Cahill

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D.C. Circuit Invalidates SEC's Proxy Advisor Disclosure Rule, Finding Proxy Advisory Voting Advice Is Not 'Solicitation'

Executive Summary

On July 1, 2025, in *Institutional Shareholder Services, Inc*. v. *SEC ("ISS")*,[1] the U.S. Court of Appeals for the District of Columbia Circuit held that proxy-voting advice recommendations are not "solicitations" under the Securities Exchange Act of 1934, thus invalidating a Securities and Exchange Commission ("SEC") rule requiring enhanced disclosure requirements for proxy advisory firms issuing proxy recommendations.

> Section 14(a) of the Exchange Act prohibits "any person," in "contravention" of SEC "rules and regulations," from "solicit[ing]" "any proxy" regarding registered securities.[2] In 2020, the SEC issued a rule defining "solicit" to include certain unprompted proxy recommendations, and on that basis promulgated regulations requiring enhanced disclosure requirements for proxy advisory firms. The enhanced disclosure requirements included an exemption that could be met under certain conditions. In 2022, the SEC rescinded two of those conditions, both of which made it easier for proxy firms to bypass the disclosure requirements. Advocacy groups challenged the rescission, which led to a circuit split between the Fifth and Sixth Circuits about the rescission's validity—the Fifth Circuit partly invalidated the rescission and the Sixth Circuit upheld it.[3]

Under the D.C. Circuit's approach, however, the enhanced disclosure requirements do not apply to proxy recommendations at all. The D.C. Circuit's analysis focused on the plain meaning of the word "solicit" when the Exchange Act was enacted in 1934. The court concluded that the SEC unlawfully expanded the statutory term, because "[p]roxy-voting advice rendered by a third party for a fee" is "simply a recommendation," not a solicitation.[4] *ISS* may signal an end to the SEC's recent efforts to regulate proxy-voting advice recommendations, especially given the SEC's voluntary dismissal of its appeal in *ISS* without explanation.[5]

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[1] 2025 WL 1802786 (D.C. Cir. July 1, 2025).

[2] 15 U.S.C. § 78n(a)(1); *see ISS*, 2025 WL 1802786, at *6.

[3] *See Nat'l Ass'n of Mfrs*. v. *SEC*, 105 F.4th 802 (5th Cir. 2024) (partly invalidating rescission); *Chamber of Com*. v. *SEC*, 115 F.4th 740 (6th Cir. 2024) (upholding rescission); *see also* Joel Kurtzberg, John MacGregor, & Jason Rozbruch, *Sixth Circuit Upholds SEC's Proxy Advisor Rule Repeal, Creating Split With Fifth Circuit*, CAHILL GORDON & REINDEL LLP (Oct. 15, 2024), https://www.cahill.com/publications/client-alerts/2024-10-15-sixth-circuit-upholds-sec-proxy-advisor-rule-repeal-creating-split-with-fifth-circuit; Joel Kurtzberg, John MacGregor, & Jason Rozbruch, *Dissecting New Circuit Split Over SEC's Proxy Adviser Rule*, LAW360 (Nov. 7, 2024), https://www.law360.com/articles/2257276.

[4] *ISS*, 2025 WL 1802786, at *8.

[5] *Id.* at *3.

Factual and Procedural History

Section 14(a) of the Exchange Act prohibits "any person . . . in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit . . . any proxy" for registered securities.[6] The Exchange Act does not define "solicit," and the SEC has sought to regulate proxy advisory firms through an interpretation of Section 14(a) that treats proxy-advice recommendations as "solicitations" of the proxy votes of institutional investors.[7]

In September 2019, the SEC distributed guidance suggesting that proxy advisory services constituted "solicitation" under the SEC's proxy rules (the "2019 Guidance").[8] The SEC codified the interpretation in a December 2019 notice of proposed rulemaking and issued a final rule in September 2020 (the "2020 Rule").[9] The 2020 Rule required proxy advisory firms to file their proxy recommendations with the SEC as proxy solicitations unless they qualified for an exemption, which could be claimed by a firm that: (1) disclosed conflicts of interest and the steps taken to address them, (2) adopted procedures to make proxy advice available to target companies at least by the time the advice is disseminated to the adviser's clients, and (3) established a mechanism to inform clients of the company's response before the applicable shareholder meeting.[10] The SEC amended the rule in 2022 to rescind the latter two requirements of the exemption.[11]

Plaintiff Institutional Shareholder Services ("ISS") commenced its lawsuit against the SEC in October 2019 after the SEC issued the initial 2019 Guidance a month earlier. ISS argued that the SEC unlawfully expanded the term "solicit" to encompass proxy voting advice.[12] ISS's case was stayed pending completion of the SEC's rulemaking, and the district court lifted the stay after the SEC adopted the 2020 Rule.[13] ISS then filed an amended complaint, asserting six claims under the Administrative Procedure Act.[14] National Association of Manufacturers ("NAM") moved to intervene on behalf of the SEC, and the court granted NAM's motion.[15] The case was then held in abeyance as the SEC sought to complete its rulemaking process.[16]

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[6] 15 U.S.C. § 78n(a)(1).

