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Feb. 3, 2020

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice 17 CFR Part 240; Release No. 34-87457; RIN 3235-AM50 File No. S7-22-19

Dear Ms. Countryman:

Nareit appreciates the opportunity to comment on the proposed amendments (Proposed Amendments) issued by the Securities and Exchange Commission (the SEC or Commission) on Nov. 5, 2019, in the proposing release entitled "Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice"[1] (Proposing Release). Nareit has long advocated for common-sense reform of the proxy process and has urged the SEC to take steps to ensure proxy advisors operate fairly, transparently and free of conflict, including issuing necessary regulatory guidance and/or engaging in appropriate rulemaking to achieve this goal.[2] Accordingly, Nareit and its members strongly support the Proposed Amendments, believing them to be an appropriate, calibrated and, indeed, modest first step towards bringing accountability and transparency to U.S. proxy advisors.

Nareit is the worldwide representative voice for real estate investment trusts (REITs)[3] and listed real estate companies with an interest in U.S. real estate and capital markets. Nareit advocates for REIT-based real estate investment with policymakers and the global investment community.

The provisions of the Internal Revenue Code that gave rise to U.S. REITs were enacted by Congress in 1960 to give all investors, especially small investors, access to income-producing real estate. Since then, the U.S. REIT approach has flourished and served as the model for more than 35 countries around the

[1] U.S. Securities and Exchange Commission, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, available at: https://www.federalregister.gov/documents/2019/12/04/2019-24475/amendments-toexemptions-from-the-proxy-rules-for-proxy-voting-advice; See also, SEC, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518 (Dec. 4, 2019), https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-24475.pdf.
[2] See, e.g., Nareit Comment to the SEC in Advance of the SEC's 2018 Proxy Roundtable (Nov. 12, 2018) available at https://www.sec.gov/comments/4-725/4725-4635941-176322.pdf.
[3] REITs are real estate working for you. Through the properties they own, finance and operate, REITs help provide the essential real estate we need to live, work and play. All U.S. REITs own approximately $3 trillion in gross assets, public U.S. REITs account for $2 trillion in gross assets, and stock-exchange listed REITs have an equity market capitalization of over $1 trillion. In addition, more than 80 million Americans invest in REIT stocks through their 401(k) retirement and other investment funds Additional information available at www.reit.com.

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world. Investments by retail investors in REITs support properties including offices, apartment buildings, warehouses, retail centers, timber, medical facilities, data centers, cell towers, infrastructure, and hotels.

Nareit developed this comment with a task force of senior U.S. REIT executives involved with the annual proxy process. We believe it is important to note at the outset that the perceived power of the two dominant U.S. proxy advisory firms has created an environment where many U.S. public companies, including many U.S. REITs, are unwilling to publicly comment on the proxy process generally, or specifically discuss these firms. Since 2016, SEC Commissioners have openly urged issuers to submit comments to the SEC, or to otherwise communicate relevant information regarding their experiences with proxy advisory firms. Nareit has passed on these requests to its members and has strongly urged them to do so. But only a very few are willing. The vast majority of our members cite concerns that their companies, or their boards and/or management, may receive retaliatory treatment from proxy advisory firms if they were to publicly criticize these firms. Accordingly, in the discussion that follows, Nareit has undertaken to summarize the experiences and perspectives of many of our REIT members who are reluctant to come forward.

Over the last several years, Nareit's publicly traded REIT members have expressed a range of serious concerns about the operations of the two dominant proxy advisors that rate U.S. public companies, including REITs, including:

- The perception that proxy advisory firms have a one-size-fits-all approach to voting recommendations, which ignores the unique characteristics and operations of the diverse REIT and real estate universe and the individual facts and circumstances of each registrant and their governance profile;

- Concerns regarding a range of conflicts of interests in the business models and operations of the two dominant U.S. proxy advisory firms;

- Reports of significant and material errors of fact and analysis found in final versions of proxy reports;

- Lack of meaningful opportunities to engage with proxy advisory firms;

- Lack of transparency in proxy advisory firm voting policy formulation and, in the metrics, algorithms and formulae that are relevant in determining voting recommendations; and,

- So-called Robo-voting of proxies, especially in conjunction with the issuance of the proxy reports.

