

The European Securities and Market Authority (ESMA)
103 Rue de Grenelle
75007 Paris
France

Date: 25.06.2012
Your ref.:
Our ref.:

Dear Sir/Madam

Ref: An Overview of the Proxy Advisory Industry. Considerations on Possible Policy Options

Norges Bank Investment Management (NBIM) is the investment management division of the Norwegian central bank (Norges Bank) and is responsible for investing the international assets of the Norwegian Government Pension Fund. NBIM also manages the major share of Norges Bank's foreign exchange reserves.

NBIM holds assets in excess of NOK 3400 billion, (€447 billion) of which approximately €105 billion is invested in European equities. NBIM is committed to make active use of its ownership and voting rights in order to build and safeguard the financial wealth of future generations by promoting good corporate governance and high ethical, social and environmental standards at investee companies. NBIM supports the initiative of ESMA to review the possible policy options regarding the European proxy advisory industry and we welcome the opportunity to contribute to the consultation process.

NBIM's opening position on the proxy industry

- NBIM regards proxy advice as a commercial, client-demanded service and integral to our active ownership activities.
- We will support proxy advisory reforms and regulatory initiatives if the outcome is to protect the industry's independence, enhance its transparency and raise the quality of the services provided.
- Any policy recommendations made by ESMA should not undermine the commercial foundations of the industry nor disrupt its ability to carry out the services sought by investors.

NBIM as stakeholder in the proxy advisory industry

For context to the views and recommendations set out in this submission, NBIM currently buys a range of services and research products from three proxy advisory firms. We have in the past bought similar services from other vendors. We have also entered into periodic

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dialogues with a wider group of proxy advisors with regard to individual shareholder proposals submitted by NBIM. We have a commitment to vote all our holdings wherever practical to do so and we seek to apply our voting rights according to our published guidelines.

Additionally, we execute our votes via an electronic platform owned and operated by a proxy advisory firm. We regard the provision of a proxy vote execution platform as separate to the provision of advisory services.

Given these activities, and our recognition of the important services provided by proxy advisors, we consider NBIM to be a stakeholder in the proxy industry and to have a voice in its future direction.

Consultation on the European proxy advisory industry

NBIM agrees that this is an opportune time for ESMA to consider the activities and influence of the proxy advisory industry in Europe. Parallel initiatives are underway at a national level in a number of jurisdictions across Europe, at an EU level and in other global markets. It is timely to draw the threads of these initiatives together.

There is clear evidence that shareholders are taking their ownership responsibilities increasingly seriously; turnout at AGMs in Europe has been rising in recent years and the willingness of shareholders to hold boards accountable at general meetings appears to be growing.

Such invigorated investor activity has not escaped the attention of issuers, most particularly those where there has been shareholder opposition to resolutions in prior years. Advisory votes on 'say on pay' have further raised issuer sensitivity to proxy recommendations and voting outcomes. We have also witnessed a marked increase in the use of proxy solicitors working on behalf of companies and more examples of issuers publicly criticizing the conclusions reached by proxy advisors. Given the environment of greater investor intervention and raised issuer opposition, it is inevitable that the role played by proxy advisors should come under scrutiny.

Observed correlation between proxy advice and voting behavior

We question ESMA's use of the term "high correlation" which seems unsubstantiated. There are only two outcomes of a vote; either the vote resolution is supported or not.

We do observe a correlation between the guidelines of the proxy advisors and our own voting guidelines. This is not surprising, for two reasons: First, there is broad consensus on the key principles of good governance that set the foundation for our respective voting guidelines, and second, we are invited to give input to the guidelines of our contracted proxy advisors through annual investor consultations.

The NBIM voting decision may be correlated to proxy advice but it is our decision

In addition to proxy research, NBIM uses the collective analytical resources of its ownership and investment teams, supporting databases and a variety of external specialists in our voting process. Consequently, the final voting decision on all resolutions at every company meeting is NBIM's. This is irrespective of what proxy advice we have access to or may choose to consult.

For investors generally, the final voting decision must be acknowledged to be their own.

