

Via Email

May 26, 2021

Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

Re: Greater transparency of proxy advice, Consultation Paper

Dear Sirs/Madams:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to The Treasury of the Australian Government in response to the Consultation Paper dated April 2021 and entitled “Greater transparency of proxy advice (Paper).”¹

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

CII members generally agree that proxy advisors effectively and efficiently serve as important research providers for large numbers of institutional investors, providing an affordable, high-quality alternative to the otherwise-prohibitive cost of analyzing in-house literally hundreds of thousands of ballot proposals at thousands of shareholder meetings each proxy season. We believe it is critical that regulators promote the availability of timely, high-quality, and independent advice and analysis of issues subject to shareholder vote.

At the outset, we are disappointed that the Paper fails to provide any context in its description of the “recent reforms” of proxy advisers in the U.S.³ Readers of the Paper should have been informed that most institutional investors—the clients of proxy advice—did not ask for the U.S. reforms, did not want them, and do not believe they are needed to facilitate investors’ ability to

¹ Consultation Paper, Greater transparency of proxy advice, TSY/AU (Apr. 2021), <https://treasury.gov.au/consultation/c2021-169360>.

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

³ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 3-4.

obtain the information necessary to make informed voting decisions.⁴ Moreover, the Paper’s statement that the U.S. Securities and Exchange Commission’s (SEC or Commission) “final amendments [(SEC Rule)⁵] . . . will come into effect in December 2021” is uncertain.⁶

Whether key aspects of the SEC Rule will come into effect in December 2021 is an issue currently before the United States District Court for the District of Columbia (Court). Last September, Institutional Shareholder Services submitted to the Court a 31-page amended complaint providing multiple bases for requesting the Court to “vacate and set aside” the SEC Rule.⁷

CII and eight of our members filed a brief *amici curiae* in support of the plaintiff.⁸ Our brief presents four arguments,⁹ any one of which, we believe could result in the Court agreeing to our request that it “set aside” the adoption of the SEC Rule.¹⁰ A decision by the Court is expected by the Fall.

Finally, it may also be relevant to readers of the Paper that in December 2020 the SEC’s own Office of the Investor Advocate issued a report to the U.S. Congress recommending that the SEC Rule be overturned or reversed.¹¹ That recommendation included the following statement:

In our view, there are several troublesome aspects of this rulemaking. For example, the Commission’s justification for the feedback mechanism initially was predicated on the corporate registrant community’s purported allegations of widespread factual errors in proxy advisory firms’ work. The Commission retreated from this rationale in the adopting release, seeking instead to reframe findings in terms of system design—the ability to share and respond to information, and the ability of participants to engage with one another. But implicit in this framing, still, was the

finding that the existing system lacked “reliability and completeness,” which rested on acceptance at face value of the claims of select market participants that proxy

⁴ See, e.g., Commissioner Allison Herren Lee, Public Statement: Paying More For Less: Higher Costs for Shareholders, Less Accountability for Management (July 22, 2020), <https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22#:~:text=Public%20Statement-.Paying%20More%20For%20Less%3A%20Higher%20Costs,Shareholders%2C%20Less%20Accountability%20for%20Management&text=At%20the%20proposing%20stage%20for,case%20with%20today's%20final%20rules> (“Most notably, there was almost universal opposition from investors, the supposed beneficiaries of this rulemaking.”).

⁵ See Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 89,372, 85 Fed. Reg. 55,082 (July 22, 2020), <https://www.federalregister.gov/documents/2020/09/03/2020-16337/exemptions-from-the-proxy-rules-for-proxy-voting-advice>.

⁶ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 2-3 (emphasis added).

⁷ First Amended Complaint, ISS v. SEC, NO. 1:19-cv-3275-APM at 24-29 (Sept. 18, 2020), <https://proxywatch.com/wp-content/uploads/2020/10/Amended-complaint-as-filed.pdf>.

⁸ Brief *Amici Curiae* of the Council of Institutional Investors in Support of Plaintiff, ISS v. SEC, Case No. 1:19-cv-3275-APM (Oct. 9, 2020), https://www.cii.org/files/issues_and_advocacy/legal_issues/Doc_%2024-1%20-%20Brief%20Amici%20Curiae.pdf.