Nareit previously urged the SEC to reassess the conditions that a proxy advisory firm must satisfy to be exempt under the Securities Exchange Act from the disclosure and filing requirements that apply to solicitations,[4] arguing then that proxy advisory firms enjoying exemption under the Exchange Act should satisfy the same basic standards applicable to other market participants. Specifically, we recommended that:

- Proxy advisor reports and recommendations be based on demonstrably accurate information and that sources of voting policy recommendations and methodologies underlying recommendations, including peer group selections and compensation analysis formulas, be fully disclosed to both the investor community and the registrant prior to finalizing voting recommendations;

- All relevant conflicts of interest—including a proxy advisor's business relationship with a registrant—be fully disclosed and managed; and,

- Registrants be provided with a meaningful opportunity to engage with proxy advisors and the opportunity to review recommendations and correct inaccuracies prior to finalizing any reports or voting recommendations.[5]

Accordingly, Nareit strongly supports the reforms set forth in the Proposed Amendments to provide greater accountability and transparency to proxy advisory firms. In expressing our support, Nareit acknowledges that proxy advisory firms provide value for many investors. We are, however, skeptical of claims that these reforms would diminish the value of proxy advisory services to these investors. To the contrary, Nareit believes that greater transparency and accountability is likely to enhance the value of this advice to these investors and to other market participants. Specifically:

- Nareit supports the proposed codification of the SEC's interpretation of "solicitation" under Rule 14A-1(*l*) and Section 14(a);

- Nareit supports the proposed amendments to Rules 14a-2(b)(1) and 14a-2(b)(3), which would require proxy advisory firms to disclose conflicts of interest;

- We support the proposed registrant review period set forth in the Proposed Amendments, including the requirement that proxy advisors offer registrants the option of linking a statement disputing a recommendation;

[4] See Nareit Comment supra note 2.
[5] Id at p. 6.

- We also support the suggestion set forth on the Proposing Release that proxy advisory firms be required to suspend so-called robo-voting when a registrant has submitted a response disputing a proxy report and/or voting recommendation; and,

- We support the proposed amendment to Rule 14a-9, to clarify the application of the anti-fraud rule to proxy advisory firm operations.

We discuss each of these topics below.

I. Nareit Supports the Proposed Codification of the SEC's interpretation of "Solicitation" under Rule 14A-1(*l*) and Section 14 (a)

Nareit and its members agree that it is appropriate and necessary to codify the Commission's interpretation of "solicitation" under Rule 14A-1(*l*) and Section 14 (a) to clarify that terms "solicit" and "solicitation" include proxy voting advice that makes a recommendation to a shareholder as to its vote, consent, or authorization on a specific matter for which shareholder approval is solicited, furnished by a person who markets its expertise as a provider of such advice. We strongly agree with the analysis in the Proposing Release that such solicitation is an activity raising concerns for investors of the nature that the Commission's proxy rules are intended to address.

II. Nareit Supports the Proposed Amendments to Rules 14a-2(b)(1) and 14a-2(b)(3) that would Require Proxy Advisory Firms to Disclose Conflicts of Interest

Nareit strongly endorses the proposed amendments to Rules 14a-2(b)(1) and 14a-2(b)(3), to require, as a condition to claiming these exemptions, that proxy advisory firms disclose material conflicts of interest and other information regarding any interest, transaction, or relationship that would be material to a reasonable investor's assessment of the objectivity of the proxy voting advice. Nareit also strongly endorses the requirement that proxy advisory firms claiming these exemptions must additionally disclose the manner in which they will address current and potential conflicts, and the requirement that boilerplate disclosure will not suffice.

Over the past 5 years, Nareit members, like registrants in other industry sectors[6], have recounted numerous instances of discovered, or suspected, conflicts of interest. Nareit members report that they

[6] See, e.g., Frank M. Placenti, Are Proxy Advisors Really A Problem (Nov. 7, 2018) available at https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/ (author examined supplemental proxy filings during 2016, 2017 and 2018 proxy seasons to assess incidence of errors and found substantial evident of factual and analytical errors of varying kinds).

feel pressured, or worry they are disadvantaged by perceived conflicts arising from the business model of proxy advisory firms, well-described in the Proposing Release, as " [a] proxy voting advice business providing voting advice to its clients on proposals to be considered at the annual meeting of a registrant while the proxy voting advice business also earns fees from that registrant for providing advice on corporate governance…"[7] Nareit also has expressed concerns about the related problem described in the Proposing Release, i.e., "[a] proxy voting advice business providing ratings to institutional investors of registrants' corporate governance practices while at the same time consulting for the registrants that are the subject of the ratings to help increase their corporate governance scores…"[8].

