

Proxy Advisor Regulation: Recent Litigation, State Law Developments, and Federal Legislation

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Proxy Advisor Regulation: Recent Litigation, State Law Developments, and Federal Legislation

Shareholders of public companies have the right to vote on certain matters—such as director elections, executive compensation plans, and shareholder proposals—at annual and special meetings. Today, most voting shareholders vote by proxy instead of attending annual and special meetings in person. Institutional investors (such as mutual funds and pension funds) dominate corporate voting because of their size and propensity to vote: institutions now own more than 70% of the U.S. stock market and vote their shares at considerably higher rates than retail investors. Many of these institutions retain proxy advisors to provide them with research, voting recommendations, and administrative services related to the proxy voting process.

The proxy advisor industry has long been a subject of debate and scrutiny. In particular, critics argue that the leading proxy advisors—Institutional Shareholder Services (ISS) and Glass, Lewis & Co. (Glass Lewis)—exert an outsized influence on corporate governance, operate with conflicts of interest, fail to correct errors in their work product, and pursue social agendas that harm shareholder value. Defenders of proxy advisors contend that the industry’s influence is overstated and that its institutional clients are largely satisfied with the quality of its services.

Proxy advisor regulation has received increased attention in the past several months. In July 2025, the U.S. Court of Appeals for the D.C. Circuit concluded that proxy voting advice does not constitute proxy “solicitation” under Section 14 of the Securities Exchange Act. Based on that holding, the D.C. Circuit affirmed a lower court decision vacating certain Securities and Exchange Commission (SEC) regulations concerning proxy advice. While the D.C. Circuit’s decision may limit the SEC’s authority to regulate proxy advisors under existing law, it is unlikely to end scrutiny of the industry. The previous month, Texas enacted a first-of-its-kind statute (Texas SB 2337) regulating proxy advice related to public companies incorporated or headquartered in the state. Proxy advisor regulation has also attracted congressional interest, with two House subcommittees holding hearings in 2025 to examine the industry and consider related legislation.

ISS and Glass Lewis have filed separate lawsuits challenging Texas SB 2337 on a variety of grounds. The Texas statute raises several interpretive questions that intersect with broader issues in corporate governance. For example, Texas SB 2337 requires proxy advisors to disclose that their services are not being provided solely in shareholders’ financial interest if proxy advisors’ voting recommendations are based upon “environmental, social, or governance (ESG)” factors. It remains to be seen whether a reviewing court would interpret this language to encompass a proxy advisor’s consideration of ESG factors as a means of increasing its clients’ risk-adjusted financial returns or adopt a narrower reading of the statute.

Several legislative proposals regarding proxy advisors have also circulated in recent Congresses. Some of these proposals would regulate proxy advisors directly, while others would target the ways in which institutional investors utilize proxy advisors. The proposals seek to address some of the issues discussed above, including proxy advisors’ alleged conflicts of interest and the accuracy of their work product.

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Institutional investors such as mutual funds and pension funds own a large majority of the U.S. stock market.¹ Many of those institutions retain proxy advisors to provide recommendations as to how they should vote on various corporate matters, including director elections, executive compensation plans, and shareholder proposals.² The proxy advisor industry—in particular, Institutional Shareholder Services (ISS) and Glass, Lewis & Co. (Glass Lewis), which reportedly have a combined market share of more than 90%—has long been a subject of debate and scrutiny.³ Critics argue that ISS and Glass Lewis exert an outsized influence on corporate governance,⁴ operate with conflicts of interest,⁵ fail to correct errors in their work product,⁶ and pursue social agendas that harm shareholder value.⁷ Defenders of proxy advisors contend that the industry’s influence is overstated and that its institutional clients are largely satisfied with the quality of its services.⁸

Proxy advisor regulation has received increased attention in the past several months. In July 2025, the U.S. Court of Appeals for the D.C. Circuit concluded that proxy voting advice does not constitute proxy “solicitation” under Section 14 of the Securities Exchange Act (the Exchange Act).⁹ Based on that holding, the D.C. Circuit affirmed a lower court decision vacating certain Securities and Exchange Commission (SEC) regulations concerning proxy advice.¹⁰ While the D.C. Circuit’s decision may limit the SEC’s authority to regulate proxy advisors under existing law, it is unlikely to end scrutiny of the industry. The previous month, Texas enacted a “first-of-its-kind” statute regulating proxy advice related to public companies incorporated or headquartered in the state.¹¹ Proxy advisor regulation has also attracted congressional interest, with two House subcommittees holding hearings in 2025 to examine the industry and consider related legislation.¹²

This report provides an overview of the debate surrounding proxy advisor regulation. It begins with background on the proxy advisor industry. Next, the report discusses the adoption, partial rescission, and ultimate vacatur of a 2020 SEC rule regulating proxy advisors. The final two sections of the report discuss recent state law developments involving proxy advisors and federal legislation that would subject the industry to stricter regulation.

¹ Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 726 (2019).

² Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 84 Fed. Reg. 47420, 47421 (Sept. 10, 2019).

³ David F. Larcker, Bryan Tayan & James R. Copland, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, HARV. L. SCH. F. ON CORP. GOV. (June 14, 2018), <https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/> [<https://perma.cc/NY25-J45B>].

⁴ STAFF OF ESG WORKING GRP., H. COMM. ON FIN. SERVS., 118TH CONG., THE FAILURE OF ESG: AN EXAMINATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS IN THE AMERICAN BOARDROOM AND NEEDED REFORMS 12 (2024) [hereinafter HOUSE FINANCIAL SERVICES ESG REPORT].

⁵ Larcker, Tayan & Copland, *supra* note 3.

⁶ HOUSE FINANCIAL SERVICES ESG REPORT, *supra* note 4, at 15.

⁷ *Id.* at 14.

⁸ George W. Dent, Jr., *A Defense of Proxy Advisors*, 2014 MICH. ST. L. REV. 1287 (2014).

⁹ ISS v. SEC, 142 F.4th 757, 768 (D.C. Cir. 2025).

¹⁰ *Id.*

¹¹ S.B. 2337, 89th Leg., Reg. Sess. (Tex. 2025); Randi C. Lesnick et al., *Texas Enacts New Law to Regulate Proxy Advisors*, JONES DAY (June 25, 2025), <https://www.jonesday.com/en/insights/2025/06/texas-enacts-new-law-to-regulate-proxy-advisory-firms> [<https://perma.cc/RPB7-VP2W>].

¹² *The Proxy Advisor Duopoly’s Anticompetitive Conduct*, Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Admin. State, Regul. Reform & Antitrust, 119th Cong. (2025); *Exposing the Proxy Advisory Cartel: How ISS and Glass Lewis Influence Markets*, Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Cap. Mkts., 119th Cong. (2025).

Background

Shareholders of public companies have the right to vote on certain matters—such as director elections, executive compensation plans, and shareholder proposals—at annual and special meetings.¹³ Some of these votes (for example, votes regarding charter amendments) have legally binding effect.¹⁴ Others (for example, votes on shareholder proposals requesting that a corporation take certain actions) are not formally binding, but may nevertheless influence corporate conduct.¹⁵ Today, most voting shareholders cast proxy ballots (which can be submitted online or by mail) instead of attending annual and special meetings in person.¹⁶ Institutional investors dominate corporate voting because of their size and propensity to vote: institutions now own more than 70% of the U.S. stock market and vote their shares at considerably higher rates than retail investors.¹⁷ Many institutional investors retain proxy advisors to provide them with research, voting recommendations, and administrative services related to the proxy voting process.¹⁸

Several developments have contributed to demand for proxy advice. In 2003, the SEC adopted a rule requiring investment advisers (including advisers to mutual funds and exchange-traded funds) to implement policies and procedures reasonably designed to ensure that they vote proxies in the best interests of their clients.¹⁹ Under the rule, the relevant policies and procedures must address how advisers resolve material conflicts of interest with their clients—for example, conflicts arising from business relationships between an adviser and a company soliciting proxies.²⁰ In the rule’s adopting release, the SEC explained that a fund adviser can demonstrate compliance with this requirement by voting proxies “in accordance with a pre-determined policy, based upon the recommendations of an independent third party.”²¹ The SEC’s 2003 rule, along with a pair of 2004 no-action letters addressing the circumstances in which proxy advisors could be deemed “independent,”²² are widely credited with increasing demand for proxy advisors.²³

The role of proxy advisors has also been magnified by an increase in the number of issues on which shareholders vote. In 2010, the Dodd-Frank Act required companies subject to the SEC’s

¹³ DEL. CODE ANN. tit. 8, § 211(b) (2025); 15 U.S.C. § 78n-1; 17 C.F.R. § 240.14a-8 (2025).

