which the only items presented for approval are the applicable M&A transaction or contested matters, a proxy voting advice business could have written policies and procedures that permit the entirety of the proxy voting advice provided with respect to that meeting to be excluded from the requirements set forth in Rule 14a–2(b)(9)(ii). If, however, additional matters are presented for shareholder approval at such meeting, then only the portion of the proxy voting advice provided with respect to the applicable M&A transaction or contested matters could be excluded from the requirements set forth in Rule 14a–2(b)(9)(ii).

We understand that proxy voting advice businesses often provide their proxy voting advice on all matters for which security holders are solicited at a particular meeting (*e.g.*, contested and uncontested matters, M&A- and non-M&A-related matters, etc.) together in a single report.[405] If a proxy voting advice business takes this approach but wishes to avail itself of the exception set forth in Rule 14a–2(b)(9)(vi), it can do so, for example, by redacting the portion of the report that contains proxy voting advice as to the applicable M&A transaction or contested matters in the version of such report that is provided to a registrant pursuant to Rule 14a–2(b)(9)(ii)(A). We further understand that at least one proxy voting advice business currently provides its clients with a separate, standalone report that provides recommendations only with respect to the M&A transactions or contested matters presented at the meeting.[406] If a proxy voting advice business adopts this approach with respect to M&A transactions and contested matters, then, under Rule 14a–2(b)(9)(vi), the requirements of Rule 14a–2(b)(9)(ii) would not be applicable to such standalone report. Finally, to the extent that a proxy voting advice business finds it too burdensome to either redact or bifurcate its reports, it is not required to avail itself of the exception set forth in Rule 14a–2(b)(9)(vi). Instead, the proxy voting advice business can choose to subject all of its proxy voting advice—including its advice as to the applicable M&A transaction and contested matters—to the requirements of Rule 14a–2(b)(9)(ii), subject to the proxy voting advice business's obligation to safeguard material, non-public information in its possession.[407]

As with proxy voting advice that is based on a custom policy, proxy voting advice that is excluded from the scope of Rule 14a–2(b)(9)(ii) pursuant to new paragraph (vi) will constitute a "solicitation" subject to Rule 14a–9. Similarly, persons who provide such advice in reliance on the exemptions in either Rule 14a–2(b)(1) or (b)(3) must comply with the conflicts of interest disclosure requirements set forth in new Rule 14a–2(b)(9)(i).

d. Response to Constitutional Objections

Some commenters raised First Amendment objections to the proposed amendments.[408] Their concerns focused primarily on the proposed registrant review and feedback provisions and the requirement that proxy voting advice businesses include in their advice a hyperlink to the registrant's response. The final amendments incorporate substantial modifications that address these concerns.

As discussed above, the proposed amendments requiring that proxy voting advice businesses give registrants an opportunity to review and provide feedback on their advice before the advice is disseminated to clients have not been included in the final amendments. Under the final amendments, proxy voting advice businesses can satisfy Rule 14a–2(b)(9)(ii)(A) by ensuring that their advice is made available to registrants at or prior to the time when such advice is disseminated to the proxy voting advice business's clients.[409]

Commenters also argued that requiring proxy voting advice businesses to share with registrants proxy voting advice that is based on custom policies would unconstitutionally compel them to disclose confidential client information.[410] Our decision to exclude such advice from Rule 14a–2(b)(9)(ii) should eliminate that concern.[411] Moreover, under the safe harbor in Rule 14a–2(b)(9)(iii), a proxy voting advice business has no obligation to provide a copy of its advice to a registrant unless such registrant acknowledges certain limits on its use of the advice.[412] Nor must a proxy voting advice business that avails itself of such safe harbor share its proxy voting advice if the registrant files its definitive proxy statement less than 40 calendar days before the shareholder meeting.

In addition, we have replaced the proposed requirement that proxy voting advice businesses include in their proxy voting advice a hyperlink to the registrant's response with a principles-based obligation to adopt policies and procedures reasonably designed to ensure that proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of the registrant's written response in a timely manner. Rule 14a–2(b)(9)(ii)(B) gives proxy voting advice businesses flexibility in determining how to achieve compliance with this requirement in the manner best suited to their business. They also have the option of relying on the safe harbor set forth in Rule 14a–2(b)(9)(iv), which involves adopting policies and procedures to provide clients a hyperlink to the registrant's written response once the registrant gives notice that a response has been filed. However, Rule 14a–2(b)(9)(ii)(B) does not mandate that specific approach as a condition of the exemption.[413]

[397] *See, e.g.*, letter from Glass Lewis II ("[O]ur experience is that contested situations are often much more fluid with both sides making supplemental filings on a continuing basis as the meeting date approaches.").

[398] *See, e.g., id.* ("Glass Lewis' data shows that report preparation and delivery timing varies significantly for mergers and acquisitions and other special situations. On average, proxy research reports were delivered to clients 14 days before the meeting date [in] M&A transactions and 13 days in contested situations.").

[399] *See supra* note 279 and accompanying text. *See also* letters from ISS (stating that the proposal would hinder "the ability of proxy advice to be appropriately responsive to important and often fast-moving situations such as proxy fights and contested mergers and acquisitions"); Glass Lewis II ("[I]t is important for a proxy advisor, when appropriate to best meet its clients' needs, to be able to defer providing its advice until near-final information is available and to be able to quickly amend already-provided advice, as needed.").

[400] *See* letters from CII I ("It is not clear whether the PA Proposal creates the potential for insider trading on certain market-moving recommendations and related analysis, particularly in connection with mergers and acquisitions (M&A), and how the SEC staff thought about such a risk in proposing the five-day review and 'final notice' periods."); Elliott I ("The risks of insider trading and leaks involving proxy voting advice are also higher when a shareholder vote involves a material event. The Proposal would put the draft proxy voting advice—potentially market-moving information—in the hands of issuers before it is provided to the investors who will act on it. This selective disclosure would necessarily increase the risk that the information will be misused or leaked, whether accidentally or deliberately."); ISS (noting that it currently "safeguard[s] [material, non-public information] by not pre-releasing potentially market-moving draft reports and vote recommendations" and allowing "selected issuers a limited review right of draft reports only for annual meetings, not special meetings" and asserting that the proposal "mis[es] significant concerns about confidentiality" and "selective disclosure of material non-public information"); Glass Lewis II ("[W]e note that commentators have raised significant questions about how the advance knowledge gained in the review processes could be misused in contested situations that should be addressed and resolved before adopting any rule mandating review in this context."). As they likely are already aware (based on the concerns expressed in the foregoing comment letters), we remind proxy voting advice businesses that they have a responsibility to safeguard any material, non-public information in their possession. Although that responsibility is heightened in the context of shareholder meetings regarding M&A transactions or contested matters, when such information is particularly sensitive and potentially market-moving, we expect proxy voting advice businesses to discharge that responsibility in all situations.

[401] 17 CFR 240.14a–3(a).

[402] Rule 14a–2(b)(9)(vi)(A). Rule 145(a) lists and describes certain M&A transactions that are broadly categorized as reclassifications, mergers of consolidation, and transfers of assets. *See* 17 CFR 230.145(a).

[403] Rule 14a–2(b)(9)(vi)(B).

[404] We recognize that a registrant or other soliciting person may present at the shareholder meeting other matters that, while not directly approving an M&A transaction or a contested matter, are nevertheless closely related to such transaction or contested matter. For example, a registrant's definitive proxy statement may seek approval of a proposed M&A transaction, approval of the issuance of the registrant's securities to finance the M&A transaction, and an advisory vote on the "golden parachute" payments to be made in connection with the M&A transaction. In such a situation, the latter two matters may be sufficiently integral to the M&A transaction such that redaction of the proxy voting advice on the M&A transaction alone would render the proxy voting advice on the remaining matters to be confusing for a registrant reading such advice. In such a case, the Rule 14a–2(b)(9)(vi) exception would be available for all three matters. The determination of whether a matter is sufficiently integral to an M&A transaction or contested matter to fall within the Rule 14a–2(b)(9)(vi) exception will depend on the particular facts and circumstances.

[405] Proposing Release at n.112 ("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 . . . .").

[406] *See* ISS, Special Situations Research, *available at https://www.issgovernance.com/solutions/governance-advisory-services/special-situations-research/* (last visited on May 28, 2020).

[407] If a proxy voting advice business decides not to avail itself of the exception set forth in Rule 14a–2(b)(9)(vi) and subjects its advice as to the applicable M&A transaction or contested matter to Rule 14a–2(b)(9)(ii), we believe that many of the concerns commenters expressed will be mitigated by the changes we made from the proposal. For example, to the extent that proxy voting advice businesses generally deliver their advice with respect to M&A transactions or contested matters to clients with less lead time before the applicable meeting, the principles-based requirements of Rule 14a–2(b)(9)(ii)(A) allows proxy voting advice businesses to design and implement policies and procedures that work best for their clients' needs and timing concerns. In addition, to the extent that proxy voting advice businesses amend their advice with respect to M&A transactions or contested matters in light of subsequent events, Rule 14a–2(b)(9)(ii)(A) does not require that proxy voting advice businesses make available to registrants such amended advice.

[408] *See, e.g.*, letters from CFA Institute I; CII IV; CIRCA; Elliott I; Glass Lewis II; ISS; Interfaith Center II; New York Comptroller II; NorthStar; Shareholder Rights II; Washington State Investment; ValueEdge III (stating that it has contacted the Department of Justice to review this proposal and recommends the Commission do the same). Most of these commenters generally opposed the proposed amendments on Constitutional grounds. Further, to the extent such commenters suggested potential alternative regulatory solutions, no commenters offered a more tailored solution that we believe would still achieve the objectives of this rulemaking.

[409] Rule 14a–2(b)(ii)(A). *See also supra* note 342 and accompanying text. We note that at least one proxy voting advice business already makes its proxy reports available for purchase by registrants upon their release to client. *See* Glass Lewis: Purchase a Proxy Paper, *available at https://www.glasslewis.com/request-a-proxy-paper-or-alert/* (last visited on May 26, 2020).

[410] *See supra* note 408.

[411] *See* Rule 14a–2(b)(9)(v).

[412] We also believe that these modifications from the proposal—among others, the fact that proxy voting advice businesses are not required to give registrants an opportunity to review proxy advice before its dissemination to clients and need not share the advice at all unless registrants acknowledge restrictions on its use—address the concerns raised by some commenters under the takings clause of the Fifth Amendment. *See* letters from CalPERS; ISS.

[413] For example, we understand that some proxy voting advice businesses already provide access to the registrant's proxy filings, including any supplemental proxy materials, automatically through their electronic platform. This kind of

Continued

We believe that the amendments, as modified from the proposal, are consistent with the First Amendment. In today's market, the proxy process represents the primary means by which registrants and their shareholders communicate to determine how the registrant governs itself. They exchange their respective views about the registrants' business operations and other registrant matters, and generally engage in discussions integral to the exercise of the shareholder franchise.[414] The Commission has a strong interest in ensuring that investors are able to obtain and evaluate information pertinent to proxy voting decisions before the vote is held.[415] The amendments are intended to facilitate the kind of robust discussion on which informed shareholder voting decisions depend in light of changing market conditions. Specifically, as discussed above, proxy voting advice businesses today are uniquely situated to influence the voting decisions of institutional investors, which hold an increasingly significant portion of shares in U.S. public companies.[416] The provision of proxy voting advice by these businesses therefore implicates a fundamental concern of our proxy rules.[417] Yet, because a significant percentage of proxy votes are typically cast shortly after a proxy voting advice business delivers its advice, and because currently proxy voting advice is not required to be publicly filed, many voting decisions are made before registrants have a meaningful opportunity to engage with that advice—for example, to address any material factual errors or omissions, or to offer views with respect to the proxy voting advice business's methodologies or conclusions—and to make investors aware of their views in time for investors to benefit from such an exchange.[418]

As previously discussed, the Commission has occasionally adjusted the proxy rules based on market developments to promote informed proxy voting decision-making.[419] The developments described above have convinced us of the need to update the application of the proxy rules to proxy voting advice businesses to facilitate the kind of robust discussion that would be possible at a meeting before a vote occurs. But at this time we do not believe it is necessary to subject proxy voting advice businesses to the full panoply of information and filing requirements that apply to registrants when seeking proxy authority. While registrants must publicly file soliciting materials and disseminate them to all shareholders, the Commission believes its objectives with respect to proxy voting advice businesses can be achieved by more tailored and far less burdensome and intrusive means.

We are therefore adopting amendments that allow proxy voting advice businesses to continue to be exempt from the filing and information requirements of the proxy rules, conditioned on their inclusion in the proxy voting advice of the conflicts of interest disclosure specified in Rule 14a–2(b)(9)(i) and their adoption and public disclosure of policies and procedures specified in Rule 14a–2(b)(9)(ii).[420] These principles-based requirements are tailored to minimize the burden on proxy voting advice businesses, while still directly advancing the Commission's regulatory objectives.

Although some commenters argued that the proposed amendments discriminated based on viewpoint,[421] our decision to impose exemption conditions on proxy voting advice businesses is unrelated to their viewpoint or message. The conditions apply regardless of the position a proxy voting advice business takes on any particular matter, and regardless of whether voting advice is supportive or adverse to registrants or to others. Proxy voting advice is subject to our proxy rules because it constitutes a "solicitation" under the Exchange Act. We have tailored the application of those rules to accommodate the unique business model of proxy voting advice businesses while also accounting for the consequential role those businesses have come to play in the proxy process.[422] The amendments to the proxy rules that we adopt in this document—like the rules that apply to registrants and other interested parties under the comprehensive regulatory scheme governing the proxy solicitation process—are intended to facilitate investor access, in a timely manner, to more accurate, complete, and transparent information and robust debate, as would occur at a meeting where shareholders are physically attending and participating. Indeed, the exemption conditions for proxy voting advice apply regardless of the content of the advice on any matter, and far from disapproving of the speech of proxy voting advice businesses, the Commission has recognized the important function proxy voting advice businesses serve in today's markets to some investors.[423]

D. Amendments to Rule 14a–9

1. Proposed Amendments

Rule 14a–9 prohibits any proxy solicitation from containing false or misleading statements with respect to any material fact at the time and in light of the circumstances under which the statements are made.[424] In addition, such solicitation must not omit to state any material fact necessary in order to make the statements therein not false or misleading.[425] 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."[426] 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.[427] We continue to believe that subjecting proxy voting advice businesses to the same antifraud standard as registrants and other persons engaged in soliciting activities, including those engaged in exempt solicitations, is appropriate in the public interest and for the protection of investors. Indeed, the Commission recently issued guidance specifically addressing the application of Rule 14a–9 to proxy voting advice,[428] stating that "any person engaged in a solicitation through proxy voting advice must not make materially false or misleading statements or omit material facts, such as information underlying the basis of advice or which would affect its analysis and judgments, that would be required to make the advice not misleading."[429] To illustrate this point, the Commission gave a list of examples of types of information that a provider of proxy voting advice should consider disclosing in order to avoid a potential violation of Rule 14a–9.[430] This included the methodology used to formulate proxy voting advice, sources of information on which the advice is based, and material conflicts of interest that arise in connection with providing proxy voting advice, without which the advice could be misleading, depending on the specific statements at issue.[431]

Currently, the text of Rule 14a–9 provides four examples of things that may be misleading within the meaning of the rule, depending upon particular facts and circumstances.[432] 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.

The Commission proposed to amend this list of examples in Rule 14a–9 to include certain additional types of information that a proxy voting advice business may, depending on the particular facts and circumstances, need to disclose to avoid potentially violating the rule. As proposed, and consistent with the Commission's recent guidance, this included the proxy advice business's methodology, sources of information and/or conflicts of interest to the extent that, under the particular facts and circumstances, the omission of such information would be materially misleading.

In addition, the Commission proposed to amend Rule 14a–9 to address concerns that have arisen 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.[433] The Commission explained that, without additional context or clarification, some 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 proxy voting advice business's determination that the registrant did not satisfy the specific 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 some 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 disclosure, clients are led to mistakenly believe that the unique criteria used by the proxy voting advice businesses were approved or set by the Commission.

Accordingly, the Commission proposed to add as an example in Rule 14a–9 of what may be misleading within the meaning of the rule, depending upon the particular facts and circumstances, the failure to disclose the use of standards or requirements in proxy voting advice that materially differ from relevant standards or requirements that the Commission sets or approves.[434]

2. Comments Received

Commenters were divided in their views about the proposed amendment.[435] Those in favor of the proposal thought it would have a beneficial impact, reasoning that it would tend to improve the quality of voting advice by making proxy voting advice businesses more accountable for any misleading statements in their advice[436] and incentivizing them to provide more robust information about their methods and sources so that their clients would be in a better position to assess the businesses' recommendations and make informed voting decisions.[437]

approach would generally be consistent with the principle.

[414] *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 14 n.10 (1986).

[415] Communications Among Shareholders Adopting Release at 48277; Concept Release at 42983; *see also Business Roundtable*, 905 F.2d at 410 ("The goal of federal proxy regulation was to improve [communications with potential absentee voters] and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting.").

[416] *See supra* note 18.

[417] *See supra* notes 6 through 17 and accompanying text.

[418] *See supra* note 373 and accompanying text.

[419] *See supra* notes 33–35 and accompanying text. Contrary to the suggestion of some commenters, the Commission's measured pursuit of a similar objective in the amendments adopted in this document does not contradict our past recognition that applying governmental filing requirements to every communication among shareholders and other parties on matters subject to a proxy vote would raise First Amendment concerns. *See supra* note 270 and accompanying text.

[420] *See supra* Sections II.B.3; II.C.3.

[421] *See, e.g.*, letters from Better Markets (expressing concern that apprehensions regarding the accuracy of proxy voting advice businesses' advice have been driven by potentially self-interested corporate management that view proxy voting advice businesses as adversarial); CalPERS; Florida Board; Glass Lewis II; ISS; NYC Comptroller; New York Comptroller II; Public Citizen; Segal Marco II; TRP.

[422] *See SEC* v. *Wall Street Publishing Inst., Inc.*, 851 F.2d 365, 372 (D.C. Cir. 1988) ("Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government, . . . and regulation of such communications has been upheld [as consistent with the First Amendment]."); *cf. Full Value Advisors, LLC* v. *SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011) ("Securities regulation involves a different balance of concerns and calls for different applications of First Amendment principles.") (internal quotation marks omitted).

[423] *See supra* Section II.A.3.

[424] 17 CFR 240.14a–9. *See also* Exchange Act Release No. 34–1350, 1937 WL 29099 (Aug. 13. 1937) ("The purpose of [the Commission's proxy] rules is to prevent the dissemination to the security holders and to the general public of untruths, half-truths, and otherwise misleading information which would stand in the way of a fair appraisal of a plan upon its merits by the security holders.").

[425] 17 CFR 240.14a–9.

[426] *See* 1979 Adopting Release at 48942.

[427] *See* Concept Release at 43010.

[428] *See* Question and Response 2 of *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 and Guidance").

[429] *Id.* at 12.

[430] *Id.* The Commission also noted that some proxy voting advice businesses currently may be providing some of the disclosures described in the list of examples. *Id.* at n. 33.

[431] *Id.*

[432] Rule 14a–9 provides a note preceding the list of examples that reads: "The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section." This note and the examples provided were adopted in their current form by the Commission in 1956. *See* Release No. 34–5276 (Jan. 17, 1956) [21 FR 577 (Jan. 26, 1956)], 1956 WL 7757.

[433] *See* Proposing Release at 66538 n.160.

[434] *See* note (e) to proposed Rule 14a–9. Examples of standards or requirements that the Commission approves are the listing standards of the national securities exchanges, such as the New York Stock Exchange (NYSE). The Commission supervises, and is authorized to approve rules promulgated by, the NYSE and other national securities exchanges pursuant to Section 19 of the Exchange Act.

[435] *See* letters from commenters supporting the proposal, *e.g.*, ACCF (asserting that the proposals will increase accountability); Axcelis; John D. Campbell, Vice President, Government Relations, Ball Corporation (Jan. 31, 2020) ("Ball Corp."); BIO; BRT; CCMC; CGC; Charter; Ecolab; ExxonMobil; FedEx; GM; IBC; NAM; Nareit; Nasdaq; SCG; James L. Setterlund, Executive Director, Shareholder Advocacy Forum (Feb. 3, 2020) ("Shareholder Advocacy"); TechNet. *But see* letters from commenters opposing the proposal, *e.g.*, Baillie Gifford; CalPERS; CII IV; CIRCA; Elliott I; Glass Lewis II; ISS; MFA & AIMA; PIAC II (although it agreed that proxy voting advice businesses should disclose material information relating to their methodology, sources of information, and conflicts of interest, the commenter indicated that it was satisfied with the disclosures currently provided and did not believe specific regulation on this point was necessary).

[436] *See, e.g.*, letters from ExxonMobil (supporting the proposal's clarification that Rule 14a–9 applies to material information concerning a proxy voting advice business's methodology, sources of information, and conflicts of interest); GM.

[437] *See, e.g.*, letters from BRT ("[I]t is important that proxy advisors not omit the disclosure of information underlying the basis of their advice or which would affect its analysis and judgment"); ExxonMobil; Nasdaq ("We agree with the Commission that the amendments are in the public interest, promote investor protection, and help ensure that investors are provided the information they need to make fully informed voting decisions."); SCG.

Several such commenters voiced concerns that proxy voting advice businesses were not sufficiently transparent about their methodologies, models, and formulas used to generate their recommendations.[438] Some commenters also believed that proxy voting advice businesses do not adequately adjust their methodologies to take into account the unique circumstances of different companies and therefore more transparent disclosure of methodologies would help investors discern the extent to which voting advice may be based on a ''one-size-fits-all'' approach.[439]

Other commenters specifically approved of the proposed amendment's reference to a proxy voting advice business's use of standards that materially differ from relevant Commission standards or requirements.[440] These commenters were concerned that not all investors were fully aware when proxy voting advice businesses applied their own analytical standards that differed from the Commission's or other applicable regulatory standards.[441]

On the other hand, some commenters contended that, in general, the proposed amendment to Rule 14a–9 would heighten legal uncertainty and litigation risk for proxy voting advice businesses because it would broaden the concept of materiality and create a new source of liability for proxy voting advice businesses, the scope of which is not sufficiently clear.[442] Two commenters also suggested that the proposed amendment may be prohibited by the First Amendment.[443]

Commenters that opposed the proposed amendment's reference to a proxy voting advice business's use of standards that materially differ from relevant Commission standards or requirements argued that it was unnecessary and based on the flawed premise that clients are either unaware of, or lack the sophistication necessary to appreciate, the distinction between a company's failure to satisfy the particular analytical standards employed by a proxy voting advice business and a company's failure to comply with relevant regulatory standards.[444] Commenters made the point that most clients are well aware of such differences and often maintain custom policies that are more rigorous than relevant regulatory standards and require the proxy voting advice business to apply such policies when preparing their proxy voting advice.[445] Moreover, commenters stated that in many cases clients hire proxy voting advice businesses precisely because they are aware and approve of these businesses using certain standards that exceed applicable regulations.[446] In addition, other commenters asserted that the proxy voting advice businesses' disclosures about the use of differing standards were already sufficiently clear.[447]

Finally, some commenters recommended modifications to the proposal that would have added a number of specific examples to the list in Rule 14a–9 of information that may be material and needs to be disclosed in certain circumstances.[448] Others requested further clarification on questions related to the scope and application of the proposed amendment [449] or suggested that Rule 14a–9 be modified to exclude the content of recommendations or differences of opinion between management and proxy voting advice businesses.[450]

[438] *See, e.g.,* letters from BRT (''Proxy advisors offer little transparency into their internal standards, procedures, and methodologies. Neither ISS nor Glass Lewis fully discloses the methodologies used to develop their voting recommendations''); CEC; FedEx; GM; NAM; Nasdaq; TechNet.

[439] *See, e.g.,* letters from CCMC (noting that proxy voting advice businesses have been criticized for ''a one-size-fits-all approach of voting recommendations that ignores the unique characteristics and operations of individual companies and industries''); FedEx; Nasdaq; NAM; Nareit; TechNet (further noting that ''one-size-fits-all'' methodologies across different subject areas often fail to account for unique differences between companies).

[440] *See, e.g.,* letters from BRT; CCMC; GM (''[N]egative voting recommendations from a proxy advisor may not align with the Commission's requirements, which can mislead or cause confusion among proxy voters. We therefore believe that proxy voters should have the benefit of this additional context to ensure that they are fully informed and understand the standards employed by a proxy advisor when reviewing their voting recommendations.''); Nareit; Nasdaq (''In Nasdaq's own experience, ISS has determined that a director was not independent under its criteria even though the director was independent under Nasdaq and SEC rules.''); SCG.

[441] *See, e.g.,* letters from BIO (stating ''that it is important for proxy voting advice businesses to clarify when a negative voting recommendation is based on the proxy voting advice business's own determination that a registrant's conduct or disclosure is inadequate, notwithstanding that the conduct or disclosure meets applicable SEC requirements''); BRT (''Business Roundtable member companies are concerned that, when making recommendations, proxy advisors rely upon information not included in the company's public SEC filings or on factors other than the actual regulatory requirements to which companies are subject. For instance, proxy advisors have their own guidelines for determining the independence of directors. This has resulted in situations where a proxy advisor recommends against a director's election because it decided that the director is not independent under its standards, despite the fact that the company's board of directors—carrying out its fiduciary duties— determined that the director in question was independent under the Commission's requirements, the company's stock exchange listing rules and its corporate governance guidelines.''); Charter; SCG (asserting that proxy voting advice businesses ''apply standards or policies that differ from SEC and/or stock exchange listing requirements frequently enough that it strains credulity to believe that the reasonable investor always understands whether a voting recommendation reflects (non)compliance with existing rules/regulations/standards or simply proxy advisor judgment'').

[442] *See, e.g.,* letters from Carl C. Icahn (Feb. 7, 2020) (''C. Icahn''); CalPERS; CIRCA; Elliott I; Glass Lewis II (asserting that the Commission does not adequately explain how, for example, a failure to disclose information regarding ''use of standards that materially differ from relevant standards or requirements that the Commission sets or approves'' could mislead shareholders); MFA & AIMA.

[443] *See* letters from CII IV; ISS. Our clarification below that differences of opinion are not actionable under the final amendment to Rule 14a–9 resolves these constitutional concerns.

[444] *See, e.g.,* letters from CalPERS (''We think it would be rare for the professionals that actually use proxy voting advice to make such a mistaken inference.''); CII IV; Glass Lewis II.

[445] *See, e.g.,* letters from CalPERS (''Existing clients . . . already know when proxy voting advice businesses produce their own guidance as opposed to report on the minimal requirements of the SEC.''); CII IV; Glass Lewis II.

[446] *See, e.g.,* letter from PIAC II (''Proxy advisors are paid to make recommendations based on governance best practices rather than legal or regulatory minimums and PIAC members expect the standards of proxy advisors to exceed those minimums.'').

[447] *See, e.g.,* letters from CalPERS (''[The Proposing Release] provides examples highlighting a problem that does not exist in reality because proxy voting advice businesses already distinguish their advice from SEC guidance . . . Competent lay people doing a minimal amount of research will find that proxy advisors routinely inform clients about where the standards come from because clients want to know.''); CII IV (noting that the Commission did not produce examples of research reports to support its assertions in the Proposing Release).

[448] *See, e.g.,* letters from BRT; CCMC (''[W]e would expand the 'relevant standards or requirements' to also include those set by any relevant stock exchange. As another example, we would also list a proxy advisor's failure to disclose whether a registrant disputes any findings in the proxy advisor's report or whether a proxy advisor diverges from its own publicly disclosed guidelines.''); Exxon Mobil (suggesting that the rules should also address proxy voting advice that is ''not designed to maximize shareholder value, like SRI specialty reports'' and require ''risk factor'' style disclosures about the value of an investment when a proxy voting advice businesses applies a standard other than shareholder value); Nareit (requesting the Commission to expand the list to require disclosure ''when voting is predicated on an advisory firm's standard that materially differs from relevant statutory requirements of the state in which the issuer is chartered''); Nasdaq; TechNet.

[449] *See, e.g.,* letters from Baillie Gifford (inquiring, among other things, whether failure to disclose conflicts of interest would be a breach of Rule 14a–9); K. Beaugez; BRT (''Additionally, the Commission should specifically make clear whether these anti-fraud provisions [of Rule 14a–9] apply when proxy advisors' voting reports include information, statements or opinions that have not been included in material filed with the Commission''); Exxon Mobil; CIRCA.

[450] *See* letter from PRI II.

3. Final Amendments

We are adopting amendments to Rule 14a–9 that will add to the examples of what may be misleading within the meaning of the rule, largely as proposed, but with one modification in response to comments received. Consistent with the Commission's guidance on proxy voting advice,[451] the Note to Rule 14a–9 will include new paragraph (e) to provide that the failure to disclose material information regarding proxy voting advice, ''such as the proxy voting advice business's methodology, sources of information, or conflicts of interest'' could, depending upon particular facts and circumstances, be misleading within the meaning of the rule. However, for the reasons given in the discussion that follows, new paragraph (e) will not include the proposed clause ''or use of standards that materially differ from relevant standards or requirements that the Commission sets or approves.''

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. Consistent with the Commission Interpretation on Proxy Voting Advice, the final amendments are designed to further clarify the potential implications of Rule 14a–9 for proxy voting advice specifically, and to help ensure that proxy voting advice businesses' clients are provided with the material information they need to make fully informed decisions.

Although we acknowledge commenters' concerns around the potential for heightened litigation risk associated with the proposed changes to Rule 14a–9,[452] we reiterate that Rule 14a–9 is grounded in materiality, and amending the rule to include updated examples of potentially misleading disclosure, depending on the facts and circumstances, in no way changes its application or scope. The amendment to Rule 14a–9 does not broaden the concept of materiality [453] or create a new cause of action, as some have suggested. As discussed above, the Commission has long taken the view that proxy voting advice generally constitutes a ''solicitation.'' [454] Because Rule 14a–9 applies to all solicitations, even those made in reliance on an exemption from the information and filing requirements of the federal proxy rules, proxy voting advice businesses and other market participants should have been on notice that Rule 14a–9 applies to proxy voting advice. The amendment also does not make ''mere differences of opinion'' actionable under Rule 14a–9.[455] Rather, it further clarifies what has long been true about the application of Rule 14a–9 to proxy voting advice and, more generally, proxy solicitations as a whole: No solicitation may contain any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.[456] The addition of paragraph (e) to the Note to Rule 14a–9, the substance of which has not been updated for over six decades, to account for contemporary market practices (including the prevalent use of proxy voting advice by institutional investors and others),[457] further clarifies that proxy voting advice is subject to Rule 14a–9. The addition of paragraph (e) also underscores that the examples are among the types of information that may provide material context without which, depending on the facts and circumstances, the proxy voting advice may run afoul of the rule. The examples are illustrative only, and are not intended to be exhaustive or absolute, or supersede the materiality principle or the facts and circumstances analysis required in each particular case.

As noted above, however, we have determined not to adopt the proposed example related to the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves. To the extent that a proxy voting advice business does not make clear to its clients that it is making a negative voting recommendation based on its own criteria, notwithstanding that the registrant has complied with the applicable standards established or approved by the Commission, there is a risk that the proxy voting advice business's clients may misunderstand the basis for the proxy voting advice business's recommendation. The proposed amendment regarding use of standards or requirements in proxy voting advice that materially differ from relevant standards or requirements that the Commission sets or approves was designed to help ensure that proxy voting advice businesses' clients are provided the information they need to make a ''fair appraisal'' [458] of the recommendation and to clarify the potential implications of Rule 14a–9.

Nevertheless, we understand the concerns expressed by some commenters who asserted that the perceived lack of clarity regarding the scope of the proposed clause ''or use of standards that materially differ from relevant standards or requirements that the Commission sets or approves,'' which was not discussed in the earlier guidance, may increase legal uncertainty and litigation risks to both proxy voting advice businesses and registrants, and that the lack of legal certainty could affect the quality of analyses provided by proxy voting advice businesses.[459] We continue to believe that there could well be occasions where, for example, the omission or distortion of essential context from a proxy voting advice business's explanation of its methodologies may be misleading under a materiality principle and the particular facts and circumstances, such that a shareholder's ability to make an informed voting decision is subverted. However, we also believe that the existing principles of Rule 14a–9 are sufficiently robust to encompass such a situation, which ultimately will come down to a question of facts and circumstances. For that reason, we do not think it is necessary to memorialize this potentially nuanced situation with an illustrative example that, because it is by definition a generalization, could create more confusion than clarity.

Therefore, we are adopting the amendment to Rule 14a–9 without this example. However, this does not negate the fact that Rule 14a–9's prohibition against materially misleading solicitations applies to proxy voting advice where the disclosures are so materially deficient that the investor could not be reasonably expected to understand that the proxy voting advice business is applying a different standard to its analysis, and therefore may vote based on such misapprehension. For similar reasons, we are also not electing to expand the list of examples beyond

[451] *See supra* notes 428 through 431 and accompanying text.

[452] *See, e.g.,* letters from C. Icahn; CalPERS; CIRCA; Elliott I; Glass Lewis II; MFA & AIMA; Minerva I.

[453] *See* letter from CalPERS.

[454] *See supra* notes 149 through 154 and accompanying text.

[455] *See, e.g.,* letter from PRI II (''[The Commission] . . . should . . . narrow the scope of the Proposed Rule to avoid chilling litigation over proxy advice, for example, by ensuring that Rule 14a–9 does not cover the content on recommendations or mere differences of opinion between management and proxy firms.'').

[456] *See* Rule 14a–9.

[457] *See supra* note 432.

[458] *See supra* note 424.

[459] *See, e.g.,* letters from C. Icahn; CalPERS; Glass Lewis II; MFA & AIMA.

what was proposed, as suggested by some commenters.[460]

E. Compliance Dates

The Commission proposed a one-year transition period after the publication of the final rule in the **Federal Register** to give affected parties sufficient time to comply with the proposed new requirements, including the development of any necessary processes and systems.[461]

Some commenters, however, thought that a longer transition period would be necessary given their expectation that affected parties, particularly proxy voting advice businesses, would need to devote significant time and resources in order to bring their systems and processes into compliance.[462] As an alternative, two commenters suggested extending the transition period to eighteen months.[463] Other commenters recommended that small entities be given an extended timeframe for compliance.[464] One commenter also suggested that the Commission consider a phased implementation schedule that would not interfere with the peak of proxy season that typically occurs during the spring each year.[465]

We continue to believe that a transition period for compliance with new Rule 14a–2(b)(9) is appropriate. Based on commenter feedback, as well as the Commission's interest in limiting unnecessary disruptions during the peak proxy season, proxy voting advice businesses subject to the final rules will not be required to comply with the amendments to Rule 14a–2(b)(9) until December 1, 2021. We believe that the length of the transition period will accommodate the need of affected parties to have sufficient time to prepare for compliance with Rule 14a–2(b)(9) while also recognizing that our adoption of a principles-based framework should allow proxy voting advice businesses and other parties the flexibility to leverage their existing practices and mechanisms to more efficiently integrate their operations with the new requirements. The compliance date for Rule 14a–2(b)(9) is intended to sufficiently precede the typical commencement of the proxy season for 2022, so as to minimize disruption to the normal functioning of the proxy system. However, we welcome early compliance with the amendment. We note that the transition period only applies with respect to the amendments to Rule 14a–2(b)(9) and does not extend to the amendments to Rule 14a–1(l) and Rule 14a–9. Because these other amendments codify existing Commission interpretations and guidance, and do not impose new obligations that necessitate significant time for preparation, we do not believe the same rationale for a transition period exists.

III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application. For example, the amendments to Rule 14a–2(b)(9)(i) operate independently from the amendments to Rule 14a–2(b)(9)(ii), and both provisions operate independently from the amendments to Rules 14a–1(1) and 14a–9.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

The discussion below addresses the economic effects of the amendments, including their anticipated costs and benefits, as well as the likely effects of the amendments on efficiency, competition, and capital formation.[466] We also analyze the potential costs and benefits of reasonable alternatives to the amendments. Where practicable, we have attempted to quantify the economic effects of the amendments; however, in certain cases, we are unable to do so because either the necessary data are unavailable or certain effects are not quantifiable. In the Proposing Release, we requested comment on our analysis of these effects. A few commenters provided quantitative estimates, and we have addressed and incorporated, where appropriate, those estimates into our analysis below. We also provide qualitative economic assessments for effects for which we are unable to provide quantitative estimates.

A. Introduction

We are adopting 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 on proxy voting advice businesses satisfying certain additional disclosure and procedural requirements. These conditions will require proxy voting advice businesses to provide enhanced conflicts of interest disclosure. They will also separately require proxy voting advice businesses to: (i) Adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business's proxy voting advice is made available to registrants at or prior to the time when such advice is disseminated to the proxy voting advice business's clients; and (ii) adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the shareholder meeting. We also are codifying the Commission's interpretation that, as a general matter, proxy voting advice constitutes a solicitation within the meaning of Exchange Act Rule 14a–1(l). Finally, we are amending 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 material information related to the proxy voting advice business's methodology, sources of information, or conflicts of interest.

We have considered the economic effects of the final amendments, including their effects on competition, efficiency, and capital formation. The purpose of the final amendments is to help ensure that investors who use proxy voting advice have access to more complete, accurate, and transparent information and are able to benefit from a robust discussion of views—similar to what is possible at a meeting where shareholders and other parties are physically attending and participating—when making their voting decisions. We generally expect the final amendments to reduce information asymmetries between proxy voting advice businesses and their clients by eliciting more tailored and comprehensive disclosure of conflicts of interest and by facilitating client access to more complete information on matters that are the subject of proxy voting advice. We also believe that the final amendments may mitigate certain agency costs associated with the clients' use of proxy advice voting businesses and thereby facilitate more efficient use of the services provided by such businesses while preserving their economies of scale.[467]

As a threshold matter, the relationship between a proxy voting advice business client and a proxy voting advice business is an example of an agency relationship. As in any principal-agent relationship, the agent (the proxy voting advice business) may not always act in the best interests of the principal (the client).[468] The conditions imposed on proxy voting advice businesses by the final amendments may reduce the costs that arise from this divergence of interests. For example, by requiring proxy voting advice businesses to provide clients with more tailored and comprehensive conflict of interest disclosure than is currently required, the amendments may make it possible for proxy voting advice businesses to more credibly reassure their clients that relevant conflicts have been disclosed, and potentially addressed (by reducing the ability of proxy voting advice businesses to obfuscate information about conflicts or selectively disclose conflicts), than is otherwise achieved by the current system of conflict disclosure. In addition, to the extent that relevant conflicts are better understood by a client as a result of the more tailored and comprehensive disclosure, the client will be better able to assess the objectivity of proxy voting advice against the influence of potentially competing interests and thus to monitor proxy voting advice business services. Moreover, by separately ensuring that registrants receive notice of proxy voting advice and a proxy voting advice business provides clients with a mechanism by which they can become more readily aware of registrant responses to that advice, the final amendments may reduce the costs clients might otherwise incur to acquire information relevant to assessing proxy voting advice and increase the efficiency of this segment of the proxy system. At the same time, the final amendments will likely impose certain additional direct costs on proxy voting advice businesses which may offset this reduction in agency costs. However, as we detail in later sections, we expect the flexibility afforded by the final amendments and current practices of at least the three major proxy voting advice businesses in the United States will serve to limit those direct costs.

As explained in more detail below, many of the economic effects of the amendments cannot be reliably quantified. Consequently, while we have attempted to quantify the economic effects expected from the amendments wherever practicable, much of the discussion remains qualitative in nature. Where we are unable to quantify the potential economic effects of the final amendments, we provide a qualitative assessment of these effects as well as the potential impacts of the amendments on efficiency, competition, and capital formation.

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

Every year, retail investors, institutional investors, and investment advisers face decisions on whether and how to vote on a significant number of matters that are subject to a proxy vote.[469] These matters range from the election of directors and the approval of equity compensation plans to shareholder proposals submitted under Exchange Act Rule 14a–8. In addition to matters presented at a company's annual shareholder meeting, investors and investment advisers also make 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, investment advisers and institutional investors play a large role in proxy voting for various reasons, including because institutional investors and clients of investment advisers individually or collectively own a large aggregate fraction of many U.S. public companies.[470] We understand that voting can be resource intensive for investors that hold or investment advisers that manage diversified portfolios. It involves organizing proxy materials, performing due diligence on portfolio companies and matters to be voted on, determining whether and how votes should be cast, and submitting proxy cards to be counted. Proxy voting advice businesses offer to perform a variety of tasks related to voting, including the following:

- Analyze and make voting recommendations on the matters presented for shareholder vote and included in the registrants' proxy statements;
- Execute proxy votes (or voting instruction forms) in accordance with their benchmark policy, a specialty policy, or a custom policy;[471]
- Assist with the administrative tasks associated with voting and keep track of the large number of voting determinations; and
- Provide research and identify potential risk factors related to corporate governance.

We also understand that, in the absence of the services offered by proxy voting advice businesses, investment advisers and other clients of these businesses may expend considerable resources to independently conduct the work necessary to analyze, recommend, and make voting determinations. As a consequence, we understand that some

[460] *See, e.g.,* letters from BRT; CCMC; CII IV; Exxon Mobil; NAM; Nareit; Nasdaq; TechNet.

[461] *See* Proposing Release at 66539.

[462] *See* letters from CalPERS; CII IV; Felician Sisters II; Glass Lewis II; Good Shepherd; IASJ; Interfaith Center II; New York Comptroller II; St. Dominic of Caldwell.

[463] *See* letters from CII IV; Glass Lewis II (additionally recommending that the effectiveness of final rules be delayed pending resolution of ongoing litigation that could impact the statutory and constitutional bases for the rulemaking).

[464] *See* letters from Felician Sisters II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.

[465] *See* letter from Glass Lewis II.

[466] Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] directs the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, 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.

[467] Researchers define a contract under which one or more persons (the principals) engage another person (the agent) to perform some service on their behalf as an agency relationship. ''Agency costs'' in the principal-agent relationship consist of: The cost to the principal of monitoring the agent to limit aberrant activities; ''bonding'' costs to the agent to reassure the client that the agent will not take certain actions that would harm the principal or that the principal will be compensated if the agent takes such actions; and the ''residual loss,'' or the loss of welfare to the principal from the divergence of activities by the agent from the interests of the principal. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. Fin. Econ. 305 (1976).

[468] For example, agents may benefit by enhancing revenues, decreasing costs, both, or by taking actions other than those that are in the principals' best interest. *Id.*

[469] 17 CFR 240.14a–8; *see, e.g.,* letters from Barbara Novick, Vice Chairman, BlackRock, Inc. (Feb. 3, 2020) (''BlackRock'') (''BlackRock acts as a fiduciary for its clients. In this capacity, we engage with thousands of companies globally and we vote in proxies at over 16,000 company meetings annually.''); NYC Comptroller (''For the year ending June 30, 2019, my office voted on 126,775 individual ballot items at 13,122 shareowner meetings in 86 markets around the world. . . . .''); *see also* letter in response to the SEC Staff Roundtable on the Proxy Process from Ohio Public Retirement (Dec. 18, 2018) (''OPERS receives in excess of 10,000 proxies in any given proxy season.'').

[470] *See supra* note 10 and accompanying text. *See also* Broadridge & PwC, 2019 *Proxy Season Review,* ProxyPulse (2019), at 1, *available at https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2019-review.pdf* (estimating that institutions own 70% of public company shares) (''Broadridge PwC 2019 Report''); Charles McGrath, *80% of Equity Market Cap Held by Institutions, Pensions & Investments* (Apr. 25, 2017), *available at https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions.*

[471] *See* letter from ISS.

investment advisers and institutional investors find it efficient to hire proxy voting advice businesses to perform various voting and voting-related services, rather than performing them in-house.[472] Proxy voting advice businesses generally are able to capture significant economies of scale that are not available to many investment advisers and institutional investors on an individual basis.[473]

In 2007, the U.S. Government Accountability Office ("GAO") found that among 31 institutions, including mutual funds, pension funds, and asset managers, large institutions relied less than small institutions on the research and recommendations offered by proxy voting advice businesses. Large institutions 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.[474] In contrast, small institutions 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.[475] The findings of a 2016 GAO study that surveyed 13 institutional investors were similar.[476]

As discussed in Section I above, proxy voting advice businesses have the potential to influence many investors' voting decisions and, as a result, the overall vote. Clients of proxy voting advice businesses number in the thousands, and they exercise voting authority or influence over a sizable number of shares that are voted annually. Commenters described the informational benefits that clients derive from proxy voting advice[477] and how proxy voting advice businesses enable them to make informed voting determinations on behalf of investors and beneficiaries.[478]

To the extent that proxy voting advice businesses influence voting decisions, they also may indirectly impose certain costs on shareholders. Recent theoretical research on the role of proxy voting advice suggests that the presence of proxy voting advice businesses may induce investors to over-rely on information produced by these businesses to make voting decisions. This over-reliance arises because shareholders do not internalize the benefits for other shareholders of their own independent research of matters put to a vote. Instead shareholders find it privately efficient to outsource the analysis of voting decisions to proxy voting advice businesses.[479] Additionally, if proxy voting advice businesses significantly influence voting,[480] registrants and other market participants may seek to engage with proxy voting advice businesses rather than engaging directly with investors or registrants. Thus, the presence of proxy voting advice businesses may negatively affect the ability of certain investors to engage with and influence registrants and other investors. On the other hand, from a transactions cost perspective, being able to engage with a few large and important intermediaries, compared to engaging bi-laterally with multiple shareholders, may be more efficient for registrants and investors.

Although the economic incentives to concentrate voting power and influence in proxy voting advice businesses are strong, research on the role of proxy voting advice businesses in influencing voting, however, has produced a wide range of results. For example, a number of studies suggest that proxy voting advice has substantial influence on proxy votes,[481] while others suggest a more limited influence.[482] We note that existing academic studies examine the relationship between proxy votes and proxy voting advice businesses' recommendations based on benchmark policies. The relationship between proxy votes cast and voting recommendations provided to clients using clients' custom policies has not, to date, been the subject of academic study.[483]

Research on the role of proxy voting advice businesses in proxy voting has also 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,[484] producing reports that contain inaccuracies, and utilizing one-size-fits-all methodologies when evaluating a diverse array of registrants or when providing services to a diverse array of clients.[485]

To assess the quality of voting advice, studies have sought to examine stock market reactions to registrants' announcements that they will adopt policies consistent with proxy voting advice businesses' recommendations.[486] These studies hypothesize that the value of such policies should be impounded in stock prices, and if investors expect adoption of a particular policy to increase the value of a registrant, an announcement that the registrant plans to adopt the policy should be associated with a positive stock price reaction. This reasoning assumes clients aim to increase a registrant's share price and that proxy voting advice businesses tailor voting recommendations to achieve this aim. Proxy voting advice businesses and certain of their clients, however, may have goals other than, or in addition to, maximizing the current value of a registrant's shares. Furthermore, the attribution of stock price reactions to the adoption of policies by a registrant may be challenging due to multiple announcements and other information about the registrant that may be released concurrently. Together, these limitations make it difficult for researchers to conclusively infer recommendation quality from stock market reactions to implementation of proxy voting advice business recommendations.[487]

2. Commenter Concerns Regarding the Rule's Economic Justification

In response to the Proposing Release, commenters expressed a range of views regarding the rule's economic justification. Some commenters asserted that there are failures in the market for proxy advice that justify the final rule.[488] In addition to a variety of anecdotal evidence, some commenters provided surveys of registrants,[489] corporate governance professionals,[490] and retail investors[491] that indicated concerns about factual inaccuracies and conflicts of interest in the proxy voting process.

Other commenters stated, generally, that there is no principal-agent problem or other market failure and that the proposed rule's economic analysis failed to describe or provide demonstrable evidence of a problem in the market for proxy advice that cannot be solved via contractual arrangements in the private sector, other market based mechanisms, or existing Commission rules (*e.g.*, Rule 206(4)–6 under the Investment Advisers Act).[492] For example, one commenter disputed the claims cited in the Proposing Release that proxy voting advice contains inaccuracies or errors significant enough to require regulatory intervention, stating that proxy voting advice businesses "have every incentive to conduct credible research and provide accurate recommendations."[493] Another commenter provided analysis showing that two proxy voting advice businesses are more likely to recommend their clients vote with management than a typical investor is to vote with management, casting doubt on claims that proxy voting advice businesses tend to encourage shareholders to oppose management proposals.[494] Another commenter provided independent analysis of the dynamics of proxy vote recommendations, showing that they change over time in response to events

[472] *See* Concept Release at 42983.

[473] *See* Chester S. Spatt, Proxy Advisory Firms, Governance, Market Failure, and Regulation 7 (2019), *available at https://www.milkeninstitute.org/sites/default/files/reports-pdf/Proxy%20Advisory%20Firms%20FINAL.pdf* ("Spatt (2019)"). Commenters also suggest that proxy voting advice businesses are an economically efficient means of collecting information and analyzing voting issues. *See, e.g.*, letter from CEC.

[474] *See* U.S. Gov't Accountability Office, GAO–07–765, Report to Congressional Requesters, Corporate Shareholder Meetings: Issues Relating to the Firms that Advise Institutional Investors on Proxy Voting, 17–18 (2007), *available at https://www.gao.gov/new.items/d07765.pdf* ("2007 GAO Report"); *see also* Letters in response to the SEC Staff Roundtable on the Proxy Process from BlackRock (Nov. 16, 2018) ("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 (Jan. 2, 2019) ("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."); Transcript of the Roundtable on the Proxy Process 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.").

[475] 2007 GAO Report, *supra* note 474, at 17–18.

[476] *See* 2016 GAO Report, *supra* note 141, at 2.

[477] *See* letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Inst. Investors (Feb. 20, 2020) ("CII VIII").

[478] *See, e.g.*, letters from MFA & AIMA; New York Comptroller II.

[479] *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 so the applicability of their results is limited by the extent to which investors have goals other than, or in addition to, share value maximization. The authors further assume that proxy advice is provided by a single monopolistic proxy advisory firm, and that 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 shows that proxy advisory services are valuable when ownership is sufficiently dispersed. In contrast, proxy advisory services are likely to have negative effects for companies with more concentrated ownership because they discourage independent information acquisition by shareholders. However, their results also imply that when ownership is very concentrated shareholders again find proxy advisory services to be valuable because each shareholder's vote is more likely to be pivotal.

[480] *See infra* notes 481 and 482.

[481] *See, e.g.*, Cindy R. Alexander et al., *Interim News and the Role of Proxy Voting Advice*, 23 Rev. Fin. Stud. 4419, 4422 (2010); Alon Brav et al., *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* (Columbia Bus. Sch., Research Paper No. 18–16, 2019) at 4, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101473* ("Brav et al. (2019)"); James R. Copland, David F. Larcker, & Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry* (Stanford Bus. Sch. Closer Look Series, May 30, 2018) at 3, *available at https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-72-big-thumb-proxy-advisory.pdf;* James R. Copland, David F. Larcker, & Brian Tayan, *Proxy Advisory Firms: Empirical Evidence and the Case for Reform*, Manhattan Institute (May 2018) at 6, *available at https://media4.manhattan-institute.org/sites/default/files/R-JC-0518-v2.pdf* ("Copland et al. (2018)"); Albert Verdam, *An Exploration of the Role of Proxy Advisors in Proxy Voting* (Working Paper, 2006) at 23, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=978835* ("Verdam (2006)"); *See* letter from Chong Shu, University of Southern California, Marshall School of Business (Jun. 22, 2020).

[482] *See* Stephen Choi, Jill Fisch, & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 Emory L.J. 869, 905–06 (2010). *See also* Brav et al. (2019), *supra* note 481, at 35. The authors find that larger mutual fund families cast votes "in ways completely independent from what are recommended by the advisors."

[483] Commenters stated that a large majority of proxy votes are cast by proxy advice business clients who provide custom policies to proxy voting advice businesses and, in return, receive customized voting recommendations based on these policies. *See* letter from ISS. To our knowledge, however, no academic study examines the relation between proxy votes and the voting recommendations provided under the client's custom policies. It is our understanding that clients who receive voting recommendations based on custom policies also receive the proxy voting advice business's benchmark reports.

[484] 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 at 42989. As a result, some proxy voting advice businesses provide advice regarding a registrant to their institutional investor clients on matters for which they may also provide consulting services to the registrant. One commenter submitted research that attempts to identify and quantify the impact of conflicts of interest on recommendations and the effect of competition between proxy voting advice businesses on the likelihood of biased recommendations. The research finds that competition reduces recommendations in favor of management, and that biased recommendations have negative effects on registrants. The ability to identify the provision of consulting services and to measure biases in recommendations, however, represents a significant data challenge for the estimation of the purported effects. *See* letter from Prof. Li.

[485] *See* letter from CCMC.

[486] *See generally* David F. Larcker, Allan L. McCall, & Gaizka Ormazabal, *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J.L. & Econ. 173 (2015) (finding 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).

[487] Proxy voting advice business clients may have goals other than, or in addition to, maximizing the value of a registrant's shares, or these clients may have investment objectives that would not be achieved solely on the basis of a positive market reaction. *See* Spatt (2019), *supra* note 473, at 4; Patrick Bolton et al., *Investor Ideology* (Nat'l Bureau of Econ. Research, Working Paper No. 25717, 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); Copland et al. (2018), *supra* note 481, at 6; Verdam (2006), *supra* note 481, at 12.

[488] *See, e.g.*, letters from CEC; BPC; Mylan; Exxon Mobil; Nareit; ACCF; BRT; Timothy M. Doyle (Feb. 3, 2020) ("T. Doyle"); CGC; State Street; Nasdaq; SCG; Charter; NAM; J. Ward; BIO; Christopher A. Iacovella, Chief Executive Officer, American Securities Association (Feb. 3, 2020) ("ASA"); Shareholder Advocacy; Michael Hietpas (Feb. 3, 2020) ("M. Hietpas"); John Endean, President, American Business Conference (Feb. 19, 2020) ("ABC").

[489] *See* letter from Nasdaq.

[490] *See* letter from SCG.

[491] *See* letter from J.W. Verret, Associate Professor of Law, George Mason University Antonin Scalia School of Law (Jan. 22, 2020) ("Prof. Verret") (updating prior Spectrem survey results). One commenter disputed the methodology used in the survey of retail investors, claiming it used leading questions and ultimately showed that retail investors are generally uninformed about the proxy voting advice market. *See* letter from Prof. Coates.

[492] *See, e.g.*, letters from Segal Marco II; TRP; PRI II; ProxyVote II; Laura Chappel, Chief Executive, Brunel Pension Partnership Limited (Feb. 3, 2020) ("Brunel"); Michael J. Clark, Founder and Director, Ario Advisory (Feb. 3, 2020) ("Ario"); CII IV; Prof. Coates; Kevin Thomas, Chief Executive Officer, Shareholder Association for Research and Education (Jan. 30, 2020) ("SHARE II"); Louise Davidson, Chief Executive Officer, Australian Council of Superannuation Investors (Jan. 31, 2020) ("ACSI"); BMO; Proxy Insight (Jan. 31, 2020) ("Proxy Insight"); Elliott I; Better Markets; New York Comptroller II; AFL–CIO II; Joel Schneider, Chair, Corporate Governance Committee, Dimensional Fund Advisors (Feb. 3, 2020) ("Dimensional"); Ron Baker, Executive Director, Colorado Public Employees' Retirement Association (Feb. 3, 2020) ("Colorado PERA"); Ashbel C. Williams, Executive Director & CIO, State Board of Administration of Florida (Feb. 3, 2020) ("Florida Board"); David Villa, Executive Director & Chief Investment Officer, et al., State of Wisconsin Investment Board (Feb. 3, 2020) ("SWIB"); CFA Institute I; CIRCA; AllianceBernstein; LA Retirement; Glass Lewis II (noting that no market failure is identified in the release and that other jurisdictions' regulators, including ESMA, have concluded that there is no market failure in the proxy voting advice business industry); ISS; Michael Passoff, CEO, Proxy Impact (Feb. 3, 2020) ("Proxy Impact"); Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Inst. Investors (Feb. 4, 2020) ("CII V"); C. Icahn; ValueEdge I; CII VIII. *See also* IAC Recommendation (stating that, rather than citing reliable evidence of material problems with proxy voting advice businesses, the SEC asserts that problems "may" or "could" exist, based on claims from private interests (who are biased in favor of issuers) that problems exist).

[493] *See* letter from New York Comptroller II. *See also* letter in response to the SEC Staff Roundtable on the Proxy Process from CII (stating that "[p]roxy advisers' business model depends on factual accuracy and their incentives are thus aligned with issuers and institutional investors alike.").

[494] *See* letter from Proxy Insight.

and new information, suggesting they are not "monolithic." [495]

One commenter suggested that there is a different source of market failure inherent to the proxy voting process and proxy voting advice businesses stemming from the collective action problem inherent in shareholder voting.[496] According to the commenter, investors do not value expending resources to determine their position on a given proxy vote because, on the margin, their vote does not matter and they do not fully internalize all of the benefits associated with any resources they do expend.[497] The commenter further asserts that proxy voting advice businesses, in turn, can therefore only charge modest fees for their services, which leads them to be resource constrained in performing their own research. Thus, according to the commenter, this arrangement leads to voting recommendations that are not adequately informed or precise, and thus imposes negative externalities on shareholders. The commenter argues that, because market forces are unable to improve the quality of voting recommendations and reduce these externalities, there is a need for regulatory action.[498] Another commenter offered a different perspective, arguing instead that proxy voting advice businesses represented a private market solution to shareholders' collective action problem, rendering regulatory intervention unnecessary.[499] Other commenters posited that the underlying concentration among proxy voting advice businesses and conflicts of interest are the result of past regulatory action that created demand for the services of proxy voting advice businesses.[500]

We believe that the important role proxy voting advice businesses currently play in facilitating clients' participation in the proxy process, as well as the importance of ensuring that clients have access to more complete information regarding matters to be voted on, and the material conflicts of interest proxy voting advice businesses may have, support the final amendments. As discussed in Section I above, the purpose of the amendments is to help ensure that investors who use proxy voting advice have access to more transparent, accurate, and complete information and benefit from a robust discussion of views—similar to what is possible at a meeting where shareholders are physically attending and participating—when making their voting decisions, while minimizing costs or delays that could adversely affect the timely provision of proxy voting advice. The amendments are expected to reduce the costs incurred by clients of proxy voting advice businesses in monitoring for conflicts of interest or acquiring information relevant to assessing proxy voting advice. In this way, the amendments should improve the overall efficiency associated with this segment of the proxy system. Proxy voting advice businesses often act as the intermediary for their clients' participation in the proxy system, and the requirements of the rule will facilitate clients' timely access to, and awareness of, more complete information prior to voting. This has the potential to benefit not just those clients and the immediate shareholders they serve but also investors in our public markets more generally.

B. Economic Baseline

The baseline against which the costs, benefits, and the impact on efficiency, competition, and capital formation of the final amendments are measured consists of the current regulatory requirements applicable to registrants, proxy voting advice businesses, 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 Market Practices

a. Proxy Voting Advice Businesses

Proxy voting advice businesses will be affected by the final amendments. As the Commission has previously stated, voting advice provided by a firm such as a proxy voting advice business 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." [501]

Several commenters noted that certain firms involved in the proxy process do not supply research, analysis, and recommendations to support the voting decisions of their clients.[502] To the extent such firms are not providing any voting recommendations and are instead exercising delegated voting authority on behalf of their clients, we agree that such services generally will not constitute "proxy voting advice" under Rule 14a–1(l)(1)(iii)(A) and have adjusted our baseline accordingly.[503]

As of July 22, 2020, to our knowledge, the proxy voting advice industry in the United States consists of three major firms: ISS, Glass Lewis, and Egan-Jones.

• 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.[504] 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).[505] As of April 2020, ISS had nearly 2,000 employees in 30 locations, and covered approximately 44,000 shareholder meetings in 115 countries, annually.[506] ISS states that it executes about 10.2 million ballots annually on behalf of those clients representing 4.2 trillion shares.[507] 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.[508]

• 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.[509] As of April 2020, Glass Lewis had more than 380 employees worldwide that provide services to more than 1,300 clients that collectively manage more than $35 trillion in assets.[510] Glass Lewis states that it covers more than 20,000 shareholder meetings across approximately 100 global markets annually.[511] 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.[512] 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.[513] As of September 2016, Egan-Jones' proxy research or voting clients mostly consisted of mid- to large-sized mutual funds,[514] and the firm covered approximately 40,000 companies.[515] Egan-Jones Ratings Company (Egan-Jones' parent company) is registered with the Commission as a Nationally Recognized Statistical Ratings Organization.[516]

Of the three proxy voting advice businesses identified, ISS and Glass Lewis are the largest and most often used for proxy voting advice.[517] We do not have access to general financial information for ISS, Glass Lewis, and Egan-Jones such as annual revenues, earnings before interest, taxes, depreciation, and amortization, and net income. We also do not have access to client-specific financial information or more general or aggregate information regarding the economics of the proxy voting advice business.

Several commenters stated that the economic analysis in the Proposing Release failed to consider effects of the proposal on smaller firms that provide proxy voting services, such as Investor Advocates for Social Justice ("IASJ").[518] Further, commenters stated that the final amendments could affect the propensity of non-U.S. firms to compete with U.S. proxy voting advice businesses.[519] Based on the information available to the Commission,[520] including comments on the Proposing Release, we are not aware of smaller firms that currently supply research, analysis, and recommendations in the United States to support the voting decisions of their clients that would fall within the definition of "solicitation." We acknowledge that any smaller firms or non-U.S. proxy voting advice businesses could be affected by the final amendments to the extent they provide proxy voting advice on registrants who have filed proxy materials with the Commission, or if the final amendments affect their willingness to enter the market to supply proxy voting advice in the United States.

In a principal-agent relationship, such as the relationship between a proxy voting advice business and a client, to the extent that the principals' and agents' interests are not perfectly aligned, agents can expend resources to assure principals that they will act in the principals' best interest. When agents operate in a competitive market soliciting business from principals, they have an incentive to expend resources to assure principals that they will act in the principals' best interest, or risk putting themselves at a competitive disadvantage.[521] Where the agent's interest and the principal's interest diverge, there can be a strong counterweight to this incentive and where a relationship is multifaceted the agent may emphasize areas of alignment and de-emphasize areas of conflict. In the proxy voting advice market, certain practices by proxy voting advice businesses serve as mechanisms to assure their clients that proxy voting advice businesses will take actions that are in clients' best interest. All three major proxy voting advice businesses have policies, procedures, and disclosures in place that are intended to reduce clients' costs of monitoring the businesses' behavior.[522]

Proxy voting advice businesses' reliance on information available to all shareholders is one example of how current market practices may mitigate agency costs. One commenter noted that facing the prospect of having their work checked by clients can discipline proxy voting advice businesses that might otherwise act based on conflicts of interest when developing proxy advice.[523] The same commenter included use of publicly available information as a step it has taken to "ensure quality and minimize error in its published research." [524] The three major proxy voting advice businesses state that they base their recommendations exclusively on information that is publicly available. Relying on publicly available information to develop proxy advice enables clients to validate the inputs that proxy voting advice businesses provide, rather than expending effort to obtain proprietary, and potentially commercially sensitive, information

[495] *See* letter from PRI II.

[496] *See* letter from B. Sharfman I. *See also* letter from Bryce C. Tingle, N. Murray Edwards Chair in Business Law, Faculty of Law, University of Calgary (Jan. 31, 2020) ("Prof. Tingle") (similarly asserting that both fund managers and proxy voting advice business are not incentivized to expend significant resources in producing and evaluating voting advice, but without attributing this lack of incentives to a collective action problem on the part of shareholders.).

[497] Academic research has shown, theoretically, that the inability of shareholders to fully internalize the benefits of developing an informed position on matters put to a shareholder vote can cause shareholders to over-rely on proxy voting advice under certain conditions. *See supra* note 479.

[498] *See* letter from B. Sharfman I.

[499] *See* letter from Glass Lewis II.

[500] *See, e.g.*, letter from P. Mahoney and J.W. Verret.

[501] *See* Commission Interpretation on Proxy Voting Advice at 47417.

[502] Specifically, commenters indicated that two additional firms included in the set of affected proxy voting advice businesses in the Proposing Release, ProxyVote Plus and Marco Consulting Group did not advise investment advisers and institutional investors on their voting determinations and would therefore not be affected by the proposed amendments. *See supra* note 100 and accompanying text. *See also* letters from Segal Marco II; ProxyVote II; CII IV.

[503] *See supra* notes 170–173 and accompanying text.

[504] *See* 2016 GAO Report, *supra* note 141, at 6.

[505] *Id.*

[506] *See* About ISS, *available at https://www.issgovernance.com/about/about-iss/* (last visited May 22, 2020). *See also supra* note 10.

[507] *See* About ISS, *available at https://www.issgovernance.com/about/about-iss/* (last visited May 22, 2020).

[508] *See* Form ADV filing for ISS, *available at https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=111940* (last accessed April 23, 2020). *See also* 2016 GAO Report, *supra* note 141, at 9.

[509] *Id.* at 7.

[510] *See* Glass Lewis Company Overview, *available at https://www.glasslewis.com/company-overview/* (last visited Apr. 26, 2020).

[511] *Id.*

[512] *See* 2016 GAO Report, *supra* note 141, at 7.

[513] *Id.*

[514] *Id.*

[515] *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.

