



BETTER MARKETS

February 3, 2020

Mrs. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Amendments to Exemptions From the Proxy Rules for Proxy Voting Advice (Release No. 34-87457; File No. S7-22-19).

Dear Secretary Countryman:

Better Markets¹ appreciates the opportunity to comment on the above-captioned rule proposal (“Release” or “Proposal”) noticed for public comment by the Securities and Exchange Commission (“SEC” or “Commission”). The Release,² if approved as noticed, would give corporate management significant new powers to stifle the independent voices of proxy advisory firms who serve for the benefit of American savers and retirees, and further entrench and strengthen management’s ability to defeat dissenting shareholders who fight for executive accountability and improved corporate governance. While the Commission claims it is imposing these new, significant regulations for the benefit of investors, the Release fails to show any legitimate evidence that investors are asking for these protections. The Release also fails to demonstrate—to any reasonable extent—that there is indeed a market failure that requires governmental intervention; at best, the Release cites self-serving and unproven claims from corporate executives and their trade groups about “errors” in proxy advisory firms reports.

Given the corrupted public engagement process that was the impetus for the Release (and the fake, fraudulent, and disingenuous letters from “investors” cited in the Release) and the utter lack of evidence for the need for these regulations, the Commission must withdraw this Release.

The Commission, instead, should act on proposals that genuinely protect and empower shareholders, such as improving the voting process and creating a Universal Proxy so that all shareholders can have similar rights and abilities to exercise their corporate suffrage.

SUMMARY

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² See, Release No. 34-87457; File No. S7-22-19, 84 Fed. Reg. 66518 (December 4, 2020) available at <https://www.federalregister.gov/documents/2019/12/04/2019-24475/amendments-to-exemptions-from-the-proxy-rules-for-proxy-voting-advice>.

The Release would harm Main Street investors as it would stifle their ability to hold corporate management accountable and weaken their ability to improve corporate governance. It must be withdrawn for the following reasons:

- The Release is a radical, ideologically-driven policy that deliberately ignores the documented value of independent advice to shareholders and fails to cite any legitimate market failures that calls for governmental intervention. The Release inappropriately sides with and further entrenches corporate management’s ability to defeat dissenting shareholders.
- The Release was based upon and promoted through a demonstrably fraudulent public engagement and comment process. Eight of nine letters cited in the Release from “investors” are either fake, fraudulent, or clearly disingenuous as they are paid-for by the same corporate interests who have lobbied for the changes proposed in the Release.
- Instead of enacting policies that would obviously harm Main Street investors, the Commission should empower and enable more robust shareholder engagement.

INTRODUCTION AND DESCRIPTION OF PROPOSED AMENDMENTS

Proxy advisory firms³ mainly serve institutional investors (most of whom in turn invest and manage the savings and retirement nest eggs of Americans) and registered investment advisers. Institutional investors own between 70-80% of the market value of U.S. public companies,⁴ which means their engagement and corporate suffrage matters significantly in guiding the policies and governance of those public companies. Registered investment advisers manage and invest on behalf of other investors or investment companies, such as mutual funds, that also handle the savings of millions of everyday Americans.

These institutional investors and advisers are asked to process or otherwise vote on tens of thousands of proxies each year. In order to process these proxies and participate in the suffrage efficiently, either directly or on behalf of their clients, they retain the services of proxy advisory firms. Proxy advisory firms provide research and analysis on matters subject to shareholder vote, craft voting guidelines to meet the policies and investment goals of the institutional investors, and “make[] voting recommendations to their clients on specific matters subject to a shareholder vote, either based on the [proxy advisory firm’s] own voting guidelines or on custom voting guidelines that the client has created.”⁵ Proxy advisory firms also maintain certain electronic platforms and

³ As of this writing, there are five known proxy advisory firms operating in the U.S.: (1) Institutional Shareholder Services (“ISS”); (2) Glass Lewis & Co. (“Glass Lewis”); (3) Egan-Jones Proxy Services; (4) Segal Marco Advisors; and (5) ProxyVote Plus, *see* fn. 190, Release at 66542. ISS and Glass Lewis are said to dominate the market with over 97% of market share (*see* fn. 215 at Release 66543). ISS is the larger of the two and is registered with the Commission as an investment adviser, subject to all rules and laws regulating investment advisers.

⁴ *See* Release at 66519.

⁵ *See* Release at 66519.

other administrative capacities to help institutional investors and investment advisers cast and track their votes.⁶

The Release makes significant changes to the regulatory framework that governs proxy advisory firms.

