CGI GLASS LEWIS

May 31, 2021

Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

By electronic lodgement to: mcdproxyadvice@treasury.gov.au

Re: Consultation — Greater Transparency of Proxy Advice

Dear Sir/Madam:

On behalf of CGI Glass Lewis Pty Ltd ("CGI Glass Lewis"), thank you for the opportunity to comment on the Treasury's Consultation on Greater Transparency of Proxy Advice.[1]

The proxy process, through which shareholders exercise their basic right to have a say in the governance of companies they own, is a critical component of the corporate governance system. Proxy advisors play an important support role in this process, providing resources and technical subject-matter expertise to help institutional investors meet their fiduciary responsibility to vote securities on behalf of their participants and beneficiaries in a cost-effective way.

The Consultation recognizes the important role that proxy advisors play in the corporate governance system. We believe it falls short, however, in identifying any market failure or other problem with proxy advisors' current operations warranting regulatory intervention. Moreover, we are concerned that adopting some of the measures put forward in the Consultation could have significant, adverse consequences on proxy advisors' ability to meet their investor clients' need for independent, timely, and cost-effective proxy advice.

CGI Glass Lewis believes in transparency and appropriate engagement with the companies that are the subject of proxy advice and, as discussed further below, has built such engagement into its current business practices. In fact, we have committed to follow the internationally endorsed Best Practices Principles for Shareholder Voting Research Providers ("Best Practices Principles"), which address these critical issues, and annually report on our compliance with those principles.

Having participated in similar consultations around the globe in recent years, we would encourage the Treasury to consider that other approaches — such as the approach taken in the European Union leveraging the Best Practices Principles — would better serve its objectives. In particular, we believe the Treasury should consider the evidence that emerged in the U.S. Securities and Exchange Commission's ("SEC") rulemaking last year that compelled the SEC to drop its proposal to mandate company preclearance of proxy advice. To assist the Treasury's further deliberations on this issue, we include background information on Glass Lewis and the current regulatory framework for proxy advisors and then, drawing on other jurisdictions' experiences considering similar approaches, specifically address the options put forward in Treasury's Consultation.

[1] CGI Glass Lewis is the Australian subsidiary of Glass, Lewis & Co., LLC ("Glass Lewis"), a proxy advisor with global operations.

I. Background.

A. Glass Lewis

Founded in 2003, Glass Lewis is a leading provider of independent proxy advice. As a proxy advisor, Glass Lewis provides proxy research and vote management services to institutional investor clients throughout the world. While, for the most part, investor clients use Glass Lewis research to help them make proxy voting decisions, these institutions also use Glass Lewis research when engaging with companies before and after shareholder meetings. Further, through Glass Lewis' Web-based vote management system, Viewpoint®, Glass Lewis provides investor clients with the means to receive, reconcile, and vote ballots according to custom voting guidelines and record-keep, audit, report, and disclose their proxy votes.

Glass Lewis serves more than 1,300 investor clients — including asset owners, asset managers, and other institutions that invest on behalf of individual investors and have a fiduciary duty to act, including through proxy voting, in the best interests of their beneficiaries. Glass Lewis covers over 30,000 meetings each year, across approximately 100 global markets.

A significant majority of Glass Lewis' clients today have their own custom voting policies. Glass Lewis helps these clients implement their policies by applying them to the circumstances presented by companies in their proxy statements and recommending how they vote accordingly. During the policy formulation process, an institution typically will review Glass Lewis' policies to assess the similarities and differences between the institution's views and Glass Lewis' "house policy." Glass Lewis engages extensively with institutional investors and aims to have policies that reflect the views of its clients. Accordingly, it is not uncommon for an investor client to elect to implement the same policy as Glass Lewis for at least some of the issues up for vote.

Glass Lewis also executes votes on behalf of investor clients in accordance with the specific instructions of those clients. To that end, Glass Lewis implements client voting policies on its vote management system so that each ballot populates with recommendations based on the specific policies of the client, enabling the client to submit votes in a timely and efficient manner. (Under no circumstance is Glass Lewis authorized to deviate from a client's instructions or to determine a vote that is not consistent with the policy specified by the client.) When a preliminary ballot is ready for review, the voting system will alert the client and provide such client with relevant disclosures and other information needed to review and evaluate the matters up for a vote. Clients can choose to restrict the submission of a ballot until after their authorized personnel have reviewed and approved the votes. Clients can also make — and often do make — changes to their preliminary ballots before signing off. And, assuming the voting deadline has not passed, they can even change their votes and resubmit them.

B. The role of proxy advisors

As the Australian Securities & Investments Commission ("ASIC") has recognized, proxy advisors play a "valuable role . . . in the market by assisting investors in making voting decisions and promoting focus on corporate governance issues relevant to shareholders."[2] Proxy advisors do so by providing

[2] ASIC, Report 539, "ASIC regulation of corporate finance: January to June 2017," at 46 (Aug 2017); see also ASIC, Report 564, "Annual general meeting season 2017," at 8 (Jan 2018).

resources and technical, subject-matter expertise to help institutional investors meet their fiduciary responsibility to vote securities on behalf of their participants and beneficiaries in a cost-effective way.