[516] *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.*

[517] *See* 2016 GAO Report, *supra* note 141, 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* letters in response to the SEC Staff Roundtable on the Proxy Process from Center on Executive Compensation (Mar. 7, 2019) (noting that there are "two firms controlling roughly 97% of the market share for such services"); Society for Corporate Governance (Nov. 9, 2018) ("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. . . . .").

[518] *See* letter from IASJ. We understand that this firm typically does not make voting recommendations to its institutional investor clients but rather assists those "who seek a partner to carry out their proxy voting." *Id.* To the extent a firm does not make voting recommendations to its clients and is instead exercising delegated authority on their behalf, it would not be engaged in a "solicitation" within the meaning of Rule 14a–1(l)(1)(iii)(A). *See supra* notes 170–173 and accompanying text. Therefore, based on our understanding of its current activities, this commenter (and others engaged in similar conduct) would not appear to be subject to compliance with Rule 14a–2(b)(9). *See also* letters from Felician Sisters II; Good Shepherd; Interfaith Center II; ProxyVote II; Segal Marco II; St. Dominic of Caldwell.

[519] *See* letters from Minerva I; PIRC.

[520] Our awareness of providers of proxy voting services may be limited because firms that provide proxy voting services, including proxy voting advice businesses, do not always engage in activities that would require them to register with the Commission. *See supra* Section I.

[521] Agents have an incentive to expend resources to assure principals that they will act in the principals' best interest as long as the cost of providing the assurance is less than the value of the assurance to principals.

[522] *See, e.g.*, letter from Glass Lewis II.

[523] *See* letter from ISS.

[524] *See id.*

directly from registrants or other sources.

As part of our consideration of the baseline for the final rules, we focus on two industry practices that are particularly relevant for the new conditions in Rule 14a–2(b): Conflicts of interest disclosure and procedures for engagement with registrants.

i. Conflict of Interest Disclosures

While the nature of potential conflicts related to revenues might be different among the three proxy voting advice businesses, all three proxy voting advice businesses have conflicts of interest policies and make disclosures to clients disclosing the nature of potential conflicts and the steps that they have taken to address them.[525] These existing policies and disclosures are part of the economic baseline for the amendments.

For example, we understand that ISS has implemented policies and procedures designed to prevent and manage conflicts that could arise from the work of ISS' research and analytics teams (''Global Research'') and the work of ISS Corporate Solutions (''ICS'') for public companies.[526] More specifically, Global Research prepares proxy voting governance research, analyzes proxy issues, and provides ratings on, and other assessments of, public companies for the benefit of institutional investors. ICS provides advisory services, analytical tools, and publications to registrants to enable registrants to improve shareholder value and reduce risk. According to ISS, one of the primary steps the firm has taken to prevent and manage this potential conflict of interest is implementing a firewall with the goal of separating ICS from ISS. ISS notes that it makes available to its institutional clients information about the relationships between ICS and its clients in a way that is intended not to alert Global Research analysts to the possible existence of such relationships. ISS also notes that it adds a legend to each global or domestic proxy analysis advising the reader of the existence of ICS and offering ISS' clients the ability to learn more about ICS and its clients. In addition, ISS indicates that it has implemented a policy on the disclosure of significant relationships, under which ISS provides clients with ''proactive visibility'' regarding a range of significant relationships within the client-facing side of the ProxyExchange platform.[527] ICS also discloses in all of its contracts that ISS' status as a registered investment adviser (as well as its internal policies and procedures) may require ISS to disclose to ISS institutional clients ICS' relationship with the registrant.

We understand the other two major proxy voting advice businesses also provide disclosure of potential conflicts of interest. Glass Lewis notes that it provides disclosure of potential conflicts on the cover of the relevant research report.[528] This is intended to enable clients and any other parties with access to a Glass Lewis report (*e.g.*, the media) to review potential conflicts at the same time they review the research, analysis, and voting recommendations contained therein. Egan-Jones also discloses its management of three categories of potential conflicts—revenue, cost, and structural—to the public.[529]

Thus, it appears that all three major proxy voting advice businesses have some level of conflict of interest disclosure policies in place and provide such disclosure to affected parties. These disclosures, which are intended to support the objectivity of voting advice and the integrity of the voting process, may overlap to a certain degree with the requirements in the final amendments. These disclosure policies, however, vary in terms of structure and coverage as well as the manner the in which the information is conveyed.

ii. Engagement With Registrants

The following section discusses existing proxy voting advice business engagement with the subjects of proxy voting advice—one avenue by which such businesses may signal to their clients that the information underlying proxy voting advice is accurate, transparent, and complete.

We understand that all three major proxy voting advice businesses have certain policies, procedures, and disclosures in place intended to assure clients that the voting advice they receive will be based on accurate, transparent, and complete information. In some cases, proxy voting advice businesses seek input from registrants to further these objectives. All three of these proxy voting advice businesses offer certain registrants some form of pre-release review of at least some of their proxy voting advice reports, or the data used in their reports. Also, all three such proxy voting advice businesses offer some registrants access to proxy voting reports and offer mechanisms by which registrants can provide feedback on those reports, in some cases for a fee.

For example, ISS states that it may, in some circumstances, give registrants, whether or not they are ICS clients, the right to review draft research analyses, ratings, or other advisory research reports so that ISS may correct factual inaccuracies before delivering final voting advice. ISS acknowledges that review of draft analyses may provide an opportunity for registrants to unduly influence those analyses and reports. To avoid the appearance of impropriety, ISS states that it generally offers registrants an opportunity to review a draft proxy analysis, rating, or other research report only for the purposes of verifying the factual accuracy of information. ISS further states that it retains sole discretion whether to accept any change recommended by the registrant. ISS's policies also govern changes to analyses based on registrant feedback. According to ISS's Code of Ethics, if the analyst changes the proposed voting recommendation or other proposed conclusion, the proposed change must be reviewed by a senior analyst and ISS will retain in its files the documents supplied by the registrant detailing the factual inaccuracies.[530]

Glass Lewis introduced a ''Report Feedback Statement'' service in 2019 that has allowed companies to submit feedback on Glass Lewis reports and have that feedback be transmitted directly to Glass Lewis clients in the proxy research papers they receive.[531] In addition to these services, beginning in 2015, Glass Lewis started providing the subjects of its research with its Issuer Data Report, which details the key facts underlying the relevant report for their review before the report is finalized. According to Glass Lewis, materials provided are deliberately limited. Glass Lewis has indicated that by providing the facts underlying the report, it can benefit from registrant review without inviting debates about Glass Lewis' methodology or what result that methodology should lead to in the context of a particular recommendation. This service has been available without a fee for several years and more than 1,400 companies currently participate in it on an annual basis.[532]

Egan-Jones provides several avenues for registrants to review and correct any material errors found in its reports. Registrants may obtain a ''draft,'' or pre-publication copy, of a report pertaining to them in order to review it. If a registrant believes there is a material error in an Egan-Jones report, the registrant may contact Egan-Jones directly. In addition, major U.S. third-party proxy solicitors participate in Egan-Jones' Research Preview program. Through that program, proxy solicitors can supply draft copies of the research regarding the registrant to the registrant, and convey appropriate documentation to Egan-Jones to correct any errors found in the research on behalf of the registrant.[533]

Although the three major proxy voting advice businesses offer registrants opportunities to review proxy voting advice, existing policies and procedures limit review in some respects. ISS, for example, offers only ''eligible'' registrants an opportunity to review draft proxy analyses and generally uses the S&P 500 constituent list to determine eligibility. Moreover, even for eligible companies, ISS provides an opportunity to review solely on a ''best-efforts'' basis.[534] As noted above, Glass Lewis indicates that its registrant review process is limited to pre-publication review of only the key facts underlying each relevant report.[535]

Additionally, it is our understanding that some proxy voting advice businesses currently include links to filings by registrants that are the subject of proxy advice in their online platforms. These links provide a means by which clients may access additional definitive proxy materials that registrants may file in response to proxy voting advice.

Non-U.S. proxy voting advice businesses that are signatories to the Best Practice Principles for Shareholder Voting Research have provided information about their engagement with registrants.[536] Based on these public disclosures, we understand that levels of registrant engagement vary across non-U.S. proxy voting advice businesses. For example, the U.K.-based firm PIRC states that it provides pre-publication drafts of proxy voting advice to registrants for some jurisdictions as a courtesy, while France-based firm Proxinvest does not.[537] While acknowledging the practices of these non-U.S. proxy voting advice businesses, this section focuses on the three major proxy voting advice businesses that operate in the United States.[538]

b. Clients of Proxy Voting Advice Businesses as Well as Underlying Investors

Clients that use proxy voting advice businesses for voting advice will be affected by the final rule amendments. In turn, investors and other groups on whose behalf these clients make voting determinations will be affected. One of the three major proxy voting advice businesses—ISS—is registered with the Commission as an investment adviser and as such, provides annually updated disclosure with respect to its types of clients on Form ADV. Table 1 below reports client types as disclosed by ISS.[539]

TABLE 1—NUMBER OF CLIENTS BY CLIENT TYPE

[as of March 28, 2020]

Type of client[a]	Number of clients[b]
Banking or thrift institutions	195
Pooled investment vehicles	300
Pension and profit sharing plans	170
Charitable organizations	110
State or municipal government entities	10
Other investment advisers	960
Insurance companies	40
Sovereign wealth funds and foreign official institutions	10
Corporations or other businesses not listed above	70
Other	225
Total	2,095

[a] The table excludes client types for which ISS indicated either zero clients or less than five clients.

[b] 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), it may indicate that it has fewer than five clients rather than reporting the number of clients.

Table 1 illustrates the types of clients that utilize the services of one of the largest proxy voting advice businesses. For example, while investment advisers (''Other investment advisers'' in Table 1) constitute a 46 percent plurality of clients for ISS, other types of clients include pooled investment vehicles (14 percent) and pension and profit sharing plans (eight percent). Other users of the services offered by ISS include corporations, charitable organizations, and insurance companies.[540] Certain of these users of proxy voting advice business services make voting determinations that affect the interests of a wide array of individual investors, beneficiaries, and other constituents.[541]

c. Registrants

Registrants also will be affected by the final 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 with respect to those registrants are subject to the

[525] *See, e.g.*, letters from ISS; Glass Lewis II. *See also* Egan-Jones Proxy Services Conflict of Interest Statement (Sept. 2019), *available at https://www.ejproxy.com/media/documents/Egan-Jones_Proxy_Conflict-of-Interest_Sep-2019.pdf*.

[526] *See* ISS, Best Practice Principles for Providers of Shareholder Voting Research & Analysis: ISS Compliance Statement (2017), *available at https://www.issgovernance.com/file/duediligence/best-practices-principles-iss-compliance-statement-april-2017-update.pdf*.

[527] *See* ISS Policy Regarding Disclosure of Significant Relationships, *available at https://www.issgovernance.com/file/duediligence/Disclosure-of-Significant-Relationships.pdf* (last visited Apr. 27, 2020).

[528] *See* Glass Lewis' Policies and Procedures for Managing and Disclosing Conflicts of Interest (2019), *available at https://www.glasslewis.com/wp-content/uploads/2019/11/GL-Policies-and-Procedures-for-Managing-and-Disclosing-Conflicts-of-Interest-050819-FINAL.pdf*.

[529] *See* Egan-Jones Proxy Services Conflict of Interest Statement, available at *https://ejproxy.com/media/documents/Egan-Jones_Proxy_Conflict-of-Interest_Sep-2019.pdf* (last visited Apr. 27, 2020).

[530] *See* ISS Code of Ethics 7 (2020), *available at https://www.issgovernance.com/file/duediligence/code-of-ethics-mar-2020.pdf*.

[531] *See* Press Release, Glass Lewis, Glass Lewis Announces that Company Opinions are Now Included With Research and Voting Recommendations (Apr. 2, 2020), *available at https://glasslewis.com/report-feedback-statement-included-with-research*. *See also* Press Release, Glass Lewis, Glass Lewis Launches Report Feedback Statement Service (Mar. 14, 2020), *available at https://glasslewis.com/glass-lewis-launches-report-feedback-statement-service*.

[532] *See* letter from Glass Lewis II.

[533] *See* Egan-Jones Issuer Engagement, *available at https://ejproxy.com/issuers* (last visited Apr. 28, 2020).

[534] *See* ISS Draft Review Process for U.S. Issuers, *available at https://issgovernance.com/iss-draft-review-process-u-s-issuers/* (last visited Apr. 28 2020).

[535] *See supra* note 532.

[536] *See* BPP Group Signatory Statements, *available at https://bppgrp.info/signatory-statements* (last visited Apr. 29, 2020).

[537] *Id.*

[538] As noted in above, we are not aware of smaller firms that currently supply research, analysis, and recommendations to support the voting decisions of their clients that would fall within the definition of ''solicitation.'' Thus we do not speculate as to how smaller firms might engage with registrants.

[539] *See* ISS Form ADV filing, *supra* note 508. ISS describes clients classified as ''Other'' as ''Academic, vendor, other companies not able to identify as above.''

[540] *Id.*

[541] One commenter argued that the economic analysis should include more data and data analysis related to senior citizens since they make up a large portion of the mainstream investor community. In particular, the commenter suggested we include more data on the proportion of total investors that are senior citizens and some demographic analysis. We are sympathetic to the commenter's suggestion regarding the importance of senior citizens as investors, but we do not have data to perform the analysis the commenter requested and none was provided by commenters. *See* letter from Jim Martin, Chairman, et al., 60 Plus Association (Feb. 3, 2020) (''60 Plus''). We note that, to the extent the final rules improve the mix of information available to shareholders when voting decisions are made, they will benefit the investor community generally, including senior citizen investors.

federal proxy rules.[542] In addition, there are certain other companies that do not have a class of equity securities registered under Section 12 of the Exchange Act that 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.[543]

As of December 31, 2018, we estimate that 5,758 registrants had a class of securities registered under Section 12 of the Exchange Act.[544] As of the same date, there were approximately 20 companies that did not have a class of securities registered under Section 12 of the Exchange Act that filed proxy materials.[545] 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.[546] As of December 2018, we identified 98 Business Development Companies (''BDCs'') that could be subject to the final amendments.[547] The summation of these estimates yields 18,594 companies that may be affected to a greater or lesser extent by the final amendments.[548]

The above estimates are an upper bound of the number of potentially affected companies 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 18,594 potentially affected registrants mentioned above, 5,690 filed proxy materials with the Commission during calendar year 2018.[549] 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.[550]

Whether or not proxy voting advice businesses permit registrants to review draft proxy voting advice, all registrants are able to respond to final proxy voting advice by filing additional definitive proxy materials. However, as discussed in the Proposing Release, some registrants have asserted that a large percentage of proxies are voted within 24 to 48 hours of proxy voting advice being issued[551] and that it can be difficult for registrants to access and analyze the proxy voting advice, formulate a response, and file the necessary materials with the Commission within that time period.[552] This is consistent with feedback received from commenters, who also indicated that registrants face time pressure in their efforts to communicate their responses to proxy voting advice to shareholders prior to votes.[553] The Proposing Release included an analysis that estimated the number of additional definitive proxy material filings in 2016, 2017, and 2018,[554] and Commission staff subsequently refined the process for identifying relevant filings and published a list of the filings it identified in a memorandum to the public comment file.[555] This list shows approximately 105, 93, and 90 filings in 2016, 2017, and 2018, respectively. Further, in the Proposing Release, the staff identified in a subset of additional definitive proxy material filings in 2018, where data were available, the number of business days between when a proxy voting advice business delivered proxy voting advice and when the registrant filed additional definitive proxy materials, and the number of business days until the planned shareholder meeting. Based on this sample, staff estimated a median value of three business days and an average value of 3.8 business days between when a proxy voting advice business issues proxy voting advice and when a registrant responds. Further, the median (average) number of days between the registrant response and the shareholder meeting based on the sample was 9.5 (10.3) business days.[556]

A number of commenters interpreted our analysis in Table 2 of the Proposing Release to indicate that the Commission took the view that the ''concerns'' raised by registrants about errors or inaccuracies reflected actual factual errors.[557] One commenter questioned whether Commission staff evaluated the merits of registrant claims presented in the Proposing Release[558] and supplied its own estimates of actual error rates in proxy voting advice business research report based on its own research,[559] as well as on supplementary information made available in the comment file.[560]

In contrast, another commenter had a different critique of Table 2, arguing that estimating error rates based on filings of additional definitive proxy materials might actually underestimate the true error rate because registrants who submit filings subject themselves to potential liability under SEC Rule 14a–9.[561]

The method for identifying filings that contained registrant concerns and classifying those concerns was detailed in the Proposing Release and in the subsequent staff memorandum.[562] Importantly, the analysis set forth in the Proposing Release took no position on the merits of responses. The analysis was intended to present how registrants currently respond to proxy voting advice and the frequency and timing of those responses and made no judgment as to whether the concerns raised by registrants in their supplemental filings were valid. Nor was the analysis intended to provide an ''error rate.'' Although we agree that reasonable readers might disagree in their classification of registrant concerns, lack of agreement on classification of specific responses does not change our assessment, discussed below, that the final rules would benefit clients of proxy voting advice businesses, and the proxy process as a whole, by improving client access to registrant information and analysis. Indeed, the fact that reviewers of additional definitive proxy materials may differ both in how they identify registrant concerns and how they classify those concerns supports the idea that clients would benefit from having a mechanism available by which they can reasonably be expected to become aware of registrant responses so they might form their own view of the merits of those responses.

2. Current Regulatory Framework

The economic baseline includes the current regulatory framework that applies to proxy voting advice businesses. As explained in the Proposing Release, 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.[563] 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.[564] Accordingly, the Commission has exempted certain kinds of solicitations from the filing and information requirements of the proxy rules, subject to various conditions, where such requirements are not necessary for investor protection.[565] Notwithstanding the exemptions, these solicitations remain subject to Rule 14a–9, the antifraud provisions of the federal proxy rules.[566]

Proxy voting advice businesses typically rely upon the exemptions in Rule 14a–2(b)(1) and (b)(3) to provide advice without complying with the filing and information requirements of the proxy rules.[567] The existing conditions to these exemptions are 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.[568] By contrast, the exemption in Rule 14a–2(b)(1) does not currently require conflicts of interest disclosure. Both exemptions 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 institutional investors.

Several commenters stated that the analysis in the Proposing Release did not reflect requirements to address conflicts of interest under existing law, including the regulatory scheme under the Investment Advisers Act, as well as proxy voting advice business best practices under the baseline.[569] We recognize that, in addition to the rules governing proxy solicitation, some proxy voting advice businesses may be subject to other regulatory regimes.[570]

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

[543] 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 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.

[544] 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 registrants that filed Forms 20–F and 40–F and asset-backed registrants that filed Forms 10–D and 10–D/A during calendar year 2018 with the Commission are excluded from this estimate. This estimate excludes BDCs that filed Form 10–K in 2018.

[545] We identify these issuers 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; 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 registrants 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 registrants 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).

[546] 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. 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.

[547] BDCs are entities that have been issued an 814- reporting number. Our estimate includes 88 BDCs that filed Form 10–K in 2018 as well as BDCs that may be delinquent or have filed extensions for their filings. Our estimate excludes six wholly-owned subsidiaries of other BDCs.

[548] The 18,594 potentially affected registrants is the sum of: (a) 5,758 registrants with a class of securities registered under Section 12 of the Exchange Act; (b) 20 registrants without a class of securities registered under Section 12 of the Exchange Act that filed proxy materials; (c) 12,718 registered management investment companies; and (d) 98 BDCs.

[549] For details on the estimation of companies that filed proxy materials with the Commission during calendar year 2018, *see supra* note 544.

[550] 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) one 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.

[551] *See* Proposing Release at 66545, n.235.

[552] *See id.* at 66545, n.236. As we noted above, shareholders have the ability to change their vote at any time prior to a meeting, including as a result of a registrant filing supplemental proxy materials in response to proxy voting advice. *See supra* note 373.

[553] *See, e.g.,* letters from Nareit; NAM; Exxon Mobil. *See also* Proposing Release at 66533, n.136.

[554] *See* Proposing Release at 66546, Table 2.

[555] *See* Memorandum from the U.S. Securities and Exchange Commission, Division of Economic Risk and Analysis, Regarding Data Analysis of Additional Definitive Proxy Materials Filed by Registrants in Response to Proxy Voting Advice (Jan. 16, 2020), *available at https://www.sec.gov/comments/s7-22-19/s72219-6660914-203861.pdf* (''Data Analysis of Additional Definitive Proxy Materials'').

[556] *See* Proposing Release at 66546.

[557] *Id.* at Table 2.

[558] *See* letter from CII I.

[559] *See* letter from CII IV.

[560] *See* letter from CII V. This commenter suggested that the error rate implied by the Commission's classification in Table 2 of the Proposing Release was 0.5% and that after correcting for registrant assertions that appear to be in error, the rate is reduced to 0.3%. The same commenter performed a case-by-case analysis of claims they believed may have been classified as errors in the Proposing Release's analysis, casting doubt on whether many of them were actually related to factual errors, and concluded that, after excluding analytical errors, which may just represent differences of opinion, the actual error rate is only 0.06%.

[561] *See* letter from ACCF.

[562] *See* Proposing Release at n.239. *See also* Data Analysis of Additional Definitive Proxy Materials, *supra* note 555.

[563] *See* Proposing Release at 66524.

[564] *See, e.g.,* Communications Among Shareholders Adopting Release 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 . . . .'').

[565] 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. Another exemption, Rule 14a–2(b)(3), generally exempts proxy voting advice furnished by an advisor to any other person with whom the advisor has a business relationship.

[566] 17 CFR 240.14a–9.

[567] *See* Commission Interpretation on Proxy Voting Advice at 47416 (discussing the ''two exemptions to the federal proxy rules that are often relied upon by proxy advisory firms'').

[568] 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).

[569] *See* letters from ISS; Glass Lewis II. *See also* IAC Recommendation.

[570] *See* Proposing Release at 66527, n.88; 66529, n.99.

For example, one of the major proxy voting advice businesses, ISS, is also a registered investment adviser, and as such, must eliminate or make full and fair disclosure of all conflicts of interest to its clients that might cause ISS to render proxy voting advice that is not disinterested such that a client can provide informed consent to the conflict.[571] In addition, ISS has 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.[572] Similarly, Egan-Jones is registered with the Commission as a Nationally Recognized Statistical Rating Organization (NRSRO). Registered NRSROs are required under Rule 17g-5 to disclose conflicts of interest relating to maintenance or issuance of a credit rating. However, these regulatory regimes serve distinct, though overlapping, regulatory purposes.[573]

One commenter also stated that the final rule's economic effects should be measured relative to a baseline that consists of regulation in effect prior to the Commission Interpretation on Proxy Voting Advice,[574] noting that no cost-benefit analysis was performed in connection with that interpretation.[575] Consistent with its past practice, the Commission continues to believe that the appropriate baseline for its economic analysis consists of all existing regulatory requirements that apply to the affected parties, including the Commission Interpretation on Proxy Voting Advice, as well as industry practice in response to those requirements. Moreover, the Commission Interpretation on Proxy Voting Advice did not create any new legal obligations under the securities laws but rather articulated the Commission's longstanding views on what constitutes ''solicitation.'' Indeed, as noted above, there is evidence that the proxy voting advice business industry has understood for over 30 years that its proxy voting advice constitutes a ''solicitation'' under Rule 14a–1(l) or at least that the Commission may consider such advice to constitute a ''solicitation.'' [576]

Even if a proxy voting advice business had believed it was not engaged in a ''solicitation'' prior to the interpretation, and thus newly realized it was engaged in a ''solicitation'' upon issuance of the interpretation, the impact of this change would have been minimal given the existing exemptions from the filing and information requirements of the proxy rules available to proxy voting advice businesses. The only thing that potentially would have changed for proxy voting advice businesses would have been heightened awareness of the application of Rule 14a–9 liability, including the examples of specific circumstances that could result in a violation of that rule. To the extent that some proxy voting advice businesses did not previously understand their voting advice to constitute solicitations and thus be subject to Rule 14a–9 liability, it is possible that this heightened awareness could cause those businesses to take more care in preparing their recommendations. It is also possible that this heightened awareness could expose proxy voting advice businesses to greater risk of litigation under Rule 14a–9. However, the Commission is not aware of evidence—including any specific information provided by commenters—that the interpretation has resulted or would result in substantial changes in proxy voting advice businesses' practices. In any event, even if we were to consider Rule 14a–9 as though it were to apply to proxy voting advice businesses for the first time, we believe the benefits to investors of this antifraud rule insofar as it would deter proxy voting advice businesses from making materially false or misleading statements or omissions supports its application to proxy voting advice notwithstanding the costs associated with any increased risk of litigation. For all of these reasons, we do not expect that using a baseline prior to the Commission Interpretation on Proxy Voting Advice would have significantly altered our assessment of the economic effects of the proposed amendments.

Finally, we note that—beyond the codification of our interpretation of solicitation—the conflicts disclosure requirements and principles-based engagement requirements in the final amendments will be new for all proxy voting advice businesses. The economic effects of these amendments are thus analyzed as new requirements for each of these businesses, regardless of whether they understood their proxy voting advice to constitute a ''solicitation'' prior to the interpretation. Accordingly, we believe that our economic analysis appropriately captures the anticipated economic effects of the final amendments.

C. Benefits and Costs

We discuss the economic effects of the final amendments below. For both the benefits and the costs, we consider each piece of the final amendments in turn. The final amendments include: (1) Amendments to the definition of solicitation in Rule 14a–1(l); (2) conditioning availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) on (a) proxy voting advice businesses providing disclosure regarding conflicts of interest and (b) proxy voting advice businesses adopting and publicly disclosing written policies and procedures reasonably designed to ensure that the proxy voting advice is made available to registrants at or prior to the time when such advice is disseminated to the proxy voting advice business's clients and that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statement about the proxy voting advice in a timely manner; and (3) an amendment to the examples in Rule 14a–9 of disclosure that, if omitted from a proxy solicitation and depending upon the particular facts and circumstances, may be misleading.

1. Overview of Benefits and Costs and Comments Received

a. Benefits

As discussed in further detail below, we expect the rule to generate benefits compared to the baseline for clients of proxy voting advice businesses and investors, and, albeit to a lesser extent, for proxy voting advice businesses and registrants. We expect that the largest benefits will come from conditioning availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) on proxy voting advice businesses providing certain disclosures and maintaining certain policies and procedures. In contrast, amendments to the definition of solicitation in Rule 14a–1(l) and to Rule 14a–9 represent less significant changes from the existing baseline and will likely result in more modest benefits for proxy voting advice businesses and their clients.

Two commenters expressed support for the general benefits that the proposed rules would generate.[577] Both commenters argued that the shareholder proxy voting process is beset with collective-action problems, whereby both institutional and retail investors are not motivated to incur large expenses to collect information to become better informed about a company, particularly when the company is just one of a portfolio. According to the commenters, this results in resource-constrained proxy voting advice businesses that produce voting recommendations that are not adequately informed or precise. Such voting recommendations could lead to suboptimal voting decisions by clients of the proxy voting advice businesses. As we mention above, the purpose of the final amendments is to improve the information available to shareholders when making voting decisions, which could ultimately result in more efficient investment outcomes.

In contrast, several commenters generally disputed the benefits to proxy voting advice businesses' clients and investors resulting from the proposed amendments.[578] One commenter argued that the general benefits of the rule are speculative at best,[579] while two other commenters characterized them as ''illusory.'' [580] One of these commenters asserted that none of the amendments would create any benefits for proxy voting advice businesses and their clients and that the only beneficiaries would be self-interested corporate insiders.[581] Another commenter argued that the proposed rules would not improve the quality of proxy advice, asserting that the benefits are small and uncertain.[582]

We do not agree with these assessments. While the extent of the benefits will depend on the existing practices of proxy voting advice businesses and how they choose to implement the required disclosures and procedures (as well as the existing practices of their clients and how they, in turn, adjust), we believe that the improved transparency that the final rules will generate will be beneficial for proxy voting advice businesses' clients and will likely improve the overall proxy voting process. Indeed, the fact that in certain circumstances, and to varying extents, proxy voting advice businesses already incorporate practices similar to the final amendments belies the notion that these expected benefits are speculative or illusory. For example, if proxy voting advice businesses saw no benefit to providing conflicts of interest disclosure to their clients, they would not provide such disclosure currently, absent a regulatory requirement. We also note that the final amendments reflect significant changes from the proposal in light of commenter input and concerns, and we believe these changes focus on improvements to the proxy process most likely to yield benefits and result in final amendments that are less costly, when measured against the baseline, as compared to the costs of the proposal.

b. Costs

We expect that proxy voting advice businesses as well as registrants will incur direct costs as a result of the final amendments. In the following sections, we analyze the costs of the final amendments due to changes in proxy voting advice business disclosure and engagement practices relative to the baseline. Further, to the extent that any of the final amendments impose direct costs on proxy voting advice businesses that are passed along to clients, the final amendments could impose indirect costs on clients of proxy voting advice businesses, including investment advisers and institutional investors, and the underlying investors they serve, if applicable.

Some commenters expressed concern that the economic analysis in the Proposing Release was not thorough enough or that it understated the costs and other negative effects that the proposed rules would have on proxy voting advice businesses and investors.[583] Some of these commenters also commented on the costs of specific proposed amendments, which we discuss below. One commenter stated that, with respect to the quantitative cost estimates in the Commission's Paperwork Reduction Act (''PRA'') analysis, it believed the actual compliance costs would be 240 times those estimated in the Proposing Release.[584] One commenter urged a more thorough cost-benefit analysis or other investigation to gather data from which reasonable cost estimates can be extrapolated.[585]

We acknowledge, as we did in the Proposing Release, that the final amendments will likely generate direct and indirect costs for proxy voting advice businesses and potentially their clients. To the extent that a large driver of the costs discussed by commenters would have been the proposed amendment regarding registrant review and response to proxy voting advice, the flexibility afforded by the principles-based approach reflected in the final rules, particularly as it accommodates practices similar to current practices, should result in lower costs for proxy voting advice businesses and their clients as compared to the more prescriptive approach we proposed.

In the following sections, we discuss the specific costs and benefits for each aspect of the final amendments.

2. Codification of the Commission's Interpretation of ''Solicitation'' Under Rule 14a–1(l) and Section 14(a)

We are codifying 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 amendment to have a significant economic impact because it codifies an already-existing Commission interpretation. This interpretation itself did not modify existing law or reflect a change in the Commission's position and is distinct from the amendments conditioning availability of the exemptions in Rules 14a–2(b)(1) and (b)(3) on proxy voting advice businesses providing certain disclosures and maintaining certain policies and procedures, which we acknowledge would alter the costs and benefits associated with being subject to the federal proxy rule regime and which we discuss in detail below.[586] Nonetheless, the final amendment to Rule 14a–1 codifying this interpretation in the Commission's proxy rules may provide more clear notice that Section 14(a) and the proxy rules apply to proxy voting advice. Parties receiving proxy voting advice may benefit from such notice to the extent that it informs them that the

[571] *See* letter from ISS; *see also* Standard of Conduct for Investment Advisers.

[572] *See* letter from ISS.

[573] *See supra* notes 41 through 53 and accompanying text.

[574] *See supra* note 74.

[575] *See* letter from ISS. Another commenter argued that under that baseline, proxy voting advice businesses were governed by the fiduciary standard of the Advisers Act, which already required proxy voting advice businesses to disclose conflicts of interest. *See* letter from Glass Lewis II. As noted above, the Commission acknowledges that some, but not all, proxy voting advice businesses may be subject to other regulatory regimes, including the Advisers Act.

[576] *See supra* Section II.A.3.

[577] *See* letters from James R. Copland, Senior Fellow and Director, Legal Policy, Manhattan Institute for Policy Research (Feb. 3, 2020) (''Manhattan Institute''); B. Sharfman I.

[578] *See* letters from Bricklayers; ISS; New York Comptroller II; ProxyVote II.

[579] *See* letter from ProxyVote II.

[580] *See* letters from CFA Institute I; ISS.

[581] *See* letter from ISS.

[582] *See* letter from Bricklayers.

[583] *See* letters from Bricklayers; CalPERS; CFA Institute I; Kathryn McCloskey, Director, Social Responsibility, United Church Funds (Feb. 3, 2020) (''Church Funds''); CII IV; Glass Lewis II; Karen L. Barr, President and CEO, Investment Adviser Association, (Feb. 3, 2020) (''IAA''); ICI; ISS; New York Comptroller II; Ohio Public Retirement; Lucian Arye Bebchuk, James Barr Ames Professor of Law, Economics, and Finance, Harvard Law School (Feb. 3, 2020) (''Prof. Bebchuk''); ProxyVote II; IASJ; Segal Marco II. *See also* IAC Recommendation.

[584] *See* letter from Nichol Garzon-Mitchell, Senior Vice President, General Counsel, Glass Lewis (Jan. 7, 2020) (''Glass Lewis I'').

[585] *See* letter from Ohio Public Retirement.

[586] Several commenters suggested that the Commission should use a baseline that does not include the August 19 interpretation. *See, e.g.*, letters from Glass Lewis II; ISS. We respond to these comments in *supra* Section IV.B.2.

communication they receive from proxy voting advice businesses is subject to the protections (*e.g.,* antifraud protections) that come from the fact that such communication is a solicitation. As discussed above, even if a proxy voting advice business had believed it was not engaged in a ''solicitation'' prior to the interpretation, we believe the impact of this change would be minimal given the existing exemptions from the filing and information requirements of the proxy rules available to proxy voting advice businesses. The Commission is unaware of specific evidence that the interpretation has resulted or would result in a substantial increase in costs due to the application of Rule 14a–9 to proxy voting advice.[587]

We also are amending Rule 14a–1(l)(2) to clarify that the furnishing of proxy voting advice by certain persons will 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 or a person who does not market its expertise as a provider of proxy voting advice, separately from other forms of investment advice, will not be deemed a solicitation. Again, we do not expect this adopted 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.

3. Amendments to Rule 14a–2(b)

a. Conflicts of Interest—New Rule 14a–2(b)(9)(i)

i. Benefits

We are amending 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.[588] These conflicts of interest disclosures are intended to augment existing requirements by eliciting information that may not be captured by the current requirements of either Rule 14a–2(b)(1) and (b)(3) and that is more tailored to proxy voting advice businesses and the nature of their conflicts. The final amendments require disclosure of conflicts that is sufficiently detailed such 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 voting advice businesses availing themselves of an exemption will 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 final amendments also will specify that the enhanced conflicts disclosures must be provided in the proxy voting advice and in any electronic medium used to deliver the advice.

We believe the final amendments will 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. Under Rule 14a–2(b)(9)(i), disclosure of conflicts will be more comprehensive regardless of which exemption the proxy voting advice business relies upon for its proxy voting advice.[589] Furthermore, we believe the requirement that conflicts of interest disclosures be included in the voting advice will benefit clients of proxy voting advice businesses by making more standard the time and manner in which such principles-based 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. We believe this will, in turn, make it easier or more efficient for such clients to review and analyze the conflicts disclosure, thus reducing the agency costs associated with utilizing the services of proxy voting advice businesses.

Disclosure of material conflicts of interest can lead to more informed decision-making, and we anticipate that institutional investors and investment advisers will use information from disclosures of material conflicts of interest to make more informed voting decisions.[590] Thus, to the extent they enable the clients of proxy voting advice businesses to make more informed voting decisions on investors' behalf, these disclosure requirements will also benefit investors. Further, we believe these disclosures will make it easier and more efficient for clients that are investment advisers to conduct a reasonable review of a proxy voting advice business's policies and procedures regarding how the proxy voting advice business identifies and addresses conflicts of interest.[591]

One commenter that is a proxy voting advice business and a registered investment adviser suggested that the benefits associated with Rule 14a–2(b)(9)(i) will be marginal because of proxy voting advice businesses' existing fiduciary duty to their clients and the disclosures they already provide.[592] Relatedly, several institutional clients of proxy voting advice businesses stated that they believe existing practices provide sufficient disclosure of conflicts of interest under the baseline.[593] As an initial matter, not all proxy voting advice businesses have registered as investment advisers and hence may not have the same fiduciary duty as the commenter. Moreover, even where certain proxy voting advice businesses provide detailed disclosure about conflicts of interest under existing practices or regulatory regimes, requiring tailored disclosure as a condition to the proxy rule exemptions will help to ensure that the disclosure is more consistently provided to consumers of proxy voting advice across the industry. As noted in Section IV.B.1 above, existing conflict of interest disclosure by proxy voting advice businesses differs across firms, including in structure, coverage, and manner of conveyance.

Importantly, the final rule will provide users of proxy voting advice with timely access to such disclosure in the proxy voting advice and in any electronic medium used to deliver the advice. As a result, we believe the final rule will allow clients of proxy voting advice businesses to more efficiently access the conflicts disclosure and assess a proxy voting advice business's potential conflicts of interest. However, we acknowledge that, to the extent that proxy voting advice businesses currently provide information that meets or exceeds the adopted disclosure requirements, and to the extent that clients of proxy voting advice businesses find current disclosure practices under the baseline to be sufficient, the benefits described above will be more limited.[594]

[587] See discussion in *supra* Section IV.B.2.

[588] *See supra* Section II.B.3.

[589] As noted above, Rule 14a–2(b)(3) requires disclosure of significant relationships with the registrant or relevant shareholder proponent, whereas Rule 14a–2(b)(1) does not currently require conflict of interest disclosures.

[590] *See* letter from CEC.

[591] *See supra* Section II.B.3.

[592] *See* letter from ISS.

[593] *See supra* notes 195–197.

[594] For example, ISS and Glass Lewis are signatories to a set of voluntary industry-developed practices which state that, as a matter of principle, signatories should have processes in place to identify and disclose conflicts of interest to their clients. *See* BPP Group Best Practice Principles for Shareholder Voting Research, *available at https://bppgrp.info* (last visited May 21, 2020).

iii. Costs

The new conflicts of interest disclosure requirements will impose a direct cost on proxy voting advice businesses to the extent proxy voting advice businesses are not already providing information that meets the adopted materiality-based disclosure requirements.[595] Specifically, proxy voting advice businesses will bear 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 advice businesses that are investment advisers are already required to identify conflicts and to eliminate or make full and fair disclosure of those conflicts.[596] Further, proxy voting advice businesses that are retained by investment advisers to assist them with proxy voting may already provide such conflicts disclosure in connection with the investment advisers' evaluation of the capacity and competency of the proxy voting advice business. Additionally, as discussed above, proxy voting advice businesses who currently rely on the Rule 14a–2(b)(3) exemption already must disclose any significant relationship or material interest bearing on the voting advice.

We are unable to provide quantitative estimates of these direct costs on proxy voting advice businesses because the facts and circumstances unique to each proxy voting advice business, including the disclosures it currently provides to its clients as well as the nature of its material interests, transactions, and relationships, will dictate the additional disclosure, if any, it must provide under the final rule. As discussed in Section II.B.1 above, boilerplate language will not be sufficient to satisfy new Rule 14a–2(b)(9)(i). Under the rule, a proxy voting advice business will be required to provide conflicts disclosure with enough specificity to enable its 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 it provides its clients and the subject registrant) and may need to be updated periodically as both the business's and its clients' interests change. Additionally, proxy voting advice businesses' direct costs will depend on the extent to which their current practices and procedures already meet or exceed the new disclosure requirements.[597]

A number of commenters asserted that the amendments regarding enhanced conflict of interest disclosure would impose compliance costs.[598] One commenter stated that the proposed additional disclosures of conflicts of interest would generate additional paperwork burdens but no additional benefits.[599] Another commenter that addressed the PRA burdens of the new conflicts of interest disclosure estimated that identifying and disclosing conflicts in the manner specified in the proposal would result in an additional one hour to identify conflicts at 5,565 registrants and 0.5 hours to disclose conflicts at 807 issuers, for a total of 5,969 additional hours per year.[600] As noted in Section V.C.1.a below, in response to that commenter's feedback, we have increased our PRA burden estimates of the enhanced conflict of interest disclosure. For PRA purposes, we estimate that the cost of the enhanced conflict of interest disclosure will be 6,000 burden hours per proxy voting advice business.

One commenter stated that the proposed amendments would compromise the firewall between its proxy voting advice business and corporate services business,[601] presumably by revealing the clients of the corporate services arm to the research arm. We note, however, that the rule we are adopting gives a proxy voting advice business the option to include the required disclosure either in its proxy voting advice *or* in an electronic medium used to deliver the proxy voting advice, such as a client voting platform, which allows the business to segregate the information, as necessary, to limit access exclusively to the parties for which it is intended.

Another commenter argued that the enhanced conflict of interest disclosure could artificially and significantly inflate the number of conflicts reported.[602] Because proxy voting advice businesses have not been providing the level of enhanced disclosure required by the final rule, compliance with the final rules would, according to the commenter, make it appear as if proxy voting advice businesses have to date been underreporting material conflicts of interest. According to the commenter, this would result in reputational harm for proxy voting advice businesses. While we agree that an increase in the number of material conflicts reported could affect the reputation of proxy voting advice businesses, we believe it is appropriate for proxy voting advice businesses that have conflicts with the potential to influence the recommendations they provide clients to bear the reputational effects and other costs associated with disclosure of those conflicts.

As discussed in Section II.B.3 above, the final amendments have been revised to streamline the requirements and provide proxy voting advice businesses the flexibility to determine which situations merit disclosure and the specific details to provide to their clients about any conflicts of interest identified. This less prescriptive approach should help alleviate concerns that the new requirement will compel disclosure of information that may compromise existing safeguards, result in unduly lengthy disclosures, or harm proxy advice voting businesses' reputations. In addition, the revised approach may make it easier for businesses to leverage their existing disclosures to satisfy the final rule and mitigate concerns that the rule will result in unnecessary paperwork burdens, while still providing more consistent information about conflicts of interest.

b. Notice of Proxy Voting Advice and Registrant Response—New Rule 14a–2(b)(9)(ii)

i. Benefits

In contrast to the Proposing Release, the final amendments to Rule 14a–2(b)(9) set forth a principles-based approach designed to ensure that proxy voting advice businesses' clients have access to more transparent and complete information and benefit from a robust discussion of views when making voting decisions.[603] The final amendments also provide non-exclusive safe harbors that the proxy voting advice businesses may use to satisfy the principles-based requirements in Rule 14a–2(b)(9)(ii).

We believe the final amendments will 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 proxy voting advice and make determinations about how to cast votes. Providing timely notice to registrants of voting advice will allow registrants to more effectively determine

[595] *Id.*

[596] *See* Standard of Conduct for Investment Advisers.

[597] *See supra* Section II.B.3.

[598] *See, e.g.,* letters from ISS; IAA; Ohio Public Retirement.

[599] *See* letter from CalPERS.

[600] *See* letter from Glass Lewis I.

[601] *See* letter from ISS.

[602] *See* letter from Ohio Public Retirement.

[603] *See supra* Section II.C.3.

whether they wish to respond to the recommendation by publishing additional soliciting materials and to do so in a timely manner prior to shareholders casting their votes. Registrants may wish to do so for a variety of reasons, including, for example, because they have identified what they perceive to be factual errors or methodological weaknesses in the proxy voting advice businesses' analysis or because they have a different or additional perspective with respect to the recommendation. In either case, clients of proxy voting advice businesses may benefit from the availability of additional information upon which to base their voting decision. Registrants may also wish to respond because they agree with some or all aspects of the analysis. In that case, that fact also would likely be relevant to and enhance a client's decision-making. Further, to the extent that proxy voting advice businesses choose to adopt policies and procedures that permit them to refine their advice based on any feedback they might receive from registrants, users of the advice and the investors they serve (if applicable) could benefit from more reliable and complete voting advice.

Ensuring that a proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of any written response by a registrant to the proxy voting advice (*i.e.*, additional soliciting materials) will benefit users of the advice—including any underlying investors—by ensuring that they have ready and timely access to the registrant's perspective on such advice when considering how to vote. Clients of proxy voting advice businesses often must make voting decisions in a compressed time period. Timely access to registrant responses to the advice would facilitate clients' evaluation of the voting advice by highlighting disagreement on facts and data, differences of opinion, or additional perspectives before the client casts its votes.

One commenter questioned the benefits to clients of proxy voting advice businesses from the registrants' ability to review the proxy voting advice.[604] According to that commenter, accurate and complete advice is already being provided by proxy voting advice businesses to their clients. As we discuss in Section II.B.2 above, and as noted by several commenters,[605] some proxy voting advice businesses currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue voting advice. This suggests that proxy voting advice businesses themselves recognize the potential benefit of such feedback, which could serve as a bonding mechanism for these businesses by demonstrating to clients that the proxy voting advice business believes the advice it provides is based on accurate information. Even where proxy voting advice businesses currently provide opportunities for review and feedback, however, these existing practices may be inadequate to appropriately mitigate the agency costs associated with use of proxy voting advice. Specifically, it does not appear that all proxy voting advice businesses currently provide all registrants with an opportunity to review proxy voting advice.[606] Under Rule 14a–2(b)(9)(ii), proxy voting advice businesses' policies and procedures must be reasonably designed to ensure that proxy voting advice is made available to registrants that are the subject of such advice in a timely manner prior to or at the same time when such advice is disseminated to the proxy voting advice businesses' clients and thus will provide additional registrants with the ability to respond to that advice (if they so choose) in a timely manner, thereby enhancing the total mix of information available to proxy voting advice business clients.

Rule 14a–2(b)(9)(iii) could also yield benefits to the extent that proxy voting advice businesses' policies and procedures encourage registrants to file their definitive proxy statements earlier than they otherwise would. Earlier filing of definitive proxy statements could benefit investors generally, as they will have more time to review the materials. As discussed below, earlier filing of these materials also could help mitigate potential costs for proxy voting advice businesses stemming from Rule 14a–2(b)(9)(iii). Under the safe harbor provided by the final amendments, proxy voting advice businesses may condition dissemination of proxy voting advice to a registrant on the registrant filing its definitive proxy statement at least 40 calendar days before the annual meeting. One commenter submitted data analysis showing that, for 2018, more than 87.8 percent of registrants filed proxy materials at least 40 calendar days before an annual meeting.[607] Based on these estimates, proxy voting advice businesses that choose to avail themselves of the safe harbor by implementing its terms without modification might affect the timing of up to 12.2 percent of filings.[608] We note, however, that proxy voting advice businesses may structure their policies to accommodate registrants that may file less than 40 calendar days before the shareholder meeting and remain within the safe harbor.

ii. Costs

With respect to the requirement that proxy voting advice businesses adopt and publicly disclose policies and procedures reasonably designed to ensure that (i) registrants receive in a timely manner the proxy voting advice report, and (ii) proxy voting advice businesses provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant's additional soliciting material in response to the advice in a timely manner, proxy voting advice businesses will bear direct costs. There will also be indirect costs to other parties.

(a) Direct Costs

For the principle set forth in Rule 14a–2(b)(9)(ii)(A), proxy voting advice businesses will bear direct costs associated with modifying current systems and methods, or developing and maintaining new systems and methods, to ensure the conditions of the exemption are met and with delivering the report to registrants. While some proxy voting advice businesses may already have systems in place to address some or all of these requirements,[609] we do not have data that would allow us to estimate the costs associated with modifying or developing these systems and methods to encompass all registrants. To the extent proxy voting advice businesses already have similar systems in place, any additional direct cost may be limited. In addition, as we discuss in more detail below, depending on how proxy voting advice businesses choose to meet the principle, they may incur direct costs associated with executing, obtaining, or modifying acknowledgments or agreements with respect to the use of any information shared with the registrant in the process of delivering the report to the registrant.

A proxy voting advice business may also incur direct costs in satisfying the requirement of Rule 14a–2(b)(9)(ii)(B) that it adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the shareholder meeting. For example, to be eligible for the safe harbor in the new Rule 14a–2(b)(9)(iv), a proxy voting advice business could provide: (i) Notice on its electronic client platform that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available); or (ii) notice through email or other electronic means that the registrant has filed, or has informed the proxy voting advice business that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available). Both mechanisms for informing clients could involve initial set-up costs as well as ongoing costs.

Since they are not required to rely on the safe harbor, proxy voting advice businesses may also put in place other mechanisms by which their clients may reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner, which could be more or less costly than relying on the safe harbor. Under the final amendments, those mechanisms also must ensure that clients obtain the notification in a timely manner. Because the final amendments permit proxy voting advice businesses substantial flexibility in satisfying this condition, we expect proxy voting advice businesses to implement mechanisms differently depending on, among other things, their own facts and circumstances and the nature of their client bases. Thus, the overall costs of satisfying this condition are difficult to quantify. We believe, however, that the costs of implementing a mechanism by which clients may reasonably be expected to become aware of registrants' views could involve (i) developing systems to gather information about the filing of additional soliciting materials by registrants; and (ii) modifying existing systems so that clients may reasonably be expected to become aware that registrants have filed such additional soliciting materials. To the extent proxy voting advice businesses already have similar systems in place, any additional direct cost may be limited.

Many commenters asserted that allowing registrants to review the proxy voting advice that proxy voting advice businesses have prepared for clients, as would have been required under the proposed rules, would generate significant costs for proxy voting advice businesses and their clients.[610] Some commenters stated that the sheer volume of reports that proxy voting advice businesses would have to send to registrants would generate large compliance costs. For example, one commenter noted that the number of reports it alone would need to send to registrants for review would increase from 450 in 2019 to approximately 6,500 to 25,000 post-adoption, and that it would incur costs of drafting at least 6,000 confidentiality agreements.[611] Another commenter asserted that the compliance costs stemming from this amendment would be disproportionately higher for smaller proxy voting advice businesses.[612] Some commenters indicated that, under the proposed rules, proxy voting advice businesses would have to negotiate and enter into confidentiality agreements with each applicable registrant to avoid the dissemination of sensitive information, and the commenters provided estimates of those burdens.[613]

We recognize the concerns raised by these commenters regarding compliance costs associated with the proposed registrant review and response process. In response, as suggested by several commenters, we are adopting a more principles-based approach intended to achieve many of the same objectives of the proposal without unduly encumbering the ability of proxy voting advice businesses to provide their clients with timely and reliable voting advice. The final amendments will require proxy voting advice businesses to have policies and procedures reasonably designed to ensure that proxy voting advice is made available to registrants at or prior to or at the same time it is disseminated to the proxy voting advice businesses' clients rather than within a specified period of time. Additionally, the final amendments impose only a one-time obligation with respect to notifying registrants of a given proxy voting advice. We are also adopting new Rule 14a–2(b)(9)(v), which will exclude from the scope of Rule 14a–2(b)(9)(ii) proxy voting advice to the extent that such advice is based on custom policies, and new Rule 14a–2(b)(9)(vi), which will exclude from the scope of Rule 14a–2(b)(9)(ii) proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.

We believe the significant additional flexibility in the final amendments will enable proxy voting advice businesses to design policies and procedures that satisfy the new conditions of the exemptions but are nonetheless efficiently tailored to their specific business models and practices. This more flexible approach also may permit proxy voting advice businesses to leverage their existing systems and methods to satisfy the conditions. We thus believe, when measured against the baseline, the final amendments will impose lower compliance costs and result in fewer disruptions for proxy voting advice businesses and their clients, than the more prescriptive approach set forth in the proposal.

While a more principles-based approach to regulation provides additional flexibility for affected parties, it also may impose certain costs if the parties are unsure of what measures are needed to satisfy the legal requirement. For example, such an approach can entail additional judgment on the part of management or result in parties doing more than what is required in order to ensure they satisfy the applicable standard. The non-exclusive safe harbors built into the final amendments will provide legal certainty to proxy voting advice businesses that they can rely on the solicitation exemptions in Rules 14a–2(b)(1) and (b)(3) and therefore could further mitigate the compliance burdens associated with the

[604] *See* letter from ISS.

[605] *See, e.g.*, letters from Glass Lewis II; ISS.

[606] *See supra* Section IV.A.

[607] *See* letter from CII VIII. Calculated as (2,900 + 460)/3,828 = 0.878. The commenter stated that of 3,828 companies, 2,900 filed proxy materials between 40 and 48 calendar days in advance of annual meetings and 460 filed proxy materials 50 or more days in advance of annual meetings.

[608] Under the safe harbor, a registrant may opt to forgo the benefits of receiving notice of proxy voting advice at the same time as clients if it deems accelerating the filing of its proxy materials to meet the 40-day threshold sufficiently costly.

[609] *See, e.g.*, letter in response to the SEC Staff Roundtable on the Proxy Process from Glass Lewis (Nov. 14, 2018) ("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.").

[610] *See, e.g.*, letters from CalPERS; CFA Institute I; CII IV; IAA; ICI; ISS; New York Comptroller II; Olshan LLP; Ohio Public Retirement; Prof. Bebchuk; ProxyVote II.

[611] *See* letter from ISS.

[612] *See* letter from CII IV.

[613] *See* letters from CalPERS (indicating that proxy voting advice businesses would need to enter into hundreds or possibly thousands of different agreements which would be costly); ISS (stating that it would incur costs of drafting at least 6,000 confidentiality agreements); Glass Lewis I (estimating that it will incur a compliance burden of four hours per registrant to negotiate or secure confidentiality agreements with 4,912 issuers for a total of 19,648 hours); Olshan LLP (suggesting that negotiating such agreements would result in the allocation of significant time and cost by proxy voting advice businesses). Also, one commenter argued that confidentiality agreements would be ineffective at preventing leaks of proxy voting advice due to the large number of registrant employees that would have access to the information. *See* letter from Olshan LLP.

new conditions. They also may provide some guidance to proxy voting advice businesses about how they can design their own policies and procedures to satisfy the conditions.

As noted in Section V.C.1.a below, we believe that much of the burden of the final amendments would be for the proxy voting advice business to develop policies that satisfy the principles and accordingly modify or develop systems and practices to implement such policies. The principles-based approach we implement should help reduce such compliance costs significantly, which would likely result in a lower PRA burden than the commenter estimates based on the proposal. Also, our revised PRA estimates take into consideration our understanding that some proxy voting advice businesses have systems and practices in place that may complement or overlap with the new requirements, which could substantially reduce compliance costs. For PRA purposes, we estimate that each proxy voting advice business would incur 2,845 burden hours for the notice to registrants under Rule 14a–2(b)(9)(ii)(A) and 2,845 burden hours for the notice to clients under Rule 14a–2(b)(9)(ii)(B).[614]

In addition to these system-related costs, we expect that proxy voting advice businesses would, as a general matter, obtain acknowledgments or agreements with respect to the use of any information shared with a registrant, as we expect that the business would seek to limit disclosure of its report. Several of the changes to the final rule amendments should allow proxy voting advice businesses to take measures to reduce these compliance costs compared with the cost of the confidentiality agreements contemplated under the proposal. For example, under the principles-based approach that we are adopting, in instances where a proxy voting advice business judges the potential impact of the disclosure of information contained in the report to be high it could provide the advice to registrants at the time it is provided to their clients or it may choose to provide draft reports to registrants before making them available to clients while imposing more stringent confidentiality requirements or terms of use on registrants to prevent release of commercially sensitive information. This should reduce the risk that commercially sensitive information about proxy voting advice may be disseminated more broadly.

Moreover, as adopted, the principles-based approach does not dictate the manner in which proxy voting advice businesses provide the report to registrants, and instead gives the proxy voting advice business discretion to choose how best to implement the principle of the rule and incorporate it into the business's policies and procedures, including by leveraging existing practices. In this regard, we note that some proxy voting advice businesses currently provide reports to registrants without requiring formal confidentiality agreements, instead requiring only an electronic acknowledgement of terms of use.[615] Such an approach is likely to involve less negotiation between proxy voting advice business and registrants than formal confidentiality agreements, and thus lower compliance costs.[616] Further, an acknowledgment of terms of use could be designed to apply prospectively, including for future proxy seasons, making this a one-time cost when a proxy voting advice business initiates coverage of a registrant. Overall, for purposes of our PRA, we estimate that each proxy voting advice business will incur a burden of between 50 and 5,690 hours per year associated with securing an acknowledgment or other assurance that the proxy advice will not be disclosed.[617] Another potential cost for proxy voting advice businesses could result from new Rule 14a–2(b)(9)(vi). When additional matters are presented for shareholder approval at meetings with applicable M&A transaction or contested matters, then the portion of the proxy voting advice provided with respect to the applicable M&A transaction or contested matters will be excluded from the scope of Rule 14a–2(b)(9)(ii). This means that in those situations, proxy voting advice businesses may choose to redact the report that they have to deliver to registrants, which will generate costs for them. It is also possible, however, that proxy voting advice businesses would choose instead to deliver an un-redacted report, in which case they will not incur the costs of redaction.[618]

A number of commenters raised concerns about the costs associated with the provisions in the proposed rules that would have established a formal process by which the registrant would be given the opportunity to review and provide feedback on draft voting advice.[619] The principles-based approach in the final rules obviates the need for a prescribed process for engagement with the registrant and instead allows proxy voting advice businesses to decide when and how to provide notice of the proxy voting advice businesses' voting advice to registrants. Under this approach, proxy voting advice businesses are not required to, although they may, share pre-publication drafts with registrants for their feedback. Rather, they must provide the registrant with a copy of their advice, which could be at the same time as the advice is shared with clients. Moreover, as with the proposal, nothing in the final amendments will require proxy voting advice businesses to alter their advice in response to registrant feedback. Thus, we believe the final amendments will substantially address, if not eliminate altogether, the concerns raised by commenters related to

[614] *See* discussion in *infra* Section V.B.1 for the assumptions we make when estimating hours and costs associated with maintaining, disclosing, or providing the information required by the amendments that constitute paperwork burdens imposed by a collection of information.

[615] For example, Glass Lewis requires a registrant to click and agree to certain "terms of use" before being able to access the notice and recommendations.

[616] We recognize that some proxy voting advice businesses, irrespective of their current practices or what the final amendments envision, may nevertheless choose to enter into formal confidentiality agreements with some registrants. For such proxy voting advice businesses, the compliance costs may be closer to those estimated by the commenters.

[617] *See* discussion in *infra* Section V.B.1 for the assumptions we make when estimating hours and costs associated with maintaining, disclosing, or providing the information required by the amendments that constitute paperwork burdens imposed by a collection of information.

[618] In choosing not to redact, proxy voting advice businesses potentially increase their exposure to the risk that their recommendations will be revealed to market participants. As a result, we anticipate that proxy voting advice businesses will be less likely to offer pre-publication review to registrants of reports that contain recommendations related to contested matters or M&A transactions.

[619] *See, e.g.,* letters from Prof. Bebchuk; ISS; Kerrie Waring, Chief Executive Officer, International Corporate Governance Network (Nov. 21, 2019) ("ICGN"); Segal Marco II; TIAA; Daniel P. Hanson, Chief Investment Officer, Ivy Investment Management Company (Feb. 3, 2020) ("Ivy Investment"); Olshan LLP; First Affirmative. *See also* IAC Recommendation. Some commenters expressed a concern that 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 reduce the diversity of thought in the marketplace for proxy voting advice. *See, e.g.,* letters from Prof. Bebchuk; CalPERS; CFA Institute I. *See also, e.g.,* letter in response to the SEC Staff Roundtable on the Proxy Process from Glass Lewis ("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 . . . ."). Some commenters noted conflicts between SRO rules that seek to limit issuers' pre-publication review of security analyst research reports and the proposed approach to pre-publication review of proxy voting advice. *See, e.g.,* letter from CII IV.

objectivity and timing pressure associated with the proposed engagement process.

(b) Indirect Costs

The final rule may also impose indirect costs on other parties. Proxy voting advice businesses may pass through a portion of the costs of modifying or developing systems to meet the requirements to their clients through higher fees for proxy advice. Moreover, the policies and procedures proxy voting advice businesses develop under the final rule could cause registrants to incur costs. For example, a proxy voting advice business that chooses to rely on the safe harbor in Rule 14a–2(b)(9)(iii) would adopt policies and procedures that provide a registrant with a copy of the proxy voting advice business's proxy voting advice, at no charge, no later than the time it is disseminated to the business's clients if the registrant has filed its definitive proxy statement at least 40 calendar days before the meeting date. A registrant that wishes to review proxy advice prior to the meeting date may incur costs to accelerate the filing of its definitive proxy statement to meet the 40-day threshold. However, we expect a registrant would incur these costs only if it expected the benefits of review to be sufficiently large.[620]

Proxy voting advice business may also bear indirect costs in the form of lost revenues. While all three major proxy voting advice business currently offer registrants access to proxy voting reports, in some circumstances they may charge a fee to registrants for such access,[621] or make such access available only in connection with the purchase of consulting services from an affiliate of the proxy voting advice businesses. The requirement to share full reports with registrants under Rule 14a–2(b)(9)(ii) may result in a proxy voting advice business providing access to proxy voting reports at no charge to registrants.[622] This would cause such proxy voting advice business to lose fees they otherwise would have earned from selling proxy voting reports to registrants. Without more detailed information about proxy voting advice businesses' fee schedules and information about the revenues they currently generate from selling proxy voting reports to registrants, we are unable to quantify the magnitude of these revenue losses.

Several commenters expressed concern that the economic analysis in the Proposing Release understated or failed to consider the costs of the proposals on consumers of proxy voting advice.[623] One commenter asserted that costs for customers of proxy voting advice will increase due to both the costs of reduced time to review proxy research reports and a potential increase in fees, as proxy voting advice businesses pass their increased costs on to institutional investor clients, who, in turn, would pass these costs on to their individual investor participants and beneficiaries.[624] Another commenter argued that such costs may lead some institutional investors to forgo the benefits of using a proxy voting advice business, which could ultimately be detrimental to the effectiveness of shareholder voting and oversight.[625] Similarly, one commenter suggested that the proposed rules, by increasing the costs of the proxy advice that opposes management, would impede investors' ability to monitor company management.[626] Another commenter, a proxy voting advice business, stated that the proposed changes could diminish proxy voting advice businesses' willingness to recommend votes against management and that this "would substantially diminish the independent information available to investors and their ability to hold management accountable for their actions." [627] Additionally, several commenters supplied empirical evidence suggesting that the quality of proxy voting advice depends on the time available for proxy voting advice businesses to conduct research.[628] One commenter concluded from this research that the proposed requirements would reduce the quality of voting advice.[629]

The principles-based approach we are adopting should mitigate many of these concerns because it will impose compliance costs on proxy voting advice businesses that are lower than the compliance costs associated with the approach in the Proposing Release, and hence will limit the potential increase in the price of proxy advice services for proxy voting advice businesses' clients. Further, because the principles-based approach does not include a registrant review and feedback process that requires pre-publication review, it should reduce concerns that registrants will lobby proxy voting advice business for changes to recommendations, and thus should not discourage proxy voting advice business from making recommendations that oppose management or impose additional timing constraints on proxy voting advice businesses.

Registrants also could incur costs associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice, and determining whether to prepare and file additional soliciting materials in response to the proxy voting advice. We expect a registrant would bear these costs only if it anticipated the benefits of such steps would exceed the costs of such a program. Similarly, because more registrants who are the subjects of proxy voting advice will have access to such proxy voting advice in advance of the shareholder vote, more registrants may file additional soliciting materials in response to proxy voting advice as a result of the rule amendments than currently do. Investment advisers, who can reasonably be expected to become aware of additional soliciting materials could incur additional costs in connection with the review of that information. Because these costs will vary depending upon the particular facts and circumstances of the proxy voting advice, any issues identified therein, the resources of the registrant or investment adviser, and in the case of an investment adviser, its policies and procedures with respect to proxy voting, it is difficult to provide a quantifiable estimate of these costs.

4. Amendments to Rule 14a–(9)

a. Benefits

Finally, we are amending Rule 14a–9 to add as an example of what could be misleading, the failure to disclose certain material information about proxy voting advice, specifically information about the proxy voting advice business's methodology, sources of information, and conflicts of interest. We do not expect the amendment to the list of examples in Rule 14a–9 to significantly alter existing disclosure practices, as it will largely codify existing Commission guidance on the applicability of Rule 14a–9 to proxy voting advice.[630] To the extent the

[620] *See supra* note 608.

[621] *See* Section IV.B.1.a.ii.

[622] To rely on the safe harbor in Rule 14a–2(b)(9)(iii), a proxy voting advice business must provide registrants with a copy of the proxy voting advice at no charge.

[623] *See, e.g.,* letters from CII IV; ICI; ISS; New York Comptroller II; PRI II; ProxyVote II; Segal Marco II; Ohio Public Retirement; Prof. Bebchuk.

[624] *See* letter from CII IV.

[625] *See* letter from Prof. Bebchuk.

[626] *See* letter from PRI II.

[627] *See* letter from ISS.

[628] *See* letter from Ana Albuquerque, Boston University, et al. (Feb 3. 2020) ("Prof. Albuquerque et al.").

[629] *See* letter from CII IV.

[630] *See* Commission Interpretation on Proxy Voting Advice at 47419.

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.

b. Costs

The final amendments to Rule 14a–9 will impose direct costs on proxy voting advice businesses to the extent the amended rule 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 the examples being codified were included in prior Commission guidance.[631]

Some commenters asserted that the main cost of the Rule 14a–9 amendments will be an increase in litigation risk for proxy voting advice businesses.[632] Several commenters stated that this increased litigation risk would make it more expensive and burdensome for proxy voting advice businesses to provide their advisory services.[633] One commenter asserted that the proposed changes amount to a new cause of action under Rule 14a–9.[634] Two other commenters argued that the proxy voting advice businesses' response to the threat of litigation under Rule 14a–9 would be to err on the side of caution in complex or contentious matters, thus increasing the likelihood of the proxy voting advice business issuing pro-registrant proxy voting recommendations.[635] We believe several factors will serve to limit this risk. As discussed above, Rule 14a–9 liability is grounded in the concept of materiality and thus would be based on the particular facts and circumstances and assessed from the perspective of the reasonable shareholder.[636] Moreover, neither our proposed amendment to Rule 14a–9 nor the other amendments we are adopting will broaden the concept of materiality or create a new cause of action, as some commenters suggested. Thus, the amendment does not change the scope or application of existing law. Therefore, we do not expect the new amendment to Rule 14a–9 to generate significant new litigation risk for proxy voting advice businesses or to result in a shift to more pro-registrant proxy voting recommendations.