¹⁴ DEL. CODE ANN. tit. 8, § 242; MODEL BUS. CORP. ACT § 10.03 (2025).

¹⁵ Luc Renneboog & Peter G. Szilagyi, *The Role of Shareholder Proposals in Corporate Governance*, 17 J. CORP. FIN. 167 (2011).

¹⁶ *Amalgamated Clothing & Textile Workers v. Wal-Mart*, 821 F. Supp. 877, 881 (S.D.N.Y. 1993).

¹⁷ Brandon Van Manen, *Retail Engagement? Get Social*, BROADRIDGE (2021), https://www.broadridge.com/_assets/pdf/broadridge-five-components-of-a-winning-proxy-strategy.pdf [https://perma.cc/NK5Q-WLJB]; ADRIANA DE LA CRUZ, ALEJANDRA MEDINA & YUN TANG, ORG. FOR ECON. COOP. & DEV., OWNERS OF THE WORLD’S LISTED COMPANIES 22 (2019), https://www.oecd.org/content/dam/oecd/en/publications/reports/2019/10/owners-of-the-world-s-listed-companies_6f8bda93/ed7ca2f3-en.pdf [https://perma.cc/CQ6B-QVQG]. Institutional investors include mutual funds, exchange-traded funds, and pension funds.

¹⁸ Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 84 Fed. Reg. 47420, 47421 (Sept. 10, 2019) (codified at 17 C.F.R. pts. 271, 276).

¹⁹ 17 C.F.R. § 275.206(4)-6(a).

²⁰ *Id.*

²¹ Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585, 6588 (Feb. 7, 2003) (codified at 17 C.F.R. pt. 275).

²² Letter from Douglas Scheidt, Assoc. Dir. & Chief Counsel, Div. of Inv. Mgmt., SEC, to Mari Anne Pisarri, Pickard & Djinis LLP (Sept. 15, 2004), <https://www.sec.gov/divisions/investment/noaction/iss091504.htm> [https://perma.cc/Q9Z8-G6QR]; Letter from Douglas Scheidt, Assoc. Dir. & Chief Counsel, Div. of Inv. Mgmt., SEC, to Kent S. Hughes, Managing Dir., Egan-Jones Proxy Servs. (May 27, 2004), <https://www.sec.gov/divisions/investment/noaction/egan052704.htm> [https://perma.cc/X6CR-7NFD].

²³ E.g., Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U. L. REV. 1459, 1468–69 (2019).

proxy rules to conduct advisory shareholder votes on executive compensation every one, two, or three years, in addition to a separate advisory vote every six years on the frequency of these “say-on-pay” votes.²⁴ Most public companies conduct annual say-on-pay votes,²⁵ consistent with the voting guidelines of the leading proxy advisors and several of the largest institutional investors.²⁶ While say-on-pay votes are not binding, they can influence corporate behavior. Many corporations are attentive to such votes because proxy advisors may recommend voting against or withholding support from members of a company’s compensation committee if the company is insufficiently responsive after a compensation plan fails to receive supermajority shareholder approval.²⁷

In addition to say-on-pay, companies have received record numbers of shareholder proposals in recent years.²⁸ As a result of these developments, one source estimates, shareholders of Russell 3000 companies now vote on more than 25,000 ballot items annually—a sharp increase since the turn of the millennium.²⁹ Proxy advisors help institutional investors manage this workload.

Concerns Regarding the Proxy Advisor Industry

The developments discussed above—which coincided with a steady increase in institutional ownership of the U.S. stock market³⁰—have led to controversy surrounding the role that proxy advisors play in corporate governance. Critics of the industry have raised a variety of concerns, which are summarized below.

Outsized Influence

Some observers argue that the leading proxy advisors—ISS and Glass Lewis—have an inappropriate level of influence on corporate America.³¹ This influence, they contend, is in part a result of the highly concentrated structure of the proxy advisor industry.³² ISS and Glass Lewis

²⁴ 15 U.S.C. § 78n-1(a)(1)–(2).

²⁵ Pamela Marcogliese et al., *When Do We Say What on Pay?*, FRESHFIELDS (Mar. 20, 2023), <https://blog.freshfields.us/post/102iauh/when-do-we-say-what-on-pay> [<https://perma.cc/CGW2-VBSF>].

²⁶ ISS, UNITED STATES PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS 50 (2025) [hereinafter ISS BENCHMARK GUIDELINES], <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=2025.2> [<https://perma.cc/3YRB-5ZBM>]; GLASS LEWIS, 2025 BENCHMARK POLICY GUIDELINES 62 (2025) [hereinafter GLASS LEWIS BENCHMARK GUIDELINES], <https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf> [<https://perma.cc/2ZFF-XE5T>]; BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR BENCHMARK POLICIES – U.S. SECURITIES 15 (2025), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> [<https://perma.cc/E2VK-JTPZ>].

²⁷ ISS BENCHMARK GUIDELINES, *supra* note 26, at 13, 47, 50; GLASS LEWIS BENCHMARK GUIDELINES, *supra* note 26, at 52.

²⁸ Matteo Tonello, *2025 Proxy Season Preview*, HARV. L. SCH. F. ON CORP. GOV. (Mar. 10, 2025), <https://corpgov.law.harvard.edu/2025/03/10/2025-proxy-season-preview/> [<https://perma.cc/6M5C-7TYJ>].

²⁹ *Exposing the Proxy Advisory Cartel: How ISS and Glass Lewis Influence Markets*, Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Cap. Mkts., 119th Cong. (Apr. 29, 2025) (statement of Elizabeth Ising, Partner, Gibson Dunn & Crutcher LLP); *id.* (statement of Paul Washington, Pres., Soc’y for Corp. Governance).

³⁰ Alon Brav, Dorothy S. Lund & Lin Zhao, *Flows, Financing Decisions, and Institutional Ownership of the U.S. Equity Market* (Euro. Corp. Governance Inst., Law Working Paper No. 749/2024, 2024).

³¹ HOUSE FINANCIAL SERVICES ESG REPORT, *supra* note 4, at 12.

³² *Id.*

reportedly have a combined market share exceeding 90%, with some estimates reaching 97%.³³ The three other U.S. proxy advisors—Egan-Jones Proxy Services, Segal Marco Advisors, and ProxyVote Plus—are considerably smaller.³⁴ In addition to raising concerns about market concentration, some commentators have criticized the way in which institutional investors utilize proxy voting advice. These critics claim that many small and mid-size institutions vote in lockstep with ISS and Glass Lewis recommendations without performing independent analysis—a practice dubbed “robovoting.”³⁵

The level of influence that proxy advisors have on shareholder votes is contested, with empirical studies reaching differing conclusions.³⁶ In evaluating the effect of a proxy advisor recommendation, it can be difficult to distinguish correlation from causation. When casting votes, institutional investors may be independently influenced by the same factors that drive proxy advisors’ analyses (e.g., a company’s financial underperformance or a director’s poor attendance at board meetings).³⁷ In addition, proxy advisors develop their voting policies based on input from their institutional clients,³⁸ while institutions may select a given advisor based on prior agreement with the advisor’s policies.³⁹ These possibilities complicate efforts to assess the causal significance of a proxy advisor’s recommendations.