First, it proposes to “codify the Commission’s interpretation that, as a general matter, proxy voting advice constitutes a solicitation within the meaning of Exchange Act Rule 14a–1(1).”⁷ This rule amendment codifies a 2019 Commission Guidance that first expressly concluded that the conduct of proxy advisory firms constitutes as “solicitation.” That Guidance was challenged in court, and the case is pending. Current SEC rules require entities engaged in proxy solicitation to make certain filings and public disclosures, unless they fall under certain exemptions. Proxy advisory firms have operated under those exemptions and have generally not been required to comply with those requirements.

Second—and most significant for the purposes this comment letter—the Release would “amend[] Exchange Act Rule 14a–2(b) to condition the availability of existing exemptions from the information and filing requirements of the proxy rules (Rules 14a–2(b)(1) and (b)(3)) on all proxy voting advice businesses providing the following in connection with their proxy voting advice: (i) enhanced conflicts of interest disclosure; (ii) a standardized opportunity for review and feedback by [companies] and certain other soliciting persons of proxy voting advice before a proxy voting advice business disseminates its proxy voting advice to clients; and (iii) the option for [companies] and certain soliciting persons 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 that sets forth the [company’s] or soliciting person’s views on the proxy voting advice.”⁸

The second amendment to the rule requires that proxy advisory firms prominently disclose to their clients (*i.e.*, sophisticated institutional investors or registered investment advisers) any conflicts of interest that they might have had when creating their proxy advisory report. These disclosures would include “any material interests, direct or indirect, of the proxy voting advice business (or its affiliates) in the matter or parties concerning which it is providing the advice.”⁹ The Commission envisions that this detailed conflicts of interest disclosure would also include, “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,” and the Commission warns that “boilerplate language that such relationships or interests may or may not exist would be insufficient for purposes of satisfying this condition to the exemptions.”¹⁰

⁶ See Release at 66520.

⁷ See Release at 66540.

⁸ See Release at 66540.

⁹ See Release at 66526.

¹⁰ See Release at 66526-7.

The second change would also allow corporate management of any public company to **twice** review the proxy advisory firm’s report and voting recommendations regarding their company’s proxy statements **before they are sent to the proxy advisory firm’s clients**. These recommendations often relate to voting on directors, say on compensation packages, mergers or other major acquisition or sale decisions, and other decisions subject to shareholder approval (but not shareholder proposals). In general, once the proxy advisory firm completes its report and voting recommendations, they would send those materials to the management of the company, the management would have five business days to review the materials and offer feedback on all matters (including methodology, assessment, opinion, etc.) to the proxy advisory firm. The proxy advisory firm would not be obligated to make any changes to their report but would be obligated to send its final version back to the management, and afford the management another two business days for review before the proxy advisory firm could send the report and recommendation to its clients: the institutional investors and investment advisers who pay for this report and recommendation.

The final rule amendment relating to proxy advisory firm reports would allow companies to require the proxy advisory firms to include a hyper-link in the final recommendation report that would be linked to webpage hosted by the management. The webpage would offer a statement that describes management’s perspective and disagreement with the proxy advisory firm’s recommendations, analysis, and opinion.

Third, and finally, since proxy advisory firms remain liable for false or misleading statements or omission of material fact, the Release adds “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 information such as the proxy voting advice business’s methodology, sources of information, conflicts of interest, or the use of standards that materially differ from relevant standards or requirements that the Commission sets or approves.”¹¹

COMMENTS

The Proposal Is a Radical, Ideologically-Driven Policy That Deliberately Ignores the Documented Value of Independent Advice to Investors and Fails to Cite any Legitimate Market Failures That Call for Governmental Intervention. The Release Inappropriately Sides with and Further Entrenches Corporate Management’s Ability to Defeat Dissenting Shareholders.

Proxy advisory firms serve shareholders’ interest by providing them valuable information and facilitating their corporate engagement. Before proxy advisory firms became prominent, shareholders would typically follow “the Wall Street Rule,” which was to either vote with management or sell their stock.¹² Proxy advisory firms leveled the playing field by increasing access to information and enabling timely and effective shareholder engagement. Proxy advisory firms are a market-based solution to a market-born problem: the volume and frequency of proxy

¹¹ See Release at 66540.