5. Effect on Smaller Entities

Several commenters specifically stated that the economic analysis failed to consider the effect and cost of the proposal on smaller proxy voting advice businesses.[637] One of these commenters asserted that small entities (defined by the commenter as those with up to $5 million in assets) would face significant resource and capacity burdens when complying with the proposed amendments, without improvements in the quality of voting for clients.[638] Another commenter similarly stated the proposals would be particularly burdensome for small proxy voting advice businesses.[639] One commenter stated that the economic analysis failed to consider the proposal's effect on small and medium-sized investment advisers and stated these entities would be disproportionately affected.[640]

As mentioned in Section IV.B.1 above, the Commission is not aware of smaller firms that currently supply research, analysis, and recommendations to support the voting decisions of their clients that would fall within the definition of "solicitation." We therefore cannot estimate how many small proxy voting advice businesses will be affected. However, we are cognizant that any smaller proxy voting advice businesses that operate now or in the future may incur proportionally higher compliance costs even under the final amendments, especially if some of the potential costs of the amendments are fixed. For example, small proxy voting advice businesses may not have conflicts of interest disclosure policies in place, or may not have mechanisms to inform clients of registrant feedback. We believe that the new principles-based approach we are adopting should help address some of the concerns about the final rule's disparate effect on smaller firms by providing small proxy voting advice businesses with the flexibility to design policies and procedures that are scaled to the scope of their business operations.

Further, we believe that the principles-based approach should afford existing proxy voting advice businesses flexibility to leverage their existing practices and mechanisms to efficiently comply with the new requirements, reducing the compliance burdens that they might pass through to smaller clients. Finally, we believe that because the final rules promote the availability of more complete and accurate information to proxy voting advice clients, they are responsive to calls for proxy process reform by smaller issuers to "inspire confidence in the voting process, drive shareholder engagement, and bolster long-term value creation." [641] Smaller issuers may also benefit from the final amendments insofar as they will have greater opportunity to receive proxy voting advice and inform their shareholders of their views on such advice, relative to the opportunities proxy voting advice business currently offer registrants under voluntary review programs.[642]

D. Effects on Efficiency, Competition, and Capital Formation

1. Efficiency

As discussed in Section IV.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 using internal resources.[643]

We believe that, for purposes of general analysis, it is reasonable to assume that the cost of analyzing matters presented for shareholder vote will 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 institutions, including mutual funds, pension funds, and asset managers, large institutions rely less than small institutions on the research and recommendations offered by proxy voting advice businesses.[644] Small institutional investors surveyed in the study indicated they had limited resources to conduct their own research.[645]

By establishing requirements that promote transparency in proxy voting advice, the final amendments could lead to an increased demand for proxy voting advice businesses' voting advice. 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, the final amendments will impose certain additional costs on proxy voting advice businesses, and these costs may be passed on to their clients. To the extent the costs passed on to a client are greater than the related benefits (or vice versa) to the client it could lead to decreased (or increased) demand for proxy voting advice business services by the client. As each client individually decides whether to use proxy voting advice business services, if aggregate demand for proxy voting advice business services increases (decreases), there will be more (or fewer) efficiencies in the proxy voting process.

Some commenters asserted that the ability of registrants to review the advice and the threat of litigation from registrants would result in voting advice from proxy voting advice businesses that is less accurate, useful, and valuable to their clients.[646] If clients perceive the amendments as affecting proxy voting advice businesses' objectivity and independence, this could lead to a decrease in demand for proxy voting advice and potentially fewer efficiencies in the proxy voting process.[647] However, as discussed above, we have made a number of changes to the proposed amendments that we believe address these concerns and will lead to more accurate, transparent and complete information for proxy voting advice business clients.[648] In addition, as discussed above, we do not expect the new amendment to Rule 14a–9 to generate significant new litigation risk for proxy voting advice businesses.[649]

Several commenters also stated that the proposed amendments could adversely affect the efficiency of how capital is allocated in two ways stemming from the potential threat of litigation by registrants and their ability to influence proxy voting advice under the proposed rule.[650] First, some of these commenters expressed concern that the amendments could reduce the independence of proxy voting advice businesses and the diversity of thought in the market for proxy advice, which in turn could reduce the information investors and investment advisers have, resulting in less efficient investment decisions.[651] Second, some of these commenters stated that the amendments would have a silencing effect on proxy voting advice businesses, resulting in value-destroying decisions by managers of registrants who are held less accountable for their actions.[652]

We believe that the principles-based approach we are adopting helps address commenter concerns about reductions in the reliability and independence of proxy voting advice. The final amendments neither require proxy voting advice businesses to share draft proxy voting advice with registrants in advance of providing advice to their clients, nor require proxy voting advice businesses to consider feedback from registrants on the proxy voting advice. In this way, the final amendments seek to limit the presence and ameliorate the possible effects of the independence-related concerns raised by commenters while preserving many of the intended benefits of the proposed engagement process, such as enhancing the accuracy, transparency and completeness of information available to clients of proxy voting advice businesses.

Other commenters disputed that the proposed amendments would bring about more accurate or transparent proxy voting advice, asserting that proxy voting advice businesses already provide adequate disclosure regarding conflicts of interest and a means for engagement with registrants because the price and quality of service for proxy advice is determined in a competitive market.[653] In that case, the amendments may not result in an increase in demand for proxy advisory services. As discussed above, while we acknowledge that proxy voting advice businesses currently disclose conflicts of interest to clients and permit certain registrants to review proxy voting advice, the final rules could nevertheless increase demand for proxy voting advice to the extent that: (i) Clients prefer a more standardized time and means of receiving conflict disclosures, and (ii) proxy voting advice businesses expand their existing review procedures as a means of satisfying the new conditions. Overall, given the changes in the final amendments relative to the proposed amendments, we do not expect the final amendments to have a significant effect on the demand for proxy advisory services, and hence efficiency.

2. Competition

The amendments' requirements that promote transparency and more effective evaluation of 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 of interest (and, more broadly, alignment of interest) and the reliability of proxy voting advice, which could, in turn, cause proxy voting advice businesses to compete more on those dimensions.

[631] *See supra* notes 46 and 67 and accompanying text.

[632] *See* letters from IAA; ISS; Glass Lewis II; Minerva I.

[633] *See* letters from IAA; Glass Lewis II; Minerva I.

[634] *See* letter from C. Icahn.

[635] *See* letters from ISS; Elliott I.

[636] *See* discussion in *supra* Section II.D.3.

[637] *See* letters from Felician Sisters II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.

[638] *See* letter from IASJ.

[639] *See* letter from Interfaith Center II.

[640] *See* letter from IAA.

[641] *See* 2019 Small Business Forum.

[642] *See supra* Section IV.B.1.a.ii.

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

[644] *See* 2007 GAO Report, *supra* note 474, at 2; *see also* letter from BRT (stating since many institutional investors face voting on a large number of corporate matters every year but lack personnel and resources, they outsource tasks to proxy advisors); *see also* letters in response to the SEC Staff Roundtable on the Proxy Process from BlackRock (Nov. 16, 2018) ("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 (Jan. 2, 2019) ("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.").

[645] *See* 2007 GAO Report, *supra* note 474, at 2; *see also* letters in response to the SEC Staff Roundtable on the Proxy Process from Ohio Public Retirement (Dec. 13, 2018) ("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."); Transcript of Roundtable on the Proxy Process 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.").

[646] *See, e.g.,* letters from Prof. Bebchuk; ISS; ICGN; PRI II; Torsten Jochem, Associate Professor of Finance, University of Amsterdam, and Anjana Rajamani, Erasmus University Rotterdam (Dec. 16, 2019) ("Profs. Jochem and Rajamani"); Segal Marco II; TIAA; Ivy Investment; Olshan LLP; First Affirmative; Lisa A. Smith, Vice President, Advocacy and Public Policy, Catholic Health Association of the United States (Feb. 3, 2020) ("Catholic Health"); NorthStar; Rowan Finnegan (Feb. 3, 2020); NASAA; ProxyVote II; Diane Wade, Head of ESG, CBRE Clarion Securities (Feb. 3, 2020) ("CBRE"); Michael Rowland (Feb. 3, 2020); Dustyn Lanz, CEO, Responsible Investment Association (Feb. 3, 2020) ("RIA"); Graeme Black, Chair, Black Group Australia (Feb. 3, 2020) ("Black Group"); Ario; CII IV; ACSI; BMO; John Starcher, President and CEO, Bon Secours Mercy Health (Feb. 3, 2020) "Bon Secours"); CFA Institute I; Baillie Gifford; CIRCA; Joanie B. (Feb. 3, 2020); Canadian Governance Coalition; AllianceBernstein; LA Retirement; Glass Lewis II; CII V; C. Icahn; CII VI; LACERS; James Elbaor (Feb. 26, 2020); Terrence M. Burgess, Senior Managing Director, Wellington Management Company (Mar. 3, 2020) ("Wellington"). *See also* IAC Recommendation.

[647] As noted above, we do not have financial data about proxy advice voting businesses, including financial data by service provided or by client type, so making these assessments on a quantitative basis is difficult.

[648] *See* discussion in *supra* Section IV.C.3.b.ii.

[649] *See* discussion in *supra* Section IV.C.4.b.

[650] *See, e.g.,* letters from Shareholder Rights II; ISS.

[651] *See* letters from Prof. Bebchuk; CalPERS; CFA Institute I.

[652] *See* letters from ISS; PRI II; Better Markets.

[653] *See, e.g.,* letter from ISS.

As discussed above, several commenters disagreed that the proposed amendments would increase the quality or transparency of proxy advice, which they thought was sufficient under the baseline, and stated that the proposed amendments could reduce the quality of proxy advice if the rule reduces the independence and diversity of thought amongst proxy voting advice businesses.[654] In that case, the rules may not increase competition in the proxy advice market. However, as noted above, we believe the final amendments' principles-based approach should address many of these concerns because proxy voting advice businesses may, but will no longer be required to, preview their proxy voting advice with registrants.

The final amendments could also have certain adverse effects on competition. The final amendments will cause proxy voting advice businesses to incur certain additional compliance costs as discussed in Section II.C.2 above. How those costs will be shared between proxy voting advice businesses and their clients depends on the ability of proxy voting advice business to exercise market power in the pricing of their services. One commenter noted that, although complaints about pricing feature regularly in oligopolistic markets, proxy voting advice business generally are not criticized for their pricing.[655] The commenter further explained that this might reflect clients' perception that, due to the scale economies involved in proxy research, it is less costly to purchase proxy voting advice than to engage in proxy research themselves.[656] The presence of these scale economies may provide proxy voting advice businesses with substantial market power, including the power to pass compliance costs associated with the final rules on to their clients. If, however, as other commenters argued,[657] clients do not place a large value on proxy voting advice, then proxy voting advice businesses may face limits in their ability to pass compliance costs through to clients. In the Proposing Release, we acknowledged that 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 amendments could decrease competition.[658] For the reasons described below, we do not believe this will be the case with the final amendments.

Many commenters stated that the economic analysis in the Proposing Release did not adequately consider the effects of the rule on competition in the market for proxy advice.[659] Some commenters asserted that the cost burdens of the amendments, particularly those associated with litigation exposure from registrants, would decrease competition in the proxy advice market, raising barriers to entry in the proxy advice market, and potentially forcing the exit of some proxy voting advice businesses from the market.[660] Several other commenters argued that the proposed amendments would reduce competition by creating new barriers to entry in what historically has been an industry with few competitors.[661] One commenter, a proxy voting advice business in the U.K., stated that the Proposed Rule made it highly unlikely it would enter the U.S. proxy voting advice business market.[662] Another commenter, however, stated that increased barriers to entry would not reduce competition because, notwithstanding the rule, entry would not occur because investors place little value on proxy voting advice and financial incentives for entry are correspondingly low.[663] The final amendments reflect a principles-based approach that is intended to limit the increased compliance costs for proxy voting advice businesses and thus should reduce the potential for significant adverse effects on competition.

Additionally, given certain industry practices, the costs associated with the final amendments could affect proxy voting advice businesses differently. For example, we understand that the three existing proxy voting advice businesses that will be affected by the final amendments already have processes in place for sharing certain aspects of their analysis with certain registrants prior to making a recommendation to clients, which they may be able to leverage to comply with the new conditions. In contrast, firms considering entering the market for proxy voting advice would need to develop such processes and thus may initially experience somewhat higher costs in connection with compliance with the final rules. A differential effect on costs across proxy voting advice businesses could, in turn, affect competition within the proxy voting advice business industry. Similarly, one commenter stated that, if it were subject to the proposed amendments, it likely would have to either significantly increase its fees or sell their firm to one of the two dominant competitors.[664] While that commenter may not be subject to the final amendments,[665] to the extent that the costs associated with the final amendments disproportionately affect proxy voting advice businesses without existing processes that can be adapted to satisfy the new conditions, particularly smaller proxy voting advice businesses that would otherwise consider entering the market for proxy advice, the final amendments could reduce competition in the market for proxy advisory services. We expect the principles-based approach reflected in the final amendments may help to ameliorate concerns about any differential effect of the final amendments by affording proxy voting advice businesses the flexibility to design policies and procedures that are scaled to the scope of their operations and client base.

Overall, we believe the benefits of improving the transparency, accuracy, and completeness of information available to shareholders when making voting decisions and enhancing the overall functioning of the proxy voting process, in furtherance of Section 14 of the Exchange Act would support adoption of the amendments notwithstanding any adverse effect on competition arising therefrom.

3. Capital Formation

By facilitating the ability of clients of proxy voting advice businesses to make informed voting determinations, the final 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 final amendments lead to more investment, we could expect greater demand for securities, which could, in turn, promote capital formation. Additionally, to the extent the final amendments ameliorate frictions in the market for proxy voting advice that may currently deter private companies from becoming public reporting companies, the amendments could serve to encourage more companies to become public.[666]

Several commenters stated that the proposal to allow registrants to review draft proxy advice could lead to the misuse of material non-public information.[667] This possibility is predicated on an expectation that a proxy voting advice business's recommendation could have an influence on the outcome of a voting matter before shareholders. For example, if a proxy voting advice business's recommendation is likely to influence the outcome of a vote that is expected to generate stock price reactions, then advance knowledge of such a recommendation would be potentially valuable to facilitate insider trading. Any such misuse of material non-public information could reduce investor confidence in the integrity of markets and lead to a reduction in capital formation. However, the final amendments do not mandate that registrants be given prior access to draft proxy voting advice. In addition, as discussed above, some form of registrant pre-review already exists at each of the three major proxy voting advice businesses, and we are not aware of any misuse of such information.

Overall, given the many factors that can influence the rate of capital formation, any effect of the final amendments on capital formation is expected to be small.

E. Reasonable Alternatives

1. Use a More Prescriptive Approach in the Final Amendments

Instead of a principles-based approach that allows proxy voting advice businesses the flexibility to design their own measures to ensure that clients have more complete and transparent information on which to base their voting decisions, we could have used a more prescriptive approach, such as the approach we proposed. For example, we could have required proxy voting advice businesses to notify registrants of their advice or provide their clients with registrants' responses to that advice in certain specific ways and time frames. Such a prescriptive approach could have reduced legal uncertainty for proxy voting advice businesses, but it would have generated greater compliance costs for proxy voting advice businesses, some or all of which could have been passed on to their clients. The principles-based approach we are adopting provides a significant degree of flexibility to proxy voting advice businesses in deciding the best way to ensure that more complete and transparent information is available to their clients, and we expect that it will significantly reduce their compliance costs.

2. Require Proxy Voting Advice Businesses To Include Full Registrant Response in the Businesses' Voting Advice

Rather than requiring proxy voting advice businesses to adopt and publicly disclose written policies and procedures reasonably designed to ensure that such businesses provide clients with a mechanism by which the clients can reasonably be expected to become aware of registrant responses to proxy voting advice, we could require proxy voting advice businesses to include the registrant's full response in the proxy voting advice itself. Including the registrant's full response in the proxy voting advice would benefit clients of proxy voting advice businesses by allowing them to avoid the additional step of accessing the response. Including a full response in the voting advice provided by proxy voting advice businesses also could benefit registrants by having their responses more prominently displayed, depending on where in the advice the response is included. Two commenters suggested this as an appropriate alternative to the proposed amendments.[668]

However, requiring inclusion of the registrant's full response in the proxy 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.

3. Public Disclosure of Conflicts of Interest

The final 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. In addition, one commenter noted that publicly disclosing conflicts could undermine the information barriers put in place between the consulting and proxy advice side of a proxy voting advice business's operations.[669]

4. Require Additional or Alternative Mandatory Disclosures in Proxy Voting Advice

In addition to requiring the adopted conflicts of interest disclosures, we could amend Rule 14a–2(b)(9) to 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 specificity required, may result in competitive consequences to proxy voting advice businesses. In light of these considerations, the adopted rules will not require such disclosures in all instances.

One commenter noted a suggestion from the 2010 Concept Release that ''proxy advisory firms could provide increased disclosure regarding the extent of research involved with a particular recommendation and the extent and/or effectiveness of its controls and procedures in ensuring the accuracy of registrant data.'' [670] The commenter also highlighted another suggestion from the Concept Release noting that the Commission's rules that govern NRSROs ''may be useful

[654] *See supra* notes 646 and 651.

[655] *See* letter from C. Spatt.

[656] *Id.*

[657] *See* letters from B. Sharfman I and Manhattan Institute.

[658] *See* Proposing Release at 66550.

[659] *See* letters from CII IV; Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Management Corporation (Mar. 30, 2020) (''Elliott II''); Felician Sisters II; Glass Lewis II; Good Shepherd; IASJ; ISS; Interfaith Center II; Minerva I; New York Comptroller II; Prof. Bebchuk; St. Dominic of Caldwell; ProxyVote II. *See also* IAC Recommendation.

[660] *See* letters from Prof. Bebchuk; TIAA; 62 Professors; CII IV. *See also* IAC Recommendation.

[661] *See, e.g.*, letters from ISS; CII IV; Segal Marco II; Prof. Sergakis; 62 Professors.

[662] *See* letters from Minerva I.

[663] *See* letter from Manhattan Institute.

[664] *See* letter from ProxyVote II.

[665] *See supra* notes 170–173 and accompanying text.

[666] *See* letters from Prof. Tingle (asserting that public capital markets have become less attractive to companies that would otherwise consider going public and that proxy voting advice businesses have been singled out as possibly complicit in this trend); TechNet (supporting the Proposed Rule as part of a commitment to ''. . . make the U.S. the most attractive place in the world for anyone to start a company, grow it here, and take it public.'').

[667] *See* letters from CII IV; Glass Lewis II; ISS.

[668] *See* letters from NAM; BIO.

[669] *See* letter from ISS.

[670] *See* letter from Glass Lewis II.

templates for developing a regulatory program addressing conflicts of interest and other issues with respect to the accuracy and transparency of voting recommendations provided by proxy advisory firms.'' The commenter stated that these two approaches should have been considered as alternatives to the rule. We have considered the alternative of requiring additional disclosure regarding the methods and procedures used to develop proxy voting advice, but believe it is preferable to avoid being overly prescriptive about the content of the report for a particular registrant/recommendation. Instead, for the reasons discussed throughout this release, we believe it is more appropriate to focus on principles that will allow the clients of proxy voting advice businesses to have access to more complete and transparent information upon which to make a voting decision, while providing flexibility to proxy voting advice businesses to determine the best means to satisfy those principles. Moreover, while we recognize that other regulatory regimes may take different approaches to similar issues, we note that the role of NRSROs and proxy voting advice businesses differ from one another and that following a similar regulatory approach might not be appropriate. We also recognize that the costs and benefits of NRSRO regulation differ from the costs and benefits of potential additional regulation of proxy voting advice businesses. The principles-based approach reflected in the final amendments is tailored to the unique role played by proxy voting advice businesses in the proxy process and is intended to be adaptable to existing market practices.

5. Require Disabling or Suspension of Pre-Populated and Automatic Submission of Votes

The final 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 electronic voting platform to disable or suspend the automatic submission of votes in instances where a registrant indicates that it intends to file (or has filed) a response to the voting advice as additional soliciting materials. Alternatively, we could require such a condition. Another alternative would be to require that the proxy voting advice business refrain from pre-populating a client's voting choices once a registrant indicates it intends to file a response, indefinitely or for a period of time, and subject to conditions. Several commenters supported an alternative that would generally limit or disable the automatic submission of votes, claiming it would lead to more informed proxy voting, though these commenters did not necessarily condition such limitations on the filing of a registrant response.[671]

We recognize that these pre-population and automatic submission functions may enable proxy voting advice business clients to vote their proxies prior to registrants being able to provide a response to the proxy voting advice. We also recognize that disabling or suspending these functions when registrants have indicated they intend to file responses to voting advice could benefit the clients of proxy voting advice businesses to the extent that it increases the likelihood that the clients of the proxy voting advice businesses would review the registrants' responses, and take them into consideration, before voting their proxies. At the same time, depending on how such a measure is implemented and conditioned, such an alternative could give rise to timing pressures and other logistical challenges. For example, disabling these functions permanently under certain circumstances could increase costs for clients if they need to devote greater resources to managing the voting process as a result, which may in turn also reduce the value of the services of the proxy voting advice businesses.

We have declined to adopt such a prescriptive approach at this time, but rather have focused on an incremental principles-based approach in order to see how practice develops in light of the changes being adopted. The amendments we are adopting are intended to make clients of proxy voting advice businesses aware of a registrant's views about proxy voting advice in a timely manner, which could assist these clients in making voting determinations. Further, the Commission has provided investment advisers, who often engage proxy voting advice businesses to provide voting related services, with additional guidance regarding how they could consider their policies and procedures regarding these types of automated voting functions.[672]

6. Exempt Smaller Proxy Voting Advice Businesses From the Additional Conditions to the Exemptions

As discussed in Section III.C.2 above, given certain industry practices, the costs associated with the final amendments may be different for certain proxy voting advice businesses. For example, the three major proxy voting advice businesses have processes in place for sharing certain aspects of their analysis with certain registrants prior to making a recommendation to clients, which they may be able to leverage to comply with the new conditions. However, it is possible that entrants to this market (which could be smaller than the existing three major proxy voting advice businesses) would have to develop new processes to meet the conditions for exemption under the final amendments if they choose to engage in the types of activities that fall within the scope of Rule 14a–1(l)(1)(iii). Some of the costs of developing these new processes are likely fixed, and do not vary with the number of issuers a proxy voting advice business covers or the number of clients it serves. Thus, the costs associated with the final amendments could affect potential entrants into the market for proxy advice that are smaller businesses more than the existing three major proxy voting advice businesses. To the extent the costs associated with the final amendments disproportionately affect smaller proxy voting advice businesses that might consider entering the market in the future, the final amendments could reduce 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). Several commenters supported such an alternative.[673] Exempting smaller proxy voting advice businesses from the additional conditions would reduce the cost of the final amendments for such businesses, and could thus facilitate the entry of new proxy voting advice businesses. However, we expect the costs associated with the final amendments to be much smaller compared to the initial costs of setting up the business, including building a reputation for providing quality services, which any newcomer will have to incur. Also, such an exemption would mean that clients of these proxy voting advice businesses would not realize the same benefits as clients of incumbent firms in terms of potential improvements in the accuracy, completeness, and transparency of the information available to them when they make voting decisions.[674] Moreover, as we have discussed in prior sections, we anticipate that the principles-based approach we are adopting is likely to result in more modest costs increases for proxy voting advice businesses than the more prescriptive approach we proposed, which should moderate the impact of the final amendments on smaller potential entrants.

7. Require a Narrower Scope of Registrant Notice

A number of commenters suggested that registrants should only be allowed to review the facts that a proxy voting advice business uses in determining its voting recommendation, particularly if we proceeded with a requirement that registrants review draft proxy voting reports before they are sent to clients.[675] For example, rather than providing a full copy of its voting advice, a proxy voting advice business could provide a summary thereof, setting forth the facts it uses without specifying further details.

We note that while the principles-based approach we are adopting does not dictate precisely how a proxy voting advice business provides notice of proxy voting advice to registrants, the final amendments require that proxy voting advice businesses share the full proxy voting report with registrants. Although we acknowledge that commenters' suggested alternative may be less costly for proxy voting advice businesses to implement, we believe that providing registrants with the full contents of proxy voting reports is necessary to achieve the Commission's objective of facilitating informed proxy voting decisions. Providing registrants with the full contents of the report gives registrants the opportunity to file additional soliciting materials that discuss not only the facts underlying the proxy voting advice business's recommendations, but also the methodology and analysis the proxy voting advice business used to arrive its recommendations. In deciding how to vote on a proxy matter, clients of proxy voting advice businesses may benefit from that additional discussion. As a result, we anticipate the final amendments will more effectively facilitate clients' assessment of proxy voting advice than this alternative. Moreover, because the final amendments do not require an opportunity for pre-publication review, we believe that the cost of sharing full reports will be more modest under the final amendments than under the proposed amendments.

VI. Paperwork Reduction Act

A. Background

Certain provisions of our rules, schedules, and forms that will be affected by the amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[676] We published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[677] The hours and costs associated with maintaining, disclosing, or providing the information required by the 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).

The Commission adopted existing Regulation 14A[678] 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.[679]

A detailed description of the amendments, including the need for the information and its 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 amendments can be found in Section IV above.

B. Summary of Comment Letters to PRA Estimates

The Commission received three comment letters in response to its request for comment on the PRA estimates and analysis included in the Proposing Release.[680] These commenters expressed concern that the estimates were not representative of actual impacts and that the analysis failed to properly account for the paperwork burden that would be incurred, in particular, by proxy voting advice businesses.[681] Two of the commenters asserted that the Commission's analysis understated the magnitude of the hourly and cost burdens that the proposed amendments would impose.[682] One of those commenters provided detailed estimates of its expected annual compliance burden for each of the components of the proposed amendments.[683]

C. Burden and Cost Estimates for the Amendments

Below we estimate the incremental and aggregate effect on paperwork burden as a result of the amendments. As discussed in Section II above, we have made a number of changes from the proposed amendments, most notably to shift to a principles-based approach in Rule 14a–2(b)(9)(ii), and we have adjusted our estimates accordingly.

The burden estimates were calculated by (i) estimating the number of parties expected to expend time, effort, and/or financial resources to generate, maintain, retain, disclose or provide information required by the amendments, and then (ii) multiplying this number by the estimated amount of time, on average, each of these parties would devote in order to comply with these new requirements over and above their existing compliance burden associated with Regulation 14A. These estimates represent the average burden for all respondents, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual respondents based on a number of factors, including the nature and conduct of their business.

1. Impact on Affected Parties

As discussed above in Section IV.B.1., there are a variety of parties that may be affected, directly or indirectly, by the amendments. These include proxy voting advice businesses; the clients to

[671] *See* letters from BRT; NAM; BIO. *But see, e.g.*, letters from CII IV; Dan Jamieson (Jan. 16, 2020); IAA; ISS; New York Comptroller II.

[672] *See* Supplemental Proxy Voting Guidance.

[673] *See* letters from SHARE II; CII IV; Manhattan Institute. One commenter more generally argued that the Commission should ''adopt policies that would ease entry and participation in the market.'' *See* letters from Elliott I, Prof. Li.

[674] *See* letter from SES.

[675] *See* letters from ISS at 57; MFA & AIMA at 2; State Street at 3; CFA Institute at 2, 8; CIRCA at 22; Glass Lewis II at 22–23; IAC at 8–9.

[676] 44 U.S.C. 3501 *et seq.*

[677] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[678] 17 CFR 240.14a–1 *et seq.*

[679] 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.

[680] *See* letters from IASJ; Glass Lewis I; ProxyVote I.

[681] *See id.*

[682] *See* letters from Glass Lewis I; ProxyVote I.

[683] *See* letter from Glass Lewis I.

whom these businesses provide voting advice; investors and other groups on whose behalf the clients of proxy voting advice business make voting determinations; registrants who are conducting solicitations and are the subject of proxy voting advice; and the registrants' shareholders, who ultimately bear the costs and benefits to the registrant associated with the outcome of voting matters covered by proxy voting advice.

Of these parties, we expect that proxy voting advice businesses and, to a lesser extent, registrants that are the subject of the proxy voting advice, would incur some additional paperwork burden resulting from the amendments.[684] As discussed further below, we believe that any incremental burden would be attributable primarily to new Rule 14a–2(b)(9). With respect to the amendments to Rule 14a–1(l) and Rule 14a–9, we do not expect the economic impact of these amendments will be significant because they do not change existing law and therefore do not change respondents' legal obligations.[685] Moreover, any impact arising from these amendments is not expected to materially change the average PRA burden hour estimates associated with Regulation 14A. We therefore have not made any adjustments to our PRA burden estimates in respect of these amendments.

a. Proxy Voting Advice Businesses

In the Proposing Release, the Commission estimated that each proxy voting advice business would incur an aggregate yearly increase in burden of 500 hours due to the proposed amendments.[686] In recognition of the changes from the proposal as well as in consideration of the comments received regarding the paperwork burdens of the proposed amendments,[687] we have adjusted our estimates of the burdens on proxy voting advice businesses.

Proxy voting advice businesses are expected to incur an increased burden as a result of new Rule 14a–2(b)(9), which will apply to anyone relying on the exemptions in Rules 14a–2(b)(1) or (b)(3) who furnishes proxy voting advice covered by Rule 14a–1(l)(1)(iii)(A). The amount of the burden will depend on a number of factors that are firm-specific and highly variable, which makes it difficult to provide reliable quantitative estimates.[688]

There are three components of new Rule 14a–2(b)(9) that we expect to result in an increased burden. First, in accordance with Rule 14a–2(b)(9)(i), proxy voting advice businesses will be required to include in their proxy voting advice (or in an electronic medium used to deliver the advice) disclosure of conflicts of interest specifically tailored to proxy voting advice businesses and the nature of their services.[689] Second, under Rule 14a–2(b)(9)(ii)(A), proxy voting advice businesses will be required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the proxy voting advice business's clients. Third, under Rule 14a–2(b)(9)(ii)(B), the proxy voting advice business will be required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the shareholder meeting. The amendments also provide non-exclusive safe harbors that the proxy voting advice businesses may use to satisfy the principle-based requirements in Rule 14a–2(b)(9)(ii). We address each of these three components in turn.

With respect to the conflicts of interest disclosure in new Rule 14a–2(b)(9)(i), the facts and circumstances unique to each proxy voting advice business, including the conflicts of interest disclosures it currently provides to its clients as well as the nature of its material interests, transactions, and relationships, will dictate the additional disclosure, if any, it must provide under the final rule. For example, to the extent that proxy voting advice businesses are already providing the kind of conflicts of interest disclosure required by the rule, it would reduce their new compliance burden. Another factor that complicates the calculation of burden is the principles-based nature of the conflicts disclosure requirement, which eschews prescriptive disclosure standards in favor of providing proxy voting advice businesses the flexibility to determine which situations merit disclosure and the specific details to provide to their clients about any conflicts of interest identified. While this flexibility in the rule's application is beneficial for both proxy voting advice business and their clients, it limits our ability to predict the associated paperwork burden. Under the rule, a proxy voting advice business's disclosure could differ for each registrant and be subject to change in the future as both the business's and its clients' circumstances change.

One proxy voting advice business estimated that its burden associated with the identification and disclosure of conflicts of information under the proposed rules would add 5,969 burden hours each year.[690] While we believe that the principles-based focus of the adopted requirement, in tandem with a proxy voting advice business's existing conflicts disclosure systems and practices (particularly as to registrants that have been the focus of the business's proxy coverage in prior years), could significantly mitigate any increased paperwork burden corresponding to the new rules, we think it is appropriate to increase our estimates to align more closely with this commenter's input. Accordingly, we estimate the conflicts of interest disclosure in new Rule 14a–2(b)(9)(i) to result in 6,000 additional burden hours per proxy voting advice business.

The remainder of the additional paperwork burden associated with the amendments will derive from the requirements of Rules 14a–2(b)(9)(ii)(A) and (B). Because these rules have been designed to permit proxy voting advice businesses substantial flexibility over the manner in which they comply, we expect those businesses will implement mechanisms differently depending on, among other things, the facts and circumstances of their particular business operations and the nature of their client bases.[691] Furthermore, some proxy voting advice businesses may already have systems sufficient to address some or all of the mechanics required to comply with Rules 14a–2(b)(9)(ii)(A) and (B),[692] which would be expected to limit their overall burden but cannot be precisely estimated.

It appears that the more prescriptive nature of the proposed amendment regarding registrants' and certain other soliciting persons' advance review and response to proxy voting advice was a large driver of the hourly and cost burdens discussed by commenters. We believe the flexibility afforded by the principles-based approach reflected in the final rules should therefore result in significantly lower costs for proxy voting advice businesses and their clients than under the proposal.[693]

We believe that much of the burden of the final amendments would be for the proxy voting advice business to develop policies that satisfy the principles and accordingly modify or develop systems and practices to implement such policies. To derive an estimate for these costs, we start with our estimated number of registrants filing proxy materials annually, which is 5,690.[694] We estimate that the burden on a proxy voting advice business in setting up, modifying, and implementing such policies and systems would involve approximately one half-hour per registrant (2,845 hours) for the notice to registrants under Rule 14a–2(b)(9)(ii)(A) and one half-hour per registrant (2,845 hours) for the notice to clients of any response by the registrants under Rule 14a–2(b)(9)(ii)(B).[695] Our revised estimates take into consideration our understanding that some proxy voting advice businesses have systems and practices in place that may complement or overlap with the new requirements, which could substantially mitigate any increases to their overall burden. Also, these estimates represent the average annual burden increase over three years, as we assume that the burden would be greatest in the first year after adoption as proxy voting advice businesses incorporate the new requirements into their existing practices and procedures, but would be less in subsequent years.

In addition to these system-related costs, we expect that the proxy voting advice businesses would, as a general matter, obtain acknowledgments or agreements with respect to the use of any information shared with a registrant, as we expect that the business would seek to limit disclosure of its report. Given that the rules do not require proxy voting advice businesses to give pre-release copies of proxy voting advice to registrants, in contrast to the proposal, we believe the need for proxy voting advice businesses to individually negotiate and secure detailed confidentiality agreements from registrants will be substantially lessened. This is particularly true to the extent that a proxy voting advice business already maintains a practice of providing copies of its proxy voting advice to registrants and can therefore utilize its existing practices with respect to confidentiality provisions. This would include, for example, the practice of requiring registrants to agree to or acknowledge certain terms of use before accessing the proxy voting advice. In this regard, we note that some proxy voting advice businesses currently provide reports to registrants without requiring formal confidentiality agreements, instead requiring only an electronic acknowledgement of terms of use.[696]

We recognize that there nevertheless may be some hourly and cost burden associated with a proxy voting advice business's efforts to obtain acknowledgements[697] or other kinds of agreements with registrants before sharing proxy voting advice materials and that there could be a range of approaches. One approach may be to develop a standardized form of acknowledgement regarding the report's terms of use and implementing systems to track the acknowledgments. Under such an approach, we estimate that each proxy voting advice business would incur 100 hours in the first year of compliance to draft such standardized terms of use and update systems to implement and track it, and 25 hours each year thereafter to implement the terms of use and systems on a going-forward basis, for a three-year average of 50 hours per year per proxy voting advice business associated with securing an acknowledgment or other assurance that the proxy advice will not

[684] The PRA requires that we estimate "the total annual reporting and recordkeeping burden that will result from the collection of information." [5 CFR 1320.5(a)(1)(iv)(B)(5)] A "collection of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information [5 CFR 1320.3(c)]. OMB's current inventory for Regulation 14A, therefore, is an assessment of the paperwork burden associated with such requirements and requests under the regulation, and this PRA is an assessment of changes to such inventory expected to result from adoption of the amendments. While other parties, such as the clients of proxy voting advice businesses, may have costs associated with the amendments (*see supra* Section IV.C.), only proxy voting advice businesses and registrants will incur any additional paperwork burden in order to comply with or respond to the informational requirements of the amendments.

[685] The amendments to Rule 14a–1(l) codify existing Commission interpretations and views about the applicability of the Federal proxy rules to proxy voting advice and are not expected to have a significant economic impact. *See supra* Section IV.C.2.b. The amendments to Rule 14a–9 may impose direct costs on proxy voting advice businesses to the extent the amended rule prompts some proxy voting advice businesses to provide additional disclosure about the bases for their voting advice. However, we expect any such costs to be minimal, especially given that the examples in new paragraph (e) of the Note to Rule 14a–9 were included in prior Commission guidance. *See supra* Section IV.C.4.b. One commenter argued that proxy voting advice businesses and their legal counsel would devote significant time and effort to review and respond to feedback received from registrants so as to protect the business from private litigation claims stemming from Rule 14a–9, as amended. *See* letter from Glass Lewis I. While the commenter mentioned the proposed amendment to Rule 14a–9, we read this comment as primarily relating to the proposed review and feedback proposal, which we are not adopting. We do not believe that the amendment to Rule 14a–9 represents a change to existing law, nor does it broaden the concept of materiality or create a new cause of action, as some commenters have suggested. *See* discussion *supra* Section II.D.3.

[686] *See* Proposing Release, PRA Table 1 "*Calculation of Increase in Burden Hours Resulting from the Proposed Amendments*," at 66553. The Commission estimated that, for each proxy voting advice business, the burden would be 1,000 hours in the first year following adoption and 250 hours in each of the following years, for a three-year average of 500 burden hours. *Id.* at note d. to Table 1. Given the Commission's assumption at the proposing stage that there were five proxy voting advice businesses, the average of 500 hours was multiplied by five to arrive at a total of 2,500 hours.

[687] *See supra* note 682.

[688] *See generally* the discussion *supra* in Sections IV.C.3.a.ii. and b.ii. concerning the difficulty in providing quantitative estimates of the costs to proxy voting advice businesses imposed by the amendments.

[689] Rule 14a–2(b)(9)(i).

[690] *See* letter from Glass Lewis I. Glass Lewis calculated that it issued 5,565 total proxy research reports on U.S. companies in 2018. Assuming one hour spent for each report to identify any potential conflicts and another .5 hours to prepare conflicts disclosure regarding 807 of the 5,565 registrants for whom Glass Lewis determined it had disclosable conflict information, Glass Lewis estimated an increased burden of 5,969 hours annually to comply with the new conflicts of disclosure requirements in proposed Rule 14a–2(b)(9)(i).

[691] As one example, to be eligible for the safe harbor in Rule 14a–2(b)(9)(iv), a proxy voting advice business has the option to provide notice on its electronic client platform that the registrant has filed additional soliciting materials, or it could choose to provide notice through email or other electronic means. Both mechanisms for informing clients could involve initial set-up costs as well as ongoing costs that are hard to predict. Since they are not required to rely on the safe harbor, proxy voting advice businesses may also put in place other mechanisms to inform their clients of a registrant's views about the proxy voting advice, which could be more or less costly than satisfying the conditions of the safe harbor.

[692] *See supra* note 609 in Section IV.C.3.b.2.

[693] For example, one commenter enumerated a number of elements of the proposal that it believed would have an impact on a proxy voting advice business's paperwork burden and provided estimates of the hourly burden expected to be incurred that totaled 59,999 burden hours. Of this amount, we have already addressed and incorporated the 5,969 hours estimate regarding identifying and disclosing conflicts. *See supra* note 690. We address the 19,648 hour estimate regarding confidentiality agreements below. We believe the remaining 34,382 burden hours pertained to elements of the proposed rules that are not directly relevant in light of our revisions in favor of a more principle-based framework that no longer requires mandatory review and feedback periods. *See* letter from Glass Lewis I.

[694] *See supra* note 549.

[695] In deriving our estimates of one half-hour per registrant for each of Rule 14a–2(b)(9)(ii)(A) and Rule 14a–2(b)(9)(ii)(B), we considered estimates provided by one commenter who estimated that the "Implementation of final notice period" component of the proposal would impose a burden of 0.5 hours per registrant, as would the "Process, review and implement requests for a hyperlinked response" component. *See* letter from Glass Lewis I. While these two proposed components are not part of the final rules, they are in some ways analogous to the two principles for which proxy voting advice businesses may need to implement systems under the final rules. Accordingly, we believe one half-hour burden per registrant for each of these components is an appropriate estimate as to the burden on each proxy voting advice business.

[696] *See supra* note 615. For example, Glass Lewis requires a registrant to click and acknowledge/accept/agree to certain "terms of use" before being able to access the notice and recommendations.

[697] See paragraph (B) of the Rule 14a–2(b)(9)(iii) safe harbor.

be disclosed. However, we recognize that proxy voting advice businesses could choose instead to negotiate individual terms of use with each registrant. As a result of modifications we have made from the proposal in response to commenters, we anticipate that the burden in those cases would nonetheless be significantly less than the four hours per issuer burden estimate provided by a commenter regarding the proposal.[698] We estimate an average burden of one hour per registrant[699] under those circumstances, for a total estimate of 5,690 hours per year associated with securing an acknowledgment or other assurance that the proxy advice will not be disclosed. Accordingly, depending on which approach a proxy voting advice business chooses, we expect that the burden could range from 50 hours to 5,690 hours per year per proxy voting advice business. Given current practices, we expect that proxy voting advice business would generally seek to rely on standardized terms of use. Nevertheless, for purposes of this PRA analysis, and so as to not underestimate the burden, we use an estimate of 5,690 hours per proxy voting advice business to obtain acknowledgments.

Overall, we believe that proxy voting advice businesses will incur an annual incremental paperwork burden to comply with Rule 14a–2(b)(9) as follows.

New requirement	Proxy voting advice business estimated incremental annual compliance burden
Rule 14a–2(b)(9)(i)—Conflicts Disclosure ..... Proxy voting advice business must include conflicts of interest disclosure in its proxy voting advice (or electronic medium used to deliver the advice), as well as a discussion of any policies and procedures used to identify and address conflicts, and any actual steps taken to address any conflicts.	Increase in paperwork burden corresponding to: To the extent that the proxy voting advice business's current practices and procedures do not already satisfy the requirement: • Identification and disclosure to clients of qualifying conflicts of interest. Includes burden associated with internal processes and procedures for: ○ Reviewing and preparing disclosures describing conflicts of interest, relevant conflicts policies and procedures, and actual steps taken to address conflicts identified; ○ Developing and maintaining methods for tracking conflicts of interest; ○ Seeking legal or other advice; and ○ Updating electronic client platforms, as applicable. We estimate the increase in paperwork burden to be 6,000 hours per proxy voting advice business.
Rule 14a–2(b)(9)(ii)(A)—Notice to Registrants and Rule 14a–2(b)(9)(iii) Safe Harbor. The proxy voting advice business has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that registrants who are the subject of proxy voting advice have such advice made available to them at or prior to the time the advice is disseminated to clients of the proxy voting advice business. • Safe Harbor—The proxy voting advice business has written policies and procedures that are reasonably designed to provide a registrant with a copy of the proxy voting advice business's proxy voting advice, at no charge, no later than the time it is disseminated to the business's clients. Such policies and procedures may include conditions requiring that: (A) The registrant has filed its definitive proxy statement at least 40 calendar days before the security holder meeting date (or if no meeting is held, at least 40 calendar days before the date the votes, consents, or authorizations may be used to effect the proposed action); and (B) The registrant has acknowledged that it will only use the copy of the proxy voting advice for its internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant's employees or advisers.	Increase in paperwork burden corresponding to: To the extent that the proxy voting advice business's current practices and procedures are not already sufficient: • Developing new or modifying existing systems, policies and methods, or developing and maintaining new systems, policies and methods capable of: ○ Tracking whether the registrant has filed additional soliciting materials; ○ Ensuring that proxy voting advice businesses provide clients with a means to learn of a registrant's written statements about proxy voting advice in a timely manner that satisfies the requirement in Rule 14a–2(b)(9)(ii)(B) and/or the safe harbor in Rule 14a–2(b)(9)(iv). • If applicable, obtaining acknowledgments or agreements with respect to use of any information shared with the registrant; and • Delivering copies of proxy voting advice to registrants. We estimate the increase in paperwork burden to be 8,535 hours per proxy voting advice business, consisting of 2,845 hours for system updates and 5,690 hours for acknowledgments regarding sharing information.

[698] *See* letter from Glass Lewis I.

[699] Out of the estimated 18,534 registrants that may be affected to a greater or lesser extent by the final amendments, 5,690 filed proxy materials with the Commission during calendar year 2018. *See* Section IV.B.1. and *supra* note 549.

New requirement	Proxy voting advice business estimated incremental annual compliance burden
Rule 14a–2(b)(9)(ii)(B)—Notice to Clients of Proxy Voting Advice Businesses and Rule 14a–2(b)(9)(iv) Safe Harbor. The proxy voting advice business has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that the proxy voting advice business provides clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding proxy voting advice by registrants who are the subject of such advice, in a timely manner before the shareholder meeting. • Safe harbor—The proxy voting advice business has written policies and procedures that are reasonably designed to inform clients who receive the proxy voting advice when a registrant that is the subject of such voting advice notifies the proxy voting advice business that it intends to file or has filed additional soliciting materials with the Commission setting forth the registrant's statement regarding the voting advice, by: (A) Providing notice to its clients on its electronic client platform that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available; or (B) The proxy voting advice business providing notice to its clients through email or other electronic means that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available.	Increase in paperwork burden corresponding to: To the extent that the proxy voting advice business's current practices and procedures are not already sufficient: • Developing new or modifying existing systems, policies and methods, or developing and maintaining new systems, policies and methods capable of: ○ Tracking whether the registrant has filed additional soliciting materials; ○ Ensuring that proxy voting advice businesses provide clients with a means to learn of a registrant's written statements about proxy voting advice in a timely manner that satisfies the requirement in Rule 14a–2(b)(9)(ii)(B) and/or the safe harbor in Rule 14a–2(b)(9)(iv). • If relying on the safe harbor in Rule 14a–2(b)(9)(iv)(A) or (B), the associated paperwork burden would include the time and effort required of the proxy voting advice businesses firm to: ○ Provide notice to its clients through the business's electronic client platform or email or other electronic medium, as appropriate, that the registrant intends to file or has filed additional soliciting materials setting forth its views about the proxy voting advice; and ○ include a hyperlink to the registrant's statement on EDGAR We estimate the increase in paperwork burden to be 2,845 hours per proxy voting advice business.
Total	17,380 hours per proxy voting advice business.

Altogether, we estimate an annual total increase of 52,640 hours[700] in compliance burden to be incurred by proxy voting advice businesses that would be subject to the amendments to Rule 14a–2(b)(9). We assume that the burden would be greatest in the first year after adoption, as proxy voting advice businesses incorporate the new requirements into their existing practices and procedures.

b. Registrants

In addition to proxy voting advice businesses, we anticipate that registrants would incur some additional paperwork burden as a result of the amendments. Registrants could experience increased burdens associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice, and preparing and filing supplementary proxy materials in response to the proxy voting advice, if they choose to do so.

As the rules do not require registrants to engage with proxy voting advice businesses or take any action in response to proxy voting advice, we expect a registrant would bear additional paperwork burden only if it anticipated the benefits of engaging with the proxy voting advice business would exceed the costs of participation. These costs will vary depending upon the particular facts and circumstances of the proxy voting advice and any issues identified therein, as well as the resources of the registrant, which makes it difficult to provide a reliable quantifiable estimate of these costs. Nevertheless, in the Proposing Release, the Commission stated its belief that the corresponding burden on registrants would be not significant in most cases, particularly when averaged among all affected registrants.[701] As such, the Commission estimated that registrants would each incur, on average, an increase of ten additional burden hours each year, for a total increase among all registrants of 18,970 hours annually.[702]

In consideration of commenters' views that the Commission's estimates were too low,[703] we have adjusted our prior burden estimates upward. Nevertheless, we do not believe the annual burden to be incurred by an individual registrant would be considerably greater than was reflected in the Proposing Release, particularly in light of the modifications we are making to the registrant review process that was originally proposed. For example, the rules as adopted do not mandate that registrants be afforded fixed periods of review of proxy voting advice, as was the case with the proposal.[704] Furthermore, our estimates consider the extent to which some registrants' current practices and procedures may already involve reviewing proxy voting advice businesses' voting advice, filing additional soliciting materials, and some amount of investor outreach in response to adverse voting recommendations. Assuming that a

[700] This represents the annual total burden increase expected to be incurred by proxy voting advice businesses (as an average of the yearly burden predicted over the three-year period following adoption) and is intended to be inclusive of all burdens reasonably anticipated to be associated with compliance with the conditions of Rule 14a–2(b)(9). The Commission is aware of three businesses in the U.S. (*i.e.*, Glass Lewis, ISS, and Egan-Jones) whose activities fall within the scope of proxy voting advice constituting a solicitation under amended Rule 14a–1(l)(1)(iii)(A). We estimate that each of these will have a burden of 17,380 hours per year. We recognize that there could be other proxy voting advice businesses, including both smaller firms and firms operating outside the U.S., which may also be subject to the final rules. However, we expect such a number to be small. Accordingly, rather than increasing our estimate of the number of affected proxy voting advice businesses beyond the three discussed above, we are increasing our annual total burden estimate by 500 hours to account for those businesses. As a result, the annual total burden that we estimate will result from this amendment will be: (17,380 × 3) + 500 = 52,640 hours.

[701] *See* Proposing Release, PRA Table 1 at 66553 and note e of the table.

[702] *Id.*

[703] *See* letters from Glass Lewis I (". . . the ten hour estimate and resulting burden hour estimate is both unsupported and likely significantly understated") and ProxyVote I ("We believe the Proposed Rulemaking significantly understates the actual burden imposed on ProxyVote and thus the actual costs we will incur.")

[704] *See* proposed Rule 14a–2(b)(9)(ii)(2). One commenter criticized the Commission for not giving proper consideration to registrants' burden hours associated with the "review and feedback" periods. *See* Glass Lewis I.

registrant's annual meeting of shareholders is covered by at least two of the three major U.S. proxy voting advice businesses, and the registrant has opted to review both sets of proxy advice and file additional soliciting materials in response, we estimate an average increase of 50 hours per registrant in connection with the amendments for a total annual increase of 284,500 hours.[705] As discussed above, however, it is difficult to predict the effect of the amendments on a registrant's paperwork burden with a great degree of precision.

2. Aggregate Increase in Burden

Table 1 summarizes the calculations and assumptions used to derive our estimates of the aggregate increase in burden for all affected parties corresponding to the amendments.

PRA Table 1—Calculation of Aggregate Increase in Burden Hours Resulting From the Amendments

	Affected parties	
	Proxy voting advice businesses	Registrants
	(A)	(B)
Burden Hour Increase	52,640	284,500
Aggregate Increase in Burden Hours	[Column Total (A)] + [Column Total (B)] = [337,140]	

3. Increase in Annual Responses

We believe that the amendments would increase the number of annual responses [706] to the existing collection of information for Regulation 14A. Although we do not expect registrants 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 17 CFR 240.14a–6 may increase in proportion to the number of times that registrants choose to provide a statement in response to a proxy voting advice business's proxy voting advice as contemplated by Rule 14a–2(b)(9)(ii)(B) and/or the safe harbor under Rule 14a–2(b)(9)(iv). For purposes of this PRA, we estimate that there would be an additional 783 annual responses to the collection of information as a result of the amendments.[707]

4. Incremental Change in Compliance Burden for Collection of Information

Table 2 below illustrates the incremental change to the total annual compliance burden for the Regulation 14A collection of information in hours and in costs [708] as a result of the amendments. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

[705] In the Proposing Release, for purposes of its PRA analysis, the Commission assumed that, on average, one-third of the 5,690 registrants that filed proxy materials with the Commission during calendar year 2018 (1,897) would be the subject of proxy voting advice each year. *See* Proposing Release, note b. of PRA Table 1 at 66553. Some commenters who disagreed with this assumption stated that this figure was too low. *See* letter from Glass Lewis I. (suggesting that the correct number was "likely much closer to 100% of those that filed proxy materials with the Commission") and ProxyVote I ("The appropriate number of registrants that should be subject to the Proposed Rulemaking's estimates should be 5,690 registrants, not 1,897 registrants"). We also note certain statements from some proxy voting advice businesses indicating that they cover tens of thousands of shareholder meetings annually across global markets. *See* letters from Glass Lewis I and II; ISS; Egan-Jones. Accordingly, we have reconsidered our original estimate of one-third, and agree that our calculations should be based on the larger number of 5,690 registrants, given the significant volume of registrants and shareholder meetings that are the subject of proxy voting advice each year. This results in a total annual burden increase of 50 × 5,690 = 284,500 hours. We note that such burden increase would be offset against any corresponding reduction in burden resulting from the registrant forgoing other methods of responding to the proxy voting advice (such as investor outreach) the registrant determines are no longer necessary or are less preferable in light of the new rules.

[706] For purposes of the Regulation 14A collection of information, the number of annual responses corresponds to the estimated number of new filings that will be made each year under Regulation 14A, which includes filings such as DEF 14A; DEFA14A; DEFM14A; and DEFC14A. When calculating PRA burden for any particular collection of information, the total number of annual burden hours estimated is divided by the total number of annual responses estimated, which provides the average estimated annual burden per response. The current inventory of approved collections of information is maintained by the Office of Information and Regulatory Affairs (OIRA), a division of OMB. The total annual burden hours and number of responses associated with Regulation 14A, as updated from time to time, can be found at *https://www.reginfo.gov/public/do/PRAMain*.

[707] Because a registrant's decision to review and file additional soliciting materials in response to proxy voting advice will be entirely voluntary, it is difficult to predict how frequently such parties will choose to do so. For purposes of the PRA estimate in the Proposing Release, the Commission used as its baseline the average number of times firms filed additional definitive proxy materials in response to proxy voting advice over the three calendar years 2016 (99), 2017 (77) and 2018 (84), or 87. *See* Proposing Release at n. 269. For purposes of its PRA analysis, the Commission estimated that at least three times as many registrants would choose to prepare responses to 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 had historically chosen to file additional soliciting materials. As a result, the Commission estimated that three times as many supplemental proxy filings would be made each year, which would increase the annual responses to the Regulation 14A collection of information by the same amount. For purposes of this PRA analysis, we apply a similar methodology. To the extent that registrants believe that the efficacy of providing a response to proxy voting advice via additional soliciting materials will be enhanced by the amendments, and make registrants more likely to use this mechanism than they have in the past, we expect that the number of annual responses to the Regulation 14 collection of information will increase correspondingly. However, it is difficult to reliably predict what this overall increase would be. In light of comments we received that, as a general matter, our PRA estimates were too low, we think it is appropriate to increase our estimate of additional soliciting materials filed each year from three times the current number to ten times the current number. Taking the average of the Rule 14a–6 filings made in years 2016, 2017, 2018 (87), we multiply by ten for an estimate of 870 Rule 14a–6 filings, or an increase of 783 annual responses to the Regulation 14A collection of information.

[708] 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.

PRA Table 2—Calculation of Increase in Burden Hours Resulting From the Amendments

Number of estimated responses	Total increase in burden hours	Increase in burden hours per response	Increase in internal hours	Increase in professional hours	Increase in professional costs
(A) †	(B) ††	(C) = (B)/(A)	(D) = (B) x 0.75	(E) = (B) x 0.25	(F) = (E) x $400
6,369	337,140	†††50	252,855	84,285	$33,714,000

† This number reflects an estimated increase of 783 annual responses to the existing Regulation 14A collection of information. *See supra* note 707. 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 (52,640 hours) and registrants (284,500 hours). *See supra* PRA Table 1.

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

5. Program Change and Revised Burden Estimates

Table 3 summarizes the estimated change to the total annual compliance burden of the Regulation 14A collection of information, in hours and in costs, as a result of the amendments.

PRA Table 3—Requested Paperwork Burden Under the Amendments

	Current burden			Program change			Revised burden		
	Current annual responses	Current burden hours	Current cost burden	Increase in responses	Increase in internal hours	Increase in professional costs	Annual responses	Burden hours	Cost burden
	(A)	(B)	(C)	(D) ‡	(E) ‡‡	(F) ‡‡‡		(H) = (B) + (E)	(I) = (C) + (F)
Reg. 14A	5,586	551,101	$73,480,012	783	252,855	$33,714,000	6,369	803,956	$107,194,012

‡ *See* Column (A) in PRA Table 2 noting an estimated increase of 783 annual responses to the existing Regulation 14A collection of information.
‡‡ *See* Column (D) in PRA Table 2.
‡‡‡ From Column (F) in PRA Table 2.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act ("RFA").[709] It relates to the amendments to: The definition of "solicitation" in Rule 14a–1(l); the proxy solicitation exemptions in Rule 14a–2(b); and the prohibition on false or misleading statements in solicitations in Rule 14a–9 of Regulation 14A under the Exchange Act. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the RFA and was included in the Proposing Release.

A. Need for, and Objectives of, the Final Amendments

Given the importance of a properly functioning proxy system to investors and the capital markets, the purpose of the amendments is to help ensure that investors, or those acting on their behalf, who use proxy voting advice have access to more transparent and complete information with which to make their voting decisions, while not imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice, with the ultimate aim of facilitating informed voting decisions. The need for, and objectives of, these amendments are discussed in more detail in Sections I, II, and IV above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would 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. We also requested comment on the number of proxy voting advice businesses that would be small entities subject to the proposed amendments.

We did not receive estimates from commenters on the number of small entities that would be affected by the proposed amendments or the number of proxy voting advice businesses that would be small entities subject to the proposed amendments. However, several commenters asserted that the Commission's economic analysis failed to consider the cost and effect of the proposed amendments on smaller proxy voting advice businesses.[710] One such commenter stated that the proposals would be particularly burdensome for small proxy voting advice businesses.[711] Another commenter, who identified itself as a small entity (with under $5 million in assets) providing proxy voting services to institutional investor clients, asserted that small entities like itself would face significant resource and capacity burdens when complying with the proposed amendments, with no gain in the quality of voting or results for their clients.[712] In addition, one commenter believed that small and medium-sized investment advisers would be disproportionately affected by increased costs that may result from the proposed amendments because they are less likely to be able to have staff solely dedicated to the proxy voting process,[713] while another predicted that delays and increased costs resulting from the proposed amendments would most heavily impact smaller institutional investors, such as churches, endowments, unions, pension funds, etc.[714] Several commenters stated that small entities may not have sufficient staffing and resources to

[709] 5 U.S.C. 601 *et seq.*

[710] *See, e.g.*, letters from Felician Sisters II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.

[711] *See* letter from Interfaith Center II.

[712] *See supra* note 518.

[713] *See* letter from IAA.

[714] *See* letter from J. McRitchie I.

comply with the review and feedback process, and therefore should either be exempted from the proposals or, at a minimum, be given an extended timeframe for compliance.[715] In developing the FRFA, we considered these comments as well as comments on the proposed amendments generally.[716] As discussed throughout this release, including in Section VI.D below, we note that the shift to a principles-based approach for the final amendment should help alleviate a number of the concerns raised by commenters about the potential impact on small entities.

C. Small Entities Subject to the Final Amendments

The amendments could affect some small entities; specifically, those small entities that are: (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)(1)(iii), as amended); and (ii) registrants conducting solicitations covered by proxy voting advice. Although not directly subject to the amendments, clients of proxy voting advice businesses and the investors on whose behalf such clients vote proxies may be indirectly affected by the amendments to the extent that the costs borne by the proxy voting advice businesses result in increased fees for such services.

The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.''[717] The definition of ''small entity'' does not include individuals. 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.[718] An investment company, including a business development company,[719] is considered to be a ''small business'' if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[720] 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.[721]

As discussed in Section IV.B.1, we are not aware of smaller entities that currently supply research, analysis, and recommendations to support the voting decisions of their clients that would fall within the definition of ''solicitation'' and would therefore be directly affected by the amendments.[722] As far as registrants that may be directly affected, we estimate that there are 1,011 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.[723] In addition, we estimate that, as of December 31, 2019, there were 92 registered investment companies that may be considered small entities.[724] Finally, we estimate that, as of December 31, 2019, there were 452 investment advisers that may be considered small entities and may be indirectly affected by the amendments.[725]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

We anticipate that any costs resulting from the amendments will primarily relate to Rule 14a–2(b)(9) and, as such, predominantly affect the proxy advice voting businesses that will 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).[726] These businesses, including any affected small entities, will likely incur costs to ensure that their internal practices, procedures, and systems are sufficient to meet the conflicts of interest disclosure and notice requirements under Rule 14a–2(b)(9). As noted above, we are not aware of smaller entities that currently provide services that would cause them to be subject to the proposed amendments; nevertheless, in the interest of completeness, we have considered the potential effects of the amendments on smaller proxy voting advice businesses throughout this FRFA. Registrants of all sizes also could incur costs associated with coordinating with proxy voting advice businesses to receive the proxy voting advice, reviewing the proxy voting advice, and determining whether to prepare and file additional soliciting materials in response to the proxy voting advice.[727] Compliance with the amendments may require the use of professional skills, including legal skills.

The amendments 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 associated with the amendments will be similar for large and small entities. Accordingly, we refer to the discussion of the amendments' economic effects on all affected parties, including small entities, in Section IV above.[728] Consistent with that discussion, to the extent that any small entities currently or in the future may provide proxy voting advice, we anticipate that the economic benefits and costs likely will vary widely among such entities based on a number of factors, including the nature and conduct of their businesses, as well as the extent to which they are already meeting or exceeding the requirements established by the amendments, which makes it difficult to project the economic impact on small entities with precision.[729]

As a general matter, however, we recognize that any costs of the amendments borne by the affected entities, such as those related to compliance with the amendments, or the implementation or restructuring of internal systems needed to adjust to the amendments, could have a proportionally greater effect on small entities, as they may be less able than larger entities to bear such costs. Further, as discussed in Section IV.B.1.a., the three major proxy voting advice businesses currently operating in the U.S. 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 voting recommendation to clients. If competing proxy voting advice businesses do not have such processes in place, they could be disproportionately affected by the amendments. Finally, the amendments may impact competition, in particular for any small entities that provide proxy voting advice services. To the extent that a proxy voting advice business's existing practices and procedures do not satisfy the conditions of Rule 14a–2(b)(9), such entities, including any affected small entities, will incur additional compliance costs and, consequently, may be more likely to exit the market for such services or less able to enter the market in the first place.

We believe that the principles-based approach we are adopting should address many of the concerns commenters raised about the proposed amendments' potential disparate effect on smaller firms. By providing proxy voting advice businesses, including those that are small entities, with the flexibility to design policies and procedures that are scaled to the scope of their business operations, we believe these entities will be able to find the most cost-effective means to comply with the requirements.

With respect to costs that may be incurred by registrants as a result of the amendments, these costs will vary depending upon the particular facts and circumstances of the proxy voting advice as well as the resources of the registrant. Consequently, as with proxy voting advice businesses, it is difficult to quantify these costs with precision, particularly since the degree to which a registrant elects to review and respond to proxy voting advice is entirely voluntary.[730] As a function of their smaller size, registrants that are small entities may incur proportionally greater costs associated with amendments than larger entities, but the extent of such costs is uncertain. Importantly, while registrants of all sizes may take advantage of the ability to review proxy voting advice provided pursuant to the amendments and potentially file additional soliciting material in response, they are not required to do so; as a result, we expect that registrants would engage in the process only to the extent that they anticipate the benefits of such review to be greater than the costs.

E. Agency Action To Minimize Effect on Small Entities

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 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 the amendments would accomplish the objectives of this rulemaking. The amendments are intended to improve the completeness and transparency of information available to shareholders and those acting on their behalf when making voting decisions and enhance the overall functioning of the proxy voting process, in furtherance of Section 14 of the Exchange Act. These objectives 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 solicitation exemptions in Rules 14a–2(b)(1) or (b)(3).[731] For similar reasons, we do not believe that exempting smaller proxy voting advice businesses from all or part of the amendments would accomplish our objectives.[732]

In a change from the proposal, the amendments generally use performance standards rather than design standards. Based on commenter feedback, including that related to the potential impact on smaller entities, we believe that moving from an approach that emphasizes design standards to one that emphasizes performance standards will provide all entities, and in particular smaller entities, with sufficient flexibility to find the most cost-effective means of compliance while still achieving our objectives. We recognize that using performance standards rather than design standards may increase the degree of uncertainty that proxy voting advice businesses and their clients have regarding whether such businesses are in full compliance with the rules. However, we also are adopting certain safe harbors that we believe will help mitigate such uncertainty to the extent proxy voting advice businesses choose to rely on them.

In adopting 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.

VII. Statutory Authority

We are adopting 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.

In accordance with the foregoing, we are amending title 17, chapter II, of the Code of Federal Regulations as follows:

[715] *See* letters from Felician Sisters II; Good Shepherd; IASJ; Interfaith Center II; St. Dominic of Caldwell.

[716] *See* supra Sections II; IV.

[717] 5 U.S.C. 601(6).

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

[719] 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); 80a–53–64].

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

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

[722] In this regard, commenters did not provide data that would allow us to ascertain the extent to which there are smaller entities that would be considered proxy voting advice businesses within the scope of the amendments.

[723] This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of either Form 10–K or amendments, filed during the calendar year of January 1, 2019 to December 31, 2019. The data used for this analysis were derived from XBRL filings, Compustat, and Ives Group Audit Analytics.