The proxy advisors cannot be held responsible if clients choose to follow their recommendations.

Segmentation of services provided to investor and issuer

ESMA has set out four policy options in its consultation document ranging from *no action* through to *binding EU-level legislative instruments*. NBIM does not consider the proxy advisory industry to be the provider of a single service. Consequently, any consideration on whether regulation/ legislation is appropriate or necessary must be addressed at service level rather than firm or industry level.

We consider there to be at least seven differentiated services provided by the proxy advisory industry:

1. Operational support

- a. Provision of voting platform
- b. Vote execution service

2. Voting policy and guidelines development

3. Fact finding

- a. Aggregation of issuer information from publicly available sources

4. Research / analysis

- a. Interpretation and application of proxy advisor guidelines
- b. Interpretation and application of NBIM specific 'bespoke' guidelines
- c. Expert analysis – local, industry and company

5. Recommendations

- a. Provision of governance-related recommendations
- b. Provision of recommendations outside normal remit of governance matters e.g. merger, acquisitions etc.

6. Company dialogue

- a. Negotiating agent on behalf of investors
- b. Governance advocacy
- c. Interpretation / negotiating agent on behalf of issuers

7. Consulting services to issuers

Based upon the above segmentation, NBIM finds there to be services that are competitive and well-functioning. However, there are areas of conflict of interests where current practices are opaque and sub-optimal for investor clients. We look to industry participants or regulation to correct these dislocations. More specifically:

- **Service 1 – Operational support:** The provision of voting platforms should be fully unbundled from advisory research. This will create a clearer pricing structure for these separate services. We see benefit in voting platforms containing competing proxy advisor recommendations on commercially agreeable terms to platform and research providers.
- **Service 2 - Voting policy and guidelines development:** There is explicit, or implicit, client involvement in the setting of proxy advisors' voting guidelines. This is constructive as it contributes to the legitimacy of guidelines as being a fair reflection of market opinion.
- **Service 3 – Fact finding:** NBIM recognises the validity of a process where proxy advisors can confirm facts with the relevant issuer upon whom they will base their analysis and, ultimately their recommendations. However, we consider it prudent that this process occurs well before a final voting recommendation has been determined. This will avoid undue focus or directed negotiation on contentious recommendations.
- **Service 4 – Research / analysis:** We consider the provision of company specific research, the interpretation of proxy advisor guidelines and the analysis of NBIM bespoke guidelines to be a competitive service and operationally effective. In particular, we believe proxy advisors are providing expert, accurate and timely governance knowledge. However, in those instances where published research must stray from clear-cut governance matters into areas of greater subjectivity, we see the need for regulation. In particular, analyst commentary that discusses the relative merits of corporate actions or investment outcomes may be considered as investment advice and, by necessity, worthy of regulation. As an example, the following text is taken from a recent proxy research note:

'from an operating standpoint, [the Company] appears to be making headway under the current board and management team towards achieving greater growth and potential profitability...we believe that shareholders would be best served supporting management's slate of director nominees at this time.'

The competencies required to make such statements are not confined to corporate governance knowledge. Regulation should therefore conform to that required of existing forms of investment advice. This may be binding regulation and firm or activity supervision.

- **Service 5 – Recommendations:** Our day-to-day analysis of general meetings has led NBIM to categorise resolutions at general meetings into four broad categories (detailed in question 7a response). The categories are based upon the degree to which analysis moves from a proxy firm's published guideline. For those recommendations built upon proxy analyst judgment, particularly outside the normal confines of corporate governance, we consider this to fall within the regulated regime of investment advice.
- **Service 6 – Company Dialogue:** It is not NBIM's intention to prevent proxy advisors having dialogues with companies. However, we consider that issuer meetings, particularly those held immediately prior to a general meeting, may offer incentive for issuers to retreat from direct contact with their investors. It can also discourage proactive and full disclosure of all necessary information to all shareholders. This is an area where we would welcome reform.

