Council of Institutional Investors®
The voice of corporate governance

Via Hand Delivery

November 9, 2017

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

Re: Proposed Legislation Relating to Proxy Advisory Firms

Dear Mr. Chairman and Ranking Member Waters:

On behalf of the Council of Institutional Investors (CII or the Council) and the undersigned 45 investors and investor organizations, we are writing to express our opposition to legislation that has recently been introduced and is pending in the Committee on Financial Services related to proxy advisory firms.

CII is a nonpartisan, nonprofit association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $3 trillion.[1] CII's member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families.

H.R. 4015, the "Corporate Governance Reform and Transparency Act of 2017,"[2] and similar language which was incorporated in Subtitle Q of Title IV of H.R. 10, "the Financial CHOICE Act,"[3] would require, as a matter of federal law, that proxy advisory firms share their research reports and proxy voting recommendations with the companies about whom they are writing before they are shared with the institutional investors who are their clients. In essence, while the stated goal

[1] For more information about the Council of Institutional Investors (Council or CII) and our members, please visit the Council's website at http://www.cii.org/about_us. We note that the two largest U.S. proxy advisory firms, Glass Lewis & Co. and Institutional Shareholder Services Inc. (ISS), are non-voting associate members of CII, paying an aggregate of $24,000 in annual dues—less than 1.0 percent of CII's membership revenues. In addition, CII is a client of ISS, paying approximately $19,600 annually to ISS for its proxy research.
[2] H.R. 4015, 115th Cong. (2017), https://www.congress.gov/115/bills/hr4015/BILLS-115hr4015ih.pdf.
[3] H.R. 10, 115th Cong. (2017), https://www.congress.gov/115/bills/hr10/BILLS-115hr10rfs.pdf.

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of the proposed legislation is the "protection of investors,"[4] as the primary customer of proxy advisory firm research, institutional investors believe that adding the new proposed requirements to the industry is unnecessary, overly burdensome and counter-productive.[5]

The proposed legislation appears to be based on several false premises, including the erroneous conclusion that proxy advisory firms dictate proxy voting results and that institutional investors do not drive or form their own voting decisions. Indeed, many pension funds and other institutional investors contract with proxy advisory firms to review their research, but most large holders have adopted their own policies and employ the proxy advisory firms to help administer the voting of proxies during challenging proxy seasons.

In short, most large institutional investors vote their proxies according to their own guidelines. While large institutional investors rely on proxy advisors to manage the analysis of issues presented in the proxy statements accompanying over 38,000 meetings annually, and to help administer proxy voting, this does not mean that they abdicate their responsibility for their own voting decisions.

The independence that shareowners exercise when voting their proxies is evident in the statistics related to "say on pay" proposals and director elections. Although Institutional Shareholder Services Inc. (ISS), the largest proxy advisory firm, recommended against say on pay proposals at 11.92 percent of Russell 3000 companies in 2017, only 1.28 percent of those proposals received less than majority support from shareowners.[6] Similarly, although ISS recommended votes in opposition to the election of 10.43 percent of director-nominees during the most recent proxy season, just 0.185 percent failed to obtain majority support.[7]

We believe the pending legislation (both Subtitle Q of Title IV of H.R. 10 and H.R. 4015, which was introduced last month) would weaken corporate governance in the United States; undercut proxy advisory firms' ability to uphold their fiduciary obligation to their investor clients; and reorient any

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[4] H.R. 4015.

[5] *See* Letter from Jack Ehnes, Chief Executive Officer, California State Teachers' Retirement System (CalSTRS) to The Honorable Maxine Waters, Ranking Member, Committee on Financial Services 2 (June 5, 2017) ("CalSTRS believes Sections 482 of the CHOICE Act that imposes new regulatory burdens and restrictions on proxy advisory firms is wholly unnecessary, could weaken the governance of public companies in the U.S. and does not reflect the needs of the customers of proxy advisory firms who are primarily institutional investors, such as CalSTRS"), https://www.calstrs.com/sites/main/files/file-attachments/06-05-2017_maxine_financial_choice_act.pdf; Letter from Gregory W. Smith, Executive Director, Colorado Public Employees' Retirement Association (PERA) to The Honorable Ken Buck, United States House of Representatives 1 (May 8, 2017) ("We believe this new regulatory superstructure is overly burdensome, unnecessarily driving up costs, and gives corporations the ability to hinder and delay the independent proxy analysis process."), http://www.peraontheissues.com/wp-content/uploads/2017/06/POTI_CHOICE-Act-letter.pdf; Letter from Karen Carraher, Executive Director, Ohio Public Employees Retirement System (OPERS) to The Honorable Joyce Beatty, United States House of Representatives 1 (May 1, 2017) (on file with CII) ("OPERS opposes Section 482 of the Act because it would negatively impact the independence, timeliness, and affordability of the proxy advisory research and reports that we use to assist in fulfilling our fiduciary duty of ensuring that each of our proxies is voted in the best long-term interests of our members."); *see also* Financial CHOICE Act of 2017, Hearing Before the H. Comm. on Fin. Servs., 115th Cong. 13 (Apr. 26, 2017) (Testimony of Michael S. Barr, The Roy F. and Jean Humphrey Proffitt Professor of Law, University of Michigan Law School) ("The proposed legislation would . . . burden proxy advisory firms."), https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-mbarr- 20170426.pdf.