Without question, the concern that the two U.S. proxy advisors have serious conflicts of this nature is among the most prevalent issues Nareit members have expressed in the last 5 years. Nareit's U.S. REIT members have recounted many instances of being solicited by the "consulting" arm of a proxy advisory firm before, during and immediately after recent proxy seasons. These REITs have questioned whether the proxy reports on their companies issued by these proxy advisory firms may be affected by whether they engage these firms. Many REIT executives and REIT independent board members have spoken passionately about their concern that their ratings may be affected by, or indeed be dependent upon, whether they purchase data and/or consulting services from one of the U.S. proxy advisory firms. This is true notwithstanding the public representations by these firms that there are "firm walls" segregating their proxy advisory and reporting operations.

During the 2019 proxy season, one REIT reported that immediately following its annual general meeting, its senior management and some members of its board received a solicitation for compensation advisory services from a proxy advisory firm that had issued an "against vote" with regard to its 2019 compensation package. Several others reported that their respective compensation consultants (several different compensation consultants) have recommended that they retain the consulting arm of a proxy advisory firm. Consultants have variously suggested that doing so would offer advantageous engagement avenues with the proxy advisory firm(s) staff, "serve as insurance", or be "helpful at the margins." Several of our members have told us that the opacity of the operations of the proxy advisory firms, together with aggressive marketing by these firms, leads them to suspect that the "secret sauce" to good ratings and favorable voting is to retain these firms for consulting services.

Many Nareit members have also reported to us that they fear reprisal or retaliation for declining to retain one or more of the proxy advisory firms for consulting and related services. Regardless of whether these concerns are well founded, they are quite prevalent. We believe that greater transparency regarding conflicts of interest would do much to alleviate these concerns and to dispel the myths surrounding the

[7] Proposing Release at pp. 27-28.
[8] Proposing Release at p. 28.

operations of proxy advisory firms. We are actually surprised that the proxy advisory firms apparently do not welcome these changes for this reason.

Additionally, Nareit's U.S. REIT members have encountered a REIT industry-specific issue, which raises the prospect of a different type of conflict, i.e., the possibility that certain stakeholders, or perhaps proxy advisory firm clients, may exert undue influence over the content of the voting policies of certain proxy advisory firms.

In late 2016, one proxy advisory firm adopted a proxy voting policy targeting Maryland REITs,[9] which effectively penalized all Maryland chartered companies whose charters follow the default standard of the Maryland Corporate Code, which provides a Maryland corporation's board with the authority to amend its charter and bylaws.[10] Several other states[11] have laws similar to Maryland's statute, which provide a company's board with sole authority to amend its bylaws. Under its so-called "shareholder bylaw amendment voting policy," this proxy advisory firm now recommends that investors vote against, or withhold votes, for governance and nominating committee board members of firms that do not provide their stockholders holding the minimum ownership stakes set forth in SEC Rule 14-a-8 with the power to directly (without board approval) amend corporate bylaws and charters.[12]

This shareholder bylaw amendment voting policy is set forth in language nearly identical to shareholder proposals made in 2016 to several lodging REITs by an organization exempt under section 501(c)(5) of the Internal Revenue Code[13] representing hotel workers, which then held *de minimis*, e.g., $2,000/1-year shares. The voting policy is, by the proxy advisor's own admission, intended to target Maryland REITs,[14] though it has also swept in other corporations in other states.[15] Moreover, this policy holds Maryland

