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February 3, 2020

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

Re: *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (File No. S7-22-19) and Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (File No. S7-23-19)*

Dear Ms. Countryman:

The Investment Company Institute[1] supports the Commission's examinations of proxy advice[2] and the shareholder proposal rule.[3] The Commission's proposals would affect registered investment companies ("funds") as both investors and issuers. As investors, funds may retain proxy advisory firms for administrative or research services. As issuers, funds receive proposals from their own shareholders; as investors, funds evaluate and vote on proposals that their fellow shareholders submit to their portfolio companies. Our comments seek to assist the Commission in striking the right balance between the interests of companies and shareholders. Funds' multi-faceted participation in the proxy system provides us with a unique vantage point to do so.

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$25.2 trillion in the United States, serving more than 100 million US shareholders, and US$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

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

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

Proxy advice should be accurate, transparent, and complete, but we do not support the proxy advice proposal's set of provisions that would grant companies the right to review and comment on proxy advisory firms' draft advice *before* fund complexes[4] and other clients receive it.[5] This 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 recommend an alternative whereby funds and other clients would receive proxy reports *concurrent* with their release to companies for review and comment.

We support the proposed changes to the eligibility and resubmission standards in the shareholder proposal rule. We regard these changes as reasonable regulatory line drawing, which will 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 proposed "momentum" exclusion—which would permit companies to exclude resubmitted proposals that experience a specified loss of shareholder support—to strike a more appropriate balance between the interests of shareholders and companies. We also recommend applying a different vote-counting methodology for shareholder proposals resubmitted to closed-end funds, which should account better for the unique attributes and characteristics of those funds and their shareholders.

We comment on the proxy advice proposal in Section I[6] and the shareholder proposal rule in Section II.

I. Proxy Advice Proposal

As institutional investors, funds vote proxies for their portfolio securities, and many fund complexes retain proxy advisory firms (or "PVABs")[7] for administrative and/or research-oriented proxy voting assistance. As issuers, funds prepare proxy solicitation materials for their shareholder meetings, and PVABs often issue proxy advice (*e.g.*, reports consisting of research, analysis, and voting recommendations) regarding funds' proxy proposals.

We strongly support the proxy advice proposal's overarching goal, that is:

> to help ensure that investors who use proxy voting advice receive more accurate, transparent, and complete information on which to make their voting decisions, in a manner that does not impose undue costs or delays that could adversely affect the timely provision of proxy voting advice.[8]

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[4] We use the term "fund complex" to refer to a group of affiliated funds and its investment adviser(s).

[5] Hereinafter we refer to this aspect of the proxy advice proposal as the "review framework," or "framework."

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

[7] We use the term "proxy advisory firm" and "proxy voting advice business" interchangeably, and abbreviate this as "PVAB."

[8] Proxy Advice Proposal at 1.

As this formulation recognizes, however, regulatory attempts to improve the accuracy, transparency, and completeness of proxy advice could impair the timeliness and cost-effectiveness of that advice. As explained below, we believe that the SEC's proposed review framework would do just that and move funds *farther* from this stated goal. Our recommended alternatives described below would address our concerns.

A. Background on Fund Complexes' Use of PVABs

As explained in our March 2019 comment letter[9] and in ICI's report on funds' use of proxy advisory firms,[10] PVABs provide a wide range of administrative and research services related to proxy voting, and many fund complexes retain PVABs to assist them in carrying out their proxy voting responsibilities. Those fund advisers that consult PVABs' research and recommendations may consider this information to varying degrees, along with views of companies, other investors, and shareholder proponents. Given the complexity and range of fund proxy voting responsibilities, many fund complexes value PVABs' services.

Fund complexes fully embrace the ongoing oversight and due diligence obligations that accompany their use of PVABs.[11] Funds' use of third-party service providers such as PVABs is not novel, and continued oversight of key service providers—by both fund boards and advisers—is critically important and deeply ingrained in practice and regulation.

Fund complexes operate under tight time constraints during the US proxy season. For some, the volume of matters analyzed and votes cast can be immense. For instance, for the 12 months ended June 30, 2017 (the 2017 proxy year), shareholders at the 3,000 largest public companies (*i.e.*, companies in the Russell 3000 Index) considered more than 25,000 proposals.[12] For US-listed companies, proxy campaigns are heavily concentrated in the second quarter.

Funds' proxy voting guidelines and research, together with PVABs' general and custom advice (*e.g.*, customized research and recommendations that PVABs provide to a specific client, often based on the client's custom proxy voting guidelines), are important tools in helping identify those proposals requiring greater attention. Often, a proposal's need for greater analysis will be readily apparent (*e.g.* proposed mergers, contested director elections, and certain shareholder proposals). For these proposals, a fund adviser may begin its analysis concurrent with the release of the company's definitive proxy

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[9] Letter from Paul Schott Stevens, President and CEO, ICI, to Ms. Vanessa Countryman, Acting Secretary, SEC, dated March 15, 2019 ("March Letter"), at 8-10 and 13-14, available at www.sec.gov/comments/4-725/4725-5124158-183336.pdf.

[10] *Report on Funds' Use of Proxy Advisory Firms,* Investment Company Institute and Independent Directors Council (January 2015), available at www.ici.org/pdf/pub_15_proxy_advisory_firms.pdf.

