



California Public Employees' Retirement System

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

December 27, 2021

**Subject: Proxy Voting Advice; Exch. Act Release No. 34-93595 (File No. S7-17-21)**

Dear Secretary Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), we write to comment on the Securities and Exchange Commission's (SEC or Commission) proposed rule entitled Proxy Voting Advice (Proposed Rule).

As the largest public defined-benefit pension fund in the United States, we manage approximately \$495 billion in global assets on behalf of more than 2 million public employees, retirees, and beneficiaries. Our duty to pay benefits decades into the future requires that we take a long-term view when assessing whether the companies that we hold in our portfolio are effectively managed. In order to do this work efficiently, we hire proxy advisory firms or proxy voting advice businesses (PVABs) as agents to assist us in executing our proxy votes. In this process, we seek to ascertain the most accurate, reasonably available information and to vote our proxies accordingly.<sup>1</sup> However, we cast our votes in accordance with our own voting guidelines based on CalPERS' Governance and Sustainability Principles<sup>2</sup> in line with our fiduciary duty.

As the SEC knows, CalPERS strongly opposed<sup>3</sup> the Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice; Exch. Act Release No. 34-87457 (File No. S7-22-19) (2020 Proposed Rule)<sup>4</sup> and the final form of the proposal (2020 Final Rule).<sup>5</sup> While the Commission's decision to revise these rules is a welcome development, we are concerned that the Proposed Rule does not address the core problems of the 2020 Final Rule. As a result, there is meaningful

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<sup>1</sup> The standard articulated in the 2020 Release of the 2020 Final Rule that "proxy advice be based on the most accurate information reasonably available," is already being met by the current system.

<sup>2</sup> <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf>.

<sup>3</sup> CalPERS Letter to SEC Dated February 3, 2020, <https://www.calpers.ca.gov/docs/legislative-regulatory-letters/02-20-comment-sec-proxy-voting.pdf>.

<sup>4</sup> <https://www.sec.gov/rules/proposed/2019/34-87457.pdf>.

<sup>5</sup> <https://www.sec.gov/rules/final/2020/34-89372.pdf>.

risk that the Proposed Rule, if unmodified, would increase the cost of investors' proxy voting operations and decrease the likelihood that PVABs will provide advice contrary to a registrant's wishes even if such advice would be in the interest of the investor for whom the PVAB is an agent.

To address these concerns, we urge the Commission to revise the Proposed Rule to include a full rescission of the 2020 Final Rule. CalPERS stands ready to work with the Commission to ensure that this proposal meets our shared goal of protecting shareowners.

## I. GENERAL CONCERNS

We commend the Commission for proposing to rescind certain aspects of the 2020 Final Rule, but we urge that it rescind the rule in its entirety, so that investors can get the best advice possible from their agents.

The 2020 Final Rule enables registrants to interfere directly with contracts between investors and their chosen agents: PVABs. This interference makes it difficult for PVABs to provide the best advice they reasonably can to investors. As a result, investors are not always able to exercise their proxies to best promote their interest, which, at times, includes voting against registrants' proposals. Such votes are uncommon as PVABs support registrants' positions around 85% of the time with overall pro-management votes trending at over 90%.<sup>6</sup> But if a PVAB's best advice is for an investor to vote against a registrant's proposal, it is important that registrants not impede that advice. If the 2020 Final Rule is not completely rescinded, investors will continue to miss out on the best advice their PVAB agents can provide.

We are also concerned that the 2020 Final Rule makes it easier for a registrant to initiate a private right of action, while making it more difficult for investors to pursue cost and time-effective methods to effectuate actions to protect their interests.

## II. SPECIFIC CONSIDERATIONS

Now is a great opportunity to improve the proxy voting process by reversing the re-categorization of proxy voting advice as "solicitations" under federal securities laws and protecting investors' relationships with their agents. To do so, we address the Proposed Rule's effect on proxy voting advice being deemed a solicitation; the proposed amendments to 14A-2(B)(9); and the proposed removal of note (e) to Rule 14a-9.

### A. *Solicitation*

For nearly 40 years, proxy voting advice has not (generally) been deemed a solicitation under federal securities laws. Accordingly, the SEC fundamentally altered the proxy voting advice services market in 2019 by classifying advice as a "solicitation" (2019 Guidance).<sup>7</sup> This seismic change is unwarranted and was unsolicited by investors, who are the market participants most fundamentally harmed by the changes. To-date, the Commission has never provided a genuine

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<sup>6</sup> Georgeson's 2021 Annual Corporate Governance Review.