[724] 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 period ending December 2019.

[725] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV. As discussed above, ISS, one of the three major firms that comprise the proxy advisory industry in the U.S., is also registered investment advisor. *See supra* Section IV.B.1.a.

[726] The amendments are discussed in detail in Section II, above. We discuss the economic impact, including the estimated costs and benefits, of the amendments to all affected entities, including small entities, in Section IV above.

[727] *See supra* Section V.C.1.b. We do not expect that the 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. *See supra* note 685.

[728] In particular, we discuss the estimated benefits and costs of the amendments on all affected parties, including larger and smaller entities, in Section IV.C. above. We also discuss the estimated compliance burden associated with the amendments for purposes of the PRA in Section V above.

[729] *See supra* Section IV.C.5.

[730] For purposes of the PRA analysis in Section V, we estimate an annual increase of 50 burden hours per registrant in connection with the amendments.

[731] Moreover, because the amendments reflect a principles-based, rather than a more prescriptive, framework, there is no practicable way to establish different compliance requirements for smaller proxy voting advice businesses without also compromising the principles-based nature of the requirements. Under the rules that we are adopting, proxy voting advice businesses may comply in whatever manner they choose so long as they satisfy the principles set forth.

[732] *See supra* Section IV.E.6. Exempting smaller proxy voting advice businesses from the additional conditions of Rules 14a–2(b)(1) and (3) would reduce the resulting costs of the 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 if they chose to avail themselves of such an exemption.

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

■ 1. The authority citation for part 240 continues to read, in part, 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:
■ a. Revising paragraph (l)(1)(iii);
■ b. In paragraph (l)(2)(iii), removing the word "or" from the end of the paragraph;
■ c. In paragraph (l)(2)(iv)(C), removing at the end of the paragraph "." and adding in its place "; or";
■ d. Adding paragraph (l)(2)(v).

The revisions and additions 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 adding paragraph (b)(9) to read as follows:

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

* * * * *

(b) * * *

(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 both of the conditions in (b)(9)(i) and (ii) of this section are satisfied:

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

(A) Any information regarding an 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

(B) 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; and

(ii) The proxy voting advice business has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that:

(A) Registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting advice business's clients; and

(B) The proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants who are the subject of such advice, in a timely manner before the security holder meeting (or, if no meeting, before the votes, consents, or authorizations may be used to effect the proposed action).

Note 1 to paragraph (b)(9)(ii): For purposes of satisfying the requirement in paragraph (b)(9)(ii)(A) of this section, the proxy voting advice business's written policies and procedures need not require it to make available to the registrant additional versions of its proxy voting advice with respect to the same meeting, vote, consent or authorization, as applicable, if the advice is subsequently revised.

(iii) A proxy voting advice business will be deemed to satisfy the requirement in paragraph (b)(9)(ii)(A) of this section if it has written policies and procedures that are reasonably designed to provide a registrant with a copy of its proxy voting advice, at no charge, no later than the time such advice is disseminated to the proxy voting advice business's clients. Such policies and procedures may include conditions requiring that:

(A) The registrant has filed its definitive proxy statement at least 40 calendar days before the security holder meeting date (or if no meeting is held, at least 40 calendar days before the date the votes, consents, or authorizations may be used to effect the proposed action); and

(B) The registrant has acknowledged that it will only use the copy of the proxy voting advice for its internal purposes and/or in connection with the solicitation and such copy will not be published or otherwise shared except with the registrant's employees or advisers.

(iv) A proxy voting advice business will be deemed to satisfy the requirement in paragraph (b)(9)(ii)(B) of this section if it has written policies and procedures that are reasonably designed to inform clients who receive proxy voting advice when a registrant that is the subject of such advice notifies the proxy voting advice business that it intends to file or has filed additional soliciting materials with the Commission pursuant to § 240.14a–6 setting forth the registrant's statement regarding the advice, by:

(A) The proxy voting advice business providing notice to its clients on its electronic platform that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available; or

(B) The proxy voting advice business providing notice to its clients through email or other electronic means that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available.

(v) Paragraph (b)(9)(ii) of this section does not apply to proxy voting advice to the extent such advice is based on custom voting policies that are proprietary to a proxy voting advice business's client.

(vi) Paragraph (b)(9)(ii) of this section does not apply to any portion of the proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization in a solicitation subject to § 240.14a–3(a):

(A) To approve any transaction specified in § 230.145(a); or

(B) By any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons.

* * * * *

■ 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, or conflicts of interest.

* * * * *

By the Commission.
Dated: July 22, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–16337 Filed 9–1–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA–5547]

Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Guidance.

SUMMARY: The Securities and Exchange Commission ("Commission") is publishing supplementary guidance regarding the proxy voting responsibilities of investment advisers under its regulations issued under the Investment Advisers Act of 1940 (the "Advisers Act") in light of the Commission's amendments to the rules governing proxy solicitations under the Securities Exchange Act of 1934 (the "Exchange Act").

DATES: *Effective:* September 3, 2020.

FOR FURTHER INFORMATION CONTACT: Thankam A. Varghese, Senior Counsel; or Holly Hunter-Ceci, Assistant Chief Counsel, at (202) 551–6825 or *IMOCC@sec.gov*, Chief Counsel's Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing supplementary guidance regarding the proxy voting responsibilities of investment advisers under 17 CFR 275.206(4)–6 [Rule 206(4)–6 under the Advisers Act [15 U.S.C. 80b]].[1]

I. Introduction

The Commission previously issued guidance discussing how the fiduciary duty and rule 206(4)–6 under the Advisers Act relate to an investment adviser's exercise of voting authority on behalf of clients and also provided examples to help facilitate investment advisers' compliance with their obligations in connection with proxy voting.[2] We are supplementing this guidance in light of information gained in connection with our ongoing review of the proxy voting process and our related regulations, including the amendments to the proxy solicitation rules under the Exchange Act that we are issuing at this time.[3]

We expect that the Exchange Act amendments adopted in Release No. 34–89372 will result in improvements in the mix of information that is available to investors and material to a voting decision. In particular, we expect issuers will have access to proxy advisory firm recommendations in a timeframe that will permit those issuers to make available to shareholders additional information that may be material to a voting decision in a more systematic and timely manner than they could previously.[4] We also expect that the amendments will result in the availability of that additional information being made known to proxy advisory firms and their clients in a timely manner, including because proxy advisory firms, as a condition to the availability of the exemptions in 17 CFR 240.14a–2(b)(1) and (b)(3), must adopt policies and procedures that are reasonably designed to provide investment advisers and other clients with a mechanism by which they can reasonably be expected to become aware of that additional information prior to making voting decisions. Accordingly, we are providing supplementary guidance to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of these amendments, including in circumstances where the investment adviser utilizes a proxy advisory firm's electronic vote management system that "pre-populates" the adviser's proxies with suggested voting recommendations and/or for voting execution services. The supplementary guidance also addresses disclosure obligations and considerations that may arise when investment advisers use such services for voting.

II. Supplemental Guidance Regarding Investment Advisers' Proxy Voting Responsibilities

Question 2.1: In some cases, proxy advisory firms assist clients, including investment advisers, with voting execution, including through an electronic vote management system that allows the proxy advisory firm to: (1) Populate each client's votes shown on the proxy advisory firm's electronic voting platform with the proxy advisory firm's recommendations based on that client's voting instructions to the firm ("pre-population"); and/or (2) automatically submit the client's votes to be counted ("automated voting"). Pre-population and automated voting generally occur prior to the submission deadline for proxies to be voted at the shareholder meeting. In various circumstances, an investment adviser, in the course of conducting a reasonable investigation into matters on which it votes,[5] may become aware that an issuer that is the subject of a voting recommendation intends to file or has filed additional soliciting materials with the Commission setting forth the issuer's views regarding the voting recommendation. These materials may or may not reasonably be expected to affect the investment adviser's voting

[1] Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR part 275], in which these rules are published.

[2] 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").

[3] *See* Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34–89372 (July 22, 2020) ("Amendments to Proxy Solicitation Rules"); *see also* 17 CFR 240.14a–2(b)(9)(iv); *see also* Commission Guidance on Proxy Voting Responsibilities, *supra* at n. 2. Proxy advisory firms will not be required to comply with certain of the amendments we are making to the proxy solicitation rules until December 1, 2021. This guidance addresses the application of the fiduciary duty, Form ADV, and rule 206(4)–6 under the Advisers Act to an investment adviser's proxy voting responsibilities in connection with current practices, as well as any policies or procedures that may be implemented by proxy advisory firms under the final amendments.

[4] *See infra* at n. 6. While 17 CFR 240.14a–2(b) uses the term "proxy voting advice business," we use the term "proxy advisory firm" in this release. This is consistent with the Commission Guidance on Proxy Voting Responsibilities, which this release supplements.

[5] *See* Commission Guidance on Proxy Voting Responsibilities, text at notes 15 and 37 and in response to Question 4.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-93595; File No. S7-17-21]

RIN: 3235-AM92

Proxy Voting Advice

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing amendments to the Federal proxy rules governing proxy voting advice. The Commission is proposing these amendments in light of feedback from market participants on those rules and certain developments in the market for proxy voting advice. The proposed amendments would remove a condition to the availability of certain exemptions from the information and filing requirements of the Federal proxy rules for proxy voting advice businesses. In addition, the proposed amendments would remove a note that provides examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading within the meaning of the Federal proxy rules' prohibition on material misstatements or omissions. Finally, the release includes a discussion regarding the application of that prohibition to proxy voting advice, in particular with respect to statements of opinion.

DATES: Comments should be received by [INSERT DATE 30 DAYS AFTER DATE OF 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 S7-17-21 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 S7-17-21. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all submitted comments on its website (http://www.sec.gov/rules/proposed.shtml). Typically, 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 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information. You should submit only information that you wish to make publicly available.

Studies, memoranda or other substantive items may be added by the Commission or staff 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 the Commission's 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: Valian Afshar, Special Counsel, Office of Mergers and Acquisitions, Division of Corporation Finance, at (202) 551-3440, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to 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

The Commission recently adopted final rules regarding proxy voting advice (the "2020 Final Rules") provided by proxy advisory firms, or proxy voting advice businesses ("PVABs").[2] The 2020 Final Rules, among other things, did the following:

- Amended 17 CFR 240.14a-1(l) ("Rule 14a-1(l)") to codify the Commission's interpretation that proxy voting advice generally constitutes a "solicitation" subject to the proxy rules.
- Adopted 17 CFR 240.14a-2(b)(9) ("Rule 14a-2(b)(9)") to add new conditions to two exemptions (set forth in 17 CFR 240.14a-2(b)(1) and (3) ("Rules 14a-2(b)(1) and (3)")) that PVABs generally rely on to avoid the proxy rules' information and filing requirements. Those conditions include:
    - New conflicts of interest disclosure requirements in 17 CFR 240.14a-2(b)(9)(i) ("Rule 14a-2(b)(9)(i)"); and
    - A requirement in 17 CFR 240.14a-2(b)(9)(ii) ("Rule 14a-2(b)(9)(ii)") that a PVAB adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants that are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the PVAB's clients and (B) the PVAB provides its clients with a mechanism by which they can reasonably be expected to become aware of any

[2] *See Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-89372 (Jul. 22, 2020) [85 FR 55082 (Sept. 3, 2020)] ("2020 Adopting Release"). For purposes of this release, we refer to persons who furnish proxy voting advice covered by 17 CFR 240.14a-1(l)(1)(iii)(A) ("Rule 14a-1(l)(1)(iii)(A)") as "proxy voting advice businesses," which we abbreviate as "PVABs." *See* 17 CFR 240.14a-1(l)(1)(iii)(A). Rule 14a-1(l)(1)(iii)(A) provides that the terms "solicit" and "solicitation" include 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. *Id.*

written statements regarding its proxy voting advice by registrants that are the subject of such advice, in a timely manner before the security holder meeting (the "Rule 14a-2(b)(9)(ii) conditions").

- Amended the Note to Rule 14a-9, which prohibits false or misleading statements, to include specific examples of material misstatements or omissions related to proxy voting advice.

The amendments to Rules 14a-1(l) and 14a-9 became effective on November 2, 2020. The conditions set forth in new Rule 14a-2(b)(9) are set to become effective on December 1, 2021.[3]

The 2020 Final Rules were intended to help ensure that investors who use proxy voting advice receive more transparent, accurate and complete information on which to make their voting decisions.[4] The Commission recognized the "important and prominent role" that PVABs play in the proxy voting process[5] and adopted the 2020 Final Rules, in part, to address certain concerns that "registrants, investors, and others have expressed . . . about the role of [PVABs]."[6] At the same time, the Commission endeavored to tailor the 2020 Final Rules to avoid imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice.[7]

[3] *Id.* at 55122. Institutional Shareholder Services, Inc. has filed a lawsuit challenging the 2020 Final Rules. *See Institutional Shareholder Services, Inc. v. SEC*, No. 1:19-cv-3275-APM (D.D.C.). That case is currently being held in abeyance until the earlier of December 31, 2021 or the promulgation of final rule amendments addressing proxy voting advice. In addition, on October 13, 2021, the National Association of Manufacturers and Natural Gas Services Group, Inc. filed a lawsuit arising out of a statement issued by the Division of Corporation Finance on June 1, 2021 regarding the 2020 Final Rules. *See* National Association of Manufacturers et al. v. SEC, No. 7:21-cv-183 (W.D. Tex.); *see also infra* note 120 (discussing the Division of Corporation Finance's June 1, 2021 statement).

[4] 2020 Adopting Release at 55082.

[5] *Id.* at 55083 (noting that institutional investors and investment advisers generally retain PVABs to assist with voting determinations on behalf of their clients as well as "other aspects of the voting process, which for certain investment advisers has become increasingly complex and demanding over time").

[6] *Id.* at 55085.

[7] *Id.* at 55082.

Since the Commission adopted the 2020 Final Rules, however, institutional investors and other clients of PVABs have continued to express strong concerns about the rules' impact on their ability to receive independent proxy voting advice in a timely manner. Furthermore, PVABs have continued to develop industry-wide best practices and improve their own business practices to address the concerns that were the impetus for the 2020 Final Rules. Accordingly, we believe it is appropriate to reassess the 2020 Final Rules, solicit further public comment and, where appropriate, recalibrate the rules to preserve the independence of proxy voting advice and ensure that PVABs can deliver advice in a timely manner without ultimately passing on higher costs to their clients. As described in more detail below, we are proposing the following changes:

- Amend Rule 14a-2(b)(9) to remove the Rule 14a-2(b)(9)(ii) conditions; and
- Amend Rule 14a-9 to remove Note (e) to that rule, which sets forth specific examples of material misstatements or omissions related to proxy voting advice.

These proposed amendments would not affect the other aspects of the 2020 Final Rules, which would remain in place and effective as to PVABs and their advice. As such, under the proposed amendments, proxy voting advice would remain a solicitation subject to the proxy rules. Additionally, in order to rely on the exemptions from the proxy rules' information and filing requirements set forth in Rules 14a-2(b)(1) and (3), PVABs would continue to be subject to Rule 14a-2(b)(9)'s conflicts of interest disclosure requirements. Finally, although the proposed amendments would remove Note (e) to Rule 14a-9—which was added in the 2020 Final Rules—material misstatements or omissions of fact in proxy voting advice would remain subject to liability under that rule. In this release, however, we discuss the application of Rule 14a-9 to

proxy voting advice, specifically with respect to a PVAB's statements of opinion.[8]

The proposed amendments do not represent a wholesale reversal of the 2020 Final Rules. Rather, they are intended to be tailored adjustments in response to concerns and developments related to particular aspects of the 2020 Final Rules. The goal of the proposed amendments is to avoid burdens on PVABs that may impede and impair the timeliness and independence of their proxy voting advice and subject them to undue litigation risks and compliance costs, while simultaneously preserving investors' confidence in the integrity of such advice. We believe that the proposed amendments, in tandem with the unaffected portions of the 2020 Final Rules and other existing mechanisms in the proxy system, including certain policies and procedures that PVABs have adopted, strike a more appropriate balance.

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed 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 Amendments to Rule 14a-2(b)(9)

1. Background

The 2020 Final Rules amended Rule 14a-2(b) by adding paragraph (9),[9] which sets forth two conditions that a PVAB must satisfy in order to rely on the exemptions in Rules 14a-2(b)(1) and (b)(3) from the proxy rules' information and filing requirements.[10] Rule 14a-2(b)(9)(i) requires PVABs to provide their clients with certain conflicts of interest disclosures in connection with their proxy voting advice.[11] The Rule 14a-2(b)(9)(ii) conditions require that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that (A) registrants that are the subject of their proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the PVABs' clients and (B) the PVABs provide their clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding their proxy voting advice by registrants who are the subject of such advice, in a timely manner before the relevant shareholder meeting (or, if no meeting, before the votes, consents or authorizations may be used to effect the proposed action).[12]

In addition to those two conditions, Rule 14a-2(b)(9) also sets forth two non-exclusive safe harbor provisions in paragraphs (iii) and (iv) that, if met, are intended to give assurance to PVABs that they have satisfied the conditions of Rules 14a-2(b)(9)(ii)(A) and (B), respectively.[13] Further, Rules 14a-2(b)(9)(v) and (vi) contain exclusions from the Rule 14a-

[8] *See infra* Section II.B.2.

[9] 17 CFR 240.14a-2(b)(9).

[10] PVABs have typically relied upon the exemptions in Rules 14a-2(b)(1) and (b)(3) to provide advice without complying with the proxy rules' information and filing requirements. *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-87457 (Nov. 5, 2019) [84 FR 66518 (Dec. 4, 2019)] ("2019 Proposing Release") at 66525 and n.68. Unless otherwise indicated, all comments cited and referenced in this release are to public comments on the rules proposed in the 2019 Proposing Release (the "2019 Proposed Rules"). Comments on the 2019 Proposed Rules are available at https://www.sec.gov/comments/s7-22-19/s72219.htm.

[11] 17 CFR 240.14a-2(b)(9)(i).

[12] 17 CFR 240.14a-2(b)(9)(ii). The Commission adopted the Rule 14a-2(b)(9)(ii) conditions, in part, in response to the concerns expressed by commenters about the "advance review and feedback" conditions that the Commission originally proposed. Under the advance review and feedback conditions in the 2019 Proposed Rules, a PVAB would have had to, as a condition to relying on the exemptions in Rules 14a-2(b)(1) and (3), 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 PVAB'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 proxy statement. *See* 2019 Proposing Release at 66530-35. These conditions were among the most contentious features of the 2019 Proposed Rules and drew a significant number of opposing public comments. 2020 Adopting Release at 55103-07. In response, the Commission reconsidered its approach and, in the 2020 Final Rules, adopted the Rule 14a-2(b)(9)(ii) conditions in place of the advance review and feedback conditions. *Id.* at 55107-08.

[13] 17 CFR 240.14a-2(b)(9)(iii) and (iv).

2(b)(9)(ii) conditions.[14] Those rules provide that PVABs need not comply with Rule 14a-2(b)(9)(ii) to the extent that their proxy voting advice is based on a client's custom voting policy or if they provide proxy voting advice as to non-exempt solicitations regarding certain mergers and acquisitions or contested matters.[15]

The Commission adopted Rule 14a-2(b)(9)(ii)(A) to facilitate effective engagement between PVABs and registrants, help ensure that registrants are timely informed of proxy voting advice that bears on the solicitation of their shareholders and further the goal of ensuring that PVABs' clients have more complete, accurate and transparent information to consider when making their voting decisions.[16] Ultimately, the Commission intended that this condition would benefit the shareholders on whose behalf PVABs' clients may be voting.[17] Similarly, the Commission adopted Rule 14a-2(b)(9)(ii)(B) as a means of providing PVABs' clients with additional information that would assist them in assessing and contextualizing proxy voting advice.[18] The Commission intended that this condition would supplement existing mechanisms—including registrants' ability to file supplemental proxy materials to respond to proxy voting advice that they may know about and to alert investors to any disagreements with such advice—so as to permit clients, including investment advisers voting shares on behalf of other shareholders, to consider registrants' views along with the proxy voting advice and before making their voting determinations.[19] This condition reflected the Commission's views that PVABs' clients would benefit from more information when considering how to vote their proxies and that shareholders should have ready access to information to make informed voting decisions.[20]

We continue to believe that these goals are important, but we also believe it is appropriate to reassess our policy judgment to adopt the Rule 14a-2(b)(9)(ii) conditions. We adopted those conditions, in part, in response to investors who expressed concerns regarding the advance review and feedback conditions in the 2019 Proposed Rules.[21] Accordingly, we made adjustments to remove the 2019 Proposed Rules' advance review condition and replace it with Rule 14a-2(b)(9)(ii)'s requirement that PVABs make their advice available to registrants at or prior to the time it is disseminated to their clients.[22] Investors, however, have continued to express strong concerns about the Rule 14a-2(b)(9)(ii) conditions even as modified in the 2020 Final Rules.[23] Notwithstanding our efforts to adopt somewhat more limited and principles-based

[14] 17 CFR 240.14a-2(b)(9)(v) and (vi).

[15] *Id.*

[16] 2020 Adopting Release at 55109.

[17] *Id.*

[18] *Id.* at 55112-13.

[19] *Id.*

[20] *Id.* at 55113.

[21] Specifically, investors expressed concerns that the 2019 Proposed Rules' advance review and feedback conditions would adversely affect the independence, cost and timeliness of that advice. *See supra* note 12.

[22] Although the 2020 Final Rules did not include an advance review requirement, we encouraged PVABs that already were providing registrants with this opportunity to continue to do so. 2020 Adopting Release at n.339.

[23] *See, e.g.*, Peter Rasmussen, *Divided SEC Passes Controversial Proxy Advisor Rule*, BLOOMBERG LAW (Jul. 29, 2020), *available at* https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-divided-sec-passes-controversial-proxy-advisor-rule (noting criticism of the 2020 Final Rules by Nell Minow, Vice Chair of ValueEdge Advisors, that the 2020 Final Rules will make proxy voting advice "more expensive and less independent"); COUNCIL OF INSTITUTIONAL INVESTORS, *Leading Investor Group Dismayed by SEC Proxy Advice Rules* (Jul. 22, 2020), *available at* https://www.cii.org/july22_sec_proxy_advice_rules ("[T]he new rules . . . seem to effectively require investment advisors who vote proxies on behalf of investor clients to consider and evaluate any response from companies to proxy advice before submitting votes. That could cause significant delays in the already constricted proxy voting process. It also could jeopardize the independence of proxy advice as proxy advisory firms may feel pressure to tilt voting recommendations in favor of management more often, to avoid critical comments from companies that could draw out the voting process and expose the firms to costly threats of litigation."); US SIF, *US SIF Releases Statement On SEC Vote To Regulate Proxy Advisory Firms* (Jul. 22, 2020), *available at* https://www.ussif.org/blog_home.asp?display=146 ("Today's vote is a blow to the independence of research

requirements in the 2020 Final Rules, investors have asserted that the Rule 14a-2(b)(9)(ii) conditions nevertheless will impose increased compliance costs on PVABs and impair the independence and timeliness of their proxy voting advice and that such effects are not justified or balanced by corresponding investor protection benefits.[24] This investor opposition is evidenced by, among other things, the fact that many clients of PVABs, predominantly investors, continue to oppose the 2020 Final Rules. Others, including PVABs themselves, have expressed similar concerns.[25]

provided by proxy advisors to investors. . . . The rule will make it more difficult, expensive and time-consuming for proxy advisors to produce their research.").

[24] *See supra* note 23. In addition, on June 11, 2021, Chair Gensler and members of the Commission staff met with representatives from the following organizations: AFL-CIO; AFR; AssuranceMark; CalPERS; CalSTRS; CFA Institute; Consumer Federation of America; Council of Institutional Investors; CtW Investment Group; Interfaith Center on Corporate Responsibility; LACERA; Legal & General; New York City Comptroller New York State Common; Segal Marco; Shareholder Rights Group; Sinclair Capital; Sustainable Investments Institute; T. Rowe Price; The Shareholder Commons; Trillium Asset Management; US SIF; and ValueEdge Advisors. During that meeting, the representatives from those organizations expressed general opposition to the 2020 Final Rules, including with respect to the Rule 14a-2(b)(9)(ii) conditions. Those representatives expressed concerns about the costs associated with the 2020 Final Rules, including the Rule 14a-2(b)(9)(ii) conditions, and the general lack of corresponding investor protection-based benefits.

[25] *See, e.g.,* John C. Coffee, Jr., *Biden and the SEC: Some Possible Agendas*, THE CLS BLUE SKY BLOG (Dec. 2, 2020), *available at* https://clsbluesky.law.columbia.edu/2020/12/02/biden-and-the-sec-some-possible-agendas/ (describing the 2020 Final Rules as "burdensome" and predicting that they would "stretch out the proxy solicitation process and possibly chill advisers' ability to recommend policies disliked by managements"); Kurt Schacht & Karina Karakulova, *SEC Proxy Rules Pose Threat To Markets, Shareholders*, LAW 360 (Aug. 26, 2020), *available at* https://www.law360.com/articles/1302091/sec-proxy-rules-pose-threat-to-markets-shareholders ("We can only imagine the number of legal challenges, delays and inefficiency [that the 2020 Final Rules] introduces to a well-functioning proxy voting process."); INSTITUTIONAL SHAREHOLDER SERVICES, *FAQs on July 22, 2020, SEC Rules & Supplemental Guidance* (Aug. 6, 2020), *available at* http://images.info.issgovernance.com/Web/ISSGovernance/%7B56ad0ea3-5d24-461e-b9c7-4ba8c6327435%7D_20200914_FAQs_SEC_July-22-2020_Rules_Supplemental_Guidance_FINAL.pdf/ ("[I]f the Rules are upheld, the current lack of clarity around the timing of any potential responses from the issuers may impact the timing of any 'Alerts' that might be warranted in response to issuers' written statements. . . . ISS is currently assessing the changes we need to make to our systems, processes, and staffing in order to accommodate the new Rules. ISS will be certain to provide advance notice of any fees we may need to charge to support the changes required by these regulatory actions."); INSTITUTIONAL SHAREHOLDER SERVICES, *Statement from ISS President & CEO, Gary Retelny, on Today's SEC Actions* (Jul. 22, 2020), *available at* https://insights.issgovernance.com/posts/statement-from-iss-president-ceo-gary-retelny-on-todays-sec-actions/ ("Despite seemingly reducing the previously contemplated burden on proxy advisers, the new rules . . . will hinder investors' ability to vote in a timely, cost-effective, and objective manner."); MINERVA ANALYTICS, *SEC ignores investor objections to implement new proxy rules* (Jul. 24, 2020), *available at* https://www.manifest.co.uk/sec-ignores-investor-objections-to-implement-new-proxy-rules/ ("Additional layers of scrutiny and back-and-forth

In addition, we are aware that the largest PVABs have current practices that could address some of the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. On July 1, 2021, the Independent Oversight Committee (the "Oversight Committee") of the Best Practice Principles Group (the "BPPG") published its first annual report (the "2021 Annual Report").[26] The BPPG is an industry group comprised of six PVABs, including Glass, Lewis & Co. ("Glass Lewis") and Institutional Shareholder Services, Inc. ("ISS"),[27] the two largest PVABs in the United States.[28] Shortly after its formation, the BPPG published the Best Practice Principles for Providers of Shareholder Voting Research and Analysis, which consist of three main principles and accompanying guidance that recommends how the principles should be applied.[29] The three principles are (1) service quality, (2) conflicts-of-interest avoidance or management and (3) communications policy.[30]

The Oversight Committee—which is comprised of non-PVAB stakeholders in proxy voting advice, including representatives from the institutional investor, registrant and academic communities—is responsible for reviewing the BPPG member-PVABs' compliance with the

between proxy advisers, companies and investment managers would slow down the system and ultimately increase the cost to those paying for the service.").

[26] *See* BEST PRACTICE PRINCIPLES OVERSIGHT COMMITTEE, *Annual Report 2021* (Jul. 1, 2021), *available at* https://bppgrp.info/wp-content/uploads/2021/07/2021-AR-Independent-Oversight-Committee-for-The-BPP-Group-1.pdf ("2021 Annual Report"). The BPPG was formed in 2014 after the European Securities and Markets Authority requested that PVABs engage in a coordinated effort to develop an industry-wide code of conduct focusing on enhancing transparency and disclosure. *Id.* at 7.

[27] *Id.* The BPPG's six member-PVABs are Glass Lewis, ISS, Minerva, PIRC, Proxinvest and EOS at Federated Hermes. *Id.*

[28] 2020 Adopting Release at 55127.

[29] 2021 Annual Report at 8.

[30] *Id.* at 33-34.

principles.[31] In the 2021 Annual Report, after reviewing each member-PVABs' compliance report, the Oversight Committee found all six firms met the standards established in the three best practices principles.[32] Notably:

- Glass Lewis provides the subjects of its proxy voting advice with its Issuer Data Report ("IDR"), which details the key facts underlying Glass Lewis' advice, before that advice is finalized and sent to its clients.[33] Glass Lewis offers the IDR service to certain registrants, giving them 48 hours to review the IDR and provide suggested updates, which are then reviewed by Glass Lewis' research analysts who in turn make relevant updates and then provide high-level feedback regarding amendments made.[34]
- In addition to the IDR's advance review opportunity, Glass Lewis provides registrants 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 (the "RFS"). Specifically, the RFS allows registrants to submit feedback about Glass Lewis' proxy voting advice and have that feedback delivered directly to Glass Lewis' clients.[35] Registrants can access Glass Lewis' proxy voting advice at the same time it is disseminated to its clients and then, pursuant to the RFS, submit to Glass Lewis a statement that responds to and expresses disagreements with, or other opinions regarding, such advice.[36] If a registrant submits such a statement, Glass Lewis will republish its proxy voting advice with that statement attached and linked on the first page of Glass Lewis' report. Glass Lewis' clients will receive a notification as soon as the registrant's statement is available, and clients that have already downloaded an earlier version of the proxy voting advice will be sent an updated version that includes the registrant's statement.
- In addition, Glass Lewis has a separate process for registrants to report errors or omissions in its proxy voting advice and indicates that it reviews any such reported errors or omissions "immediately."[37] Glass Lewis states that if its proxy voting advice is updated to reflect new disclosure or the correction of an error, it notifies all clients that have accessed that advice, or have ballots in the system for the meeting tied to that advice, whether or not the updates or revisions affected Glass Lewis' voting recommendations, as well as the exact nature of those updates and revisions.[38]
- ISS also detailed in its compliance statement the relevant processes it has in place.[39] Significantly, ISS allows any registrant to request a copy of its proxy voting advice free of charge after such advice has been disseminated to ISS' clients.[40] Registrants can pre-

[31] *Id.* at 7.

[32] Stephen Davis, *First Independent Report on Proxy Voting Advisory Firm Best Practices* (Jul. 14, 2021), *available at* https://corpgov.law.harvard.edu/2021/07/14/first-independent-report-on-proxy-voting-advisory-firm-best-practices/.

[33] GLASS LEWIS, *Glass Lewis Statement of Compliance for the Period 1 January 2019 through 31 December 2019* (May 2020), *available at* https://bppgrp.info/wp-content/uploads/2021/03/Glass-Lewis-BPP-Statement.pdf ("Glass Lewis Statement of Compliance") at 7-8.

[34] GLASS LEWIS, *Issuer Data Report*, *available at* https://www.glasslewis.com/issuer-data-report/. In the United States, the IDR service is available for "companies listed on the NASDAQ and NYSE exchanges" that register for the service with Glass Lewis and "disclose their meeting documents at least 30 days in advance of their meeting date." *Id.*

[35] Glass Lewis Statement of Compliance at 24.

[36] GLASS LEWIS, *Report Feedback Statement*, *available at* https://www.glasslewis.com/report-feedback-statement/.

[37] GLASS LEWIS, *Report an Error or Omission*, *available at* https://www.glasslewis.com/report-error/.

[38] *Id.*

[39] ISS, *ISS Compliance Statement* (Jan. 11, 2021), *available at* https://bppgrp.info/wp-content/uploads/2021/03/best-practices-principles-iss-compliance-statement-jan-2021-update.pdf ("ISS Statement of Compliance").

[40] *Id.* at 23.

register to receive proxy voting advice, and ISS will send those registrants a notification when such advice is available for them to access.[41]

- If a registrant believes that ISS' proxy voting advice contains an error, it can notify ISS either via email or through its "Help Center" interface.[42] ISS states that if it determines that there is a material error, it will promptly issue an "Alert" to update previously issued proxy voting advice.[43]
- ISS also stated that it instituted a Feedback Review Board ("FRB") to provide a mechanism to all stakeholders to communicate with ISS regarding its proxy voting advice.[44] The FRB considers comments from market constituents regarding the accuracy of ISS' research and data, policy application and the general fairness of its policies, research and recommendations.[45] The FRB focuses on higher-level feedback and does not address registrant-specific or time-sensitive feedback.[46]
- Instead, ISS has other processes in place for registrants and other market participants to provide feedback on specific proxy voting advice (including via the above-described error reporting processes). For example, ISS noted that it provides draft reports to registrants in certain markets prior to publication.[47] Notably, ISS does not provide draft proxy voting advice to any United States registrants.[48] ISS can, however, choose to engage with registrants during the process of formulating its proxy voting advice.[49] Some of that engagement is initiated by ISS, but registrants themselves can also request engagement with ISS' proxy research teams.[50]

Finally, although Egan-Jones, the third major PVAB in the United States,[51] is not a member of the BPPG, it too appears to have adopted some policies and procedures that approximate at least a portion of the Rule 14a-2(b)(9)(ii) conditions. According to Egan-Jones, it provides a number of ways in which registrants can gain access to its reports and the models used to create them.[52] Specifically, Egan-Jones allows registrants to obtain and review a copy of its proxy voting advice before such advice is disseminated to its clients.[53] Registrants can then

[41] ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920.

[42] *Id*.

[43] *Id*.

[44] ISS Statement of Compliance at 21.

[45] *Id*.

[46] ISS, *Feedback Review Board*, *available at* https://www.issgovernance.com/contact/feedback-review-board/ (noting that the FRB is "[a]n ISS body that considers comments from stakeholders regarding the general fairness of ISS policies and methodologies as well those related to how we operate as a provider of research, voting recommendations, corporate ratings, and other solutions and services to financial market participants" and that "[c]omments should not be company specific nor should they be time-sensitive").

[47] ISS Statement of Compliance at 23.

[48] ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920 ("In the US, as from January 2021, drafts are no longer provided to U.S. companies including those in the S&P500 index.").

[49] ISS Statement of Compliance at 21-23.

[50] ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920 ("ISS' proxy research teams interact regularly with company representatives, institutional shareholders, dissident shareholders, sponsors of shareholder proposals, and other parties in order to gain deeper insight into many issues and to check material facts relevant to our research. . . . Sometimes such dialogue is initiated by ISS, while other times it is initiated by the issuer or other stakeholders (including shareholders who may or may not be ISS clients).").

[51] 2020 Adopting Release at 55126.

[52] EGAN-JONES, *Egan-Jones Proxy Services Issuer Engagement*, *available at* https://www.ejproxy.com/issuers/.

[53] *Id.* ("Issuers may obtain a 'draft,' or pre-publication copy, of their report in order to review it by submitting a fully completed copy of our Draft Request Form to issuer@ejproxy.com.").

notify Egan-Jones of any material errors that they detect in the proxy voting advice so as to allow Egan-Jones to correct that advice.[54]

2. Proposed Amendments

We are proposing to amend Rule 14a-2(b)(9) by deleting paragraph (ii) and rescinding the Rule 14a-2(b)(9)(ii) conditions. The proposed amendments would also delete paragraphs (iii), (iv), (v) and (vi) of Rule 14a-2(b)(9), which contain safe harbors and exclusions from the Rule 14a-2(b)(9)(ii) conditions.[55] As discussed above, the Rule 14a-2(b)(9)(ii) conditions were intended to benefit shareholders by improving the overall mix of available information so as to allow them to make more informed voting decisions. While the goal of facilitating more informed voting decisions remains unchanged, we believe that the continued concerns expressed by the investors who rely on proxy voting advice to make their voting decisions warrants a reassessment of the appropriate means to achieve that goal.

As part of that reassessment, we have further considered PVABs' efforts to develop industry-wide practices, as well as improve their own business practices, that could address the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. Although these practices differ from the Rule 14a-2(b)(9)(ii) conditions, the leading PVABs have adopted policies and procedures that provide their clients and registrants with some of the opportunities and access to information that would have been required pursuant to the Rule 14a-2(b)(9)(ii) conditions. Moreover, because PVABs developed these measures themselves, we believe they are less likely to

[54] *Id.* ("If an issuer believes there is a material error in an EJPS report, they should send a detailed email documenting what they believe the error to be to issuer@ejproxy.com.").

[55] Given that the other paragraphs of Rule 14a-2(b)(9) would all be deleted, the proposed amendments would redesignate the conflicts of interest disclosure condition set forth in Rule 14a-2(b)(9)(i) as Rule 14a-2(b)(9). The substance of that condition, however, would otherwise remain unchanged.

adversely affect the independence, cost and timeliness of proxy voting advice. And, although they are not the primary basis for these proposed amendments, we do find these industry-wide practices persuasive in these specific circumstances. This persuasiveness is due, in part, to the relative salience of a review of such industry-wide practices given the small number of PVABs in the U.S.

For example, Glass Lewis' IDR service goes beyond what the Rule 14a-2(b)(9)(ii) conditions would have required and allows registrants the opportunity to review the research and data on which Glass Lewis bases its voting recommendations before Glass Lewis disseminates its proxy voting advice to its clients. The RFS also operates in a similar manner to what the Rule 14a-2(b)(9)(ii) conditions would have required. As with the condition in Rule 14a-2(b)(9)(ii)(A), Glass Lewis makes its proxy voting advice available to registrants, for a fee, at the time such advice is disseminated to its clients. And, similar to the condition in Rule 14a-2(b)(9)(ii)(B), Glass Lewis will update its proxy voting advice to include a registrant's response to its advice and notify its clients of such response.

ISS also has mechanisms in place that approximate at least a portion of the Rule 14a-2(b)(9)(ii) conditions. Specifically, ISS makes its proxy voting advice available to registrants at the time such advice is disseminated to its clients. Although ISS does not update its proxy voting advice to incorporate any response a registrant may have to such advice, it does offer its advice to registrants for free. This presumably makes it easier for registrants to access ISS' proxy voting advice and respond to such advice by publishing and filing additional soliciting materials in a more timely manner. Further, ISS provides its clients with access to a registrant's EDGAR filings through the electronic platform that it uses to deliver its proxy voting advice. Because any response by a registrant to proxy voting advice is required to be filed with the Commission

as additional soliciting materials,[56] we believe that the access that ISS provides to its clients to a registrant's response via its electronic platform addresses many of the policy concerns underlying the Rule 14a-2(b)(9)(ii) conditions.[57]

We recognize that the mechanisms that these PVABs have in place may not perfectly replicate the requirements of the Rule 14a-2(b)(9)(ii) conditions or result in the same investor-oriented benefits that those conditions were intended to produce. These mechanisms are, in some ways, broader than the requirements of the Rule 14a-2(b)(9)(ii) conditions.[58] They also are, in other ways, more limited.[59] Furthermore, although some of the above-described mechanisms were developed after the Commission adopted the 2020 Final Rules,[60] we acknowledge that others were in place and considered by the Commission at the time it adopted

[56] *See* 17 CFR 240.14a-6(b).

[57] This belief is based on our understanding that ISS gives its clients the option of receiving push notifications via email from its electronic platform that will notify the clients of any additional soliciting materials filed by a registrant as to which those clients have received proxy voting advice.

[58] For example, both Glass Lewis, through the IDR service, and Egan-Jones allow registrants opportunities to review at least a portion of their proxy voting advice before it is disseminated to their clients. In addition, although the Rule 14a-2(b)(9)(ii) conditions would have applied only to registrants, Glass Lewis makes the RFS available to both registrants and shareholder proponents. GLASS LEWIS, *Report Feedback Statement*, *available at* https://www.glasslewis.com/report-feedback-statement/ ("Any company or shareholder proponent that purchases a Glass Lewis report will now automatically have the right to submit an RFS at no extra cost.").

[59] For example, ISS and Egan-Jones' public descriptions of their relevant services do not indicate whether they will notify their clients of any response to their proxy voting advice by a registrant. In addition, although ISS provides a copy of its proxy voting advice to registrants for free, it does not allow registrants to share that advice with any external parties, including its attorneys, proxy solicitors and compensation consultants. ISS, *FAQs regarding ISS Proxy Research*, *available at* https://www.issgovernance.com/contact/faqs-engagement-on-proxy-research/#1574276867038-b204d1c3-a920 ("Our final, published proxy research reports are provided to companies free of charge as a courtesy, subject to the following conditions: (i) the reports are only for the subject company's internal use by employees of the company, and (ii) the company is expressly prohibited from making the report, or any part of it, public, or sharing the reports, profiles or login credentials with any external parties (including but not limited to any external advisors retained by the company such as a law firm, proxy solicitor or compensation consultant)."). These restrictions may inhibit a registrant's ability to adequately respond to ISS' proxy voting advice in a manner that would benefit its shareholders.

[60] Notably, the Oversight Committee convened for the first time on July 30, 2020 and issued its 2021 Annual Report on July 1, 2021. *See* 2021 Annual Report at 10.

the 2020 Final Rules.[61] Finally, we recognize that although the three major United States-based PVABs have some promising mechanisms in place, those mechanisms differ across the three PVABs, and, absent the Rule 14a-2(b)(9)(ii) conditions, there is no assurance that a new entrant to the PVAB market will adopt similar mechanisms or that existing PVABs will maintain them.

We have nevertheless decided to reconsider the Rule 14a-2(b)(9)(ii) conditions because we share the concerns that PVABs' clients and others continue to express about the conditions' potential adverse effects on the independence, cost and timeliness of proxy voting advice.[62] We have also taken notice of the efforts by PVABs to develop industry-wide standards, including the Oversight Committee's assessment of its members' compliance with the BPPG principles in the 2021 Annual Report. Notwithstanding our prior policy judgment, we believe there are market-based incentives for PVABs to adopt and maintain policies and procedures that provide some of the same benefits as those of the Rule 14a-2(b)(9)(ii) conditions without raising the concerns investors have expressed about those conditions. We believe that rescinding the Rule 14a-2(b)(9)(ii) conditions would give PVABs, investors and registrants the flexibility to select mechanisms that best serve the needs of investors and other stakeholders and adapt to evolving market practices. Furthermore, our continued observance of these mechanisms in practice, including during the 2021 proxy season, has given us additional confidence in their efficacy. Thus, although these mechanisms are not the primary basis for the proposed amendments, we do consider them to be relevant.

Because our proposed amendments to Rule 14a-2(b)(9) are based, in part, on our evaluation of the current state of the PVAB market, we will continue to monitor that market to

[61] *See* 2020 Adopting Release at 55128-29 (describing Glass Lewis' IDR service and the RFS and Egan-Jones' advance review service).

[62] *See supra* notes 23-25 and accompanying text.

help ensure that investors are adequately protected and have ready access to information that allows them to make informed voting decisions. To the extent that there are changes in the quality of PVABs' policies and procedures or new entrants to the PVAB market that do not adopt policies and procedures consistent with best practices, we will reevaluate the state of the PVAB market and consider whether further action should be taken.

Request for Comment

1. Should we amend Rule 14a-2(b)(9) as proposed to rescind the Rule 14a-2(b)(9)(ii) conditions? Would such a rescission help facilitate the provision of timely and independent proxy voting advice? Alternatively, rather than rescinding the Rule 14a-2(b)(9)(ii) conditions as proposed, should we commit to a retrospective review of the Rule 14a-2(b)(9)(ii) conditions after they have become effective? If so, what is the appropriate period of time after which we should conduct such review? What would be the potential drawbacks of conducting such a retrospective review?
2. Are the existing mechanisms in the proxy system, including the role played by the BPPG and the Oversight Committee and the policies and procedures that PVABs have in place, sufficient to obviate the need for the Rule 14a-2(b)(9)(ii) conditions? Are there other relevant existing mechanisms in the proxy system that the Commission should consider?
3. How might we address the risk that PVABs will change their policies and procedures to the detriment of investors if we rescind the Rule 14a-2(b)(9)(ii) conditions? How might we address the risk that, absent the Rule 14a-2(b)(9)(ii) conditions, new entrants to the PVAB market will not be properly incentivized to adopt policies and procedures that approximate those conditions?
4. Are there ways that we can mitigate the potential adverse effects on proxy voting advice associated with the Rule 14a-2(b)(9)(ii) conditions other than by rescinding those conditions?
5. 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?
6. Should we also reconsider the Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers that the Commission issued in connection with the 2020 Final Rules? Because that supplemental guidance was prompted, in part, by the Rule 14a-2(b)(9)(ii) conditions, will the guidance be useful if the Rule 14a-2(b)(9)(ii) conditions are rescinded? Should the guidance be rescinded concurrently with the Rule 14a-2(b)(9)(ii) conditions? Should it instead be revised, and, if so, how? Notwithstanding the proposed rescission of the Rule 14a-2(b)(9)(ii) conditions, are there aspects of the supplemental guidance that should be clarified?

B. Proposed Amendment to Rule 14a-9

1. Background

Before adopting the 2020 Final Rules, the Commission, in August 2019, issued an interpretation and guidance that clarified the application of the Federal proxy rules to the provision of proxy voting advice (the "Interpretive Release").[63] In the Interpretive Release, the Commission explained that the determination of whether a communication is a solicitation for purposes of Section 14(a) of the Exchange Act depends upon the specific nature, content and timing of the communication and the circumstances under which the communication is

[63] *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)] ("Interpretive Release").

transmitted.[64] The Commission stated that PVABs' proxy voting advice generally would constitute a solicitation subject to the proxy rules.[65] As a solicitation, proxy voting advice is subject to Rule 14a-9. Rule 14a-9 "prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact."[66] The rule also requires that solicitations "must not omit to state any material fact necessary in order to make the statements therein not false or misleading."[67] The Commission noted that although PVABs may rely on exemptions from the proxy rules' information and filing requirements, even these exempt solicitations remain subject to Rule 14a-9.[68]

In the adopting release for the 2020 Final Rules, the Commission codified the guidance set forth in the Interpretive Release that proxy voting advice is generally subject to Rule 14a-9.[69] The 2020 Final Rules amended Rule 14a-9 by adding paragraph (e) to the Note to that rule. Paragraph (e) sets forth examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice. Specifically, Note (e) to Rule 14a-9 provides that the failure to disclose material information regarding proxy voting advice, "such as the [PVAB's] methodology, sources of information, or conflicts of interest" could, depending upon particular facts and circumstances,

[64] *Id.* at 47417-19.

[65] *Id.*

[66] *Id.* at 47419.

[67] *Id.*

[68] *Id.*

[69] 2020 Adopting Release at 55121.

be misleading within the meaning of the rule. In adopting these amendments, the Commission noted that "[t]he ability of a client of a [PVAB] to make voting decisions is affected by the adequacy of the information it uses to formulate such decisions" and stated that the amendments "are designed to further clarify the potential implications of Rule 14a-9 for proxy voting advice specifically, and to help ensure that [PVABs'] clients are provided with the material information they need to make fully informed decisions."[70]

Although commenters on the 2019 Proposed Rules expressed concern that the changes to Rule 14a-9 could heighten the litigation risk for PVABs, the Commission stated that the 2020 Final Rules were not intended to change the application or scope of Rule 14a-9 or create a new cause of action against PVABs.[71] The Commission also stated that the amendments do "not make 'mere differences of opinion' actionable under Rule 14a-9."[72] Instead, the amendments were intended to clarify "what has long been true about the application of Rule 14a-9 to proxy voting advice and, more generally, proxy solicitations as a whole: no solicitation may contain any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading."[73]

Despite these Commission statements regarding the intent of the 2020 Final Rules' amendments to Rule 14a-9, PVABs, their clients and other investors continue to express

[70] *Id.*

[71] *Id.*

[72] *Id.* The Commission also stated that "differences of opinion are not actionable under the final amendment to Rule 14a-9." *Id.* at n.443.

[73] *Id.*

concerns and uncertainty regarding the extent of PVABs' liability under Rule 14a-9.[74] PVABs continue to assert that the amendments may increase their litigation risks, thereby increasing their costs, which, ultimately, may be passed along to their clients.[75] These parties indicate that those litigation risks could also impair the independence and quality of PVABs' proxy voting advice if, for example, registrants use the threat of litigation to pressure PVABs to make their proxy voting advice more favorable to such registrants. Further, PVABs and their clients remain concerned that Rule 14a-9 claims may be available for registrants who disagree with their proxy voting advice. Such disagreements could pertain not only to PVABs' voting recommendations, but also to the specific methodology, analysis and information that PVABs use to formulate their recommendations.

2. Proposed Amendment

As explained in the release adopting the 2020 Final Rules, the Commission's position is that proxy voting advice is a "solicitation" and, as such, is subject to Rule 14a-9's prohibition against material misstatements and omissions.[76] We recognize, however, that PVABs, their clients and other investors continue to express concerns that the 2020 Final Rules' amendments to Rule 14a-9 may extend liability to mere differences of opinion regarding the proxy voting

[74] *See supra* notes 23-25 (citing to concerns that investors and others have expressed regarding the 2020 Final Rules, including the amendment to Rule 14a-9). In addition, because of the large similarities between the proposed amendment to Rule 14a-9 in the 2019 Proposed Rules and the amendment to Rule 14a-9 adopted in the 2020 Final Rules, we also consider some of the comment letters that expressed concerns regarding the proposed amendment to be relevant for purposes of evaluating the ongoing concerns regarding Note (e) to Rule 14a-9, as adopted. *See* comment letters from Carl C. Icahn (Feb. 7, 2020), Marcie Frost, Chief Executive Officer, CalPERS (Feb. 3, 2020), Rob Collins, Council for Investor Rights and Corporate Accountability (Feb. 3, 2020), Richard B. Zabel, General Counsel and Chief Legal Officer, Elliott Management Corporation (Jan. 31, 2020), Kevin Cameron, Executive Chair, Glass Lewis (Feb. 3, 2020), and Gary Retelny, CEO, ISS (Jan. 31, 2020).

[75] *Id.*

[76] 2020 Adopting Release at 55093-94.

advice.[77] These differences of opinion could include disagreements regarding the substance of a PVAB's voting recommendations (*e.g.*, a registrant's disagreement with a PVAB's recommendation that shareholders vote against a director nominee recommended by the board) or the appropriate analysis, methodology or information that the PVAB should use to formulate its voting recommendations (*e.g.*, a disagreement between a registrant and a PVAB regarding the appropriate peer companies for a particular analysis). These parties have also expressed concerns that a PVAB could be liable under Rule 14a-9 solely because it declined to accept a registrant's suggested revisions or corrections to its proxy voting advice.[78] In their view, these uncertainties unnecessarily increase the litigation risk to PVABs and impair the independence of the proxy voting advice that investors use to make their voting decisions.

In light of these concerns, we are proposing to delete Note (e) to Rule 14a-9. As discussed above, Note (e) sets forth examples of what may, depending on the particular facts and circumstances, be misleading within the meaning of Rule 14a-9 with respect to proxy voting advice. Although Note (e) was intended to clarify the potential implications of Rule 14a-9 for proxy voting advice under existing law, it appears instead to have unintentionally created a misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion.[79] The proposed deletion of Note (e) is intended to address that misperception and thereby reduce any resulting uncertainty that could lead to increased litigation risks or the threat of litigation and impaired independence of proxy voting advice.

[77] *See supra* notes 23-25.

[78] *Id.*; *see also* comment letter from Gary Retelny, CEO, ISS (Jan. 31, 2020).

[79] *See supra* note 74 and accompanying text.

At the same time, we believe it may be helpful to briefly clarify our understanding of the limited circumstances in which a PVAB's statement of opinion may subject it to liability under Rule 14a-9. A PVAB, like any other person engaged in solicitation, 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 our proposed deletion of Note (e). We recognize, however, that the formulation of proxy voting advice often requires subjective determinations and exercise of professional judgment. We do not interpret Rule 14a-9 to subject PVABs to liability for such determinations simply because a registrant holds a differing view.

Our conclusion that Rule 14a-9 liability cannot rest on mere differences of opinion is supported by the Supreme Court's decisions in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[80] and *Virginia Bankshares, Inc. v. Sandberg*.[81] As noted above, Rule 14a-9 prohibits misstatements or omissions of "material fact." In *Omnicare*, the Court explained that "a sincere statement of pure opinion is not an 'untrue statement of material fact'" even if the belief is wrong.[82] Thus, to state a claim under Rule 14a-9, it would not be enough to allege that a PVAB's opinions—regarding, for example, its determination to select a particular analysis or methodology to formulate its voting recommendations or the ultimate

[80] 575 U.S. 175 (2015).

[81] 501 U.S. 1083 (1991). While *Omnicare* involved claims brought under Section 11 of the Securities Act of 1933, we believe its discussion of the circumstances in which a statement of opinion may be actionable under that provision applies to Rule 14a-9. *See Omnicare*, 575 U.S. at 185 n.2 (noting that Rule 14a-9 "bars conduct similar to that described in § 11"); *see also, e.g.*, *Golub v. Gigamon, Inc.*, 994 F.3d 1102 (9th Cir. 2021) (holding that the *Omnicare* standards apply to claims under Rule 14a-9); *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 322-23 (4th Cir. 2019) (applying the *Omnicare* standards to claims under Rule 14a-9).

[82] 575 U.S. at 186.

voting recommendations themselves—were wrong.[83]

As the Court explained in *Omnicare*, there are three ways in which a statement of opinion may be actionable as a misstatement or omission of material fact. First, every statement of opinion "explicitly affirms one fact: that the speaker actually holds the stated belief."[84] Thus, a PVAB may be subject to liability under Rule 14a-9 for a statement of opinion that "falsely describe[s]" its view as to the voting decision that it believes the client should make.[85] Second, a statement of opinion may contain "embedded statements of fact" which, if untrue, may be a source of liability under Rule 14a-9.[86] And third, "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view."[87] A PVAB's statement of opinion may thus give rise to liability if it "omits material facts about the [PVAB's] inquiry into or knowledge concerning [the] statement" and "those facts conflict with what a reasonable investor would take from the statement itself."[88]

[83] *Id.* at 194.

[84] *Id.* at 184.

[85] *Id.*; *see also Virginia Bankshares*, 501 U.S. at 1092, 1095. For example, if a speaker states the belief that a company has the highest market share, while knowing that the company in fact has the second highest market share, that statement of belief would be an "untrue statement of fact" about the speaker's own belief.

[86] *Omnicare*, 575 U.S. at 185-86; *see also Virginia Bankshares*, 501 U.S. at 1092, 1095. For example, in stating its opinion that shareholders should vote for a particular director-candidate, a PVAB may support that opinion by reference to that candidate's prior professional experience. Those descriptions of the candidate's professional experience would be statements of fact potentially subject to liability under Rule 14a-9, notwithstanding the context in which they were made (*i.e.*, as support for a statement of opinion).

[87] *Omnicare*, 575 U.S. at 188.

[88] *Id.* at 189. In *Omnicare*, the court offered the example of "an unadorned statement of opinion about legal compliance: 'We believe our conduct is lawful.'" *Id.* at 188. The court noted that "[i]f the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete." *Id.* This example can also be applied to a PVAB's proxy voting advice if, for example, it makes a statement of opinion regarding the legality of a registrant's proposal or corporate action without having consulted a lawyer.

Omnicare and *Virginia Bankshares* support our view that neither mere disagreement with a PVAB's analysis, methodology or opinions, nor a bare assertion that a PVAB failed to reveal the basis for its conclusions, would suffice to state a claim under Rule 14a-9. Rather, a litigant "must identify particular (and material) facts" indicating a misstatement or omission of a material fact that renders a PVAB's statements misleading in one of the three senses above—which, the Supreme Court noted, is "no small task."[89] As such, a PVAB would not face liability under Rule 14a-9 for exercising its discretion to rely on a particular analysis, methodology or set of information—while relying less heavily on or not adopting alternative analyses, methodologies or sets of information, including those advanced by a registrant or other party—when formulating its voting recommendations. Similarly, a PVAB would not face liability under Rule 14a-9, for example, simply because it did not accept a registrant's suggested revisions to its proxy voting advice concerning such discretionary matters. Instead, a PVAB's potential liability under Rule 14a-9 turns on whether its proxy voting advice contains a material misstatement or omission of fact.[90]

Request for Comment

7. Should we amend Rule 14a-9 as proposed to remove Note (e)? Should we modify the Note instead of deleting it? If so, how should the Note be modified? Rather than rescinding or amending Note (e), should we instead commit to conducting a retrospective review of Note (e) after a given period of time? If so, what is the appropriate amount of time after which we should conduct such review? What would be the potential drawbacks of conducting such a retrospective review?
8. Has the addition of Note (e) to Rule 14a-9 improved the quality or integrity of proxy voting advice? Is there a risk that PVABs will change their policies and procedures to the detriment of investors if the Commission adopts the proposed amendments to Rule 14a-9? Are there any other adverse consequences associated with the removal of Note (e) to Rule 14a-9?
9. Has the addition of Note (e) to Rule 14a-9 resulted in increased litigation for PVABs? Have PVABs experienced an increase in litigation costs or credible threats of litigation since the adoption of the 2020 Final Rules? Have there been any other adverse consequences associated with the addition of Note (e) to Rule 14a-9?
10. We have set forth our understanding of the scope of Rule 14a-9 liability in the context of proxy voting advice. Are there other ways we could address concerns about potential increased litigation risks to PVABs and impairment of the independence of proxy voting advice? For example, should we amend Rule 14a-9 to codify this understanding? Alternatively, should we exempt all or parts of proxy voting advice from Rule 14a-9 liability entirely? For example, should we amend Rule 14a-9 to expressly state that a PVAB would not be subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations, including its decision to use a specific analysis, methodology or information or its decision as to how to respond to any disagreement a registrant may have with its proxy voting advice?

III. ECONOMIC ANALYSIS

We are proposing amendments to Exchange Act Rule 14a-2(b)(9) to rescind the Rule 14a-2(b)(9)(ii) conditions. The purpose of these proposed amendments is to address concerns about the potential adverse effects of the 2020 Final Rules on the independence, cost and

[89] *Id.* at 194. We further note that both *Omnicare* and *Virginia Bankshares* were cases against registrants; we are not aware of any enforcement actions or private lawsuits against a PVAB based on statements of opinion in connection with proxy voting matters.

[90] This release does not address any duties or liabilities that a PVAB may have under the Investment Advisers Act of 1940, as applicable.

timeliness of proxy voting advice, while still achieving many of the intended benefits of the 2020 Final Rules with respect to the quality of the advice provided to PVABs' clients. We also are proposing an amendment to Exchange Act Rule 14a-9 to remove paragraph (e) of the Note to that rule. The purpose of this proposed amendment is to avoid any misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing that rule's application and scope, including its application to statements of opinion.

The discussion below addresses the economic effects of the proposed amendments, including their anticipated costs and benefits, as well as the likely effects of the amendments on efficiency, competition and capital formation.[91] We also analyze the potential costs and benefits of reasonable alternatives to the proposed amendments. Where practicable, we have attempted to quantify the economic effects of the proposed amendments; however, in most cases, we are unable to do so because either the necessary data is unavailable or certain effects are not quantifiable. Below, we request comment on our analysis of these effects as well as data that could help us quantify these effects.

A. 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, PVABs, investment advisers and other clients

[91] Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] directs the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission when making rules under the Exchange Act, to consider the impact that the rules would have on competition, 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.

of PVABs, as well as current industry practices used by these entities in connection with the preparation, distribution and use of proxy voting advice.

The adopting release for the 2020 Final Rules provided an overview of the role of PVABs in the proxy process, including a discussion of existing economic research on PVABs and the quality of proxy voting advice they provide.[92]

1. Affected Parties and Current Market Practices

a. Proxy Voting Advice Businesses

As of November 2021, to our knowledge, the proxy voting advice industry in the United States consists of three major firms: ISS, Glass Lewis and Egan-Jones.

- 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.[93] 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).[94] As of April 2020, ISS had nearly 2,000 employees in 30 locations, and covered approximately 44,000 shareholder meetings in 115 countries, annually.[95] ISS states that it executes about 10.2 million ballots annually on behalf of those clients representing 4.2 trillion

[92] *See* 2020 Adopting Release.

[93] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-47, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON ECONOMIC POLICY, COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE, CORPORATE SHAREHOLDER MEETINGS: PROXY ADVISORY FIRMS' ROLE IN VOTING AND CORPORATE GOVERNANCE PRACTICES, 6 (2016), *available at* https://www.gao.gov/assets/690/681050.pdf ("2016 GAO Report").

[94] *Id*.

[95] *See* ABOUT ISS, *available at* https://www.issgovernance.com/about/about-iss.

shares.[96] 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.[97]

- 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.[98] As of April 2020, Glass Lewis had more than 380 employees worldwide that provide services to more than 1,300 clients that collectively manage more than $35 trillion in assets.[99] Glass Lewis states that it covers more than 20,000 shareholder meetings across approximately 100 global markets annually.[100] 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.[101] 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.[102] As of September 2016, Egan-Jones' proxy research or voting clients mostly consisted of mid- to large-sized mutual funds,[103] and the firm covered approximately 40,000 companies.[104] Egan-Jones Ratings Company (Egan-Jones' parent company) is registered with the Commission as a Nationally Recognized Statistical Ratings Organization.[105]

Of the three PVABs identified, ISS and Glass Lewis are the largest and most often used for proxy voting advice.[106] We do not have access to general financial information for ISS, Glass Lewis and Egan-Jones such as annual revenues, earnings before interest, taxes, depreciation and amortization and net income. We also do not have access to client-specific financial information or more general or aggregate information regarding the economics of the PVABs.

As part of our consideration of the baseline for the proposed amendments, we focus on the industry practice that is particularly relevant for the proposed amendments to Rule 14a-2(b)(9): the PVABs' procedures for engagement with registrants. As mentioned above, all three major PVABs have certain policies, procedures and disclosures in place intended to assure clients that the proxy voting advice they receive will be based on accurate, transparent and complete information.[107] In some cases, PVABs seek input from registrants to further these

[96] *See* ABOUT ISS, https://www.issgovernance.com/about/about-iss.

[97] *See* Form ADV filing for ISS, *available at:* https://adviserinfo.sec.gov/IAPD/content/ViewForm/crd_iapd_stream_pdf.aspx?ORG_PK=111940 (last accessed April 23, 2020) ("ISS Form ADV filing"). *See also* 2016 GAO Report at 9.

[98] *Id.* at 7.

[99] *See* GLASS LEWIS COMPANY OVERVIEW, *available at* https://www.glasslewis.com/company-overview/.

[100] *Id.*

[101] *See* 2016 GAO Report at 7.

[102] *Id.*

[103] *Id.*

[104] *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.

[105] *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.

[106] *See* 2016 GAO Report 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* letters in response to the SEC Staff Roundtable on the Proxy Process from Center on Executive Compensation (Mar. 7, 2019) (noting that there are "two firms controlling roughly 97% of the market share for such services"); Society for Corporate Governance (Nov. 9, 2018) ("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. . . . .").

[107] *See supra* Section II.A.1.

objectives. Glass Lewis and Egan-Jones offer registrants some form of pre-release review of at least some of their proxy voting advice reports, or the data used in their reports. ISS does not provide draft proxy voting advice to any United States registrants, but it engages with registrants during the process of formulating its proxy voting advice. Also, all three PVABs offer registrants access to proxy voting advice after it is distributed to clients, in some cases for a fee, and offer mechanisms by which registrants can provide feedback on such advice. In the 2021 Annual Report, after reviewing each member-PVAB's compliance report, the Oversight Committee found that ISS and Glass Lewis met the standards established in the three best practices principles, which include communication with and feedback from registrants.[108]

Additionally, it is our understanding that some PVABs currently provide their clients with notifications of and links to filings by registrants that are the subject of proxy voting advice in their online platforms.[109] These notifications and links provide a means by which clients may access additional definitive proxy materials that registrants may file in response to proxy voting advice.

b. Clients of Proxy Voting Advice Businesses as Well as Underlying Investors

Clients that use PVABs for proxy voting advice will be affected by the proposed amendments. In turn, investors and other groups on whose behalf these clients make voting determinations will be affected. One of the three major PVABs—ISS—is registered with the Commission as an investment adviser and, as such, provides annually updated disclosure with

[108] *See supra* Section II.A.1.

[109] *See supra* note 57.

respect to its types of clients on Form ADV. Table 1 below reports client types as disclosed by ISS.[110]

Table 1: Number of Clients by Client Type (as of March 28, 2020)

Type of Client[a]	Number of Clients[b]
Banking or thrift institutions	195
Pooled investment vehicles	300
Pension and profit sharing plans	170
Charitable organizations	110
State or municipal government entities	10
Other investment advisers	960
Insurance companies	40
Sovereign wealth funds and foreign official institutions	10
Corporations or other businesses not listed above	70
Other	225
Total	2,095

[a] The table excludes client types for which ISS indicated either zero clients or fewer than five clients.

[b] 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), it may indicate that it has fewer than five clients rather than reporting the number of clients.