Defenders of the proxy advisor industry claim that critics overstate its influence. They argue that the largest institutional investors have their own voting policies and conduct independent analysis of contested issues,⁴⁰ relying on proxy advisors primarily for research and to identify matters that warrant further examination.⁴¹

Conflicts of Interest

Some commentators argue that ISS and Glass Lewis operate with conflicts of interest because they provide both proxy voting advice to investors and consulting services to corporations that are the subject of their proxy voting advice.⁴² Critics have claimed that the proxy advisors’ voting recommendations may be influenced by whether a corporation has purchased their consulting

³³ Press Release, H. Comm. on Fin. Servs., Capital Markets Subcommittee Examines Market Influence by Proxy Advisory Firms (Apr. 29, 2025), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409711> [<https://perma.cc/2VC6-2KGU>].

³⁴ Segal Marco Advisors and ProxyVote Plus also target a narrower range of clients than the other proxy advisors, focusing primarily on multiemployer pension plans. Dominic P. Keilty, *Solving the Proxy Advisory Problem: Minimum Regulation for Maximum Competition*, 14 MICH. BUS. & ENTREPRENEURIAL L. REV. 67, 74 (2025).

³⁵ Paul Rose, *Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting* (Ohio State Legal Studies Rsch. Paper No. 631, 2021).

³⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-47, CORPORATE SHAREHOLDER MEETINGS: PROXY ADVISORY FIRMS’ ROLE IN VOTING AND CORPORATE GOVERNANCE PRACTICES 15–19 (2016) [hereinafter GAO PROXY ADVISOR REPORT].

³⁷ Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 879 (2010).

³⁸ GAO PROXY ADVISOR REPORT, *supra* note 36, at 20.

³⁹ Choi, Fisch & Kahan, *supra* note 37, at 879.

⁴⁰ GAO PROXY ADVISOR REPORT, *supra* note 36, at 16.

⁴¹ Douglas Sarro, *Proxy Advisors as Issue Spotters*, 15 BROOK. J. CORP. FIN. & COM. L. 371, 402 (2021).

⁴² ISS offers both corporate governance and executive compensation consulting. *Governance Advisory Services*, ISS, <https://www.issgovernance.com/solutions/governance-advisory-services/> [<https://perma.cc/VC6G-EPDH>] (last visited Aug. 20, 2025); *Executive Compensation*, ISS, <https://www.iss-corporate.com/solutions/executive-compensation/> [<https://perma.cc/ZYW8-MGSM>] (last visited Aug. 20, 2025). Glass Lewis offers compensation consulting. *Equity Compensation Plan Advisory*, GLASS LEWIS, <https://www.glasslewis.com/corporate-solutions/equity-compensation-plan-advisory> [<https://perma.cc/YY55-92D4>] (last visited Aug. 20, 2025).

services.⁴³ Glass Lewis also offers to engage with companies on behalf of investor clients regarding governance issues,⁴⁴ which observers say incentivizes the firm to favor activist investors that purchase its engagement services.⁴⁵

ISS and Glass Lewis indicate that they maintain structural safeguards to ensure the independence of their proxy advice and consulting businesses.⁴⁶ Both firms also say they disclose potential conflicts of interest to their clients.⁴⁷

Errors

A third category of concerns regarding proxy advisors involves alleged errors in their work product. Some commentators, for example, contend that ISS and Glass Lewis frequently make factual and analytical mistakes and are insufficiently responsive when companies attempt to correct such errors.⁴⁸ (In 2020, ISS discontinued a policy of allowing S&P 500 companies to review draft copies of its research reports.⁴⁹ Glass Lewis allows companies to respond to its analysis and recommendations and makes those responses available to clients.)⁵⁰

The industry's defenders contend that claims of analytical error often amount to disputes over methodology or policy and that proxy advisors' work exhibits low rates of factual error.⁵¹

Environmental and Social Agendas

ISS and Glass Lewis have been criticized for supporting shareholder proposals on environmental and social issues that allegedly harm shareholder value.⁵² To address this concern, a 2024 staff report from the House Committee on Financial Services recommended that proxy advisors be required to “disclose their economic analysis and provide financial justifications” for vote

⁴³ E.g., Letter from Clifton A. Pemble, President & Chief Exec. Officer, Garmin Ltd., to Vanessa A. Countryman, Sec'y, SEC (Jan. 27, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6703085-206073.pdf> [<https://perma.cc/L5Y8-W3J9>].

⁴⁴ *Active Stewardship Engagement Program*, GLASS LEWIS, <https://www.glasslewis.com/investor-solutions/active-stewardship-engagement> [<https://perma.cc/95A3-AFWE>] (last visited Aug. 20, 2025).

⁴⁵ *Cracking the Proxy Advisor Duopoly*, WALL ST. J. (July 12, 2023), <https://www.wsj.com/opinion/proxy-advisory-firms-glass-lewis-institutional-shareholder-services-esg-investing-761e044f> [<https://perma.cc/KAA5-NJAW>].

⁴⁶ GLASS LEWIS, POLICIES AND PROCEDURES FOR MANAGING AND DISCLOSING CONFLICTS OF INTEREST 8 (2024) [hereinafter GLASS LEWIS CONFLICT POLICIES], <https://resources.glasslewis.com/hubfs/Compliance/2024%20Policies%20and%20Procedures%20for%20Managing%20and%20Disclosing%20Conflict%20of%20Interests.pdf> [<https://perma.cc/759V-PXD6>]; ISS, COMMENTS ON PROPOSED AMENDMENTS TO EXEMPTIONS FROM THE PROXY RULES FOR PROXY VOTING ADVICE, FILE NO. S7-22-19, at 32 (2020) [hereinafter ISS COMMENT LETTER], <https://www.issgovernance.com/file/duediligence/31012020-ISS-Comments-Filing.pdf> [<https://perma.cc/EDL8-NKNP>].

⁴⁷ GLASS LEWIS CONFLICT POLICIES, *supra* note 46, at 8; ISS COMMENT LETTER, *supra* note 46, at 34–36.

⁴⁸ KYLE ISAKOWER, AM. COUNCIL FOR CAP. FORMATION, PROXY ADVISORS REMAIN A PROBLEM: 2024 PROXY SEASON ANALYSIS SHOWS COMPANIES REPORT—PERSISTENT ERRORS IN PROXY ADVISORS' ANALYSES (2025), https://accf.org/wp-content/uploads/2025/07/ACCF-2024-Proxy-Report_7.7.25.pdf [<https://perma.cc/NB86-2FWF>].

⁴⁹ Edward Greene, *ISS to No Longer Provide S&P 500 Companies with Draft Proxy Research Reports for Review*, GEORGESON (Nov. 5, 2020), <https://www.georgeson.com/us/iss-to-no-longer-provide-sp-500-companies-with-draft-proxy-research-reports-for-review> [<https://perma.cc/GK39-QJ2X>].

⁵⁰ *Report Feedback Statement (RFS)*, GLASS LEWIS, <https://www.glasslewis.com/issuer-relations/report-feedback-statement-rfs> [<https://perma.cc/SQ6S-GSNU>] (last visited Aug. 20, 2025).

⁵¹ Letter from Kenneth A. Bertsch, Exec. Dir. & Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Investors, to Vanessa A. Countryman, Sec'y, SEC 3–4 (Feb. 4, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6764339-208028.pdf> [<https://perma.cc/3R8B-N2C3>].