[11] *See generally Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Release No. IA-5325 (Aug. 21, 2019) ("Investment Adviser Guidance"), available at www.sec.gov/rules/interp/2019/ia-5325.pdf.

[12] Mitler, Morris, Dorothy Donohue, and Sean Collins. 2019. "Proxy Voting by Registered Investment Companies, 2017." *ICI Research Perspective* 25, no. 05 (July), at 4. Available at www.ici.org/pdf/per25-05.pdf.

materials. The PVAB's report may organize the underlying proxy information in a uniform way that facilitates and supplements the adviser's analysis, and in some cases, the report may identify additional issues. Timeliness is especially critical here, because these matters are complex and may have a significant impact on a fund's investment in a company. Following receipt of the report, fund advisers may engage directly with companies, requesting additional information or perspective.

Timing varies as to when fund advisers typically receive proxy reports from PVABs. During relatively slow periods, fund advisers may receive these reports within twenty days of the shareholder meeting; during the peak of proxy season or for special meetings, receipt may occur seven days or less prior to the meeting. Furthermore, fund advisers' receipt of custom advice may lag their receipt of "benchmark" proxy reports (*i.e.*, those standardized PVAB reports issued broadly to clients that include research, analysis, and a general voting recommendation).

Funds also experience pressure on the back end of the proxy timeline. Because of the intermediated nature of proxy voting and the number of entities involved, funds typically must vote two days or more prior to the meeting date. For foreign companies that list on US exchanges, the voting cut-off date may be even sooner, with funds at times required to vote a week or more in advance of the meeting. This existing timeline is tight, and funds are greatly concerned about regulatory changes that would exacerbate these already intense timing pressures.

Considering the strong regulatory framework in place for, and the developed voting practices of, funds and their advisers, we question the need for additional regulation—direct or indirect—that could adversely affect funds' ability to vote proxies.

In fact, the Commission more heavily regulates proxy voting by funds than that of any other entity that casts votes. Since 2004, funds have publicly reported their proxy votes to the SEC, providing a full and transparent voting record.[13] Funds also must describe in their registration statements the policies and procedures that they use to determine how to vote proxies for their portfolio securities.[14]

The Commission further requires a fund adviser with voting authority to adopt and implement proxy voting policies and procedures reasonably designed to ensure that it votes client proxies in the best interest of its clients.[15] The adviser must describe its policies and procedures in its Form ADV. Further,

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[13] Investment Company Act Rule 30b1-4 and Form N-PX. *See also Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, SEC Release No. IC-25922 (Jan. 31, 2003)("Fund Proxy Release"), available at www.sec.gov/rules/final/33-8188.htm.

[14] Item 17(f) of Form N-1A (registration statement for open-end funds), Item 18 of Form N-2 (registration statement for closed-end funds), and Item 20 of Form N-3 (registration statement for separate accounts organized as management investment companies). Closed-end funds also must include similar disclosure under Item 7 of their annual Form N-CSR filings.

[15] *Proxy Voting by Investment Advisers*, SEC Release No. IA-2106 (Jan. 31, 2003), available at www.sec.gov/rules/final/ia-2106.htm.

the policies and procedures must address how the adviser will handle material conflicts of interest between it and its clients.[16]

The SEC has considered regulating the activities of PVABs at least since 2010, when it issued its concept release on the proxy system.[17] While we have questioned the need for additional regulation of PVABs,[18] ICI has remained open to regulatory changes that do not:

- Impede fund complexes' ability to receive administrative or research-oriented proxy voting assistance from PVABs;
- Adversely affect the timeliness of the PVAB advice for which fund complexes pay, and which may be an important input for fund advisers to analyze and consider within an already-compressed proxy voting schedule; or
- Overly complicate communications flows or systems in ways that add costs that fund shareholders likely would bear.[19]

With these principles in mind, we evaluate the review framework and offer more suitable alternatives below.

B. Proposal's Framework for Company Review

We do not believe that the proposed review framework sufficiently accounts for the interests of funds and their shareholders, particularly their need for timely and cost-effective advice.[20]

Rule 14a-2(b) under the Exchange Act conditionally exempts certain solicitations, including those of PVABs, from the proxy rules' information and filing requirements. The proposal would modify the rule's conditions for claiming these exclusions. Most significantly for funds, the proposed amendments[21] would require that PVABs:

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[16] Advisers Act Rule 206(4)-6 applies to all registered investment advisers. An adviser also must (i) disclose how clients may obtain information about how the adviser voted with respect to their securities, and (ii) provide clients with a copy of its proxy voting policies and procedures upon request.

[17] *Concept Release on the U.S. Proxy System*, SEC Release No. 34-62495 (July 14, 2010), available at www.sec.gov/rules/concept/2010/34-62495.pdf.

[18] Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, SEC, dated October 20, 2010, at 14-16, available at www.sec.gov/comments/s7-14-10/s71410-167.pdf.

[19] March Letter at 13-14.

[20] We focus on the proposal's impact on fund complexes, even though they are only one type of investor (and PVAB client) that the proposal would affect.

[21] We comment only on the proposed amendments to Rule 14a-2 that would create the review framework.

- Provide companies[22] with an opportunity to review and provide feedback on proxy advice *before* PVABs issue it to their clients (*e.g.*, fund complexes), 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.

