

MEMO# 32192

February 3, 2020

ICI Submits Comment Letter on the SEC's Proxy Advice and Rule 14a-8 Proposals

[32192]

February 3, 2020 TO: ICI Members
Investment Company Directors SUBJECTS: Closed-End Funds
Compliance
Disclosure
Fund Governance
Intermediary Oversight
Investment Advisers
Operations
Transfer Agency RE: ICI Submits Comment Letter on the SEC's Proxy Advice and Rule 14a-8 Proposals

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.[\[2\]](#)

Today, ICI submitted the attached comment letter, which addresses both proposals. We summarize our comments on each below.

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.[\[3\]](#)

We agree with the SEC that proxy advice should be accurate, transparent, and complete, but we do not support the proposal's set of provisions that would grant companies the right to review and comment on proxy advisory firms' draft advice before fund complexes and other clients receive it (the "review framework").[\[4\]](#) 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. We explain why by analyzing the key provisions of the proposed framework.

If the SEC insists on a mandatory review framework of some kind, we recommend two superior alternatives:

- Our much-preferred alternative would result in fund complexes receiving final 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.[\[5\]](#)

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 three eligibility options that combine amount of securities owned and time held;[\[6\]](#) and
- Raise the current resubmission thresholds for shareholder proposals[\[7\]](#) and include a new provision for excluding resubmissions that experience a drop in support (the "momentum provision").[\[8\]](#)

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. In addition, we recommend:

- applying a different vote-counting methodology for shareholder proposals resubmitted to closed-end funds, which should account better for the unique attributes of those funds and their shareholders and the challenges that arbitrageurs present;[\[9\]](#)
- revising the "momentum provision" to require a 30 percent drop in shareholder support to exclude a resubmitted proposal, to strike a more appropriate balance between the interests of shareholders and companies;
- requiring that mutual funds' and ETFs' shareholder proponents reaffirm periodically (e.g., within three years from the date of submission if no shareholder meeting has occurred) any outstanding proposals; and
- improvements to the SEC staff's process for reviewing requests to exclude shareholder proposals.[\[10\]](#)

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[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] We provide no comments on the proposed amendments to the "solicitation" definition or to the other proposed amendments to Rule 14a-2.

[5] See the attached letter for the terms of our alternatives.

[6] 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.

[7] 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.

[8] 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.

[9] Specifically, we recommend that the SEC calculate resubmission eligibility for closed-end fund proposals using a “shares entitled to vote” rather than a “votes cast” standard, which we believe would depict more accurately whether there truly is “widespread” support for a proposal that would merit allowing a shareholder to resubmit it.

[10] Specifically, we recommend that the SEC and staff return to the status quo ante on a permanent basis. In 2019, the Division of Corporation Finance staff announced changes to its exclusion review process, indicating that the Division may decline to take a position on certain exclusion requests. SEC Division of Corporation Finance, *Announcement regarding Rule 14a-8 No-Action Requests* (Sept. 6, 2019), available at www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests. We believe that these announced changes will increase uncertainty for all parties.

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