⁵² HOUSE FINANCIAL SERVICES ESG REPORT, *supra* note 4, at 14.

recommendations that diverge from the judgments of independent boards of directors.⁵³ As discussed below, ISS and Glass Lewis have also faced investigations from state attorneys general (AGs) involving the role that environmental and social considerations play in their recommendations.⁵⁴

In response to these allegations, ISS and Glass Lewis have emphasized that their institutional clients choose among different voting policies, including a benchmark policy, various specialized policies (e.g., policies that incorporate Catholic moral values or climate-related considerations), and custom policies tailored to particular clients.⁵⁵ ISS has said that approximately 86% of the shares for which it processes voting instructions are tied to custom policies,⁵⁶ while Glass Lewis claims that a “significant majority” of its institutional clients vote according to a custom policy or a custom process for reaching voting decisions.⁵⁷ Both ISS and Glass Lewis have indicated that their benchmark voting policies evaluate environmental and social shareholder proposals based on how the proposals contribute to shareholder value.⁵⁸

SEC Regulation

In 2020, the SEC finalized amendments to its proxy rules regarding proxy voting advice.⁵⁹ The SEC has issued its proxy rules pursuant to Section 14 of the Exchange Act, which gives the agency broad authority to regulate the proxy voting process for companies that are listed on a national securities exchange or exceed certain asset and shareholder thresholds.⁶⁰ Under Section 14(a), it is unlawful to “solicit” proxies in contravention of rules that the SEC may prescribe “as necessary or appropriate in the public interest or for the protection of investors.”⁶¹

⁵³ *Id.*

⁵⁴ *Missouri AG Investigates Proxy Advisors Over ESG and DEI Practices*, STATE AG REPORT (July 17, 2025), <https://www.stateagreport.com/news/missouri-ag-investigates-proxy-advisors-over-esg-and-dei-practices/> [<https://perma.cc/E6ZB-55F4>].

⁵⁵ Letter from Kevin Cameron, Exec. Chair, Glass, Lewis & Co., to State Attorneys General Listed 2–3 (Jan. 31, 2023) [hereinafter Glass Lewis Letter], <https://resources.glasslewis.com/hubfs/Compliance/2023%20Letter%20to%20State%20AGs.pdf> [<https://perma.cc/MJ7C-TSRK>]; Letter from Gary Retelny, President & Chief Exec. Officer, ISS, to Sean D. Reyes et al. 7–10, n.21 (Jan. 31, 2023), <https://www.issgovernance.com/file/publications/iss-ag-response-31jan23.pdf> [<https://perma.cc/P45W-5M23>].

⁵⁶ Complaint for Declaratory and Injunctive Relief ¶ 28, ISS v. Paxton, No. 1:25-cv-01160 (W.D. Tex. July 24, 2025) [hereinafter ISS Complaint].

⁵⁷ Complaint ¶ 41, Glass, Lewis & Co. v. Paxton, No. 25-cv-1153 (W.D. Tex. July 24, 2025) [hereinafter Glass Lewis Complaint].

⁵⁸ ISS BENCHMARK GUIDELINES, *supra* note 26, at 66; Glass Lewis Letter, *supra* note 55, at 3.

⁵⁹ Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082 (Sept. 3, 2020) (codified at 17 C.F.R. pt. 240).

⁶⁰ 15 U.S.C. § 78n(a)(1).

⁶¹ *Id.* As discussed, most voting shareholders vote by proxy. *Amalgamated Clothing & Textile Workers v. Wal-Mart*, 821 F. Supp. 877, 881 (S.D.N.Y. 1993). The New York Stock Exchange and Nasdaq require listed companies to solicit proxies for all shareholder meetings. NYSE LISTED COMPANY MANUAL § 402.04(A) (2025); NASDAQ STOCK MKT. LLC RULES § 5620(b) (2025). Proxy voting also helps corporations satisfy state law quorum requirements for shareholder meetings. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1135 (1993). To ensure those requirements are met, public companies ordinarily distribute to shareholders a form of proxy (often called a proxy card or simply a proxy) by which shareholders can authorize a corporate official to vote their shares as instructed. *Id.* In contested votes, shareholders may receive proxies from both incumbent management and a dissident shareholder running an alternative slate of director candidates or opposing a management proposal. *Id.* at 1135 n.25. While state law authorizes proxy voting, it has not traditionally imposed significant restrictions on the proxy (continued...)

The Supreme Court has explained that the purpose of Section 14(a) is to prevent corporate management and others soliciting proxies from obtaining authorization for corporate action through deceptive or inadequate disclosures.⁶² To that end, the SEC's proxy rules include information and filing requirements under which persons soliciting proxies must (absent an exemption) provide to shareholders and file with the SEC a proxy statement containing specified disclosures.⁶³ The proxy rules also include an anti-fraud provision prohibiting false or misleading statements and omissions in proxy solicitation materials.⁶⁴

The SEC's 2020 rule concerning proxy voting advice consisted of four principal components.

First, the rule codified the SEC's view that selling proxy voting advice generally constitutes proxy "solicitation."⁶⁵ In prohibiting the solicitation of proxies in contravention of SEC rules, Section 14 of the Exchange Act does not define the term "solicit." Since 1956, the SEC has defined that term to include not only requests to execute or revoke a proxy, but also any communications to shareholders "under circumstances reasonably calculated to result in" the procurement, withholding, or revocation of a proxy.⁶⁶ The SEC has recognized the breadth of this definition and adopted various exemptions to the proxy rules' information and filing requirements to mitigate its expansiveness.⁶⁷ Those exemptions include carveouts for persons who do not seek proxy authority and persons who furnish proxy voting advice under specified circumstances, both of which have been relied upon by proxy advisors.⁶⁸ Proxy advisors have also maintained that they are not subject to *any* of the SEC's proxy rules because proxy voting advice does not constitute proxy "solicitation" under Section 14.⁶⁹ The SEC's 2020 rule rejected that contention and codified the agency's position that selling proxy voting advice for a fee typically constitutes proxy "solicitation."⁷⁰

Second, the SEC's 2020 rule required proxy advisors to make specified conflict-of-interest disclosures as a condition of relying upon the two exemptions mentioned above.⁷¹ Those exemptions are important to proxy advisors because the proxy rules' information and filing requirements would entail significant challenges for proxy advisors' business models. Among

solicitation process. 4 LOUIS LOSS ET AL., SECURITIES REGULATION 402 n.1 (4th ed. 2009) (characterizing state proxy regulation as "a virtual void").

⁶² J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964), *abrogation recognized by*, Ziglar v. Abbasi, 582 U.S. 120, 132 (2017).

⁶³ 17 C.F.R. §§ 240.14a-3, 240.14a-6.

⁶⁴ *Id.* § 240.14a-9.

⁶⁵ Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55091 (Sept. 3, 2020).

⁶⁶ *Id.* at 55088. The SEC adopted this component of its definition of "solicitation" in 1956 in response to concerns regarding abusive practices in contested director elections. Amendments to Proxy Rules, 21 Fed. Reg. 577, 577 (Jan. 26, 1956) (codified at 17 C.F.R. pt. 240); *see also* Regulations of Communications Among Shareholders, 57 Fed. Reg. 48276, 48277–78 (Oct. 22, 1992) (codified at 17 C.F.R. pts. 240, 249) (discussing the background of the 1956 amendments). The 1956 amendments targeted preliminary written communications by dissidents waging a proxy contest (often called "fight letters"), in addition to management responses to those communications. ARANOW & EINHORN ON PROXY CONTESTS FOR CORPORATE CONTROL § 5.01[B] (3d ed. 2001). Because many of these communications did not reference any intent to solicit proxies, they appeared to fall outside the SEC's pre-1956 definition of "solicitation." *Id.*

⁶⁷ 85 Fed. Reg. at 55088.

⁶⁸ 17 C.F.R. §§ 240.14a-2(b)(1), 240.14a-2(b)(3).

⁶⁹ Letter from Kevin Cameron, Exec. Chair, and Nichol Garzon-Mitchell, Senior Vice President, Gen. Counsel, Glass, Lewis & Co., to Vanessa A. Countryman, Sec'y, SEC 61–67 (Feb. 3, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6745349-207938.pdf> [<https://perma.cc/M33H-RLEB>]; ISS COMMENT LETTER, *supra* note 46, at 4–11.