As an increasing share of investors own stock indirectly, such as through managed investment schemes and superannuation and other pension funds, these individual investors are dependent on those institutional investors to vote on their behalf and act in their best interest. To do so both effectively and efficiently, those institutional investors often leverage their resources by using the services of a proxy advisor. As a coalition of investors recently explained:

> Retail holders now invest much of their capital with institutional investors because they understand that institutional investors' expertise and size bear the expectation of higher returns, lower costs and mitigated risks. Importantly, retail investors also understand that aggregating their individual holdings into larger, concentrated blocks through an institutional manager allows for more effective monitoring of company management.
>
> Even so, institutional investors themselves face challenges in spending significant time and resources on voting decisions because the funds and other vehicles they manage receive only a portion of the benefits conveyed on all investors of the relevant enterprise.
>
> Proxy advisors are a market-based solution to address many of these practical cost issues. Proxy advisors effectively serve as collective research providers for large numbers of institutional investors, providing these investors an affordable alternative to the high costs of individually performing the requisite analysis for literally hundreds of thousands of ballot proposals at thousands of shareholder meetings each proxy season.[3]

The stewardship facilitated by proxy advisor's research is vital to healthy capital markets and, in turn, Australia's economy. As ASIC has explained, "[s]trong institutional shareholder engagement with voting is a key part of a well-functioning capital market in Australia."[4]

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[3] Letter of Ken Bertsch, Executive Director, Council of Institutional Investors and 60 institutional investors to U.S. SEC Chair Jay Clayton, at 2 (Oct. 15, 2019), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/201910015proxy_advisor_sign_on_final.pdf.

[4] ASIC Report 539, at 46. In addition, proxy advisors provide a viable solution for asset managers and other investors seeking a way to mitigate their own conflicts of interest when voting shares on behalf of their participants or beneficiaries. See U.S. SEC, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA-5325 at 5-6 (Aug. 21, 2019) ("U.S. SEC August 2019 Guidance"). While the ultimate responsibility of voting proxies in the best interest of its clients continues to lie with the investment adviser, regulators have signaled that "this third-party input into such an investment adviser's voting decision may mitigate the investment adviser's potential conflict of interest." Id.

C. The regulatory environment of proxy advisors

Proxy advisors are hired by and work to assist institutional investors in voting shares on behalf of their clients and beneficiaries. In many jurisdictions, these institutional investors are subject to robust regulatory regimes for the voting of proxies on behalf of their clients that, among other things, impose specific responsibilities for their oversight of third-party service providers they use in the voting process.[5] CGI Glass Lewis' experience is that its clients take their oversight responsibilities very seriously. CGI Glass Lewis devotes substantial resources to regularly engaging with its clients as they carry out their due diligence by answering oral and written questions, providing written materials, and facilitating visits to its office sites.

In addition to oversight by their regulated clients, proxy advisors hold themselves accountable to a set of best practices principles designed specifically for the proxy advisor industry. These principles have grown out of regulatory consultations around the globe on the role of proxy advisors in recent years. Recognizing that proxy advisors are a voluntary, private-market response to investors' need for independent, cost-effective advice, most jurisdictions to study these issues have concluded that encouraging the development of best practices, rather than government regulation, was the appropriate response.

Most notably, in 2013, after a public consultation, the European Securities and Markets Authority ("ESMA") found no evidence of a market failure in the proxy advice market and therefore did not see a need for binding or quasi-binding regulation of proxy advisors.[6] Instead, ESMA said the "appropriate approach" was for the industry to develop a code of conduct, to be applied on a comply-or-explain basis, that would address two areas of concern raised in the consultation: 1) identifying, disclosing and managing conflicts of interest; and 2) fostering transparency to ensure the accuracy and reliability of the advice.

In response, Glass Lewis and other leading proxy advisors formed the Best Practice Principles Group ("BPPG") to develop a code of conduct for the industry, which the signatories to the Best Practices Principles said they would apply globally. The BPPG developed the Best Practices Principles with input from ESMA and other stakeholders, including numerous corporate respondents to the

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[5] See EU DIRECTIVE 2017/828 of 17 May 2017 ("SRD II"); U.S. SEC August 2019 Guidance.

[6] See Press Release, "ESMA recommends EU Code of Conduct for proxy advisor industry," (Feb. 19, 2013), available at https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-240.pdf.; see also U.S. General Accountability Office, Report to Congress, Corporate Shareholder Meetings—Proxy Advisory Firms' Role in Voting and Corporate Governance Practices, at 11 (Nov. 2016) ("In recent years, [ESMA and the Canadian Securities Administrators] conducted reviews of the proxy advisory firm industry and concluded that *regulatory intervention was not needed*. Specifically, the European Securities and Markets Authority concluded that regulation was not justified because there was *no evidence of a market failure in relation to how proxy advisory firms interact with institutional investors and corporate issuers*. However, both entities proposed guidance and recommendations for the firms to enhance transparency, among other issues.") (emphases added).

consultation from both Europe and North America. Following a global, public consultation, the Best Practices Principles were officially launched in March 2014.[7]

The Best Practices Principles encourage transparency, conflict management and disclosure, and engagement with companies when appropriate. Glass Lewis meets the Best Practices Principles' standards by making the following publicly available on its website: detailed policy guidelines; research approach and methodologies; conflict avoidance and disclosure policies; and public-company engagement procedures. Since the launch of the principles, Glass Lewis and the other charter signatories have each published their Statements of Compliance, featuring detailed information on how the organizations comply with the principles. Glass Lewis applies the Principles to its activities globally and updates its Statement of Compliance annually.