Table 1 illustrates the types of clients that utilize the services of one of the largest PVABs. For example, while investment advisers ("Other investment advisers" in Table 1)

[110] *See* ISS Form ADV filing (describing clients classified as "Other" as "Academic, vendor, other companies not able to identify as above").

constitute a 46 percent plurality of clients for ISS, other types of clients include pooled investment vehicles (14 percent) and pension and profit sharing plans (eight percent). Other users of the services offered by ISS include corporations, charitable organizations and insurance companies.[111] Certain of these users of PVABs' services make voting determinations that affect the interests of a wide array of individual investors, beneficiaries and other constituents.

c. Registrants

Registrants also will 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 with respect to those registrants are subject to the Federal proxy rules.[112] In addition, there are certain other companies that do not have a class of equity securities registered under Section 12 of the Exchange Act that 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.[113]

We note that because registrants are owned by investors, effects on registrants as a result of the proposed amendments will accrue to investors. Among the investors in a given registrant, there may be individual investors or groups of investors that may want to influence the direction

[111] *Id.*

[112] Foreign private registrants are exempt from the Federal proxy rules under Rule 3a12-3(b) of the Exchange Act. *See* 17 CFR 240.3a12-3. Furthermore, we are not aware of any asset-backed registrants that have a class of equity securities registered under Section 12 of the Exchange Act. Most asset-backed registrants are registered under Section 15(d) of the Exchange Act and thus are not subject to the Federal proxy rules. Nine asset-backed registrants obtained a class of debt securities registered under Section 12 of the Exchange Act as of December 2018. As a result, these asset-backed registrants are not subject to the Federal proxy rules.

[113] Under Rule 20a-1 of the Investment Company Act, registered management investment companies must comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made with respect to a security registered pursuant to Section 12 of the Exchange Act. *See* 17 CFR 270.20a-1. Additionally, "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.

that the registrant should pursue. Those individual investors or groups of investors could be clients of PVABs. Separately, because of the principal-agent relationship between investors and management in a corporation, there may exist conflicts between management of the registrant and investors. It is possible that some investors may use PVABs' advice as part of their decision-making process on a particular matter presented for shareholder approval for which management's interests may not be aligned with those of investors in general.

As of December 31, 2020, we estimate that approximately 5,400 registrants had a class of securities registered under Section 12 of the Exchange Act.[114] As of the same date, there were approximately 86 companies that did not have a class of securities registered under Section 12 of the Exchange Act that filed proxy materials.[115] As of September 30, 2021, there were 14,062 registered management investment companies that were subject to the proxy rules: (i) 13,347 open-end funds, out of which 2,497 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share class; (ii) 701 closed-end funds; and (iii) 14

[114] We are able to estimate the number of registrants with a class of securities registered under Section 12 of the Exchange Act by reviewing all Forms 10-K and 10-K amendments filed during calendar year 2018 with the Commission. After reviewing all forms, we then count 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 registrants that filed both Forms 20-F and 40-F, as well as asset-backed registrants that filed Forms 10-D and 10-D/A during calendar year 2018 with the Commission are excluded from this estimate. This estimate excludes BDCs that filed Form 10-K or an amendment in 2020.

[115] We identify these issuers as those that: (1) are subject to the reporting obligations of Exchange Act Section 15(d), but do not have a class of equity securities registered under Exchange Act Section 12(b) or 12(g); and (2) have filed any proxy materials during calendar year 2020 with the Commission. Additionally, we are considering the following proxy materials in our analysis: DEF14A; DEF14C; DEFA14A; DEFC14A; DEFM14A; DEFM14C; DEFR14A; DEFR14C; DFAN14A; N-14; PRE 14A; PRE 14C; PREC14A; PREM14A; PREM14C; PRER14A; PRER14C. Form N-14 can be a registration statement and/or proxy statement. We also manually review all Forms N-14 filed during calendar year 2020 with the Commission, excluding any Forms N-14 that are exclusively registration statements from our estimates. To identify registrants 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 2020 with the Commission. We then count the number of unique registrants that identify themselves as subject to Section 15(d) reporting obligations with no class of equity securities registered under Section 12(b) or Section 12(g).

variable annuity separate accounts registered as management investment companies.[116] As of June 2021, we identified 99 Business Development Companies ("BDCs") that could be subject to the proposed amendments.[117] The summation of these estimates yields 19,647 companies that may be affected by the proposed amendments.[118]

The above estimates are an upper bound of the number of potentially affected companies because not all of these registrants may file proxy materials related to a meeting for which a PVAB issues proxy voting advice in a given year. Out of the 19,647 potentially affected registrants mentioned above, approximately 5,350 filed proxy materials with the Commission during calendar year 2020.[119] Out of the 5,350 registrants, 4,500 (84 percent) were Section 12 or Section 15(d) registrants and the remaining 850 (16 percent) were registered management investment companies.

2. Current Regulatory Framework

On July 22, 2020, the Commission adopted the 2020 Final Rules. The 2020 Final Rules:

- Amended Rule 14a-1(l) to codify the Commission's interpretation that proxy voting advice generally constitutes a "solicitation" subject to the proxy rules.

[116] We estimate the number of unique registered management investment companies based on Forms N-CEN filed between December 2020 and September 2021 with the Commission. Open-end funds are registered on Form N-1A, while 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.

[117] BDCs are entities that have been issued an 814-reporting number. Our estimate includes 82 BDCs that filed Form 10-K in 2020, as well as 17 BDCs that were not traded.

[118] The 19,647 potentially affected registrants is the sum of: (a) 5,400 registrants with a class of securities registered under Section 12 of the Exchange Act; (b) 86 registrants without a class of securities registered under Section 12 of the Exchange Act that filed proxy materials; (c) 14,062 registered management investment companies; and (d) 99 BDCs.

[119] *See* 2020 Adopting Release at n.544 (setting forth details on the estimation of companies that filed proxy materials with the Commission during calendar year 2018).

- Adopted Rule 14a-2(b)(9) to add new conditions to two exemptions (set forth in Rules 14a-2(b)(1) and (3)) that PVABs generally rely on to avoid the proxy rules' information and filing requirements. Those conditions include:
  - New conflicts of interest disclosure requirements; and
  - The Rule 14a-2(b)(9)(ii) conditions.
- Amended the Note to Rule 14a-9, which prohibits false or misleading statements, to include specific examples of material misstatements or omissions related to proxy voting advice. Specifically, Note (e) provides that the failure to disclose material information regarding proxy voting advice, "such as the [PVAB's] methodology, sources of information, or conflicts of interest" could, depending upon particular facts and circumstances, be misleading within the meaning of the rule.

The changes to the definition of "solicitation" and to Rule 14a-9 became effective on November 2, 2020. The conditions set forth in Rule 14a-2(b)(9) will become effective on December 1, 2021.

B. Benefits and Costs

In the following sections, we discuss the specific benefits and costs of the proposed amendments.

1. Benefits

The main benefit for PVABs from our proposed rescission of the Rule 14a-2(b)(9)(ii) conditions would be the reduction of the initial or ongoing[120] direct costs associated with

[120] The compliance date for the Rule 14a-2(b)(9)(ii) conditions is December 1, 2021. On June 1, 2021, the Division of Corporation Finance issued a statement that it would not recommend enforcement action based on the Interpretive Release or the 2020 Final Rules during the period in which the Commission is considering further regulatory action in this area. Division of Corporation Finance, *Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9*, U.S. SECURITIES AND EXCHANGE COMMISSION, *available at* https://www.sec.gov/news/public-

modifying their current systems and methods, or developing and maintaining new systems and methods, to satisfy the requirement of Rule 14a-2(b)(9)(ii)(A) that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that registrants that are the subject of proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to PVABs' clients. Additionally, the proposed amendments would reduce the direct costs of satisfying the requirement of Rule 14a-2(b)(9)(ii)(B) that PVABs adopt and publicly disclose written policies and procedures reasonably designed to ensure that PVABs provide clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the shareholder meeting. As set forth in the 2020 Final Rules, to be eligible for the safe harbor in Rule 14a-2(b)(9)(iv), a PVAB could provide: (i) notice on its electronic client platform that the registrant has filed, or has informed the PVAB that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available); or (ii) notice through email or other electronic means that the registrant has filed, or has informed the PVAB that it intends to file, additional soliciting materials (and include an active hyperlink to those materials on EDGAR when available). Both mechanisms for informing clients could involve initial set-up costs as well as ongoing costs.

statement/corp-fin-proxy-rules-2021-06-01. This staff statement does not alter the December 1, 2021 compliance date for the Rule 14a-2(b)(9)(ii) conditions, and thus we recognize that PVABs may have already incurred certain costs to modify their systems or otherwise ensure that the conditions of the exemption are met. Even so, the elimination of these conditions would eliminate any ongoing costs or other costs of the conditions that have not yet been incurred. To the extent a PVAB has not yet incurred any direct costs from the Rule 14a-2(b)(9)(ii) conditions, the proposed amendments would eliminate or avoid potential future costs.

To the extent PVABs already have similar systems in place to meet the requirements of Rules 14a-2(b)(9)(ii)(A) and (B), any benefits from the proposed amendments may be limited.[121] For purposes of the Paperwork Reduction Act of 1995 ("PRA"),[122] in the adopting release for the 2020 Final Rules, we estimated that each PVAB would incur 2,845 burden hours to satisfy Rule 14a-2(b)(9)(ii)(A) and 2,845 burden hours to satisfy Rule 14a-2(b)(9)(ii)(B).[123] Also for purposes of our PRA analysis, we estimated that each PVAB would incur a burden of between 50 and 5,690 hours per year associated with securing an acknowledgment or other assurance that the proxy voting advice will not be disclosed.[124] We believe that the proposed amendments would eliminate these PRA burdens.

Additionally, while all three major PVABs currently offer registrants access to their proxy voting advice, in some circumstances they may charge a fee to registrants for such access.[125] Once the Rule 14a-2(b)(9)(ii) conditions become effective, the requirement to share full reports with registrants under Rule 14a-2(b)(9)(ii) may result in a PVAB providing access to proxy voting reports at no charge to registrants to the extent that the PVAB relies on the safe harbor provided in Rule 14a-2(b)(9)(iii) to satisfy the condition in Rule 14a-2(b)(9)(ii)(A).[126] This would cause such a PVAB to lose fees it otherwise would have earned from selling proxy voting advice to registrants. By eliminating the Rule 14a-2(b)(9)(ii) conditions (and, therefore,

[121] *See supra* Section II.A.1.

[122] 44 U.S.C. 3501 *et seq.*

[123] *See* 2020 Adopting Release at Section V.B.1.

[124] *See* 2020 Adopting Release at Section V.B.1.

[125] *See* 2020 Adopting Release at Section IV.B.1.a.ii.

[126] To rely on the safe harbor in Rule 14a-2(b)(9)(iii), a PVAB must provide registrants with a copy of the proxy voting advice at no charge.

the need to rely on the Rule 14a-2(b)(9)(iii) safe harbor), the proposed amendments could allow PVABs to charge registrants for access to the proxy voting reports, thus increasing their revenues.

The proposed amendments may also benefit other parties. PVABs may pass through a portion of the costs of modifying, developing or maintaining systems to meet the Rule 14a-2(b)(9)(ii) conditions to their clients through higher fees for proxy voting advice. Eliminating such costs could therefore be beneficial to clients of PVABs.

Some commenters on the 2019 Proposed Rules suggested that the proposal could negatively affect PVABs' independence: because of the ability of registrants to review and provide feedback on proxy voting advice in advance of its dissemination to PVABs' clients (and potentially lobby PVABs for changes to recommendations), the 2019 Proposed Rules could have diminished PVABs' willingness to recommend votes against management, thus substantially diminishing the independent information available to investors and impeding investors' ability to monitor company management.[127] The 2020 Final Rules did not include a registrant advance review and feedback process, and instead implemented a principles-based approach, in an effort to address such concerns. However, notwithstanding these changes, clients of PVABs have continued to express strong concerns about the adverse effects of the amendments on the independence of proxy voting advice. To the extent that the proposed amendments eliminate the possibility of such alleged adverse effects, they would benefit PVABs, their clients and investors in general.

[127] *See* comment letters from Fiona Reynolds, Chief Executive Officer, Principles for Responsible Investment (Feb. 3, 2020) and ISS.

Lastly, we do not expect the proposed deletion of paragraph (e) to the Note to Rule 14a-9 to generate any significant benefits other than avoiding any misperception that the 2020 Final Rules' addition of that paragraph purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion. Notwithstanding this proposed deletion, a PVAB may still be subject to liability under Rule 14a-9, depending on the facts and circumstances, for a materially misleading statement or omission of fact, including with regard to its methodology, sources of information or conflicts of interest. Thus, we expect that this proposed amendment would not have any significant economic effect.

2. Costs

The proposed amendments may impose costs on the clients of PVABs—and thereby ultimately the investors they serve—by potentially reducing the overall mix of information available to those clients as they assess proxy voting advice and make determinations about how to cast votes. Requiring timely notice to registrants of proxy voting advice could allow registrants to more effectively determine whether they wish to respond to the recommendation by publishing additional soliciting materials and to do so in a timely manner before shareholders cast their votes. Registrants may wish to do so for a variety of reasons, including, for example, because they have identified what they perceive to be factual errors or methodological weaknesses in a PVAB's analysis or because they have a different or additional perspective with respect to the advice. In either case, clients of PVABs, and registrants' investors in general, may benefit from the availability of additional information upon which to base their voting decisions. Clients of PVABs often must make voting decisions in a compressed time period. Timely access to registrant responses to proxy voting advice could facilitate a client's evaluation of the advice by highlighting disagreements regarding facts and data, differences of opinion or additional perspectives before the client casts its votes. To the extent that the proposed amendments reduce

this type of information and it is valuable to investors, the proposed amendments may make it more costly for investors to obtain such information and to make timely voting decisions. Additionally, to the extent that a PVAB relies on the safe harbor Rule 14a-2(b)(9)(iii), which requires PVABs to provide registrants with their proxy voting advice for free, the proposed amendments may cause some registrants to incur costs in the form of fees or the purchase of additional PVAB services in order to obtain and respond to proxy voting advice. Such costs will ultimately be borne by investors.

We note, however, that some PVABs currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue voting advice.[128] Additionally, the above-described efforts by PVABs to develop industry-wide standards, such as the BPPG's principles and the Oversight Committee's role in assessing compliance with such standards, could address some of the concerns underlying the Rule 14a-2(b)(9)(ii) conditions. Thus, if PVABs already provide accurate and complete proxy voting advice to their clients, this potential cost associated with the proposed amendments may not be significant. Moreover, because PVABs developed these internal policies and measures themselves, we believe they are less likely to adversely affect the independence, cost and timeliness of proxy voting advice than measures they would adopt to satisfy the Rule 14a-2(b)(9)(ii) conditions.

Lastly, we do not expect the proposed deletion of Note (e) to Rule 14a-9 to create any significant costs for PVABs. Given that this proposed amendment would not alter a PVAB's liability under Rule 14a-9, we would expect that its economic impact would be minimal.

[128] *See*, *e.g.*, comment letters from Kevin Cameron, Executive Chair, Glass Lewis (Feb. 3, 2020) and ISS.

C. Effects on Efficiency, Competition, and Capital Formation

As discussed in Section III.A above, PVABs perform a variety of functions for their clients, including analyzing and making voting recommendations on matters presented for shareholder votes and included in registrants' proxy statements. As an alternative to utilizing these services, clients of PVABs could instead conduct their own analyses and execute votes using internal resources.[129] Given the costs of analyzing and voting proxies, the services offered by PVABs may offer economies of scale relative to their clients performing those functions themselves. For example, a GAO study found that among 31 institutions, including mutual funds, pension funds and asset managers, large institutions rely less than small institutions on the research and recommendations offered by PVABs.[130] Small institutional investors surveyed in the study indicated they had limited resources to conduct their own research.[131]

To the extent the 2020 Final Rules increase compliance costs and litigation-risk costs for PVABs which could be passed on to clients, the proposed amendments could reverse those

[129] Clients of PVABs may also rely on some combination of internal and external analysis.

[130] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-765, REPORT TO CONGRESSIONAL REQUESTERS, CORPORATE SHAREHOLDER MEETINGS: ISSUES RELATING TO THE FIRMS THAT ADVISE INSTITUTIONAL INVESTORS ON PROXY VOTING, 2 (2007), *available at* https://www.gao.gov/new.items/d07765.pdf ("2007 GAO Report"). *See generally* comment letter from Business Roundtable (Feb. 3, 2020) (stating that because many institutional investors face voting on a large number of corporate matters every year but lack personnel and resources for managing such activities, they outsource tasks to proxy advisors). *See also* letters in response to the SEC Staff Roundtable on the Proxy Process from BlackRock (Nov. 16, 2018) (stating that "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 (Jan. 2, 2019) (stating that 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").

[131] *See* 2007 GAO Report at 2. *See also* letters in response to the SEC Staff Roundtable on the Proxy Process from Ohio Public Retirement (Dec. 13, 2018) ("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."); Transcript of Roundtable on the Proxy Process at 194 (comments of Mr. Scot Draeger, stating that: "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.").

increases along with any decrease in demand for PVABs' advice they may have caused. To the extent PVABs offer economies of scale relative to their clients performing certain functions themselves, increased demand for, and reliance upon, PVABs' services could lead to greater efficiencies in the proxy voting process.

To the extent that the Rule 14a-2(b)(9)(ii) conditions impair the independence of PVABs or reduce the diversity of thought in the market for proxy voting advice (*e.g.*, by PVABs erring on the side of caution in complex or contentious matters), the proposed elimination of those conditions could reverse those effects, thus leading to advice from PVABs that is more accurate, useful and valuable to their clients. If clients perceive the proposed amendments as positively affecting PVABs' objectivity and independence, this could lead to an increase in demand for proxy voting advice and potentially greater efficiencies in the proxy voting process.[132]

If the proposed amendments reduce costs for PVABs, this could increase competition for proxy voting advice compared to the current baseline, which includes the effect of the 2020 Final Rules. In particular, if costs associated with the 2020 Final Rules are passed on to clients, the reduction of these costs because of the proposed amendments could encourage some investors to retain the services of PVABs, which could reduce the use of internal resources for voting. Also, if the proposed amendments improve the independence of PVABs and thus increase the quality of proxy voting advice, this could cause PVABs to compete more on this dimension. Lastly, reduction in compliance costs and litigation-risk costs, if large enough, may encourage entry into the market for proxy voting advice, increasing the competition among PVABs.[133] However,

[132] As noted above, we do not have financial data about PVABs, including financial data by services provided or by client type. This makes these assessments on a quantitative basis difficult.

[133] *See* comment letter from Sarah Wilson, CEO, Minerva Analytics (Feb. 22, 2020). In its comment letter, Minerva, a PVAB in the U.S. market prior to 2010, stated that the threat of litigation for "errors" is a factor influencing its views on whether to reenter the U.S. market. *Id.*

given the fact that prior to the adoption of the 2020 Final Rules there were only three major PVABs in the United States, we do not expect that the proposed amendments would significantly increase the likelihood of new entry into this market.

If the proposed amendments facilitate the ability of clients of PVABs to make informed voting determinations, this 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. Overall, 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.

Lastly, we do not expect the proposed deletion of Note (e) to Rule 14a-9 to have any significant economic effect on efficiency, competition and capital formation.

D. Reasonable Alternatives

1. Interpretive Guidance or No-Action Relief on Whether Systems and Processes Satisfy the 2020 Final Rules

Alternatives to rescinding the Rule 14a-2(b)(9)(ii) conditions that could reduce compliance costs and independence concerns for PVABs include the Commission issuing interpretive guidance or the staff providing no-action relief regarding whether the systems and processes that PVABs have in place satisfy the 2020 Final Rules. The benefit of either of these approaches is that they could reduce PVABs' initial or ongoing costs of complying with the 2020 Final Rules if the Commission were to determine that their current systems and processes already satisfy the conditions in Rule 14a-2(b)(9), at least to the extent PVABs have not already made modifications to their existing business models. To the extent PVABs' existing systems and processes satisfy the Rule 14a-2(b)(9)(ii) conditions, these approaches could also mitigate

concerns that the independence of the advice could become impaired by making clear that modifications are not required. The potential cost of these alternatives is that, to the extent that PVABs' current systems and processes do not satisfy the 2020 Final Rules, they may not eliminate potential costs or concerns associated with the requirements of Rule 14a-2(b)(9).

2. Exempting Certain Parts of PVABs' Proxy Voting Advice from Rule 14a-9 Liability

Rather than, or in addition to, deleting Note (e) to Rule 14a-9, the Commission could amend Rule 14a-9 to exempt certain portions of proxy voting advice from Rule 14a-9 liability. For example, the Commission could amend Rule 14a-9 to expressly state that a PVAB would not be subject to liability under that rule for any subjective determinations it makes in formulating its recommendations, including its decision to use a specific analysis, methodology or information. The benefit of this alternative would be that it may give PVABs additional comfort that they will not be subject to liability under Rule 14a-9 on the basis of mere disagreement over their analysis, methodology or sources of information. The main cost of this alternative is that it may lower the overall quality of the advice that PVABs provide, and thus negatively affect the voting decisions of institutional investors and investment advisers, and ultimately the other investors they serve. In addition, creating such an exemption from Rule 14a-9 liability that differs from existing law may generate additional uncertainty and litigation.

Request for Comment

11. Have we correctly characterized the benefits and costs for PVABs from the proposed amendments? Are there any other benefits and costs that should be considered? Please provide supportive data to the extent available.
12. Have we correctly characterized the benefits and costs for institutional investors, their clients and registrants from the proposed amendments? Are there any other related benefits and costs that should be considered? Please provide supportive data to the extent available.
13. We assume that the proposed amendments would strengthen the independence of PVABs. Are we correct in that characterization? Please provide supportive data to the extent available.
14. Have we correctly characterized the effects on efficiency, competition and capital formation from the proposed amendments? Are there any effects that should be considered? 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 PRA. We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[134] 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).

[134] 44 U.S.C. 3507(d); 5 CFR 1320.11.

We adopted existing Regulation 14A[135] 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.[136] 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. Most, if not all, of the effect on paperwork burden as a result of the proposed amendments would come from the rescission of Rule 14a-2(b)(9)(ii) and would be expected to reduce the burden from Rule 14a-2(b)(9). However, because Rule 14a-2(b)(9) has not yet become effective, that rule has not yet resulted in any paperwork burden, and there is nothing yet to reduce. Our proposed amendments to Rule 14a-2(b)(9), therefore, would not have any effect on the current paperwork burden as of the date of this release. Nonetheless, as Rule 14a-2(b)(9) is scheduled to become effective on December 1, 2021, to fully analyze the impact of the proposed amendments, for purposes of this PRA analysis, we instead set forth the estimated amount of paperwork burden that the parties affected by Rule 14a-2(b)(9) would avoid as a result of our proposed amendments to Rule 14a-2(b)(9), including our proposed rescission of the Rule 14a-2(b)(9)(ii) conditions.

1. Impact on Affected Parties

As discussed above in Section III.A.1, there are a variety of parties that may be affected, directly or indirectly, by the proposed amendments. These include PVABs; the clients to whom PVABs provide proxy voting advice; investors and other groups on whose behalf the clients of PVABs make voting determinations; registrants who are conducting solicitations and are the subject of proxy voting advice; and the registrants' shareholders, who ultimately bear the costs and benefits to the registrant associated with the outcome of voting matters covered by proxy voting advice.

Of these parties, we expect that PVABs would avoid some additional paperwork burden as a result of the proposed amendments.[137] As discussed further below, we believe that any avoidance of an incremental increase in burdens would be attributable primarily to the rescission of Rule 14a-2(b)(9)(ii). With respect to the proposed amendment to Rule 14a-9, we do not expect the economic impact of this amendment will be significant because it would not change existing law and, therefore, would not change respondents' legal obligations.[138] Moreover, any

[135] 17 CFR 240.14a-1 *et seq*.

[136] 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 PVABs whose proxy voting advice falls within the ambit of the Federal rules and regulations that govern proxy solicitations.

[137] The PRA requires that we estimate "the total annual reporting and recordkeeping burden that will result from the collection of information." [5 CFR 1320.5(a)(1)(iv)(B)(5)] A "collection of information" includes any requirement or request for persons to obtain, maintain, retain, report or publicly disclose information [5 CFR 1320.3(c)]. OMB's current inventory for Regulation 14A, therefore, is an assessment of the paperwork burden associated with such requirements and requests under the regulation, and this PRA is an assessment of changes to such inventory expected to result from these proposed amendments. While other parties, such as the clients of PVABs, may have benefits and costs associated with the proposed amendments (*see supra* Section III.B.), only PVABs and registrants will avoid any additional paperwork burden as a result of the proposed amendments.

[138] The proposed amendment to Rule 14a-9 may relieve PVABs of direct costs to the extent Note (e) to that rule prompted some PVABs to provide additional disclosure about the bases for their proxy voting advice. However, we expect any such costs would be minimal because the adoption of that Note did not represent a change to existing law, nor did it broaden the concept of materiality or create a new cause of action. *See* 2020 Adopting Release at n.685. Similarly, we expect that any avoidance of incremental burdens associated with our proposed amendment to

impact arising from this proposed amendment is not expected to materially change the average PRA burden hour estimates associated with Regulation 14A. Thus, we have not made any adjustments to our PRA burden estimates in respect of the proposed amendment to Rule 14a-9.

a. Proxy Voting Advice Businesses

We expect that PVABs would avoid increased paperwork burden as a result of our proposed amendments to Rule 14a-2(b)(9), which, when effective,[139] will apply to anyone relying on the exemptions in Rules 14a-2(b)(1) or (b)(3) who furnishes proxy voting advice covered by Rule 14a-1(l)(1)(iii)(A). The amount of burdens that PVABs would avoid depends on a number of factors that are firm-specific and highly variable, which makes it difficult to provide reliable quantitative estimates.[140]

There are two components of the proposed amendments to Rule 14a-2(b)(9) that we expect to result in an avoidance of increased burdens. First, under Rule 14a-2(b)(9)(ii)(A), PVABs are required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that registrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time such advice is disseminated to the PVABs' clients. Second, under Rule 14a-2(b)(9)(ii)(B), PVABs are required to adopt and publicly disclose written policies and procedures reasonably designed to ensure that PVABs provide their clients with a mechanism by which they can reasonably be expected to become aware of a registrant's written statements about the proxy voting advice in a timely manner before the

Rule 14a-9 would be minimal because our proposed rescission of Note (e) to Rule 14a-9 is not intended to alter that rule's application to proxy voting advice. *See supra* Section II.B.2.

[139] *See supra* note 3 and accompanying text.

[140] *See generally* the discussion in Section III.B.1 *supra* concerning the difficulty in providing quantitative estimates of the benefits to PVABs associated with the proposed amendments.

shareholder meeting. The proposed amendments would rescind both of these rules, thereby relieving PVABs of the obligation to comply with these requirements. The proposed amendments would also rescind the non-exclusive safe harbors (set forth in Rules 14a-2(b)(9)(iii) and (iv)) that PVABs may use to satisfy the principle-based requirements in Rule 14a-2(b)(9)(ii). We address each of these components in turn.

In the release adopting the 2020 Final Rules, we estimated that PVABs would incur an annual incremental paperwork burden to comply with Rules 14a-2(b)(9)(ii), (iii) and (iv) as follows:

New Requirement	PVAB Estimated Incremental Annual Compliance Burden
Rule 14a-2(b)(9)(ii)(A) – Notice to Registrants and Rule 14a 2(b)(9)(iii) Safe Harbor	Increase in paperwork burden corresponding to:
The PVAB has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that registrants who are the subject of proxy voting advice have such advice made available to them at or prior to the time the advice is disseminated to clients of the PVAB. Safe Harbor – The PVAB has written policies and procedures that are reasonably designed to provide a registrant with a copy of the PVAB's proxy voting advice, at no charge, no later than the time it is disseminated to the PVAB's clients. Such policies and procedures may include conditions requiring that: (A) The registrant has filed its definitive proxy statement at least 40 calendar days before the security holder meeting date (or if no meeting is held, at least 40 calendar days before the date the votes, consents, or authorizations may be used to effect the proposed action); and (B) The registrant has acknowledged that it will only use the copy of the proxy voting advice for its internal purposes and/or in connection with the solicitation and it will not be published or otherwise shared except with the registrant's employees or advisers.	To the extent that the PVAB's current practices and procedures are not already sufficient: o Developing new or modifying existing systems, policies and methods, or developing and maintaining new systems, policies and methods to ensure that it has the capability to timely provide each registrant with information about its proxy voting advice necessary to satisfy the requirement in Rule 14a-2(b)(9)(ii)(A) and/or the safe harbor in Rule 14a-2(b)(9)(iii) o If applicable, obtaining acknowledgments or agreements with respect to use of any information shared with the registrant; and o Delivering copies of proxy voting advice to registrants We estimate the increase in paperwork burden to be 8,535 hours per PVAB, consisting of 2,845 hours for system updates and 5,690 hours for acknowledgments regarding sharing information.

Rule 14a-2(b)(9)(ii)(B) – Notice to Clients of Proxy Voting Advice Businesses and Rule 14a-2(b)(9)(iv) Safe Harbor	Increase in paperwork burden corresponding to:
The PVAB has adopted and publicly disclosed written policies and procedures reasonably designed to ensure that the PVAB provides clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding proxy voting advice by registrants who are the subject of such advice, in a timely manner before the shareholder meeting. Safe harbor – The PVAB has written policies and procedures that are reasonably designed to inform clients who receive the proxy voting advice when a registrant that is the subject of such voting advice notifies the proxy voting advice business that it intends to file or has filed additional soliciting materials with the Commission setting forth the registrant's statement regarding the voting advice, by: (A) providing notice to its clients on its electronic client platform that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available; or (B) The PVAB providing notice to its clients through email or other electronic means that the registrant intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on EDGAR when available.	To the extent that the PVAB's current practices and procedures are not already sufficient: Developing new or modifying existing systems, policies and methods, or developing and maintaining new systems, policies and methods capable of: o Tracking whether the registrant has filed additional soliciting materials; o Ensuring that PVABs provide clients with a means to learn of a registrant's written statements about proxy voting advice in a timely manner that satisfies the requirement in Rule 14a-2(b)(9)(ii)(B) and/or the safe harbor in Rule 14a-2(b)(9)(iv). If relying on the safe harbor in Rule 14a-2(b)(9)(iv)(A) or (B), the associated paperwork burden would include the time and effort required of the PVAB to: o provide notice to its clients through the PVAB's electronic client platform or email or other electronic medium, as appropriate, that the registrant intends to file or has filed additional soliciting materials setting forth its views about the proxy voting advice; and o include a hyperlink to the registrant's statement on EDGAR We estimate the increase in paperwork burden to be 2,845 hours per PVAB.
TOTAL	11,380 hours per PVAB

Altogether, we estimated an annual total increase of 34,140 hours[141] in compliance burden to be incurred by PVABs that would be subject to Rules 14a-2(b)(9)(ii), (iii) and (iv). Accordingly, we expect that our proposed amendments would allow PVABs to avoid these burdens that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

b. Registrants

In addition to PVABs, we anticipate that registrants would avoid increased paperwork burden as a result of our proposed amendment to Rule 14a-2(b)(9). In the adopting release for the 2020 Final Rules, we noted that registrants could, as a result of the adoption of Rule 14a-2(b)(9), experience increased burdens associated with coordinating with PVABs to receive the proxy voting advice, reviewing the proxy voting advice and preparing and filing supplementary proxy materials in response to the proxy voting advice, if they choose to do so. Because Rule 14a-2(b)(9) does not require registrants to engage with PVABs or take any action in response to proxy voting advice, we stated that we expected a registrant would bear additional paperwork burden only if it anticipated the benefits of engaging with the PVABs would exceed the costs of participation. We noted that these costs would vary depending upon the particular facts and

[141] This represented the annual total burden increase expected to be incurred by PVABs (as an average of the yearly burden predicted over the three-year period following adoption of the 2020 Final Rules) and was intended to be inclusive of all burdens reasonably anticipated to be associated with compliance with the Rule 14a-2(b)(9)(ii) conditions. The Commission is aware of three PVABs in the U.S. (*i.e.*, Glass Lewis, ISS and Egan-Jones) whose activities fall within the scope of proxy voting advice constituting a solicitation under amended Rule 14a-1(l)(1)(iii)(A). We estimated that each of these would have a burden of 11,380 hours per year associated with Rules 14a-2(b)(9)(ii), (iii) and (iv). *See* 2020 Adopting Release at n.700. We recognized that there could be other PVABs, including both smaller firms and firms operating outside the U.S., which may also be subject to those rules. However, we expected such a number to be small. Accordingly, rather than increasing our estimate of the number of affected PVABs beyond the three discussed above, we increased our annual total burden estimate by 500 hours to account for those businesses. However, that 500 hour increase also accounted for the burden imposed by Rule 14a-2(b)(9)(i), which is not affected by the proposed amendments. Because we did not indicate, in the adopting release for the 2020 Final Rules, what portion of that 500 hour increase would be attributable to the various conditions in Rule 14a-2(b)(9), we do not include that 500 hour increase in this PRA analysis in order to avoid overestimating the amount of burden that PVABs would be relieved of as a result of the proposed amendments.

circumstances of the proxy voting advice and any issues identified therein, as well as the resources of the registrant, which made it difficult to provide a reliable quantifiable estimate of these costs.

Notwithstanding those difficulties, we estimated an average increase of 50 hours per registrant in connection with the amendments for a total annual increase of 284,500 hours, assuming that a registrant's annual meeting of shareholders is covered by at least two of the three major PVABs in the United States, and the registrant has opted to review both sets of proxy voting advice and file additional soliciting materials in response.[142] Accordingly, we expect that by eliminating the Rule 14a-2(b)(9)(ii) conditions, our proposed amendments would result in a corresponding reduction of potential paperwork burdens that those registrants would have otherwise been expected to incur once Rule 14a-2(b)(9) becomes effective.

2. Aggregate Burden Avoided as a Result of the Proposed Amendments

Table 1 summarizes the calculations and assumptions used in the adopting release for the 2020 Final Rules to derive our estimates of the aggregate increase in burden for all affected parties corresponding to the Rule 14a-2(b)(9)(ii) conditions.

PRA Table 1. Calculation of Aggregate Increase in Burden Hours Resulting from the Rule 14a-2(b)(9)(ii) Conditions

	Affected Parties	
	Proxy Voting Advice Businesses (A)	Registrants (B)
Burden Hour Increase	34,140	284,500
Aggregate Increase in Burden Hours	[Column Total (A)] + [Column Total (B)] = [318,640]	

[142] We also noted that such burden increase would be offset against any corresponding reduction in burden resulting from the registrant forgoing other methods of responding to the proxy voting advice (such as investor outreach) that the registrant determines are no longer necessary or are less preferable in light of Rule 14a-2(b)(9).

Accordingly, we expect that our proposed amendments would allow the affected parties to avoid these estimated burden hours that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

3. Increase in Annual Responses Avoided as a Result of the Proposed Amendments

We believe that the proposed amendments would avoid an increase in the number of annual responses[143] to the existing collection of information for Regulation 14A. In the adopting release for the 2020 Final Rules, we stated that we do not expect registrants to file any different number of proxy statements as a result of those rules. We did state, however, that we anticipated that the number of additional soliciting materials filed under 17 CFR 240.14a-6 may increase in proportion to the number of times that registrants choose to provide a statement in response to a PVAB's proxy voting advice as contemplated by Rule 14a-2(b)(9)(ii)(B) or the safe harbor under Rule 14a-2(b)(9)(iv). For purposes of the PRA analysis in that release, we estimated that there would be an additional 783 annual responses to the collection of information as a result of the 2020 Final Rules.[144] Accordingly, we expect that our proposed amendments would result in an

[143] For purposes of the Regulation 14A collection of information, the number of annual responses corresponds to the estimated number of new filings that will be made each year under Regulation 14A, which includes filings such as DEF 14A; DEFA14A; DEFM14A; and DEFC14A. When calculating PRA burden for any particular collection of information, the total number of annual burden hours estimated is divided by the total number of annual responses estimated, which provides the average estimated annual burden per response. The current inventory of approved collections of information is maintained by the Office of Information and Regulatory Affairs ("OIRA"), a division of OMB. The total annual burden hours and number of responses associated with Regulation 14A, as updated from time to time, can be found at https://www.reginfo.gov/public/do/PRAMain.

[144] 2020 Adopting Release at n.707.

avoidance of such an increase in the number of additional annual responses to the collection of information for Regulation 14A.

4. Incremental Change in Compliance Burden for Collection of Information

PRA Table 2 below illustrates our estimated incremental change to the total annual compliance burden for the Regulation 14A collection of information in hours and in costs[145] as a result of the Rule 14a-2(b)(9)(ii) conditions, as calculated in the PRA analysis for the 2020 Final Rules. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA Table 2. Increase in Burden Hours Resulting from the Rule 14a-2(b)(9)(ii) Conditions as Reflected in the 2020 Final Rules

Number of Estimated Responses (A)†	Total Increase in Burden Hours (B)††	Increase in Burden Hours Per Response (C) = (B)/(A)	Increase in Internal Hours (D) = (B) x 0.75	Increase in Professional Hours (E) = (B) x 0.25	Increase in Professional Costs (F) = (E) x $400
6,369	318,640	50†††	238,980	79,660	$31,864,000

† This number reflects an estimated increase of 783 annual responses to the existing Regulation 14A collection of information as a result of the Rule 14a-2(b)(9)(ii) conditions. *See supra* text accompanying note 144. The adopting release for the 2020 Final Rules indicated that 5,586 responses are filed annually. 2020 Adopting Release at 55151.

†† Calculated as the sum of annual burden increases estimated for PVABs (34,140 hours) and registrants (284,500 hours). *See supra* PRA Table 1.

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

Accordingly, we expect that our proposed amendments would allow the affected parties to avoid these estimated burden hours and costs that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

[145] Our estimates in the adopting release for the 2020 Final Rules assumed that 75% of the burden would be borne by the company and 25% would be borne by outside counsel at $400 per hour. We recognized that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of the PRA analysis, we estimated that such costs would be an average of $400 per hour. This estimate was based on consultations with several registrants, law firms and other persons who regularly assist registrants in preparing and filing reports with the Commission. *See* 2020 Adopting Release at n.708.

5. Program Change and Revised Burden Estimates

PRA Table 3 summarizes the estimated change to the total annual compliance burden of the Regulation 14A collection of information, in hours and in costs, as a result of the Rule 14a-2(b)(9)(ii) conditions, as calculated in the PRA analysis for the 2020 Final Rules.

PRA Table 3. Paperwork Burden under the Rule 14a-2(b)(9)(ii) Conditions as Reflected in the 2020 Final Rules

Reg. 14A	Current Burden			Program Change			Revised Burden		
	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Increase in Responses (D)±	Increase in Internal Hours (E)±±	Increase in Professional Costs (F) ±±±	Annual Responses	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)
	5,586	551,101	$73,480,012	783	238,980	$31,864,000	6,369	790,081	$105,344,012

± *See* Column (A) in PRA Table 2 noting an estimated increase of 783 annual responses to the Regulation 14A collection of information as a result of the Rule 14a-2(b)(9)(ii) conditions.

±± *See* Column (D) in PRA Table 2.

±±± From Column (F) in PRA Table 2.

Accordingly, we expect that our proposed amendments would allow the affected parties to avoid these estimated burden hours and costs that they would otherwise be subject to, absent the proposed amendments, once Rule 14a-2(b)(9) becomes effective.

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 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. S7-17-21. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-17-21 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"),[146] 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.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act ("RFA")[147] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act, to consider the impact of those

[146] 5 U.S.C. 801 *et seq.*

[147] 5 U.S.C. 601 *et seq.*

rules on small entities. The Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") in accordance with Section 603 of the RFA.[148] It relates to the proposed amendments to the proxy solicitation exemptions in Rule 14a-2(b) 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)(9) is to address concerns about the potential adverse effects of the 2020 Final Rules on the independence, cost and timeliness of proxy voting advice, while still achieving many of the intended benefits of the 2020 Final Rules with respect to the quality of the advice provided to clients. In addition, the purpose of the proposed amendment to Rule 14a-9 is to avoid any misperception that the addition of Note (e) to Rule 14a-9 purported to determine or alter the law governing Rule 14a-9's application and scope, including its application to statements of opinion. 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, 23(a) and 36 of the Securities Exchange Act of 1934, as amended.

C. Small Entities Subject to the Proposed Amendments

The proposed amendments are likely to affect some small entities; specifically, those small entities that are either: (i) PVABs; or (ii) registrants conducting solicitations covered by proxy voting advice.

[148] 5 U.S.C. 603.

The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[149] 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.[150] An investment company, including a business development company,[151] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[152] 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.[153] We estimate that there are 660 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.[154] In

[149] 5 U.S.C. 601(6).

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

[151] 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].

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

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

[154] This estimate is based on staff analysis of issuers potentially subject to the final amendments, excluding co-registrants, with EDGAR filings on Form 10-K, or amendments thereto, filed during the calendar year of January 1, 2020 to December 31, 2020, or filed by September 1, 2021, that, if timely filed by the applicable deadline, would have been filed between January 1 and December 31, 2020. This analysis is based on data from XBRL filings, Compustat, Ives Group Audit Analytics, and manual review of filings submitted to the Commission.

addition, we estimate that, as of June 2021, there were 70 registered investment companies that would be subject to the proposed amendments that may be considered small entities.[155] Finally, we estimate that, as of June 2021, there were 548 investment advisers that may be considered small entities.[156] As discussed above, one of the three major PVABs in the United States—ISS—is a registered investment advisor.[157]

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 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.[158] 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.[159] 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 could have a proportionally greater effect on small entities, as they

[155] 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 2021.

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

[157] *See supra* Section III.B.1.

[158] In particular, we discuss the estimated benefits and costs of the proposed amendments on affected parties in Section III.B. *supra*. We also discuss the estimated compliance burden associated with the proposed amendments for purposes of the PRA in Section IV *supra*.

[159] *See supra* Section III.C.

may be less able to bear such costs relative to larger entities. For example, as discussed in Section III.B.2, the proposed amendments to Rule 14a-2(b)(9) could potentially reduce the overall mix of information available to PVABs' clients as they assess proxy voting advice and make determinations about how to cast votes. Further, as noted in Section III.C, small institutions tend to rely more heavily on PVABs' proxy voting advice than larger institutions because those smaller institutions have more limited resources to conduct their own research. As such, to the extent the proposed amendments to Rule 14a-2(b)(9) reduce the overall mix of information available to PVABs' clients in connection with PVABs' proxy voting advice, the costs associated by such reduction would be borne disproportionately by smaller institutions. That said, as discussed in Section III.B.2, we expect that any such costs imposed on PVABs' clients would be mitigated to the extent that PVABs currently have internal policies and procedures aimed at enabling feedback from certain registrants before they issue proxy voting advice. However, we request comment on the extent to which PVABs' current internal policies and procedures would mitigate any costs imposed on PVABs' clients as a result of the proposed amendments to Rule 14a-2(b)(9).

We do not expect that PVABs or registrants would incur significant costs as a result of the proposed amendments to Rule 14a-2(b)(9). However, we request comment on how PVABs and registrants may be affected by the proposed amendments.

Finally, as discussed in Section III.B.2. above, we do not expect the proposed amendment to Rule 14a-9 would create any significant costs. However, we request comment on how the proposed amendment may affect PVABs, their clients and registrants.

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.

The purpose of these proposed amendments is to address concerns about the potential adverse effects of the 2020 Final Rules on the independence, cost and timeliness of proxy voting advice, while still achieving many of the intended benefits of the 2020 Final Rules with respect to the quality of the advice provided to PVABs' clients. The proposed amendments do not impose any compliance or reporting requirements; rather, they would remove certain conditions for PVABs of all sizes, including small entities. Our objectives would not be served by establishing different compliance or reporting requirements for small entities, exempting small entities from all or part of the requirements, or clarifying, consolidating or simplifying compliance and reporting requirements for small entities. Similarly, because the proposed amendments do not set forth any standards, our objectives would not be served by establishing performance rather than design standards.

VII. STATUTORY AUTHORITY

We are proposing the rule amendments contained in this release under the authority set

forth in Sections 3(b), 14, 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 general 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, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(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.

* * * * *

2. Amend § 240.14a-2 by revising paragraph (b)(9) to read as follows:

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

* * * * *

(b) * * *

(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

the proxy voting advice business includes in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice prominent disclosure of:

(i) Any information regarding an 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

(ii) 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.

§ 240.14a-9 [Amended]

3. Amend § 240.14a-9 by removing paragraph e. of the Note.

By the Commission.

Dated: November 17, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

I

(Legislative acts)

DIRECTIVES

DIRECTIVE (EU) 2017/828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 May 2017

amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 50 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Directive 2007/36/EC of the European Parliament and of the Council [3] establishes requirements in relation to the exercise of certain shareholder rights attached to voting shares in relation to general meetings of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.

(2) The financial crisis has revealed that shareholders in many cases supported managers' excessive short-term risk taking. Moreover, there is clear evidence that the current level of 'monitoring' of investee companies and engagement by institutional investors and asset managers is often inadequate and focuses too much on short-term returns, which may lead to suboptimal corporate governance and performance.

(3) In its communication of 12 December 2012 entitled 'Action Plan: European company law and corporate governance — a modern legal framework for more engaged shareholders and sustainable companies', the Commission announced a number of actions in the area of corporate governance, in particular to encourage long-term shareholder engagement and to enhance transparency between companies and investors.

(4) Shares of listed companies are often held through complex chains of intermediaries which render the exercise of shareholder rights more difficult and may act as an obstacle to shareholder engagement. Companies are often unable to identify their shareholders. The identification of shareholders is a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights

[1] OJ C 451, 16.12.2014, p. 87.
[2] Position of the European Parliament of 14 March 2017 (not yet published in the Official Journal) and decision of the Council of 3 April 2017.
[3] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17).

and shareholder engagement. This is particularly relevant in cross-border situations and when using electronic means. Listed companies should therefore have the right to identify their shareholders in order to be able to communicate with them directly. Intermediaries should be required, upon the request of the company, to communicate to the company the information regarding shareholder identity. However, Member States should be allowed to exclude from the identification requirement shareholders holding only a small number of shares.

(5) In order to achieve that objective, a certain level of information on shareholder identity needs to be transmitted to the company. That information should include at least the name and contact details of the shareholder and, where the shareholder is a legal person, its registration number or, if no registration number is available, a unique identifier, such as the Legal Entity Identifier (LEI code), and the number of shares held by the shareholder as well as, if requested by the company, the categories or classes of shares held and the date of their acquisition. The transmission of less information would be insufficient to allow the company to identify its shareholders in order to communicate with them.

(6) Under this Directive, the personal data of shareholders should be processed to enable the company to identify its existing shareholders in order to communicate directly with them, with a view to facilitating the exercise of shareholder rights and shareholder engagement with the company. This is without prejudice to Member State law providing for processing of the personal data of shareholders for other purposes, such as to enable shareholders to cooperate with each other.

(7) In order to enable the company to communicate directly with its existing shareholders with a view to facilitating the exercise of shareholder rights and shareholder engagement, the company and the intermediaries should be allowed to store personal data relating to the shareholders for as long as they remain shareholders. However, companies and intermediaries are often not aware that a person has ceased to be a shareholder unless they have been informed by the person or have obtained that information through a new shareholder identification exercise, which often takes place only once a year in relation to the annual general meeting or other important events such as takeover bids or mergers. Companies and intermediaries should therefore be allowed to store personal data until the date on which they have become aware of the fact that a person has ceased to be a shareholder and for a maximum period of 12 months after becoming aware of that fact. This is without prejudice to the fact that the company or intermediary may need to store the personal data of persons who have ceased to be shareholders for other purposes, such as ensuring adequate records for the purposes of keeping track of succession in title of the shares of a company, maintaining necessary records in respect of general meetings, including in relation to the validity of its resolutions, fulfilling by the company of its obligations in respect of the payment of dividends or interest relating to shares or any other sums to be paid to former shareholders.

(8) The effective exercise of shareholder rights depends to a large extent on the efficiency of the chain of intermediaries maintaining securities accounts on behalf of shareholders or of other persons, especially in a cross-border context. In the chain of intermediaries, especially when the chain involves many intermediaries, information is not always passed from the company to its shareholders and shareholders' votes are not always correctly transmitted to the company. This Directive aims to improve the transmission of information along the chain of intermediaries to facilitate the exercise of shareholder rights.

(9) In view of their important role, intermediaries should be obliged to facilitate the exercise of rights by shareholders, whether shareholders exercise those rights themselves or nominate a third person to do so. When shareholders do not want to exercise the rights themselves and have nominated the intermediary to do so, the latter should exercise those rights upon the explicit authorisation and instruction of the shareholders and for their benefit.

(10) It is important to ensure that shareholders who engage with an investee company by voting know whether their votes have been correctly taken into account. Confirmation of receipt of votes should be provided in the case of electronic voting. In addition, each shareholder who casts a vote in a general meeting should at least have the possibility to verify after the general meeting whether the vote has been validly recorded and counted by the company.

(11) In order to promote equity investment throughout the Union and to facilitate the exercise of rights related to shares, this Directive should establish a high degree of transparency with regard to charges, including prices and fees, for the services provided by intermediaries. Discrimination between the charges levied for the exercise of shareholder rights domestically and on a cross-border basis is a deterrent to cross-border investment and the efficient functioning of the internal market and should be prohibited. Any differences between the charges levied for the domestic and the cross-border exercise of shareholder rights should be allowed only if they are duly justified and reflect the variation in actual costs incurred for delivering the services by intermediaries.

(12) The chain of intermediaries may include intermediaries that have neither their registered office nor their head office in the Union. Nevertheless, the activities carried out by third-country intermediaries could have effects on the long-term sustainability of Union companies and on corporate governance in the Union. Moreover, in order to achieve the objectives pursued by this Directive, it is necessary to ensure that information is transmitted throughout the chain of intermediaries. If third-country intermediaries were not subject to this Directive and did not have the same obligations relating to the transmission of information as Union intermediaries, the flow of information would risk being interrupted. Third-country intermediaries which provide services with respect to shares of companies that have their registered office in the Union and the shares of which are admitted to trading on a regulated market situated or operating within the Union should therefore be subject to the rules on shareholder identification, transmission of information, facilitation of shareholder rights, and transparency and non-discrimination of costs to ensure the effective application of the provisions on shares held via such intermediaries.

(13) This Directive is without prejudice to national law regulating the holding and ownership of securities and arrangements maintaining the integrity of securities and does not affect the beneficial owners or other persons who are not shareholders under the applicable national law.

(14) Effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the different organs and different stakeholders. Greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including as regards environmental, social and governance factors, in particular as referred to in the Principles for Responsible Investment, supported by the United Nations. In addition, greater involvement of all stakeholders, in particular employees, in corporate governance is an important factor in ensuring a more long-term approach by listed companies that needs to be encouraged and taken into consideration.

(15) Institutional investors and asset managers are often important shareholders of listed companies in the Union and can therefore play an important role in the corporate governance of those companies, but also more generally with regard to their strategy and long-term performance. However, the experience of the last years has shown that institutional investors and asset managers often do not engage with companies in which they hold shares and evidence shows that capital markets often exert pressure on companies to perform in the short term, which may jeopardise the long-term financial and non-financial performance of companies and may, among other negative consequences, lead to a suboptimal level of investments, for example in research and development, to the detriment of the long-term performance of both the companies and the investors.

(16) Institutional investors and asset managers are often not transparent about their investment strategies, their engagement policy and the implementation thereof. Public disclosure of such information could have a positive impact on investor awareness, enable ultimate beneficiaries such as future pensioners optimise investment decisions, facilitate the dialogue between companies and their shareholders, encourage shareholder engagement and strengthen their accountability to stakeholders and to civil society.

(17) Institutional investors and asset managers should therefore be more transparent as regards their approach to shareholder engagement. They should either develop and publicly disclose a policy on shareholder engagement or explain why they have chosen not to do so. The policy on shareholder engagement should describe how institutional investors and asset managers integrate shareholder engagement in their investment strategy, which

different engagement activities they choose to carry out and how they do so. The engagement policy should also include policies to manage actual or potential conflicts of interests, in particular situations in which the institutional investors or asset managers or their affiliated undertakings have significant business relationships with the investee company. The engagement policy or the explanation should be publicly available online.

(18) Institutional investors and asset managers should publicly disclose information about the implementation of their engagement policy and in particular how they have exercised their voting rights. However, with a view to reducing the possible administrative burden, investors should be able to decide not to publish every vote cast if the vote is considered to be insignificant due to the subject matter of the vote or to the size of the holding in the company. Such insignificant votes may include votes cast on purely procedural matters or votes cast in companies where the investor has a very minor stake compared to the investor's holdings in other investee companies. Investors should set their own criteria regarding which votes are insignificant on the basis of the subject matter of the vote or the size of the holding in the company, and apply them consistently.

(19) A medium to long-term approach is a key enabler of responsible stewardship of assets. The institutional investors should therefore disclose to the public, annually, information explaining how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities and how those elements contribute to the medium to long-term performance of their assets. Where they make use of an asset manager, either through discretionary mandates involving the management of assets on an individual basis or through pooled funds, institutional investors should disclose to the public certain key elements of the arrangement with the asset manager, in particular how it incentivises the asset manager to align its investment strategy and decisions with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities, how it evaluates the asset manager's performance, including its remuneration, how it monitors portfolio turnover costs incurred by the asset manager and how it incentivises the asset manager to engage in the best medium to long-term interest of the institutional investor. This would contribute to a proper alignment of interests between the final beneficiaries of institutional investors, the asset managers and the investee companies and potentially to the development of longer-term investment strategies and longer-term relationships with investee companies involving shareholder engagement.

(20) Asset managers should give information to the institutional investor that is sufficient to allow the latter to assess whether and how the manager acts in the best long-term interests of the investor and whether the asset manager pursues a strategy that provides for efficient shareholder engagement. In principle, the relationship between the asset manager and the institutional investor is a matter for bilateral contractual arrangements. However, although big institutional investors may be able to request detailed reporting from the asset manager, especially if the assets are managed on the basis of a discretionary mandate, for smaller and less sophisticated institutional investors it is crucial to set a minimum set of legal requirements, so that they can properly assess, and hold to account, the asset manager. Therefore, asset managers should be required to disclose to institutional investors how their investment strategy and the implementation thereof contribute to the medium to long-term performance of the assets of the institutional investor or of the fund. That disclosure should cover reporting on the key material medium to long-term risks associated with the portfolio investments, including corporate governance matters and other medium to long-term risks. That information is key to allowing the institutional investor to assess whether the asset manager carries out a medium to long-term analysis of the equity and the portfolio which is a key enabler of efficient shareholder engagement. As those medium to long-term risks will impact the returns of the investors, more effective integration of those matters into investment processes may be crucial for institutional investors.

(21) Moreover, asset managers should disclose to institutional investors the composition, turnover and turnover costs of their portfolio as well as their policy on securities lending. The level of portfolio turnover is a significant indicator of whether an asset manager's processes are fully aligned with the identified strategy and interests of the institutional investor and indicates whether the asset manager holds equities for a period of time that enables it to engage with the company in an effective way. High portfolio turnover may be an indicator of a lack of conviction in investment decisions and momentum-following behaviour, neither of which is likely to be in the institutional investor's best interests in the long term, especially as an increase in turnover raises the costs faced by the investor and can influence systemic risk. On the other hand, unexpectedly low turnover may signal inattention to risk management or a drift towards a more passive investment approach. Securities lending can cause controversy in the area of shareholder engagement under which the investors' shares are in effect sold, subject to a buyback right. Sold shares have to be recalled for engagement purposes, including voting at the general meeting. It is therefore important that the asset manager reports on its policy on securities lending and how it is applied to fulfil its engagement activities, particularly at the time of the general meeting of the investee company.

(22) The asset manager should also inform the institutional investor whether and, if so, how the asset manager makes investment decisions on the basis of an evaluation of the medium to long-term performance of the investee company, including its non-financial performance. Such information is particularly useful to indicate whether the asset manager adopts a long-term oriented and active approach to asset management and takes social, environmental and governance matters into account.

(23) The asset manager should provide proper information to the institutional investor on whether and, if so, which conflicts of interests have arisen in connection with engagement activities and how the asset manager has dealt with them. For example, conflicts of interests may prevent the asset manager from voting or from engaging at all. All such situations should be disclosed to the institutional investor.

(24) Member States should be allowed to provide that where the assets of an institutional investor are not managed on an individual basis but are pooled together with assets of other investors and managed via a fund, information should also be provided to other investors, at least upon request, in order to allow all the other investors of the same fund to be able to receive that information if they so wish.

(25) Many institutional investors and asset managers use the services of proxy advisors who provide research, advice and recommendations on how to vote in general meetings of listed companies. While proxy advisors play an important role in corporate governance by contributing to reducing the costs of the analysis related to company information, they may also have an important influence on the voting behaviour of investors. In particular, investors with highly diversified portfolios and many foreign shareholdings rely more on proxy recommendations.

(26) In view of their importance, proxy advisors should be subject to transparency requirements. Member States should ensure that proxy advisors that are subject to a code of conduct effectively report on their application of that code. They should also disclose certain key information relating to the preparation of their research, advice and voting recommendations and any actual or potential conflicts of interests or business relationships that may influence the preparation of the research, advice and voting recommendations. That information should remain publicly available for a period of at least three years in order to allow institutional investors to choose the services of proxy advisors taking into account their performance in the past.

(27) Third-country proxy advisors which have neither their registered office nor their head office in the Union may provide analysis with respect to Union companies. In order to ensure a level playing field between Union and third-country proxy advisors, this Directive should also apply to third-country proxy advisors which carry out their activities through an establishment in the Union, regardless of the form of that establishment.

(28) Directors contribute to the long-term success of the company. The form and structure of directors' remuneration are matters primarily falling within the competence of the company, its relevant boards, shareholders and, where applicable, employee representatives. It is therefore important to respect the diversity of corporate governance systems within the Union, which reflect different Member States' views about the roles of companies and of bodies responsible for the determination of the remuneration policy and of the remuneration of individual directors. Since remuneration is one of the key instruments for companies to align their interests and those of their directors and in view of the crucial role of directors in companies, it is important that the remuneration policy of companies is determined in an appropriate manner by competent bodies within the company and that shareholders have the possibility to express their views regarding the remuneration policy of the company.

(29) In order to ensure that shareholders have an effective say on remuneration policy, they should be granted the right to hold a binding or advisory vote on the remuneration policy, on the basis of a clear, understandable and comprehensive overview of the company's remuneration policy. The remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company and should not be linked entirely or

mainly to short-term objectives. Directors' performance should be assessed using both financial and non-financial performance criteria, including, where appropriate, environmental, social and governance factors. The remuneration policy should describe the different components of directors' pay and the range of their relative proportions. It can be designed as a frame within which the pay of directors is to be held. The remuneration policy should be publicly disclosed, without delay, after the vote by the shareholders at the general meeting.

(30) In exceptional circumstances, companies may need to derogate from certain rules in the remuneration policy such as criteria for fixed or variable remuneration. Therefore, Member States should be able to allow companies to apply such temporary derogation to the applicable remuneration policy if they specify in their remuneration policy how it would be applied in certain exceptional circumstances. Exceptional circumstances should only cover situations where the derogation from the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or assure its viability. The remuneration report should include information on remuneration awarded under such exceptional circumstances.

(31) To ensure that the implementation of the remuneration policy is in line with that policy, shareholders should be granted the right to vote on the company's remuneration report. In order to ensure corporate transparency, and accountability of the directors, the remuneration report should be clear and understandable and should provide a comprehensive overview of the remuneration of individual directors during the most recent financial year. Where the shareholders vote against the remuneration report, the company should explain, in the following remuneration report, how the vote of the shareholders was taken into account. However, for small and medium-sized companies, Member States should be able to provide, as an alternative to the vote on the remuneration report, for the remuneration report to be submitted to shareholders only for discussion in the annual general meeting as a separate item of the agenda. If a Member State uses this possibility, the company should explain, in the following remuneration report, in what manner the discussion at the general meeting was taken into account.

(32) In order to provide shareholders with easy access to the remuneration report, and to enable potential investors and stakeholders to be informed of directors' remuneration, the remuneration report should be published on the company's website. This should be without prejudice to the possibility of Member States also to require the publication of the report by other means, for example as part of the corporate governance statement or management report.

(33) The disclosure of individual directors' remuneration and the publication of the remuneration report are intended to provide increased corporate transparency and increased accountability of directors, as well as better shareholder oversight over directors' remuneration. This creates a necessary prerequisite for the exercise of shareholder rights and shareholder engagement in relation to remuneration. In particular, the disclosure of such information to shareholders is necessary to enable them to assess directors' remuneration and to express their views on the modalities and level of directors' pay as well as on the link between pay and performance of each individual director, in order to remedy potential situations in which the amount of remuneration of a director is not justified on the basis of his or her individual performance and the performance of the company. Publication of the remuneration report is necessary in order to enable not only shareholders, but also potential investors and stakeholders to assess directors' remuneration, to what extent that remuneration is linked to the performance of the company and how the company implements its remuneration policy in practice. The disclosure and publication of anonymised remuneration reports would not allow the achievement of those objectives.

(34) In order to increase corporate transparency, and the accountability of directors, and to enable shareholders, potential investors and stakeholders to obtain a full and reliable picture of the remuneration of each director, it is of particular importance that every element and total amount of remuneration are disclosed.

(35) In particular, in order to prevent the circumvention of the requirements laid down by this Directive by the company, to avoid any conflicts of interests and to ensure loyalty of the directors to the company, it is necessary to provide for the disclosure and the publication of the remuneration awarded or due to individual directors not only from the company itself, but also from any undertaking belonging to the same group. If remuneration awarded or due to individual directors by undertakings belonging to the same group as the company were excluded from the remuneration report, there would be a risk that companies try to circumvent the requirements laid down by this Directive by providing directors with hidden remuneration via a controlled undertaking. In such a case, shareholders would not have a full and reliable picture of the remuneration granted to the directors by the company and the objectives pursued by this Directive would not be achieved.

(36) In order to provide a complete overview of directors' remuneration, the remuneration report should also disclose, where applicable, the amount of remuneration granted on the basis of the family situation of individual directors. The remuneration report should therefore also cover, where applicable, remuneration components such as family or child allowance. However, because personal data which refer to the family situation of individual directors or special categories of personal data within the meaning of Regulation (EU) 2016/679 of the European Parliament and of the Council [1] are particularly sensitive and require specific protection, the report should disclose only the amount of the remuneration and not the ground on which it was granted.

(37) Under this Directive, personal data included in the remuneration report should be processed for the purposes of increasing corporate transparency as regards directors' remuneration with the view to enhancing directors' accountability and shareholder oversight of directors' remuneration. This is without prejudice to Member State law providing for the processing of the personal data of directors for other purposes.

(38) It is essential to assess the remuneration and the performance of directors not only annually but also over an appropriate time period to enable shareholders, potential investors and stakeholders to assess properly whether the remuneration rewards long-term performance and to measure the middle-to-long-term evolution in directors' performance and remuneration, in particular in relation to company performance. In many cases, it is possible only after several years to evaluate whether the remuneration granted was in line with the long-term interests of the company. In particular the granting of long-term incentives may cover periods of up to seven to ten years and may be combined with deferral periods of several years.

(39) It is also important to be able to assess the remuneration of a director over the entire period of his or her directorship on a particular company's board. In the Union, directors remain on a company board for a period of six years on average, although in some Member States that period exceeds eight years.

(40) In order to limit interference with the directors' rights to privacy and to the protection of their personal data, public disclosure by companies of directors' personal data included in the remuneration report should be limited to 10 years. That period is consistent with other periods laid down by Union law related to the public disclosure of corporate governance documents. For example, under Article 4 of Directive 2004/109/EC of the European Parliament and the Council [2], the management report and the corporate governance statements must remain publicly available as part of the annual financial report for at least 10 years. There is a clear interest in having various types of corporate governance reports, including the remuneration report, available for 10 years, so as to provide the overall state of a company to shareholders and stakeholders.

(41) At the end of the 10-year period, the company should remove any personal data from the remuneration report or cease to disclose the remuneration report publicly as a whole. Following that period access to such personal data could be necessary for other purposes, such as in order to exercise legal actions. The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

[2] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

Article 153(5) of the Treaty on the Functioning of the European Union, general principles of national contract and labour law, Union and national law regarding involvement and the general responsibilities of the administrative, management and supervisory bodies of the company concerned, and the rights, where applicable, of the social partners to conclude and enforce collective agreements, in accordance with national law and customs. The provisions on remuneration should also, where applicable, be without prejudice to national law on the representation of employees in the administrative, management or supervisory body.

(42) Transactions with related parties may cause prejudice to companies and their shareholders, as they may give the related party the opportunity to appropriate value belonging to the company. Thus, adequate safeguards for the protection of companies' and shareholders' interests are of importance. For this reason Member States should ensure that material related party transactions are submitted to approval by the shareholders or by the administrative or supervisory body according to procedures that prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of the shareholders who are not a related party, including minority shareholders.

(43) Where the related party transaction involves a director or a shareholder, that director or shareholder should not take part in the approval or vote. However, Member States should have the possibility to allow the shareholder who is a related party to take part in the vote provided that national law foresees appropriate safeguards in relation to the voting process to protect the interests of companies and of the shareholders who are not a related party, including minority shareholders, such as for example a higher majority threshold for the approval of transactions.