In sum, the framework's costs to funds and their shareholders would outweigh its benefits.

Specific to investors (including funds), the SEC states that the review framework's benefits include "enhancing the overall mix of information available,"[23] "more accurate and complete voting advice," and "ready and timely access to the company's and other soliciting person's perspective when considering the advice, such as where there are differing views about the proxy advisor's methodological approach or other differences of opinion… ."[24]

More specifically, the SEC's analysis indicates that the number of factual errors reported by companies in their additional proxy materials in 2018 were less than three-tenths of a percent (17/5,862). This analysis evidences that companies already publicly voice their disagreements—factual and otherwise—with proxy advice, suggesting that "completeness" is an area where improvement may be only modest. And since the number of company-reported factual errors is such a small percentage of total annual

[22] The proposal would grant review rights to the "registrant or any other person conducting a solicitation (other than a solicitation exempt under §240.14a-2) covered by its proxy voting advice…", but we generally use the term "company" in this letter to simplify and streamline our discussion and analysis of the proposal. Similarly, even though the proposal extends review rights to situations other than advice issued in advance of shareholder meetings (*e.g.*, solicitations of written consents or authorizations from shareholders in lieu of a meeting), we generally refer only to proxy statements and shareholder meetings. We also use these conventions in Section I.C below, where we refer generally to "companies" for clarity but do not mean to limit the scope of our alternatives in that way.

[23] We expect shareholders being equipped to evaluate a more complete set of information will be beneficial in situations where the PVAB is evaluating a more specialized type of company, such as a closed-end fund, with which PVABs have less experience. Our members report that with respect to closed-end fund proxy matters, even small errors by the PVABs may have a quite significant impact, unduly imposing costs on fund shareholders.

[24] Proxy Advice Proposal at 101.

proxy filings, there would appear to be little room for improved factual accuracy. If anything, this analysis calls into question the magnitude of benefits that regulation may produce.

The SEC does not attempt to quantify investors' costs in its economic analysis and instead states only that certain costs imposed on PVABs could be passed along to investors, and that failure to deliver timely advice could cause investors to "incur an indirect cost in that they would have less time to consider the business's voting advice prior to the proxy vote."[25] It also states that the review framework "could impact perceptions about the independence and objectivity of the advice … [and] affect the willingness of investment advisers and other clients to engage the services of proxy voting advice businesses."[26]

The SEC's treatment of investor costs is far too cursory, and fails to appreciate fully the review framework's impact on the timeliness and cost of proxy advice, which we highlight below.

1. **The Scope of Review is Overly Broad and Would Compromise the Confidentiality of Fund Complexes' Proxy-Related Information**

Under the proposed review framework, the scope of materials that the SEC would permit companies to review is far too broad. The proposed amendments do not define "proxy voting advice," but the proposing release contemplates a very broad definition,[27] including not only the benchmark reports that PVABs distribute broadly to clients but also custom reports that PVABs issue to individual clients.[28] The distribution and review of custom reports would create a tremendous amount of work for companies and PVABs alike, which in turn would affect PVABs' ability to provide their clients with timely advice.

Most significantly for fund complexes, it could expose confidential and proprietary information (*e.g.*, underlying methodological information) that they provide to PVABs for purposes of effectuating their proxy voting guidelines, which in some cases exceeds what they publicly disclose.[29] It is imperative that any final review framework *not* include PVAB communications containing client-specific information.

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[25] *Id*. at 104, 108.

[26] *Id* at 107-108.

[27] The proposing release defines this as "the voting recommendations provided by proxy voting advice businesses on specific matters presented at a company's shareholder meeting … along with the analysis and research underlying the voting recommendations, and 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." Proxy Advice Proposal at 8.

[28] *See* Proxy Advice Proposal at n.116 ("We note that the proxy voting advice required to be provided may include multiple reports, if applicable, that the proxy voting advice business produces for its clients. For example, some proxy voting advice businesses may provide a so-called 'benchmark report,' as well as separate 'specialty reports' to a client.").

[29] *See supra*, Section I.A.

2. The Framework Is Highly Likely to Reduce the Timeliness of PVABs' Advice and Increase Its Costs

Fully informed and thoughtful proxy voting requires fund advisers to receive relevant information as early as possible. Funds are deeply concerned about the proposal's impact on the timeliness and cost of the proxy advice that they receive, for the following reasons.

First, the company review periods are overly generous and timed too closely to the intended distribution of the advice. Assuming they timely file their definitive proxy statements, companies would have two separate, non-concurrent review periods—an initial five-business or three-business day review period, followed by an additional two-business day review period. Thus, these review and comment periods would total either (i) seven business days for those filing their materials at least 45 calendar days before the meeting date, or (ii) five business days for those filing their materials less than 45 calendar days, but at least 25 calendar days, before the meeting date. All timely filers receive these review rights, irrespective of whether they have any intention of exercising them. And PVABs are precluded from distributing advice to their clients during this fixed review period, even though many companies may not review nor comment on the advice.[30]

The SEC does not explain why it sets company review periods in *business* days, while it conditions companies' review rights on filing proxy statements within set numbers of *calendar* days. But this critical distinction, together with the lengthy review periods described above, would negatively affect funds, as we demonstrate in the example below.