¹² See George W. Dent, Jr. *A Defense Of Proxy Advisors*, MICHIGAN STATE LAW REVIEW, (2014), available at <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1102&context=lr>.

statements make it **economically inefficient** for each institutional investor or investment adviser to conduct their own analysis and create their own voting platforms.¹³ The efficiencies gained are even more pronounced for small and medium-sized institutional investors who have even fewer resources to conduct the required analysis to be able to satisfy their fiduciary duty obligations towards their clients: savers and retirees. Proxy advisory firms fill this gap by either entering into a contractual agreement that stipulates their obligations¹⁴ towards their clients—institutional investors and investment advisers—or complying with the statutory obligation to act in the best interest of their clients.¹⁵

Proxy advisory firms serve the interests of shareholders by providing them objective advice and analysis that is not tainted or spun by the management of a company.¹⁶ The recommendations that proxy advisory reports produce can improve corporate performance even without gaining shareholder approval.¹⁷ Proxy advisory firms have empower investors enough that management often seeks to defuse an issue in the interest of the shareholders before (or after) a shareholder vote, or at a minimum, forces the management to better explain the rationale for its decisions.¹⁸

Given these developments, it is no surprise that corporate management finds proxy advisory firms a thorn in their side. Silencing the proxy advisory firms has been on the wish-list of corporate management and their trade associations and lobbying organizations for years, and this Proposal seems to satisfy almost all their demands. For example, the Business Roundtable’s goal has been to regulate-to-death the proxy advisory firms.¹⁹ The Chamber of Commerce’s financial regulation priorities list includes the “reform” of proxy advisory firms as a top priority.²⁰ This has been a priority for them for some time, dating back at least to 2014.²¹ The American Securities Association—a lobbying group entirely funded by the financial industry—writes in its Corporate Governance issues section that, “Unfortunately, over time proxy advisory megafirms have exploited Main Street investors by prioritizing a conflict-ridden political agenda over the

¹³ See Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals (2020) available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf> (“IAC Letter”).

¹⁴ As in the case of Glass Lewis, which is not a registered investment adviser.

¹⁵ As in the case of ISS, a registered investment adviser.

¹⁶ See Stefano Feltri, *Why CEOs and Regulators Clash With the Duopoly of Proxy Advisory Firms*, ProMarket (2019), available at <https://promarket.org/why-ceos-and-regulators-clash-with-the-duopoly-of-proxy-advisory-firms/>

In particular see Professor Lucian Bebchuk’s quote to *Politico*, “If the proposed rules are adopted, proxy advisers would face the prospect of suits against them by issuers that are displeased with their recommendation, and this prospect would operate to discourage recommendations that are unfavorable to managers and to impose costs that would be borne by investors.”

¹⁷ See George Dent.

¹⁸ See George Dent.

¹⁹ See Business Roundtable’s Policy Priorities, available at <https://www.businessroundtable.org/policy-perspectives/corporate-governance/promoting-responsible-shareholder-engagement>.

²⁰ See U.S. Chamber of Commerce’s Legislative and Regulatory Priorities, available at https://www.uschamber.com/sites/default/files/soab_20priorities_capitalmks.pdf.

²¹ See Tom Quaadman, *What Color is That Smoke?—Proxy Advisory Firms Need Oversight*, U.S. Chamber of Commerce (2014), available at <https://www.uschamber.com/above-the-fold/what-color-smoke-proxy-advisory-firms-need-oversight>.

retirement security of millions of Americans.”²² The Center for Executive Compensation—a lobby group created to defend current executive compensation practices—has written multiple briefs and reports calling for heightened regulation of proxy advisory firms.²³ This Release encompasses nearly all the items on the wish-lists of corporate America.

The Proposal pretends that it aims to increase the accuracy of proxy advisory firms’ reports and recommendations, yet the “error” and omissions’ rate is in fact miniscule. Moreover, managements have long had the opportunity to correct the record before a shareholder meeting by releasing supplemental proxy materials. As the IAC letter discusses the matter of errors, “From over 17,000 shareholder votes over three years, the number of possible factual errors identified by companies themselves in their proxy supplements amounts to 0.3% of proxy statements—and none of those is shown to be material or to have affected the outcome of the related vote.”²⁴ In addition to management’s ability to correct the record or otherwise offer supplemental materials that could counter a proxy advisory firm’s report or recommendations through the proxy statements (before or after the shareholder meeting), as the Release itself recognizes, 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.²⁵

The Proposal also pretends that the changes are for the benefit of investors, yet there is little evidence to support that claim (see next section below). 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.²⁶

While there may be one or two laudable ideas in the Release (such as the obligation to disclose conflicts of interest), they cannot justify the overwhelmingly negative impact that these proposals will have on shareholders and investors. This Proposal, driven by ideology and corporate preferences rather than facts and rigorous analysis, is flawed to its core and must be withdrawn.