⁷⁰ 85 Fed. Reg. at 55091.

⁷¹ *Id.* at 55098.

other difficulties, a requirement to file proxy voting advice with the SEC would allow investors to obtain that advice without paying for it.⁷² Recognizing this concern, the SEC’s 2020 rule preserved the exemptions, but conditioned their availability on proxy advisors’ compliance with minimum disclosure standards regarding conflicts of interest.⁷³

Third, the SEC’s 2020 rule conditioned the relevant exemptions on proxy advisors’ compliance with new procedural requirements involving companies’ ability to review and respond to voting recommendations (the “notice-and-awareness” conditions).⁷⁴ Under the notice-and-awareness conditions, a proxy advisor would have been ineligible to rely on the relevant exemptions unless it adopted policies and procedures reasonably designed to ensure that

- companies that were the subject of proxy voting advice had such advice made available to them at or prior to the time when such advice was disseminated to the proxy advisor’s clients; and
- clients of the proxy advisor were provided with a mechanism by which they could reasonably be expected to become aware of any written responses from the company in a timely manner before the associated shareholder meeting.⁷⁵

In adopting the notice-and-awareness conditions, the SEC embraced a less demanding approach than a 2019 proposed rule, which would have required proxy advisors to provide companies with the opportunity to review and provide feedback on recommendations before the recommendations were disseminated to clients.⁷⁶ Some commenters on the proposed rule expressed concerns that this advance review scheme would impede proxy advisors’ ability to deliver timely and high-quality advice, in addition to potentially undermining their impartiality.⁷⁷ The SEC contended that the final rule’s concurrent review scheme addressed many of these concerns while ensuring that proxy advisors’ clients have access to “more complete, accurate, and transparent information.”⁷⁸

Fourth, the SEC’s 2020 rule added an explanatory note to the anti-fraud provision of the proxy rules.⁷⁹ The note indicated that the failure to disclose material information regarding proxy voting advice—such as a proxy advisor’s methodology, sources of information, or conflicts of interest—may be considered misleading in certain circumstances.⁸⁰ (Proxy solicitations are subject to the anti-fraud provision even if they are exempt from the proxy rules’ information and filing requirements.)⁸¹

The SEC revisited the 2020 rule after a change in the agency’s leadership. In 2022, the SEC rescinded the notice-and-awareness conditions and removed the explanatory note regarding proxy voting advice from the proxy rules’ anti-fraud provision.⁸² In rescinding the notice-and-awareness conditions, the SEC said that the potential benefits of those conditions did not sufficiently justify the risks the conditions posed to “the cost, timeliness, and independence of proxy voting

⁷² *Id.* at 55085.

⁷³ *Id.* at 55091.

⁷⁴ *Id.* at 55107.

⁷⁵ *Id.* at 55109.

⁷⁶ *Id.* at 55102.

⁷⁷ *Id.* at 55104.

⁷⁸ *Id.* at 55109–10.

⁷⁹ *Id.* at 55121.

⁸⁰ *Id.* at 55155.

⁸¹ *Id.* at 55118.

⁸² Proxy Voting Advice, 87 Fed. Reg. 43168, 43169 (July 19, 2022) (codified at 17 C.F.R. pts. 270, 276).

advice.”⁸³ The agency also cited “strong opposition” to the conditions from many institutional investors.⁸⁴ The SEC removed the explanatory note regarding proxy voting advice from the proxy rules’ anti-fraud provision based on a concern that the note could be read to imply that proxy voting advice raises heightened fraud concerns.⁸⁵

In adopting these changes, the SEC retained the portion of the 2020 rule codifying the agency’s view that proxy voting advice generally constitutes proxy “solicitation.”⁸⁶ Likewise, the SEC’s 2022 rescissions did not affect the requirement that proxy advisors make certain conflict-of-interest disclosures as a condition of relying upon the relevant exemptions from the proxy rules’ information and filing requirements.⁸⁷

Multiple lawsuits challenged the SEC’s partial rescission of the 2020 rule, ultimately generating a circuit split. In June 2024, the U.S. Court of Appeals for the Fifth Circuit held that the SEC’s rescission of the notice-and-awareness conditions violated the Administrative Procedure Act.⁸⁸ In September 2024, the U.S. Court of Appeals for the Sixth Circuit rejected a similar lawsuit.⁸⁹ While those cases were being adjudicated, ISS and the SEC litigated a separate suit with potentially broader ramifications for the SEC’s authority to regulate proxy advisors.

ISS v. SEC

In *ISS v. SEC*, a lawsuit in the U.S. District Court for the District of Columbia, ISS contended that proxy voting advice does not constitute proxy “solicitation” under Section 14 of the Exchange Act.⁹⁰ The case had an intricate procedural history, originating as a challenge to 2019 guidance in which the SEC took the opposite position.⁹¹ After the SEC issued its 2020 rule, ISS amended its complaint to challenge the rule on a variety of grounds. The district court also allowed the National Association of Manufacturers (NAM), a trade association, to intervene in defense of the rule.⁹² The SEC’s 2022 rescissions mooted some of ISS’s claims, ultimately narrowing the case to the legality of the 2019 guidance and the surviving portions of the 2020 rule.⁹³

In February 2024, the district court sided with ISS, holding that proxy voting advice does not represent proxy “solicitation” under Section 14.⁹⁴ The district court based that conclusion on its assessment of the ordinary meaning of the term “solicit” at the time of the Exchange Act’s enactment.⁹⁵ Dictionaries from that period, the district court determined, defined “solicit” to mean “some variant of endeavoring to secure an action or object from another by actively pleading or

⁸³ *Id.* at 43170.

⁸⁴ *Id.*

⁸⁵ *Id.* at 43181.

⁸⁶ *Id.* at 43170.

⁸⁷ *Id.*

⁸⁸ *Nat’l Ass’n of Mfrs. v. SEC*, 105 F.4th 802 (5th Cir. 2024).

⁸⁹ *Chamber of Com. of the U.S. v. SEC*, 115 F.4th 740 (6th Cir. 2024).

⁹⁰ 718 F. Supp. 3d 7 (D.D.C. 2024), *aff’d*, 142 F.4th 757 (2025).

⁹¹ *Id.* at 15.

⁹² *Id.* at 16.

⁹³ *Id.* at 17.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 20–22.

asking.”⁹⁶ The district court reasoned that proxy advisors do not “solicit” proxies in this sense because they are disinterested actors that do not seek to persuade clients “to vote in a certain way to benefit themselves.”⁹⁷ The district court also concluded that the purpose and history of Section 14 supported ISS’s reading of the statute. In the district court’s view, regulations of proxy voting advice would do little to advance Congress’s goal of promoting “transparency and the exchange of complete and truthful information by and among interested parties seeking to obtain proxies in connection with a shareholder vote.”⁹⁸ The court thus vacated the 2020 rule.⁹⁹

The SEC and NAM appealed.¹⁰⁰ In August 2024, however, the SEC dismissed its appeal, leaving NAM as the sole party defending the 2020 rule.¹⁰¹ In July 2025, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit affirmed the district court’s decision, holding that proxy “solicitation” encompasses efforts to obtain proxies but not disinterested voting advice.¹⁰²

It remains to be seen whether NAM will seek Supreme Court review of the D.C. Circuit’s decision. If the D.C. Circuit decision stands, any future SEC efforts to regulate proxy advisors would, absent legislative changes, need to rely on authorities other than Section 14 of the Exchange Act. One possible alternative to Section 14 is the Investment Advisers Act (IAA), which establishes federal fiduciary standards for investment advisers.¹⁰³ Three of the five U.S. proxy advisors, including ISS, are registered with the SEC as investment advisers.¹⁰⁴ Glass Lewis, however, maintains that it does not fall within the IAA’s definition of an “investment adviser” and that it separately qualifies for the statute’s “publisher” exclusion.¹⁰⁵ Based on that reading of the IAA, Glass Lewis has not registered with the SEC.¹⁰⁶ Any efforts to regulate unregistered proxy advisors under the IAA may thus face litigation.

