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December 20, 2021

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

Dear Ms. Countryman, Chairman Gensler, Commissioners, and staff of the SEC,

I very much appreciate the opportunity to comment on the proposal on proxy advisors. I am grateful for the prompt and thoughtful attention the staff has paid to the issues raised in the comments and litigation over that rule.

Given the problem of dark money-funded "astroturf" (fake grassroots), fake "public policy" thinktanks[1], fishy" comments[2], sock puppets,[3] and advocacy masquerading as scholarship that undermined the integrity of the notice and comment system in the previous rulemaking, I want to emphasize that no one is paying me to file a comment and that neither I nor my firm or our clients have any financial interest in the outcome of this rule. My longtime business partner, Robert A.G. Monks, and I were among the founders of the largest proxy advisory firm, Institutional Shareholder Services, in 1985, but neither of us has worked there since 1990 or

[1] https://www.nytimes.com/2020/11/11/climate/fti-consulting.html
[2] https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change
[3] https://valueedgeadvisors.com/2018/11/06/more-useless-sock-puppet-bluster-from-fake-front-group-main-street-investor-coalition/ and note the overlap in the comments between groups with the same members/funders like the Business Roundtable and the World Business Council.

had any financial ties to the firm since shortly thereafter.[4] I include my professional affiliation for context but the opinions expressed are entirely my own, based on more than three decades in this field. I urge the Commission to include language along these lines in future NPRMs:

> We encourage commenters to state clearly whether they are directly or indirectly receiving payment or subsidies for submission of the comment and any financial ties they have to those who are likely to be affected by the rule. These disclosures are not required but failure to include them will be a factor in determining the credibility of the comments.

If corporate insiders had a legitimate case to make, they would not resort to these tactics. They know regulators are rightly suspicious of self-interest if their names are on the "studies" and "groups" behind the comment letters, and so they hide behind the dark money-funded smoke and mirrors of fake sources. It is telling that neither the subscribers to proxy advisory services nor the institutional investors who choose not to subscribe are complaining about them. The complaints are coming from the people who do not want any oversight on core agency costs like CEO pay or on ESG issues.

It is unfortunate that the same people who always rhapsodize about the purity of the free market when they claim to be job creators and try to justify excessive pay plans somehow get weak in the knees when it comes to actual market responses. The issuer-funded claims of conflicts of interest and over-reliance on proxy advisors are not supported by the facts, as I will discuss below. But it is important to recognize up front that there is no claim of *any* specific proxy proposal that was "wrongly" voted as a result of a proxy advisory recommendation. It is remarkable that issuers would claim that there is a conflict of interest requiring regulatory oversight due to one firm's consulting arrangements with portfolio companies when (1) any client who wishes to avoid those clearly disclosed conflicts has a choice of two other firms that do not do consulting and (2) one would presume, following the "logic" of the claim, that any such conflicts would result in slanting the proxy advice toward corporate executives and boards. No such evidence exists.[5] Proxy advisors seem to be no more persuasive than management's own recommendations, both of which overwhelming recommend votes for the company's proposals and against the shareholder proposals. And if there was any evidence that ISS is more likely to support management-sponsored proposals or oppose shareholder proposals at companies that use their consulting services, we would have seen it.

My most important point: *There is no justification for any regulation of proxy advisors beyond the rules already in place*. The claims by issuers (and their fake, dark money-funded think tanks) of undue influence and conflicts of interest are not just unsubstantiated; they are conclusively disproven by the data. It is important to remember that the origin of proxy advisory services

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[4] Mr. Monks' son continued to be connected to ISS for an additional period. No one in the family has had any connection to the company, which is now majority owned by Deutsche Bourse Group, along with Genstar Capital and ISS management.

[5] For example, see https://repository.upenn.edu/cgi/viewcontent.cgi?article=1093&context=joseph_wharton_scholars

and the focus on the issue of proxy voting by fund managers both stem from documented conflicts of interest stemming from actual and potential commercial relationships between fund management firms and portfolio companies. The only proven undue influence in proxy voting comes from these conflicts, as fund managers are more likely to vote in favor of excessive pay plans and against worthwhile shareholder proposals if the securities are in a company doing business with the fund manager's firm. For example, a recent study by As You Sow[6] found:

> Proxy voting biases favoring clients occurred at all four asset managers [BlackRock, State Street, T. Rowe Price, and Vanguard] on management resolutions and occurred at three of the four asset managers; environmental, social, and governance (ESG) resolutions; and climate-related resolutions. The bottom line is that proxy voting by major asset managers favors their clients — a clear conflict of interest. More stringent reporting requirements and new technological and policy solutions should be implemented to remove proxy voting conflicts of interest and allow shareholder interests, as intended, to be the primary driver of proxy voting.