[6] ISS Voting Analytics Database (last viewed on Oct. 23, 2017 & on file with CII).

[7] *Id.*

surviving firms to serve companies rather than investors. The system of corporate governance that has evolved in the United States relies on the accountability of boards of directors to shareowners, and proxy voting is a critical means by which shareowners hold boards to account.[8] Currently, proxy advisors provide equity holders of U.S. corporations with independent advice. The proposed bills threaten to abrogate that very independence, which is a hallmark of ownership and accountability.

Proxy advisory firms, while imperfect, play an important and useful role in enabling effective and cost-efficient independent research, analysis and informed proxy voting advice for large institutional shareholders, particularly since many funds hold thousands of companies in their investment portfolio.[9] In our view, the proposed legislation would undermine proxy advisory firms' ability to provide a valuable service to pension funds and other institutional investors.

We are particularly concerned that, if enacted, H.R. 10 and H.R. 4015 would:

- **Require that proxy advisory firms: 1) provide companies early review of their recommendations and most elements of the research informing their reports; 2) give companies an opportunity to review and lobby the firms to change their independent recommendations; 3) mandate a heavy-handed "ombudsman" construct to address issues that companies raise.[10]**

- **Under H.R. 10, the company could essentially veto the proxy advisor's report and prevent its publication,[11] while H.R. 4015 would require proxy advisors to publish a company's statement "detailing its complaints" in the proxy advisory firms' final reports to their clients, if the ombudsman is unable to resolve these complaints and if the companies make the request in writing.[12]**

Giving corporate issuers the "right to review" the proxy advisors' work product BEFORE the reports go to the paying customers would not only give corporate management substantial undue influence over proxy advisory firms' reports, but could compromise the very fiduciary duties that large institutional investors have to their own clients, beneficiaries and shareowners. We believe the objective of the bills is to bias proxy advisory firm recommendations in favor of corporate management, creating a dynamic that would encourage the firms to view management as their clients, rather than the investors who contract for this research. This approach would award a privileged position

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[8] "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests," wrote the Delaware Chancery Court in the seminal 1988 decision, Blasius Indus. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988). "If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out," wrote the Delaware Supreme Court in Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del 1985).
[9] *See* Letter from Jack Ehnes at 2 ("Proxy advisory firms provide useful research regarding the governance and finance at these companies to supplement our own due diligence and research, and they play an important and helpful role in enabling cost-effective proxy voting with respect to the 7,000 companies in our investment portfolio."); Letter from Karen Carraher at 2 ("With holdings in more than 9,300 public companies, it would be more difficult for OPERS to fulfill its fiduciary duty without the research and recommendations of proxy advisors").
[10] H.R. 4015, § 3(a), § 15H(g)(1); H.R. 10, § 482(a), § 15H(g)(1).
[11] H.R. 10, § 482(a), § 15H(g)(1).
[12] H.R. 4015, § 3(a), § 15H(g)(1).

to high-powered CEOs and other executives to talk proxy advisory firms out of criticizing management on subjects such as CEO pay, without providing the same pre-publication right to others.
Another concern is that such forced pre-publication review may not be consistent with First Amendment rights to freedom of speech. Regardless, the attempt by government fiat to interpose corporate management between investors and those investors hire to provide them with independent research is highly questionable as a matter of public policy.

Further, the additional regulatory hurdles imposed would surely: increase the complexity of the challenges faced by the proxy advisory firms; impose even more severe time constraints on the production of reports; and, without doubt, add significant resource burdens that would increase the cost of their services. In short, H.R. 4015 would add no value but would add an unnecessary drag to institutional investors' portfolios. This is not constructive regulatory "reform," and is not supported by institutional investors.

Under both bills, pension funds and other institutional investors would have less time to analyze the advisor's reports and recommendations in the context of their own adopted proxy voting guidelines to arrive at informed voting decisions. Time is already tight, particularly in the highly concentrated spring "proxy season," due to the limited period between a company's publication of the annual meeting proxy materials and annual meeting dates.