[7] *ISS*, 2025 WL 1802786, at *1-2.

[8] *Id.* at *2 (citing *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47,416, 47,417 (Sept. 10, 2019)).

[9] *Id.* (citing 85 Fed. Reg. at 55,082; 85 Fed. Reg. at 55,154). The SEC correspondingly amended its regulations to define "solicit" and "solicitation" as "[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee." *Id.* (citing *Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,154 (Sept. 3, 2020)). The definition excluded proxy advice given in response to an unprompted request. *Id.*

[10] *Id.*

[11] *Id.* (citing Proxy Voting Advice, 87 Fed. Reg. 43,168, 43,174 (July 19, 2022)). This rescission was the subject of Administrative Procedures Act challenges in the Fifth and Sixth Circuits, as discussed above. *See Nat'l Ass'n of Mfrs*., 105 F.4th 802; *Chamber of Com*., 115 F.4th 740.

[12] *Id.* at *3.

[13] *Id.*

[14] *Id.* Specifically, ISS asserted that (i) proxy advice is not solicitation under Section 14(a) (Count 1); (ii) the SEC lacks statutory authority to regulate proxy advisers (Count 2); (iii) the 2019 Guidance and the 2020 Rule are arbitrary and capricious (Counts 3 and 4); (iii) the 2020 Rule's exemption's disclosure requirements violate the First Amendment (Count 5); and (iv) the 2019 Guidance is procedurally invalid (Count 6).

[15] *Id.*

[16] *Id.*

ISS, NAM, and the SEC each moved for summary judgment, and the district court granted ISS's motion on Counts 1 and 2.[17] The court rejected the SEC's reliance on a broad regulatory definition and found, based on Section 14(a)'s text, that "solicit" could not reasonably include disinterested voting advice.[18] NAM and the SEC both appealed. They asserted that the district court defined "solicit" too narrowly because, for instance, "solicit" can mean "endeavor to obtain," and advisory firms like ISS "solicit" proxies by seeking to obtain votes aligned with their recommendations.[19] The SEC voluntarily dismissed its appeal in August 2024 "without explanation," leaving NAM as the sole appellant defending the definitional change in the amended rule.[20]

D.C. Circuit Decision

The D.C. Circuit affirmed, agreeing with the district court that the legal definition of solicitation does not cover proxy voting advice, and that the SEC exceeded its authority in enacting the 2020 Rule.

The court first noted its "independent obligation to assure" that it has jurisdiction "before proceeding to the merits," and held that NAM sufficiently demonstrated associational standing by showing that the 2020 Rule's vacatur "reimpos[ed]" on NAM's members the monetary and operational burdens caused by misleading proxy advice.[21]

Next, the D.C. Circuit "exercise[d]" its "independent judgment" under *Loper Bright*[22] to assess whether the SEC's interpretation of the Exchange Act was "contrary to law."[23] In *Loper Bright*, the Supreme Court overruled the principles of agency deference as stated in *Chevron*[24] and instead required courts to "independently interpret" statutes that "delegate discretionary authority to an agency" and "effectuate the will of Congress."[25] In providing the "best reading" of such statutes, courts determine whether an agency has acted under the authority granted by its governing statute.[26] The Supreme Court recognized that, in some instances, Congress did "'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term."[27] In *ISS,* neither the lower court nor the D.C. Circuit found statutory ambiguity and "thus did not accord the agency's interpretation deference."[28] The D.C. Circuit looked to the ordinary definition of the word "solicit" when the Exchange Act was enacted in 1934 and determined that it meant "seeking to persuade another to take a specific action."[29] Based on this interpretation, the Court found that the "ordinary meaning of 'solicit'" did not encompass "entities that provide proxy voting recommendations requested by others, even if those recommendations influence the requestors' eventual votes."[30]

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[17] *Id.*; *Institutional Shareholder Services, Inc*., v. *SEC*, 718 F. Supp. 3d 7, 29 (D.D.C. 2024), *appeal dismissed*, 2024 WL 4099897 (D.C. Cir. Sept. 5, 2024), *and aff'd*, 2025 WL 1802786.

[18] *Id.*

[19] *ISS*, 2025 WL 1802786, at *5.

[20] *Id.* at *3.

[21] *Id.* at *5.

[22] *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 394 (2024).

[23] *ISS*, 2025 WL 1802786, at *5.

[24] *Chevron U.S.A. Inc*. v. *Natural Resources Defense Council Inc*., 467 U.S. 837 (1984).

[25] *Loper Bright Enters.*, 603 U.S. at 395.

[26] *Id.* at 394.

[27] *Id.*

[28] *ISS*, 2025 WL 1802786, at *3, n.2.

[29] *Id.* at *6.

[30] *Id*.