Furthermore, NBIM does not need or wish proxy advisors to act as negotiating agents with issuers on our behalf. The primacy of the investor as principal must be upheld, and be seen to be upheld. We have two specific areas of concern:

We require unambiguous clarification when the proxy advisor is acting on behalf of the investor. Currently there is a risk, or opportunity for misunderstanding, that proxy advisors can act as negotiating agent on behalf of both investor and issuer. This is exacerbated by the introduction of 'stewardship services' whereby proxy advisors seek to be paid as facilitation-agent between investors and issuers.

There is a lack of transparency over the purpose of dialogue between issuer and proxy advisor - and a further lack of transparency over the content of such conversations/meetings. This concern can be mitigated by a framework which allows for company comments to be made available to the proxy advisors' subscribers, by incorporating such comments into the same document containing the proxy advisors analysis and voting recommendations.

- **Service 7 – Consulting services to issuers:** We see clear risk of conflict of interest when proxy advisors sell services to both investors and issuers. The practice introduces an unavoidable question over the independence and integrity of the resulting analysis and recommendations provided to investors. If it is to occur, there must be detailed and proactive disclosure of all relationships. With regard to conflicts of interest more generally, these should be avoided where possible and mitigated where unavoidable. This is an area where regulation is warranted. The nature of regulation may be binding if it then falls into the realm of EU or national supervised activities.

Policy Recommendation

ESMA has offered four possible policy options in the consultation:

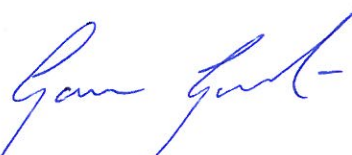
1. No action at EU-level at this stage
2. Encouraging at EU level member states and/or industry to develop standards
3. Quasi-binding EU-level regulatory instruments
4. Binding EU-level legislative instruments

NBIM does not recognize a perfect logic to the four options offered by ESMA as there are a number of additional or alternative steps within those four alternatives set out. The recommendations NBIM has set out for each of the seven segmented services may necessitate binding regulation at a service level and, furthermore, supervision. We therefore foresee industry reforms that may require elements of policy options 2, 3 and 4.

We are in regular dialogue with our contracted proxy advisors to achieve the service refinements and improvements as set out in our five-point reforms. Looking to the longer term where the role of proxy research is likely to remain integral to long term investment decision making and to be formally recognized as investment advice, the question of formal regulation must be addressed.

We reiterate our support for the efforts taken by ESMA to review the role and influence of proxy advisors in Europe. As a large, long term shareholder in European companies and as the user of proxy advisory services, we welcome this opportunity to contribute our views on the future shape of the industry in Europe. NBIM will be pleased to discuss our proposals directly with ESMA should that be of value for its considerations.

Yours sincerely,



Jan Thomsen,
Chief Risk Officer

Gavin Grant,
Head of Corporate Governance, Ownership Policy

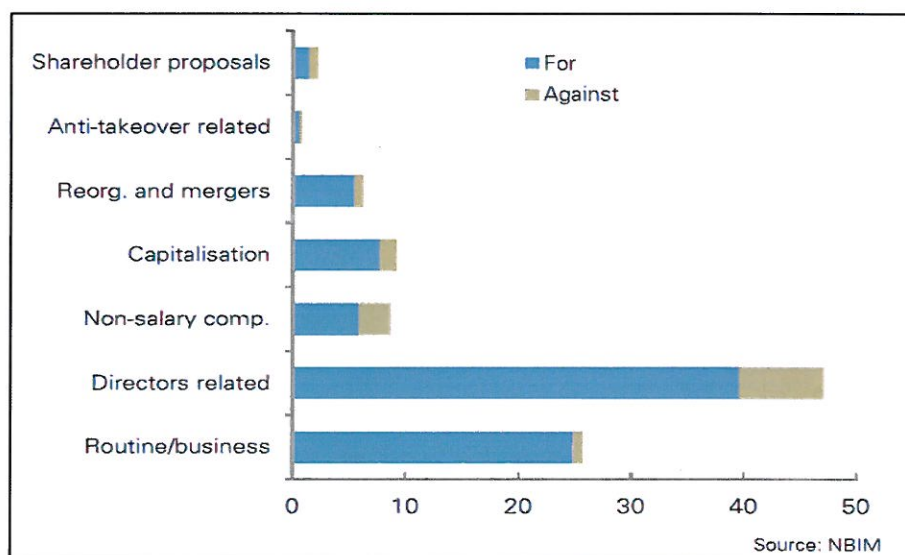
Detailed Response to ESMA Questions

1) How do you explain the high correlation between proxy advice and voting outcomes?