Example of How Company Review Would Affect Funds

Suppose that a company files its proxy statement today (February 3, 2020), and schedules its shareholder meeting for February 28, 2020. The proposal would entitle the company to a five business day review period (three business days plus two additional business days for final review). If the PVAB wished to provide its clients even a week to review its advice prior to the meeting date—far from ideal, especially for matters such as proposed mergers and contested director elections—it would distribute it to them on February 21. This means that the PVAB would need to provide the company with the draft advice by February 13. In such a scenario, PVABs would have 10 calendar days to prepare draft advice; companies would have eight calendar days to review it (five business days, two weekend days, and Presidents' Day); and fund advisers would have no more than five calendar days (three business days) to consider it prior to voting.

We show this graphically below. Company review consumes nearly a third of the period, leaving the fund adviser with relatively little time to review the advice and engage with the company. Moreover, this example optimistically assumes (i) that the company's review does *not* delay the PVAB's

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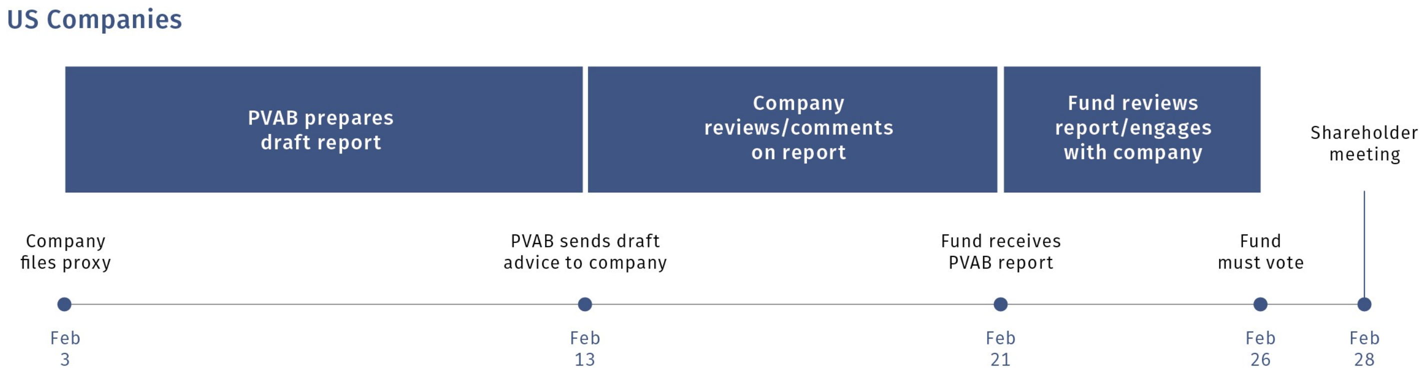
[30] ICI's *Proxy Voting by Registered Investment Companies, 2017* (*supra* note, 12) indicates that of all management proposals on which funds voted in 2017, ISS recommended votes "for" over 93 percent of them (Figure 10). In those cases where a PVAB recommends votes "for" all management proposals and against any shareholder proposal(s) on a company's proxy, there would not appear to be a strong incentive for the company to review and comment on the PVAB's draft advice.

distribution of its advice to clients, and (ii) a relatively late voting cut-off date (two days prior to the meeting; as noted above, however, the voting cut-off date for certain US-listed foreign companies may be a week or more prior to the shareholder meeting). If these assumptions do not hold, then fund complexes would be further squeezed, and the value of advice once received would be diminished further. A company would have more time with, and earlier access to, the advice than the PVABs' paying customers, a result that surely does not support informed proxy voting.



Second, the proposal would not require companies to *promptly* provide comments. Rather, a company need only provide comments prior to the expiration of the two-day review period, *i.e.*, at the very end of its overall review. This means that a company with a seven business day review period could provide substantive comments immediately before the PVAB's intended distribution date, all but ensuring that the PVAB will delay releasing its advice to clients while it reviews the comments and determines which changes, if any, to make.[31]

Third, the SEC has not sufficiently incentivized companies to accelerate their proxy statement filings. Although the Commission generally acknowledges the importance of timely advice, the review framework itself undermines this key objective.

Companies that do not file their proxy statements at least 25 days before the shareholder meeting date would have no review rights, but this is not much of an incentive. The proposal states that companies customarily file and/or mail their definitive proxy materials anywhere from 35 to 40 or 30 to 50 days before a shareholder meeting.[32] Most companies already would qualify for the five business day review

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[31] The SEC has stated that the PVABs' proxy advice is subject to Rule 14a-9, the antifraud provision of the proxy rules, which means that PVABs will consider any company comments carefully.

On the proposed additions to Rule 14a-9's text, we welcome the SEC's emphasis on ensuring that PVABs disclose their "use of standards that materially differ from relevant standards or requirements that the Commission sets or approves." Members report that PVABs have, at times, opined that a closed-end fund board candidate was not "independent" based on its own definition, without also disclosing that the candidate is in fact "independent" under the Investment Company Act. We request that the Commission clarify in any adopting release that a PVAB omitting this critical fact would violate Rule 14a-9.