[9] See ISS United States Proxy Voting Guidelines Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2017 at https://www.issgovernance.com/file/policy/2017-us-summary-voting-guidelines.pdf.
[10] MD Corp & Assn Code § 5-611 (2018).
[11] See e.g., IND. CODE § 23-1-39-1 (2017) ("Unless the articles of incorporation or section 4 of this chapter provide otherwise, only a corporation's board of directors may amend or repeal the corporation's bylaws.").and OKLA. STAT. tit. 18, § 1013 (2015) (only the board of directors has the power to amend or repeal the corporation's bylaws, unless the charter expressly grants this power conterminously to shareholders).
[12] See ISS United States Proxy Voting Guidelines Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2019, Section 1, Board of Directors—Voting of Director Nominees in Uncontested Elections—Accountability—Problematic Takeover Defenses/Governance Structure, available at https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf (accessed October 7, 2019).
[13] The ISS 2017 surveys and policy releases used language nearly identical to wording in 2016 proxy proposals submitted by a 501(c)(5) organization focused on the hotel and gaming industries.
[14] ISS published a report titled Material Restrictions on Shareholders Ability to Amend the Bylaws: A Review of Impacted Maryland Real Estate Companies (July 26, 2017) that left little doubt that REITs were its target. Available at https://www.reit.com/sites/default/files/ISSMaterial-Restrictions-on-Shareholders-Ability-to-Amend-the-Bylaws-Review-of-Maryland-Real-Estate-Companies-July262017.pdf
[15] See e.g., Eli Lilly 2018 proxy supra note 11 ("We believe that ISS's policy on this issue does not fairly apply to Lilly: we have not diminished shareholders' rights under state law in any way, because shareholders do not have the right under Indiana law to

REITs to a higher standard than Delaware corporations in many circumstances[16] and gives rise to a the paradox that, under common proxy access rules, shareholders must demonstrate a significantly greater ownership stake to nominate a director candidate to stand for election than to propose a self-executing binding change on a Maryland REIT's bylaws.

In adopting the shareholder bylaw amendment policy, the proxy advisory firm asserted, with no supporting authority, that shareholders have a "fundamental right" to amend a corporation's bylaws and charters by a simple majority of votes and to propose such binding amendments predicated on the Rule 14-a-8 minimum. To the contrary, the right of shareholders to propose binding amendments on corporate bylaws has always been a creature of state law, i.e., there is nothing "fundamental" about it. Nor did the proxy advisory firm present research suggesting that this voting policy is correlated with better performance or outcomes for investors. Rather, the history and chronology of this 2017 voting policy change strongly suggests that this proxy voting policy, which sets forth a voting standard penalizing firms for following the chartering rules of their respective states, was prompted by a request from an unidentified stakeholder with an unrelated agenda, a practice that has been noted and criticized by experts.[17]

Regardless of one's views on the appropriate requirements and procedures to amend the fundamental organizing documents of a corporation, this example raises troubling questions about possible conflicts of interest in the formulation of proxy voting policy by proxy advisory firms. For this reason, Nareit is strongly supportive of this aspect of the Proposed Amendments.

III. Nareit Supports the Proposed Registrant Review Period set forth in the Proposed Amendments, including the Requirement that Proxy Advisors Offer Registrants the Option of Linking a Statement Disputing a Recommendation

We endorse the review period contemplated in the Proposed Amendments to Rules 14a-2(b)(1) and 14a-2(b)(3), which would provide registrants an opportunity to review and provide feedback on proxy voting advice prior to issuance, with the length of the permissible registrant review period dependent on the number of days between the filing of the definitive proxy statement and the date of the shareholder

amend the bylaws as a statutory default. Lilly's charter has reflected the statutory default under Indiana law of allowing only the board of directors to amend the bylaws for over 80 years.").

[16] ISS grandfathered hundreds of Delaware corporations with existing supermajority requirements to amend their bylaws, but would not accept similar amendments for Maryland corporations after Feb. 1, 2017. A 2017 survey found that roughly 41.9% (1,087 companies out of a sample of 2,594) of U.S. registrants have supermajority provisions for amending one or more provisions of their bylaws See, Scott Hirst, Frozen Charters, 34 Yale J. on Reg. (2017). Available at: http://digitalcommons.law.yale.edu/yjreg/vol34/iss1/3.

[17] See Statement of Darla C. Stuckey, President & CEO Society for Corporate Governance Before the Committee on Banking, Housing, and Urban Affairs, "Legislative Proposals to Examine Corporate Governance" (June 28, 2018) available at https://www.banking.senate.gov/imo/media/doc/Stuckey%20Testimony%206-28-18.pdf.

meeting. We believe this is a reasonable first step towards addressing another commonly cited problem that REITs report, which is lack of review and engagement opportunities to discuss and resolve errors in proxy reports. We also agree with the statement of SEC Commissioner Elad C. Roisman at the open meeting,[18] that this proposal reflects a relatively modest expansion of the current stated practices of the dominant U.S. proxy advisory firms to obtain feedback from the largest U.S. registrants on the data underlying their reports and the reports themselves.