State Law Developments

State Attorney General Investigations

Alongside the developments discussed above, officials in several states have scrutinized the proxy advisor industry, focusing on the role that environmental and social considerations play in proxy advisors’ recommendations. In January 2023, 21 Republican state attorneys general (AGs) wrote to ISS and Glass Lewis requesting information regarding the firms’ analysis of various environmental issues.¹⁰⁷ The letter accused ISS and Glass Lewis of prioritizing nonpecuniary

⁹⁶ *Id.* at 21.

⁹⁷ *Id.* at 24.

⁹⁸ *Id.* at 27.

⁹⁹ *Id.* at 29.

¹⁰⁰ *ISS v. SEC*, 142 F.4th 757 (D.C. Cir. 2025).

¹⁰¹ *Id.* at 763.

¹⁰² *Id.* at 768.

¹⁰³ 15 U.S.C. §§ 80b-1–80b-21.

¹⁰⁴ ISS COMMENT LETTER, *supra* note 46, at 19.

¹⁰⁵ Katherine Rabin, *Statement of Record for SEC Roundtable on the Proxy Process*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 21, 2018), <https://corpgov.law.harvard.edu/2018/11/21/statement-of-record-for-sec-roundtable-on-the-proxy-process/> [https://perma.cc/UY9N-WJNZ].

¹⁰⁶ Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55086 n.49 (Sept. 3, 2020).

¹⁰⁷ Letter from Sean D. Reyes, Utah Att’y Gen., et al., to Gary Retelny, President & Chief Exec. Officer, ISS, and Kevin Cameron, Exec. Chairman, Glass, Lewis & Co. (Jan. 17, 2023), (continued...)

environmental goals over companies' financial performance, alleging that such conduct raised "serious questions" about whether the proxy advisors had violated federal and state law and breached contracts with state investment funds.¹⁰⁸

In 2025, two state AGs announced investigations into ISS and Glass Lewis. In March 2025, the Florida AG announced investigations into whether ISS and Glass Lewis violated the state's consumer protection statute by making misleading representations regarding their consideration of "Environmental, Social, and Governance (ESG)" and "Diversity, Equity, and Inclusion (DEI)" factors.¹⁰⁹ In July 2025, the Missouri AG announced similar investigations.¹¹⁰

Texas Senate Bill 2337

Texas lawmakers have also examined the role that ESG factors play in proxy advisor recommendations. In June 2025, Texas enacted Senate Bill 2337 (SB 2337), a statute regulating proxy advice related to public companies incorporated or headquartered in the state.¹¹¹ Under SB 2337, proxy advisors must make certain disclosures when providing advisory services "not . . . solely in the financial interest of the shareholders" of covered companies.¹¹² Specifically, SB 2337 requires proxy advisors that render such services to disclose to shareholders and the relevant company that the services are not being provided solely in shareholders' financial interest and explain with particularity the basis of their advice.¹¹³ Proxy advisors that render such services also must disclose on their websites that their services include advice and recommendations that are not based solely on the financial interest of shareholders.¹¹⁴ SB 2337 provides that proxy advice is not offered "solely in the financial interest" of shareholders if it

- is "wholly or partly based on, or otherwise takes into account, one or more nonfinancial factors" including, among other things, "environmental, social, or governance (ESG)" factors and "diversity, equity, or inclusion (DEI)";¹¹⁵
- recommends a vote on a shareholder proposal that is inconsistent with the recommendation of the board of directors or a board committee composed of a majority of independent directors, unless the recommendation includes a written economic analysis of the proposal's financial impact on shareholders that meets certain conditions;¹¹⁶

<https://www.texasattorneygeneral.gov/sites/default/files/images/press/Utah%20%26%20Texas%20Letter%20to%20Glass%20Lewis%20%26%20ISS%20FINAL.pdf> [https://perma.cc/TLD6-3EGW].

¹⁰⁸ *Id.* at 3.

¹⁰⁹ Press Release, Off. of Att'y Gen. James Uthmeier, Attorney General James Uthmeier Announces Investigation into Glass Lewis & Co. and Institutional Shareholder Services Inc. for ESG and DEI Policies (Mar. 20, 2025), <https://www.myfloridalegal.com/newsrelease/attorney-general-james-uthmeier-announces-investigation-glass-lewis-co-and> [https://perma.cc/V76N-VK8X].

¹¹⁰ Press Release, Andrew Bailey, Mo. Att'y Gen., Attorney General Bailey Leads Fight Against Hidden ESG and DEI Agendas in Corporate America (July 11, 2025 at 9:07 ET), <https://ago.mo.gov/attorney-general-bailey-leads-fight-against-hidden-esg-and-dei-agendas-in-corporate-america/> [https://perma.cc/43K6-C2C9].

¹¹¹ S.B. 2337, 89th Leg., Reg. Sess. (Tex. 2025).

¹¹² *Id.* sec. 2, § 6A.101(a) (codified as amended at TEX. BUS. ORGS. CODE ANN. §§ 6A.101–202 (West 2025)).

¹¹³ *Id.* sec. 2, § 6A.101(b)(1).

¹¹⁴ *Id.* sec. 2, § 6A.101(b)(3).

¹¹⁵ *Id.* sec. 2, § 6A.101(a)(1).

¹¹⁶ *Id.* sec. 2, § 6A.101(a)(2).

- is “not based solely on financial factors and subordinates the financial interests of shareholders to other objectives”;¹¹⁷ or
- advises against a company proposal to elect a “governing person,” unless the proxy advisor affirmatively states that it considered only the financial interest of shareholders in offering such advice.¹¹⁸

SB 2337 also includes disclosure requirements that apply when a proxy advisor renders “materially different” advice to different clients that have not “expressly requested services for a nonfinancial purpose.”¹¹⁹

Violations of SB 2337 constitute deceptive trade practices under Texas’s consumer protection statute.¹²⁰ Proxy advisors’ clients, companies that are the subject of proxy voting advice, and shareholders of such companies can seek declaratory and injunctive relief for violations of the law.¹²¹

In July 2025, ISS and Glass Lewis filed separate lawsuits in federal district court challenging SB 2337.¹²² In its complaint, ISS contends that SB 2337

- violates the First Amendment to the U.S. Constitution because it engages in content-based and viewpoint-based regulation of speech without adequate justification and compels ISS to make false representations about its services;¹²³
- is void for vagueness under the Fourteenth Amendment’s Due Process Clause because it fails to define key categories, including the “nonfinancial factors” that would trigger disclosure requirements if considered by proxy advisors in making voting recommendations;¹²⁴
- violates the Contracts Clause of the U.S. Constitution by substantially impairing ISS’s contractual relationships with its customers without a legitimate public purpose;¹²⁵ and
- is expressly and impliedly preempted by the IAA.¹²⁶

Glass Lewis’s lawsuit alleges that SB 2337

- violates the First Amendment because it engages in content-based and viewpoint-based regulation of speech without adequate justification;¹²⁷
- violates the First Amendment’s guarantee of freedom of association by imposing disclosure requirements when proxy advisors’ recommendations take into

¹¹⁷ *Id.* sec. 2, § 6A.101(a)(3).

¹¹⁸ *Id.* sec. 2, § 6A.101(a)(4).

¹¹⁹ *Id.* sec. 2, § 6A.102(b)(4).

¹²⁰ *Id.* sec. 2, § 6A.201.

¹²¹ *Id.* sec. 2, § 6A.202.

¹²² ISS Complaint, *supra* note 56; Glass Lewis Complaint, *supra* note 57.