The key findings of the study:

- From January 2015 through June 2020, BlackRock, State Street, T. Rowe Price, and Vanguard all voted in favor of management resolutions more often when they also had business ties for financial services.
- BlackRock, State Street, and T. Rowe Price supported shareholder ESG proposals less often when they received compensation for financial services from January 2015 through June 2020.
- BlackRock was three times more likely to vote with shareholders when no business ties were present on climate-related proposals from January 2015 through June 2020, voting with shareholders 9.5% with no relations versus 3.1% when commercial relations were present.
- State Street had the highest level of bias on shareholder proposals across the same timeframe, voting with shareholders only 23% when business ties are present versus 37% when no relations were present — showing a 14% bias to favor companies providing compensation.
- In 2019, the four managers analyzed received $489 million in compensation across a total of 932 corporations where they also voted proxies on behalf of shareholders — demonstrating conflict of interest for fund managers that vote proxies at corporate clients.
- The number of years each asset manager favored management recommendations by resolution type is summarized in Figure 1, demonstrating the trend to favor commercial clients.

[6] https://www.asyousow.org/reports/uncovering-conflict-of-interest

The Commission's focus should be on clarifying the obligation of fund managers to vote for the exclusive benefit of beneficial holders and data like that found by As You Sow should create a rebuttable presumption of failure to do so. Unless a fund manager can show that there is a legitimate reason to favor management that has commercial ties to the organization, the Commission should undertake enforcement actions and impose penalties.

Proxy advisory firms mitigate these conflicts of interest with affordable independent analysis. The conflicts of fund managers are a vastly greater problem than the conflicts claimed for ISS by issuers, which have not produced a single data point showing, for example, more support for management at consultant clients than at non-clients. The other two major proxy advisory firms do not have those relationships, and any client who wishes to avoid a proxy advisor that also performs consulting services thus has other choices.

I note that for several years when I worked at another firm, we were retained by one of the world's biggest fund managers to vote proxies at the two dozen or so portfolio companies where they believed their commercial connections or pending transactions could create a real or apparent conflict of interest. I am no longer in this business but I encourage the Commission to consider this as a possible model for fund managers to consider as one option for preventing tainted votes.

The Commission's priorities here should be (1) to clarify the fiduciary obligation to vote proxies solely in the interests of beneficial holders, especially in light of its recission of guidance, (2) to investigate conflicted votes like those documented by As You Sow, (3) to fix the extensive proxy plumbing issues, (4) to provide more accessible information to retail investors about proxy votes by fund managers, and (4) to encourage competition and remove barriers to entry in the proxy advisory sector.

Issuers are spending millions of dollars of corporate money that should be deployed on behalf of creating shareholder value advocating for suppression of proxy advice for just one reason: to kill the messenger, the sole source of independent analysis and advice available on proxy issues. They do not like it that following the Enron-era accounting scandals, the Wall Street securities analyst scandals, the financial meltdown, the exponentially increasing gulf between pay and performance, and many other reminders that the separation between ownership and control has made shareholder oversight all but vestigial, shareholders are increasingly likely to vote against outrageous pay plans and inadequate directors, and in favor of shareholder proposals related to better managing investment risk.

A reminder: **Proxy advisory firms publish analysis no one has to buy or read and recommendations no one has to follow.** These purchases are made – or not -- by the most sophisticated financial professionals in the world. Many fund managers subscribe to more than one proxy advisory service; many subscribe to none.

The subscribers to proxy advisory services are also fiduciaries and thus are governed by the strictest standard in our legal system in addition to the Commission's rules governing

investment advisors. All evidence shows that **the more complicated or controversial the issue, the less likely the subscribers are to follow the advice. They read the analysis and come to their own conclusions**.[7]

The votes are non-binding. In well over 98 percent of the cases, even a 100 percent vote contrary to the recommendation of management is advisory only. Management is free to disregard a majority vote of the shareholders, and they frequently do. So, the burden of proof is very heavy here to show that there is a problem that needs to be solved or that the benefits of any regulation exceed the costs.

"Robo-voting" is a fake term made up by corporate executives to describe something that does not exist[8]. **It is difficult to understand the objection to the claimed "power" of proxy advisory firms as over 90 percent of proxy advisory recommendations are to vote with management.** There is a vast difference between alleged zombie-like "robo-voting" and determining that a proxy item is routine, like voting in favor of unopposed directors or approving the auditors. Advisory votes on CEO pay are usually deemed to be routine as well. In 2021, fewer than three percent of CEO pay plans failed to get majority support from shareholders.[9] If the bottom three percent should not get a "no" vote, then what percentage would the critics of proxy advisory firms consider appropriate?