⁹ *Id.* at i.

¹⁰ *Id.* at 25.

¹¹ U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report on Activities, Fiscal Year 2020 at 3-6 (Dec. 29, 2020), <https://www.sec.gov/files/sec-investor-advocate-report-on-activities-2020.pdf>.

voting advice historically had not been transparent, accurate, and complete. The Commission did not evaluate the substance of these claims or distinguish biased opinion from fact, and these claims remain unsupported by empirical evidence.

. . . We believe investors should be free to seek the services of a third party to provide independent, objective advice about voting their shares, and investors should not be forced to pay for feedback mechanisms that subject them to further lobbying by corporate management. This is especially important in light of the compressed timeframe for proxy voting during the busy annual meeting season. We worry that the newly mandated feedback mechanism enables undue interference in the voting process and will likely result in the suppression of dissenting views.¹²

The remainder of this letter presents CII's responses to the first four options set forth in the Paper. We do not have a view on Option 5 "regarding professional licensing."¹³

Option 1: Improved disclosure of trustee voting.¹⁴

CII's membership approved policies indicate that institutional investors "should make publicly available in a timely manner . . . Proxy voting guidelines [and] . . . Proxy votes cast . . ." ¹⁵ We believe such fund disclosure practices "foster an environment of transparency and accountability."¹⁶

We generally do not support the proposed mandated disclosure of "whether the voting actions taken were consistent with the proxy advice."¹⁷ We note that most institutional investors members vote according to our own guidelines and policies which they believe are in the best interests of their plan beneficiaries.¹⁸ It is unclear to us why the proposed information would be useful to investors and other stakeholders and the Paper fails to provide an explanation.¹⁹

Option 2: Demonstrating independence and appropriate governance.²⁰

CII generally does not support the proposed mandate that "proxy advisors would be required to be meaningfully independent" from their clients. We have long supported proposed requirements

¹² *Id.* at 4-5.

¹³ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 7.

¹⁴ *Id.* at 5.

¹⁵ Council of Institutional Investors, Policies on Other Issues, Best Disclosure Practices for Institutional Investors (May 1, 2009), https://www.cii.org/policies_other_issues#disclosure_practices_inst_invest.

¹⁶ *Id.*

¹⁷ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 5.

¹⁸ *See, e.g.*, Brief Amici Curiae of the Council of Institutional Investors in Support of Plaintiff, ISS v. SEC, Case No. 1:19-cv-3275-APM at 3a (statement of CII member the Colorado Public Employees' Retirement Association: "Although we value and incorporate research from proxy advisors into our analysis, we ultimately vote according to our own guidelines and policies, which we believe are in the best interests of our plan beneficiaries.").

¹⁹ *See, e.g.*, Call for Comment on Australian Treasury's Counter-Productive Proxy Reforms, Regulatory Matters, Glass Lewis (May 5, 2021), <https://www.glasslewis.com/call-for-comment-on-australian-treasury-counter-productive-proxy-reforms/> ("No explanation is provided for why these disclosures would be useful to fund members or how these disclosures would work.").

²⁰ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 5.

to elicit disclosure of proxy advisors' conflicts of interest to their clients.²¹ We agree that conflict-of-interest disclosure is important for all major participants in the securities markets, including proxy advisors. However, it is unclear to us why a proposed mandated independence standard is necessary.

We believe that before mandating an independence standard for proxy advisors there should first be an evaluation of whether the conflict-of-interest disclosures currently provided are adequate to meet the information needs of their institutional investor clients. As indicated, CII has historically supported and continues to support requiring proxy advisors to disclose details of potential conflicts in their research reports to clients.

Option 3: Facilitate engagement and ensure transparency.²²

CII strongly opposes the proposed mandate for proxy advisors "to provide their report containing the research and voting recommendations for resolutions at a company's meeting, to the relevant company before distributing the final report to subscribing investors."²³ We believe the proposed mandate would likely significantly and negatively impact the ability of institutional investors to obtain independent, timely and cost-effective research and advice from proxy advisors for at least four reasons.