The Release Was Crafted and Promoted on the Basis of a Demonstrably Fraudulent Public Engagement and Comment Process.

Throughout the Release, the Commission argues that the Release is intended for the benefit of investors and to help “ensure that investors who use proxy voting advice receive more accurate,

²² See American Securities Association’s policy priorities list available at <https://www.americansecurities.org/issues>.

²³ See Center for Executive Compensation, *Policy Brief on Proxy Advisory Firms*, (2017), available at https://exccomp.org/Docs/c17-13_DuffyBill_PB_Updated_12_2017.pdf.

²⁴ See IAC Letter, p.5.

²⁵ See Release at 66545.

²⁶ See Letter from Karen Carraher, Executive Director & Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System (Dec. 13, 2018), available at <https://www.sec.gov/comments/4-725/4725-4767821-176841.pdf>; Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors (Nov. 8, 2018), available at <https://www.sec.gov/comments/4-725/4725-4630831-176413.pdf>; Letter from Marcie Frost, Chief Executive Officer, California Public Employees’ Retirement System (Dec. 11, 2018), available <https://www.sec.gov/comments/4-725/4725-4765670-176812.pdf>.

transparent, and complete information on which to make their voting decisions.”²⁷ In a section discussing the rationale for the changes, the Commission claims that “[i]n recent years, registrants, **investors**, and others have expressed concerns about the proxy voting advice business” and it cites nine letters supposedly from investors.²⁸

We examined these recent letters of support allegedly from “investors.” Three are written by an individual who identifies his affiliation as “Chairman, Advisory Council, Main Street Investors Coalition;” one is written by a “Member” of the same advisory council at the same entity; one is affiliated with an organization called “60 Plus Association;” one is affiliated with an entity called “A Coalition of Growth Companies;” one is affiliated with an organization called “Institute of Pension Fund Integrity;” and finally two are written by supposedly unaffiliated individuals.

Further investigation into these entities and individual comment letters reveals that they actually represent the views not of investors but of corporate interests. The Main Street Investors Coalition has—according to an informed observer— “nothing to do with mom-and-pop investors. The group is actually funded by big business interests that want to diminish the ability of pension funds and large 401(k) plans—where most little guys keep their money—to influence certain corporate governance issues.”²⁹ The next entity, “60 Plus Association,” as discussed further below, is funded by corporate supporters of more stringent proxy adviser regulation. The third entity, “A Coalition of Growth Companies,” seems to be a tagline included in the letterhead of a business association called “American Business Conference,”³⁰ which promises to “provide its members with unparalleled access to: Cabinet Officers and top Administration policymakers; Members of Congress; Commissioners and staff of the SEC and other regulatory agencies; Key media and Opinion leaders.”³¹ The fourth entity, “Institute of Pension Fund Integrity,” according to an informed and recent profile of the organization and its leader, seems to be a “dark-money lobbying group” that frequently publishes information that is “rife with errors and seemingly self-serving data.”³² And, as we further write below, the two individuals cited have denied, on the record, that they even wrote the letters attributed to them.

As we detailed in a separate letter to the Commission, the Release was crafted and promoted based on demonstrably fraudulent public engagement process.³³ On November 15,

²⁷ See Release at 66518.

²⁸ See Release at 66520, *see also* fn. 24 at Release at 66520, in which the Release cites the nine letters.

²⁹ See Andrew Ross Sorkin, *What’s Behind a Pitch For The Little-Guy Investor? Big Money Interests*, N.Y. TIMES (July 24, 2018), *available at* <https://www.nytimes.com/2018/07/24/business/dealbook/main-street-investors-coalition.html>.

³⁰ See the letterhead that is affixed to a letter the organization sent to the SEC in connection with the announcement of the Proxy Process Roundtable, *available at* <https://www.sec.gov/comments/4-725/4725-4226796-172989.pdf>.

³¹ See About ABC page at <http://10432043.sites.myregistered.com/about-abc.php>.

³² See Alicia McElhaney, *The Dark-Money Lobbying Group Going After Pension Funds*, Institutional Investors (April 2019), *available at* <https://www.institutionalinvestor.com/article/b1f3bld0jg586l/The-Dark-Money-Lobbying-Group-Going-After-Pension-Funds>.