In the previous rulemaking, some comments brought up the error rate in proxy advisory firm publications, documented at under one percent at ISS. I would challenge any of the critics of ISS to prove a better error rate in their own operations. In any event, even the critics had to concede that the errors were all promptly acknowledged and corrected.

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[7] ProxyInsight found that only 21 percent of investors use the Proxy Voting Policy of a Proxy Voting Advisor and of the 1,086 investors surveyed 70.9 percent vote proxies based on their own policy with a further 8.5 percent delegating to a sub advisor or other asset manager.
Of course, just as every trade involves two different views of a security's value, there will always be different assessments on proxy issues as well, depending on the goals and time horizons of the fund and also on what other securities the fund holds, including bonds or shares in other affected companies. An investment manager might have one view of a proposed business combination based on whether the portfolio is more weighted toward the acquiror or the target. . Ning Chiu of Davis Polk reports, "On shareholder proposals, ISS recommended for social and environmental proposals 55.4 percent of the time, but funds only supported those proposals 25.2 percent of the time. Overall, ISS was in favor of shareholder proposals 64.7 percent of the time, yet funds voted for them only 34.6 percent of the time. But average support for shareholder proposals during the 2017 season was 39 percent," indicating that of that 39 percent a substantial group may not be ISS clients at all.
[8] As used (though not substantiated), for example, in this article, based on research sponsored by the corporate-funded, right-leaning Manhattan Institute. https://corpgov.law.harvard.edu/2021/05/27/proxy-advisors-and-market-power-a-review-of-institutional-investor-robovoting/ Interestingly, the Institute describes itself as focused on promoting free-market principles" with a mission to "develop and disseminate new ideas that foster greater economic choice and individual responsibility," completely contrary to its position on this issue.
[9] https://corpgov.law.harvard.edu/2021/09/08/2021-proxy-season-review-say-on-pay-votes-and-equity-compensation/ This article notes that none of the CEO pay plans that got "no" votes in 2020 got "no" votes in 2021, showing that even an advisory vote can lead to improvements. It also notes, "The most important qualitative factors are performance standards that are deemed not sufficiently rigorous or are not sufficiently disclosed, followed by the use of subjective criteria for determining compensation," showing that the basis for "no" votes reflects thoughtful, credible analysis.

Proxy advisory firms exemplify the operation of free market efficiency. When Robert A.G. Monks first told me about his plans for ISS in 1985, his vision was very different from what it became. He spent a year trying to sell a very different product without making a sale. But many of the institutional investors he called on told him that what they really wanted was advice and recommendations on proxy issues. Unexpectedly, after decades of routine votes on unopposed directors and auditors, in the midst of the Michael Milken era of junk bonds and abuses of shareholders by both what were then called raiders and by entrenched insiders, proxy votes had become material. There were some small firms that looked at what we today would call ESG issues and the non-profit IRRC, funded by Harvard and the Ford Foundation, which provided analysis but no recommendations. And so, ISS began a business of publishing proxy advisories, analysis and recommendations on issues put to shareholders for a vote. All of the current proxy advisory firms are, like any commercial enterprise, extremely sensitive to the preferences of the customers and adapt their products accordingly. As one of them says on its website, their recommendations "are based on proxy voting guidelines chosen by the client, adjusted for company-specific information." There is no evidence that proxy advisors more of an influence on their subscribers than their subscribers are on them.

Today's fund managers who wish to have access to independent analysis of proxy issues have a choice between three major proxy advisors. One has and discloses its conflicts of interest with consulting clients. The other two have none to disclose. One is a registered investment advisor. One is registered as an NRSRO. This gives fund managers a distinctive range of choices. Anyone who wants to start a competitor proxy advisory firm can do so (and the Commission should be careful about making it prohibitively expensive by imposing unnecessary regulatory burdens). A former SEC Commissioner did create a new proxy advisory firm some years ago and its products were impressive. It failed because customers were understandably skeptical due it its initial funding by issuers, proving that this is a robust market with sophisticated consumers who make economically-based choices.