First, as in the U.S., we suspect that the proposed mandate is motivated, at least in part, by unsubstantiated allegations from issuers and their advocates of significant rates of factual and analytical errors in proxy advisor voting advice.²⁴ CII's own analysis in connection with the SEC Rule demonstrated that the number of asserted factual or analytical errors was overstated; that the purported analytical errors were actually disagreements on analytic methodology, not errors; that most of those assertions were incorrect; and that the alleged factual errors occurred in approximately just 0.3% of reports issued.²⁵ We believe an error rate of that magnitude does not provide a reliable basis for proposing mandated regulation of proxy advisors.²⁶ And absent any reliable evidence that factual errors or methodological weaknesses in proxy voting advice are actually prevalent and material at rates sufficient to impact voting recommendations, we question

²¹ See, e.g., Examining the Market Power and Impact of Proxy Advisory Firms; Hearing Before the Subcomm. on Capital Mrts. & Gov't Sponsored Enters. of the Comm. on Fin. Servs., 113th Cong. (June 5, 2013) (Statement of Ann Yerger, Exec. Dir., CII at 4), https://www.cii.org/files/publications/misc/06_05_13_cii_proxy_advisor_hearing_submission_ann_yerger.pdf ("CII believes that proxy advisory firms should . . . disclose details of potential conflicts, including those involving companies or resolution sponsors, in the applicable meeting report").

²² Consultation Paper, Greater transparency of proxy advice, TSY/AU at 6.

²³ *Id.*

²⁴ See, e.g., Commissioner Allison Herren Lee, Public Statement: Paying More For Less: Higher Costs for Shareholders, Less Accountability for Management ("there simply was not evidence of any significant error rate in proxy voting advice").

²⁵ See, e.g., Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 2 (Feb. 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/20200204%20PAF%20error%20claims%20letter%20FINAL.pdf ("The number of claimed inaccuracies is a very small: 0.3 percent").

²⁶ See, e.g., Commissioner Allison Herren Lee, Statement on Shareholder Rights (Nov. 5, 2019), <https://www.sec.gov/news/public-statement/statement-lee-2019-11-05-shareholder-rights> (commenting that the Securities and Exchange Commissioner's proposal on proxy advice was "missing data demonstrating an error rate in proxy advice sufficient to warrant a rulemaking").

whether there is any justification to mandate regulations that would potentially damage the integrity and quality of proxy voting advice and harm the investors that employ it.

Second, even assuming our estimate of proxy advisor error rates is too low, the mandated proposed timeframe for the proxy voting advice businesses to undertake their research and draft their recommendations, and, importantly, for institutional investor clients to review and act upon the advice in a measured way, would be a decrease from current practice. Delaying the dissemination of advice to investors would further reduce the limited time they already have to factor the advice into well-considered voting decisions. This would likely damage the ability of investors to consider proxy voting issues with the benefit of the proxy advisor advice that they pay for.

Third, the proposed mandate would likely impair the independence of proxy voting advice. Setting aside the issue of whether a mandatory, additional opportunity for company views on issues subject to shareholder votes provides *any* incremental value to shareholders,²⁷ we strongly oppose mandating that the proxy advisors seek review and receive feedback from the self-interested company *before* sharing the final report with their own paying institutional investor clients.

The reality here is that some companies and their advocates want to rein in independent advice that assists shareholders in holding management to account.²⁸ Institutional investors pay for voting advice from proxy advisors precisely because they are independent from management and thus able to report objectively and critically on executive compensation plans, director qualifications and independence, and other important issues that are the subject of shareholder votes. We are deeply concerned that subjecting proxy voting advice to the proposed mandate would likely impair the independence of proxy advisors, reducing the reliability and completeness of voting advice.²⁹

Fourth, the cost of the proposed mandate is almost certain to restrict the market for proxy advisors, likely serving as a formidable barrier to entry. The market itself is an important source of pressure for accuracy and quality in proxy advisor reports. The proposed mandate seems to ignore the value of market-based solutions, and overvalues prescriptive regulation. The proposed mandate would undoubtedly increase proxy advisors' internal costs and those higher costs would

²⁷ See, e.g., Commissioner Allison Herren Lee, Public Statement: Paying More For Less: Higher Costs for Shareholders, Less Accountability for Management at n.16 (“[i]ssuer views are important and valuable, but issuers are not impartial when it comes to their own proposals, and they have ample means to communicate those views. Proxy advisors and their clients can decide for themselves whether and when to wait for or consider any additional views an issuer may have. Today’s rule per se assumes that these views are so valuable we should add cost, complexity, and delay into the process in order to ensure that they are considered. There is simply no evidence for this premise.”).