To enhance its governance, per the recommendation of ESMA and complementary to the requirements of the Shareholder Rights Directive II ("SRD II"), as well as stewardship developments in other global markets, the BPPG has formed an Independent Oversight Committee. The Committee, chaired by Dr. Stephen Davis, a Senior Fellow at the Harvard Law School Program on Corporate Governance and a co-founder of the International Corporate Governance Network ("ICGN"), is comprised of both investor and company representatives.[8] The Committee oversees an annual independent review of the Principles and the public Statements of Compliance of each signatory to hold all members accountable.

CGI Glass Lewis continues to believe that a market-based solution to proxy advisor oversight and accountability is appropriate. In particular, CGI Glass Lewis believes that an industry code of best practices is the appropriate means to address the issues raised in the Consultation — namely transparency, accountability, and company engagement. In our view, the existing standards of conduct, coupled with a mechanism to monitor and ensure compliance, would be a more appropriate way to address these issues and would best serve the interests of all market participants.

[7] The Best Practices Principles and additional information on the BPPG is available on its website, see https://bppgrp.info/. In 2017, the charter signatories to the Best Practices Principles conducted another public consultation to elicit market feedback on the extent to which the Principles were achieving their original objectives and to identify opportunities for improving understanding and transparency. An advisory panel, comprised of stakeholders from companies, asset owners, asset managers, and other constituencies, provided input to the preparation of the consultation under the guidance of an independent chairman. Among other things, the latest update to the Best Practices Principles addresses the transparency requirements for proxy advisors outlined in SRD II as regards the encouragement of long- term shareholder engagement.

[8] See Press Release, "BPP Group Announces Appointment of Oversight Committee Representatives" (July 16, 2020), available at https://bppgrp.info/bpp-group-announces-appointment-of-oversight-committee-representatives/.

II. Lack of Evidence for the Reforms

We appreciate that the Consultation merely aims to "assess the adequacy of the current regulatory regime and help develop reform options that would strengthen the transparency and accountability of proxy advice." At the same time, Treasury's contemplation of government intervention into this market and characterization of its options as "reforms" suggests it has identified and intends to address problems in current market practice. The Consultation lacks any real evidence of such problems, however.

- The Consultation notes that "there are only four main proxy advisers operating in Australia," which the Treasury asserts gives these proxy advisors "a high degree of influence in the outcomes of company resolutions." As a service provider, a proxy advisor can only succeed by adding value for its clients, so it is to be expected that its proxy advice would have some influence on its clients' voting decisions. What the Consultation lacks is any evidence that this influence is excessive or problematic. In fact, in 2018, ASIC undertook a multi-year consultation and field study of the operation of proxy advisors in Australia and concluded that empirical evidence "appears to suggest that concerns regarding the extent of influence of proxy adviser recommendations on the voting outcomes of company resolutions is overstated."[9]

- The Consultation also cites international developments, suggesting Australian reforms are needed to keep up with the U.S. and UK. But the U.S. and the UK have not adopted the more extreme options put forward by Treasury in the Consultation. As further discussed below, the U.S. SEC abandoned its proposal to require company pre-review of proxy advice as part of its controversial rulemaking last year. Nor does the UK Financial Conduct Authority ("FCA") mandate advance review of proxy advice, disclosure of whether votes were consistent with proxy advice, or "independence" of proxy advisors from certain of their clients. In fact, like a number of other countries, the UK FCA's approach builds on the Best Practices Principles.[10] As discussed above, this model is increasingly looked to in a number of jurisdictions, but not discussed in the Consultation.

- Finally, the Treasury notes that "[b]usiness representative groups have raised the importance of companies being able to engage with proxy advisers." This general sentiment, however, falls far short of evidence of a problem warranting government intervention. In 2020 alone, Glass Lewis conducted approximately 1,500 engagement meetings and calls with companies, dissident shareholders, and shareholder proponents globally — including some 280 engagements with

[9] ASIC, Report 578, "ASIC review of proxy advisor engagement practices," at 4 (Jun 2018); see also ASIC report 564, at 10 ("Clients of these proxy advisers have strongly represented to ASIC that they do not follow proxy advisers' recommendations automatically, but make their own voting decisions. There were also reports of large institutional shareholders deciding to vote against resolutions that were the subject of a 'for' recommendation by proxy advisers.")