[32] Proxy Advice Proposal at n.114.

period, and the marginal benefit of extending this to seven likely is not very great. If substantial numbers of companies do not file earlier than they do now, then the spring proxy timeline will not meaningfully "expand." Without this expansion, fitting this review framework into a still-cramped timeline will lead to some combination of (i) delays in PVABs' issuance of their advice, or (ii) increased costs to efficiently handle these responsibilities, which PVABs are likely to pass along to funds. Neither is desirable for fund shareholders.

Fourth, the review framework is needlessly complicated and has at least one significant ambiguity. The Commission has not presented a compelling reason for a two-step pre-distribution review process, especially when companies need not act during the first period. We also are troubled by the requirement to provide "a copy of such proxy voting advice that the proxy voting advice business *will deliver* to its clients… ." (emphasis added) It is unclear whether subsequent changes to the advice would re-set the review clock for companies. One easily can imagine scenarios where the linked comments are helpful (and could convince the PVAB to make certain necessary changes to its report), *or* where the PVAB believes that the linked comments are misguided, and wishes to explain why in its report. But if doing so triggers a new review period, "timeliness" is compromised. If a provision along these lines is retained, the SEC should clarify that any subsequent amendments do *not* trigger a new review period for companies.[33]

Finally, delays caused by the proposed framework would limit the time that fund advisers have to engage with companies, particularly following a PVAB's "against" recommendation on a management proposal or a "for" recommendation on a shareholder proposal. If a fund adviser has only a few days between receipt of proxy advice (which may include the company's objection(s)) and the deadline to vote, there would be little time to communicate directly with the company, evaluate the competing claims of the company and the PVAB, and decide how to vote. In these cases, the company's ability to rebut may be limited to its linked statement in the final advice. By contrast, having a system where recommendations are released sooner would allow for more comprehensive dialogue on important and complex topics.[34]

3. The Framework's Increased Costs to Funds and Shareholders Would Continue a Disturbing Regulatory Trend

More generally, we are deeply concerned by the cumulative and increasing regulatory costs that funds and their shareholders are bearing. In response to ICI's 2017 survey, members reported a median

[33] The SEC could do so by changing "will deliver" to "intends to deliver" and clarifying that any subsequent changes that a PVAB makes to the advice (including those made in response to the company's comments) would not trigger yet another review period.

[34] For example, at least one PVAB has a policy to recommend a vote "for" all proposals to declassify boards and "against" all proposals to classify boards. It applies this policy without distinction to both closed-end funds and operating companies, despite their stark differences. In this instance, it would be quite beneficial to allow closed-end funds sufficient time to inform their shareholders, for example, that a classified board helps ensure that it maintains a long-term focus on pursuing the fund's investment objectives, consistent with the interests of the funds' long-term shareholders.

increase in compliance costs of an estimated *twenty percent* over the previous five years.[35] Members cited one-time compliance costs (*e.g.*, legal costs, preparation of new policies and procedures, creation of internal controls, and staff training), increased technology expenditures, increased use of third-party fund service providers (*i.e.*, vendors), increased vendor costs, increased oversight of vendors and intermediaries, and increased staffing needs as primary drivers of these overall cost increases. If adopted, these proxy advice amendments would be the latest rulemaking that increases vendor costs for funds and their shareholders.

C. ICI's Proposed Alternative Review Frameworks

If the SEC is intent on providing a mandated review for companies, the process should be as efficient and unobtrusive as possible. Below we present two alternatives that achieve the SEC's stated objectives without the previously-discussed deleterious effects on funds. The first would grant a company the right to review and comment on the PVAB's benchmark report concurrent with its release to clients. The second also would grant this concurrent review right, along with a limited right to review and comment on draft factual information prior the report's distribution to clients. We recommend the first alternative, because it is simpler, less costly to implement, and less likely to compromise funds' receipt of timely advice.

1. Preferred Alternative: Concurrent Review of PVAB Reports

The SEC could require that a PVAB do the following for any company that files its definitive proxy statement at least 60 days prior to the shareholder meeting:[36]

- Concurrently share with the company its final benchmark report.[37]
- Notify its clients if the company raises any objections to the PVAB's report within 2 business days of receipt.[38]

As with the proposal, the PVAB could, but would not be obligated to, amend its final report. We strongly support this aspect of the SEC's proposal, and it is imperative that the SEC retain it in any final framework. We also believe that companies should pay for access to these reports so that PVABs' clients do not bear any expenses incurred to implement and administer this review framework.

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[35] *See* Letter from Susan Olson, General Counsel, ICI, to Vanessa Countryman, Secretary, SEC, dated September 24, 2019, Appendix A, available at www.sec.gov/comments/s7-08-19/s70819-6190597-192465.pdf.

[36] Even under this concurrent review alternative, incentivizing companies to accelerate their proxy filings would be critical. This would help accelerate PVABs' distribution of their proxy advice, and thus provide companies and fund advisers more time to analyze that advice and engage with one another as appropriate.

[37] Only the benchmark reports that PVABs issue broadly to their clients (as opposed to any custom reports or client-specific advice) should be subject to this company review.

[38] The PVAB could do this by inserting a company-provided link into an amended report, or simply sending its clients a link to any company filing on EDGAR that addresses the PVAB's proxy report.

As discussed in our March Letter, this framework would provide investors with a more complete, and easily accessible, "record" prior to casting votes. It would provide companies with another channel to communicate with investors and allow for better visibility of their comments on PVAB advice. Unlike the SEC's proposal, this would not delay fund advisers' review of PVAB advice, and it would help insulate fund shareholders from any cost increases resulting from these regulations.

