MANAGED FUNDS ASSOCIATION

AIMA

February 3, 2020

Via Electronic Submission: rule-comments@sec.gov

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice; File Number S7-22-19

Dear Ms. Countryman:

Managed Funds Association[1] ("MFA") and the Alternative Investment Management Association[2] ("AIMA") (collectively, the "Associations") appreciate the opportunity to provide comments to the Securities and Exchange Commission in response to the Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (the "Proposals").[3] We commend the SEC for examining the role of proxy advisory firms and considering ways to ensure that investors receive proxy voting advice that is based on accurate and complete information.

As registered investment advisers, our members have a fiduciary duty to their clients with respect to proxy voting determinations on their behalf, and have a strong interest in receiving timely and cost efficient proxy voting advice to assist them in making these determinations. While we support ensuring

[1] The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

[2] The Alternative Investment Management Association is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council ("ACC") to help firms focused in the private credit and direct lending space. The ACC currently represents over 170 members that manage $400 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation ("CAIA"), the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

[3] SEC Release No. 34-87457 (Nov. 5, 2019), 84 F.R. 66518 (Dec. 4, 2019) (the "Release").

that proxy voting advice is accurate, we recommend that the Commission avoid making any changes that would lead to unnecessary delays, costs, or legal uncertainty. These unintended consequences would make it more difficult for fund managers to obtain high quality proxy voting advice for the benefit of our clients on whose behalf we make voting determinations.

We recommend the SEC narrow the scope of the proposed review and feedback process to apply exclusively to factual information in proxy voting advice, *i.e.*, underlying facts and data, and enhance legal certainty for proxy advisory firms in Rule 14a-9 under the Securities Exchange Act of 1934 ("Exchange Act"). We support the proposed additional disclosure of material conflicts of interest that will provide additional information to fund managers. Finally, we offer our view on one aspect of the prior Commission guidance on proxy voting for investment advisers relating to the determination of voting proxies. We provide additional discussion of each of these recommendations below.

Narrow the Scope of Information Subject to Issuer Review and Feedback

The SEC should consider narrowing the information subject to issuer review and feedback to include only factual information, which we believe would better meet the objectives of the Proposals and mitigate some of the potential costs, delays and harm to the quality of proxy voting advice.

Fund Managers Rely on Cost Efficient and Timely Proxy Voting Advice

We appreciate that throughout the Release the SEC recognizes the important role of investment advisers, including fund managers, in the proxy voting process, and explains that the Proposals are designed to ensure that proxy voting advice enables investment advisers to make informed voting determinations on behalf of their clients.[4] We agree that the SEC should strongly consider the impact of the Proposals on investment advisers, and we offer these views from our perspective as clients of proxy advisory firms that use proxy voting advice in meeting our fiduciary duty to clients and obligations in Rule 206(4)-6 under the Investment Advisers Act of 1940.

As noted in the Release, fund managers and other investment advisers have significant holdings in many public companies and may consider voting determinations in hundreds or thousands of shareholder proposals each year, most of which occur in a period of only a few months. Fund managers often engage proxy advisory firms to assist them in making these voting determinations in accordance with their proxy voting policies and procedures pursuant to Rule 206(4)-6.

Fund managers use proxy voting advice because it provides them with a detailed assessment of many issuer shareholder proposals that in our experience is cost efficient and delivered on a timely basis, which assists managers in fulfilling their obligations on behalf of their clients. Proxy voting advice is cost efficient because fund managers are often faced with the challenge of reviewing hundreds of shareholder proposals with only limited internal resources, while proxy advisory firms can specialize and utilize economies of scale to lower costs. Timeliness of the advice is critical because shareholder meetings occur in a brief period, and managers have limited time to receive the advice and make their voting determinations. We encourage the SEC to minimize any potential effects on the cost efficiency and timeliness of the existing proxy voting process for fund managers and their clients.