[10] See FCA, Requirements for Proxy Advisors (proxy advisors must disclose basic information concerning their policies and procedures, any conflicts, and "the code of conduct which they apply, and . . . the manner in which the code has been applied"), available at https://www.fca.org.uk/markets/primary-markets/proxy-advisors; see also the discussion of the UK Stewardship Code below at note 17.

224 ASX-listed companies. Moreover, ASIC's 2018 study found that "the policies of all the proxy advisers appear to reflect . . . a willingness to engage with companies and make a copy of their report available to companies either prior to or after publication [and] a willingness to receive feedback from companies in relation to potential factual errors and to correct material factual errors."[11] Companies had the opportunity to engage in at least 95% of the cases of "against" recommendations ASIC studied across the four main Australian proxy advisors.[12] Treasury offers no evidence that this high level of engagement is deficient or somehow harmful to corporate governance in Australia.

The potential reforms are solutions in search of a problem.[13]

[11] ASIC Report 578, at 6.

[12] Id.

[13] The Consultation does not claim that the reforms are needed to address proxy advisor inaccuracy, nor could it credibly do so. While this claim has been advanced by corporate management critics of proxy advisors — and was touted as the primary reason for the U.S. SEC's proposed company pre-review regime — the record in the SEC's rulemaking disproved these claims. In the words of an SEC Commissioner who dissented from the final rules, proxy advisor inaccuracy "failed as a justification for the proposal because there simply was not evidence of any significant error rate in proxy voting advice." Statement of the Honorable Allison Herren Lee at SEC Open Meeting (July 22, 2020), available at https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22; see also id. ("The final rules will still add significant complexity and cost into a system that just isn't broken, as we still have not produced any objective evidence of a problem with proxy advisory firms' voting recommendations. No lawsuits, no enforcement cases, no exam findings, and no objective evidence of material error—in nature or number. Nothing."); see also Letter of Nichol Garzon-Mitchell, General Counsel, Glass Lewis, to the Ontario Capital Markets Task Force, at 8-9 (Sept 7, 2020) (discussing the evidentiary record from the SEC rulemaking in more detail), available at https://www.glasslewis.com/wp-content/uploads/2020/09/GL-Comment-Letter-to-Ontario-Taskforce-FINAL.pdf.

III. Comments on the Regulatory Options.

Our views on the five regulatory options described in the Consultation follow.

A. Option 1: Improved disclosure of trustee voting.

Treasury's first two regulatory options seek to "improv[e] independence of proxy advisers for the purposes of ensuring superannuation funds are held to the highest standards of governance and transparency." To that end, Treasury's first regulatory option proposes "improved" disclosure of superannuation fund trustee voting, specifically extending disclosure requirements to whether the superannuation fund received proxy advice, who provided that advice, and "whether the voting actions taken were consistent with the proxy advice."

While disclosure of proxy voting policies and general information concerning votes cast is an established and accepted practice in Australia and a number of other jurisdictions,[14] the additional disclosures contemplated in the Consultation depart from this model in their prescriptiveness and their focus on the proxy advice received. No explanation is provided for why disclosures at this level of specificity would be useful to Australian super fund members. Moreover, there are significant questions about how these disclosures would work and whether they would result in meaningful disclosure. Most notably, as discussed above, a significant majority of Glass Lewis' clients have their own custom voting policies. In these circumstances, Glass Lewis' "advice" is specifically tailored to that client based on its unique policy.[15] Disclosure of whether a particular institutional shareholders' voting actions were consistent with custom advice it received would not be comparable to other shareholders' voting records. It is also not clear how this disclosure would work in the common situation of an asset manager that subscribes to more than one proxy advisors' reports.[16]

Even in other jurisdictions that require some disclosure about proxy advice received, such as the UK through its Stewardship Code, those disclosure requirements are framed in a broader manner.[17] If

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[14] Section 29QB of the Superannuation Industry (Supervision) Act 1993 requires registered superannuation funds to disclose proxy voting policies and a summary of when and how they have exercised their voting rights in relation to shares in listed companies. See also Superannuation Industry (Supervision) regulations 2.38(2)(n-o); ASIC, Regulatory Guide 252, "Keeping superannuation websites up to date" (Jun 2014).

[15] The Consultation does not mention custom policies or custom advice.

[16] See ASIC Report 578, at 4 ("many institutional investors will subscribe to more than one adviser's reports").

[17] See UK Financial Reporting Council, UK Stewardship Code, at 9 (Sept 2012) (Principle 6 guidance: "Institutional investors should disclose publicly voting records. Institutional investors should disclose the use made, if any, of proxy voting or other voting advisory services. They should describe the scope of such services, identify the providers and disclose the extent to which they follow, rely upon or use recommendations made by such services."), available at

Treasury determines that additional disclosure in this area would be useful to super fund members, any new requirements should be similarly principles-based, allowing investors to choose how to present the information in a meaningful way in accordance with industry norms.