2. Second Alternative: Limited Review of Draft Materials and Concurrent Review of Final Reports

While we do not favor this second alternative, if the SEC insists on providing companies the right to review *draft* PVAB materials prior to distribution to clients, we recommend that any such review framework have the following provisions:

- *Single Pre-Distribution Review Only for Timely Filers.* A company could review a PVAB's "proxy voting research" (as defined below) only if it files its definitive proxy statement at least 60 days prior to its shareholder meeting.[39] A qualifying company could review this research only once prior to distribution to clients.
- *Definition of "Proxy Voting Research" (a new proposed term).* We recommend replacing "proxy voting advice" with "proxy voting research," defined to include only factual information in any PVAB benchmark report.[40] Again, any review rights must not include custom reports or any other client-specific information.
- *Additional Provisions.* A review framework designed to help investors should have the following additional provisions:
    - A company must receive the PVAB's draft proxy voting research at least 5 business days prior to the anticipated date for distribution to clients.[41]

[39] As discussed above, for any pre-distribution review framework to help funds, companies must file sooner to allow PVABs to complete their work and fund advisers to consider it as part of their overall analysis prior to voting.

[40] The SEC's proposal provides a right to review "proxy voting advice," which has a much broader meaning. *See supra*, note 27. We recognize that distinguishing "fact" from "opinion" is complex. We also recognize that some PVABs currently provide companies with pre-distribution review rights that in some cases extend beyond "facts only." Nothing in our recommendation would preclude PVABs from continuing to do so. Still, we believe that any *mandated* pre-distribution review rights should be more limited in scope, to allow more room for private ordering among the relevant parties.

[41] While we would not favor being overly prescriptive, we would like to see this "facts only" review occur as early in the process as practicable. This lessens the risk of delays in the PVAB issuing advice to clients. Also, this need not include finalized portions of written reports, but could instead be extracted data and information that will appear in the final reports.

- A company would be required to provide any comments (and a link to those comments) to the PVAB within 2 business days of receipt of the research.[42] The PVAB would be required to include this link in its final report, upon the company's request.[43]

- The PVAB need not modify the contents of its report in any way in response to comments (beyond inserting the link).

- The company would file the comments it provides to the PVAB with the SEC as solicitation material.

- Consistent with our preferred alternative, the PVAB would be required to:
  - Concurrently share with the company its final benchmark proxy report; and
  - Notify its clients if the company raises any objections to the PVAB's report within 2 business days of receipt.

  This would provide the company with a second and more comprehensive review. Crucially, however, this review would not delay or shorten fund advisers' reviews.

As with our preferred alternative, we believe that companies should pay for access to these reports so that PVABs' clients do not bear expenses incurred to implement and administer this review framework. We would expect the expenses of this second alternative to be higher than those for the first.

II. Proposed Amendments to the Shareholder Proposal Rule (Rule 14a-8)

The parameters of the shareholder proposal rule are important to funds both as investors (funds vote on shareholder proposals for their portfolio companies) and issuers (funds receive and respond to proposals from *their* shareholders). In this section, we comment on the proposed rule amendments that would alter the current requirements for submitting and resubmitting shareholder proposals, and also recommend: (i) a requirement that mutual funds' and ETFs' shareholder proponents reaffirm periodically any outstanding proposals; and (ii) improvements to the SEC staff's process for reviewing requests to exclude shareholder proposals.

A. Shareholder Eligibility Requirements

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)

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[42] We would not object to providing smaller companies (as defined by some objective measure, such as market capitalization) with an extra day to review.

[43] The SEC also could require that the PVAB include the company's link in any custom reports. This would help ensure that the company's comments would be easily accessible to those PVAB clients that review custom (rather than benchmark) reports.

$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.

ICI supports these changes. Considering minimum dollar investments in tandem with holding periods is a reasonable way to ensure that smaller shareholders maintain their access to this engagement channel, while also properly insisting that their interests be aligned with those of long-term shareholders generally. These changes recognize the costs that a single shareholder's proposal generates for *all* shareholders and the importance of permitting long-term shareholders to submit shareholder proposals.[44]

B. Resubmissions Thresholds for Shareholder Proposals

Rule 14a-8(i) provides 13 bases upon which a company may exclude a shareholder proposal, including a "resubmissions" exclusion. Currently, a fund may exclude a shareholder proposal to resubmit the same (or a similar) proposal that has been submitted during the preceding 5 calendar years if the prior proposal did not receive at least 3, 6, and 10 percent shareholder approval for the first, second, and third submissions, respectively. The proposal would raise those resubmission thresholds to 5, 15, and 25 percent, respectively, of "votes cast."

ICI supports the proposed increases to the existing thresholds. But we recommend applying a different vote-counting methodology to closed-end funds, as described below.

We commend the Commission for relying on data and its experience with the shareholder proposal process.[45] As we stated in our March Letter, the rule's resubmission thresholds should permit exclusion of proposals that stand "no significant chance" of obtaining shareholder approval in a subsequent resubmission, and we believe the SEC's proposal reasonably can be expected to accomplish this.