The Proposals Are Likely to Increase Costs and Lead to Delays for Fund Managers and Clients

The Proposals are likely to disrupt the preparation and delivery of proxy voting advice to fund managers by requiring a new review and feedback process between proxy advisory firms and issuers

[4] 84 F.R. at 66520.

before the advice is sent to clients. As proposed, a proxy advisory firm would need to first provide the entire proxy voting advice to each issuer and allow for a review period of three or five days, based on how far in advance of a shareholder meeting the issuer files its proxy materials.[5] After receiving feedback from each issuer, a proxy advisory firm would also need to send each issuer a final version of the proxy voting advice at least two business days before sending it to clients.

In our view, the broad scope of information subject to review and feedback and the short timeline creates risk that future proxy voting advice would be more costly and delivery could be delayed. These unintended consequences would be harmful to investment advisers and inconsistent with the stated goal in the Release to provide more accurate information without generating undue costs or delays that might adversely affect the timely provision of proxy voting advice.[6]

The review and feedback process would potentially impose costs and delays by requiring proxy advisory firms to engage with hundreds of issuers regarding thousands of shareholder proposals during the critical shareholder vote season. Following the issuance of shareholder proposals, proxy advisory firms would need to prepare proxy voting advice, agree with issuers on the framework for sharing the advice and submit it to issuers for review, wait the prescribed time period and receive feedback, make any revisions based on issuer comments, provide a final notice to issuers two days prior to distribution, and deliver the advice to clients sufficiently prior to shareholder meetings. Based on our understanding, we believe proxy advisory firms would be challenged to deliver timely materials to fund managers under these circumstances.

Delays would make it more difficult for managers to use the advice and create risk that some advice may not be delivered with adequate time in advance of a shareholder meeting. Proxy advisory firms would face higher costs to perform the additional work in a shorter time period and would need to pass on these costs to their clients. The review and feedback process, together with the proposed amendments to Rule 14a-9, could also potentially result in lower quality advice if it leads to pressure on proxy advisory firms to conform their recommendations with views of issuers.

The SEC Should Narrow the Scope to Factual Information to Avoid Unintended Consequences

We believe a review and feedback process that requires proxy advisory firms to provide issuers with factual information could mitigate the risk of delays and increased costs. Requiring proxy advisory firms to share factual information with issuers would address the primary goal of the Proposals, as stated in the Release, to ensure the recipients of proxy voting advice make voting determinations on the basis of materially complete and accurate information.[7] With respect to investment advisers, the SEC states that it is concerned about the risk of inaccurate or incomplete voting advice that could be relied upon to the detriment of investors.[8]

If the SEC determines that proxy voting advice could be made more accurate, including factual information in the advice would allow issuers to review information about the company and correct any

[5] An issuer would have three days to review the proxy voting advice if it files its definitive proxy statement less than 45 but at least 25 calendar days before its shareholder meeting, and would have at least five days to review the proxy voting advice if it files its definitive proxy statement 45 calendar days or more before its shareholder meeting. If an issuer files its definitive proxy statement less than 25 calendar days before the meeting, there would be no requirement to provide the issuer with the proxy voting advice.

[6] 84 F.R. at 66521.

[7] 84 F.R. at 66518.

[8] 84 F.R. at 66520.

factual or analytical errors. This would benefit investment advisers by ensuring the advice is based on accurate and complete information, and they could better allocate their internal resources rather than performing fact checks on potentially hundreds of recommendations.

In the Release, the SEC provides information about the number and type of errors in proxy voting advice. In Table 2, the SEC shows data from 2016, 2017, and 2018, in which 5,690, 5,744 and 5,862 issuers filed proxy materials with the SEC, and issuers filed additional definitive proxy materials responding to proxy voting advice 99, 77, and 84 times, respectively.[9] The low number of responsive filings compared to the total number of filed proxy materials, less than 2%, indicates in the vast majority of cases issuers did not dispute proxy voting advice.