B. Option 2: Demonstrating independence and appropriate governance.

The Consultation suggests that a proxy advisor, at least for a superannuation fund, must be independent of that fund so that proxy advice is provided "on an 'arm's length' basis." The specific concern motivating this option is unclear to us. While conflict avoidance and disclosure is an important attribute of proxy advice, this has never, to our knowledge, been held to mean that a proxy advisor must be independent of its clients (as opposed to avoiding conflicts with the company under review or other parties, such as a dissident or shareholder proposal proponent, seeking a particular outcome from a proxy vote). In fact, the notion that proxy advice must be provided "on an 'arm's length' basis" would seem to call into question the routine practice of an institutional investor's own staff providing advice on proxy matters. Treasury should clarify what problem this option would address and avoid enunciating any new principle of "independence" that would call into question established, benign market practices.

C. Option 3: Facilitate engagement and ensure transparency.

In perhaps its most far-reaching and problematic proposal, the Consultation suggests that the government create a special right for Australian companies to clear proxy advice before it goes to the proxy advisors' clients. Company pre-review of proxy advisor recommendations threatens to impair proxy advisor independence and would severely limit the time institutional investors have to consider proxy advice, engage with companies, and determine how to vote.

This issue was thoroughly explored as part of the recent U.S. SEC proxy advisor rulemaking. In that proceeding, a divided SEC proposed that proxy advisors be effectively required to allow companies to review proxy advisors' recommendations before they were transmitted to the proxy advisor's clients. In response, the SEC was met with a deluge of comments from market participants demonstrating that the proposed advance review period was not workable. Coming in the middle of a complex and already highly-compressed process, allowing companies five days to pre-review proxy advice would severely disrupt and impinge on the time available for institutional investor shareholders to make proxy voting decisions.[18] In fact, Glass Lewis' analysis showed that, for companies filing their proxy statement 25-30

https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf.

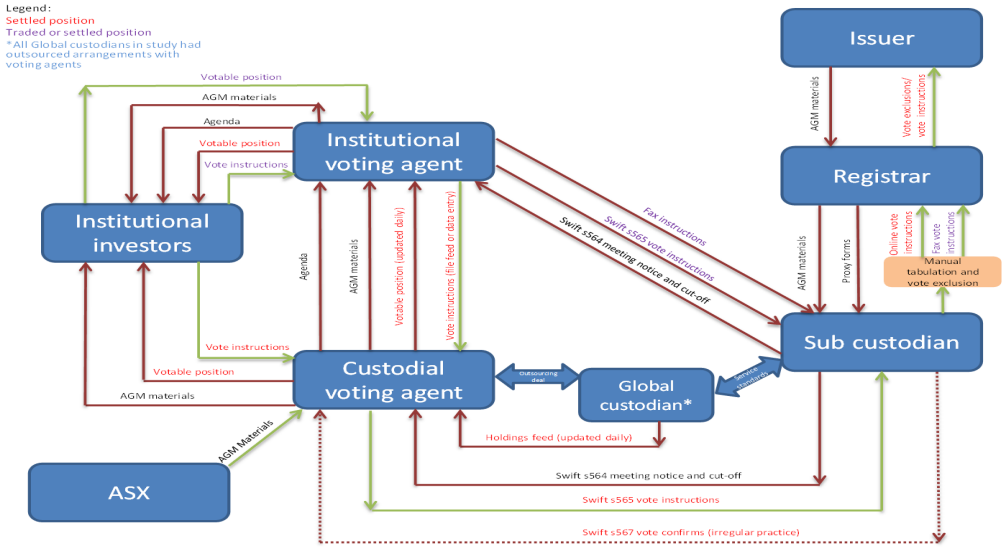
[18] While ASX-listed companies release their annual meeting notice 28 days before the meeting, a complex series of information flows involving numerous intermediaries takes place in the period between the notice of meeting and the meeting date (see illustration below). Necessary, logistical steps in this process shorten shareholders' time to consider AGM materials and vote. AGM materials may not be immediately available to investors and proxy advisors upon their release. ACSI, "Institutional Proxy Voting in Australia," at 4.2 (October 2012) ("ACSI Report"), available at https://acsi.org.au/wp-content/uploads/2020/11/institutional-proxy-voting-in-australia.pdf. Also, vote instructions must be sent ahead of sub-custodian deadlines, which, depending on the custodian, often means that

days before the annual meeting — as happens in Australia — investors would lose between 38 and 57 percent of the time they currently have before the meeting to consider and act on proxy advice.[19]

institutional investors need to submit their vote instructions to their voting agent 6-8 business days prior to a company's annual meeting.

In reality, the total available time for: 1) proxy advisors to review companies' AGM materials, analyze the issues, draft reports and prepare benchmark and custom recommendations; and 2) for proxy advisors' clients to review the proxy advice, conduct their own analysis (including directly engaging with the company, if warranted) and make voting decisions, is often a 2-3 week period. Occupying five or more days of that period with company pre-review of proxy advice would be a significant change.

Figure 2: Australian Proxy Information Flow



Source: ACSI Report (Figure 2).