(44) Companies should publicly announce material transactions no later than at the time of the conclusion of the transaction, identifying the related party, the date and the value of the transaction and any other information that is necessary to assess the fairness of the transaction. Public disclosure of such transaction, for example on a company's website or by other easily available means, is needed in order to allow shareholders, creditors, employees and other interested parties to be informed of potential impacts that such transactions may have on the value of the company. The precise identification of the related party is necessary to better assess the risks implied by the transaction and to enable challenges to the transaction, including by means of legal action.

(45) This Directive sets up transparency requirements for companies, institutional investors, asset managers and proxy advisors. Those transparency requirements are not intended to require companies, institutional investors, asset managers or proxy advisors to disclose to the public certain specific pieces of information the disclosure of which would be seriously prejudicial to their business position or, where they are not undertakings with a commercial purpose, to the interest of their members or beneficiaries. Such non-disclosure should not undermine the objectives of the disclosure requirements laid down in this Directive.

(46) In order to ensure uniform conditions for the implementation of the provisions on shareholder identification, transmission of information and facilitation of the exercise of shareholder rights, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council [1].

(47) In particular, the Commission implementing acts should specify the minimum standardisation requirements as regards formats to be used and deadlines to be complied with. Empowering the Commission to adopt implementing acts allows those requirements to be kept up to date with market and supervisory developments and to

[1] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

prevent diverging implementation of the provisions across Member States. Such diverging implementation could result in the adoption of incompatible national standards, increasing the risks and costs of cross-border operations and thus jeopardising their effectiveness and efficiency and resulting in additional burdens for intermediaries.

(48) In exercising its implementing powers in accordance with this Directive, the Commission should take into account the relevant market developments and, in particular, existing self-regulatory initiatives such as, for example, Market Standards for Corporate Actions Processing and Market Standards for General Meetings, and should encourage the use of modern technologies in communication between companies and their shareholders, including through intermediaries and, where appropriate, other market participants.

(49) In order to ensure a more comparable and consistent presentation of the remuneration report, the Commission should adopt guidelines to specify its standardised presentation. Existing Member State practices as regards the presentation of the information included in the remuneration report are very different and, as a result, they provide an uneven level of transparency and protection for shareholders and investors. The result of the divergence of practices is that shareholders and investors are, in particular in the case of cross-border investments, subject to difficulties and costs when they want to understand and monitor the implementation of the remuneration policy and engage with the company on that specific issue. The Commission should consult Member States, as appropriate, before adopting its guidelines.

(50) In order to ensure that the requirements set out in this Directive or the measures implementing this Directive are applied in practice, any infringement of those requirements should be subject to penalties. To that end, penalties should be sufficiently dissuasive and proportionate.

(51) Since the objectives of this Directive cannot be sufficiently achieved by the Member States in view of the international nature of the Union equity market and action by Member States alone is likely to result in different sets of rules, which may undermine or create new obstacles to the functioning of the internal market, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(52) This Directive should be applied in compliance with Union data protection law and the protection of privacy as enshrined in the Charter of Fundamental Rights of the European Union. Any processing of the personal data of natural persons under this Directive should be undertaken in accordance with Regulation (EU) 2016/679. In particular, data should be kept accurate and up to date, the data subject should be duly informed about the processing of personal data in accordance with this Directive and should have the right of rectification of incomplete or inaccurate data as well as right to erasure of personal data. Moreover, any transmission of information regarding shareholder identity to third-country intermediaries should comply with the requirements laid down in Regulation (EU) 2016/679.

(53) Personal data under this Directive should be processed for the specific purposes set out in this Directive. The processing of those personal data for purposes other than the purposes for which they were initially collected should be carried out in accordance with Regulation (EU) 2016/679.

(54) This Directive is without prejudice to the provisions laid down in any sector-specific Union legislative act regulating specific types of company or specific types of entity, such as credit institutions, investments firms, asset managers, insurance companies and pension funds. The provisions of any sector-specific Union legislative act should be considered to be *lex specialis* in relation to this Directive and should prevail over this Directive to the

extent that the requirements provided by this Directive contradict the requirements laid down in any sector-specific Union legislative act. However, the specific provisions of a sector-specific Union legislative act should not be interpreted in a way that undermines the effective application of this Directive or the achievement of its general aim. The mere existence of specific Union rules in a particular sector should not exclude the application of this Directive. Where this Directive provides for more specific provisions or adds requirements to the provisions laid down in any sector-specific Union legislative act, the provisions laid down by any sector-specific Union legislative act should be applied in conjunction with those of this Directive.

(55) This Directive does not prevent Member States from adopting or maintaining in force more stringent provisions in the field covered by this Directive to further facilitate the exercise of shareholder rights, to encourage shareholder engagement and to protect the interests of minority shareholders, as well as to fulfil other purposes such as the safety and soundness of credit and financial institutions. Such provisions should not, however, hamper the effective application of this Directive or the achievement of its objectives, and should, in any event, comply with the rules laid down in the Treaties.

(56) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents [1], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(57) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council [2] and delivered an opinion on 28 October 2014 [3],

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2007/36/EC

Directive 2007/36/EC is amended as follows:

(1) Article 1 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

'1. This Directive establishes requirements in relation to the exercise of certain shareholder rights attached to voting shares in relation to general meetings of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State. It also establishes specific requirements in order to encourage shareholder engagement, in particular in the long term. Those specific requirements apply in relation to identification of shareholders, transmission of information, facilitation of exercise of shareholders rights, transparency of institutional investors, asset managers and proxy advisors, remuneration of directors and related party transactions.

2. The Member State competent to regulate matters covered in this Directive shall be the Member State in which the company has its registered office, and references to the "applicable law" are references to the law of that Member State.

For the purpose of application of Chapter Ib, the competent Member State shall be defined as follows:

(a) for institutional investors and asset managers, the home Member State as defined in any applicable sector-specific Union legislative act;

(b) for proxy advisors, the Member State in which the proxy advisor has its registered office, or, where the proxy advisor does not have its registered office in a Member State, the Member State in which the proxy advisor has its head office, or, where the proxy advisor has neither its registered office nor its head office in a Member State, the Member State in which the proxy advisor has an establishment.';

[1] OJ C 369, 17.12.2011, p. 14.
[2] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).
[3] OJ C 417, 21.11.2014, p. 8.

(b) in paragraph 3, points (a) and (b) are replaced by the following:

'(a) undertakings for collective investment in transferable securities (UCITS) within the meaning of Article 1(2) of Directive 2009/65/EC of the European Parliament and of the Council (*);

(b) collective investment undertakings within the meaning of point (a) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council (**);

(*) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).
(**) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).';

(c) the following paragraph is inserted:

'3a. The companies referred to in paragraph 3 shall not be exempted from the provisions laid down in Chapter Ib.';

(d) the following paragraphs are added:

'5. Chapter Ia shall apply to intermediaries in so far they provide services to shareholders or other intermediaries with respect to shares of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.

6. Chapter Ib shall apply to:

(a) institutional investors, to the extent that they invest directly or through an asset manager in shares traded on a regulated market;

(b) asset managers, to the extent that they invest in such shares on behalf of investors; and

(c) proxy advisors, to the extent that they provide services to shareholders with respect to shares of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.

7. The provisions of this Directive are without prejudice to the provisions laid down in any sector-specific Union legislative act regulating specific types of company or specific types of entity. Where this Directive provides for more specific rules or adds requirements compared to the provisions laid down by any sector-specific Union legislative act, those provisions shall be applied in conjunction with the provisions of this Directive.'.

(2) Article 2 is amended as follows:

(a) point (a) is replaced by the following:

'(a) "regulated market" means a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council (*);

(*) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).';

(b) the following points are added:

'(d) "intermediary" means a person, such as an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU, a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (*) and a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council (**), which provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons;

(e) "institutional investor" means:

(i) an undertaking carrying out activities of life assurance within the meaning of points (a), (b) and (c) of Article 2(3) of Directive 2009/138/EC of the European Parliament and of the Council (***), and of reinsurance as defined in point (7) of Article 13 of that Directive provided that those activities cover life-insurance obligations, and which is not excluded pursuant to that Directive;

(ii) an institution for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council (****) in accordance with Article 2 thereof, unless a Member State has chosen not to apply that Directive in whole or in parts to that institution in accordance with Article 5 of that Directive;

(f) "asset manager" means an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU that provides portfolio management services to investors, an AIFM (alternative investment fund manager) as defined in point (b) of Article 4(1) of Directive 2011/61/EU that does not fulfil the conditions for an exemption in accordance with Article 3 of that Directive or a management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC, or an investment company that is authorised in accordance with Directive 2009/65/EC provided that it has not designated a management company authorised under that Directive for its management;

(g) "proxy advisor" means a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights;

(h) "related party" has the same meaning as in the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (*****);

(i) "director" means:

(i) any member of the administrative, management or supervisory bodies of a company;

(ii) where they are not members of the administrative, management or supervisory bodies of a company, the chief executive officer and, if such function exists in a company, the deputy chief executive officer;

(iii) where so determined by a Member State, other persons who perform functions similar to those performed under point (i) or (ii);

(j) "information regarding shareholder identity" means information allowing the identity of a shareholder to be established, including at least the following information:

(i) name and contact details (including full address and, where available, email address) of the shareholder, and, where it is a legal person, its registration number, or, if no registration number is available, its unique identifier, such as legal entity identifier;

(ii) the number of shares held; and

(iii) only insofar they are requested by the company, one or more of the following details: the categories or classes of the shares held or the date from which the shares have been held.

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(*) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

(**) Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

(***) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

(****) Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

(*****) Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).'.

(3) The following Chapters are inserted:

'CHAPTER Ia

IDENTIFICATION OF SHAREHOLDERS, TRANSMISSION OF INFORMATION AND FACILITATION OF EXERCISE OF SHAREHOLDER RIGHTS

Article 3a

Identification of shareholders

1. Member States shall ensure that companies have the right to identify their shareholders. Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %.

2. Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity.

3. Where there is more than one intermediary in a chain of intermediaries, Member States shall ensure that the request of the company, or of a third party nominated by the company, is transmitted between intermediaries without delay and that the information regarding shareholder identity is transmitted directly to the company or to a third party nominated by the company without delay by the intermediary who holds the requested information. Member States shall ensure that the company is able to obtain information regarding shareholder identity from any intermediary in the chain that holds the information.

Member States may provide for the company to be allowed to request the central securities depository or another intermediary or service provider to collect the information regarding shareholder identity, including from the intermediaries in the chain of intermediaries and to transmit the information to the company.

Member States may additionally provide that, at the request of the company, or of a third party nominated by the company, the intermediary is to communicate to the company without delay the details of the next intermediary in the chain of intermediaries.

4. The personal data of shareholders shall be processed pursuant to this Article in order to enable the company to identify its existing shareholders in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company.

Without prejudice to any longer storage period laid down by any sector-specific Union legislative act, Member States shall ensure that companies and intermediaries do not store the personal data of shareholders transmitted to them in accordance with this Article for the purpose specified in this Article for longer than 12 months after they have become aware that the person concerned has ceased to be a shareholder.

Member States may provide by law for processing of the personal data of shareholders for other purposes.

5. Member States shall ensure that legal persons have the right of rectification of incomplete or inaccurate information regarding their shareholder identity.

6. Member States shall ensure that an intermediary that discloses information regarding shareholder identity in accordance with the rules laid down in this Article is not considered to be in breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision.

7. By 10 June 2019, Member States shall provide the European Supervisory Authority (European Securities and Markets Authority) (ESMA), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council (*) with information on whether they have limited shareholder identification to shareholders holding more than a certain percentage of the shares or voting rights in accordance with paragraph 1 and, if so, the applicable percentage. ESMA shall publish that information on its website.

8. The Commission shall be empowered to adopt implementing acts to specify the minimum requirements to transmit the information laid down in paragraph 2 as regards the format of information to be transmitted, the format of the request, including their security and interoperability, and the deadlines to be complied with. Those implementing acts shall be adopted by 10 September 2018 in accordance with the examination procedure referred to in Article 14a(2).

Article 3b

Transmission of information

1. Member States shall ensure that the intermediaries are required to transmit the following information, without delay, from the company to the shareholder or to a third party nominated by the shareholder:

(a) the information which the company is required to provide to the shareholder, to enable the shareholder to exercise rights flowing from its shares, and which is directed to all shareholders in shares of that class; or

(b) where the information referred to in point (a) is available to shareholders on the website of the company, a notice indicating where on the website that information can be found.

2. Member States shall require companies to provide intermediaries in a standardised and timely manner with the information referred to in point (a) of paragraph 1 or the notice referred to in point (b) of that paragraph.

3. However, Member States shall not require that the information referred to in point (a) of paragraph 1 or the notice referred to in point (b) of that paragraph be transmitted or provided in accordance with paragraphs 1 and 2 where companies send that information or that notice directly to all their shareholders or to a third party nominated by the shareholder.

4. Member States shall oblige intermediaries to transmit, without delay, to the company, in accordance with the instructions received from the shareholders, the information received from the shareholders related to the exercise of the rights flowing from their shares.

5. Where there is more than one intermediary in a chain of intermediaries, information referred to in paragraphs 1 and 4 shall be transmitted between intermediaries without delay, unless the information can be directly transmitted by the intermediary to the company or to the shareholder or to a third party nominated by the shareholder.

6. The Commission shall be empowered to adopt implementing acts to specify the minimum requirements to transmit information laid down in paragraphs 1 to 5 of this Article as regards the types and format of information to be transmitted, including their security and interoperability, and the deadlines to be complied with. Those implementing acts shall be adopted by 10 September 2018 in accordance with the examination procedure referred to in Article 14a(2).

Article 3c

Facilitation of the exercise of shareholder rights

1. Member States shall ensure that the intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings, which shall comprise at least one of the following:

(a) the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights;

(b) the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for the shareholder's benefit.

2. Member States shall ensure that when votes are cast electronically an electronic confirmation of receipt of the votes is sent to the person that casts the vote.

Member States shall ensure that after the general meeting the shareholder or a third party nominated by the shareholder can obtain, at least upon request, confirmation that their votes have been validly recorded and counted by the company, unless that information is already available to them. Member States may establish a deadline for requesting such confirmation. Such a deadline shall not be longer than three months from the date of the vote.

Where the intermediary receives confirmation as referred to in the first or second subparagraph, it shall transmit it without delay to the shareholder or a third party nominated by the shareholder. Where there is more than one intermediary in the chain of intermediaries the confirmation shall be transmitted between intermediaries without delay, unless the confirmation can be directly transmitted to the shareholder or a third party nominated by the shareholder.

3. The Commission shall be empowered to adopt implementing acts to specify the minimum requirements to facilitate the exercise of shareholder rights laid down in paragraphs 1 and 2 of this Article as regards the types of the facilitation, the format of the electronic confirmation of receipt of the votes, the format for the transmission of the confirmation that the votes have been validly recorded and counted through the chain of intermediaries, including their security and interoperability, and the deadlines to be complied with. Those implementing acts shall be adopted by 10 September 2018 in accordance with the examination procedure referred to in Article 14a(2).

Article 3d

Non-discrimination, proportionality and transparency of costs

1. Member States shall require intermediaries to disclose publicly any applicable charges for services provided for under this Chapter separately for each service.

2. Member States shall ensure that any charges levied by an intermediary on shareholders, companies and other intermediaries shall be non-discriminatory and proportionate in relation to the actual costs incurred for delivering the services. Any differences between the charges levied between domestic and cross-border exercise of rights shall be permitted only where duly justified and where they reflect the variation in actual costs incurred for delivering the services.

3. Member States may prohibit intermediaries from charging fees for the services provided for under this Chapter.

Article 3e

Third-country intermediaries

This Chapter also applies to intermediaries which have neither their registered office nor their head office in the Union when they provide services referred to in Article 1(5).

Article 3f

Information on implementation

1. Competent authorities shall inform the Commission of substantial practical difficulties in enforcement of the provisions of this Chapter or non-compliance with the provisions of this Chapter by Union or third-country intermediaries.

2. The Commission shall, in close cooperation with ESMA and the European Supervisory Authority (European Banking Authority), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council (**), submit a report to the European Parliament and to the Council on the implementation of this Chapter, including its effectiveness, difficulties in practical application and enforcement, while taking into account relevant market developments at the Union and international level. The report shall also address the appropriateness of the scope of application of this Chapter in relation to third-country intermediaries. The Commission shall publish the report by 10 June 2023.

CHAPTER Ib

TRANSPARENCY OF INSTITUTIONAL INVESTORS, ASSET MANAGERS AND PROXY ADVISORS

Article 3g

Engagement policy

1. Member States shall ensure that institutional investors and asset managers either comply with the requirements set out in points (a) and (b) or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements.

(a) Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. The policy shall describe how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement.

(b) Institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors. They shall publicly disclose how they have cast votes in the general meetings of companies in which they hold shares. Such disclosure may exclude votes that are insignificant due to the subject matter of the vote or the size of the holding in the company.

2. The information referred to in paragraph 1 shall be available free of charge on the institutional investor's or asset manager's website. Member States may provide for the information to be published, free of charge, by other means that are easily accessible online.

Where an asset manager implements the engagement policy, including voting, on behalf of an institutional investor, the institutional investor shall make a reference as to where such voting information has been published by the asset manager.

3. Conflicts of interests rules applicable to institutional investors and asset managers, including Article 14 of Directive 2011/61/EU, point (b) of Article 12(1) and point (d) of 14(1) of Directive 2009/65/EC and the relevant implementing rules, and Article 23 of Directive 2014/65/EU shall also apply with regard to engagement activities.

Article 3h

Investment strategy of institutional investors and arrangements with asset managers

1. Member States shall ensure that institutional investors publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

2. Member States shall ensure that where an asset manager invests on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking, the institutional investor publicly discloses the following information regarding its arrangement with the asset manager:

(a) how the arrangement with the asset manager incentivises the asset manager to align its investment strategy and decisions with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities;

(b) how that arrangement incentivises the asset manager to make investment decisions based on assessments about medium to long-term financial and non-financial performance of the investee company and to engage with investee companies in order to improve their performance in the medium to long-term;

(c) how the method and time horizon of the evaluation of the asset manager's performance and the remuneration for asset management services are in line with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities, and take absolute long-term performance into account;

(d) how the institutional investor monitors portfolio turnover costs incurred by the asset manager and how it defines and monitors a targeted portfolio turnover or turnover range;

(e) the duration of the arrangement with the asset manager.

Where the arrangement with the asset manager does not contain one or more of such elements, the institutional investor shall give a clear and reasoned explanation why this is the case.

3. The information referred to in paragraphs 1 and 2 of this Article shall be available, free of charge, on the institutional investor's website and shall be updated annually unless there is no material change. Member States may provide for that information to be available, free of charge, through other means that are easily accessible online.

Member States shall ensure that institutional investors regulated by Directive 2009/138/EC are allowed to include this information in their report on solvency and financial condition referred to in Article 51 of that Directive.

Article 3i

Transparency of asset managers

1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. Such disclosure shall include reporting on the key material medium to long-term risks associated with the investments, on portfolio composition, turnover and turnover costs, on the use of proxy advisors for the purpose of engagement activities and their policy on securities lending and how it is applied to fulfil its engagement activities if applicable, particularly at the time of the general meeting of the investee companies. Such disclosure shall also include information on whether and, if so, how, they make investment decisions based on evaluation of medium to long-term performance of the investee company, including non-financial performance, and on whether and, if so, which conflicts of interests have arisen in connection with engagements activities and how the asset managers have dealt with them.

2. Member States may provide for the information in paragraph 1 to be disclosed together with the annual report referred to in Article 68 of Directive 2009/65/EC or in Article 22 of Directive 2011/61/EU, or periodic communications referred to in Article 25(6) of Directive 2014/65/EU.

Where the information disclosed pursuant to paragraph 1 is already publicly available, the asset manager is not required to provide the information to the institutional investor directly.

3. Member States may where the asset manager does not manage the assets on a discretionary client-by-client basis, require that the information disclosed pursuant to paragraph 1 also be provided to other investors of the same fund at least upon request.

Article 3j

Transparency of proxy advisors

1. Member States shall ensure that proxy advisors publicly disclose reference to a code of conduct which they apply and report on the application of that code of conduct.

Where proxy advisors do not apply a code of conduct, they shall provide a clear and reasoned explanation why this is the case. Where proxy advisors apply a code of conduct but depart from any of its recommendations, they shall declare from which parts they depart, provide explanations for doing so and indicate, where appropriate, any alternative measures adopted.

Information referred to in this paragraph shall be made publicly available, free of charge, on the websites of proxy advisors and shall be updated on an annual basis.

2. Member States shall ensure that, in order to adequately inform their clients about the accuracy and reliability of their activities, proxy advisors publicly disclose on an annual basis at least all of the following information in relation to the preparation of their research, advice and voting recommendations:

(a) the essential features of the methodologies and models they apply;

(b) the main information sources they use;

(c) the procedures put in place to ensure quality of the research, advice and voting recommendations and qualifications of the staff involved;

(d) whether and, if so, how they take national market, legal, regulatory and company-specific conditions into account;

(e) the essential features of the voting policies they apply for each market;

(f) whether they have dialogues with the companies which are the object of their research, advice or voting recommendations and with the stakeholders of the company, and, if so, the extent and nature thereof;

(g) the policy regarding the prevention and management of potential conflicts of interests.

The information referred to in this paragraph shall be made publicly available on the websites of proxy advisors and shall remain available free of charge for at least three years from the date of publication. The information does not need to be disclosed separately where it is available as part of the disclosure under paragraph 1.

3. Member States shall ensure that proxy advisors identify and disclose without delay to their clients any actual or potential conflicts of interests or business relationships that may influence the preparation of their research, advice or voting recommendations and the actions they have undertaken to eliminate, mitigate or manage the actual or potential conflicts of interests.

4. This Article also applies to proxy advisors that have neither their registered office nor their head office in the Union which carry out their activities through an establishment located in the Union.

Article 3k

Review

1. The Commission shall submit a report to the European Parliament and to the Council on the implementation of Articles 3g, 3h and 3i, including the assessment of the need to require asset managers to publicly disclose certain information under Article 3i, taking into account relevant Union and international market developments. The report shall be published by 10 June 2022 and shall be accompanied, if appropriate, by legislative proposals.

2. The Commission shall, in close cooperation with ESMA, submit a report to the European Parliament and to the Council on the implementation of Article 3j, including the appropriateness of its scope of application and its effectiveness and the assessment of the need for establishing regulatory requirements for proxy advisors, taking into account relevant Union and international market developments. The report shall be published by 10 June 2023 and shall be accompanied, if appropriate, by legislative proposals.

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(*) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(**) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).'.

(4) The following Articles are inserted:

'Article 9a

Right to vote on the remuneration policy

1. Member States shall ensure that companies establish a remuneration policy as regards directors and that shareholders have the right to vote on the remuneration policy at the general meeting.

2. Member States shall ensure that the vote by the shareholders at the general meeting on the remuneration policy is binding. Companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been approved by the general meeting.

Where no remuneration policy has been approved and the general meeting does not approve the proposed policy, the company may continue to pay remuneration to its directors in accordance with its existing practices and shall submit a revised policy for approval at the following general meeting.

Where an approved remuneration policy exists and the general meeting does not approve the proposed new policy, the company shall continue to pay remuneration to its directors in accordance with the existing approved policy and shall submit a revised policy for approval at the following general meeting.

3. However, Member States may provide for the vote at the general meeting on the remuneration policy to be advisory. In that case, companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been submitted to such a vote at the general meeting. Where the general meeting rejects the proposed remuneration policy, the company shall submit a revised policy to a vote at the following general meeting.

4. Member States may allow companies, in exceptional circumstances, to temporarily derogate from the remuneration policy, provided that the policy includes the procedural conditions under which the derogation can be applied and specifies the elements of the policy from which a derogation is possible.

Exceptional circumstances as referred to in the first subparagraph shall cover only situations in which the derogation from the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability.

5. Member States shall ensure that companies submit the remuneration policy to a vote by the general meeting at every material change and in any case at least every four years.

6. The remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability and shall explain how it does so. It shall be clear and understandable and describe the different components of fixed and variable remuneration, including all bonuses and other benefits in whatever form, which can be awarded to directors and indicate their relative proportion.

The remuneration policy shall explain how the pay and employment conditions of employees of the company were taken into account when establishing the remuneration policy.

Where a company awards variable remuneration, the remuneration policy shall set clear, comprehensive and varied criteria for the award of the variable remuneration. It shall indicate the financial and non-financial performance criteria, including, where appropriate, criteria relating to corporate social responsibility, and explain how they contribute to the objectives set out in the first subparagraph, and the methods to be applied to determine to which extent the performance criteria have been fulfilled. It shall specify information on any deferral periods and on the possibility for the company to reclaim variable remuneration.

Where the company awards share-based remuneration, the policy shall specify vesting periods and where applicable retention of shares after vesting and explain how the share based remuneration contributes to the objectives set out in the first subparagraph.

The remuneration policy shall indicate the duration of the contracts or arrangements with directors and the applicable notice periods, the main characteristics of supplementary pension or early retirement schemes and the terms of the termination and payments linked to termination.

The remuneration policy shall explain the decision-making process followed for its determination, review and implementation, including, measures to avoid or manage conflicts of interests and, where applicable, the role of the remuneration committee or other committees concerned. Where the policy is revised, it shall describe and explain all significant changes and how it takes into account the votes and views of shareholders on the policy and reports since the most recent vote on the remuneration policy by the general meeting of shareholders.

7. Member States shall ensure that after the vote on the remuneration policy at the general meeting the policy together with the date and the results of the vote is made public without delay on the website of the company and remains publicly available, free of charge, at least as long as it is applicable.

Article 9b

Information to be provided in and right to vote on the remuneration report

1. Member States shall ensure that the company draws up a clear and understandable remuneration report, providing a comprehensive overview of the remuneration, including all benefits in whatever form, awarded or due during the most recent financial year to individual directors, including to newly recruited and to former directors, in accordance with the remuneration policy referred to in Article 9a.

Where applicable, the remuneration report shall contain the following information regarding each individual director's remuneration:

(a) the total remuneration split out by component, the relative proportion of fixed and variable remuneration, an explanation how the total remuneration complies with the adopted remuneration policy, including how it contributes to the long-term performance of the company, and information on how the performance criteria were applied;

(b) the annual change of remuneration, of the performance of the company, and of average remuneration on a full-time equivalent basis of employees of the company other than directors over at least the five most recent financial years, presented together in a manner which permits comparison;

(c) any remuneration from any undertaking belonging to the same group as defined in point (11) of Article 2 of Directive 2013/34/EU of the European Parliament and of the Council (*);

(d) the number of shares and share options granted or offered, and the main conditions for the exercise of the rights including the exercise price and date and any change thereof;

(e) information on the use of the possibility to reclaim variable remuneration;

(f) information on any deviations from the procedure for the implementation of the remuneration policy referred to in Article 9a(6) and on any derogations applied in accordance with Article 9a(4), including the explanation of the nature of the exceptional circumstances and the indication of the specific elements derogated from.

2. Member States shall ensure that companies do not include in the remuneration report special categories of personal data of individual directors within the meaning of Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council (**) or personal data which refer to the family situation of individual directors.

3. Companies shall process the personal data of directors included in the remuneration report pursuant to this Article for the purpose of increasing corporate transparency as regards directors' remuneration with the view to enhancing directors' accountability and shareholder oversight over directors' remuneration.

Without prejudice to any longer period laid down by any sector-specific Union legislative act, Member States shall ensure that companies no longer make publicly available pursuant to paragraph 5 of this Article the personal data of directors included in the remuneration report in accordance with this Article after 10 years from the publication of the remuneration report.

Member States may provide by law for processing of the personal data of directors for other purposes.

4. Member States shall ensure that the annual general meeting has the right to hold an advisory vote on the remuneration report of the most recent financial year. The company shall explain in the following remuneration report how the vote by the general meeting has been taken into account.

However, for small and medium-sized companies as defined, respectively, in Article 3(2) and (3) of Directive 2013/34/EU, Member States may provide, as an alternative to a vote, for the remuneration report of the most recent financial year to be submitted for discussion in the annual general meeting as a separate item of the agenda. The company shall explain in the following remuneration report how the discussion in the general meeting has been taken into account.

5. Without prejudice to Article 5(4), after the general meeting the companies shall make the remuneration report publicly available on their website, free of charge, for a period of 10 years, and may choose to keep it available for a longer period provided it no longer contains the personal data of directors. The statutory auditor or audit firm shall check that the information required by this Article has been provided.

Member States shall ensure that the directors of the company, acting within its field of competence assigned to them by national law, have collective responsibility for ensuring that the remuneration report is drawn up and published in accordance with the requirements of this Directive. Member States shall ensure that their laws, regulations and administrative provisions on liability, at least towards the company, apply to the directors of the company for breach of the duties referred to in this paragraph.

6. The Commission shall, with a view to ensuring harmonisation in relation to this Article, adopt guidelines to specify the standardised presentation of the information laid down in paragraph 1.

Article 9c

Transparency and approval of related party transactions

1. Member States shall define material transactions for the purposes of this Article, taking into account:

(a) the influence that the information about the transaction may have on the economic decisions of shareholders of the company;

(b) the risk that the transaction creates for the company and its shareholders who are not a related party, including minority shareholders.

When defining material transactions Member States shall set one or more quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation, including equity, or turnover of the company or take into account the nature of transaction and the position of the related party.

Member States may adopt different materiality definitions for the application of paragraph 4 than those for the application of paragraphs 2 and 3 and may differentiate the definitions according to the company size.

2. Member States shall ensure that companies publicly announce material transactions with related parties at the latest at the time of the conclusion of the transaction. The announcement shall contain at least information on the nature of the related party relationship, the name of the related party, the date and the value of the transaction and other information necessary to assess whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders.

3. Member States may provide for the public announcement referred to in paragraph 2 to be accompanied by a report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders, and explaining the assumptions it is based upon together with the methods used.

The report shall be produced by one of the following:

(a) an independent third party;

(b) the administrative or supervisory body of the company;

(c) the audit committee or any committee the majority of which is composed of independent directors.

Member States shall ensure that the related parties do not take part in the preparation of the report.

4. Member States shall ensure that material transactions with related parties are approved by the general meeting or by the administrative or supervisory body of the company according to procedures which prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of the shareholders who are not a related party, including minority shareholders.

Member States may provide for shareholders in the general meeting to have the right to vote on material transactions with related parties which have been approved by the administrative or supervisory body of the company.

Where the related party transaction involves a director or a shareholder, the director or shareholder shall not take part in the approval or the vote.

Member States may allow the shareholder who is a related party to take part in the vote provided that national law ensures appropriate safeguards which apply before or during the voting process to protect the interests of the company and of the shareholders who are not a related party, including minority shareholders, by preventing the related party from approving the transaction despite the opposing opinion of the majority of the shareholders who are not a related party or despite the opposing opinion of the majority of the independent directors.

5. Paragraphs 2, 3 and 4 shall not apply to transactions entered into in the ordinary course of business and concluded on normal market terms. For such transactions the administrative or supervisory body of the company shall establish an internal procedure to periodically assess whether these conditions are fulfilled. The related parties shall not take part in that assessment.

However, Member States may provide for companies to apply the requirements in paragraph 2, 3 or 4 to transactions entered into in the ordinary course of business and concluded on normal market terms.

6. Member States may exclude, or may allow companies to exclude, from the requirements in paragraphs 2, 3 and 4:

(a) transactions entered into between the company and its subsidiaries provided that they are wholly owned or that no other related party of the company has an interest in the subsidiary undertaking or that national law provides for adequate protection of interests of the company, of the subsidiary and of their shareholders who are not a related party, including minority shareholders in such transactions;

(b) clearly defined types of transactions for which national law requires approval by the general meeting, provided that fair treatment of all shareholders and the interests of the company and of the shareholders who are not a related party, including minority shareholders, are specifically addressed and adequately protected in such provisions of law;

(c) transactions regarding remuneration of directors, or certain elements of remuneration of directors, awarded or due in accordance with Article 9a;

(d) transactions entered into by credit institutions on the basis of measures, aiming at safeguarding their stability, adopted by the competent authority in charge of the prudential supervision within the meaning of Union law;

(e) transactions offered to all shareholders on the same terms where equal treatment of all shareholders and protection of the interests of the company is ensured.

7. Member States shall ensure that companies publicly announce material transactions concluded between the related party of the company and that company's subsidiary. Member States may also provide that the announcement is accompanied by a report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders and explaining the assumptions it is based upon together with the methods used. The exemptions provided in paragraph 5 and 6 shall also apply to the transactions specified in this paragraph.

8. Member States shall ensure that transactions with the same related party that have been concluded in any 12-month period or in the same financial year and have not been subject to the obligations listed in paragraph 2, 3 or 4 are aggregated for the purposes of those paragraphs.

9. This Article is without prejudice to the rules on public disclosure of inside information as referred to in Article 17 of Regulation (EU) No 596/2014 of the European Parliament and of the Council (***).

(*) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

(**) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

(***) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).'.

(5) The following Chapter is inserted:

'CHAPTER IIa

IMPLEMENTING ACTS AND PENALTIES

Article 14a

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC (*). That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council (**).

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 14b

Measures and penalties

Member States shall lay down the rules on measures and penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented.

The measures and penalties provided for shall be effective, proportionate and dissuasive. Member States shall, by 10 June 2019, notify the Commission of those rules and of those implementing measures and shall notify it, without delay, of any subsequent amendment affecting them.

(*) Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ L 191, 13.7.2001, p. 45).

(**) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).'.

Article 2

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 June 2019. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Notwithstanding the first subparagraph, Member States shall, not later than 24 months after the adoption of the implementing acts referred to in Articles 3a(8), 3b(6) and 3c(3) of Directive 2007/36/EC, bring into force the laws, regulations and administrative provisions necessary to comply with Articles 3a, 3b and 3c of that Directive.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

Article 3

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 17 May 2017.

For the European Parliament	*For the Council*
The President	*The President*
A. TAJANI	C. ABELA

Best Practice Principles for Providers of Shareholder Voting Research & Analysis 2019

Review and Update of the Best Practice Principles for Providers of Shareholder Voting Research & Analysis

by The Review Committee - Best Practices Principles Group

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Acronyms and Definitions Used

BPP or **The Principles** refer to the Best Practice Principles for Providers of Shareholder Voting Research and Analysis

BPPG refers to Best Practice Principles Group for Providers of Shareholder Voting Research and Analysis

BPP Oversight Committee refers to the governing body providing an annual independent review of the monitoring of the Best Practice Principles and the public reporting of each BPP Signatory

BPP Review Committee comprises the current BPPG members and Independent Review Chair

BPP Signatories refers to all ratified signatories to the Best Practice Principles

ESMA refers to the European Securities and Markets Authority

General Meeting refers to a meeting of a company's shareholders whether an Annual General Meeting or Extraordinary General Meeting

SRD II refers to the EU Shareholder Rights Directive II

Part One: Preamble

Executive Summary

These reviewed *Best Practice Principles for Providers of Shareholder Voting Research & Analysis 2019* ("Principles") are the result of a thorough review process by the Best Practice Principles Group ("BPPG") which refers to the latest updated stewardship codes globally[1], the requirements of the revised EU Shareholder Rights Directive II ("SRD II") and the *ESMA 2015 Follow-Up Report on the Development of the Best Practice Principles for Providers of Shareholder Voting Research and Analysis* ("2015 ESMA Follow-Up Report"). It also refers to the input of investors, issuers and other stakeholders received through a public consultation by the BPPG (completed in December 2017) and a review by the BPP Review Committee chaired by an independent review chair. These 2019 Principles replace the original 2014 Principles.

2019 Best Practice Principles Key Updates
• **New Governance Oversight Arrangements** • **New Reporting Arrangements** • **New Monitoring Arrangements** • **Updated Principles and Guidance**

In an increasingly complicated investment landscape, investors often choose to engage the services of data and analytics providers and other research providers to support their investment-related activities. Providers of shareholder voting research and analysis provide important research and analysis services to support investors in exercising one of their most important stewardship responsibilities and shareholder rights, that of casting informed votes at a company's annual general or special meeting.

The BPPG aims to educate global stakeholders about the role and key features of shareholder voting research and analysis service providers within the investment process; to advocate for the interests of research service users and providers worldwide; and to encourage high industry standards of good practice, independence and transparency. In working with regulators, market participants and other representative bodies, the BPPG promotes sound practices in the shareholder voting research and analysis industry that serve the needs of investors and, as such, strengthen the capital markets.

The standards contained in the Principles not only ensure the availability of high-quality research and the integrity of the business practices of BPPG members, but also to foster improvement, innovation and vigorous competition within the industry. BPPG members are committed to abiding by the antitrust and competition laws of all jurisdictions in which they operate. Nothing in these Principles is a substitute for adherence to relevant laws and market regulations.

[1] See Appendix 5 page 30

Purpose

The purpose of the Principles is to complement applicable legislation, regulation and other soft-law instruments and contribute to a greater understanding among investors, issuers and other stakeholders about:

- the nature and character of shareholder voting research and analysis services;
- the standards of conduct that are required to underpin those services;
- how signatories to the Principles ("BPP Signatories") interact with other market participants.

Scope

The Principles have been developed to be applied by providers of shareholder voting research and analysis globally, even though the Principles were originally conceived as a soft-regulatory mechanism in the European Union ("EU"). Of note, although the new *SRD II Article 1* refers to a short, relatively narrow definition of "proxy advisor", the scope of the Principles is broader than this definition. The 2015 ESMA Follow-Up Report highlighted that the comply-or-explain principle on which the Principles are based, allows for tailored implementation based on each BPP Signatory's characteristics. Therefore, entities that fall partially under the definition of the Principles should be able to – and are encouraged to – apply the Principles to the appropriate extent. As a corollary, however, and to promote application of the Principles as a global code of conduct, the BPPG will put in place a process for ratifying BPP Signatories that is governed by the Principles' Oversight Committee body (see "Part Four: Governance of the Best Practice Principles").

The Principles apply to providers of shareholder voting research and analysis. BPP Signatories provide services associated with the provision of shareholder voting research and analysis. In addition to promoting the integrity and efficiency of processes and controls related to the provision of such services, the Principles are intended to foster greater understanding of the role of service providers in facilitating the voting decisions made by institutional investors (i.e., asset owners and fund managers). New BPP Signatories beyond members of the BPPG are encouraged to adopt the Principles.

The Principles are based on the notion that investors have a number of important ownership rights, one of which is the right to vote at general meetings. Voting is a key right of investors, whose effective discharge may also be a fiduciary responsibility. As with many other parts of the investment process, investors need access to information and administration tools that support them in the discharge of their responsibilities. BPP Signatories provide a range of professional services designed to assist investors in the discharge of their rights and responsibilities. In the spirit of the apply-or-explain framework[2], the Principles set forth here are designed to facilitate transparency and assist BPP Signatories' conduct in discharging their responsibilities toward their clients.

[2] See Part Two: Applying the Best Practice Principles page 9

These Principles have been developed with the following considerations in mind:

- The services are an efficient way of managing the logistical complexities associated with analysing and interpreting company disclosures, as well as ensuring and managing the operational aspects of shareholder voting;
- Clients may use one or more services that support and complement their own in-house research and voting activities;
- Clients may, themselves, be subject to a variety of rules and regulations in relation to asset ownership and oversight;
- BPP Signatories' underlying clients are responsible for their own compliance procedures;
- BPP Signatories operate within the framework provided by applicable law, including those governing company law, contract law and client confidentiality and data protection, as well as securities laws associated with market abuse and insider trading;
- Nothing in these Principles is a substitute for adherence to relevant laws and market regulations.

Irrespective of the type of services used to support ownership and voting activities, these Principles are based on the understanding that the ultimate responsibility to monitor investments and make voting decisions lies with investors. The use of third-party services – such as those provided by BPP Signatories that deliver high-quality support, thought-leadership, expertise and insight – does not shift this responsibility or relieve investors from any fiduciary duty owed to their clients. Stakeholders wishing to understand how an institutional investor discharges its stewardship or ownership responsibilities should consult relevant disclosures of the investor to understand its approach. This includes how the investor takes national market, legal, regulatory and company-specific conditions into account and how this relates to global standards of corporate governance and investor stewardship frameworks.

Contents of the Principles

The Principles are not a rigid set of prescriptive rules; rather they consist of a set of Principles and accompanying Guidance. The Principles describe a code of conduct for providers of shareholder voting research and analysis. Not all BPP Signatories offer the same services in the same way. The way in which the Principles are applied should be the central question for each Signatory as it determines how to apply these Principles. The Guidance recommends how the Principles are to be applied (see Appendix 1). The Principles may be regarded as reflecting widely-held and accepted general views on how providers of shareholder voting research and analysis contribute to the roles and responsibilities of investors and issuers in fostering effective stewardship and robust corporate governance and ensuring efficient markets.

BPP Signatories may depart from these Principles and Guidance, provided they give reasons for doing so. The conditions for departures are explained below in the section titled "Compliance with the Principles"[3]

[3] See Part Two: Applying the Best Practice Principles page 9

Definitions

As highlighted in the earlier Scope section (see page 5), SRD II Article 1 applies a relatively narrow definition of the type of service provider. According to SRD II, the term "proxy advisor" refers to a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights.'

Although the Principles include this definition, they also include broader definitions in line with the 2015 ESMA Follow-Up Report[4].

Services
To better understand the relevance and application of the Principles, it is important to understand the different types of services BPP Signatories provide. The key objective of BPP Signatories is to support institutional investors in the exercise of their ownership rights and responsibilities through the provision of value-added services. Services may be provided on a commercial, not-for-profit or membership basis.

Shareholder Voting Research & Analysis
BPP Signatories analyze the corporate disclosures of listed companies with a view to informing investor voting decisions. Services include the provision of research, advice or voting recommendations that relate specifically to the exercise of voting rights. The services may exhibit one or more of the following characteristics:

- Data and analysis
- Company-specific research, advice or opinions
- ESG Assessment or Ratings[5]
- Policy guidance
- Voting recommendations
- Alerts, bulletins and newsletters

Depending on the services subscribed to, the services may yield different results for different clients. This is because governance and ownership policies and preferences will vary from organisation to organization.

Note: Unless otherwise stated or disclosed, BPP Signatories do not act on behalf of any particular shareholder or group of shareholders that is trying to influence how other shareholders vote. Similarly, BPP Signatories do not act on behalf of an issuer that is trying to secure votes from its shareholders.

Vote agency and/or engagement and governance overlay services
In addition to shareholder voting research and analysis services, BPP Signatories may also provide other services, such as vote agency and/or engagement and governance overlay services.

[4] ESMA 2015 Follow-Up Report on the Development of the Best Practice Principles for Providers of Shareholder Voting Research and Analysis Page 11
[5] Per para (20) Regulation (EC) No 1060/2009 "ESG Ratings" do not constitute Credit Ratings

- **Vote Agency:** A voting agent provides shareholder vote execution services, whereby the voting agent is responsible for some or all of the logistical and operational activities associated with transmitting instructions from the institutional investor to the company meeting, as well as record-keeping and reporting activities. Votes may be transmitted to the meeting directly (including personal attendance) or through a chain of operational intermediaries, depending on regulatory or market specificities in each relevant jurisdiction.
- **Engagement & Governance Overlay Services:** Engagement services are defined as undertaking contact and engagement with issuers on behalf of an investor or group of investors with a view to asking the company in question to amend aspects of its governance.

Overlay services are defined as the provision of fully outsourced governance engagement and voting services to institutional investors. Vote agency, engagement and governance overlay service providers may provide shareholder voting research, recommendations and analysis as part of their service. Where this is the case, the provisions of these Principles apply to the shareholder voting research and analysis services they offer, either on a standalone basis or in conjunction with other services. The particularities of vote agency and engagement services are not addressed by these Principles.

Note: Unless otherwise stated, disclosed or addressed by these Principles, BPP Signatories act under the direct instruction of their investor clients and do not cast votes without their authority.

Part Two: Applying the Best Practice Principles

Apply and explain
The new Principles operate on an "apply and explain" basis, in line with SRD II. This enables each Signatory to explain how the Principles relate to their specific circumstances and business model.

Meaningful, relevant and detailed explanations
BPP Signatories that choose not to apply one of the Principles, or choose not to follow the Guidance, should deliver meaningful, relevant and detailed explanations that enable the reader to understand their approach. The explanations should be substantiated and adapted to the Signatory's particular situation and should convincingly indicate why a specific aspect justifies a departure from a Principle or the Guidance. The explanations provided should state what alternative provisions have been made, if applicable. If a Signatory intends, at a later stage, to apply a Principle from which it has provisionally deviated, it should state when this temporary situation will come to an end.

Public Statement of Compliance
Each BPP Signatory should publish its annual Statement of Compliance with the Principles ("Statement of Compliance") on its own website, and via a link to the BPPG's independent website. If they so choose, BPP Signatories may also wish to issue their Statement of Compliance via other publicly-accessible sources. Furthermore, ESMA displays on its website a list of entities that have advised ESMA that they are BPP Signatories together with a link to the independent BPPG website.

The Public Statement of Compliance should:

- Describe in a meaningful way how the BPP Signatory applies the Principles and related Guidance;
- Disclose any specific information set out in the supporting Guidance;
- Where any of the Principles have not been applied or relevant information has not been disclosed, provide a reasoned explanation as to why.

Annual Update of the Statement of Compliance
In line with the requirements of the SRD II, each BPP Signatory is responsible for updating its Statement of Compliance on an annual basis and for ensuring that the statement is publicly available on the Signatory's corporate website. Access to a BPP Signatory's Statement of Compliance must remain available, free of charge, for at least three years from its publication date.

Material Non-compliance
The complaints procedure is detailed on the BPPG website here: https://bppgrp.info/the-principles/complaints-feedback/ and all complaints will be considered as part of the BPP Oversight Committee's annual review process (see page 14).

Part Three: The Best Practice Principles

The Principles for Providers of Shareholder Voting Research & Analysis were updated in 2019. The Principles are supported by Guidance that also was updated in 2019. Detailed in Appendix 1, the Guidance explains the background, relevance and application of the Principles. The apply-and-explain framework applies to both the Principles and the Guidance. All relevant policies should be clearly disclosed on a Signatory's company website and updated annually. The updated Principles and Guidance are the result of a thorough review process by the BPPG, which refers to the latest updated stewardship codes globally[6], the requirements of the revised SRD II and the ESMA 2015 Follow-Up Report. The updated Principles and Guidance also reflect the input of investors, issuers and other stakeholders received through a Public Consultation (completed in December 2017); the results of a review by the BPPG Review Committee, a process overseen by an independent review chair; and discussions and feedback from a global, diverse Stakeholder Advisory Panel.
These Principles are based on the understanding that the ultimate responsibility to monitor investments and make voting decisions lies with investors. Use of third-party services such as those provided by BPP Signatories which deliver high-quality voting research and analysis, does not shift this responsibility or relieve investors from any fiduciary duty owed to their clients. Stakeholders wishing to understand how an institutional investor discharges its stewardship or ownership responsibilities should consult relevant disclosures of the investor to understand its approach. This includes how the investor views global standards of corporate governance and investor stewardship frameworks and the extent to which national market, legal, regulatory and company-specific conditions are considered.

Principle One: Service Quality

BPP Signatories provide services that are delivered in accordance with agreed-upon investor client specifications. BPP Signatories should have and publicly disclose their research methodology and, if applicable, "house" voting policies. BPP Signatories' disclosure will include:

- the essential features of the methodologies and models they apply;
- the main information sources they use;
- procedures put in place to ensure the quality of the research, advice and voting;
- experience and qualifications of the staff involved;
- whether and, if so, how, BPP Signatories take national market, legal, regulatory and company-specific conditions into account; how this relates to global standards of corporate governance and investor stewardship frameworks;
- the essential features of any house voting policies BPP Signatories apply for each market (client-specific custom policies will not be disclosed);
- how BPP Signatories alert clients to any material factual errors or revisions to research, analysis or voting recommendations after research publication.

[6] See Appendix 5, page 30

Principle Two: Conflicts-of-Interest Avoidance or Management

BPP Signatories' primary mission is to serve investors. BPP Signatories should have and publicly disclose a conflicts-of-interest policy that details their procedures for avoiding or addressing potential or actual conflicts of interest that may arise in connection with the provision of services.

In addition to disclosing their general policy, BPP Signatories should also have a process in place to identify and disclose without delay to their clients, on a case-by-case basis, actual or potential conflicts of interest or business relationships that may influence the preparation of their research, advice and voting recommendations and the actions they have undertaken to eliminate, mitigate and manage actual or potential conflicts of interest.

Principle Three: Communications Policy

BPP Signatories' primary mission is to serve investors. BPP Signatories should provide high-quality research that enables investor clients to review the research and/or analysis sufficiently in advance of the vote deadline ahead of a general meeting. This primary accountability to investors should remain the key priority for BPP Signatories when applying Principle Three.

With regard to the delivery of Services, BPP Signatories should explain their approach to communication with issuers, shareholder proponents, other stakeholders, media and the public. BPP Signatories should disclose a policy (or policies) for dialogue with issuers, shareholder proponents and other stakeholders. BPP Signatories should inform clients about the nature of any dialogue with relevant parties in their research reports, which may also include informing clients of the outcome of that dialogue.

Part Four: Governance of the Best Practice Principles

BPP Oversight Committee

The BPPG has established a BPP Oversight Committee to provide an annual independent review of the monitoring of the Best Practice Principles and the public reporting of each BPP Signatory.

The BPP Oversight Committee's governance aims to provide:

1. Confidence in the Principles that underpin the services provided by BPP Signatories.
2. Guidance and advice to the BPPG with respect to the operation and development of the Principles.

BPP Signatories are expected to co-operate with the BPP Oversight Committee, consistent with applicable contractual and legal requirements.

Scope and Responsibilities

1. Independent, annual reviews of each BPP Signatory's Public Statement of Compliance, in order to identify matters considered to require further BPP Signatory action or clarification.
2. Ratification of applications by new BPP Signatories that have been approved by BPPG members (see the BPPG Membership and Governance Guidelines 2016 on the BPPG website, which may be updated in due course by the BPP Oversight Committee) and sanction of Signatories that are non-compliant, including the ultimate sanction of the Committee ending BPP Signatory status and BPPG membership[7].
3. Oversight of the complaints-management procedure[8] of the BPPG, monitoring of outcomes and responses to the BPPG.
4. Management of an annual open forum for investors, companies and other interested stakeholders for education, questions and feedback on the Principles.
5. Review and administration of suggested minor updates to the Principles outside of the periodic major reviews and updates.
6. Monitoring of progress and impact of the Principles.
7. Development and publication of an annual report summarizing the activities and findings of the BPP Oversight Committee. The annual report will be published on the website of the Best Practice Principles Group https://bppgrp.info.

[7] The ratification and sanctioning terms of reference are to be developed in further detail by the BPP Oversight Committee
[8] The complaints procedure is detailed on the BPPG website here: https://bppgrp.info/the-principles/complaints-feedback/ and all complaints will be considered as part of the BPP Oversight Committee's annual review process

Structure

Role	Description	Time Period
Independent Chair	Chair to be completely independent of BPPG members and BPP Signatories	2-year term
Oversight Committee Members	11 members in total: 6 institutional investor/representative bodies 3 companies/representative bodies 2 independent (e.g. academic)	2- or 1-year terms as below 4 x 2-year term; 2 x 1-year term 1 x 2-year term; 2 x 1-year term 1 x 2-year term; 1 x 1-year term
Observers	Offer observer status to appropriate interested regulators	Meeting by meeting basis
Administration	Support to be provided by the BPPG Members	Ongoing

Membership

The BPP Oversight Committee shall be comprised of an Independent Chair and Committee Members with a diverse mix of skills, backgrounds, knowledge, experience and geographic locations.

The Principles have been developed to promote understanding of and confidence in the services provided by the BPP Signatories. These services play an important role in supporting investors' exercise of their stewardship rights and responsibilities. The representation of investors is therefore of primary importance and, for this reason, six members will be drawn from investor/investor representative bodies. The representativeness of investor members is also important therefore overall membership should reflect different investment styles (e.g. active vs. passive) and geographic regions (at least one member from each of the Americas, EMEA and AsiaPac). The current signatories to the Principles and any potential future BPP Signatories are not eligible for membership of the BPP Oversight Committee

Nomination and Election

BPP Oversight Committee member vacancies, including the BPP Oversight Committee Independent Chair, shall be advertised on the BPPG website and in other appropriate media. Upon inception of the BPP Oversight Committee, BPPG members will appoint the BPP Oversight Committee Independent Chair in advance of the BPP Oversight Committee members. BPPG members shall consider the nominations received and determine a "long list" of suitable candidates from the nominations. The Independent Chair and existing BPP Oversight Committee members shall then deliberate, taking into account the expertise and other requirements needed, to create a "short list" of candidates for the BPPG members to vote on. For the initial appointments of the BPP Oversight Committee Members upon inception of the BPP Oversight Committee, BPPG members will undertake this process, with input from the BPP Oversight Committee Independent Chair.

In the case of the initial appointment of the BPP Oversight Committee Independent Chair, BPPG members will put forward a "short list" of up to five independent, qualified candidates, with a minimum of two candidates. Candidates will be voted on individually by BPPG members and must receive unanimous support from BPPG members in order to be elected. In the case of the initial appointments to the BPP Oversight Committee (up to eleven Member vacancies, excluding the Chair), the short list shall be for up to thirty-three short-list candidates. To fill future vacancies, the short list shall comprise up to three candidates for each role to be filled, with a minimum of two candidates per vacancy. Upon inception of the BPP Oversight Committee, short-list candidates proposed by the Independent Review Chair shall be voted on by BPPG members and must receive unanimous support from BPPG members in order to be elected.

In accepting their role, BPP Oversight Committee members recognise that:

- Shareholder voting research services play an important role in supporting investors' exercise of their stewardship rights and responsibilities
- The primary responsibility of shareholder voting research service providers is to their investor clients;
- The primary purpose of the Principles and the BPPG is to uphold and protect the responsibilities of BPP Signatories to their investor clients.

Reporting

A report summarising the activities and findings of the BPP Oversight Committee will be published annually on the website of the BPPG. This report will include feedback regarding minor updates to the Principles outside of the periodic major reviews and updates.

Individual Signatory Compliance

The BPP Oversight Committee will write to an individual BPP Signatory when a need for progress is identified. Initially, this communication will be done on a confidential basis to enable the BPP Signatory to address the issue over a specified period of time that may vary in accordance with the severity of the issue but should generally not exceed one year. After the prescribed period, if the BPP Signatory has not addressed the issue in a satisfactory manner, the Oversight Committee will discuss appropriate next steps with other BPPG members, up to and including the ultimate sanction of ending BPP Signatory status and BPPG membership.

Monitoring

- Each BPP Signatory's application and disclosure will be monitored on an annual basis, based on the public Statements of Compliance.
- Monitoring may be conducted by independent members or third parties assigned by the BPP Oversight Committee;
- The results of the monitoring will be reported in the annual report by the BPP Oversight Committee.

Signatory Criteria

A BPP Signatory must ideally be unanimously approved by the BPPG members and then ratified by the BPP Oversight Committee. If a unanimous decision to approve a BPP Signatory by the BPPG members cannot be reached during a meeting, the decision will be postponed until the following meeting. It will then require a qualified majority rule of at least 75% of the present or represented Members[9]. Any new BPPG member must be ratified by the BPP Oversight Committee. Thereafter, a BPP Signatory must maintain adequate annual reporting against the Principles. The BBP Oversight Committee retains discretion to determine whether signatories are compliant. BPPG members are responsible for engaging with the BPP Oversight Committee as needed to support the BPP Oversight Committee in carrying out its duties. BPPG members must actively monitor regulatory developments that could merit an update to the Principles, inform the BPP Oversight Committee as such, and draft any necessary updates to the Principles or its governing documents.

[9] Please see the BPPG Membership and Governance Guidelines 2016 on the BPPG website, which may be updated in due course by the BPP Oversight Committee

Funding Structure

Funding is needed to cover the governance fees of the BPP Oversight Committee, i.e. for the Independent Chair and the two independent (academic) members. For the independent (academic) members, membership will be honorary, but fees will be paid for work relating to the independent review. The funding structure will be based on the fee band structure for service providers. Appendix 6 details the bands in which current (and future) BPPG Members would sit with the staff numbers they self-report. Staff numbers should be publicly available, either via annual reports, or via other sources.

Appendix 1: Guidance on Applying the Principles

Principle One: Service Quality

BPP Signatories provide services that are delivered in accordance with agreed client specifications. BPP Signatories should have and publicly disclose their research methodology and, if applicable, "house" voting policies. BPP Signatories' disclosure will include:

- the essential features of the methodologies and models they apply;
- the main information sources they use;
- procedures put in place to ensure quality of the research, advice and voting;
- experience and qualifications of the staff involved;
- whether, and, if so, how BPP Signatories take national market, legal, regulatory and company-specific conditions into account; how this relates to global standards of corporate governance and investor stewardship frameworks;
- the essential features of any house voting policies BPP Signatories apply for each market (client-specific custom policies will not be disclosed);
- how BPP Signatories alert clients to any factual errors or material revisions to research, analysis or voting recommendations after research publication.

Principle One Guidance

1. Introduction

a) BPP Signatories should explain how they organise their activities to ensure that research is developed in accordance with a stated research methodology and voting policies.

b) BPP Signatories should describe what reasonable efforts they make to ensure their research and analysis are independent and free from inappropriate bias or undue influence.

2. Responsibilities to Clients

a) A BPP Signatory's primary responsibility is to provide services to investor clients in accordance with agreed specifications. Clients are the ultimate and legitimate 'judges' of the quality of shareholder voting research and analysis and other services they subscribe to from BPP Signatories and pay for.

3. Quality of Research

a) Shareholder voting research and analysis should be relevant, based on accurate information and reviewed by appropriate personnel prior to publication.

b) BPP Signatories should be able to demonstrate to their clients that their reports, analyses, guidance and/or recommendations are prepared to a standard that can be substantiated as reasonable and adequate.

c) BPP Signatories should have systems and controls in place to reasonably ensure the reliability of the information used in the research process. BPP Signatories should disclose to what

extent issuers have the opportunity to verify, review or comment on the information used in research reports, analysis or guidance.

d) BPP Signatories cannot be responsible for disclosures published by issuers or shareholder resolution proponents that are the subject of their research.

e) BPP Signatories should maintain records of the sources of data used for the provision of services to clients (to the extent legally or contractually possible).

f) BPP Signatories' disclosure should include procedures to reasonably ensure the quality of the research, advice and voting recommendations. BPP Signatories should implement proportionate organisational features to achieve adequate verification or double-checking of the quality of research that is provided. These may include:

- Issuer fact-checking;
- IT-based consistency check;
- Four-eyes principle (i.e., reports reviewed by an appropriate second person);
- Review by senior analyst;
- Review by governance committee;
- Review by senior management and/or executives

g) BPP Signatories should be transparent regarding the sources used and content included in the research information they provide to their clients, including, when applicable, notations about any dialogue with issuers, shareholder proponents, dissidents or their advisors that may have taken place in accordance with their specific policies and procedures (see Principle 3). To that end, BPP Signatories should ensure that use, inclusion or reproduction of external private information be duly referenced, so clients can assess to what degree third-party input plays a role in the services they use.

h) BPP Signatories should alert clients to any verified factual errors or material revisions to published research or analysis without delay. Alerts should explain the reasons for any revision in a transparent and understandable way.

4. Research Methodology

a) BPP Signatories' disclosure will include the essential features of the methodologies and models they apply and the main information sources they use. This will include whether and, if so, how they take national market, legal and regulatory and company-specific conditions into account.

BPP Signatories should have and disclose a written research methodology that comprises the following essential features:

- The general approach that leads to the generation of research;
- The information sources used;
- The extent to which local conditions and customs are taken into account;
- The extent to which custom or house voting policies or guidelines may be applied;

- The systems and controls deployed to reasonably ensure the reliability of the use of information in the research process, and the limitations thereof.

b) In making such disclosure, BPP Signatories do not need to provide information that could harm the BPP Signatory's legitimate business interests, including, but not limited to, its intellectual property and trade secrets, as well as the intellectual property of any of its clients or third-party content providers.

5. Voting Policies or Guidelines

a) Shareholder Policies

i. Shareholders may assess investee companies' governance arrangements and make voting decisions based on their own view or "custom" voting policy. In this case, a shareholder may contract with a BPP Signatory to receive services based on the shareholder's own voting policies.
ii. Shareholders may subscribe to shareholder voting research and analysis services based on a BPP Signatory's proprietary or "house" voting policies and subsequently decide on the extent to which they incorporate that research and analysis into their own assessment and decision-making process.

Whether shareholders adopt a policy that is consistent with a BPP Signatory's "house" voting policy or vote according to a "custom" voting policy that differs from the policy of the BPP Signatory, shareholders are always responsible for and entitled to exercising their own judgement when determining their final voting decisions.

b) BPP Signatory Policies

iii. BPP Signatories may provide shareholder voting research and analysis services based on "house" voting policies or guidelines. These voting policies typically consist of corporate governance principles against which the governance arrangements and general meeting resolutions of listed companies are assessed.
iv. BPP Signatories should disclose whether they have developed "house voting policies. If so, they should disclose these policies, including, but not limited to, the extent to which local standards, guidelines and market practices are taken into account, the extent to which issuer explanations on deviations from comply-or-explain corporate governance codes are taken into account and the extent to which peer comparisons are used in formulating analysis and recommendations. BPP Signatories should specify the scope of their research.
v. Each BPP Signatory will have its own approach to voting policy development and review, which may include one or more of the following approaches:

- Client review
- Academic literature review
- Public consultations
- Guideline exposure drafts

- One-on-one/face-to-face discussions
- Group discussions/webinars
- Expert/regulatory body reports
- Discussion at industry conferences

vi. BPP Signatories should explain how their voting policies are developed and updated. They should explain whether and how they incorporate feedback into the development of voting policies. They should disclose the timing of their policy updates and policies should be reviewed at least annually.

vii. BPP Signatories should explain how and to what extent clients may customize their voting policies using the Signatories' services, without disclosing proprietary information. BPP Signatories are not responsible for disclosing client corporate governance policies or voting guidelines and may have contractual obligations that preclude them from discussing any aspect of their client relationships, voting guidelines or intentions.

A BPP Signatory's voting guidelines do not need to include information that could harm the BPP Signatory's legitimate business interests, including, but not limited to, intellectual property and trade secrets of the BPP Signatory, as well as the intellectual property of any of its clients or third-party content providers.

Whether services are provided on a "custom" or "house" voting policy basis, clients expect BPP Signatories to exercise their independent professional judgment when delivering shareholder voting research and analysis.

6. Employee Qualification & Training

BPP Signatories should disclose the procedures they have in place to ensure staff members are qualified to perform their respective jobs, including:

a) The procedures they have in place to ensure staff members have the appropriate education, skills, competence and experience.

b) BPP Signatories should make reasonable efforts to ensure their staff is trained on the relevance and importance of their activities and on how they contribute to service delivery.

c) Where a BPP Signatory outsources any process that could affect service quality, the BPP Signatory should exercise control over such processes. The type and extent of control applied to these outsourced processes should be clearly explained.

d) BPP Signatories should disclose their operational arrangements for the provision of services, including, for example, qualifications of staff and organization of production processes, etc.

7. Timeliness

a) BPP Signatories have a responsibility to provide clients with adequate and timely services, subject to the availability of source information from issuers and shareholder resolution proponents, as well as intermediary constraints (for example, vote deadlines and intermediary cut-offs).

b) BPP Signatories should make reasonable efforts to use the most up-to-date publicly available information when delivering their services. BPP Signatories should disclose how and to what extent relevant stakeholders can submit supplementary information for consideration in their research or analysis, taking into consideration relevant deadlines.

8. Complaints & Feedback Management

a) BPP Signatories should have and disclose their policies for managing and responding to complaints, comments or feedback about their services.

9. Client & Supplier Understanding

a) The operational aspects of service delivery will generally form the basis of the service agreement between BPP Signatories and their clients.

b) BPP Signatories should notify clients of the scope of the services provided, as well as any known or potential limitations or conditions that should be taken into account in the use of signatory services. Limitations may include:

- Data availability issues, as not all markets require the same level of detail in disclosure;
- Missing, inaccurate or incomplete documents or disclosures, such as from issuers or shareholder proponents;
- Reliance on third parties that are beyond the control of the signatory;
- Inconsistencies and irregularities of information provided by intermediaries in the ownership chain, such as agenda information, vote deadlines and blocking procedures, etc.

c) BPP Signatories should provide clients with a framework that enables them to fulfil their due-diligence requirements. The framework could include the following:

- Site visits;
- Interaction with research teams;
- Information on quality controls that govern the research development process;
- Information on the qualifications and experience of the BPP Signatory's staff;
- Information on how the research framework has been or will be applied and on which assumptions the research output has been based.

10. Client Disclosure Facilitation

a) BPP Signatories recognise that institutional investors may be subject to disclosure requirements regarding the investors' use, if any, of shareholder voting research and analysis services.

b) BPP Signatories should assist clients, upon reasonable request, with disclosure relating to the clients' discharge of stewardship responsibilities. This disclosure could include information on how an institutional investor client uses a BPP Signatory's services; the public identification of a BPP Signatory; conflict avoidance and management by the BPP Signatory; and information on the scope of services offered by a BPP Signatory, among other relevant issues.

Principle Two: Conflicts-of-Interest Avoidance or Management

BPP Signatories' primary mission is to serve investors. BPP Signatories should have and publicly disclose a conflicts-of-interest policy that details their procedures for avoiding or addressing potential or actual conflicts of interest that may arise in connection with the provision of services.