<sup>7</sup> Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, September 10, 2019, <https://www.sec.gov/rules/interp/2019/ia-5325.pdf>.

justification. For instance, the 2020 Proposed Rule provided conclusory statements and repeated the definition of solicitation<sup>8</sup> without addressing the 2019 Guidance or providing analysis why prior Commissions got it wrong. As it revises the Proposed Rule, the SEC should recognize the fundamental and unwarranted changes it has made to proxy voting advice and correct them. Further, given the interpretation applies to “persons’ and not just PVABs, the Commission should examine the complete contours of the change or provide additional guidance to the entire market. CalPERS is ready to dialogue with the SEC about the proxy voting advice system and to address any concerns that the Commission may have.

### *B. Proposed Amendments to Rule 14A-2(B)(9)*

PVABs provide highly accurate and decision-useful advice to investors, as evidenced by Table 2 of 2020 Proposed Rule to the 2020 Final Rule. Per Table 2, only 54 of the 17,296 company votes (approximately 0.3%) contained factual errors.<sup>9</sup> Stated differently, the 2020 Proposed Rule confirms that company votes had an accuracy rate of 99.7%. We are unaware of any evidence that the errors contained in those 54 votes resulted in a different outcome than would have occurred absent the errors.

Given the accuracy of PVABs’ services, we urge the Commission to focus more on the accuracy of disclosures by registrants. Improving the accuracy of registrant disclosures would better protect and inform investors as they engage in the “basic bargain” of allocating capital based on true information. In fact, investors and PVABs would be better able to evaluate and vote on proxies if registrants’ disclosures were more accurate and decision-useful.

Moreover, such a shift in focus and rescission of the 2020 Final Rule would create real accountability for registrants who issue deficient disclosures and better equip investors to invest with the best performing companies. In our experience, a registrant loses a binding vote when investors believe that the registrant has failed to address a serious concern. There is hardly any evidence that registrants lose votes they would have won but for errors by a proxy advisor. The SEC should reinforce registrant accountability, not shield them from it. To that end, the Commission should also rescind the 2019 Guidance.

We do, however, appreciate and support the Commission’s proposals to remove paragraph (ii) of Rule 14a-2(b)(9), rescind the Rule 14a-2(b)(9)(ii) conditions, and delete paragraphs (iii), (iv), (v) and (vi) of Rule 14a-2(b)(9).

### *C. Deleting Note (e) to Rule 14a-9*

The SEC is right to propose deleting note (e), as note (e) imposed more stringent requirements on PVABs (who review disclosures) rather than registrants (who are actually required to draft the disclosures). For instance, registrants are not normally required to disclose their methodologies or assumptions, despite the legal responsibilities of certain disclosures. For years, we have sought registrant disclosure of assumptions made around carbon emitting

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<sup>8</sup> 2020 Proposed Rule at 15.

<sup>9</sup> 2020 Proposed Rule at 84.

assets,<sup>10</sup> but have been unable to obtain such information because the SEC does not require such information of registrants but were willing to require it from PVABs.

As it rightfully removes this disproportionate and mismatched obligation from PVABs, the Commission should consider requiring registrants to provide their methodologies and assumptions. Such requirements would help improve mandated disclosures by registrants, particularly disclosures regarding executive compensation, carbon emissions, diversity calculations, and political spending attributions, among others. As a concrete step, the Commission should elevate the quality of company disclosures or exempt all proxy voting advice from Rule 14a-9 liability entirely, or simply make clear that only the registrant in its own name with board approval can file a claim.

### III. CONCLUSION

The Proposed Rule would implement certain welcome changes to the 2020 Final Rule, but we hope the SEC will take this opportunity to provide more forceful relief for investors by rescinding the 2020 Final Rule in its entirety. We welcome the opportunity to discuss the Proposed Rule in more detail and potential amendments to better serve investors.

Please contact Anne Simpson, Managing Investment Director, at [Anne.Simpson@calpers.ca.gov](mailto:Anne.Simpson@calpers.ca.gov), or (916) 795-9672, if you have any questions or wish to discuss in more detail.

Sincerely,

Marcie Frost  
Chief Executive Officer

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<sup>10</sup> CaIPERS Letter to SEC dated June 12, 2021, <https://www.calpers.ca.gov/docs/legislative-regulatory-letters/comment-sec-countryman-jun-12-2021.pdf>, page 6, stating, “climate issues should be considered, and sustainable assumptions shown in drawing up accounts.”