Lack of Opportunity to Review Proxy Advisory Firm Reports

For many years, our REIT members have cited lack of meaningful opportunity to review draft or even final proxy reports as one of their greatest concerns regarding proxy advisory firms. Some of our largest REIT members recounted many instances in which they received 36 hours or less to review a proxy report. Others have reported reports arriving late at night. One REIT, which had roughly 39 hours' notice in 2019, complained, "ISS sent us a draft of their report at 8:10pm on April 29, 2019, and gave us until 11:00am on May 1, 2019, to provide them with comments." Other REITs reported that the draft report was seemingly randomly sent to someone in their company with no involvement in the process resulting in many lost hours, or in one case, a lost opportunity to review it. Many REITs have reported that upon receipt of a draft report, they were not been able to reach a relevant professional at the proxy advisory firm to discuss it, despite persistent efforts.

REIT members range in size from Fortune 100 to small cap public companies. ISS's stated policy is to only provide S&P 500 companies with an opportunity to review draft reports. Because only 31 of the 219 public U.S. REITs are in the S&P 500, 188 U.S. stock-exchange listed REITs have never been offered the opportunity to review a draft ISS report.[19] Many REITs report that they have never, or only rarely, had the opportunity to review a draft report from either of the two dominant proxy advisory firms.

In late July 2019, Nareit informally surveyed a select sample of large U.S. stock-exchange listed equity REITs, to assess their experiences during the 2019 proxy season. Most REIT respondents indicated dissatisfaction with the outcome of their efforts to engage with ISS and Glass Lewis regarding disputed facts and analysis in their 2019 proxy reports. With regard to timing, most REIT respondents reported that they either did not receive the proxy reports in advance of issuance, or if they did, they received it 36 hours or less prior to issuance.

[18] See Statement of the Elad C. Roisman at SEC Open Meeting (November 5, 2019) available at https://www.sec.gov/news/public-statement/statement-roisman-2019-11-05-14a-2b
[19] The ISS Draft Review Process for U.S. Issuers is available at https://www.issgovernance.com/iss-draft-review-process-u-s-issuers/

Material Factual Errors in Proxy Reports

In the past three years, Nareit's member REITs believe that the frequency of material errors of fact and analysis is significant and may have increased over time. Nearly all respondents to our 2019 informal survey commented that one, or both, of their 2019 proxy reports contained factual errors of some kind. Anecdotally, two members told us that their retained compensation consultants had told them that proxy advisory report error rates were generally higher during the 2019 proxy season than in previous years.

Factual errors range from large to small. In 2019, one REIT reported that its proxy report from one proxy advisory firm included a misstatement of key compensation metrics and a misstatement of the name and tenure of its CEO. Another REIT reported that although its CEO was recently hired to "turn-around" the then ailing company and that this history is widely known, in 2019 one proxy advisory firm based a negative recommendation on the CEO's compensation on an analysis based, in part, on the company's performance prior to the CEO's hire. We are aware of at least 11 U.S. REITs that filed supplemental proxies in 2019 to address errors in a proxy report. Many others, under enormous time pressure, reported to us that they scrambled to reach key investors to dispute factual errors in 2019 proxy reports.

Errors in Analysis/Say-on-Pay in 2019 Reports

REITs overwhelmingly reported to us that proxy advisory firms refuse to engage on any disputed matters of "analysis" in their proxy reports in 2019. In the case of ISS, "analysis" includes ISS voting recommendations on say-on-pay and the related analysis. REIT respondents reported to us that they were frustrated by ISS's non-engagement policy on say-on-pay in 2019, as illustrated by the comments below:

- "…after ISS issued it's 'no' recommendation on say on pay …we reached out to them to address the matter. We sent them a letter explaining our position. They responded with a brief email saying 'we are bound by our policies, which have been set in line with the interests of our clients. We welcome the opportunity to engage further, following the completion of the US proxy season.'"