We would first question the term “high correlation” which seems unsubstantiated. There are only two outcomes of a vote; either the issue is approved or not (abstention being a form of disapproval). Even though investors may have varying views, they will be left with only two options; to approve or not. The nature of such binominal vote leads to high correlation in itself.

We, with ESMA, identify a correlation between proxy advisors recommendations and voting outcomes. NBIM can also identify an obvious correlation between proxy advice and management recommendations. In the majority of cases, proxy advisors are recommending a vote in favor of management’s recommendations. In the majority of these cases, investors choose to follow the recommendations of company management. Figure 1. illustrates the resolutions where NBIM voted for or against a board’s recommendation in 2011.

Figure 1. Resolutions where NBIM voted for or against a board’s recommendation in 2011 (x axis is % of total resolutions voted by NBIM)



In the case of votes against management recommendations, there is a correlation between the voting recommendations provided by the proxy advisors retained by NBIM and our final voting decision. This should not be a surprise. First, we agree on the key principles of good governance that set the foundation for our respective voting guidelines and therefore we are likely to agree on contentious governance resolutions.

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good governance that set the foundation for our respective voting guidelines and therefore we are likely to agree on contentious governance resolutions.

Second, we are invited to indirectly shape the guidelines of our contracted proxy advisors through annual consultations. For example, ISS consults annually with clients in their policy review. NBIM has also observed that advisors' views on independent chairman have evolved over the last few years and we see this as proof of proxy guidelines keeping up with governance best practises.

Finally, we draw ESMA's attention to the fact that proxy advisors' policies are being developed in an environment of competition for clients. Advisors seek to arrive at policies that are generally accepted by their broad client bases or can attract new clients. This is healthy and should be encouraged.

2) To what extent:

a) Do you consider that proxy advisors have a significant influence on voting outcomes?

We recognize that proxy advisors have an influence on voting outcomes. This is due, in part, to proxy advisors successfully alerting investors to issuers with points of notable governance contention.

For NBIM, this influence on voting outcomes is based on a conscious choice as we regard the voting recommendations of our proxy advisors closely reflect our own ownership principles and voting guidelines. NBIM regards it as a key task to monitor the methodologies and guidelines used by each proxy advisor. Should we at any time conclude that the guidelines do not accurately reflect the views and ownership principles of NBIM, we will revise our bespoke voting guidelines or change proxy advisor.

b) Would you consider this influence as appropriate?

We consider this influence as appropriate as long as the proxy advisor is accurately and consistently reflecting best corporate governance practices. It is worth restating that the majority of proxy voting recommendations are in-line with management recommendation.

3) To what extent can the use of proxy advisors induce a risk of shifting the investor responsibility and weakening the owner's prerogatives?

We agree that this is a risk, but proxy advisors cannot be held responsible if their clients choose to follow their recommendations. Similarly, mitigating this risk cannot be the responsibility or duty of the proxy advisor. The responsibility for the vote lies solely with the investor purchasing the advice.

We caution against issuers using proxy advisors as the point of contact for investors. Equally, proxy advisors should not seek to be regarded as 'gatekeeper' to the end investor and thereby drift from an agent and advisor role to de-facto principal.

4) To what extent do you consider proxy advisors:

a) To be subject to conflicts of interest in practice?

The risk of conflict of interest is clear. We acknowledge the existence of, and potential for, on-going conflict of interest in the proxy advisor industry. We note that individual proxy advisors have different business models and operational policies with regard to conflict of interest management. But, when proxy advisors choose to sell services to both investors and issuers, the practice introduces an unavoidable question over the independence and integrity of the resulting analysis. This is an area where regulation is warranted, and where, at the very least, there must be explicit, detailed and proactive disclosure of all forms of relationship.

b) Have in place appropriate conflict mitigation measures?