Moreover, the proposed legislation does not appear to contemplate a parallel requirement that dissidents in a proxy fight or proponents of shareowner proposals also receive the recommendations and research in advance. This would violate an underlying tenet of U.S. corporate governance that where matters are contested in corporate elections, management and shareowner advocates should operate on a level playing field.

- **Require the Securities and Exchange Commission (SEC) to assess the ability of proxy advisory firms to perform their duties and to assess the adequacy of proxy advisory firms' "financial and managerial resources**."[13]

The entities that are in the best position to make assessments about the ability of proxy advisory firms to perform their contractual duties are the pension funds and other institutional investors that choose to purchase and use the proxy advisory firms' reports and recommendations. These are sophisticated consumers who make choices based on free-market principles.

In 2014, the SEC staff issued guidance reaffirming that investment advisors have a duty to maintain sufficient oversight of proxy advisory firms and other third-party voting agents.[14] We publicly supported that guidance.[15] We are unaware of any compelling empirical evidence indicating that the

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[13] H.R. 4015, § 3(a), § 15H(d)(6); H.R. 10, § 482(a), § 15H(b)(1)(B)(i).
[14] U.S. Securities and Exchange Commission, Staff Legal Bulletin No. 20 at 3 (June 13, 2014) ("it is the staff's position that an investment adviser that receives voting recommendations from a proxy advisory firm should ascertain that the proxy advisory firm has the capacity and competency to adequately analyze proxy issues, which includes the ability to make voting recommendations based on materially accurate information"), https://www.sec.gov/interps/legal/cfslb20.htm.
[15] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, CII to The Honorable Scott Garrett, Chairman, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services et al. 5 (July 23, 2014),

guidance is not being followed or that the burdensome federal regulatory scheme contemplated by the proposed legislation is needed.

- **Increase costs for institutional investors with no clear benefits.**

If enacted, the proposed legislation is likely to result in higher costs for pension plans and other institutional investors – potentially much higher costs if investors seek to maintain current levels of scrutiny and due diligence around proxy voting amid the exit of some or all proxy advisory firms from the business. The proposed legislation is highly likely to limit competition, by reducing the current number of proxy advisory firms in the U.S. market and imposing serious barriers to entry for potential new firms.[16]

We believe that the cost estimate provided by the Congressional Budget Office to the House Financial Services Committee in September 2016 on substantially similar legislation in the 114th Congress (that is, that private sector costs would be less than $154 million) underestimates the costs that this bill would impose through private-sector mandates.[17] The CBO should analyze the probable effects of the proposal on competition, and the costs to investors if (a) competition is reduced and the pricing power of a surviving proxy advisory firm is enhanced, and (b) if all present firms exit the market and the services they provided are no longer available, forcing individual investors to use internal resources not subject to the new regulatory mandate.

Finally, we note that in recent months the United States Department of Treasury (Treasury) performed outreach to identify views on proxy advisory firms in connection with its recently issued report to the President on "A Financial System that Creates Economic Opportunities, Capital Markets."[18] In that report, the Treasury found that "institutional investors, who pay for proxy advice and are responsible for voting decisions, find the services valuable, especially in sorting through the lengthy and significant disclosures contained in proxy statements."[19] More importantly, the Treasury *did not* recommend any legislative changes governing the proxy advisory firm industry.[20]

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http://www.cii.org/files/issues_and_advocacy/correspondence/2014/07_23_14_letter_Subcommittee_Capital_Markets.pdf.

[16] *See, e.g.,* Keith F. Higgins, "Keynote Address at the Practicing Law Institute, Corporate Governance – A Master Class" 2 (Mar. 9, 2017) (on file with CII) (commenting on proposed proxy advisory firm legislation noting that "[i]t is unclear how added regulatory burden will help promote competition").

[17] Congressional Budget Office, Cost Estimate, H.R. 5311, Corporate Governance Reform and Transparency Act of 2016 ("Aug. 30, 2016) ("CBO estimates that implementing H.R. 5311 would cost $5 million over the 2017-2021 period to hire about 4 additional staff to create and maintain the registry and to prepare annual reports"), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr5311.pdf.

[18] U.S. Department of the Treasury, "A Financial System that Creates Economic Opportunities, Capital Markets" 31 (Oct. 7, 2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[19] *Id.*

[20] *Id.* ("Treasury recommends further study and evaluation of proxy advisory firms, including regulatory responses to promote free market principles if appropriate.").

Thank you for considering these views. CII would be very happy to discuss its perspective in more detail. Jeff Mahoney can be reached at jeff@cii.org, or by telephone at (202) 822-0800.

Sincerely,

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The Honorable Joyce Birdson Beatty, Committee on Financial Services, United States House of Representatives
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