The D.C. Circuit explained that Section 14(a)'s "structure" further supported the conclusion that the statute "presupposes" that "proxy solicitation involves parties *actively* seeking to secure votes or voting authority."[31] Section 14(a) was therefore not intended to reach proxy advisors, who do not "seek[] votes" on behalf of themselves or others.[32] The Court explained that "[o]ther contextual clues" supported its conclusion, including that proxy advisors are also subject to the Investment Advisers Act of 1940, whose statutory scheme was amended to include different standards for investment advisers that, like proxy advisory firms, issue "analyses or reports concerning securities" for "compensation and as part of a regular business."[33]

Conclusion

The D.C. Circuit's decision, in tandem with the SEC's voluntary dismissal of its appeal in *ISS* without explanation, may signal an end to the SEC's recent efforts to regulate proxy advisory firms under Section 14(a). In addition, the D.C. Circuit's determination that proxy voting advice is not a solicitation, and its criticism of the SEC for unduly expanding the statutory definition, will likely narrow both the SEC's authority and appetite for such regulation.[34] Moreover, in their decisions, neither the D.C. Circuit nor the district court deferred to the SEC's interpretation, as the courts did not find the statute to be ambiguous.[35] The D.C. Circuit also found that the SEC's definition of "solicit" was both "incorrect" as a matter of statutory interpretation and went beyond the "boundaries of [any] delegated authority."[36]

Proxy advice policy reform may ultimately come from legislation by Congress, rather than from regulation by an executive agency. Earlier this year, Senators Tim Scott (R-S.C.) (Senate Banking Committee Chairman), Mike Rounds (R-S.D.) (Subcommittee on Securities, Insurance, and Investment Chairman), and Bill Hagerty (R-Tenn.) (Protecting Main Street Investors Working Group Chairman), raised concerns about the influence of proxy advisors on the corporate governance of U.S. public companies.[37] On May 20, 2025, Senators Scott, Rounds, and Hagerty sent a letter to ISS and Glass, Lewis & Co.—two of the largest proxy advisory firms—copying SEC Chairman Paul Atkins—stating that the companies operate with "virtually no transparency, minimal accountability, and no meaningful regulatory oversight."[38] This congressional development, the D.C. Circuit's decision in *ISS*, and the SEC's voluntary dismissal of its own appeal in that case, may signal a change in direction with respect to the SEC's recent efforts to regulate proxy advisory firms, and that Congress could have a more significant role going forward.

On the state congressional level, Texas Governor Greg Abbott signed Senate Bill 2337 ("SB 2337") on June 20, 2025, and the law will take effect on September 1, 2025.[39] SB 2337 would require proxy advisors relying on non-financial factors, such as environmental, social, and governance ("ESG") topics and diversity, equity, and inclusion ("DEI") initiatives, to make certain disclosures about their voting recommendations for Texas-based corporate

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[31] *Id.* (emphasis added).

[32] *Id.*

[33] *Id*. at *7.

[34] *See* Andrew Ramonas, *Trump's Next SEC Faces Hurdles Saving Contested Proxy Firm Curbs*, BLOOMBERG LAW (Jan. 3, 2025), https://news.bloomberglaw.com/esg/trumps-next-sec-faces-hurdles-saving-contested-proxy-firm-curbs.

[35] *ISS*, 2025 WL 1802786, at *3, n.2.

[36] *Id.* at *5 n.5 (quoting *Loper Bright Enters.*, 603 U.S. at 395).

[37] Letter from Senate Banking Committee Chairman Tim Scott to Institutional Shareholder Services Inc. President and CEO Gary Retelny and Glass, Lewis & Co. CEO Katherine Rabin (May 20, 2025), https://www.banking.senate.gov/imo/media/doc/05202025lettertoissandglasslewis.pdf.

[38] *Id.* at 1.

[39] Tex. S.B. 2337, 89th Leg., R.S. (2025).

issuers.[40] The law also deems proxy advice to be “not provided solely in the financial interest of the shareholders,” and requires proxy advisors to make disclosures to that effect, when the advisor (1) “advises against” a company’s proposal to elect a governing person, or (2) recommends action on a shareholder-sponsored proposal “inconsistent” with the company board’s recommendation.[41] ISS and Glass Lewis filed separate lawsuits challenging the law on July 24, 2025, alleging that the law, among other things, violates the First Amendment’s restrictions on compelled speech and viewpoint and content discrimination.[42] The outcome of this litigation could determine how significant of a role state legislatures will play in regulating proxy advisory firms.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor (Partner) at 212.701.3445 or jmacgregor@cahill.com; Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; Alexa Plesco (Associate) at 212.701.3139 or aplesco@cahill.com; or email publicationscommittee@cahill.com.

[40] *Id.*

[41] *Id*. § 6A.101(a)(2), (4).

[42] *See* Complaint, *Glass Lewis & Co. LLC* v. *Paxton,* No. 1:25-cv-01153, (W.D. Tex. July 24, 2025), ECF No. 1; Complaint, *Institutional Shareholder Services Inc.* v. *Paxton*, No. 1:25-cv-01160, (W.D. Tex. July 24, 2025), ECF No. 1.