NBIM believes that the only way to assure stakeholders that the appropriate mitigating measures are in place is via industry-wide and measureable standards. NBIM would welcome a framework that addresses the potential of conflict of interest and that gives clear guidance as to how to separate the conflicting business models.

c) To be sufficiently transparent regarding the conflicts of interest they face?

Greater transparency regarding all conflicts of interests is required. Current practices introduce an unavoidable question over the independence and integrity of the resulting analysis and recommendations provided to investors. This is an area where regulation is warranted, and where, at the very least, there must be explicit, detailed and proactive disclosure of all forms of relationship.

NBIM has offered its guidance to proxy advisors that they take this opportunity, in parallel to any regulatory framework, to proactively establish conflict mitigation processes and procedures that improve the disclosure of conflicts where they exist.

5) If you consider there are conflicts of interest within proxy advisors which have not been appropriately mitigated:

a) Which conflicts of interest are the most important?

We highlight two conflicts of interest:

1. Proxy advisors choosing to sell services to both investors and issuers, and,
2. Proxy advisor recommendations, or guidelines, being shaped by the opinion of large or influential investor clients.

b) Do you consider that these conflicts lead to impaired advice?

We can provide no evidence as to whether these conflicts have led to impaired advice – but this is due to the lack of transparency around such conflicts. We consider that conflicts of interest represent a challenge for the industry.

6) To what extent and how do you consider that there could be improvement:

a) For taking into account local market conditions in voting policies?

There is a balance to be struck between the application of global guidelines and the need to respect legal jurisdictions and local listing rules. It is important also to recognize the right for companies to establish unconventional corporate governance practices. Proxy advisors must have the resources to accommodate this. We consider that proxy advisors are generally successful at achieving this balance. The proxy advisors we work with have made significant effort to incorporate local factors into their voting guidelines, which has led to generally high quality research.

Looking forward, we recognize and are encouraging our proxy advisors to maintain local company and market knowledge. Furthermore, the unbundling of proxy research from vote execution platform would be a practical means to encourage the provision of local and/ or special proxy research.

b) On dialogue between proxy advisors and third parties (issuers and investors) on the development of voting policies and guidelines?

It is not NBIM's view that proxy advisors should not have dialogues with companies. However, we consider that such meetings, particularly those held immediately prior to a general meeting, may offer incentive for issuers to retreat from direct contact with investors. It can also discourage proactive and full disclosure of all necessary information to all shareholders. This is an area where we would welcome reform.

NBIM does not need or wish proxy advisors to act as negotiating agents on our behalf with issuers. The primacy of the investor as principal must be upheld, and be seen to be upheld - if necessary by regulation. We have two specific areas of concern:

1. We require unambiguous clarification when the proxy advisor is acting solely on behalf of the investor. Currently there is a risk, or opportunity of misunderstanding, that proxy advisors can act as negotiating agent on behalf of both investors and issuers. This is exacerbated by the introduction of 'stewardship services' whereby proxy advisors seek to be paid facilitation agents between investors and issuers.
2. There is a lack of transparency over the purpose of dialogue between issuer and proxy advisor - and a lack of transparency over the content of such meetings. This concern can be mitigated by a framework which allows for company's comments to

be made available to the proxy advisors' subscribers, by incorporating such comments into the same document containing the proxy advisors analysis and voting recommendations.

We will support dialogue if it is carried out solely for the purpose of enhancing the quality of the guidelines for all users, and does not result in prejudiced or biased outcomes. Such dialogues must be carried out in a transparent manner with the goals and objectives known to all stakeholders. However, we again question the purpose of such meetings immediately before a general meeting.

7) To what extent do you consider that there could be improvement, also as regards to transparency, in:

a) The methodology applied by proxy advisors to provide reliable and independent voting recommendations?