³³ See Better Markets Letter to Chairman Jay Clayton re The SEC Must Investigate Allegations That Dozens of Fraudulent or Misleading Comment Letters Were Submitted to And Relied Upon By The SEC in Connection With Two Recent Rule Proposals on The Proxy Process (December 9, 2019), *available at* https://bettermarkets.com/sites/default/files/Fraudulent_comment_letters_-_Letter_to_SEC_12-9-19.pdf (incorporated by reference herein as if fully set forth herein).

2018, the SEC held a roundtable in Washington, D.C. focusing on “the current proxy voting mechanics and technology, the shareholder proposal process, and the role of proxy advisory firms.”³⁴ The SEC solicited public comments on those topics and received over 18,000 submissions following announcement of the roundtable.³⁵ In August of this year, the SEC issued two forms of guidance relating to the proxy process.³⁶ And on November 5, 2019, the SEC noticed this Release.

At the open meeting on November 5, 2019, Chairman Clayton issued a statement in support of the Proposals, including this Release.³⁷ In that statement, he singled out as particularly influential seven specific comment letters, purportedly filed by everyday citizens after the roundtable. Those letters all expressed strong support for new measures, including the Release. In Chairman Clayton’s words,

Some of the letters that struck me the most came from long-term Main Street investors, including an army veteran and a Marine veteran, a police officer, a retired teacher, a public servant, a single mom, a couple of retirees who saved for retirement, all of whom expressed concern about the current proxy process. **A common theme in their letters was the concern that their financial investments—including their retirement funds—were being steered by third parties to promote individual agendas**, rather than to further their primary goals of being able to have enough money to lessen the fear of “running out” in retirement or to leave money to their children and grandchildren.³⁸

The clear intent of those comment letters and of Chairman Clayton’s public reference to them was to convey the impression that the Proposals were strongly supported by everyday investors, not only by large corporate interests, their boards, and their trade association allies.

However, on November 19, 2019, just two weeks following Chairman Clayton’s statements and the Commission’s vote to release the Proposals, a Bloomberg article appeared that cast grave doubts on the authenticity of dozens of comment letters submitted to the SEC, including

³⁴ Securities and Exchange Commission, Spotlight on the Proxy Process (Nov. 15, 2018), *available at* <https://www.sec.gov/proxy-roundtable-2018>; *see also* Securities and Exchange Commission, Statement Announcing SEC Staff Roundtable on the Proxy Process (July 30, 2018), *available at* <https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process>

³⁵ Securities and Exchange Commission, Comments on Statement Announcing SEC Staff Roundtable on the Proxy Process, *available at* <https://www.sec.gov/comments/4-725/4-725.htm>

³⁶ Securities and Exchange Commission, Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Release No. 34-86721 (Aug. 21, 2019), *available at* <https://www.sec.gov/rules/interp/2019/34-86721.pdf>; Securities and Exchange Commission, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release Nos. IA-5325; IC-33605 (Aug. 21, 2019), *available at* <https://www.sec.gov/rules/interp/2019/ia-5325.pdf>.

³⁷ *See* Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System (Nov. 5, 2019), *available at* <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting> (“Clayton Statement”).

³⁸ *See* Clayton Statement (emphasis added).

the seven comment letters highlighted by Chairman Clayton.³⁹ The article included the appalling revelation that those seven letters, along with at least 19 additional letters in the comment file, were either fraudulent or materially misleading with respect to the identities of the signers. According to the article, several people denied ever signing the letters that bore their names; several people were prevailed upon to sign their letters without any understanding of the issues they were supposedly addressing; and numerous signers were people with close connections to an advocacy group known as “60 Plus Association” (“60 Plus”), which is funded by corporate supporters of the Proposals. As further reported in the article, those signers included former employees of 60 Plus; a contractor for the group; and friends and relatives of the President of the organization—none of whom disclosed their connection to 60 Plus in their letters.