Compare proxy advisory publications to other analyses and recommendations provided to investors:

Unlike the ratings agencies:

- No one is required to buy or issue proxy advisory publications,
- They are paid for by the end users, not the issuers, so there are no moral hazards leading to analysis slanted toward the funders that might need to be monitored, disclosed, or mediated, and
- There is no monopoly. I could begin another proxy advisory service tomorrow and it would be much easier and cheaper than creating ISS because the field is already established (it is always easier to sell a product competing with an existing product than to explain why subscribers need something they never had before) and because back in

1987 we had to receive the proxy materials on paper and send out all of our advisory reports through the mail.[10]

Unlike proxy solicitors:

- Proxy advisors are not paid advocates for corporate insiders. Proxy solicitor materials are sent to all investors including individuals who do not have the expertise of professionals. I have been contacted by proxy solicitors including one who urged me to vote against my own shareholder proposal and so I know from experience how misleading their advocacy can be. Proxy advisor publications go solely to sophisticated financial professionals who make an informed decision to subscribe to their analysis and recommendations and then make their own decisions on how to vote.

Unlike security analyst reports:

- They are freely purchased in the open market by sophisticated financial consumers governed by the strictest standard imposed by our legal system, the fiduciary standard.

Unlike filings and other communications issued by corporate executives and boards:

- Proxy advisory publications are independently produced by people who have no incentive to accommodate corporate insiders.

All of these other communications have built-in agency costs and moral hazards and so the Commission's rules wisely impose strict standards of disclosure, timeliness, and accuracy. But no such conflicts of interest occur with proxy advisors. It is important to remember that back in the 1980s, the conflicts of interest in proxy voting that were of concern were the documented differences between the votes on portfolio company proxies that were clients of the firm and those that were not. Vanguard founder John Bogle wrote about this issue extensively, noting that there are only two kinds of portfolio companies, those that are clients and those that are prospective clients. If fund managers are trying to get 401(k) business from a company, they will think twice about voting against the CEO's pay plan. The Commission's decision to require disclosure of proxy votes by fund managers came only after a Deutsche Bank fund switched its vote on because Hewlitt-Packard gave it a million-dollar fee in order to secure majority support for the merger with Compaq. (That deal later led to an SEC fine,[11] a $1.2 billion write-down, and inclusion in a worst-ever tech merger list,[12] so apparently the original "no" vote was the correct one).

Proxy advisory firms play a more subtle but equally crucial role in market efficiency. Unlike buy/sell decisions, which can be evaluated solely in terms of the costs and benefits to each fund

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[10] The Commission should consider in this rulemaking the importance of not imposing any additional barriers to competition with additional costs. There are three strong proxy advisory services in the market with distinct differences that give their subscribers a choice. The three major players have significant differences to choose from: one is a registered investment advisor, one is a registered NRSRO, one is not registered. One has (disclosed) conflicts of interest due to consulting fees from covered companies; the others do not. A corporate-funded competitor founded by a former SEC Commissioner had an excellent product but was unable to make a profit because the same sophisticated financial professionals were able to evaluate the potential conflicts and decide they undermined the credibility of the recommendations.

[11] https://www.plansponsor.com/deutsche-hit-with-750000-for-h-p-compaq-deal-conflict/?layout=print

[12] https://www.zdnet.com/article/worst-tech-mergers-and-acquisitions-hp-and-compaq/

or even each account[13], **proxy voting in our gigantic capital market is sub-optimally efficient due to the collective choice problem[14]**. Even multi-billion-dollar funds can be "rationally apathetic" because the cost of doing the research and analysis on any given proxy issue plus the cost of overcoming the kind of conflicts of interest described by John Bogle is likely to outweigh the marginal benefits of a "correct" proxy vote. That is, unless enough other large investors vote the same way. Only independent, objective proxy advisory firms can minimize the collective choice problem by bringing down the cost through economies of scale. For buy/sell/hold decisions there is a competitive advantage in having exclusive information (except for inside information, which may be micro-market efficient but not macro because it raises the risks of self-dealing to damage the credibility of the capital markets). But for proxy voting decisions, the more shareholders who have access to independent advice, the better, because it takes a critical mass of votes across a wide variety of investors to make a difference.[15]

As the Commission is well aware, the nearly century-old problem of the separation of ownership and control[16] is changing due to the concentration of stock through intermediaries. As Lucien Bebchuk and Scott First wrote in 2019[17]:

> The Big Three [BlackRock, Vanguard, and State Street Global Advisors] have almost quadrupled their collective ownership stake in S&P 500 companies over the past two decades; that they have captured the overwhelming majority of the inflows into the asset management industry over the past decade; that each of them now manages 5% or more of the shares in a vast number of public companies; and that they collectively cast an average of about 25% of the votes at S&P 500 companies.
>
> We then extrapolate from past trends to estimate the future growth of the Big Three. We estimate that the Big Three could well cast as much as 40 percent of the votes in S&P 500 companies within two decades. Policymakers and others must recognize — and must take seriously — the prospect of a Giant Three scenario. The plausibility of this scenario exacerbates concerns about the problems with index fund incentives that we identify and document in other work.