The proposed higher thresholds would preserve a shareholder's ability to build support for its proposal through successive submissions while also reducing the number of repeat proposals that have little, or no, chance of gaining majority shareholder support. Such proposals impose costs on companies and also on those shareholders (including funds) that attempt to vote thoughtfully on those matters put before them. These costs simply are not justified where lack of support for a previously-unsuccessful proposal indicates little or no likelihood that a resubmitted proposal ever would gain acceptance.

We strongly recommend, however, that the Commission adopt a different vote-counting methodology for shareholder proposals resubmitted to closed-end funds.[46] In particular, the Commission should calculate resubmission eligibility for closed-end funds using a "shares entitled to vote" rather than a

[44] *See* Rule 14a-8 Proposal at 20-21.

[45] *See id*. at 41-56.

[46] The Commission requested comment on whether it should revise the vote-counting methodology for resubmissions, including whether shares held by insiders should be excluded from the voting calculation or whether broker non-votes or abstentions should count as votes "against." *See id*. at 57 (Question 42).

"votes cast" standard.[47] The recommended approach has precedent: Both current rule 14a-8 and the rule as proposed to be amended use an "entitled to vote" counting methodology for purposes of initial eligibility to submit a shareholder proposal. Additionally, the recommended approach would account better for the unique attributes and characteristics of closed-end funds and their shareholders and is consistent with the Commission's overarching policy objectives.

Closed-end funds register under the Investment Company Act and register their shares under the Securities Act. The assets of a closed-end fund are professionally managed in accordance with the fund's investment objectives and policies, and may be invested in stocks, bonds, and other assets.[48] Closed-end funds generally issue a fixed number of shares that are listed on a stock exchange or traded in the over-the-counter market. The market price of closed-end fund shares fluctuates like those of other publicly-traded securities and is determined by supply and demand in the marketplace. Therefore, a fund's shares may trade at a price higher or lower than net asset value (NAV). A closed-end fund trading at a share price higher than its NAV is said to be selling at a "premium" to the NAV, while a closed-end fund trading at a share price lower than its NAV is said to be selling at a "discount."

Closed-end funds generally have individual, retail "Main Street" investors who invest for the long-term and also have arbitrageurs who seek to profit at the expense of these long-term shareholders by taking advantage of situations where a fund's shares are trading at a discount to NAV. Recently, such arbitrageurs have intensified their efforts to seize control of closed-end funds to extract short-term profits. Arbitrageurs typically accumulate large positions in the fund, and then seek to cause the fund to take immediate actions to provide liquidity at or near NAV (*e.g.,* tender offer, conversion to open-end, or liquidation).[49] These arbitrage tactics can cause serious harm to a fund and the interests of its long-term investors, including forcing fundamental changes to the nature of the product that are contrary to what Main Street investors sought when choosing to invest in the fund.

The Institute has been working closely with our closed-end fund members to assist with identifying ways, including through possible regulatory changes, that would provide closed-end fund boards with additional tools to protect long-term shareholders.

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[47] Alternatively, we would support the Commission counting abstentions and broker non-votes as votes *against* a shareholder proposal (these are "shares present" at a shareholder meeting that have not voted in support of the proposal), consistent with the first prong of the "majority vote" standard in Section 2(a)(42) of the Investment Company Act.

[48] At year-end 2018, 64 percent of closed-end fund assets ($159 billion) were held by bond funds. The remaining 36 percent of closed-end fund assets ($91 billion) were held by equity funds. Between 2011 and 2018, more closed-end funds were liquidated, merged, or converted into open-end mutual funds or exchange-traded funds than were launched. *See* 2019 Investment Company Fact Book, available at www.icifactbook.org/ch5/19_fb_ch5.

[49] *See*, *e.g.*, Rachel Levy, "*Boaz Weinstein's Hedge Fund Battle with Neuberger Berman Gets More Heated*," THE WALL STREET JOURNAL (Oct. 9, 2019) (summarizing recent actions against one closed-end fund); Gretchen Morgenson, "*Saba can Nominate Slate to BlackRock Fund Boards, Delaware Court Says*," THE WALL STREET JOURNAL (June 28, 2019) (summarizing recent actions against two closed-end funds).

If the Commission were to amend Rule 14a-8 to permit closed-end funds to measure support for shareholder proposals using a "shares entitled to vote" standard, it would depict more accurately whether there truly is "widespread" support for a proposal that would merit allowing a shareholder to resubmit the proposal.[50] In other words, for closed-end funds, the level of support should be assessed, in part, based on whether a sufficient portion of retail long-term shareholders have made the effort to both cast a vote and vote in favor of the proposal. A "votes cast" standard effectively discounts those who simply have chosen not to vote.

Applying a "shares entitled to vote" standard for closed-end funds would be consistent with the Commission's policy of placing limits on the unfettered ability of one, or a few, shareholders to use the shareholder proposal process to repeatedly and unreasonably create significant costs for *all* shareholders.[51] Importantly, it would relieve closed-end funds of the obligation to consider and spend resources on matters that do not reflect the views of the broader shareholder base.

C. "Momentum" Exclusion

Under the resubmissions exclusion, the proposal also creates an additional means of excluding shareholder proposals: A company could 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 (the "momentum exclusion"). The exclusion's purpose is to relieve management and shareholders from repeatedly considering, and bearing the costs related to, matters for which shareholder interest has declined.