In addition to disclosing their general policy, BPP Signatories should also have a process in place to identify and disclose without delay to their clients, on a case-by-case basis, actual or potential conflicts of interest or business relationships that may influence the preparation of their research, advice and voting recommendations and the actions they have undertaken to eliminate, mitigate and manage actual or potential conflicts of interest.

Principle Two Guidance

1. Introduction

a) The possibility for conflicts of interest can arise in all businesses. While conflicts cannot always be eliminated, they can be managed and mitigated.

b) The overriding objective of this Principle is to ensure, as far as reasonably possible, that research and business conduct are independent, fair, clear, not misleading and free from possible bias or undue influence.

c) With this in mind, BPP Signatories should make full and timely disclosure of potential conflicts that could reasonably be expected to impair their independence or interfere with their duty to clients.

2. Conflicts of Interest Policy

BPP Signatories should publicly disclose their policy regarding the prevention and management of potential conflicts of interest.

a) A BPP Signatory's conflicts-of-interest policy should explain:
- The existence of potential material conflicts;
- How and when potential material conflicts will be disclosed to clients (for example on a website, within the applicable research report and in email bulletins, etc.);
- How BPP Signatories communicate their conflicts-of-interest policy and train their employees in the operation of that policy;
- How conflicts will be managed.

3. Possible Conflicts for Consideration

a) BPP Signatories should consider how the following non-exhaustive list of potential conflicts may materially impact their operations and how these potential conflicts may be addressed:
- A BPP Signatory's ownership or shareholder base/structure, such as when a BPP Signatory is owned by an investor that owns shares in companies under coverage or when the investor is owned by an issuer under coverage;
- A BPP Signatory's employee activities, such as board memberships and stock ownership, etc.;

- Investor-client influence on the BPP Signatories, such as when an investor who is a client of the service provider is a shareholder proponent or is a dissident shareholder in a proxy contest;
- Issuer-client influence on the BPP Signatories, such as when BPP Signatories provide consulting services to companies under coverage for research;
- Influence of other investor clients.

4. Conflict Management & Mitigation

a) Conflict management and mitigation procedures should include the following approaches to the extent that they are relevant to potential conflicts faced by the Signatory:

- Transparent policies and procedures
- Code of ethics
- Division of labour
- Employee recusal
- Fire walls/IT systems and controls
- Information barriers and ring-fencing
- Independent oversight committees
- Physical employee separation
- Separate reporting streams

5. Conflict Disclosure

In addition to disclosing their general policy, in line with SRD II, BPP Signatories also should have a process in place to identify and disclose without delay to their clients, on a case-by-case basis, actual or potential conflicts of interest or business relationships that may influence the preparation of their research, advice and voting recommendations, as well as the actions they have undertaken to eliminate, mitigate or manage the actual or potential conflict of interest.

If a BPP Signatory becomes aware of a material conflict of interest, that is not otherwise addressed in its general policies, the BPP Signatory should:
- disclose the conflict to the relevant client(s) without undue delay before or at the same time the service is delivered, subject to contractual arrangements;
- provide the relevant client(s) with research from an unconflicted proxy advisor for the relevant meeting; or
- manage the conflict as further detailed in the BPP Signatory's conflicts-of-interest policy.

Principle Three: Communications Policy

BPP Signatories' primary mission is to serve investors. BPP Signatories should provide high-quality research in a timely fashion that enables investor clients to review the research and/or analysis prior to the vote deadline ahead of a company meeting. This primary accountability to investors should remain the key priority for BPP Signatories when applying Principle Three.

With regard to their delivery of Services, BPP Signatories should explain their approach to communication with issuers, shareholder proponents, other stakeholders, media and the public. BPP Signatories should disclose a policy (or policies) for dialogue with issuers, shareholder proponents and other stakeholders. If issuer communication has taken place, BPP Signatories should inform clients about the nature of the dialogue with relevant parties in their research reports, which may also include informing clients of the outcome of that dialogue.

Principle Three Guidance

1. Introduction

Shareholders are always responsible for and entitled to exercising their own judgment when determining their final voting decisions, according to their own investment and governance philosophy and company engagement activities in any particular situation.

a) BPP Signatories should explain their approach to communication with issuers, shareholder proponents, other stakeholders, media and the public.

b) It is up to BPP Signatories to choose whether or not to engage in dialogue and in what format. If a BPP Signatory chooses to have such a dialogue, it is up to the Signatory to determine the objectives, timing, frequency and format of this dialogue.

c) Comments and statements in the press or public forums may have a significant impact and, as such, should be properly managed.

2. Dialogue with Issuers, Shareholder Proponents & Other Stakeholders

a) BPP Signatories should have a policy (or policies) for dialogue with issuers, shareholder proponents and other stakeholders.

b) BPP Signatories should communicate to clients in their research reports the nature of any dialogue with relevant parties, which may also include informing clients of any changes made to their research or analysis as a result of that dialogue.

c) The policy on dialogue should cover issues including, but not limited to:

- The circumstances under which such dialogue could occur;
- Details of any year-round mechanisms for dialogue with relevant parties;

- Whether BPP Signatories provide engagement services to investors and how these relate to shareholder voting research provision;
- How BPP Signatories verify the information used in their analysis;
- Whether and how issuers are provided with a mechanism to review research reports or data used to develop research reports prior to publication to clients;
- Procedures for avoiding receipt of privileged, non-public information and, in cases where such information is received, procedures for managing such information;
- If/how BPP Signatories communicate during the voting period (defined as the period from release of the agenda until the general meeting);
- What steps are taken to protect BPP Signatories and their employees from undue pressure or retaliatory actions arising from the delivery of services.

3. Dialogue with Media & the Public

a) BPP Signatories reserve the right to respond to general media enquiries about the nature of their services and about the companies or issues they cover. However, BPP Signatories should have and disclose a policy (or policies) for communication with the media and the public. This policy should include, at minimum, the following considerations:

- Which of the BPP Signatory's employees are permitted to make comments to the media;
- The BPP Signatory's policy toward the publication of house recommendations (if made) on any particular resolution prior to the publication of their reports to clients. Exceptions to this policy should be explained.

b) It should be noted that BPP Signatories cannot be held responsible for the unauthorized use or re-use of their materials.

c) At all times, BPP Signatories should observe applicable laws or regulations regarding libel, slander, market abuse, insider trading and distribution of confidential or material non-public information, etc.

Appendix 2 BPPG Signatories

At the launch date of the 2019 BPP, the BPPG comprises of the following members:

- Glass, Lewis & Co., LLC
- Institutional Shareholder Services Inc.
- Minerva Analytics Ltd (The Manifest Voting Agency Ltd)
- PIRC Ltd
- Proxies

The BPPG operates an independent website: https://bppgrp.info which is a central location for BPPG documents.

Appendix 3 BPP Review Committee & Review Chair

2014 Best Practice Principles Chair

Following the publication of the ESMA Final Report and Feedback Statement on the Consultation Regarding the Role of the Proxy Advisory Industry in February 2013, a number of industry members formed a committee under the ESMA endorsed independent chairmanship of Prof. Dr. Dirk Andreas Zetzsche, LL.M. (Toronto), to develop an industry code of conduct. The "Best Practice Principles for Providers of Shareholder Voting Research & Analysis" were published in April 2014. With this report, the Chair's aim was to make the committee's work and discussions transparent to facilitate the application of the provisions and enhance understanding of the reasoning behind their adoption. The report also aims to enhance transparency and understanding on the functioning of Providers of Shareholder Voting Research & Analysis and their role in corporate governance and assist in creating a more informed discussion.

2019 Best Practice Principles Review Chair

Terms of Reference

In April 2017, the BPPG Steering Group announced its intention to launch a Review of the operation of the Best Practice Principles for Shareholder Voting Research (the Principles). In order to gather the views of stakeholders, a public consultation was held at the end of 2017, and an advisory stakeholder panel was established to provide input to the preparation of the consultation document and any subsequent revisions to the Principles. The Review was overseen by the BPPG Steering Group comprising representatives from the current signatories to the Principles and the independent chair.

Nomination of Review Chair

BPPG members put forward a long list of 5 independent, qualified candidates. Candidates were voted on individually by BPPG members and needed to receive at least 50% of the valid votes to be elected.

In April 2017 the BPPG appointed BPPG independent Review Chair, Chris Hodge, who served in the role until June 2018 and completed the public consultation phase.

In October 2018, the BPPG appointed Dr. Danielle A.M. Melis MBA, to succeed Chris Hodge as the new Review Chair of the BPPG. The main task of the new Chair was to oversee the BPPG Steering Group and coordinate and facilitate the finalization the Review process as outlined below leading to the 2019 update of the Principles and updated governance structure of BPPG.

The purpose of the Review was to:

- assess the implementation and content of the Best Practice Principles;
- ensure that they achieved the original objectives;
- identify where there was scope to improve practice and transparency;
- ensure that the Principles would be capable of being applied in all markets for which voting research and analysis is provided, and by all providers of such services.

The Review referred to the original objectives of the Principles to:

- promote a greater understanding of the role of shareholder voting research providers in the voting decisions made by institutional investors;
- promote the integrity and efficiency of processes and controls related to the provision of these research services;
- foster a robust management of any conflicts of interest.

The assessment involved consideration of:

- the structure and content of the Principles;
- the form and frequency of reporting against the Principles;
- the process and criteria for providers to become signatories;
- the oversight arrangements for monitoring and reviewing the Principles.

The Review was informed by:

- the views of investors, companies and other stakeholders through a Public Consultation;
- experience of implementing the Principles since they were introduced in 2014;
- the December 2015 report on the development and implementation of the Principles by the European Securities and Markets Authority;
- the revised EU Shareholder Rights Directive and regulatory developments in other markets since the Principles were introduced.

The Review Process was completed by June 2019 and resulted in:

1. updated set of Principles (and guidance to the Principles)
2. updated governance structure of BPPG (oversight and monitoring process)
3. review Report of the Chairman and all BPPG members

BPP Review Committee

Independent Review Chairs		
Dr. Danielle A.M. Melis (2018-2019)	Director	Aequinova
Chris Hodge (2017-2018)	Director	Governance Perspectives
Members		
Loïc Dessaint	CEO	Proxinvest
Lorraine Kelly	Managing Director, Head of Governance Business	Institutional Shareholder Services Inc (ISS)
Alan MacDougall	CEO	PIRC
KT Rabin	CEO	Glass Lewis
Sarah Wilson	CEO	Minerva

Support Staff		
Sarah Ball	Drafting support	ISS
Jennifer Thompson	Administrative support	Glass Lewis

Appendix 4 BPP Review Stakeholder Advisory Panel

Terms of Reference

The BPP Review Stakeholder Advisory Panel consisted of members with the mix of skills, backgrounds, knowledge, experience, geographic locations and diversity appropriate to achieve oversight of updates to the Principles in light of the transparency requirements for proxy advisors outlined in the amendments to the revised EU Shareholder Rights Directive 2007/36/EC, adopted on 3 April 2017 and due for implementation in 2019. Members should represent the following stakeholder groups – companies/representative bodies, asset owners/representative bodies and asset managers/representative bodies.

Given that the Principles exist to promote the integrity and efficiency of shareholder voting research services, which play an important role in investors exercising their stewardship rights and responsibilities, it is recognised that investor representation on the BPP Review Stakeholder Advisory Panel is, therefore, of major importance.

Nominations

Each BPPG member put forward a list of up to 30 candidates. The Chair then deliberated, taking into account the incumbent BPP Review Stakeholder Advisory Panel members and potential expertise needed to update the Principles to create a short list of 15. Candidates were voted on individually by BPPG members and had to receive unanimous support to be elected, with a view to the Stakeholder Advisory Panel being comprised of at least 10 members in total.

In accepting their role, BPP Review Stakeholder Advisory Panel members recognised, as much as possible, that:

- The BPPG's mission is to promote greater understanding of the corporate governance and ESG research and support services provided to professional investors and other capital markets participants.
- Shareholder voting research services play an important role in investors exercising their stewardship rights and responsibilities, that the primary responsibility of shareholder voting research service providers is to their investor clients, and that one primary purpose of the BPP is to uphold and protect this responsibility.
- The BPP Stakeholder Advisory Panel should be diverse regarding geographic balance and experience.

2019 BPP Stakeholder Advisory Panel Members

Richard Gröttheim	CEO	AP7
Jakob Skafte	Senior Analyst, ESG	ATP
Mirza Baig	Global Head of Governance	Aviva Investors
Geof Stapledon	Vice President Governance	BHP
Michael Herskovich	Head of Corporate Governance	BNP Paribas Asset Management
Matt Orsagh	Director, Capital Markets Policy	CFA Institute
Ken Bertsch	Executive Director	Council of Institutional Investors
Rients Abma	Executive Director	Eumedion
Lutgart Van den Berghe	Professor of Corporate Governance	Vlerick Business School
Carine Smith Ihenacho	Chief Corporate Governance Officer	NBIM
Francesco Chiappetta	Consultant, Corporate Governance	Pirelli & C. S.p.A
Paul Clark	Head of Stewardship	UBS Asset Management

Appendix 5 BPP Review Process

The Review Process was completed by June 2019 and resulted in:

1. updated set of Principles (and guidance to the Principles);
2. updated governance structure of BPPG (oversight and monitoring process);
3. review Report of the Chairman and all BPPG members.

Prior to publication of the Principles, in Q1 2019 the BPPG provided a series of intermediate process updates and, in Q2 2019, organised a preview event for issuers, investors and regulators to validate the amendments.

In April 2017, the BPPG appointed BPP Review Chair Chris Hodge, who served in the role until June 2018 and completed the public consultation phase.

In October 2018, the BPPG appointed Dr. Danielle A.M. Melis MBA, to succeed Chris Hodge as the new Review Chair. The main task of the new Chair was to oversee the BPPG Steering Group and coordinate and facilitate the finalization of the Review process as outlined below.

The assessment involved consideration of:

- structure and content of the Principles;
- form and frequency of reporting against the Principles;
- process and criteria for providers to become signatories;
- oversight arrangements for monitoring and reviewing the Principles.

The Review was informed by:

- views of investors, companies and other stakeholders received through the Public Consultation by BPPG completed in December 2017;
- experience of implementing the Principles since they were introduced in 2014;
- December 2015 report on the development and implementation of the Principles by the European Securities and Markets Authority;
- revised EU Shareholder Rights Directive and regulatory developments in other markets since the Principles were introduced.
- the following Investor Codes:
    - AFG: Recommendations de l'Association Française de Gestion (FR)
    - BVI: Bundesverband Investment and Asset Management Rules of Good Conduct (DE)
    - The Committee On Corporate Governance Denmark: Stewardship Code (D)
    - The Council of Experts on the Stewardship Code: Japan's Stewardship Code (JP)
    - EFAMA: Stewardship Code Principles for asset managers' monitoring of, voting in, engagement with investee companies (EU)
    - Eumedion: The Dutch Stewardship Code (NL)
    - FRC: The UK Stewardship Code (UK)
    - G20/OECD: Organisation for Economic and Co-operation and Development Principles of Corporate Governance; OECD Corporate Governance Factbook (Global)

    - ICGN: International Corporate Governance Network Statement of Principles on Institutional Shareholder Responsibilities; ICGN Model Stewardship Disclosures (Global))
    - PRI: Principles for Responsible Investment (Global)
    - Singapore Stewardship Principles for Responsible Investors Working Group: Singapore Stewardship Principles for Responsible Investors (SG)

- The following financial markets participants:
    - AMF: Recommendation No 2011-06 of 18 March 2011 in respect of proxy voting agencies issued by the Autorité des Marchés Financiers (FR)
    - CFA: Code of Ethics and Standards of Professional Conduct and Research Objectivity Standards (Global)

This list is not comprehensive in covering all relevant Investor Codes or regulatory instruments/guidance globally. There are additional (local) codes that were reviewed by specific members that contributed to the Principles, up to the BPP Review's completion date in June 2019.

Appendix 6 BPP Oversight Committee

Minimum Terms of Reference

Below are the minimum terms of reference for the BPP Oversight Committee upon inception, which may be augmented after the BPP Oversight Committee has been established in 2H 2019, in light of their further feedback.

Confidentiality

The BPP Oversight Committee members agree to treat as confidential and to not at any time disclose or permit to be disclosed to any person any Confidential Information (whether during or after a member's term expires), or otherwise make use of or permit to be made use of any Confidential Information. This restriction shall cease to apply to information or knowledge that has come into the public domain other than by breach of this clause.

Meetings

Meetings shall be held no less than three times per year. Provision shall be made for members to attend either in person or virtually by web or teleconference.

Quorum

Quorum shall normally be satisfied when the Chair and at least eight of the eleven members of the Committee are present. A quorum change must be clearly stated on the agenda for any meeting, circulated to all members at least 72 hours in advance of the meeting.

Funding Structure

This is based on the BPP Oversight Committee consisting of:

1 independent chair
6 institutional investor/representative bodies (to be appointed free of charge)
3 companies/representative bodies (to be appointed free of change)
2 independents (e.g. academics)
Observers are allowed and support is to be provided by the Members

It is also based on the following key responsibilities of the BPP Oversight Committee:

1) Execute an independent, annual review of each BPP Signatory's Public Statement of Compliance
2) Ratification of applications by new Signatories and sanctioning
3) Oversight of the compliance management procedure
4) Management of an annual open forum
5) Review and implementation of minor updates to the Principles
6) Monitoring of progress and impact of the Principles
7) Development and publication of an annual report summarising the Oversight Committee's activities.

Funding is needed to cover the fees of the Independent Chair and the two independent (academic) members. For the independent (academic) members, membership will be honorary but fees will be paid for work relating to the independent annual review.

The six representatives from the investor community and the three representatives from the issuer community will be appointed to be honorary members of the BPP Oversight Committee, free of charge.

All Signatories should be willing and able to pay their fair share of the required BPPG budget in any year (which will be agreed upon between the members annually).

The 2019 BPP Oversight Committee funding structure will be based on the fee bands in the table below based on staff numbers they self-report. Staff numbers should be publicly available, either via annual reports, or via other sources. Each year, after ratification of new Signatories, the BPP Oversight Committee will adjust the percentages of fee bands in the table to match the new number of Signatories to the Principles.

The table below indicates the bands in which the current 2019 BPPG Members sit and the percentage of the total payment for the BPP Oversight Committee to which they are committed. The right-hand column provides a future example of how the allocation could change, should a new Member join the BPPG.

2019 BPPG Member Fee Band by Number of Staff	BPP Oversight Committee % of Total Payment per 2019 BPPG Member Fee Band	Future Example: additional new Member with 51-200 staff
Staff 1- 10	10% (1 x 2019 BPPG Member)	10%
Staff 11 - 50	15% (2 x 2019 BPPG Members)	12.5%
Staff 51 -200	n/a (0 x 2019 BPPG Members)	20%
Staff > 200	30% (2 x 2019 BPPG Members)	22.5%

The fee split will be formalised in a contract, to be amended upon acceptance of any new Members/new Signatories.

Best Practice Principles for Providers of Shareholder Voting Research & Analysis 2019

Web: www.bppgrp.info
Email: committee@bppgrp.info

日本取引所グループ金融商品取引法研究会

議決権行使助言会社（４）－理論的検討（その２）－
わが国の議決権行使助言会社の規制

2021年12月24日（金）15:00～16:55
オンライン開催

出席者（五十音順）

石田　眞得　関西学院大学法学部教授
伊藤　靖史　同志社大学法学部教授
梅本　剛正　甲南大学共通教育センター教授
片木　晴彦　広島大学大学院人間社会科学研究科実務法学専攻教授
加藤　貴仁　東京大学大学院法学政治学研究科教授
川口　恭弘　同志社大学法学部教授
黒沼　悦郎　早稲田大学大学院法務研究科教授
齊藤　真紀　京都大学大学院法学研究科教授
志谷　匡史　神戸大学大学院法学研究科教授
白井　正和　京都大学大学院法学研究科教授
洲崎　博史　京都大学大学院法学研究科教授
髙橋　陽一　京都大学大学院法学研究科准教授
舩津　浩司　同志社大学法学部教授
前田　雅弘　京都大学大学院法学研究科教授
松尾　健一　大阪大学大学院高等司法研究科教授
山下　徹哉　京都大学大学院法学研究科教授

【報　　告】

議決権行使助言会社（４）－理論的検討（その２）－

「わが国の議決権行使助言会社の規制」

甲南大学共通教育センター教授
梅　本　剛　正

目　　次

○川口　　それでは、定刻になりましたので、JPX 金融商品取引法研究会を始めたいと思います。

本日は、前回に引き続き甲南大学の梅本先生から、「議決権行使助言会社（４）－理論的検討（その２）－「わが国の議決権行使助言会社の規制」」と題してご報告をいただきます。

よろしくお願いいたします。

○梅本　　よろしくお願いいたします。

本日は、「わが国の議決権行使助言会社の規制」について検討を加えていきたいと思います。

Ⅰ．はじめに

１．比較法の小括

前回見ましたアメリカと EU の議論では、これらの国におきましても、議決権行使助言会社に関

するルール作りは比較的最近行われたものであることが分かります。政権交代という事情があるにせよ、朝令暮改のようにみえるアメリカの状況というのは、規制の基本的なスタンスすら十分に定まっていない感すらありますが、民主党政権下のSEC におきましても、議決権行使助言会社を委任状勧誘規則において規制対象とするという姿勢自体は維持していることから、規制の必要性は認識されているようです。

なお、法規制という点では、前回詳しく触れていませんでしたが、オーストラリアが場合によると厳格な規制を行う可能性があるようです。これは数日前に資料を見つけたもので私も詳しく調べたものではないのですが、今年の４月にオーストラリア政府は、議決権行使助言会社の規制について諮問文書を公表しています。そこでは、議決権行使助言会社をライセンス制――これは「免許」と訳すべきなのか、あるいは実質的に「登録」と訳すべきものなのか分からないので、一応「ライセンス」と言っておきますが――とすることも検討しているようです。

現在のオーストラリアの規制では、金融商品の取引に関わる助言をする場合には金融サービスライセンスというものが必要になるようです。例えば自己株式取得の議案や公開買付けに関わる議案に関してアドバイスする業者にはライセンスが求められているそうでして、オーストラリアでは現在４つの議決権行使助言会社が活動しているそうですけれども、これらの会社は全てライセンスを得たうえで事業活動を行っているということです。

理論上は、金融取引に関わらない役員選任議案や報酬議案に限定して助言を行うには、ライセンスは不要です。今回の諮問では、金融取引に関わらない議案に対する助言についてもライセンスを必要とするよう法改正をすべきかどうかが諮問されています。

内容的には、アメリカの 2020 年規則のような、利益相反の開示や調査対象会社との事前の情報共有などの規制も検討されているようですけれども、ライセンスの内容次第ではかなり厳格なルールとなる可能性もあると言われていまして、このような規制の方向に対しては批判も強く、規制導入がなされるのか否か、あるいはなされるとしてどのようなものになるのかというのはまだ明らかではありません。パブリックコメントが６月に終了していますが、その後の状況は確認できていません。

オーストラリアは別としまして、EU にせよ、アメリカにせよ、議決権行使助言会社に対して厳格な規制を加えるところはありません。民事・刑事・行政上の制裁を伴う規制を加えようとする立場はいずれの国にもないようです。議決権行使助言会社に対して、厳格な規制を設けるべきだという主張もほとんど見かけません。

規制形式につきましては、アメリカは法規制であり、EU の場合も法規制が基本ですけれども、自主規制にその内容を多く委ねていますので、ソフトロー的なものと見ることもできそうです。ただ、EU につきましては、国によってディレクティブに上乗せする、独自の規制を設けるということはあり得ることでありまして、各国の事情次第ではやや異なるものになるかもしれませんが、EU レベルではそうなっているということです。

規制の内容につきましては、どの国においても①利益相反の開示、②策定過程の透明化ないし助言内容の正確性確保等、これらの情報開示が中心ではないかと思われます。調査対象会社に調査レポートの事前チェック等をどの程度認めるのか、あるいは認めないのかという点については対立があるようです。この点を除けば、さほど大きな対立のある問題はないように思われます。

わが国の規制でありますスチュワードシップ・コードも、厳格な規制ではない、法規制ではないという点ではソフトローに多くを委ねる EU などと似ていまして、また規制内容も、各国同様に利益相反の開示や策定プロセスの透明化などであり、大きく異なるところはないように思われます。

ただ、仮に法規制にしたとしても、規制内容次第では、負担感の小さなものにとどめることは可能だと思われますので、将来的に法規制という選択肢を排除する必要はないように思われます。た

だ、この場合、アメリカのように委任状勧誘規制に定めを置くというような特異な形はとらないだろうと思われます。この点につきましては、黒沼先生が議決権行使助言会社に関する SEC のリリースに関連しまして、アメリカと日本の委任状勧誘規制の違いという点から以前検討を加えていらっしゃいます（資料版商事法務 428 号（2019）６頁）。

２．本日の報告内容

本日は、わが国において議決権行使助言会社に一定の規制を加えている日本版スチュワードシップ・コードの内容を中心に検討を加えたいと思っています。ただ、それに加えてもう１つ、蛇足になるかもしれませんけれども、議決権行使助言会社の規制の在り方というべきか、規制の前提となる競争条件を確保する方法というべきか、やや従来とは異なる見地から検討を加えてみたいと考えています。

上場会社の株式保有比率を増大させている機関投資家が、上場会社の株主総会において議決権行使を求められるようになってきましたが、その膨大な事務作業に苦労した結果、多くの作業をアウトソーシングしているというのが議決権行使助言会社の影響力の大きさの原因であることは前回見たとおりです。

議決権行使助言会社が一定数存在して競争環境にあるのならば、議決権行使助言会社の提供するサービスの質の確保というものは競争に委ねればよくて、議決権行使助言会社の規制という論点はそもそも問題になり得なかったのかもしれません。しかしながら、助言サービスを提供する議決権行使助言会社は、どの国においても１社あるいは数社に限られていまして、ほとんどが ISS の独占状態と言っていい状態ではないかと思われます。

ところで、イギリスにおきましては、議決権行使助言会社の影響力はさほど大きくないという Andrew Tuch という方の研究がありまして、本日はそれをご紹介しようと思って付け加えたところです。

イギリスにおきましては、伝統的に、議決権行使助言会社と類似のサービスを機関投資家の業界団体が提供しています。その結果、イギリスでは議決権行使助言会社の影響力はアメリカなどと比べて小さいと言われています。

議決権行使助言会社の新規参入等がほとんど見込めない現状を考えますと、イギリスを参考にして、機関投資家自身が業界団体等を通じて議案の分析・推奨といったサービスを提供できるようそれを妨げている障害を取り除き、議決権行使助言会社の事実上の過大ともいえる影響力を抑えるという方向で、つまり、規制が求められてきた ISS の独占という現状を改めることを考えるというのも一つのアイデアではないかと思われます。

Ⅱ．わが国における議決権行使助言会社の規制

１．スチュワードシップ・コードにおける規制の沿革

（１）2014 年スチュワードシップ・コード

2014（平成 26）年２月 26 日の最初のスチュワードシップ・コードにおきまして、議決権行使助言会社について部分的に記載はされていました。例えば「本コードの目的」の８におきまして、「本コードの対象とする機関投資家は、基本的に、日本の上場株式に投資する機関投資家を念頭に置いている。また、本コードは、機関投資家から業務の委託を受ける議決権行使助言会社等に対してもあてはまるものである」とされていたほか、機関投資家が議決権行使助言会社を利用している場合の対応について定める指針５－４に若干のコメントがなされていました。

（２）2017 年改訂版スチュワードシップ・コード

しかしながら、指針等で明示的に定めが置かれましたのは、2017 年改訂のスチュワードシップ・コードです。ここでは、議決権行使助言会社を対象とした指針５－５が新設されました。すなわち、「議決権行使助言会社は、企業の状況の的確な把握等のために十分な経営資源を投入し、また、本コードの各原則（指針を含む）が自らに当てはま

ることに留意して、適切にサービスを提供すべきである。また、議決権行使助言会社は、業務の体制や利益相反管理、助言の策定プロセス等に関し、自らの取組みを公表すべきである」とするものです。

この指針５－５が設けられた経緯は以下のとおりです。

まず、2016（平成 28）年４月 26 日開催の「スチュワードシップ・コード及びコーポレートガバナンス・コードのフォローアップ会議」の第７回で事務局から、「７点目でございますが、議決権行使助言会社は形式的な企業の対応を助長する結果につながらないよう、実質的な判断を行うよう努めるべきというご意見があったということでございます」と説明があり、この「ご意見」というのが、2015（平成 27）年９月 24 日の第１回会議における冨山和彦氏の意見です。「機関投資家の側におかれても、議決権行使助言会社の助言に形式的に依拠するのではなく、その利用に先立って、その質などを具体的に検証するなど、みずから実質的な判断を行う必要があるということであろうかと思います」との発言を指しています。方向性を示したものとしましては、ここでの事務局の説明が最初ではないかと思われます。

ただ、本格的な議論がなされましたのは、2017（平成 29）年２月 17 日の「スチュワードシップ・コードに関する有識者検討会」の第２回ではないかと思われます。アメリカや EU において議決権行使助言会社を対象とした規制が設けられていることが事務局から紹介され、わが国のスチュワードシップ・コードにも議決権行使助言会社に関する定めを盛り込むことが議論されています。全体的に利益相反の開示の必要性や十分な資源を投入しているか等の策定プロセスの開示は必要だという点で、検討会では合意が取れていたような印象を受けました。

フォローアップ会議も有識者検討会も機関投資家の関係者が参加していますが、アメリカと異なり、機関投資家の規制反対論は聞かれないのが興味深いところです。恐らく規制内容が、スチュワードシップ・コードにおいて一定の情報開示を求めるものにとどまるものだからではないかと推察します。

（３）2020 年再改訂版スチュワードシップ・コード

2020 年３月４日再改訂版スチュワードシップ・コードでは、原則８と３つの指針という形で、より詳細な規定が設けられました。

議決権行使助言会社の扱いが従来に比べて大きくなった理由といいますか、きっかけは、2019（平成 31）年４月 24 日公表の「スチュワードシップ・コード及びコーポレートガバナンス・コードのフォローアップ会議」の意見書（４）で指摘があったこと、これが大きかったのではないかと思われます。

一部読み上げますと、「2017 年のスチュワードシップ・コード改訂において議決権行使助言会社の責務が明確化されたものの、その助言策定プロセスが依然として不透明であり、取締役選任議案等について個々の企業の状況を実質的に判断するために必要な人的・組織的体制が備わっていないのではないか等の指摘がある。パッシブ運用が広く行われる中で多くの運用機関が議決権行使助言会社を利用している実態を踏まえると、企業の持続的成長に資する議決権行使が行われるためには、個々の企業に関する正確な情報を前提とした助言が運用機関に提供されることが重要である。こうした観点から、議決権行使助言会社において、十分かつ適切な人的・組織的体制の整備と、それを含む助言策定プロセスの具体的な公表が行われるとともに、企業の開示情報のみに基づくばかりでなく、必要に応じ自ら企業と積極的に意見交換しつつ助言を行うことが期待される」等々です。

このフォローアップ会議の意見書を受けまして、「スチュワードシップ・コードに関する有識者検討会」（１回～３回）におきまして議決権行使助言会社についてや、機関投資家による助言会社の活用状況についての議論があり、この間にアメリカの SEC 規則改正案が公表されていますが、この

ような経緯を経て 2020 年のスチュワードシップ・コードが策定されたということです。

２．わが国のスチュワードシップ・コードの個別的検討

前回見ましたEUの規制と同様、ISSはわが国のスチュワードシップ・コードにつきましてもコンプライアンスステートメントを公表していますが、全体的には EU の場合とさほど異なるものではありませんので、コードの内容を検討する中で必要な範囲で触れるにとどめます。

（１）情報公開は英語でよいのか？

まず、原則８「機関投資家向けサービス提供者は、機関投資家がスチュワードシップ責任を果たすに当たり、適切にサービスを提供し、インベストメント・チェーン全体の機能向上に資するものとなるよう努めるべきである」についてです。

原則８全体に言えることですが、このような情報開示を求める趣旨は、限られた数の議決権行使助言会社が機関投資家の議決権行使に大きな影響力を持つに至り、上場会社の重要な決定が行われる株主総会の結果を左右する力を持つに至ったことから、開示を通じてそのサービスが適正になされることを目的としているのではないかということは、再三申し上げているとおりです。念頭に置かれているのはわが国の上場会社の株主総会への影響力であると考えられ、前述のフォローアップ会議の意見書の意図も、わが国の上場会社の株主総会の議案に対する推奨を問題にしているものと思われます。かかる趣旨からしますと、情報の公表は英語ではなく、日本語でなされるべきではないかと考えるのですが、大手２社である ISS もグラスルイスも、英語でしか情報を開示していません。

ただ、議決権行使助言会社が規制趣旨に沿わない開示をしているかというと、必ずしもそういうわけではなくて、規制当局が日本語での開示を求めていない節があり、そちらの方が問題ではないかと私は考えます。

スチュワードシップ・コードの 2017 年改訂時のパブコメ 32 番では、「指針５－５が求める議決権行使助言会社による自らの取組みの公表について、公表される内容は、日本国内の上場企業及び受益者である国民一般に認識されるべきであることから、日本語で公表されることが望ましいと考える。これにより、議決権行使助言会社もまた、受益者等により、適切に評価または淘汰されることが望ましいと考える」とのコメントがありました。個人的には、もっともな内容だと思います。

ところが、金融庁の回答は「貴重なご意見として承ります」、つまり、霞が関用語として対応するつもりはないということなのでしょう。金融庁としても英語の開示で差し支えないという立場のようでありまして、実際に 2020 年版でも日本語での開示を求めていません。しかし、日本語によらない開示を許容することは果たして前述した規制趣旨に沿うものなのかどうか、私は常々疑問に思っているところでありまして、先生方のご意見を賜りたいところです。

（２）利益相反の開示

次に、指針８－１ですが、「議決権行使助言会社・年金運用コンサルタントを含む機関投資家向けサービス提供者は、利益相反が生じ得る局面を具体的に特定し、これをどのように実効的に管理するのかについての明確な方針を策定して、利益相反管理体制を整備するとともに、これらの取組みを公表すべきである」という内容です。

議決権行使助言会社の利益相反の開示あるいは管理体制の開示につきましては、欧米におきましても開示規制の対象とされている事項です。議決権行使助言会社の調査や推奨内容を適正なものとするうえで重要な開示事項であると思われます。ここでは、利益相反が生じ得る局面の特定と管理体制整備と取組みを公表すべきであるとされています。

ISS の日本版スチュワードシップ・コードに対するコンプライアンスステートメントにおきましては、前回扱った EU の最良慣行規範に対するコ

ンプライアンスステートメントとほぼ同じような内容の事項が記載されています。

ただ、基本的な問題としまして、日本において潜在的利益相反がどの程度深刻なのか、あるいはそうでないのかは、公表されている情報だけではイメージしにくいのも確かです。例えば、わが国におきまして再三問題になります、コンサルティング部門の ICS と契約している会社というのは実際のところ何社ぐらいあるのか、あるいはほとんどないのかという情報は、開示されてもよいのではないかという気がします。

議決権行使助言会社がグローバルに行っている抽象的な取組みや実務が説明されても、我々としては、日本の問題としてどうなのかというところに関心があるわけでして、具体的に ISS 全社としてどう取り組んでいるのかということとはちょっと関心がかけ離れているのではないかという気がします。

（3）助言策定プロセス

次に、指針８－２「議決権行使助言会社は、運用機関に対し、個々の企業に関する正確な情報に基づく助言を行うため、日本に拠点を設置することを含め十分かつ適切な人的・組織的体制を整備すべきであり、透明性を図るため、それを含む助言策定プロセスを具体的に公表すべきである」です。

この助言策定プロセスの公表のところにつきましては、注がありまして、「助言策定プロセス」については、「個別の議案に係る助言に当たっての対話の内容等を念頭に置いているものではなく、一般的に、助言策定に当たって、依拠する主な情報源、対象企業との対話の有無、態様等を公表することが考えられる」と説明されています。コンプライアンスステートメントも大体これに沿った内容になっています。

また、「議決権行使助言会社において、議決権行使の助言についての方針を策定する際にも、当該方針は、できる限り明確なものとすべきであるが、単に形式的な判断基準にとどまるのではなく、投資先企業の持続的成長に資するものとなるよう工夫すべきである」との補足的な説明も注書きでなされています。

（4）日本拠点の設置

さて、この指針８－２で興味深い点、2020 年版スチュワードシップ・コードで注目されるのは、日本の拠点設置について言及されているところです。前回見ました EU の株主権ディレクティブでは、規制の対象となる議決権行使助言会社について、EU 域内に「施設」を有するものであれば全て対象にするとされていました。

これに対して指針８－２の趣旨は、規制対象をどう捉えるかという問題ではなくて、十分なリソースで調査・分析活動を行うに当たっての具体例として拠点設置が示されているという点が異なるのかなと理解しました。例えばパブコメ 157 番への回答では、「日本拠点の設置は、議決権行使助言会社が個々の企業に関する正確な情報に基づく助言を行うための、十分かつ適切な人的・組織的体制の整備の代表的な具体例の一つを示したものです。したがって、個々の議決権行使助言会社の置かれた状況に照らして、十分かつ適切な人的・組織的体制の検討が進められることを期待します」とされています。

日本拠点設置に懐疑的な意見を寄せたパブコメの 158～160 番への回答では、「ご指摘の点については、議決権行使助言会社が、日本に拠点を設置することにより、企業との意見交換等が円滑になされる場合があると考えられるため、指針８－２において、議決権行使助言会社について、日本に拠点を設置することを含め十分かつ適切な人的・組織的体制を整備すべきとしています」とされている点からも、このあたりは明らかではないかと思われます。

ISS コンプライアンスステートメントでは、日本の拠点について、2001 年に東京に支部を設けたことが言及されています。

（5）人的・組織的体制の開示は世界全体の数値

で足りる？

ISS のコンプライアンスステートメントでは、人的リソースについては、EU の規制と同じく、ISS の世界における活動についてのみ記載されています。日本の上場会社の調査分析活動に従事するスタッフについては情報開示されていません。この点につきましては、既に 2017 年の有識者検討会でも次のとおり指摘されていました。

2017 年改訂時の「スチュワードシップ・コードに関する有識者検討会」第３回（2017（平成 29）年３月 22 日）での、ガバナンス・フォー・オーナーズ・ジャパンの小口俊朗氏の発言です。「グローバルにこれだけ人がいますよ、グローバルに体制が整っていますよというところで終わってしまうことが懸念されるのです。それで肝心の日本株の部分に絞った開示まで多分行かないと思うんですよね。日本株に関する取組みと、その開示を求めるという趣旨であるのであれば、そこははっきり書いたほうがいいのかなと、実務的な話で恐縮ですけれども……」とおっしゃっています。恐らくこの小口氏の発言は、日本の上場企業の株主総会に対する助言業務を行う中で、調査分析のための適正な人的・組織的体制が整備されているのかどうなのかということを問題にするのであれば、日本株を対象とした部分について開示すべきではないのかと。ISS が EU や日本のコンプライアンスステートメントで書いてあるような、本体も合わせて何人のスタッフがいるという開示では、ちょっと趣旨から外れるのではないかなと。小口氏はそこのところはちゃんと対応してもらいたいという発言をされたのですけれども、今日に至るまで特段対応はされていないようです。

この点につきましては、９月の本研究会の質疑におきまして、川口先生に加えて私も質問させていただいたのですが、ISS 日本代表の石田氏から、日本の上場会社だけの調査・分析スタッフ等の数値を開示することは、誤解を招くおそれがあるので難しいという発言がありました。

日本株専門以外の部署とも協力するので、日本株調査のスタッフだけを開示しろと言われるとミスリーディングになるということでしたが、たしかに、理解できないわけではありません。しかし、フォローアップ会議において、必要に応じて助言会社は上場会社と意見交換することが求められていたということは、日本の拠点の人的・組織的体制がどうなっているのか、という問題関心ともつながるわけでして、開示の仕方を工夫して、日本株に対応するスタッフがどの程度いるのか、概数だけでも開示はなされてもいいのではないかとも考えます。

比較対象としていいのかどうか分かりませんが、10 月の本研究会に報告にいらっしゃったブラックロック・ジャパンの江良氏は、日本拠点の人数や世界各地の支部の人数についてもかなり明確に数値を示して下さいましたが、それでブラックロックの調査分析体制に誤解が生まれることはないように思うのです。議決権行使助言会社についても是非踏み込んだ開示をお願いしたいところです。

（６）情報の正確性確保と企業との情報交換

次に、指針８－３「議決権行使助言会社は、企業の開示情報に基づくほか、必要に応じ、自ら企業と積極的に意見交換しつつ、助言を行うべきである。助言の対象となる企業から求められた場合に、当該企業に対して、前提となる情報に齟齬がないか等を確認する機会を与え、当該企業から出された意見も合わせて顧客に提供することも、助言の前提となる情報の正確性や透明性の確保に資すると考えられる」についてです。

①原案修正

まず、指針８－３の前段は、原案では「議決権行使助言会社は、企業の開示情報のみに基づくばかりでなく、必要に応じ、自ら企業と積極的に意見交換しつつ、助言を行うべきである」とされていました。しかし、パブリックコメントにおいて、「あたかも開示情報のみに基づく判断は不十分で、必ず企業と意見交換をしなければならないかのような規定に受け止められる。議決権行使に限らず、投資家の投資判断は、企業の開示情報に基づくこ

とが基本であ」るとの意見（パブコメ 162 番）を踏まえて、現行のように、「企業の開示情報に基づくほか、必要に応じ」という文言に変更されました。

②対象会社と調査レポート等の情報共有

指針８－３の後段は、対象会社と調査レポート等の情報共有というしばしば論点となるところですが、指針８－３の文言のみを見ますと、読みようによっては、対象会社、当該企業にチェックする機会を与えて、それについてまた顧客に当該情報を提供する必要があるかのように読めますけれども、あくまで８－３の後段は、そういった方向もありますよねという程度のことを書いているにすぎないということです。

指針８－３の後段に対しては、「議決権行使助言会社に対して、助言内容を発行会社に事前確認させる機会を与え、発行会社の意見を顧客に提供することを、より強く促す記載内容にしていただきたい」という意見（パブコメ 167 番）がありました。これはアメリカの 2020 年の SEC 規則案と同じ方向を考えておられる意見ではないかと推察され、また上場会社の側としては、こういった考えの会社が少なくないのではないかと思われます。

これに対しては、パブコメ回答では「指針８－３の後段は、助言の対象となる企業に対して、前提となる情報に齟齬がないか等を確認する機会を与え、当該企業から出された意見も合わせて顧客に提供することも、議決権行使助言会社から提供される助言の前提となる情報の正確性や透明性に資する取組みの一つとして考えられる旨を示したものです。一方で、このような取組みを具体的に実施するに当たっては、個々の議決権行使助言会社の置かれた状況に照らし、「必要に応じ」、自ら積極的に意見交換を行うものとしています。ご指摘のような企業側の株主総会資料の早期開示については、「スチュワードシップ・コードの再改訂に当たって」において企業側の課題の一つとして取り上げており、今後、フォローアップ会議や金融庁を含む関係者において更に検討を行うことが期待されます」と、株主総会資料の早期開示の問題として最後まとめられていますけれども、回答の内容としてはもっともなことではないかと思われます。

評価対象の会社が公表前の調査レポートの内容をチェックできるようにすべきかについては、わが国のスチュワードシップ・コードでは特にかかる手続を求めているものではないと言えます。

前回見ましたように、対象企業による事前チェックの問題は、アメリカの SEC 規則で重要な論点とされてきました。2020 年規則の原案段階では、基本的にそれを認める方向でルールベースの規制が設けられていましたが、パブリックコメントを経た最終的な規則では大幅にプリンシプルベースの規制に修正されまして、2021 年の規則改正案では、この部分はばっさりと削除されることになりました。

日本では、外国と比較すると総会関係資料の公開時期が遅いため、助言会社と情報共有してから対応を検討しては間に合わないというところが多いのかもしれません。いずれにせよ、総会関係資料の早期開示は、別途議論する必要がある問題ではないかと思われます。

③議決権行使助言会社の評価への対応手段

議決権行使助言会社の推奨内容が形式的に過ぎるということがしばしば批判対象とされています。そういった場合に、評価対象の会社は反論を公表することが多いのですけれども、それ以外にすべきことはないのかという点で、2017 年コード改訂時の「スチュワードシップ・コードに関する有識者検討会」第２回（2017（平成 29）年２月 17 日）での議論が、私個人的には興味深く感じました。

それは石油元売会社 JXTG ホールディングス（現在の ENEOS ホールディングス）副社長の川田順一氏のコメントです。ちょっと長いのでかいつまんで申し上げますと、原油の備蓄義務を法律上負っている石油元売会社は在庫評価損が生ずるリスクを常に負っている。経営努力にもかかわらず、原油価格次第では連続して赤字に陥ることがあり

得る。他方 ISS は、議決権行使基準において ROE が一定数を下回れば、原則として経営トップの選任議案は反対推奨することにしています。しかし、石油元売会社の現状からするとそれは合理性を欠くと、そのように ISS に説明したが、受け入れてもらえなかった。ISS の言い分は、個別の会社の事情を聞いていると指針を適用できなくなってしまうということのようです。そこで、川田氏らは内外の機関投資家に対して手紙を送付して事情を説明したら、反対票が賛成票に変わったという、そういった体験を語っておられます。

この事例は、議決権行使助言会社の判断の形式主義というものをよく表したエピソードであると同時に、会社側の日頃の IR 活動などの重要性を示唆するものであるように思えて興味深かったです。会社の IR 等が十分に行われていれば議決権行使助言会社の形式的な判断を懸念する必要はない、とまでは言えないかもしれませんが、議決権行使助言会社の議決権行使基準は毎年度公表されているわけですから、それを見れば自社の議案に対して問題があるかないかということは事前に分かるものです。で、問題がありそうなものについては、議案自体を変えるか、あるいは機関投資家の判断を変えるかという形で対応するほかないと思われるのですけれども、ENEOS の事例は、機関投資家に働きかけるという方法をとったものです。

現在の ENEOS の開示情報に興味を持ちましたので、調べてみましたところ、決算説明ですとか有価証券報告書などに記載されている営業利益などにつきましては、在庫の影響を除いたものと除かないものの二本立てで数値を公表しています。決算説明会でも、在庫の影響のあるもの、ないものといった形で説明しているので、川田氏がコメントされたときからか、あるいは従来からか分からないのですけれども、自社の固有の情報について一般の投資家に対して理解できるように説明する努力をしている具体例といえるのではないでしょうか。もちろん、議案によっては、常にこのような対応が可能なものばかりではないと思われますが、形式主義を批判するばかりではなくて、自社の IR 活動を見直す契機と捉えるべきではないかと感じるところではあります。

（７）その他　～推奨内容の事後開示

わが国のスチュワードシップ・コードに限らず、議決権行使助言会社に対する主たる規制内容は、何度も言いますように、潜在的利益相反の開示と調査レポートの正確性・適正性を確保する手段の開示を求めるものです。

しかし、議決権行使助言会社の調査レポートや推奨内容を適正にするという目的との関係で、このような規制で足りるのだろうかという疑問を持ちます。利益相反が管理されたり、人的・組織的体制が整備されたりしていること、その情報開示をさせるということは、推奨内容等に問題がないことを必ずしも意味しません。むしろ、個別の推奨内容が世間の目から見て合理性を欠くものとなっていないか、事後にチェックできる仕組みというものが必要ではないかと考えます。

こう思いましたのは、２年前に住設機器メーカーの LIXIL でありました内紛の経過を観察した経験からです。この事件では株主側と会社側が提案した役員候補のいずれが多数を占めるかという点に注目が集まりましたが、議決権行使助言会社の推奨内容は、株主側に同情的だった世間の予想に反して ISS もグラスルイスも、会社側候補が多数を占めるような推奨を行っていました。

問題は、どちらが正しかいのかということではなくて、議決権行使助言会社の推奨内容は新聞報道でしか一般の人には分からないということではないかと思います。議決権行使助言会社の推奨内容等は、原則として契約先の機関投資家と場合によってはメディアしか知り得ず、事後であっても議決権行使助言会社の推奨内容は一般には公開されません。ましてや、推奨理由等を示したレポートが対外的に明らかにされることはまずありません。

2017 年改定スチュワードシップ・コードを契機として、多くの機関投資家による議決権行使結果の個別開示や理由の開示が行われるようになりま

した。個々の株主総会でどのような議決権行使を行ったかということを開示すれば、事後に当該議決権行使の適切さ等について検証することが可能となり、有意義な改訂であったと個人的には考えております。実際に利益相反管理を適切にやっていると開示を行っている某生保会社について、事後開示をみると団体保険契約先の上場企業の議案に対してかなり甘い議決権行使をしているように思われる節があったりするようです。事後開示が行われているからこそ、そのような邪推といいますか推測ができるわけでありまして、具体的に個別の議案にどのような議決権行使をしたかを明らかにさせることは、事後的にその行為の検証可能性を確保するという意味で重要ではないかと思われます。

議決権行使助言会社についても同じように、個々の株主総会の議案に対する推奨内容を個別開示することを求めるべきではないかと考えます。事前に議案の推奨内容等の開示を求めたりしますと、議決権行使助言会社のビジネスモデルそのものを破壊してしまいますが、事後開示であれば、さほど大きな問題にならないのではないかと推察します。９月の本研究会の折に ISS の石田氏に質問させていただいたところ、そのような開示は行なっていないというご返答をいただきましたけれども、勝手な印象かもしれませんが、必ずしも否定的ではなかった感じがしました。ぜひ検討していただきたいと考えました。

日本版スチュワードシップ・コードの具体的な検討は以上ですけれども、やや異なる視点、かなり毛色の違ったところからもう一つ議論を追加させていただきます。

Ⅲ．機関投資家の集合行為問題という見地から規制を考えてみる

１．機関投資家の集合行為問題と議決権行使助言会社

これまで議決権行使助言会社を直接規制する議論をしてきましたが、議決権行使助言会社を規制すべきだという理由・根拠は、これもくどいですけれども、ほぼ１社の議決権行使助言会社が多くの機関投資家に利用されて、その推奨内容が事実上、上場会社の株主総会に大きな影響力を有するということによるものです。その国の産業の根幹を担うといってもよい上場会社の重要事項を決定する株主総会の賛否推奨が、万一、不正確な情報や不適切な評価によって歪められてしまっては問題だというのが規制論の主たる理由です。

このことは、逆に言うと、議決権行使助言会社の影響力がさほど大きくなければ、規制の必要性は高くないと言うこともできるのではないかと思われます。

機関投資家が議決権行使助言会社を利用するのは、議決権行使のためにかかる手間暇等のコストを低減させるサービスを提供してくれるからです。依然として６月下旬に上場会社の株主総会が集中的に開催されるわが国はもちろん、アメリカにおきましても株主総会の開催は４月、５月のシーズンに集中しています。自ら個々の議案について情報を収集・分析し判断する能力を有する大手機関投資家であっても、重視すべき議案にフォーカスしてリソースを投じ、主たる争点のない議案については議決権行使助言会社にアウトソーシングするのが合理的であるということは、10月の研究会でブラックロックの江良氏が報告されていました。

ところで、機関投資家が保有株式について議決権行使をする動機は、それにより投資先企業の企業価値が上昇する、あるいは下落を阻止することが期待されるからです。しかし、機関投資家には著名な「集合行為問題」、すなわちガバナンスに関与することによるコストは自らが負担するのに対して、その成果はガバナンスに関与しない株主も含めて全ての株主に及んでしまう、そもそもコスト負担をするインセンティブが生まれないという問題が存在します。

現在のアメリカや日本のように、多くの機関投資家が、議決権行使助言会社の推奨に従って上場会社の株主総会において同じ方向で議決権行使をすることは、事実上この集合行為問題を解決して

いると見ることもできそうです。議決権行使助言会社の議決権行使基準は、あるべきガバナンスについて機関投資家などステークホルダーの意見が反映されており、最良慣行に沿った議案に賛成、それに反した議案に反対する形で協調的な投票行動が採られ、そうすることによって投資先企業への影響力が担保され、機関投資家の意図が実現すると見ることもできます。

機関投資家の実際の利用目的は別としまして、議決権行使助言会社を利用することにより投資先企業のガバナンスの改善と企業価値の向上が図られるのであれば、議決権行使助言会社が集合行為問題を事実上解消ないし緩和しているという見方も可能ではないかと思われます。

ところで、議決権行使手続の煩雑さの解消にせよ、集合行為問題の解決にせよ、議決権行使助言会社にだけしかその役割を担うことができないかというと、そういうわけではない。近年、アメリカとイギリスにおける議決権行使助言会社の影響力の違いについて比較検討した興味深い研究が公表されています(Andrew Tuch, Proxy Advisor Influence in a Comparative Light, 99 B.U. L. Rev.1459(2019))。イギリスでは、機関投資家の業界団体が議決権行使助言会社と類似のサービスを提供しているため、議決権行使助言会社の影響力はさほど大きくないといった内容のものです。

議決権行使助言会社の影響力が過大なものではなくなれば、規制の必要性も大きな論点ではなくなります。果たして日本でもイギリスと同じことができるのかどうか、頭の体操にお付き合い頂ければ幸いです。

２．イギリスにおける議決権行使助言会社の影響力の相対的な低さと規制

Andrew Tuch によると、アメリカとイギリスは先進的な証券市場を有し、上場企業の株主に機関投資家が多いことなど類似した点がかなり多いにもかかわらず、イギリスではアメリカほど議決権行使助言会社の影響力は大きくないと言われます。

主たる理由は、イギリスにおいては、機関投資家の業界団体が上場会社の株主総会において議決権行使ガイドラインを設定したり、個別の議案の情報収集・分析を行うなど、コーポレートガバナンスに積極的に関わっており、そのため議決権行使助言会社の役割がアメリカなどに比べて相対的に低くなっているということです。

アメリカとイギリスの比較分析をする中で、両国のコーポレートガバナンスにおいて機関投資家の役割が異なるようになった原因の一つとしてTuch が指摘するのが、大量保有報告制度です。ほかにもいろいろ指摘されていますが、制度上の問題として大きなウエートを持つのは大量保有報告制の違いではないかと分析しています。

アメリカでは、ご承知のように機関投資家が協調してガバナンス活動を行おうとしても、大量保有報告制度が障害になります。アメリカでは、証券取引所法 13 条(d)項におきまして、投資家が上場会社株式の５％超を取得した場合には、10 日以内に SEC や発行会社等に届け出ることが求められています。

この大量保有報告制度には、共同保有者といいますか、「Acting in Concert」ですから「共同行為者」と言った方がいいのでしょうか――の開示義務が定められています。共同保有者の保有株式を合算して開示することは、機関投資家にとってはほぼ不可能なほどの事務負担をもたらすものです。保有株式の対象会社に対して協調して株主権行使をしたり、業界団体を通じて協調した行動を取ったりすることは、共同保有者としての開示リスクを負うことになるため、アメリカの機関投資家が行うことはまずありません。

加えて、機関投資家のように原則的に支配権取得を意図しないような特定の投資家については、開示規制が緩やかになっています。通常はスケジュール 13D ですけれども、機関投資家はスケジュール 13G という簡易化された届け出をすれば足りるということです。経営に関与する場合は、この 13G を使うことができません。アメリカにおいては、機関投資家がイギリスで行っているような協働エンゲージメントを行う場合には、共同保有者

に該当すると同時に簡易な報告書の提出もできなくなるという不利益を被ることになります。

これに対してイギリスにおいては、大量保有報告制度を定めているUK Listing Authority（上場審査局）の定めるDisclosure Rules and Transparency Rules（DTR)では、「協調して議決権行使をすることにより、当該発行者の経営陣に対し長期的な共通の方針（lasting common policy）を採ることを互いに義務付ける合意をした場合（5.2.1(a)）には、他方の株主の保有する議決権数を合算することが求められています。lasting common policy、ここのところがポイントですが、単に個々の株主総会において同一の議決権行使をするだけでは、これに該当しないと言われています。イギリスの大量保有報告制度では、保有目的の開示も求められていません。アメリカと異なり、業界団体を通じて株主総会における共同行為を行ったとしても、イギリスの場合は大量保有報告制度による開示の強化にはつながらないということです。

注目すべきは、イギリスの規制は偶然このような形を採ったのではなく、規制の制定・改正におきまして、機関投資家が従来伝統的に行ってきた集団的スチュワードシップ活動を阻害しないように政府が配慮してきたことが影響しています。つまり、集団的スチュワードシップ・コード、協働エンゲージメントがまず先にあって、それを阻害しない形で大量保有報告制度が作られているということです。イギリスにおきましては、政府が機関投資家による協調的なガバナンスへの介入を促進する傾向が昔からあったと言われるからではないかと思われます。

３．わが国への示唆

わが国の大量保有報告制度はアメリカの制度を参考にして作られていますので、同じように機関投資家が共同してガバナンスに関与するとするならば、「共同保有」の該当性と「重要提案行為」の該当性とが問題になると思われます。

わが国のスチュワードシップ・コードは、イギリスのように「他の投資家と協調して個別先企業に対して行動を起こすこと」を促す原則を採用しているわけではありません。2017年の改定、2020年の再改定で、「機関投資家が投資先企業との間で対話を行うに当たっては、単独でこうした対話を行うほか、必要に応じ、他の機関投資家と協働して対話を行うこと（協働エンゲージメント）が有益な場合もあり得る」（原則４・指針４－５）との規定が加わったにすぎず、イギリスほど踏み込んだものとはなっていません。せいぜい株主権行使に関わらない話し合いを前提とするものですから、共同保有についても、重要提案行為についても該当しないという解釈が示されています。

逆に言うと、現行規制を前提とするならば、わが国の機関投資家がイギリスのように業界団体を通じるなどして議決権行使助言会社の代替的な活動を行うというのは難しいことになると考えられます。

わが国におきましても、大量保有報告制度を改正して、イギリスのように機関投資家が業界団体等を通じて積極的に上場会社を規律するという方向を探るのであれば、議決権行使助言会社の影響力を抑えることになって、議決権行使助言会社の規制などは議論の実益がなくなるかもしれません。

とはいえ、イギリス型の機関投資家の活動が議決権行使助言会社の影響力を低下させる効果があるとしても、そうすることが望ましいのかは自明とは言い難いうえに、外国人投資家の株式保有比率の上昇を考えますと、国内の機関投資家の協調を前提としたやり方が将来的に持続可能かどうか、これはイギリスにも妥当することですけれども、必ずしも明らかではないように思われます。

Ⅳ．おわりに

わが国のスチュワードシップ・コードの規制内容は、EUやアメリカの議決権行使助言会社の規制と比べて大きく異なるものではありません。少なくとも現時点ではグローバルスタンダード並みと言えるのかもしれません。しかしながら、幾つかの問題点を指摘する必要はありそうです。

議決権行使助言会社の規制の必要性を指摘したフォローアップ会議意見書において、「正確な情報に基づく助言を行うため」「十分かつ適切な人的・組織的体制を整備」し、「透明性を図るため、それを含む助言策定プロセスを具体的に公表すべき」であるとされたのは、わが国の上場会社の株主総会における助言策定プロセスの透明化を求めたものと考えるべきでありまして、それにもかかわらず、議決権行使助言会社において、わが国の株主総会に関連しないグローバルなスタッフ等を含めた開示しかなされていない。しかも、規制当局がそれを黙認しているというのは問題ではないのかという気がします。

加えて、規制趣旨からしますと、わが国の国民に対する情報開示が求められているわけですから、英語ではなく日本語で開示がなされるべきだと考えるのですが、こちらについても規制当局の関心は薄いようです。「議決権行使助言会社が個々の企業に関する正確な情報に基づく助言を行うための、十分かつ適切な人的・組織的体制の整備の代表的な具体例の一つ」（パブコメ 157 回答）として日本拠点の設置の検討は求めるが、情報開示は日本語でなくても構わないという理屈は理解困難です。現状のスチュワードシップ・コードの実務は、情報開示を求める規制趣旨に沿っているのかどうなのかというところは疑問が残るところです。

日本の現状は、議決権行使助言会社の規制について、法規制によるべきか、コードで足りるのかという議論をする以前の問題で、規制の必要性や規制の趣旨について再度議論を詰めておく必要があるのではないかと思われます。規制趣旨について再確認したうえで、その趣旨が実務に反映されるようにすることがまずは重要ではないかと考える次第です。

また、議決権行使助言会社の利益相反の管理にせよ、正確な情報に基づく助言にせよ、事前開示よりも事後開示の方が、意味があるのではないかという気がします。利益相反管理や十分かつ適切な人的・組織的体制について助言会社に説明させるよりも、潜在的利益相反を有する会社の株主総会の議案や経営権争いに関連した議案において、議決権行使助言会社の助言内容を事後的に検証できるようにする方が、その職務の適切さの確保を促すうえで有益ではないでしょうか。

なお、議決権行使助言会社の新規参入が期待し難く、助言サービスに事実上競争原理が働いていない現状から、イギリスを参考にして、機関投資家の業界団体等を通じて情報分析等のサービスを提供させることで議決権行使助言業において、競争的な環境を整備するという方向も、規制の在り方といいますか、政策論的な話としては考えられるところではあります。しかし、そのためには、大量保有報告制度の規制変更など様々な対応が必要となりますが、それが望ましいかどうかも含めて、なお検討が必要ではないかと考えられるところです。

報告は以上です。ご教示いただければ幸いです。

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【討　　論】

○川口　　ご報告ありがとうございました。

それでは、どこからでも結構ですので、ご質問、ご意見があれば、よろしくお願いいたします。

【議決権行使助言会社に開示を求める趣旨】

○伊藤　　ご報告どうもありがとうございました。

すごく初歩的なことになるかもしれませんけれど、議決権行使助言会社に関する開示を要求するのはそもそもなぜなのかというところを伺いたいです。

今日のご報告では、例えば情報公開は日本語で行うべきであるとか、あるいは推奨内容の事後開示が望ましいというご提案が示されていまして、確かに、一般公衆のために議決権行使助言会社に関する開示を行わせるべきであると考えるのであれば、そういったご提案も素直かと思います。ただ、そもそも一般公衆のために議決権行使助言会社に関する開示を要求することに何の意味があるのか、私にはいま一つ分からないところがありま

す。

といいますのは、議決権行使助言会社を実際に利用するのは機関投資家です。では、一般公衆の側は、例えば議決権行使助言会社の開示を見て、助言策定プロセスについて情報を得て、自分がお金を拠出して、そのお金を運用してくれている機関投資家について、自分が考えるに、そのようないいかげんなプロセスで助言を策定しているような議決権行使助言会社を使っているのはけしからんと言って責任追及をするといったことが期待されているのでしょうか。

あるいは、そういった具体的なアクションが期待されていないのであれば、なぜコストをかけさせてまで一般公衆に対する議決権行使助言会社に関する開示を要求することが望ましいと言えるのか、いま一つ腑に落ちないところがあるわけです。

○梅本　　確かに、議決権行使助言会社の規制という場合、議決権行使助言会社というのは、機関投資家の契約相手であって、議決権行使助言会社が直接上場会社に影響力を行使しようというのではなくて、そのサービス提供契約に基づいて情報を収集・分析・推奨するというに過ぎず、議決権行使の主体はあくまで機関投資家です。ただ、大手と中小、さらに海外の多くの機関投資家に分けて考えた方がいいかなという気がします。国内の大手は、確かにおっしゃるように、助言会社の助言があっても、自分たちで情報を収集・分析する能力があるので、一つの参考にして議決権行使をするのであって、極端な話、利益相反にせよ、何にせよ、別に公開してくれなくても構わないという立場なのかもしれません。

本来、機関投資家がしっかりやっていれば、それでいいはずで、前回の EU の自主規制でも、ISS のコンプライアンスレポートでも、助言会社側が強く言っているのは、議決権行使をする職務上の責任は個々の機関投資家にあるのであって、議決権行使助言会社ではないということで、それは確かにそのとおりなのですね。そのとおりなのですけれども、事実としてはノルウェーの年金基金が日本の上場会社の詳細な状況なんて分かりっこないので、議決権行使助言会社の推奨にそのまま乗って議決権行使しているという状況が存在していると思うのです。

そうなってくると、確かに議決権行使をしているのは機関投資家なのだけれども、建前は別として、株主総会に影響力を与えているのは事実上は議決権行使助言会社ということになります。こうなると一般公衆の目から見て、また当該推奨対象になっている企業やその株主にとってみると、状況によっては本当にちゃんと分析しているのか、利益相反があるのではないか等の疑問を持つことはありうるし、株主総会が不当な評価で歪められていないという安心感を提供する意味はあると思うのです。それに応えるために、議決権行使助言会社に対して情報開示を求めるのは一概に不当とはいえないと思うのですが。

○伊藤　　先生がおっしゃるような事実上の影響力が生じるかもしれないという話はよく理解できます。私が気になりますのは、それでは、そこで議決権行使助言会社にコストをかけさせて開示を求めることが、事実上の影響力が生じることの何か改善策になるのかというところです。

といいますのは、先生のおっしゃるような事実上の影響力というのは、あくまで機関投資家が適切に行動しないから生じる話だと思うからです。議決権行使助言会社に開示を求めるとして、その開示によって機関投資家の側の行動が変わるのかがいま一つ分からないということです。