The alleged conduct may have violated the criminal code, including 18 U.S.C. § 1001(a) (prohibiting materially false statements to the federal government) and 18 U.S.C. §§ 1341 and 1343 (prohibiting the use of the mails or wires in any “scheme or artifice to defraud”). For example, a person violates the mail and wire fraud provision if, with specific intent to defraud, he or she uses the mail or interstate wire communications in furtherance of a scheme to defraud.⁴⁰ Forging the names of ostensibly sympathetic retail investors, such as a retired teacher and a single mom, to letters that in fact reflect the industry’s desired policy goals, for the purpose of generating a false impression of popular support for corporate-friendly policies, betrays a clear intent to defraud. Moreover, it is obvious in light of Chairman Clayton’s statements, discussed above, that if the letters were forged or misrepresented as alleged, this deception involved **material** false statements, i.e. false statements that are “capable of influencing the decision of the decision-making body to which [they] are addressed.”⁴¹ In fact, the Department of Justice has opened criminal investigations in similar situations where groups have engaged in fraud by submitting forged comment letters urging regulators to take particular actions.⁴²

These defects in the rulemaking process are unacceptable. They have contaminated the Release and they must be addressed through a thorough investigation and a series of remedial measures, including, without limitation, a reassessment of the Proposal without reliance on the fraudulent or misleading comment letters described above. It would be impermissible for the Commission to attempt to finalize the Proposal on the current record.

Instead of Enacting Policies That Would Obviously Harm Main Street Investors, the Commission Should Empower and Enable More Robust Shareholder Engagement.

³⁹ Zachary Mider and Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, BLOOMBERG, available at <https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change>.

⁴⁰ *United States v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003); see also *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996) (“To prove mail and wire fraud, the government must prove, beyond a reasonable doubt: (1) the defendant’s knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme.”).

⁴¹ *Neder v. United States*, 527 U.S. 1, 16 (1999).

⁴² Kevin Collier & Jeremy Singer-Vine, *Millions Of Comments About The FCC’s Net Neutrality Rules Were Fake. Now The Feds Are Investigating*, BUZZFEED NEWS (Dec. 8, 2018), available at <https://www.buzzfeednews.com/article/kevincollier/feds-investigation-net-neutrality-comments>.

As demonstrated above, the Proposal suffers from multiple material defects and should be withdrawn and fundamentally reconsidered. But it is not enough for the Commission to withdraw a toxic Proposal; it can and should go further and actively pursue a number of reforms in the proxy process that will better equip shareholders to play an appropriately robust role in the governance of public companies. Two examples stand out as worthy of the Commission's immediate attention:

- **The Commission Must Approve Its Universal Proxy Rule:** Today, the choices available to shareholders voting for duly nominated directors through the proxy process are not the same as those available to shareholders who attend shareholder meetings in person. Shareholders voting by proxy are effectively required to choose either the company's nominees or those submitted by the dissidents, but not a mixture of both slates. In late 2016, the Commission proposed a sensible rule to fix this problem by requiring both the company and the dissident shareholders to use a Universal Proxy listing all duly nominated candidates (with no regard to the nominating party). This change will afford those voting through the proxy process the same selection as that available to shareholders attending the shareholder meetings in person.⁴³ The Commission should expeditiously approve this pro-shareholder proposal.
- **The Commission Should Improve the Voting Process:** Proxy voting infrastructure is critically important for both institutional and retail shareholders. As outlined by Council of Institutional Investors—an association that is comprised of pension funds, employee benefit funds, state and local entities charged with investing public assets, foundations, endowments, asset managers that in total manage over \$29 trillion of investments—there are several critical improvements the Commission could undertake that would improve the proxy process infrastructure.⁴⁴ With all the advances in technology, accuracy of vote counting is still questioned, and shareholders are not confident whether their votes are indeed counted. The dissemination of proxy materials is slow and cumbersome: shareholders have little time to analyze proxy statements to be maximally informed on how to vote. Costs associated with transmitting proxy materials are too high, and they often fall on shareholders. The Commission could study the use of private blockchain to enable shareholders to vote and track their engagement with the companies they co-own.

Conclusion

We hope the Commission finds our comments helpful. The Commission must withdraw this patently anti-shareholder Release and instead focus on protecting and empowering today's shareholders so they can more effectively engage with the companies they co-own.

Sincerely,

⁴³ See Better Markets Comment Letter re Universal Proxy (January 9, 2017), *available* at <https://www.sec.gov/comments/s7-24-16/s72416-1470144-130398.pdf> (incorporated by reference herein as if fully set forth herein).

⁴⁴ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors (Nov. 8, 2018), *available* at <https://www.sec.gov/comments/4-725/4725-4630831-176413.pdf>.



Dennis M. Kelleher
President & CEO

Lev Bagramian
Senior Securities Policy Advisor

Stephen W. Hall
Legal Director & Securities Specialist

Better Markets, Inc.
1825 K Street, NW
Suite 1080
Washington, DC 20006
(202) 618-6464

dkelleher@bettermarkets.com
lbagramian@bettermarkets.com
shall@bettermarkets.com
www.bettermarkets.com