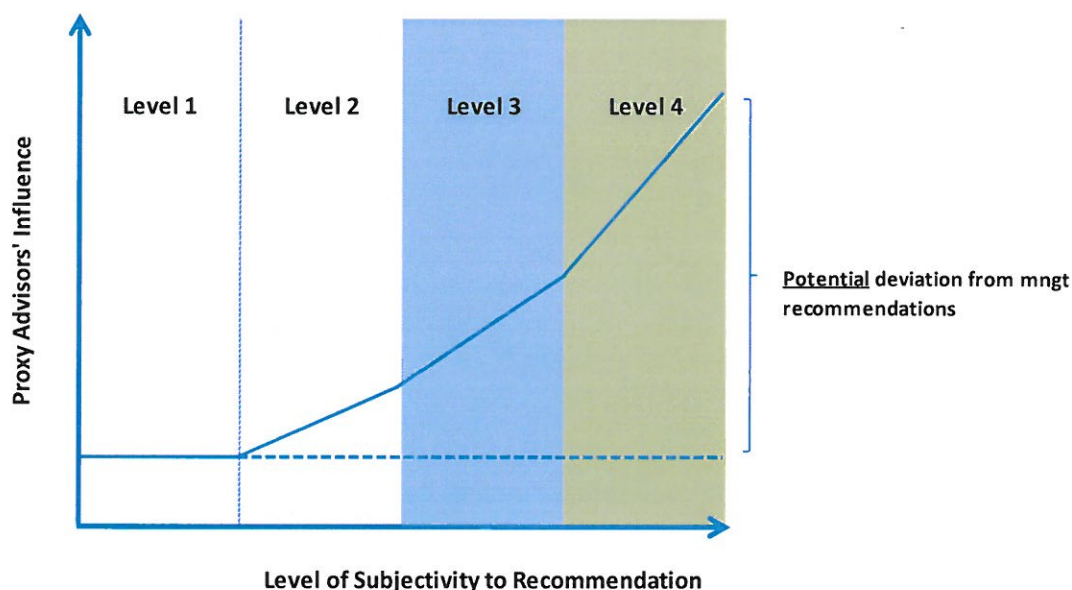
We believe it to be of great importance that proxy advisors clearly state the reasoning behind the recommendation given for any resolution. We realize the impossibility of having a pre-defined voting guideline for every possible iteration of every resolution. However, this only underpins the importance of providing a clear and transparent rationale for each recommendation made. This includes transparency on the facts used, any guidelines applied, any representations made, as well as the level of analyst opinion that may contribute to the final recommendation.

The day-to-day analysis of general meetings has led NBIM to categorize voting recommendations into four broad categories. These categories are based upon the level of subjectivity required to reach a decision and how factually based the information is. For example; Separation of Chairman and CEO is a principled-based vote decision for NBIM and offers little opportunity for subjectivity. The existence of a CEO and Chairman is factual. Such a resolution will be level 1. At the other end of the spectrum is, for example, a resolution to approve a merger. The information we use to determine our voting decision will not be determined by a corporate governance voting guideline. We will use a variety research tools and our subjective analysis to come to a decision. Such a resolution will be level 4.

Turning this example to the proxy advisors, for resolutions that require considerable analyst opinion and a high degree of subjectivity there is greater opportunity for issuers (and investors) to seek to influence the vote recommendation. As a consequence, the proxy advisors influence on the final vote recommendation - and potential voting outcome - is higher.

Figure 2. sets out these four levels and illustrates the relationship between the subjectivity/analyst opinion and level of proxy advisors influence. The figure is not based upon derived data from NBIM. It is merely to illustrate our categorization of resolutions.

Figure 2. The relationship between level of subjectivity and proxy advisors influence, potentially resulting in deviation from management recommendations.



It is the view of NBIM that proxy advisors could also recognize the various levels of subjectivity that is deployed when determining a vote recommendation. It may be possible to flag each resolution category in the research. This will provide investors with improved visibility on the vote recommendation determination process.

b) The dialogue with issuers when drafting voting recommendations?

We recognize the need for fact-checking between issuer and proxy advisor. However, we are more cautious with regard to pre-meeting dialogues that depart from fact checking and technical clarification, and instead stray into negotiation over individual resolutions. We regard this 'grey area' to be one aspect of the proxy advisory service that is most open to conflict of interest. It is essential that proxy advisors draft research and voting recommendations without undue or private influence from any party.