While we do not object to the momentum concept, we recommend modifying its parameters to require a greater decline in support. As proposed, the same shareholder proposal could garner shareholder support of:

- 10 percent in year one;
- 20 percent in year two;
- 49 percent in year three; and
- 44 percent in year four.

[50] *See* Rule 14a-8 Proposal at 48 (noting the Commission's concern that "the current resubmission thresholds may allow proposals that have not received widespread support from a company's shareholders to be resubmitted.").

[51] *See id*. We strongly urge the Commission also to consider that arbitrageur campaigns are often substantially aided by PVABs' voting recommendations. For instance, PVABs routinely support proposals to declassify closed-end fund boards, citing good corporate governance practices but fail to recognize: (i) the important distinctions between operating companies and closed-end funds; and (ii) the arbitrageurs' interest in near-term liquidity at the expense of Main Street long-term investors. Arbitrageurs use the PVABs' blanket support for declassification proposals as a tool to generate quick arbitrage profits.

If the shareholder proponent submitted it a fifth time, the company could exclude it from its proxy statement, notwithstanding the still-substantial level—44 percent—of shareholder support.[52]

In our view, the Commission should permit a company to exclude a shareholder proposal that experiences a decline in support of **30** percent or more after at least three attempts.[53] A decline of this larger magnitude would better assure that potentially viable proposals would not be excluded based on a relatively small decline in support that could be temporary.

D. Recommended Shareholder Affirmation of Outdated Proposals

The proposing release observes that mutual funds and ETFs generally do not hold annual shareholder meetings, and that several years may pass between submission of a shareholder proposal and the next shareholder meeting. The release then asks whether the Commission should consider requiring shareholder proponents to reaffirm prior proposals after some passage of time.

We recommend that the Commission adopt amendments to effectuate this. The Commission correctly notes that as time passes, the initial submission may no longer reflect the interest of the proponent, or the proponent may have sold its shares.

For funds with these outdated proposals, tracking and reconfirming them can be a significant administrative burden, given the fluidity of share ownership over long periods. Therefore, we recommend implementing an expiration date for shareholder proposals to open-end funds (*e.g.*, three years from the date of submission, if no shareholder meeting has been held during that period). Absent resubmission or some other form of written reaffirmation of the initial proposal prior to expiration by the shareholder proponent (which would include reaffirmation that the shareholder continues to satisfy the rule's eligibility requirements), the proposal would expire, and the fund would not be obligated to include it on the proxy statement for its next shareholder meeting.

E. Recommended Improvements to the Staff Review Process

While not addressed in the proposing release, the Division of Corporation Finance staff recently announced changes to its shareholder proposal exclusion review process.[54] The staff stated that:

> [s]tarting with the 2019-2020 shareholder proposal season, … the staff may respond orally instead of in writing to some no-action requests … . If the staff declines to state a view on any particular request, the interested parties should not interpret that position

[52] In this case, a 10 percent decline from 49 percent would be 4.9 percent, so any decline of that amount or more would mean that the company could exclude the same (or a substantially similar) proposal if subsequently re-submitted.

[53] Under this 30 percent standard and using the example above, a company could exclude a proposal receiving shareholder support of 34.3 percent or less (compared to 44.1 percent under the SEC's proposed 10 percent standard) on the fourth attempt if submitted a fifth time.

[54] 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.

> as indicating that the proposal must be included. In such circumstances, the staff is not taking a position on the merits of the arguments made, and the company may have a valid legal basis to exclude the proposal under Rule 14a-8.

The staff weighs in only when the company wishes to exclude a shareholder proposal on one or more of the bases provided in Rule 14a-8(i). Staff involvement brings more certainty and consistency to the process and imposes discipline on companies and shareholder proponents alike.

We appreciate the difficulty of this staff work, but this announcement concerns us on both substantive and procedural grounds. Our members are apprehensive that these changes will promote uncertainty for all parties.[55]

Given the importance of these matters and the tight time constraints of the proxy season, a company or fund that submits an exclusion request to the staff and receives no substantive reply will have three unappealing options: (i) include the proposal on its proxy statement and incur any related costs, despite misgivings about its appropriateness and legality; (ii) exclude the proposal from its proxy statement based on its interpretation and application of existing precedent, without any indication from the staff or a court that doing so is legally appropriate; or (iii) "seek formal, binding [court] adjudication," as the staff's statement suggests, with its attendant costs and uncertainty.[56]

We recommend that the SEC and staff return to the *status quo ante* on a permanent basis. If the Commission is not willing to do so, we request that, at a minimum, it temporarily return to the *status quo ante* while it provides interested parties an opportunity to comment and share any observed consequences of the staff's decision.

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[55] Exchange rules require closed-end funds to have annual shareholder meetings, and shareholder proponents often submit proposals.

[56] We question the practical viability of seeking a judicial remedy given the proxy process's time constraints.

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ICI appreciates the opportunity to provide our views on the regulation of proxy advice and its effects on funds. If you have any questions, please contact me at 202-326-5901, Susan Olson at 202-326-5813, Dorothy Donohue at 202-218-3563, or Matthew Thornton at 202-371-5406.

Sincerely,

Paul Schott Stevens
President and CEO
Investment Company Institute

cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee

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