MEMO# 32162

January 17, 2020

ICI Draft Comment Letter on the SEC's Proxy Advice and Rule 14a-8 Proposals; Comments Due to ICI by January 28

[32162]

January 17, 2020 TO: Chief Compliance Officer Committee
Closed-End Investment Company Committee
Compliance Advisory Committee
Investment Advisers Committee
Operations Committee
Proxy Working Group
SEC Rules Committee
Small Funds Committee
Transfer Agent Advisory Committee RE: ICI Draft Comment Letter on the SEC's Proxy Advice and Rule 14a-8 Proposals; Comments Due to ICI by January 28

In November, the SEC proposed amendments to its proxy rules that would:

- more substantively regulate proxy advisory firms' activities;[1] and
- modify the requirements for including shareholder proposals on companies' proxies.[2]

Attached is ICI's draft comment letter. Please provide any comments you have on it (to matt.thornton@ici.org) by Tuesday, January 28, COB. We welcome your comments on the entire letter, and especially on those items that we have bracketed. Comments are due to the SEC by February 3.

ICI's Comments on the Proxy Advice Proposal

Proxy advisory firms (or "proxy voting advice businesses" as they are referred to in the proposing release, and which we abbreviate as "PVABs") provide proxy voting advice to institutional investors, including fund complexes. Most significantly for fund complexes, this proposal would create a new mandatory review framework that would grant companies the right to review and comment on proxy advisory firms' draft advice before fund complexes and other clients receive it.[3]

ICI's draft letter does not support this proposed review framework. Our letter explains why any framework-driven improvements to proxy advisory firms' research and analysis would be more than offset by the framework's adverse impacts on the timeliness, cost, and independence of that research and analysis to fund complexes. If the SEC insists on a mandatory review framework of some kind, we recommend two superior alternatives:

- Our much-preferred alternative would still result in fund complexes receiving proxy reports *concurrent* with their release to companies for review and comment.
- The second alternative would grant companies more limited review rights of draft materials, along with the first alternative's concurrent review rights (see the letter for details).

ICI's Comments on the Rule 14a-8 Proposal

Rule 14a-8 conditionally permits a company's shareholders to include proposals (*i.e.*, recommendations or requirements that a company and/or its board take action) on a company's proxy statement. Most notably, the proposed amendments to Rule 14a-8 would:

- Replace the current ownership requirements with a tiered approach providing three options for demonstrating an ownership stake through a combination of amount of securities owned and length of time held;[4] and
- Raise the current resubmission thresholds for shareholder proposals[5] and include a new provision for excluding resubmissions that experience a drop in support (the "momentum provision").[6]

We support the SEC's proposed changes to the eligibility and resubmission standards. We regard each as reasonable regulatory line drawing, which would preserve access to the company proxy for smaller shareholders while also seeking to align the interests of shareholder proponents with those of long-term shareholders generally. We recommend revising the "momentum provision" to strike a more appropriate balance between the interests of shareholders and companies. We also recommend (i) that mutual funds' and ETFs' shareholder proponents be required to reaffirm periodically any outstanding proposals, and (ii) improvements to the SEC staff's process for reviewing requests to exclude shareholder proposals.

Dorothy M. Donohue
Deputy General Counsel - Securities Regulation

Matthew Thornton
Assistant General Counsel

Attachment

endnotes

[1] *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, SEC Release No. 34-87457 (Nov. 5, 2019), *available at* www.sec.gov/rules/proposed/2019/34-87457.pdf.

[2] *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, SEC Release No. 34-87458 (Nov. 5, 2019), *available at* www.sec.gov/rules/proposed/2019/34-87458.pdf.

[3] More specifically, this review framework would:

- Provide companies with an opportunity to review and provide feedback on proxy advice before PVABs issue it to their clients, with the length of review generally as follows:
    - no less than five business days before issuance, if the company has filed its definitive proxy statement at least 45 calendar days before the meeting date; and
    - no less than three business days before issuance, if the company has filed its definitive proxy statement less than 45 calendar days, but at least 25 calendar days, before the meeting date.
- Provide companies a second and final notice of voting advice (no earlier than the applicable review period and no later than two business days prior to delivery to clients). This final notice must include a copy of the proxy voting advice that will be delivered to clients, including any revisions made after the review and feedback period.
- Include in the final proxy voting advice a hyperlink that leads to a statement with the company's views on the advice, upon the company's request.

[4] Currently, to submit a proxy proposal, a shareholder must continuously hold at least $2,000 in market value (or one percent) of a company's stock entitled to vote for at least one year. The proposed changes would permit a shareholder to submit a proposal if the shareholder has continuously held at least: (i) $2,000 of the company's securities for at least three years; (ii) $15,000 of the company's securities for at least two years; or (iii) $25,000 of the company's securities for at least one year.

[5] Currently, for a shareholder to be eligible to resubmit the same (or a similar) proposal, the proposal must have received at least 3, 6, and 10 percent shareholder approval for the first, second, and third submissions, respectively, each within the preceding 5 calendar years. The proposal would raise those resubmission thresholds to 5, 15, and 25 percent, respectively.

[6] The momentum provision would permit a company to exclude a proposal that previously had been voted on three or more times in the last five years, notwithstanding having received at least 25 percent of the votes cast on its most recent submission, if at the time of the most recent vote the proposal: (i) received less than 50 percent of the votes cast; and (ii) experienced a decline in shareholder support of 10 percent or more compared to the immediately preceding vote.