Beyond early fact-checking, we question the need and purpose of pre-AGM dialogue between issuer and proxy advisor. Such communication can only be to manage the recommendations on individual resolutions. If clarification, greater explanation and other elements of deeper understanding are necessary for a proxy agent to accurately assess the merits of a resolution, then we consider the issuer to have failed in its duty to provide all necessary information to all shareholders to reach a considered decision.

In such instances where there is dialogue between parties and proxy advisors ahead of a general meeting, we propose proxy advisors consider the implementation of a framework

for the full disclosure of all such dialogues. This should comprise a common template on the proxy advisor's research platform where all contact is noted and the content of such contact is detailed.

ESMA's question relates to dialogue with issuers. We draw attention to the dialogues proxy advisors may also chose to have with investors, other clients and third party agents such as shareholder bodies. We favor full and open disclosure of all dialogues relating to individual companies. Such dialogues should be accommodated in the disclosure framework we propose.

It is NBIM's opinion that proxy advisors should never change their voting recommendations based on information which has not been made available to all stakeholders. Finally, NBIM recognizes that the cost of proxy research may rise to reflect the higher cost of managing and reporting all issuer dialogues.

c) The standards of skill and experience among proxy advisor staff?

NBIM continuously monitors the general level of service, including the quality of analysis; we receive from our contracted proxy advisors. If we at any time conclude that the research produced by any proxy advisor repeatedly falls below a standard acceptable to NBIM we will ask for the analysis to be redone or we will stop purchasing the service. Also, it is important to note that proxy advisors are faced with the unavoidable fact that the majority of annual general meetings fall within a narrow time frame as a result of same fiscal year-end. Consequently, proxy advisors will always be faced with a trade-off between in-depth analysis and volume of meetings periods.

It goes without saying that we will support any initiative that contributes to the raising of skills and experience among proxy advisor staff. We acknowledge that this question is directly linked to the financial resources available to the proxy advisory industry – to hire, incentivize and retain highly skilled analysts.

We regard this not just an issue of competence, but whether recommendations, particularly those on mergers and acquisitions fall in another category which may necessitate other regulatory and or supervisory requirements to be met.

8) Which policy option do you support, if any? Please explain your choice and your preferred way of pursuing a particular approach within that option, if any.

NBIM does not recognize a perfect logic to the four options offered by ESMA as there are a number of additional or alternative steps within those four alternatives set out. The recommendations NBIM has set out for each of the seven segmented services may necessitate binding regulation at a service level and, furthermore, supervision. We therefore foresee industry reforms that may require elements of policy options 2, 3 and 4.

In this submission we have set out the proxy advisory services we consider necessary for reform. If implemented we consider these improvements will address the key issues raised by ESMA, namely, transparency, accuracy, independence and conflicts of interest.

9) Which other approaches do you deem useful to consider as an alternative to the presented policy options? Please explain your suggestion.

10) If you support EU-level intervention, which key issues, both from section IV and V, but also other issues not reflected upon in this paper, should be covered? Please explain your answer.

11) What would be the potential impact of policy intervention on proxy advisors, for example, as regards:

- a) Barriers to entry and competition;**
- b) Inducing a risk of shifting the investor responsibility and weakening the owner's prerogatives; and/or**
- c) Any other areas?**

We do not wish the consequence of any regulation to reduce the legitimate scope of proxy advisors to carry out their business in an open, competitive and client demand-driven manner. We caution against regulation that may impose costs, tighter deadlines etc. without an obvious link to product quality.

In conclusion,

- NBIM regards proxy advice as a commercial, client-demanded service and integral to our active ownership activities.
- We will support proxy advisory reforms and regulatory initiatives if the outcome is to protect the industry's independence, enhance its transparency and raise the quality of the services provided.
- Any policy recommendations made by ESMA should not undermine the commercial foundations of the industry nor disrupt its ability to carry out the services sought by investors.

12) Any other comments

END