The information also indicates that a substantial number of the responsive filings involve factual or analytical errors, which would be corrected in a modified review and feedback process. The Table categorizes the types of concerns listed by issuers as: (i) factual errors, (ii) analytical errors, (iii) general or policy disputes, (iv) amended or modified proposal, and (v) other. Factual errors are when the issuer identifies what it considers as incorrect data or inaccurate facts used by the proxy advisory firm; analytical errors are methodological errors in the proxy advisory firm's analysis. In contrast, general or policy disputes are when the registrant does not dispute the facts or the analytical methodology, but claims that the proxy advisory firm's evaluation is overly simplistic or restrictive.

The Table indicates that roughly half the errors fell within the categories of factual or analytical errors. These categories generally correspond to the type of factual information we propose to be provided to issuers, so that including this type of information in the review and feedback process would eliminate a substantial percentage of the errors cited by issuers in the last three years. The remaining errors, which mostly fall within the category of general or policy disputes, are not errors of fact or analysis, but instead are subjective disagreements about the scope of the evaluation by the proxy advisory firm.[10]

A modified review and feedback process would also mitigate higher costs and the potential for delayed delivery of the advice. Subjecting only factual information to the review and feedback process, and excluding subjective information including methodologies and analyses, would materially simplify the process. Proxy advisory firms could more quickly and easily prepare the information and provide it to issuers, and issuers could review the factual information and provide any specific corrections within the three- or five-day time periods.

Modify the Proposed Amendments to Rule 14a-9 to Provide Legal Certainty

We are concerned the proposed changes to Rule 14a-9 could jeopardize the quality of proxy voting advice by creating legal uncertainty and the threat of litigation. We recommend the SEC either maintain existing Rule 14a-9 or allow proxy advisory firms to mitigate the risk of legal disputes with issuers.

[9] 84 F.R. at 66545-46.

[10] In the Release, the SEC acknowledges these different categories of claimed errors, noting that issuers may have disagreements that extend beyond the accuracy of the data used, such as differing views about the proxy advisor's methodological approach or other differences of opinion that they believe are relevant to the voting advice. 84 F.R. at 66530.

The Proposals would codify the recent Commission interpretive release determining that proxy voting advice is a solicitation under Section 14(a) of the Exchange Act and subject to Rule 14a-9.[11] Rule 14a-9 prohibits any solicitation from containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading. The Proposals would also amend Rule 14a-9 by adding examples of information that would need to be disclosed in proxy voting advice, including the proxy advisory firm's methodology, sources of information, conflicts of interest, and any standards or requirements that materially differ from SEC standards.[12]

While we strongly support ensuring that proxy voting advice contains all material information and is not misleading, the proposed examples appear in some cases to extend beyond material, factual information. We are concerned that such a disclosure standard could subject proxy advisory firms to the threat of litigation in cases where issuers may disagree with the analysis and voting recommendations regardless of the presence or absence of factual errors. This legal uncertainty for proxy advisory firms could affect the quality of analysis in cases where the firms may oppose shareholder proposals endorsed by issuers. The mere threat of litigation may move proxy advisory firms to use fewer independent methodologies, source their analysis with fewer inputs, or conform more of their recommendations to those supported by issuers.

Heightened legal risk under Rule 14a-9 would lead to higher legal and compliance burdens and costs for proxy advisory firms. Even a small percentage of disputes from the thousands of reports published annually could impose significant costs, which we expect proxy advisory firms would pass on to clients. Higher costs could cause some fund managers to reduce their use of proxy voting advice or limit the number of proxy votes in which they participate, limiting the SEC's efforts to enhance shareholder engagement and participation in shareholder votes.