- "The Company was able to review our ISS report before release and we did file a response with ISS regarding their negative recommendation on our Say on Pay proposal. The ISS response indicated that they reviewed our comments, but did not believe them to fully mitigate pay for performance misalignment concerns. ISS issued their final report with no change to their negative recommendation on Say on Pay."

Several REITs were particularly concerned and confused by ISS's abrupt changes in the composition of the compensation peer group designated for their companies in 2019. Peer group analysis informs ISS's

measurement of "Relative Degree of Alignment (RDA),"[20] a key say-on-pay metric. REITs that not were included in the survey sample also communicated concerns with peer group composition in 2019. More than a half dozen REITs reported to us that ISS had inexplicably changed the composition of their compensation peer group from the previous year (or years, in some cases), without either warning or explanation. Some REITs in the S&P 500 were compared to peer groups comprised of several smaller firms; while other REITs were compared to companies in different REIT subsectors and/or geographies. Some REIT board members reported that they were extremely frustrated, claiming that they cannot discharge their responsibilities for evaluating compensation if the relevant peer group is "a moving target without logic."

ISS's non-engagement policy with so many REITs on say-on-pay recommendations appears to have been consequential for several REITs during the 2019 proxy season. Sixteen of the 19 REITs that received negative ISS say-on-pay recommendations were cited for their pay "misalignment," which is highly dependent on peer group analysis.

We are aware of one REIT that did successfully engage with ISS and Glass Lewis on Say-on-Pay matters last year. This REIT's experience usefully illustrates how the proposed registrant review period and engagement opportunity contemplated in the Proposed Amendments is likely to improve the quality of information available to voting shareholders.

In 2018 ISS applied a methodology to value this REIT's performance-based equity grants that was inconsistent with the methodology it had used for this REIT in the prior year. Specifically, in 2017, ISS had used stock price on grant date, and in 2018 it used Monte Carlo Value ("MCV"), which typically results in a large discount from the stock price on grant date. Noting that the inconsistent valuation methods applied served to distort the presentation of year-over-year results, the REIT sought a correction in 2018. ISS responded that it would not correct or republish its 2018 report, but it assured the REIT in writing that it would apply MCV consistently in its future reports.

In its draft 2019 report, ISS issued an Against recommendation on this REIT's say-on-pay, again failing to use MCV, and further compounded this error by double counting the CEO's cash bonus. After rebuffing the REIT's initial requests for correction, ISS eventually reversed its negative recommendation after the REIT appealed and brought this error and the prior ISS written commitment to its attention. But the delay meant that a large percentage of the REIT's shares had already been voted.

[20] See, ISS, Pay for Performance Mechanics 2019 at 5 ("The Relative Degree of Alignment (RDA) compares the percentile ranks of a company's CEO pay and TSR performance, relative to a comparison group of 12-24 companies selected by ISS on the basis of size, industry, market capitalization, and other factors, generally measured over a three-year period…").

Moreover, this REIT encountered a separate problem with its 2019 Glass Lewis report, which initially included an Against recommendation for the company's equity plan predicated on a failure to account for all of the company's outstanding shares on a fully diluted basis. This recommendation was also eventually reversed. But the delay was costly to the company during the 2019 proxy season. Nine of the REIT's top 25 stockholders that had initially cast Against votes were able to change their votes, but many other shareholders were not. The vast majority of REITs, which do not currently receive drafts of ISS and Glass Lewis reports, would not have similar recourse to address these kinds of errors.

Hyperlinked Registrant Response Statement

Nareit supports the proposed requirement that proxy advisors, as a condition to the exemptions from the proxy solicitation rules, be required, upon request, to include a hyperlink (or other analogous electronic medium) to the registrant's statement about the proxy advisor's voting advice.[21] We acknowledge the requirement that such linked statements would constitute a "solicitation," and be subject to the anti-fraud prohibitions and must be timely filed with the SEC as supplemental proxy materials [22]

IV. Nareit Supports the Suggestion to Require Proxy Advisory Firms to Disable Electronic Voting When a Registrant has Submitted a Response Disputing a Proxy Report and/or Voting Recommendation

The Proposing Release requests comment on whether amended Rules 14a-2(b)(1) and 14a-2(b)(3) should condition the relevant exemptions on a proxy advisor structuring its electronic voting platform to disable the automatic submission of votes in instances when a registrant has submitted a response to the voting advice. Nareit members support this suggestion, believing that it would be a constructive response to a problem that many have experienced.