²⁸ See, e.g., Rick Fleming, Investor Advocate, The SEC Speaks in 2019: Important Issues for Investors in 2019 (Apr. 8, 2019), <https://www.sec.gov/news/speech/fleming-important-issues-investors-2019> (“In my view, and as these articles suggest, the simple fact of the matter seems to be that proxy advisors have given asset managers an efficient way to exercise much closer oversight of the companies in their portfolios, and those companies don’t like it.”).

²⁹ See Commissioner Allison Herren Lee, Statement on Shareholder Rights (“We do this without even addressing the concerns expressed by investment advisers that greater issuer involvement would undermine the reliability and independence of voting recommendations.”).

likely constrain competition in an industry in which the Paper acknowledges that currently there are only “four main proxy advisers operating in Australia.”³⁰

If, despite our strong opposition, a required review of the draft report by the subject company before the proxy advisor firm distributes its report to subscribing investors is mandated, we believe that at a minimum the mandate should include the following provisions:

- Company review of, and any comments on, the report should be limited to factual information and data and exclude any review of the proxy advisor voting recommendations.
- To be eligible for review of the report’s factual information and data, the company should be required to reimburse the proxy advisor for reasonable expenses associated with the mandated review and receipt of comments.
- Company review of, and any comments on, the report’s factual information and data should be limited to a maximum period of two business days.

We believe a regulation based on the stipulations above would likely produce far better outcomes than the proposed mandate. At the same time, if structured properly, it would likely not substantially worsen the time crunch challenges institutional investors face in voting proxies.

Option 4: Make materials accessible.³¹

CII does not support the proposed mandate that proxy advisers “would be required to notify their clients on how to access the company’s response to the report.”³² It is unclear to us why such a mandate is needed.

It is our understanding that companies that disagree with proxy advice already have mechanisms to communicate that disagreement to investors.³³ The proposed mandate essentially forces proxy advisors to subsidize the issuers’ costs for criticizing their recommendations.

If, despite our strong opposition, the Treasury adopts a mandate that proxy advisers “would be required to notify their clients on how to access the company’s response to the report,”³⁴ we believe the participating companies should be required to reimburse the proxy advisor for reasonable expenses associated with complying with the mandate. In that regard, we note that in 2019 Glass Lewis introduced a Report Feedback Statement that provides companies the ability to

³⁰ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 2.

³¹ *Id.* at 6.

³² *Id.*

³³ See, e.g., ASIC review of proxy adviser engagement practices, Report 578 at 9 (June 2018), <https://www.asic.gov.au/media/4778954/rep578-published-27-june-2018.pdf> (“If a subject company discovers a matter that is materially false or misleading in a proxy adviser report, the company should: • notify the proxy adviser of the matter promptly and seek a correction • consider whether it would be appropriate to respond to the matter by way of an ASX announcement or other communication to investors.”).

³⁴ Consultation Paper, Greater transparency of proxy advice, TSY/AU at 7.

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submit feedback about the reports directly to Glass Lewis's clients if the companies *purchase* Glass Lewis reports.³⁵

CII appreciates the opportunity to submit comments on this important matter. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style.

Jeffrey P. Mahoney
General Counsel

³⁵ Call for Comment on Australian Treasury's Counter-Productive Proxy Reforms, Regulatory Matters, Glass Lewis ("in 2019, Glass Lewis introduced the Report Feedback Statement . . . through which companies that purchase Glass Lewis' research reports can opt to have a statement responding to Glass Lewis' research transmitted to Glass Lewis clients through its client and voting platforms").