We believe the current scope of and examples in Rule 14a-9 is appropriate, as it prohibits statements that are false or misleading with respect to material facts or the omission of any material facts. This standard achieves the appropriate balance in ensuring that proxy voting advice is accurate and not misleading, and providing certainty as to the type of information that needs to be disclosed. Relatedly, the SEC asks in the Release whether instead of amending Rule 14a-9, it should amend Rule 14a-2(b)(9) to require that proxy voting advice include disclosure of a proxy advisory firm's use or application of standards that materially differ from standards set or approved by the Commission.[13] We agree that if the SEC is primarily concerned with this information and believes that its omission could be misleading, it could enhance disclosure in this area rather than adopt new and broad disclosure requirements in Rule 14a-9.

If the SEC nevertheless determines to amend Rule 14a-9, it should at a minimum allow proxy advisory firms to request that issuers identify and correct any inaccuracies in the proxy voting advice during the review and feedback process, and agree not to later claim that the advice did not comply with

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[11] Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, SEC Release No. 34-86721 (Aug. 21, 2019), 84 F.R. 47416 (Sept. 10, 2019). We recognize that others have raised the question of the applicability of the proxy solicitation framework to proxy voting advice.

[12] Proposed Note (e) to Rule 14a-9.

[13] 84 F.R. at 66539.

Rule 14a-9.[14] This could be achieved by the Commission permitting proxy advisory firms to include in any confidentiality agreement they enter into with issuers a waiver of claims or litigation other than in connection with fraud. The Commission would continue to retain jurisdiction to pursue claims under the Rule in all circumstances. As a result of agreeing not to later claim inaccuracies under Rule 14a-9, issuers would be encouraged to identify any errors during the review and feedback process, rather than after proxy voting advice has been provided to clients. Proxy advisory firms would have more legal certainty in preparing their proxy voting advice, and could provide robust analysis in the final advice without the potential for litigation.

Disclosure About Material Conflicts of Interest

We support the proposal for proxy advisory firms to provide their clients with additional information about material conflicts of interest. We agree with the SEC that the proposed disclosure would help fund managers better understand and assess risks that proxy voting advice could be influenced by the proxy advisory firm's own interests, and assist managers in fulfilling their obligations as described in recent Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers ("Guidance").[15] We encourage the SEC to ensure that the disclosure is well-tailored to the needs of the recipients of the disclosure. The SEC should align the disclosure of information relating to material conflicts of interest with the type of information an investment adviser would need to review in fulfilling its obligations, so that an adviser generally would not need to request additional information from a proxy advisory firm.

Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers

We appreciate that in the Guidance, the SEC encourages investment advisers to contact SEC staff with questions or feedback, which it would consider to further supplement the Guidance. We would like to express our support for the response to Question 6 which relates to whether an investment adviser that has assumed voting authority on behalf of a client is required to exercise every opportunity to vote a proxy for that client. In the answer, the Commission indicates that an adviser is not required if it has either: (i) agreed in advance with clients to limit the conditions under which the adviser would exercise voting authority; or (ii) determined that refraining from voting a proxy on behalf of a client is in the best interest of that client, which may be the case where the adviser determined that the cost to the client of voting the proxy exceeded the expected benefit to the client.[16]

We support this aspect of the Guidance, in particular the confirmation that an investment adviser is not obligated to vote a proxy if it determines that voting is not in the best interest of the client. Investment advisers should continue to make these determinations through an assessment of the cost to the client of voting the proxy as compared with the expected benefit to the client.

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[14] Such an agreement would be similar to the provision in the Proposals that would allow a proxy advisory firm to require that issuers agree to keep information confidential, and refrain from commenting publicly, as a condition of receiving the proxy voting advice. Note 2 to paragraph (ii) of Proposed Rule 14a-2(b)(9).

[15] Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, SEC Release No. IA-5325 (Aug. 21, 2019), 84 F.R. 47420 (Sept. 10, 2019).

[16] Response to Question 6.

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MFA and AIMA appreciate the opportunity to provide these comments in response to the Proposals. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Matthew Newell (mnewell@managedfunds.org) at MFA or Suzan Rose (srose@aima.org) at AIMA.

Respectfully submitted,

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