¹²³ ISS Complaint, *supra* note 56, ¶¶ 62–79.

¹²⁴ *Id.* ¶¶ 80–87.

¹²⁵ *Id.* ¶¶ 88–95.

¹²⁶ *Id.* ¶¶ 96–104.

¹²⁷ Glass Lewis Complaint, *supra* note 57, ¶¶ 82–123.

- account membership in organizations that evaluate companies based on nonfinancial factors;¹²⁸
- is void for vagueness under the Fourteenth Amendment’s Due Process Clause because it leaves the meaning of key phrases, such as “solely in the financial interest of the shareholders,” unclear;¹²⁹
 - is expressly preempted by the Employee Retirement Income Security Act, which governs private employee benefit plans;¹³⁰ and
 - unduly burdens interstate commerce in violation of the Dormant Commerce Clause “by requiring out-of-state proxy advisors to give out-of-state shareholders time-consuming, expensive, and distracting disclosures about companies that need not even be incorporated in Texas.”¹³¹

In August 2025, after a hearing that focused on the plaintiffs’ First Amendment and vagueness claims, a federal district court preliminarily enjoined the enforcement of SB 2337 against ISS and Glass Lewis.¹³² A trial is scheduled for February 2026.¹³³

The text of SB 2337 presents a variety of interpretive issues that courts may need to resolve, some of which implicate broader topics in corporate governance. For example, SB 2337 provides that proxy advisors must disclose that their services are not being provided solely in shareholders’ financial interest if proxy advisors’ voting recommendations take into account “nonfinancial” factors, including “environmental, social, or governance (ESG)” factors.¹³⁴ The concept of “ESG investing,” which has grown in popularity over the past decade, does not have a singular established meaning.¹³⁵ Often, the ESG acronym “operates as something of an umbrella term” for two distinct strands of thought.¹³⁶ One variant of ESG—which traces its roots to the “socially responsible investing” movement of the 1980s—involves investors forgoing “some degree of profit-seeking” and instead “demanding more prosocial behavior from portfolio companies, either

¹²⁸ *Id.* ¶¶ 124–34.

¹²⁹ *Id.* ¶¶ 135–48.

¹³⁰ *Id.* ¶¶ 149–58.

¹³¹ *Id.* ¶¶ 159–65.

¹³² David Woodcock, Hillary H. Holmes & Gregg J. Costa, *Texas Court Blocks Enforcement of New Texas Proxy Advisor Law Against ISS and Glass Lewis*, GIBSON DUNN & CRUTCHER LLP (Aug. 30, 2025), <https://www.gibsondunn.com/texas-court-blocks-enforcement-of-new-texas-proxy-advisor-law-against-iss-and-glass-lewis/>.

¹³³ *Id.*

¹³⁴ S.B. 2337, sec. 2, § 6A.101, 89th Leg., Reg. Sess. (Tex. 2025).

¹³⁵ Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584, 1594 (2024) (reviewing STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* (2023)) (indicating that the phrase “ESG investing” has become “somewhat infamous for its malleability”); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 436–37 (2024) (noting that the term “ESG” lacks a clear definition and has been used for a range of different purposes); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 397 (2020) (explaining that the term “ESG investing” is “inherently ambiguous” and distinguishing between different variants of that concept).

¹³⁶ Lipton, *supra* note 135, at 1594.

by divesting from bad actors, or by using their voting power to influence corporate policy.”¹³⁷ A pair of scholars has referred to this version of ESG investing as “collateral benefits ESG.”¹³⁸

Another type of ESG investing involves the consideration of environmental, social, and governance factors as a means of improving risk-adjusted financial returns.¹³⁹ Market participants employing this strategy might believe that companies that score poorly on various ESG metrics face heightened regulatory risks or exhibit poor long-term performance for other reasons.¹⁴⁰ ISS and Glass Lewis claim that their benchmark voting policies evaluate environmental and social shareholder proposals in this latter way—i.e., based on their impact on shareholder value.¹⁴¹ They thus contend that SB 2337 requires them to make false representations if the statute’s disclosure requirements are triggered by any consideration of ESG factors.¹⁴² An alternative reading of SB 2337 would construe the statute’s reference to ESG factors as being limited to collateral benefits ESG.

The text of SB 2337 may offer support for both readings. SB 2337’s characterization of ESG factors as “nonfinancial” could be read to mean that the statute’s disclosure requirements do not apply if a proxy advisor considers ESG factors as part of a strategy for improving its clients’ financial returns. On the other hand, while some of the triggers for SB 2337’s disclosure requirements include exceptions, the provision referencing ESG factors does not. For example, if a proxy advisor makes a recommendation regarding a shareholder proposal that is inconsistent with a board recommendation, it can avoid SB 2337’s disclosure requirements by producing an economic analysis that meets certain conditions.¹⁴³ Similarly, if a proxy advisor recommends voting against a company proposal to elect a “governing person,” it can avoid SB 2337’s disclosure requirements by affirmatively stating that it considered only the financial interests of shareholders in making the recommendation.¹⁴⁴ The absence of a similar off-ramp for a proxy advisor’s consideration of ESG factors might suggest that SB 2337’s disclosure requirements are triggered by any consideration of ESG factors.

This ambiguity may be particularly salient when it comes to the “G” in “ESG.” Interest in the connection between corporate governance and financial performance predates the advent of return-oriented ESG investing. Investors have evaluated corporate governance issues through the lens of shareholder value maximization since well before the concept of ESG investing was developed and popularized.¹⁴⁵ Many academics and market participants, for example, favor independent boards of directors, unclassified boards, and the removal of takeover defenses because they believe those practices enhance shareholder value.¹⁴⁶ There is also a vast empirical

¹³⁷ *Id.*; see also Schanzenbach & Sitkoff, *supra* note 135, at 388, 397 (noting that one version of ESG investing is “motivated by providing a benefit to a third party or otherwise for moral or ethical reasons” and tracing this variant to the socially responsible investment movement).

¹³⁸ Schanzenbach & Sitkoff, *supra* note 135, at 397.

¹³⁹ *Id.* at 397–98.

¹⁴⁰ *Id.*

¹⁴¹ ISS BENCHMARK GUIDELINES, *supra* note 26, at 66; Glass Lewis Letter, *supra* note 55, at 3.

¹⁴² ISS Complaint, *supra* note 56, ¶ 4; Nichol Garzon, *Response to TX SB 2337*, HARV. L. SCH. F. ON CORP. GOV. (June 12, 2025), <https://corpgov.law.harvard.edu/2025/06/12/response-to-tx-sb-2337/> [<https://perma.cc/9GY5-4HAB>].

¹⁴³ S.B. 2337, § 2, 89th Leg., Reg. Sess. (Tex. 2025).

¹⁴⁴ *Id.*

¹⁴⁵ See Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2569–607 (2021).

¹⁴⁶ E.g., Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007); Lucian Arye Bebchuk, John C. Coates IV & Guhan (continued...)

literature analyzing the relationship between corporate governance practices and stock market performance.¹⁴⁷

A broad reading of SB 2337's reference to "governance" factors could produce paradoxical results. Consider the following hypothetical: one proxy advisor believes classified boards reduce shareholder value by entrenching subpar managers, while another proxy advisor believes that classified boards can promote shareholder value by giving managers flexibility to pursue long-term projects and/or leverage to negotiate higher takeover premiums.¹⁴⁸ Based on those views, the first proxy advisor recommends voting in favor of a board declassification proposal, while the second proxy advisor recommends voting against the proposal. An expansive reading of SB 2337's reference to "governance" factors would appear to require each proxy advisor to disclose that its recommendation is not offered solely in the financial interest of shareholders. Under this reading of SB 2337, it is not clear whether proxy advisors could ever make recommendations regarding governance proposals without triggering the statute's disclosure requirements.