事実上の影響が生じることを苦々しく思っている会社の経営陣からすると、少し胸のつかえがおりるとか、あるいは何かおかしな事実上の影響力が生じていることが一般公衆にも見えるようになるかもしれないということは分かるのですけれども、それを超えて、事実上の影響力が生じることの問題の解決に、そのような開示が論理的にどうつながるのかが、いま一つ分からないというのが、私の疑問なのです。

○梅本　　前回の議論と重なるのですけれども、前提として、助言会社の中に競争原理が働いていて、こいつはあかんからこっちに変えるというこ

とであれば、おっしゃるとおりだと思うのです。が、恐らくこの規制の議論の前提は、各国の規制の議論を見ても、もうほぼ１社か２社が独占的にサービスを提供しているじゃないか、選択可能性はないよねということだと思うのです。スーパーパワーとしての ISS が仕切っているのだったら、利益相反などについて開示をさせて、助言サービスが適正になされるようにさせようということではないかと思うのです。競争原理が働いていないということを前提として、ISS の独占的サービスを前提としながら、じゃあ、この ISS の提供するサービスが歪まないためにはどうしたらよいのか、というところではないかと思うのです。

○伊藤　　ISS の独占的サービスになっていて競争原理が働いていないという前提から始めるとしても、開示を求めることが、では何になるのかというところが、究極的に分からないところなのです。ISS が既に独占力を持っている。その者にコストを生じさせて何らかの開示をさせる。それで例えば ISS が、開示が強制されない世界に比べて、利益相反について慎重に対処するようになるとか、助言の策定プロセスはより注意深く、各企業の事情を可能な限り見るようなものになるとか、そういう期待を持っても大丈夫なのでしょうか。

○梅本　　うーん、期待はできるかもしれない……

○伊藤　　つまり、独占力を持つ者が気に入らないから何かコストをかけさせるという以上の効果があるのかが分からないというところなのです。

○梅本　　利益相反の開示については二面あるような気がします。一つは機関投資家に対するものです。当社はこの議案について利益相反を抱えています、抱えていません、といったことを助言サービス提供の内容として知らせるべきかどうか、という問題。もう一つは一般公衆に対して、当社は利益相反管理をちゃんとやってます、質の高いサービスを提供して上場会社の株主総会を歪めたりしていませんよという開示をさせる、そういった趣旨はあるのではないかと思います。

ただ、他の規制についてもいえますが、この種の事前の情報開示は、開示する側の裁量が大きくて、実態はどうであれ、利益相反は適正に管理している等々開示できるので、私個人的には、議決権推奨内容を個別に事後開示をさせて事後的にチェックできるようにした方がいいのかなと考えています。

規制趣旨の実効性という点からは、例えば、利益相反を適切に管理しているかについても、機関投資家が議決権行使の個別開示をしているように、議決権行使助言会社についても、事後に推奨内容を個別開示してもらい、あとから検証できるようにした方がよいと個人的には考えています。

逆に、事後の推奨内容の個別開示についてはどのようにお考えになりますか。

○伊藤　　ちょっとそこまで私自身は考えがまとまってはいないところです。ただ、先生のおっしゃるように、せめて何か開示をされる方がいいだろうということも、そうかもしれないなとは思うところでして、そこまで大きく反対するものではないのですけれど。

どうもありがとうございました。

【議決権行使個別開示の根拠―機関投資家と助言会社の違い】

○川口　　機関投資家の議決権行使の個別開示ですが、機関投資家は受託者責任を負っていますよね。そのため、議決権行使の個別開示をすることで、受託者責任を果たしていることを示すことができます。しかし、議決権行使助言会社は対象会社にそのような義務を負っていないのですね。そのため、個別開示を課すには、何か根拠が要るのではないですか。

○梅本　　利益相反ですとか人的・組織的体制というものを開示させるというのは、情報分析あるいは議決権行使の推奨内容を適切なものにするということが主たる目的だと思うのです。で、そうするうえで、利益相反の開示や人的・組織的体制の事前開示が有効かというと、むしろ事後的に開示させることによって検証可能性を確保するということの方がいいのではないかと思うのです。

とはいえ規制根拠という点では川口先生ご指摘のとおり詰めていくとなかなか簡単ではない気もします。先生がおっしゃるように機関投資家は受託者責任があります。だから個別開示すべきだという理屈は論理的に整理されていると思うのですけれども、議決権行使助言会社に推奨内容を個別開示させるとすると、趣旨・目的が違ったところから導き出されるのではないかという気はします。2014年のスチュワードシップ・コードでも、基本的に機関投資家に対するスチュワードシップ責任というのは、議決権行使助言会社を初めサービス提供者にも及ぶと言っているのは、何かやっぱり受託者責任の波及的なものが助言会社にも及ぶのではないかなという気がすると。だから、そこから何か根拠付けられるのではないかなという気はするという次第です。不十分な回答で申し訳ありません。

○川口　　ありがとうございます。機関投資家と同列に扱って良いのか疑問があったので、質問をさせていただきました。

【助言会社の規制根拠等について】

○黒沼　　伊藤先生のご質問は非常に重要な点だと思いましたので、ちょっと自分なりの答えを述べさせていただきますと、現在、議決権行使助言会社に対する規制の手がかりはスチュワードシップ・コードです。助言会社もスチュワードシップ・コードを採用しています。そうすると、スチュワードシップ・コードは、機関投資家の受益者の利益を図るということと、日本企業の中長期的な成長を促すということを目的にしているわけですから、助言会社のいろいろな行為の規制の目的もそこに求めることができるのではないかということです。

つまり、何のために開示その他の規制をするかというと、機関投資家の受益者の利益と企業の中長期的な成長ということに形式的には求められるということではないかと思います。

それから２点目、機関投資家との関係ですが、機関投資家は全て助言会社に助言を委ねているわけではないです。機関投資家によって違うと思いますけれども、例えば利益相反の高い投資先の議決権行使については、直接自ら行使するよりは第三者の助言を受けた方がいいということで、助言会社に委託をしていると思うのですね。それ以外については、機関投資家はそれぞれ議決権行使基準を自ら定めて、それに従って投票し開示しているという状況です。ですから、助言会社の日本における影響力がどの程度かということも、実証的に研究する価値はあるのかなと思っています。

それからもう一点として、助言会社の議決権行使の結果を事後的に公表・検証できたらいいというのはもっともだと思うのですが、機関投資家は議決権行使結果とその理由を個別に公表していまして、その中には、助言会社に従った部分も含まれているので、これも機関投資家によって違うと思いますけれども、「ISS による」というふうに理由を書く場合があるのです。ですから、それを見ると、ISS がどういう投票を行ったかというのは分かります。ただ、そこでは ISS その他助言会社が、どのような理由に従って行ったかというのは、それだけでは分からないというのが現状と思います。

質問じゃなくて申し訳ないのですが、ちょっとコメントさせていただきました。

○川口　　ありがとうございます。梅本先生、何かありますか。

○梅本　　いえ、お話を聞いて、頭の中がかなり整理された気がしました。ありがとうございます。

○川口　　黒沼先生の最初のところのご発言は、先ほどの私の質問に対するお答えにもなっているかと理解いたしました。

【スチュワードシップ・コードと議決権行使助言会社】

○伊藤　　今の黒沼先生のご発言について、一つ確認をさせていただきたいことがあります。スチュワードシップ・コードによると、企業の中長期的な成長と受益者の利益ということが様々な規制の目的になるというお話だったのですが、議決権

行使助言会社の場合の受益者とは誰だと考えるべきなのでしょうか。直接の契約の相手方は機関投資家でして、機関投資家のみを受益者と考えるべきなのか、あるいは機関投資家の背後にいる、機関投資家にお金を拠出している一般公衆までここでは受益者と捉えるべきなのかというところが、特に開示の規制との関係では、気になっているところです。

一般公衆まで受益者に含めるのは、受益者として非常に抽象的で薄いような気もいたしまして、そのあたりどう考えるべきなのか、お教えいただければと思います。

○黒沼　　私が発言してよろしいでしょうか。

○川口　　お願いします。

○黒沼　　スチュワードシップ・コードは、インベストメント・チェーンの様々な段階にいる金融事業者が自ら採用するものでして、そこで言う受益者というのは、最終的な投資家とか、あるいは年金の受給者のことを指しています。ですから、間接的なものですから、法的に議論をするのは難しいけれども、助言会社もそれを採用している限りは、最終の受益者の利益がそこでは目的になっていると理解されているのではないかと思います。

○伊藤　　なるほど、ありがとうございます。それはまた理解できるところでして、そうすると、やはり２つ目的はありますが、あくまで受益者の利益を第一に考えていくという話になると思うのですけれども、この理解で正しいのでしょうか。企業の中長期的な成長というところを強調すると、またかなり違和感のある話になってきますので。

○黒沼　　スチュワードシップ・コードを作った人たちはそういうふうに考えているということです。私は、スチュワードシップ・コードで日本企業が中長期的に成長するとは思っていませんので、ちょっとお門違いだと思っています。

○伊藤　　どうもありがとうございました。

【日本語での情報開示と英文開示】

○川口　　ほかはいかがでしょうか。それでは、つなぎの質問ですが、本日のご報告では、日本語での情報提供がなされていないという点を批判されていたかと思います。他方で、日本の証券市場で株式を公開している外国企業については、開示コストの削減などのために英語による開示が認められていますよね。本国で適切な開示基準に基づいて英語で開示がなされているような場合には、英語による有価証券報告書の提出ができ、この英文開示はほかの書類にも広がってきていると思うのですね。

そういう意味では、別に英語の開示でも構わないのではないかとも言えそうです。対象が日本人であるからといって日本語が必須という考えは、現在の金商法の世界では必ずしも採られていないようにも思うのです。でも、やはり議決権行使助言会社の場合は違うというふうにお考えなのでしょうか。

○梅本　　外国企業の英文開示の問題というのは、当該株式を売買対象にする投資家の話でありまして、当該投資家にとって見ると、英文開示をしているということを認識したうえで、英文の情報の分析能力のある方が投資対象にすればよいということなのだろうと思います。

それに対して議決権行使助言会社につきましては、先ほどの開示の必要性という議論、受益者に対するものだ、インベストメント・チェーンの一部にある議決権行使助言会社が間接的ながらも機関投資家の背後にいる受益者に配慮するのだということであれば、開示の対象者は多くの場合は日本の年金基金受給者であるとか、日本の保険契約者になるのではないかと思われます。英語読解能力の有無を問いません。

また、中長期的な企業価値の向上ということであれば、個々の企業のステークホルダーを念頭に置いているので、ここでも情報提供を受けるべき対象者は一般の日本人になる。もちろん、外国人投資家も日本株を手掛けておりますので、外国人投資家に対する英語の開示というものが無意味だと言うつもりはないのですけれども、多くの場合、これに関心を持つのは日本人であるということを考えると、日本語での開示がなされる必要がある

のではないかなと。

英語だけで開示してそれで足りるというのはどうなのだろうなという疑問を感じるということでございます。

○川口　　個人投資家ならばいざ知らず、機関投資家であれば英語ぐらいは読めよ、というようなこともあり得るのかなと思ったのですけれども（笑）。

○梅本　　機関投資家相手であれば、先生のおっしゃるとおり英語で足りると思います。しかし、これは最初の議論に関わりますけれども、その背後にいる受益者も念頭においたものである、あるいは中長期的な企業価値の向上という見地からの開示というのであれば、当該会社のステークホルダー、少数株主なんかも含められるのではないかと思いますので、日本版スチュワードシップ・コードで情報開示を求めながら英語での開示が許容されるというのは、やはり違和感があるということでございます。

○川口　　ありがとうございます。

【推奨内容の事後開示】

○前田　　推奨内容まで事後開示するのがいいという梅本先生のご提言には、大変説得力を感じましたし、先ほどの先生方の議論を聞いておりまして、スチュワードシップ・コードの基本的な思想に照らせば、根拠付けも何とかできるのであろうと思います。

ただ他方で、推奨内容まで開示させることに伴うマイナス面、特に機関投資家の議決権行使結果の個別開示のところで反対論者が主張していましたように、開示をさせますと、どうしても推奨の結果の方に重きが置かれるというか、注目が集まって、その結果、形式的に無難な推奨しかされなくなってしまい、ひいては企業と意見交換をして推奨内容を形成していくというデリケートな作業が行われなくなってしまうのではないかという問題がないではないように思うのです。このことはそれほど懸念する必要はないのか、梅本先生のご感触をお聞かせいただければ幸いです。

○梅本　　先生のおっしゃるように、結果のみに注目されて無難なものになるのではないかということについては、私はあまり考えたことがなかったですが、そういう側面もあるのかもしれません。ただ、ISS の石田氏がおっしゃっていたように、多くの議案につきましては、事前の議決権行使ガイドラインを当てはめていけば結果は分かるというようなもので、事後開示させたとしても予想された推奨内容がずらっと並ぶのではないかと思うのです。

問題は、例えば LIXIL ですとか、あるいは最近の買収防衛策の株主総会であったり、そういった注目を浴びる株主総会の議案に対して議決権行使助言会社がどのようなスタンスを採るのかというもの、もちろんメディアが報じてくれるので、それでいいといえばいいのかもしれないですけれども、メディアが報じないけれども重要な株主総会というのは、恐らく幾つもあると思うのですね。そういったものについて議決権行使助言会社のスタンスというのをできれば知りたいと。何でそうなのかという、本当はその理由まで開示してくれればいいと思うのですけれども。

結果のみに注目されるというのは、結果のみに注目されて困るのだったら、議決権行使助言会社の側が必要に応じて理由も開示すればよいとすら思うのです。

９月の研究会で加藤先生が理由の開示について、ISS の石田氏に質問をされていましたが、お答えは難しいという話でした。契約相手の機関投資家との関係でも、事後であっても推奨理由の開示までは簡単に踏み込めないのだろうなという気はいたします。けれども、議決権行使助言会社の側からみて推奨内容のみの開示で不都合があれば、理由も可能な範囲で開示してくれれば、外部の者から見て納得できる場合もありそうで、結果的に正しい理解を促すのなら双方にとってメリットがあるのではないかという気はいたします。

○前田　　分かりました。どうもありがとうございます。

○川口　　ほかはいかがでしょうか。

今のお話にあった「重要な株主総会」と判断する基準はどこに求めれば良いですか。

○梅本　　重要か重要でないかというものは、基本的に分からないので、全部開示してくれればいいという立場です。

○川口　　分かりました。

【法規制かスチュワードシップ・コードか】

○川口　　ほかはいかがでしょうか。

梅本先生は、登録制の導入までは必要がないというようなお考えでしょうか。現状のスチュワードシップ・コードの中でやっていけばよく、例えば金商法で登録制にしたり、あるいは、信用格付と同様の規制にするといったことは不要というご意見でしょうか。

○梅本　　先生が指摘された格付会社の規制というのはたしかに参考になると私も思います。ただ、格付会社の場合は、格付けの不適切さが市場に悪影響を及ぼしたという経緯がありましたので、ある程度踏み込んだ規制が必要だったと思うのですけれども、議決権行使助言会社については、大きな弊害があったというわけではありません。これまで議論にありましたように、議決権行使については機関投資家が一義的な責任を持っているので、議決権行使助言会社に法的な規制を及ぼす必要がどれほどあるかというと、なかなか難しい。ただ、もし必要があればということですけれども、登録制にしたとしても、その負担をどの程度にするのかという話次第なのかなという気はいたします。

単に容易に提供しうる情報を開示しろということであれば、そんなに問題ないような気もします。他方で、例えばライセンス剥奪とかという厳格な制裁を課す局面が果たしてあるのかというと、それも考えにくいように思われますので、とりあえずはスチュワードシップ・コードで問題ないというのが私の考えでございます。

○川口　　ありがとうございます。金商法で規制をするとなると、金商法の保護法益との関係でどのように説明するのか、株主総会の決議がゆがむというのは金商法の守備範囲かといった話が出来てきますね。

○黒沼　　投資助言業としての規制はできないのですかね。つまり、機関投資家を通じてですけれども、間接的に一般の投資者を勧誘していると見ることができるとすれば、投資助言業としての登録を及ぼすというのはあり得るかなと思います。

それから、信用格付機関の登録のような形にするかというのも一つ大きな問題なのですが、あれは、登録することができるという登録制なのですね。登録しなくてもよい。しかし、あれでいくとなかなか登録してもらえないでしょうから、規制の実効性というのも問題でしょうし、それから規制の内容についても、世界的に活動しているような機関を対象にするので、国際的なすり合わせが必要だとは思います。私は、規制の対象にすること自体は、スチュワードシップ・コードのようなソフトローに頼るよりは、大もとは規制をかける方がいいのではないかと思っています。

○川口　　梅本先生、いかがでしょうか。

○梅本　　私も法的規制を排除する必要はないとは思います。ただ、川口先生がおっしゃったように保護法益との関係ももちろんですし、法的規制の必要性の高さというか――どうなんでしょうね。黒沼先生がおっしゃったように、グローバルな規制の在り方という点で見ると、EUもアメリカも原則法規制ではあるわけですから、それを考えると、日本で法規制というところに踏み出すというのも悪くはないのかなという気はします。十分に考えを詰めておらず申し訳ありません。

○川口　　ありがとうございます。

黒沼先生が法的規制の方が良いとお考えなのは、どういう趣旨からでしょうか。やはりエンフォースがしっかりできるということなのでしょうか。

○黒沼　　スチュワードシップ・コードを通じて助言会社に対して一定の義務を課すというのは、難しいと思うのです。今回の改正でも、例えば発行体との間で求められたら事前に協議すべきであるというふうには、スチュワードシップ・コードには書けないと思うのです。私は、それが内容としていいかどうかはともかくとして、そういうこ

とをしたいのであれば、法的な規制にせざるを得ないのではないかと思います。
○川口　　ありがとうございました。

【ソフトローでなくてはならないか】
○舩津　　先ほどの黒沼先生の話と重複することになるかもしれませんけれども、ソフトローであるべきかどうかというあたりです。ソフトローが積極的に望ましいという話なのか、ソフトローでしかできない、法規制は無理なのだということなのか、どちらなのかなということを少し考えておりました。

まず、議決権行使助言が独占的であるということを前提とした場合に、ソフトローでは根源的な解決というか本質的な解決は無理なのではないかという気がしています。それはなぜかというと、仮に、の話になりますけれども、助言会社がソフトローから離脱するということになってしまうと、もうそれは議決権行使助言の制度自体が規律に乗らなくなるのに等しいからです。

では、法規制をすべきかということになってくると、今度は、格付会社に対する規制の際にも議論があったと思うのですけれども、意見表明に対する登録制なり何なりという規制は言論に対する規制になるのではないかということを考えていったときに、反対の議決権行使の推奨をする前にはこういうことをしなければいけない、そうしなければ要するに言論として発表できないというような形にするというのが仮に正当化されるとすれば一体どういう理屈が考えられるのだろうかと。そうすると、やはり最初の伊藤先生の疑問に戻ってくるのかもしれませんけれども、何らかの規制の正当化根拠というものが要るのではないかという気がしています。

結局、ああでもない、こうでもないと悩んでいることを申し上げているだけなのですけれども、ソフトローであるべきなのか、ソフトローでなければ無理なのかといったあたりについて、梅本先生のご見解をお聞きできればと思います。よろしくお願いします。
○梅本　　私は、ソフトローであるべきかどうかというところは、深く考えたことがないというのが正直なところです。

ソフトローで相手方がちゃんと規制の趣旨を踏まえて情報開示なり何なりをしている限りは、ソフトローでも問題ない。でも、ソフトローのままでは、規制が徹底しないなど何らかの問題が出てくるようであれば法規制に踏み込むという、何となく規制根拠とは別のレベルの話になってしまいますけれども、そういう方向でしか考えておりません、申し訳ないです。
○舩津　　その点に関して私が少し思いましたのは、英文開示でいいですよという話も、独占との関係で、日本のマーケットのためだけに日本語開示を要求するということをすると、ジャパンパッシングのようなことも起こるかもしれないといった配慮もあったのかなとかと思いました。

すみません、雑駁な感想で申し訳ないですが、以上です。
○川口　　英文開示については、自分で言っておいて何なのですが、外国企業の上場を日本に誘致したいという趣旨から出てきたもので、この点で、議決権行使助言会社の助言内容の開示とはちょっと違うとも言えそうですね。

【協働エンゲージメントと大量保有報告制度】
○川口　　ご報告の最後に話されていた大量保有報告制度ですけれども、梅本先生としては、結局どういうご意見なのでしょうか。このまま放っておくと、共同保有者にどうしてもなりますよね。
○梅本　　はい、なります。
○川口　　スチュワードシップ・コードができたときに、共同保有者に該当するのではないかという点が問題となり、金融庁からも Q&A が出ていました。この研究会でも、機関投資家の代表者が、共同保有者になる可能性があるので、共同して行動することは難しいという話をされていました。この点については、梅本先生はどのようなスタンスでしょうか。改正によって対処するということもお考えでしょうか。

○梅本　　イギリス型を認める方向で大量保有報告制度を改正するということも考えられないではないと思うのですけれども、２つ問題があるように思います。１つはそうしたところで本当に機関投資家はそういう活動をするのかどうなのか。ご承知のように日本では、機関投資家が共同してガバナンスに関与したような、イギリスのような伝統はありません。主としてメインバンクがガバナンスに関わってきたというのが実態ではないかと思われます。

第２に共同保有者の規制を改正した場合の波及効果の問題です。共同保有の規制を緩めてしまうと、例えばアクティビストにとってみると、今までよりも行儀のよくないことを自由にできるようになったりしないのか。あるいは以前、10月の研究会の折りにブラックロックの方に質問させていただきましたコモン・オーナーシップの問題ですが、日本でも将来的にパッシブ運用のファンドが多くの上場会社の筆頭株主とか上位株主に出てきて、独占・寡占と言えるかどうか分かりませんけれども、そうなってくる可能性はあるかもしれないと思うのです。

アメリカのコモン・オーナーシップの議論において、それを痛烈に批判する興味深い論文があります（John D. Morley, Too Big to Be Activist 92 S. Cal. L. Rev. 1407 (2019)）。それによると、共同保有者ですとか重要提案行為についての大量保有報告制度の規制があるので、例えばブラックロックの傘下にある多くのファンドが同じ方向で株主権を行使をしようと思っても、事実上できないようになっているというものです。

大手運用会社が大量の上場株式を保有して大株主として名を連ねているとしても、傘下の個別ファンドの株主権を協調して行使できないのだから、コモン・オーナーシップというのは単なる神話だという主張です。もし日本においても同じようにパッシブファンドの運用会社が多くの上場会社の上位株主になってきて、そうして大量保有報告制度を改正して、ファンドが共同して株主権行使をするようになるとすると、かえって望ましくない結果を生む危険があるのではないか気になるところです。杞憂かもしれませんけれども、助言サービス業の競争環境を確保することを目的に、議決権行使助言会社に対抗する勢力を作るために大量保有報告制度を改正するということは、安易に踏み込まない方がいいのではないかという気がしまして、かなり中途半端なことを申し上げた次第です。

○川口　　ありがとうございます。

発言を遠慮されている方々もいかがでしょうか。

【ポイズンピルの推奨内容と事後開示】

○洲崎　　ご発言がないようですので。（笑）

梅本先生がご報告で、日本語による開示が必要なのではないか、また、事後的でもよいから推奨結果と推奨理由を出してほしいと述べられた点は、私も同感です。

例えば取締役や監査役の独立性に関する話とか、ENEOS のケースで出てきたように決算の情報に基づいて取締役らの再任を認めるかどうかといった問題はある程度形式的な基準に従っているので、発行会社の方も、こういう数字やデータだと議決権行使助言会社がどういう立場を採るかというのは分かると思うのです。

しかし、梅本先生も言われた敵対的買収の対抗策・防衛策、特に最近出てきているポイズンピルは非常に複雑で、法律家が見ても、一体このポイズンピルがどのように働くのかは、一読しただけではとても分からない。そのように非常に複雑なものが出てきていて、裁判でも争われているわけです。そのようなものについて助言会社が正しく理解したうえで、助言会社が持っている基準をどういうふうに当てはめて判断したのかが、現状では全然分からないわけです。

私が知りたいのは、助言を利用している機関投資家に対して出されるレポートなどでは、そのあたりのことがある程度説明がなされているのかどうか。そもそも英語で推奨結果、推奨理由が書いているというところからして、日本の大手の法律事務所の弁護士さんたちですら、簡単には理解で

きないような複雑なポイズンピルについて、法律の専門家ではないかもしれない人が正しく評価しているのか、というのが非常に不安です。議決権行使助言会社が買収防衛策について正しく評価ができているのかどうか、現状ではよく分からないような感じがするのですけれども、それはやはりよく分からないということなのでしょうか。

黒沼先生がもしそのあたりの情報をご存じであれば、黒沼先生にお答えいただくということでも結構です。よろしくお願いいたします。

○川口　　まずは、梅本先生、何かコメントがあればお願いします。

○梅本　　私も全く存じませんが、確かに知りたいところです、特にポイズンピルについての賛否につきましては。

○川口　　助言会社が理解しているかどうかというのは、英文開示の問題とは違う話ですよね。

○洲崎　　日本語で説得力のある法的な説明をしてくれているのであれば、日本の法律に詳しい方々が分析して正しく評価できているのかどうかということも判断しやすくなるように思うのですが、英文開示ではそのあたりが判断しづらくなるように思うのです。本当は９月の研究会のときにそのあたりのことをもっと突っ込んで聞いておけばよかったのかもしれないですが、そのときにはまだよく分かっていなかったところもあって、十分な質問ができませんでした。

○川口　　今の部分は、英語を読んだら何となく分かるのではないですか、議決権行使助言会社が理解してそれを書いているかどうかというのは。見る人が見ればということで。（笑）

○黒沼　　その点は、私もよく知りません。議決権行使を委任している部分については、行使結果だけが来るのだろうと思います。

話題となった事件について ISS がどういう判断をしているかというようなことを聞くことはありますが、これは感想ですけれども、彼らは、言葉の問題なのか、最新の情報まで踏まえた判断になっていないという感じはしますね。最新の新聞報道まで見て決定しているのではなくて、それゆえ買収側でも防衛側でも、十分な理由が説明されていないとか開示されていないというようなことを根拠とすることがあるように感じました。

○洲崎　　要するに、よく分からないということですかね、現時点では。（笑）ありがとうございました。

○川口　　ほかはいかがでしょうか。

【評価のズレと会社の開示の在り方】

○片木　　ちょっと感想みたいな話になるのですけれども、先ほどの ENEOS の例、大変興味深く聞かせていただきました。ただ、思いますのは、なぜそんな議決権行使助言会社から反対推奨が起こされそうというときまで説明がずっとできていなかったのだろうか。２期連続ないし３期連続で赤字になっているということは分かるわけですから、そうすると事業報告なり、あるいは計算書類の脚注なりでその内容とか分析についてのそれなりの説明といいましょうか、あるいは経営者のいわゆるマネジメントオピニオンといいましょうか、そういったところでそういう情勢について経営方針としてどういうふうに考えているのかということの説明をしておけば、ある意味でよかったようなことではあるかと思いますね。

計算書類の脚注とか事業報告なんかの業績の説明とかを見ましても、やはり現在でも非常に形式的な説明が多いのではないかと思います。助言会社なんかのいろいろな議決権行使の方針については、たしか開示はされているのだろうと思いますが、それはコーポレートガバナンス・コードの各種指針と同じように、結果的に似たような形で、方針に反対するのだったらエクスプレインしろよという一種圧力にはなっているわけですよね。

独立性についてやや問題があるような取締役をそれでも選任したいとか、あるいは現在の自分のところの取締役会のいわば多様性というものについてはまだ十分ではないけれども、今現在ではここでいきたいというふうな議論をするときに、やはり事業報告なりの一部どこか、あるいは計算書類の脚注なり積極的な説明をちゃんとするという

ことが行われていれば済むことではないのかなというふうな気もしましたということです。

○川口　　梅本先生のご報告では、個別に説得したにもかかわらず直してくれなかったということでした。片木先生のご意見だと、事業報告とかに書いておけば、それは正式な書類なので、向こうもそれを重要視しただろうということでしょうか。

○片木　　先ほどのご報告では、助言会社は納得しなかったけれども、機関投資家は納得してくれたという話でしたね。ですので、やはり最初からある程度予測ができるようなことであれば、むしろ自分の方から積極的な開示やマネジメントオピニオンとしてきちっと報告することで、機関投資家を説得する努力というのは最初からしておくということが必要なのではないかなと思ったということです。

○川口　　分かりました。ありがとうございます。

　今の点について、梅本先生、何かありますでしょうか。

○梅本　　いえ、私も片木先生のおっしゃるとおりだと思います。

○川口　　ほかはいかがでしょうか。ご質問などがないようであれば、これで、本日の研究会は閉じさせていただきます。梅本先生、ご報告ありがとうございました。

わが国の議決権行使助言会社の規制

2021/12/24　梅本剛正

Ⅰ　はじめに

1　比較法の小括

前回見たアメリカと EU の規制の議論において，これらの国においても議決権行使助言会社の規制という問題は、比較的最近取り組み始めたものであることがわかった。

朝令暮改のようにみえるアメリカの状況は、規制の基本的なスタンスすら定まっていない感すらあるが、民主党政権下の SEC においても，議決権行使助言会社を委任状勧誘規則において規制対象とする姿勢自体は維持していることから，規制の必要性は認識されているようである。

なお、法規制という点では，今回詳しく触れていないが、オーストラリアが場合によると厳格な規制を行う可能性がある。今年の 4 月にオーストラリア政府は，議決権行使助言会社の規制について諮問文書を公表したが，そこでは議決権行使助言会社をライセンス制[1]（免許制 or 登録制）とすることも検討しているようである[2]。

現在のオーストラリアの規制では，金融商品の取引に関わる助言をする場合には金融サービスライセンスが必要となる。たとえば、自己株取得の議案や公開買付けに関わる議案に関してアドバイスする業者にはライセンスが求められている（オーストラリアで活動する議決権行使助言会社はすべてこのライセンスを得たうえで事業活動を行っている）。

理論上金融取引に関わらない役員選任議案や報酬議案に限定して助言を行うにはライセンスは不要であるが、今回の諮問では，金融取引に関わらない議案に対する助言についてもライセンスを必要とするよう法改正をすべきかが諮問されている。

それ以外には，アメリカの 2020 年規則のような，利益相反の開示や調査対象会社との事前の情報共有などの規制が検討されているようであるが，ライセンスの内容次第では厳格なルールとなる可能性もある。このような規制の方向に対しては批判も強く[3]，規制が導入

[1] 前回見たように，アメリカでも議決権行使助言会社の登録制度を設ける連邦法の改正提案は何度か議会に上がったが成立していない。

[2] The Australian Government the Treasury, Greater transparency of proxy advice Consultation Paper (April 2021).

[3] Reuters, Investors criticize Australia's proposed proxy advisor rules(June 2, 2021) https://www.reuters.com/business/sustainable-business/investors-criticise-australias-proposed-proxy-advisor-rules-2021-06-02/

されるか否か，されるとしてどのようなものになるかはまだ明らかではない（パブリックコメントは 6 月に終了）。

オーストラリアは別として，EU にせよアメリカにせよ，議決権行使助言会社に対して厳格な規制を加えるもの―たとえば，民事・刑事・行政上の制裁を伴う規制を加えるもの―とはなっておらず，またそうすべきだとする主張も聞かない。

規制形式については，アメリカは法規制であるが，EU の場合は法規制を前提としながらも，自主規制に多くを委ねているので，ソフトロー的なものとみることもできそうである[4]。

規制内容については，どの国においても①利益相反の開示，②策定過程の透明化ないし助言内容の正確性確保等である。対立があるのは，②に関連して，調査対象会社に調査レポートの事前チェック等をどの程度認めるのか，あるいは認めないのか，という点にあるようである。

わが国の規制である，スチュワードシップ・コードも厳格な規制でないという点では，EU などと似ており，また規制内容も各国同様に利益相反の開示や策定プロセスの透明化などであり，大きく異なるところはない。

登録制度などの法規制であっても，規制内容次第では，負担感の小さいものに留めることは可能だと思われるので，将来的に法規制という選択肢を排除する必要はないように思われるが，アメリカのように委任状勧誘規制に定めを置くことにはならないであろう[5]。

2　本日の報告内容

今回は，わが国において，議決権行使助言会社に一定の規制を加えているスチュワードシップ・コードの内容について主として検討を加えることとする。加えて，もう 1 つ議決権行使助言会社の規制の在り方について，やや異なる見地から検討を加えてみたい。

上場会社の株式保有比率を増大させている機関投資家が，上場会社の株主総会において議決権行使を求められるようになってきたが，その膨大な事務作業に苦労した結果、多くの作業をアウトソーシングしていることに、議決権行使助言会社の影響力の大きさの原因があることは前回見た通りである。

議決権行使助言会社が一定数存在し競争環境にあるのなら，議決権行使助言会社の提供するサービスの質の確保は競争に委ねればよく，議決権行使助言会社の規制という論点はそもそも問題になり得なかったのかもしれない。とはいえ，議決権行使助言会社の規制はどの国においても ISS(とグラスルイス)がほぼサービスを独占的に提供している。

ところで，イギリスにおいては，議決権行使助言会社の影響力はさほど大きくないという

[4] ただし，国によって上乗せ規制がなされている可能性があるので，一律にそうであるとはいいがたい。

[5] 黒沼悦郎「議決権行使助言会社に関する SEC の 2 つのリリースとその日本への示唆」資料版商事法務 428 号(2019)6 頁。

研究がある。イギリスにおいては伝統的に，議決権行使助言会社と類似のサービスを，機関投資家の業界団体が提供しているのが主たる理由である。

議決権行使助言会社の新規参入等がほとんどない現状を踏まえると，イギリスを参考にして，機関投資家自身が業界団体等を通じて議案の分析や推奨内容の決定という作業を担うことを検討することも考えられる。

Ⅱ　わが国における議決権行使助言会社の規制

1　スチュワードシップ・コードにおける規制の沿革

（1）2014 年スチュワードシップ・コード

2014（平成 26）年 2 月 26 日の最初のスチュワードシップ・コードにおいても，議決権行使助言会社について部分的な記載はなされていた。たとえば，「本コードの目的」8 において，「本コードの対象とする機関投資家は、基本的に、日本の上場株式に投資する機関投資家を念頭に置いている。また、本コードは、機関投資家から業務の委託を受ける議決権行使助言会社等に対してもあてはまるものである」とされていたほか、機関投資家が議決権行使を利用している場合の対応について定める指針 5−4 に若干のコメントがなされていた。

（2）2017 年改訂版スチュワードシップ・コード

指針５－５ 議決権行使助言会社は、企業の状況の的確な把握等のために十分な経営資源を投入し、また、本コードの各原則（指針を含む）が自らに当てはまることに留意して、適切にサービスを提供すべきである。また、議決権行使助言会社は、業務の体制や利益相反管理、助言の策定プロセス等に関し、自らの取組みを公表すべきである。

しかし，指針等で明示的に定めが置かれたのは、2017 年改訂スチュワードシップ・コードにおいてであり、ここでは議決権行使助言会社を対象とした「指針 5−5」が新設された。この間の経緯は以下のとおり。

○2016(平成 28)年 4 月 26 日開催の「スチュワードシップ・コード及びコーポレートガバナンス・コードのフォローアップ会議」第 7 回
事務局から「7 点目でございますが、議決権行使助言会社は形式的な企業の対応を助長する結果につながらないよう、実質的な判断を行うよう努めるべきというご意見[6]があったということでございます。機関投資家の側におかれても、議決権行使助言会社の助言に形式的に依拠するのではなく、その利用に先立って、その質などを具体的に検証するなど、みずから実質的な判断を行う必要があるということであろうかと思います。」との説明があったのが方向性を示すものとしては最初。

[6] 2015（平成 27）年 9 月 24 日第 1 回会議における冨山和彦氏の意見のこと。

本格的な議論がなされるのは、2017(平成 29)年 2 月 17 日「スチュワードシップ・コードに関する有識者検討会」第 2 回である。アメリカや EU において議決権行使助言会社を対象とした規制が設けられていることが事務局から紹介され、わが国のスチュワードシップ・コードにも，議決権行使助言会社を盛り込むことについて議論がされる。全体的に利益相反の開示の必要性や十分な資源を投入しているか等の策定プロセスの開示は必要であるという点で検討会では合意が取れていた印象。

フォローアップ会議も有識者検討会も，機関投資家の関係者が参加しているが，アメリカと異なり機関投資家の規制反対論は聞かれないのが興味深い。おそらく規制内容がスチュワードシップ・コードにおいて一定の情報開示を求めるものに留まるものだからであろう。

（3）2020 年再改訂版スチュワードシップ・コード

原則８ 機関投資家向けサービス提供者は、機関投資家がスチュワードシップ責任を果たすに当り、適切にサービスを提供し、インベストメント・チェーン全体の機能向上に資するものとなるよう努めるべきである。

2020 年 3 月 4 日改訂スチュワードシップ・コードでは「原則 8」と 3 つの指針という形で，より詳細な規定が設けられた。

議決権行使助言会社の扱いが従来に比べて大きくなった理由は、フォローアップ会議意見書(4)での指摘にあったと考えられる（赤字筆者）。

○2019(平成 31)年 4 月 24 日公表「スチュワードシップ・コード及びコーポレートガバナンス・コードのフォローアップ会議」意見書（4）

「2017 年のスチュワードシップ・コード改訂において議決権行使助言会社の責務が明確化されたものの、その助言策定プロセスが依然として不透明であり、取締役選任議案等について個々の企業の状況を実質的に判断するために必要な人的・組織的体制が備わっていないのではないか等の指摘がある。パッシブ運用が広く行われる中で多くの運用機関が議決権行使助言会社を利用している実態を踏まえると、企業の持続的成長に資する議決権行使が行われるためには、個々の企業に関する正確な情報を前提とした助言が運用機関に提供されることが重要である。こうした観点から、議決権行使助言会社において、十分かつ適切な人的・組織的体制の整備と、それを含む助言策定プロセスの具体的な公表が行われるとともに、企業の開示情報のみに基づくばかりでなく、必要に応じ自ら企業と積極的に意見交換しつつ助言を行うことが期待される。また、運用機関についても、企業との相互理解を深め、建設的な対話に資するため、議決権行使助言会社の活用の状況について、利用する議決権行使助言会社名や運用機関における助言内容の確認の体制、具体的な活用方法等に関する説明や情報提供を促すことが重要である。」

このフォローアップ会議意見書を受けて、「スチュワードシップ・コードに関する有識者検討会」(1 回～3 回）において、議決権行使助言会社や機関投資家による活用状況について

議論（この間にアメリカの SEC 規則改正案が公表され事務局から概要が紹介）。

2　わが国のスチュワードシップ・コードの個別的検討

前回みた EU の規制と同様に，ISS はわが国のスチュワードシップ・コードについても，コンプライアンスステートメントを公表しているが、全体的にさほど異なるものではないので、必要な範囲で触れるに留める。

原則 8 機関投資家向けサービス提供者は、機関投資家がスチュワードシップ責任を果たすに当たり、適切にサービスを提供し、インベストメント・チェーン全体の機能向上に資するものとなるよう努めるべきである。

（1）　情報公開は英語でよいのか？

原則 8 全体にいえることであるが，このような情報開示を求める趣旨は，限られた数の議決権行使助言会社が機関投資家の議決権行使に大きな影響力を持つに至り，上場会社の重要な決定が行われる株主総会の結果を左右する力を持つにいたったことから，開示を通じてそのサービスが適正になされることを目的としているはずである。上記フォローアップ会議の意見書の意図もわが国の上場会社の株主総会の議案に対する推奨を問題にしているはず。かかる趣旨からすると，情報の公表は英語ではなく日本語でなされるべきではないだろうか。ところが，大手 2 社である ISS もグラスルイスも英語でしか情報を開示していない。

ただし，議決権行使助言会社が規制趣旨に沿わない開示をしているというよりも，規制当局が日本語での開示までは求めていないフシがあり，そちらが問題ではないか。

つまり，スチュワードシップ・コード 2017 改訂版時のパブコメ 32 番では，「指針 5－5 が求める議決権行使助言会社による自らの取組みの公表について、公表される内容は、日本国内の上場企業及び受益者である国民一般に認識されるべきであることから、日本語で公表されることが望ましいと考える。これにより、議決権行使助言会社もまた、受益者等により、適切に評価または淘汰されることが望ましいと考える」とのコメントがあった。

ところが，金融庁の回答は「貴重なご意見として承ります。」のみ。つまり，金融庁としても英語の開示でも差し支えないとの立場なのであろう。2020 年版でも取り立てて日本語での開示を求めていないことからすると，同じ立場なのだろう思われる。しかし，日本語によらない開示は規制趣旨に沿うものだろうか？

８－１．　議決権行使助言会社・年金運用コンサルタントを含む機関投資家向けサービス提供者は、利益相反が生じ得る局面を具体的に特定し、これをどのように実効的に管理するのかについての明確な方針を策定して、利益相反管理体制を整備するとともに、これらの取組みを公表すべきである。

（2）　利益相反の開示

議決権行使助言会社の利益相反の開示については，欧米においても規制対象とされている事項であるが，議決権行使助言会社の調査や推奨内容を適正なものとするうえで，重要な開示事項である。ここでは，利益相反が生じうる局面と管理方針の策定と管理体制整備と取り組みを公表すべきであるとされている。

ISS の日本版スチュワードシップ・コードに対するコンプライアンスレポートにおいては，ほぼ前回扱った EU の最良慣行規範に対するコンプライアンスステートメントと類似の事項が記載されている。

ただし，基本的な問題として，潜在的利益相反がどの程度深刻なのか，あるいはそうでないのかは公表されている情報だけではイメージしにくいのも確かである。そもそもわが国においてコンサルティング部門(ICS)の契約会社というのは何社くらいあるのかくらいは開示されてもよいのではあるまいか。

８－２．　議決権行使助言会社は、運用機関に対し、個々の企業に関する正確な情報に基づく助言を行うため、日本に拠点を設置することを含め十分かつ適切な人的・組織的体制を整備すべきであり、透明性を図るため、それを含む助言策定プロセスを具体的に公表すべきである。

（3）　助言策定プロセス

「助言策定プロセス」については，「個別の議案に係る助言に当たっての対話の内容等を念頭に置いているものではなく、一般的に、助言策定に当たって、依拠する主な情報源、対象企業との対話の有無、態様等を公表することが考えられる[7]」と説明されている。

また「議決権行使助言会社において、議決権行使の助言についての方針を策定する際にも、当該方針は、できる限り明確なものとすべきであるが、単に形式的な判断基準にとどまるのではなく、投資先企業の持続的成長に資するものとなるよう工夫すべきである[8]」との補足説明もされている。

（4）　日本拠点の設置

2020 年版スチュワードシップ・コードで注目されるのは，日本の拠点設置について言及されている点である。前回見た EU 株主権ディレクティブでは規制の対象となる議決権行使助言会社について EU 域内に施設を有するものであればすべて対象にするとされていた。

これに対して指針 8-2 の趣旨は，規制対象の問題ではなく，十分なリソースで調査・分析活動を行うにあたっての具体例として拠点設置が示されている。たとえば，パブコメ 157 番への回答では「日本拠点の設置は、議決権行使助言会社が個々の企業に関する正確な情報に

[7] 注 28
[8] 注 29

基づく助言を行うための、十分かつ適切な人的・組織的体制の整備の代表的な具体例の一つを示したものです。したがって、個々の議決権行使助言会社の置かれた状況に照らして、十分かつ適切な人的・組織的体制の検討が進められることを期待します。」とされている。

日本拠点設置に懐疑的な意見を寄せた 158～160 番への回答では「ご指摘の点については、議決権行使助言会社が、日本に拠点を設置することにより、企業との意見交換等が円滑になされる場合があると考えられるため、指針８－２において、議決権行使助言会社について、日本に拠点を設置することを含め十分かつ適切な人的・組織的体制を整備すべきとしています」とされている点からも明らか。

ISS コンプライアンスステートメントでは、日本の拠点については，2001 年に東京に支部を設けたことが言及されている。

(5)　人的・組織的体制の開示は世界全体の数値で足りる？

ISS のコンプライアンスステートメントでは、人的リソースについては，EU の規制と同じく ISS の世界における活動についてのみ記載されている。日本の上場会社の調査分析活動に従事するスタッフについては情報開示されていない。

この点については、すでに 2017 年の有識者検討会でも次の通り指摘されていたが、対応されていない。つまり規制当局はグローバルな数値のみ記載すれば足りるという立場か。

○2017 年コード改訂時「スチュワードシップ・コードに関する有識者検討会」第 3 回(2017(平成 29)年３月 22 日）議事録・小口俊朗氏発言

「議決権行使助言会社、あるいはサービス会社というのは、基本的に海外の会社がグローバルにカバーリングしているところに日本株の部分がちょっとあるという現状であります。序文の４には「投資先の日本企業」と書いてあり、スチュワードシップ・コードは基本的には投資先の日本企業についてということで、その後は書いていないけれども、黙示的にそういう前提で理解されていると思うのですが、議決権行使会社のみが該当する５－５が英語になって、それに対して議決権行使助言会社が開示する場合、対象をはっきりしておかないと、グローバルにこれだけ人がいますよ、グローバルに体制が整っていますよというところで終わってしまうことが懸念されるのです。それで肝心の日本株の部分に絞った開示まで多分行かないと思うんですよね。日本株に関する取組みと、その開示を求めるという趣旨であるのであれば、そこははっきり書いたほうがいいのかなと、実務的な話で恐縮ですけれどもコメントさせていただきます」

この点については、９月の研究会の質疑等において，ISS の石田氏より日本の上場会社だけの調査・分析スタッフ等の数値を開示することは難しいとの発言があった。

ルールにおいて，開示すべき事項・開示の仕方の定め方について仕方を工夫すれば不可能というほどのものではないのではあるまいか。

８－３．　議決権行使助言会社は、企業の開示情報に基づくほか、必要に応じ、自ら企業と積極的に意見交換しつつ、助言を行うべきである。助言の対象となる企業から求められた場合に、当該企業に対して、前提となる情報に齟齬がないか等を確認する機会を与え、当該企業から出された意見も合わせて顧客に提供することも、助言の前提となる情報の正確性や透明性の確保に資すると考えられる。

(6)　情報の正確性確保と企業との情報交換

①原案修正

指針 8-3 の前段は，原案では「議決権行使助言会社は、企業の開示情報のみに基づくばかりでなく、必要に応じ、自ら企業と積極的に意見交換しつつ、助言を行うべきである。」とされていた。しかし，パブリックコメント[9]において「あたかも開示情報のみに基づく判断は不十分で、必ず企業と意見交換をしなければならないかのような規定に受け止められる。議決権行使に限らず，投資家の投資判断は、企業の開示情報に基づくことが基本であ」るとの意見を踏まえて，現行のように改められた。

②対象会社と調査レポート等の情報共有

指針 8－3 後段に対しては，「議決権行使助言会社に対して、助言内容を発行会社に事前確認させる機会を与え、発行会社の意見を顧客に提供することを、より強く促す記載内容にしていただきたい[10]」との意見があった。

これに対しては，「指針８－３の後段は、助言の対象となる企業に対して、前提となる情報に齟齬がないか等を確認する機会を与え、当該企業から出された意見も合わせて顧客に提供することも、議決権行使助言会社から提供される助言の前提となる情報の正確性や透明性に資する取組みの一つとして考えられる旨を示したものです。一方で、このような取組みを具体的に実施するに当たっては、個々の議決権行使助言会社の置かれた状況に照らし、「必要に応じ」、自ら積極的に意見交換を行うものとしています。ご指摘のような企業側の株主総会資料の早期開示については、「スチュワードシップ・コードの再改訂に当たって」において企業側の課題の一つとして取り上げており、今後、フォローアップ会議や金融庁を含む関係者において更に検討を行うことが期待されます」(167 番への回答)と，株主総会資料の早期開示の問題として，やや肩透かしの回答がなされている。

つまり，評価対象の会社が公表前の調査レポートの内容をチェックできるようにすべきかについて、わが国のスチュワードシップ・コードでは特にかかる手続きは求められていないということであろう。

[9] パブコメ 162 番

[10] パブコメ 167 番

前回見たように対象企業による事前チェックの問題は、アメリカの SEC 規則で重要な論点とされてきた。2020 年規則の原案は，基本的にそれを認めるものであったが，パブリックコメントを経た最終的な規則では大幅に修正され，2021 年の規則改正案ではこの部分は削除されることとなった。

日本では，外国と比較すると招集通知が送付・公開される時期が遅いため，助言会社と情報共有してから対応を検討しても間に合わないことが多いかもしれない。いずれにせよ，総会関係資料の早期開示は，別途議論する必要がある問題といえよう[11]。

③議決権行使助言会社の評価への対応手段

議決権行使助言会会社の推奨内容が形式的である場合に，評価対象の会社は反論を公表する以外にすべきことはないのか？この点で以下の有識者検討会での発言は示唆的であり興味深い。

○2017 年コード改訂時「スチュワードシップ・コードに関する有識者検討会」第 2 回(2017(平成 29)年 2 月 17 日）議事録・川田順一氏発言(現在の ENEOS ホールディングス副社長)

「議決権行使助言会社と機関投資家の関係、あるいは、集団的エンゲージメントに関し、もし参考になればと思いお話します。当社は、去年、株主総会を行った際に、取締役選任議案を提出いたしましたが、実は２年連続の赤字でございました。これには理由がございまして、当社のような民間の石油会社は、法律上 70 日間の原油の備蓄義務を負っております。そうしますと、原油価格の変動が激しいときには、会計上、在庫評価損が発生しますので、何千億かの赤字を計上せざるを得ませんでしたが、在庫評価影響を除く実質的な経常利益はきちんと確保しているという状況でした。しかし、議決権行使助言会社は、過去５期平均の自己資本利益率（ＲＯＥ）が５％を下回りかつ改善傾向にない場合には、会長、社長である取締役の選任議案に対し原則として反対票を投じることを推奨しておりました。それで、当社はそういういわば特殊な事情があるということを何回も議決権行使助言会社に説明したのですが、彼らからは個々の企業からそれぞれの事情を聞いていると、全ての企業から聞かなければならなくなるため、形式的に判断して反対の推奨をしますという発言がありました。そして、結果的にはやはり彼らは当社の提案に対して反対を推奨すると発表しました。そこで、困った事態になったと思い、内外の機関投資家に手紙を書きました。手紙には、当社のような日本の石油会社は、法律上 70 日間の原油の備蓄義務を負っており、価格変動の影響を大きく受けること、そのため、会計上、赤字を計上せざるを得なかったけれども、実質的にはこのような利益を確保しているということを書きました。その結果、インターネット経由で議決権行使を行っていた海外の機関投資家の多くは、当初、反対票を投じていましたが最終的には賛成しました。最初はおそらく、議決権行使助言会社の助言に従って社長・会長である取締役の選任議案に反対したのだろうと思います。しかし、この手紙を出した後は、どんどん、反対から賛成に変わりました。こうした経験を通じて、我々はやはり対話というのは非常に必要だと痛感しました。同時に、議決権行使助言会社の推奨通りに議決権行使を行っている機関投資家は意外と多いのではないかと思いました。したがって、対話というのは非常に重要であり、投資家の理解が得られれば、彼らの投資行動も変わってくるということの実例として参考までに申し上げました。」

[11] わが国における会社の反対論で多いのは，社外役員候補の独立性に関するものである(鈴木裕「議決権行使助言業者に対する上場会社の反応」(2020) https://www.dir.co.jp/report/research/capital-mkt/asset/20200625_021613.pdf) ISS の議決権行使方針では，「2021 年議決権行使助言基準」によると，監査役設置会社の社外監査役や監査等委員会設置会社の監査等委員，指名委員会等設置会社の社外取締役については，ISS の定める独立性要件を求めるため，会社が法律上の要件を満たしていること等を理由に反論を述べることが少なくない。事実認識の誤りを指摘するものであればともかく，このような議決権行使基準自体に反対する反論は，あまり意味があるとは思えない。

原油の備蓄義務を負っている石油元売り会社は在庫評価損が生ずるリスクを常に負い，経営努力にも拘わらず連続して赤字に陥ることはありうる。

他方、ISS は議決権行使基準において，ROE が一定数を下回れば原則として経営トップの選任議案は反対推奨することにしている。しかし，石油元売り会社の現状からするとそれは合理性を欠く、ISS にそのように説明したが受け入れてもらえなかった、そこで内外の機関投資家に手紙で事情を説明したら，反対票が賛成票に変わったとのこと。

議決権行使助言会社の判断の形式主義をよく表したエピソードではある。この点については，会社側の日ごろの IR 活動などが十分に行われていれば，議決権行使助言会社の形式的な判断を懸念する必要はないともいえそうである（もちろん、議案によっては常にそういう対応が可能なものばかりではないであろうが)。

(7)　その他　～推奨内容の事後開示[12]

わが国のスチュワードシップ・コードに限らず，議決権行使助言会社に対する主たる規制内容は，(潜在的)利益相反の開示と調査レポートの正確性・適正性を確保する手段の開示を求めるものとなっている。

しかし，議決権行使助言会社の調査レポートや推奨内容を適正にするという目的との関係で，そのような規制で足りるのだろうか。利益相反が管理されたり人的・組織的体制が整備されたりしていることは，推奨内容等に問題ないことは必ずしも意味しない。むしろ，個別の推奨内容が世間の目から見て合理性を欠くものとなっていないか，事後にチェックできる仕組みが必要ではないだろうか。

[12] これについては，梅本剛正「議決権行使助言会社の規制」証券レポート 1717 号 (2019)39 頁。

2 年前に住設機メーカーの LIXIL の内紛があり，株主側と会社側が提出した役員候補のいずれが多数を占めるのかに注目が集まった。その際，世間の予想に反して議決権行使助言会社はいずれも会社側候補が多数を占める推奨を行った。

問題は，どちらが正しかったかではなく，議決権行使助言会社の推奨内容は新聞報道でしか一般人には分からないということである。議決権行使助言会社の推奨内容等は原則的に契約先の機関投資家しか知りえず，事後であっても一般には公開されない。ましてや，推奨理由等を記載したレポート全文が対外的に明らかにされないのはいうまでもない。

2017 年改定スチュワードシップ・コードにより，機関投資家による議決権行使結果の個別開示や理由の開示が行われるようになってきた。個々の株主総会でどのような議決権行使を行ったかを開示すれば、事後に当該議決権行使の適切さ等について検証することが可能となり，有意義な改訂であったと評価できる。

議決権行使助言会社についても同じように，個々の株主総会の議案に対する推奨内容を個別開示することを求めるべきではあるまいか。事前に議案の推奨内容等の開示を求めたとすると、議決権行使助言会社のビジネスそのものが成り立たないが、株主総会後に開示することに支障はないはずである。大きなコスト負担もないはず[13]。

III　機関投資家の集合行為問題という見地から規制を考えてみる

1　機関投資家の集合行為問題と議決権行使助言会社

これまで議決権行使助言会社を直接規制する議論をしてきた。ところで，議決権行使助言会社を規制すべきだという理由・根拠は，限られた数(ほぼ 1 社？)の議決権行使助言会社が多くの機関投資家に利用され，その推奨内容が事実上，上場会社の株主総会に大きな影響力を持つことによるものである。会社の重要事項を決定する株主総会の賛否推奨が，不正確な情報や不適切な評価によって歪められては問題だというのが規制論の主たる理由である。

このことは，議決権行使助言会社の影響力がさほど大きくなければ規制の必要性は低いということもできる。

機関投資家が議決権行使助言会社を利用するのは議決権行使のためにかかる手間暇等のコストを低減させるサービスを提供してくれるからである。依然として六月下旬に上場会社の株主総会が集中的に開催されるわが国はもちろんのこと、アメリカにおいても株主総会の開催は四月・五月のシーズンに集中している。自ら個々の議案について情報を収集・分析し判断する能力を有する大手機関投資家であっても、重視すべき議案にフォーカスしてリソースを投じ、主たる争点のない議案については、議決権行使助言会社にアウトソーシングするのが合理的と考えているようである[14]。

ところで、機関投資家が保有株式について議決権行使をする動機は，それにより投資先企業の企業価値が上昇する（あるいは下落を阻止する）ことが期待されるからである。しかし、機関投資家にはいわゆる集合行為問題、すなわちガバナンスに関与することによるコストは自らが負担するのに対して、その成果はガバナンスに関与しない株主も含めてすべての株主に及ぶため、そもそもコスト負担をするインセンティブが生まれないという問題が存在する。

現在のアメリカや日本のように，多くの機関投資家が議決権行使助言会社の推奨に従って、上場会社の株主総会において同じ方向で議決権を行使することは、結果的に集合行為問題を解決していると見ることもできる。議決権行使助言会社の議決権行使基準は、あるべきガバナンスについて、機関投資家などステークホルダーの意見が反映されており、最良慣行に沿った議案に賛成、それに反した議案に反対する形で協調的な投票行動が採られ，そうすることにより投資先企業への影響力が担保され、機関投資家の意図が実現することになる。

機関投資家の実際の利用目的は別として議決権行使助言会社を利用することにより、投資先企業のガバナンスの改善と企業価値の向上が図られるのであれば、議決権行使助言会社が集合行為問題を事実上解消ないし緩和しているという見方も可能である。

議決権行使手続きの煩雑さの解消にせよ，集合行為問題の解決にせよ，議決権行使助言会社にだけしか，その役割を果たすことができないわけではない。近年，アメリカとイギリスにおける議決権行使助言会社の影響力の違いについて，比較検討した興味深い研究が公表[15]された。イギリスでは機関投資家の業界団体が議決権行使助言会社と類似のサービスを提供しているため，議決権行使助言会社の影響力はさほど大きくないというものである。

議決権行使助言会社の影響力が過大なものではなくなれば，規制の必要性も大きな論点ではなくなる。

2　イギリスにおける議決権行使助言会社の影響力の相対的な低さと規制

Tuch によると，アメリカとイギリスは先進的な証券市場を有し，上場会社の株主に機関投資家が多いことなど類似した点がかなり多い，それにも拘らず，イギリスではアメリカほど議決権行使助言会社の影響力は大きくないといわれる。

主たる理由は，イギリスにおいては機関投資家の業界団体が，上場会社の株主総会における議決権行使ガイドラインや，個別の議案の情報収集・分析を行うなど，コーポレートガバナンスに積極的に関わっており，議決権行使助言会社の役割が他の国に比べて相対的に低くなっているからである。

[13] 9 月の研究会において，ISS の石田氏に議決権行使助言会社も推奨内容の事後開示をしてはどうかと質問したところ，そのような開示を行なってはいないとの返答を頂戴したが、必ずしも否定的ではなかったという印象を受けた。

[14] 10 月研究会報告(ブラックロックの事例)

[15] Andrew Tuch, Proxy Advisor Influence in a Comparative Light, 99 B.U. L. Rev.1459(2019)．本稿を紹介するものとして，梅本剛正「なぜイギリスでは議決権行使助言会社の影響力がアメリカほど大きくないのか」証券レポート 1729 号(2021)33 頁。

Tuch がアメリカとイギリスの比較分析において，コーポレートガバナンスにおいて機関投資家の(業界団体の)役割が異なるようになった原因として指摘するのが，大量保有報告制度である。

アメリカでは機関投資家が協調してガバナンス活動を行う場合，大量保有報告制度が障害になるといわれる。アメリカでは証券取引所法 13 条(d)項において，投資家が上場株式の 5%超を取得した場合には，10 日以内に SEC や発行会社に届け出ることを求めている。

この大量保有報告制度には共同保有者(共同行為者)の開示義務が定められている。共同保有者の保有株式を合算して開示することは，機関投資家にとってはほぼ不可能なほどの事務負担をもたらす。保有株式の対象会社に対して協調して株主権行使をしたり，業界団体を通じて活動したりすることは，共同保有者としての開示リスクを負うことになるため，アメリカの機関投資家が行うことはない。

加えて，機関投資家のように原則的に支配権取得を行わない特定の投資家については，開示規制が緩やかになっているが(スケジュール 13G)，経営に関与する場合は，この書式を使うことができない。アメリカにおいては，機関投資家がイギリスで行っているような協働エンゲージメントを行う場合には，共同保有者に該当すると同時に簡易な報告書の提出もできなくなるという不利益を被ることになる。

これに対して，イギリスにおいて大量保有報告制度を定める，UK　Listing　Authority(上場審査局）の定める Disclosure Rules and Transparency Rules (DTR)では，「協調して議決権行使をすることにより，当該発行者の経営陣に対し長期的な共通の方針(lasting common policy)を採ることを互いに義務づける合意をした場合」(5.2.1（a）)には，他方の株主の保有する議決権数を合算することが求められる。単に個々の株主総会において同一の議決権行使をするだけでは，これに該当しない。イギリスの大量保有報告制度では，保有目的の開示も求められていない。アメリカと異なり業界団体を通じて株主総会における共同行為を行ったとしても，大量保有報告書制度による開示の強化にはつながらないのである。

さらに注目すべきは，イギリスの規制は偶々このような形をとったのではなく，規制の制定・改正において，機関投資家による伝統的な集団的スチュワードシップ活動を阻害しないように，国が配慮してきたことが影響しているといわれる。イギリスにおいては，政府が機関投資家による協調的なガバナンスへの介入を促進する傾向があったからである。

3　わが国への示唆

わが国の大量保有報告制度はアメリカの制度を参考にして作られているが，同じように機関投資家が共同してガバナンスに関与するに当たっては，「共同保有」該当性と「重要提案行為」の該当性とが問題となる。

わが国のスチュワードシップ・コードはイギリスのコードのように 「他の投資家と協調して個別先企業に対して行動を起こすこと」を促す原則を採用しているわけではない。2017 年・2020 年の改定で，「機関投資家が投資先企業との間で対話を行うに当たっては、単独で

こうした対話を行うほか、必要に応じ、他の機関投資家と協働して対話を行うこと（協働エンゲージメント）が有益な場合もあり得る」（原則 4・指針 4-5)との規定が加わったに過ぎず，イギリスほど踏み込んだものとはなっていない。それゆえ，せいぜい株主権行使に関わらない話し合いを前提とするのであるから，共同保有についても重要提案行為についても該当しないとの解釈が示されている 。

逆に言うと，現行規制を前提とするなら，わが国の機関投資家がイギリスのように業界団体を通じて議決権行使助言会社の代替的な活動を行うことは難しいことになる[16]。

わが国においても，大量保有報告制度を改正して，イギリスのように機関投資家が業界団体等を通じて，積極的に上場会社を規律するという方向を探るなら議決権行使助言会社の影響力を抑えることになり，議決権行使助言会社の規制などは議論の実益がなくなるかもしれない。

とはいえ，イギリス型の機関投資家の活動が議決権行使助言会社の影響力を低下させる効果があるとしても，それが必ずしも望ましいとは限らないうえに、外国人投資家の株式保有比率の上昇を踏まえると，将来的にそれが持続可能かは必ずしも明らかではない。

Ⅳ　おわりに

わが国のスチュワードシップ・コードの規制内容は EU やアメリカと比べて大きく異なるものではない。

しかし、幾つかの問題点を指摘する必要がある。議決権行使助言会社の規制の必要性を指摘したフォローアップ会議意見書において，「正確な情報に基づく助言を行うため」、「十分かつ適切な人的・組織的体制を整備」し、「透明性を図るため、それを含む助言策定プロセスを具体的に公表すべき」であるとされたのは，わが国の上場会社の株主総会における助言策定プロセスの透明化を求めたものと考えるべきであろう。それにも拘わらず，議決権行使助言会社においては，わが国の株主総会に関連しないスタッフ等も含めた開示がなされており、それを規制当局も黙認しているのは問題ではないだろうか。

加えて，規制趣旨からすると，わが国の国民に対する情報開示が求められているのであるから，英語ではなく日本語で開示がなされるべきだと考えられるが，こちらについても，規制当局は関心が薄いようである。「議決権行使助言会社が個々の企業に関する正確な情報に基づく助言を行うための、十分かつ適切な人的・組織的体制の整備の代表的な具体例の一つ」(パブコメ 157 回答)として日本拠点の設置の検討は求めるが，情報開示は日本語でなくても構わないとする理屈は理解困難である。現状のスチュワードシップ・コードの実務は，情

[16] それ以前に、日本では機関投資家によるガバナンスへの関与の伝統はなく、主としてメインバンク制度を通じた経営規律が存在したに過ぎないため、協同エンゲージメントが可能になったとして、どの程度、積極的な活動をするかは未知数である。

報開示を求める規制趣旨に沿っているのか疑問が残る。

日本の現状は，議決権行使助言会社の規制について，法規制によるべきかコードで足りるのか，という議論をする以前の話で，規制の必要性や規制趣旨について再度議論を詰める必要があると同時に，当該趣旨が実務に反映されるようにする方が重要であるように思われる。

また、議決権行使助言会社の利益相反の管理にせよ、正確な情報に基づく助言にせよ、事前開示よりも事後開示の方が、意味があると考えられる。いかなる体制をとっているかを説明させるよりも，潜在的利益相反を有する会社の株主総会の議案や，経営権争いに関連した議案において，議決権行使助言会社の助言内容を事後的に検証できるようにする方が，その職務の適切さの確保を促すうえで有益だと考えられる。

なお、議決権行使助言会社のサービスに事実上競争原理が働いていない現状から、イギリスを参考に機関投資家の業界団体等を通じて、情報分析等のサービスを提供させることで、議決権行使助言会社の影響理力を低下させるという方向も考えられる。しかし，そのためには、大量保有報告制度の規制変更など様々な対応が必要となるが、それが望ましいか否かも含めてなお検討が必要と考えられる。

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