[19] See Letter of Kevin Cameron, Executive Chair, and Nichol Garzon-Mitchell, General Counsel, Glass Lewis to the U.S. SEC, at 21-22 (Feb. 3, 2020), available at https://www.sec.gov/comments/s7-22-19/s72219-6745349-207938.pdf. The time periods at issue in the SEC rulemaking were comparable to Treasury's Consultation. Specifically, the SEC proposed that companies that filed their proxy statement between 25 and 45 days before their annual meeting be given three business days to review proxy advice, followed by a second two business day "final notice" period.

The logistical challenges and costs of administering such a review process would be exacerbated by the intense seasonality of the proxy advice business.[20] Yet a mandatory five-day review period would entitle companies to the same review period whether it is the busiest or least busy time of the year for annual meetings and, for that matter, whether they wish to review the proxy advice or not. Additional complications would be posed in more fluid situations, such as M&A transactions and contested director elections, in which proxy materials may be frequently amended up to the time of the meeting. Not surprisingly, a broad consensus of institutional investors expressed grave concern about the effect of the SEC's proposal on their stewardship practices.[21]

Other critical details that would affect the feasibility, as well as the potentially significant cost, of this option have not been provided. Does Treasury intend for there to be five calendar or five business days of review?[22] Would proxy advisors be allowed to mandate that companies respond within less than the full review period or would they have to use time after the five-day review period to consider the company feedback and evaluate whether it warrants any change to their report and advice? Would only proxy advisors' benchmark reports have to be provided or does Treasury contemplate that companies would also somehow have the opportunity to comment on specialty reports or custom advice? Would the advance versions of the reports be provided under confidentiality agreements and, if so, would the terms of these agreements be dictated by the government or left to individual negotiation between proxy advisors and Australian companies?[23] How would the government mitigate the risk of insider

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[20] The Australian proxy season is heavily concentrated between October and December each year. See ASIC Report 564, at 4.

[21] See, for example, Letter of Matthew DiGuiseppe and Benjamin Colton, Heads of Asset Stewardship, State Street Global Advisers, to U.S. SEC (Feb. 3, 2020) ("we are concerned that the proposed mandatory review process for issuers would shorten the timeframe that we have to make informed voting decisions based on available data. Therefore, we view the proposed review process as costly and unnecessary . . . ."), available at https://www.sec.gov/comments/s7-22-19/s72219-6740556-207724.pdf; Letter of William J. Stromberg, President and CEO, T. Rowe Price, to U.S. SEC ("Even if the Proposal were able to illustrate how issuer review of proxy research would benefit rather than harm investors, in our experience, it would still be impossible within the current timeline to accommodate the proposed review periods."), available at https://www.sec.gov/comments/s7-22-19/s72219-6721059-206207.pdf; Letter of Peter Ferket, Chief Investment Officer, Robeco, to U.S. SEC (Jan. 16, 2020) (proposal will "reduce the time that shareholders spend undertaking their own reviews on each proxy vote. An unintended consequence might be that shareholders are even more likely to vote in-line with proxy advisors."), available at https://www.sec.gov/comments/s7-23-19/s72319-6668207-203963.pdf.

[22] See, for example, Press Release, Australian Institute of Company Directors, "AICD welcomes move to greater transparency of proxy advice" (May 4, 2021) (understanding that Option 3 would give companies "at least five business days"), available at https://aicd.companydirectors.com.au/media/media-releases/aicd-welcomes-move-to-greater-transparency-of-proxy-advice.

[23] The Consultation refers to the proxy advice being shared with companies "five days prior to the recommendation being made *publicly available*." (emphasis added). Proxy advice, however, is generally not made publicly available. Like other proxy advisors, CGI Glass Lewis' research is its proprietary work

trading from granting one party advance notice of proxy advisor recommendations?[24] Given the scale of proxy advisors' work and the compressed time frames, particularly in proxy season, these are critical details that would all have to be successfully resolved for any company prior review regime to be workable.

Option 3 also threatens the integrity and objectivity of proxy advice. During the SEC's rulemaking, many institutional investors questioned why the government would mandate that a third party review advice they have contracted for, and paid to receive, before they can even see it.[25] Mandating company pre-review would give company management a behind-the-scenes opportunity to try to influence, slow down the work of, or even retaliate against proxy advisors who recommend against their proposals. Recognizing this, proxy advisor clients expressed concern that the previously objective advice they paid for would now be potentially skewed or conflicted. As a prominent U.S. institutional investor put it: "While proxy advisory firms should, and do, have procedures in place to mitigate any potential conflicts of interest, I can conceive of no conflict of interest more insidious than the one created by a Proposal that would grant a company that is the subject of proxy voting advice the right to review and provide feedback on that advice."[26]

In fact, Option 3 would create the very conflict that Australian law prohibits in comparable circumstances. Specifically, it would lead to the arbitrary result that Australian proxy advisors would be mandated to share their research reports with companies before issuing them, while investment

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product and is generally only available to its paying clients. In light of this and the potential risks of misuse of non-public information, the U.S. SEC proposed that advance copies of proxy advice be provided pursuant to confidentiality agreements between companies and proxy advisors. The necessity of agreeing to and executing such agreements, however, exacerbated the already significant cost and timing issues of advance review. See Letter of Nichol Garzon-Mitchell, General Counsel, Glass Lewis, to U.S. SEC (Jan. 7, 2020) (discussing the potential costs and time of negotiating and executing thousands of confidentiality agreements), available at https://www.sec.gov/comments/s7-22-19/s72219-6617071-202957.pdf.

