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by email to rule-comments@sec.gov
Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-22-19 Proposed Rules on Proxy Advisory Firms

Dear Secretary Countryman:

I am submitting this letter in response to the Commission's request for comments on its proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice [Release No. 34-87457; File No. S7-22-19] (the "Release"). Axcelis Technologies, Inc. ("Axcelis" or the "Company'), is a Delaware corporation listed on the Nasdaq Global Select Market since 2000. Axcelis manufactures capital equipment for the global semiconductor industry.

Axcelis supports the Commission's efforts to increase the regulation of proxy advisory firms ("PAFs"). Corporate issuers have challenges ensuring that PAF recommendations are based on accurate facts and that PAF reports are available with adequate time to address any issues prior to a stockholder meeting. The imposition of procedural requirements on PAF voting recommendations and the clarification of the liability of PAFs under the securities laws, covered by the proposed regulations, is an entirely reasonable and warranted approach that will help address these deficiencies of the current proxy advisory processes. Criticisms that provisions of the Release will be overly burdensome or result in issuers being granted a 'veto' over PAF recommendations are unfounded. The Commission should reject these criticisms as nothing more than an effort to preserve the status quo and entrench the influence of PAFs. If adopted, the Release would make the vote recommendation process more transparent and ensure that shareholders receive the most accurate and relevant information regarding proxy votes at public companies.

We do hope, however, that the Commission will take further action to address the bigger picture issue relating to PAFs. Beyond erroneous and last minute PAF reports lies the fundamental challenge for corporate issuers: the arbitrary, constantly changing, "hot button" voting policies, which are often not fully transparent. We view most PAF voting policies as arbitrary because they are based on ideological positions, such as promoting shareholder democracy (despite actual pointless or negative consequences for investors),[1] and social and environmental initiatives. These proxy voting policies are not based on empirical data that demonstrates a link between the policy and improved business results or higher stock values. *Public company proxy voting has simply become an arena for asset managers to drive social and political change, totally divorced from business results and stock valuations, for which corporate managers are held legally accountable*. Of course, some companies have business risks associated with social and environmental activities, but the PAFs do not engage in differentiating the risk exposures of different companies—universal policies apply to all.

Issuers recognize that our securities laws do not insulate public companies from shareholder voting based on factors unrelated to corporate performance. However, the Commission should be concerned that the existence of arbitrary, constantly changing, hot button voting policies unrelated to corporate performance is having an overall negative effect on corporate issuers, to the detriment of the investing public and the attractiveness of our public stock markets.

We agree with the sentiment expressed previously by Commissioner Roisman that, when it comes to proxy voting, the ultimate concern of the Commission should be the retail investors whose capital is actually at risk, *not* the asset managers who are obligated act on those investors' behalf. To that end, it is not at all clear that the US investing public supports the use of their economic power to drive shareholder democracy initiatives (against their own interests) and social and environmental initiatives (which may bear no relationship to the investor's interests). As others have asserted, the use of voting policies unrelated to corporate performance by asset managers with fiduciary obligations is likely a violation of those fiduciary obligations. A significant portion of the US equity market is held in private pensions and 401(k) plans governed by ERISA, in government pension plans, and by institutional or retail mutual funds in which the asset managers have fiduciary duties to the investors.[2] If the right to vote corporate equity securities is exercised by fiduciaries without adequate disclosure to, or regard for the interests of, the beneficial owners of the securities, investors are misled and potentially harmed.[3]

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[1] Shareholder democracy initiatives include support for (i) the annual election of directors, (ii) proxy access, (iii) majority voting for directors, (iv) the elimination of forum selection clauses, (v) unrestricted rights of stockholder actions by written consent, and (vi) the elimination of supermajority voting provisions. See footnote 9 for commentary on the questionable advisability of these and other policies.

[2] See https://awealthofcommonsense.com/2019/01/who-owns-all-the-stocks-bonds/. For a discussion of the fiduciary obligations under ERISA and under state trust law governing mutual funds, See William G. Droms, Fiduciary Responsibilities of Investment Managers and Trustees, *Financial Analysts Journal,* Vol. 48, No. 4 (Jul. - Aug., 1992), pp. 58-64.

[3] These fiduciary concerns obviously do not apply in the case of institutions investing their own proprietary assets, and the institution would be free to use voting policies (whether created by a PAF or an institution itself) that are

The US Department of Labor (the "DOL") has provided guidance to ERISA fiduciaries on the status of voting as a fiduciary act, stating that "the fiduciary act of managing plan assets that involve shares of corporate stock includes making decisions about voting proxies and exercising shareholder rights."[4] The DOL has confirmed the objective of the fiduciary duties under ERISA:

> "A fiduciary's evaluation of the economics of an investment should be focused on financial *factors that have a material effect on the return and risk of an investment* [emphasis added] based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives. ... [P]lan fiduciaries, including appointed investment managers, should [not] routinely incur significant plan expenses to, for example, fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues relating to such companies."