This is mostly good news. The good news is that we have a stable base of capital, a permanent financial infrastructure to provide a foundation for our markets. We have the potential for

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[13] I note that while it is justifiable to make different buy/sell/hold decisions in different portfolios depending on the stated goals of each fund, the same calculus does not apply to proxy voting. As most investment managers recognize, the interest of fund clients is better served by an enterprise-wide approach to proxy voting.

[14] See for example *Proxy voting and the SEC: Investor Protection Versus Market Efficiency*, John Pound, Journal of Financial Economics, Volume 29, Issue 2, October 1991, Pages 241-285, incorporated in full here by reference.

[15] We recommend this scholarship on a related or analogous issue as a subject for future consideration by the Commission. https://theshareholdercommons.com/wp-content/uploads/2018/07/Taking-a-Benefit-Stance.OXREP-ArticleSSRN.Vers1_.pdf

[16] See, for example https://reference.findlaw.com/lawandeconomics/5630-the-separation-of-ownership-and-control.pdf

[17] The Specter of the Giant Three, Boston University Law Review, Vol. 99, 2019, pp. 721-741

committed, long-term owners who can protect companies and fellow shareholders from rapacious activists seeking short-term gains. These permanent investors have the experience and expertise and access to resources to understand what is on a proxy and the incentives to make good decisions for the long term. The obstacles are the commercial conflicts and collective choice issues described above. The opportunity, as outlined by The Shareholder Commons and others, is for a Beta-based portfolio theory that focuses on overall market returns.

Here is a thought experiment: Let's imagine that for reasons of conflicts of interest rather than a legitimate difference of opinion a proxy advisor makes a recommendation clearly contrary to the best interests of shareholders and then for reasons of negligence or its own corrupting conflicts of interest a money manager casts the "wrong" vote. Where should the Commission's focus be? Perhaps the Commission should ratify the practice already in place to require proxy advisory firms disclose of all economic ties to the company. But that will not solve the problem. I would argue that the Commission's primary focus should be on the failed fiduciary obligation of the money manager.

This is why it is critically important in considering this rulemaking to evaluate the impact of the rescinded guidance on proxy voting by investment managers, especially important because the decision to rescind the guidance was mysteriously unsupported. Why rescind two 2004 letters about proxy advisory services before the roundtable scheduled for just weeks later to present expert testimony on many elements of the proxy system, including proxy advisors and shareholder proposals? Why act before the evidence was on the record and the Commissioners and staff had a chance to ask questions? At the time, I followed up with the "for more information, contact" email in the very unforthcoming announcement of this decision and the only answer I got from the staff was that rescinding the guidance would "facilitate" the hearing. I then asked how acting before hearing the testimony would "facilitate the hearing" and was simply told again that it would facilitate the hearing. Rosanna Landis Weaver of As You Sow filed an FOIA request asking for any memoranda or notes from staff meetings with interested parties concerning the guidelines. She received a reply saying that no such documents existed. The Commission has never explained who asked for withdrawal of the guidelines and there is no information in the record about any analysis that went into the decision, a prima facie case of the decision's being arbitrary and capricious. There is nothing in the record of this rulemaking or the previous about the impact of that decision. Any examination of the legitimacy of proxy votes cast by investment managers should include a comparison of those votes and the reliance on proxy advisory firms before and after the guidance was rescinded.

If the Commission has data showing that an institutional investor is voting proxies for any reason other than a strictly financial assessment of risk and return on behalf of the beneficial holders, the Commission has not only the authority but the obligation to investigate and, when appropriate, assess a penalty, as they did with Deutsche Bank. The same applies to any evidence that an institutional investor is delegating voting authority explicitly or implicitly (by following proxy advisor recommendations without any other assessment) without sufficient attention to the best interests of the beneficial holders.

After the Commission turns its attention to the well-documented problems with “proxy plumbing,” it can then make a better evaluation of the quality of proxy voting and exercise of other rights of share ownership, including engagement, shareholder proposals, litigation, and dissident slates by fund managers. As it considers the costs and benefits of this rulemaking, it should be especially cautious about imposing rules that will make it even harder for new entries into the proxy advisory field, like the one proposed by The Shareholder Commons[18].

I appreciate the Commission’s attention to these issues and will be reviewing other comments to determine whether I need to supplement this filing with any responses. I am also available to provide further information or meet with staff if that would be of assistance.

Sincerely,

Nell Minow

Nell Minow
Vice Chair

[18]https://docs.google.com/forms/d/1nvgaihFDBhsmrMf_7wZzqWfnabsOzXfFOrUAZHeZ3Jk/viewform?edit_requested=true