The respondents to our informal 2019 survey reported that the volume of votes cast within 24 and 48 hours of the release of ISS proxy reports was in line with data cited in some published reports[23]. On average, 22% of votes were cast within 24 hours of the issuance of the ISS report and 30%, on average, within 48 hours. These responses suggest that the issuance of the ISS proxy report had a material influence on REIT proxy voting in 2019. Respondents suggest that the impact of ISS proxy reports on voting was particularly apparent with regard to negative ISS voting recommendations. Several REITs told us that they felt particularly disadvantaged by their inability to respond to negative ISS voting recommendations contained in their reports. One respondent, whose REIT received a negative ISS

[21] Proposing Release at 54.
[22] Id at 55.
[23] See, e.g., U.S. Chamber of Commerce, Proxy Season Survey (2018) at 7 ("With ISS, several companies reported that 10%-15% of their shares would vote automatically in line, while others estimated that between 25%-30% fell into that category.") available at https://www.centerforcapitalmarkets.com/wpcontent/uploads/2018/10/ProxySeasonSurvey_v3_Digital.pdf

recommendation on say-on-pay in 2019, wrote in a note accompanying its voting data, “this data means the answer to the SEC's specific question is that within the 48-hour period following the release of the ISS report, approximately 17% (16.98%) of the shares were voted “Against” the Say on Pay proposal.”

As noted above, in 2019, 11 of the 19 REITs that received ISS negative say-on-pay recommendations filed supplemental proxies with the SEC (form DEFA14A) to respond to negative ISS voting recommendations and bring their perspective to their investors. REITs also attempted to engage key shareholders directly after their ISS report was issued, but often found that the “die was already cast.” One REIT described a conversation with an institutional investor, which said that after hearing the company’s “side” of the story, it wished it had not already voted, but that it was “too difficult” to undo its voting.

V. Nareit supports the Proposed Amendment to Rule 14a-9, addressing the Anti-Fraud Rule

We support the Proposed Amendment to Rule 14a-9 to add four additional examples of conduct that must be disclosed. We believe that the fourth example, which would require the disclosure of voting standards that materially differ from relevant SEC standards or requirements is particularly useful. This example would require that proxy advisory firms to state when a recommendation reflects its own policies, rather than noncompliance with SEC rules. We respectfully suggest that it would also be constructive if the SEC would expand the list to require disclosure when voting is predicated on an advisory firm’s standard that materially differs from relevant statutory requirements of the state in which the issuer is chartered.

Conclusion

As others have noted, today proxy advisory firms are virtually alone in being unregulated participants in the annual proxy process for public companies. Many of the comments filed by clients of the two dominant proxy advisory firms point to the importance of their advice to these investors. We do not dispute these claims. Rather, we believe that the many comments and other testimony establishing that large numbers of investors rely on voting guidance and execution services provided by proxy advisory firms provides additional support for the Proposed Amendments. With so many investors relying on these firms, it is essential that proxy advisors operate transparently, free of conflict and that they are accountable for the accuracy of their reports.

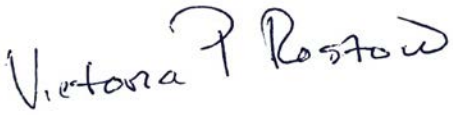
Nareit members strongly believe that bringing greater accountability and transparency to the rules and procedures governing the annual proxy process and addressing troubling conflicts of interest is essential to maintaining investor trust and confidence in U.S. public companies. For this reason, Nareit has also

commented on the SEC proposed amendments to Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8.[24]

Nareit and its members would be happy to support the work of the Commission and its staff as the Commission moves forward with efforts to modernize the proxy rules. We also would be happy to answer any questions that you may have about Nareit's comment. Please feel free to contact us (tedwards@nareit.com, (202) 739-9408 and vrostow@nareit.com; (202) 739-9431) with any further questions that you may have.

Respectfully submitted,

Tony M. Edwards
Senior Executive Vice President



Victoria P. Rostow
Senior Vice-President & Deputy General Counsel

[24] See, Nareit Comment on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (Nov. 5, 2019) available at https://www.sec.gov/comments/s7-23-19/s72319.htm