This guidance implies that fiduciaries should not exercise voting rights with the objective of advocating for governance, environmental or social objectives that do not have an economic benefit to the investor. As one law firm recently observed, relying on a PAF to carry out proxy voting activities on behalf of an ERISA plan can lead to uncertainty with respect to whether the plan fiduciary is appropriately discharging its duties and as to the level of monitoring required to ensure fiduciary standards are met.[5] The DOL is expected to provide further regulatory guidance on the topic of ERISA proxy voting decisions, following the Executive Order issued in April 2019,[6] in which the US President directed the DOL to review and update its the proxy voting guidance to "ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets." It is expected this DOL guidance will further emphasize that proxy voting decisions by ERISA fiduciaries must solely be in the interest of, and for the exclusive purpose of providing plan benefits to, participants, beneficiaries and plans.

As noted above, PAF voting policies are not justified on the basis of "financial factors that have a material effect on the return and risk of an investment." Rather, PAF policies largely reflect the objectives of the "shareholder democracy" initiative, societal improvement goals (such as Board diversity and humanitarian labor principles), and environmental goals. Retail investors are likely "unaware that the power of their proxies can be and often is wielded in ways that do not maximize

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not driven by economic value creation. Similarly individual investors directly holding securities may exercise their proxy voting rights without regard to economic value creation.

[4] See the Department of Labor's Field Assistance Bulletin No. 2018-01, issued April 23, 2018.

[5] Ropes and Gray Podcast: ERISA Plan Fiduciaries' Proxy Voting: Regulatory Updates, December 16, 2019 https://www.ropesgray.com/en/newsroom/podcasts/2019/December/Podcast-ERISA-Plan-Fiduciaries-Proxy-Voting-Regulatory-Updates

[6] US Presidential Executive Order on Promoting Energy Infrastructure and Economic Growth, issued on: April 10, 2019. https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-infrastructure-economic-growth/

financial returns."[7] Like ERISA plan participants, in the absence of other information,[8] mutual fund investors should be assumed to be seeking to maximize economic return on their investment. Fiduciary proxy voting should be guided by that objective. In the absence of express investor consent, voting to achieve a particular governance, social or environmental objectives should only be permitted if the fiduciary has reasonably concluded that achievement of the objective is likely to result in value creation for the investor and appropriate disclosures of that conclusion have been made.

So far, many asset managers do not seem to feel any obligation to evaluate the connection between proxy voting policies and the economic value of an investment. It is as if PAF voting policies exist in a different universe that bears no relation to the reason why the investor turned funds over to the asset manager. There is no lack of information to assess PAF voting policies; academics and others have been assessing these policies for years. In many cases, there are significant doubts as to whether long-established PAF policies work to the economic benefit of the beneficial owners of the corporation.[9]

It is incumbent on the Commission to provide mutual fund investors with the same protections that the DOL is providing participants in ERISA plans. All investment fiduciaries should be held responsible for concluding that the voting policies applied (whether generated by a PAF or the asset manager itself) are designed to promote economic benefit to the beneficial owners of the securities. At a minimum, asset managers should be required to annually disclose the use of specific proxy voting policies and publish a balanced disclosure of the link between the policy and improved business performance or stock

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[7] Corporate Governance Update: The 2019 Proxy Season Hints at New Challenges, David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, October 31, 2019.

[8] The only exception to the objective of optimizing the economic return on investment for both investment and voting decisions by mutual fund fiduciaries would be in the case of mutual funds that have a stated objective other than economic benefit, such as an ESG fund, in which the beneficial owners are clearly agreeing to a less than optimized economic benefit in exchange for achieving other understood objectives.

[9] See Did Harvard Violate Federal Securities Law? The Campaign Against Classified Boards of Directors, Daniel Gallagher (the Commission) and Joseph Grundfest (Stanford University Law School), Rock Center for Corporate Governance at Stanford University Working Paper No. 199, Posted: 10 Dec 2014 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536586

See also Seven Myths of Boards of Directors, David F. Larcker and Brian Tayan (Stanford Graduate School of Business), September 30, 2015, Rock Center for Corporate Governance at Stanford University. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2669629

See also, New Developments in Social Investment by Public Pensions, Alicia H. Munnell and Anqi Chen, Center for Retirement Research at Boston College, No. 53, November 2016.

See also, Calpers' Dilemma: Save the World or Make Money?, Heather Gillers, The Wall Street Journal, June 16, 2019.

See also the discussion of pointless and anti-minority stockholder voting policies in my letter to the Commission dated June 19, 2019. https://www.sec.gov/comments/4-725/4725-5707991-185967.pdf valuations.[10]

If you have any questions or request additional information, please do not hesitate to contact the undersigned at [redacted] or at [redacted]. Thank you.

Very truly yours,

Lynnette C. Fallon
Executive Vice President HR/Legal, General Counsel and Secretary

[10] See ICI Research Perspective, Proxy Voting by Registered Investment Companies , 2017, July 2019, Vol. 25, No. 5, noting that "Fund advisers have a fiduciary duty to funds and their shareholders...funds must adopt proxy voting policies and procedures, which they describe in their publicly available registration statements."