An alternative reading of SB 2337 might construe the concept of a "governance" factor more narrowly, perhaps based on the purpose for which a proxy advisor considers a governance factor or a governance factor's substantive content. That type of narrower reading might avoid the result mentioned above. It could also create administrability challenges, however, insofar as it would require inquiries into a proxy advisor's subjective intentions or content-based distinctions among different governance factors.

Federal Legislation

Several legislative proposals regarding the proxy advisor industry have circulated in recent Congresses. Some proposals would regulate proxy advisors directly,¹⁴⁹ while others would target the ways in which institutional investors utilize proxy advisors.¹⁵⁰

Two bills related to proxy advisors have been introduced in the 119th Congress.

- H.R. 4098, the Stopping Proxy Advisor Racketeering Act, would prohibit proxy advisors from providing proxy voting advice while facing a "conflict of interest."¹⁵¹ Conflicts of interest would include conflicts arising from the provision of consulting services to securities issuers; a proxy advisor's

Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002). Some scholars have seized on this fact to argue that the "ESG" acronym conflates conceptually distinct inquiries. David F. Larcker & Brian Tayan, *The Case for Taking the 'G' Out of ESG*, WALL ST. J. (Apr. 28, 2022 at 11:00 ET), <https://www.wsj.com/finance/investing/esg-the-case-for-taking-out-the-g-11651004068>. [<https://perma.cc/5BGD-X8AT>]. They contend that whether a company has shareholder-friendly governance has little to do with whether the company performs well on environmental and social metrics. *Id.*

¹⁴⁷ BRYCE C. TINGLE, *HARD LESSONS IN CORPORATE GOVERNANCE* xi (2024) ("There are thousands of empirical studies about corporate governance and an equally large secondary literature discussing those studies.").

¹⁴⁸ At companies with classified boards, directors are grouped into multiple classes, with only one class standing for election each year. Bebchuk, Coates & Subramanian, *supra* note 146, at 893. When combined with another takeover defense called the poison pill, which renders stock purchases beyond a specified threshold economically irrational for a bidder, classified boards can make hostile takeovers difficult by requiring a bidder to prevail in two consecutive proxy contests to gain control of the board, which may be necessary to remove a poison pill. *Id.* at 890. Those who regard hostile takeovers as a valuable disciplinary mechanism thus tend to oppose classified boards. *E.g., id.* at 891.

¹⁴⁹ *E.g.*, H.R. 4098, 119th Cong. (2025).

¹⁵⁰ *E.g.*, H.R. 3402, 119th Cong. (2025).

¹⁵¹ H.R. 4098, sec. 2, § 14C(a).

modification of recommendations based on whether a company subscribes to the proxy advisor's services; the provision of stewardship or engagement services related to matters covered by a proxy advisor's voting advice; and membership in an organization that supports a shareholder proposal that is the subject of a proxy advisor's voting advice.¹⁵²

- H.R. 3402 would require "institutional investment managers" that retain proxy advisors to make certain disclosures.¹⁵³ Among other things, the bill would require institutional investment managers to disclose the percentage of their votes on shareholder proposals that are consistent with proxy advisor recommendations and explain how they consider such recommendations in making voting decisions.¹⁵⁴ Institutional investment managers with at least \$100 billion in assets under management would also have to perform an economic analysis of each shareholder proposal on which they cast votes that are inconsistent with the recommendations of boards composed of a majority of independent directors.¹⁵⁵ The economic analyses would have to determine that such votes are in the best economic interest of the shareholders on behalf of whom the institutional investment managers hold shares.¹⁵⁶

Other relevant bills were introduced in the 118th Congress and have also circulated as discussion drafts in the 119th Congress.¹⁵⁷

- H.R. 4590 (118th Cong.) would have amended Section 14 of the Exchange Act to provide that a proxy advisor's failure to disclose its methodology, sources of information, or conflicts of interest, along with material misstatements by a proxy advisor regarding proxy voting advice, "shall be considered to be false or misleading with respect to a material fact."¹⁵⁸
- H.R. 4589 (118th Cong.) would have required proxy advisors to register with the SEC.¹⁵⁹ The bill would have instructed the SEC to deny applications for registration (and suspend or revoke a registration) if a proxy advisor failed to certify to the SEC's satisfaction that it was "able to consistently provide proxy advice based on accurate information," would provide voting advice "only in the best economic interest" of shareholders, and complied with requirements governing conflicts of interest and the reliability of its recommendations.¹⁶⁰ The reliability requirements included a requirement to adopt procedures under which companies could review and respond to voting recommendations before the recommendations were sent to proxy advisors' clients.¹⁶¹ The bill also would have directed the SEC to issue rules prohibiting proxy advisors from engaging in

¹⁵² *Id.*

¹⁵³ H.R. 3402, sec. 1, § 13(f)(7).

¹⁵⁴ *Id.* sec. 1, §§ 13(f)(7)(A)(ii)–(iii).

¹⁵⁵ *Id.* sec. 1, § 13(f)(7)(B).

¹⁵⁶ *Id.*

¹⁵⁷ For the discussion drafts from the 119th Congress, see *Exposing the Proxy Advisory Cartel: How ISS and Glass Lewis Influence Markets: Hearing Before the H. Comm. on Fin. Servs.*, 119th Cong. (2025), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409697> [<https://perma.cc/3LEB-UJ96>].

¹⁵⁸ H.R. 4590, 118th Cong. sec. 1, § 14(1) (2023).

¹⁵⁹ H.R. 4589, 118th Cong. sec. 1(a), § 15H (2023).

¹⁶⁰ *Id.* sec. 1(a), §§ 15H(b)(1)(B), 15H(b)(2)(C).

¹⁶¹ *Id.* sec. 1(a), § 15H(g).

practices the SEC deemed “unfair, coercive, or abusive,” including practices related to corporate governance consulting services.¹⁶²

Other legislative proposals have circulated as discussion drafts in the 119th Congress, but have not been introduced.

- H.R. ___, a bill to amend the Securities Exchange Act of 1934 to provide for certain requirements related to proxy voting, and for other purposes, would direct the SEC to issue a rule prohibiting “robovoting.”¹⁶³ The draft defines the term “robovoting” to mean “the practice of automatically voting in a manner consistent with the recommendations of a proxy advisory firm or pre-populating votes on a proxy advisory firm’s electronic voting platform with the proxy advisory firm’s recommendations, in either case, without independent review and analysis.”¹⁶⁴ The draft also would make it unlawful for an “institutional investor” to “outsource” voting decisions to any person other than an SEC-registered investment adviser, broker, or dealer that has a “fiduciary or best interest duty to the institutional investor.”¹⁶⁵
- H.R. ___, a bill to amend the Securities Exchange Act of 1934 to require the Securities and Exchange Commission to study certain issues with respect to shareholder proposals, proxy advisory firms, and the proxy process, and for other purposes, would direct the SEC to conduct a study of the proxy process that assesses, among other things, the economic analyses that proxy advisors conduct when recommending votes in favor of shareholder proposals and whether proxy advisors are subject to “sufficient and effective regulation.”¹⁶⁶

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¹⁶² *Id.* sec. 1(a), § 15H(j).

¹⁶³ H.R. ___, 119th Cong. sec. 1, § 14(l) (2025), <https://docs.house.gov/meetings/BA/BA16/20250429/118146/BILLS-119pih-Nunnproxyvotingreqs.pdf> [<https://perma.cc/FPF4-KK87>].

¹⁶⁴ *Id.* sec. 1, § 14(l)(2).

¹⁶⁵ *Id.* sec. 1, § 14(m).

¹⁶⁶ H.R. ___, 119th Cong. sec. 1, § 4(j)(10) (2025), <https://docs.house.gov/meetings/BA/BA16/20250429/118146/BILLS-119pih-Wagnerstudyissues.pdf> [<https://perma.cc/Q86U-R5LW>].

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