[24] See Ronald Orol, "Activist Spotlight: SEC Rule Could Give Activists an Advantage" (Dec. 2, 2019) (noting that proxy solicitation experts said there would be "many unintended consequences associated with the early access" in contested board elections, including potential trading based on material non-public information).

[25] See, for example, Letter of Joseph V. Amato, Chief Investment Officer, Neuberger Berman (Jan 27, 2020), ("We also question why services for which we pay are subject to review by those who neither compensate anyone for those services nor have responsibility to diligence the product. We believe that the increased burden only harms our clients, who will bear higher costs in order to support an unnecessary appeal mechanism for companies to earn support.").

[26] Comments of Scott M. Stringer, Comptroller, City of New York, at 3 (Nov. 20, 2019), available at https://www.sec.gov/comments/s7-22-19/s72219-6451863-198927.pdf.; see also Comments of Graeme Black, Chair, Black Group Australia Pty Ltd (Feb. 3, 2020) ("By giving companies the automatic right to preview proxy advisory firm reports and to lobby the authors to change recommendations, this proposal fosters an inappropriate pro-management bias in proxy advisor reports"), available at https://www.sec.gov/comments/s7-22-19/s72219-207584.htm.

research report providers are prohibited from doing the same.[27] ASIC Regulatory Guide 79 ("Research report providers: Improving the quality of investment research") specifies that research reports are first sent to clients and that any fact-checking with a product issuer before it goes to clients must be "done in a carefully controlled way (e.g. without communicating the recommendations or opinions also contained in the report)."[28] It would be odd, to say the least, if a research analyst and a proxy advisor could both write a report on the same company and the analyst would violate securities laws by showing it to the company in advance, while the proxy adviser would violate the law if it did not show it to the company in advance.

Finally, we do not believe regulatory intervention on this point is necessary. Among other things, the Best Practices Principles encourage appropriate communication with companies, shareholder proponents and other stakeholders. To that point, CGI Glass Lewis, like other proxy advisors, already has incentives to produce accurate research and provide its clients with useful information and therefore has designed and implemented several processes to engage with companies as part of its work. First, as noted above, Glass Lewis conducts well over one thousand engagement meetings and calls with companies, dissident shareholders, and shareholder proponents each year, including some 280 just with Australian companies. Second, CGI Glass Lewis' research reports are available for companies to purchase, for a nominal amount, at the same time they are issued to our clients. Finally, Glass Lewis' Report Feedback Statement ("RFS") program allows companies that purchase our issued reports to submit unedited feedback on them, which we then attach to our reports, reissue and deliver directly to our clients. [29]

Confronted with these issues, the U.S. SEC abandoned the aspect of its proposal that would have created a mandatory pre-review period for proxy advice.[30] For much the same reasons, Australia should not pursue this unworkable, counterproductive, and unnecessary option.

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[27] Australian Financial Review, Chanticleer, "Proxy Reforms Would Hurt Investors" (May 3, 2021), available at https://www.afr.com/chanticleer/proxy-reforms-would-hurt-investors-20210502-p57o68

[28] ASIC, Regulatory Guide 79, "Research report providers: Improving the quality of investment research," at RG 79.141 (Dec. 2012).

[29] For more information on Glass Lewis' RFS program, see https://www.glasslewis.com/report-feedback-statement/. Glass Lewis' program, which is also available to shareholder proposal proponents and dissident shareholders, has been carefully designed to not interfere with or delay Glass Lewis' clients' receipt of proxy advice.

[30] The U.S. SEC's final rules, which are scheduled to become fully effective in December 2021, effectively require that proxy advice be "made available" to companies at least at the same time as a proxy advisors' clients. The rules are the subject of ongoing litigation, pending in the U.S. District Court for the District of Columbia, which challenges, among other things, whether the SEC properly recharacterized proxy advice as a proxy solicitation under its enabling legislation and whether the government may mandate that proxy advisors publish companies' views consistent with the free speech guarantees of the U.S. Constitution's First Amendment.

D. Option 4: Make Materials Accessible

To further promote engagement with companies, the Consultation also seeks comment on requiring proxy advisors "to notify their clients on how to access the company's response to the report." While it is not clear exactly what Treasury has in mind here, we question the need for a new regulation on this topic in light of current ASX mechanisms and past and current market practices.

As ASIC noted in its 2018 report, companies that disagree with proxy advice have always been able to "respond to the matter by way of an ASX announcement or other communication to investors."[31] In addition, as noted above, in 2019, Glass Lewis introduced the RFS, through which companies that purchase Glass Lewis' research reports can opt to have a statement responding to Glass Lewis' research transmitted to Glass Lewis clients through its client and voting platforms. Since this program's successful launch, hundreds of companies, including a number of the largest companies listed on the ASX, have submitted feedback on their report directly to Glass Lewis' investor clients.

These mechanisms are readily available to Australian companies today that wish to respond to CGI Glass Lewis' proxy advice and/or directly provide CGI Glass Lewis clients with their response. Even if there were a need for regulatory intervention, any regulation on this topic should not be so prescriptive as to inhibit developing market practices or to impose requirements, such as expecting proxy advisors or institutional investors to search for company responses, that might interfere with the efficient functioning of the proxy advice and shareholder voting processes.

E. Option 5: Ensuring advice is underpinned by professional licensing.

Finally, the Consultation briefly raises the possibility of requiring proxy advisors to obtain an Australian Financial Services License ("AFSL") to provide proxy advice. CGI Glass Lewis, like other Australian proxy advisors, holds an AFSL today with respect to its advice on financial products. CGI Glass Lewis respects ASIC's regulatory role in overseeing the financial services industry in Australia and, even with respect to activities outside its AFSL, seeks to cooperate with ASIC and, in addition to the basic standards applicable to AFSL licensees, holds itself to the more specific standards for proxy advisors in the Best Practices Principles as a signatory member of the Best Practices Principles Group.[32]

Most of CGI Glass Lewis' proxy advice, however, is not on financial products. In fact, CGI Glass Lewis' primary services — providing institutional shareholders advice on corporate governance matters up for vote at companies' meetings, as well as helping them implement their voting policy and execute

[31] ASIC Report 578, at 9.

[32] Compare Section 912A of the Corporations Act with the Best Practices Principles (articulating expectations for signatory proxy advisors related to service quality, conflict of interest avoidance and management, and communication with companies and other stakeholders).

votes — are qualitatively different than the financial services that require an AFSL today.[33] The Consultation notes that "[m]aking assessments on issues such as the appropriateness of a proposed executive remuneration package, the performance of a director and whether they should be re-elected, and the outcome of a change in the company's constitution all require a high degree of expertise to assess." And Treasury also notes that proxy advisors make assessments "on issues that have a material impact on the conduct of business in Australia."

While both Treasury's assertions are no doubt true, many assessments on matters that require expertise and may affect Australian business fall outside the AFSL licensing regime today.[34] Treasury has offered no reason for singling out the corporate governance advice provided by proxy advisors to institutional shareholders for the AFSL regime. CGI Glass Lewis, as noted above, is already licensed and holds itself to comparable standards with respect to all its proxy advice. If Treasury determines that additional regulatory oversight of proxy advisors is warranted, however, CGI Glass Lewis believes that the Best Practices Principles provide a more tailored and appropriate benchmark for proxy advisors' conduct than the general standards applicable to AFSL licensees.

IV. Conclusion

For the reasons above, we encourage Treasury to critically evaluate and seek to substantiate any concerns about proxy advisors before proposing a new regulatory framework. To the extent it determines such a regulatory framework is warranted, Treasury should decline to pursue some of the overly prescriptive options put forward in the Consultation. In particular, we are deeply concerned about the significant costs, timing pressures, complexities and other potential adverse consequences of mandatory company prior review. Such interference with the institutional proxy voting process could severely impair our investor clients' ability to obtain the independent and timely proxy advice they need to serve as effective stewards of the companies they own.

We continue to believe that the market-based framework of the Best Practices Principles, coupled with the independent oversight of those Principles now in place, is the appropriate mechanism to promote accountability in the proxy advisor industry. Such a principles-based approach would allow for evolution of practices, such as Glass Lewis' RFS, while avoiding the fixed costs and unintended consequences of prescriptive conduct regulation. It would also be more in line with the regulatory approach to proxy advice taken in Europe and a number of other jurisdictions.

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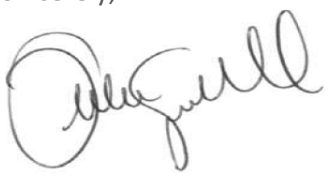
[33] See section 911A of the Corporations Act; see also ASIC, Regulatory Guide 1, "AFS Licensing Kit: Part 1— Applying for and varying an AFS licence," at RG 1.2 ("An AFS licence authorises you and your representatives to provide financial services to clients.... You will provide financial services if you: (a) provide financial product advice; (b) deal in a financial product; (c) make a market for a financial product; (d) operate a registered scheme; (e) provide a custodial or depository service; (f) provide traditional trustee company services; (g) provide a crowd-funding service; or (h) provide a claims handling and settling service.").

[34] A number of other participants in the corporate governance eco-system also make such assessments, including corporate governance consultants, retail shareholders' associations, attorneys, remuneration consultants, financial journalists, proxy solicitors, and corporate directors themselves.

* * *

Again, CGI Glass Lewis appreciates the opportunity to comment on the Consultation. If we can provide any further information, please contact me at +1 415-678-4256.

Sincerely,



Nichol Garzon-Mitchell

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