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Filed Electronically

December 22, 2021

Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Proxy Voting Advice; *File No. S7-17-21 (Proposal)*

Dear Ms. Countryman:

Institutional Shareholder Services Inc. (ISS) submits these comments in response to the Proposal to rescind portions of the rules the Commission adopted last year to regulate fiduciary proxy voting advice as though it were a proxy solicitation under the Securities Exchange Act of 1934 (Exchange Act).[1]

The first of these rules (collectively, the "2020 Rules") codified an expansive definition of "solicitation" that the Commission initially articulated in a 2019 Interpretation and Guidance.[2] As a result of this new definition, three of the five U.S. proxy advisory firms were recharacterized as "proxy voting advice businesses"—a term never before used in law or commerce—and treated like proxy solicitors for purposes of the Exchange Act proxy rules.[3] The second rule conditioned covered proxy advisers' access to exemptions from the proxy rules' information and filing requirements on certain conflict of interest disclosures and on the establishment of a mechanism by which the subjects of proxy voting advice can review that advice and convey their views thereon to the covered proxy advisers' investor clients.[4] Finally, the Commission expanded the scope of potential liability for covered proxy advisers by amending a note to the proxy solicitation antifraud rule (Note) to include specific examples of material misstatements or omissions related to proxy voting advice.[5] Like the definitional rule, this amendment derived from the 2019 Interpretation and Guidance, which indicated that a covered proxy adviser could be sued for its "opinions, reasons, recommendations, or beliefs, which may be statements of material facts for purposes of [Rule 14a-9]."[6]

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[1] *Proxy Voting Advice,* Exchange Act Rel. No. 93595 (Nov. 17, 2021), 86 Fed. Reg. 67383 (Nov. 26, 2021) (Proposing Release). *See also Exemptions from the Proxy Rules for Proxy Voting Advice,* Exchange Act Rel. No. 89372 (Jul. 22, 2020), 85 Fed. Reg. 55082 (Sep. 3, 2020) (2020 Adopting Release).

[2] Rule 14a-1(l); 17 CFR 240.14a-1(l). *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, Exchange Act Rel. No. 86721 (Aug. 21, 2019), 84 Fed. Reg. 47416 (Sep. 10, 2019) (2019 Interpretation and Guidance).

[3] The instant rulemaking substitutes an acronym for the 2020 Rules' novel terminology, thus further distancing the regulated entities from their advisory roots. For purposes of clarity, ISS refers to these firms as "covered proxy advisers."

[4] Rule 14a-2(b)(9)(i) and (ii); 17 CFR 240.14a-2(b)(9)(i) and (ii).

[5] Rule 14a-9, Note (e), 17 CFR 240.14a-9, Note (e).

[6] 2019 Interpretation and Guidance at 11, 84 Fed. Reg. at 47419.

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The Commission now proposes to rescind two aspects of the 2020 Rules: the Rule 14a-2(b)(9)(ii) conditions requiring covered proxy advisers to share their reports and recommendations with issuers and disseminate issuers' views on same (Issuer Review and Feedback Conditions); and that portion of the Note that provides examples of situations in which covered proxy advisers may be deemed to violate the proxy rules' prohibition on material misstatements or omissions. The Commission does not propose to disturb any other aspect of the 2020 Rules.

ISS is pleased to support the Proposal insofar as it partially rescinds the 2020 Rules. However, ISS respectfully submits that this proposal does not go far enough and that the 2020 Rules and the 2019 Interpretation and Guidance on which they are based should be rescinded in their entirety.

The Issuer Review and Feedback Conditions Should Be Rescinded

The 2020 Rules were promulgated at the behest of certain corporate issuers and their representatives, who claimed, among other things, that proxy voting advice is prone to "factual errors, incompleteness, or methodological weaknesses."[7] On the other hand, these rules were strenuously opposed by virtually every segment of the investing public, including public pension plans,[8] mutual funds,[9] hedge funds,[10] other investment advisers,[11] trade associations,[12] labor

[7] *Amendments to the Exemptions from the Proxy Rules for Proxy Voting Advice*, Exchange Act Rel. No. 87457 (Nov. 5, 2019) at 39, 84 Fed. Reg. 66518, 66528 (Dec. 4, 2019) (2019 Proposing Release). The rules proposed in the 2019 Proposing Release are referred to as the "2019 Proposal."

[8] *See e.g.,* the following comments to the 2019 Proposal, *available at* SEC.gov/ Comments on Proposed Rule: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice: Thomas P. DiNapoli, New York State Comptroller (Feb. 3, 2020); Karen Carraher, Executive Director, and Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System (Feb. 3, 2020); Ron Baker, Executive Director, Colorado Public Employees' Retirement Association (Feb. 3, 2020) (CoPERA Letter); Aeisha Mastagni, Portfolio Manager, California State Teachers' Retirement System (Feb. 3, 2020) (CalSTRS Letter; Marcie Frost, Chief Executive Officer, California Public Employee Retirement System (Feb. 3, 2020) (CalPERS Letter); Jocelyn Brown, Senior Investment Manager, RPMI RailPen (Jan. 31, 2020).

[9] *See e.g.,* comment letters from William J. Stromberg, Pres. and CEO, T. Rowe Price (Jan. 29, 2020); and Chris C. Meyer, Manager of Advocacy and Research, Everence and the Praxis Mutual Funds (Jan. 31, 2020).

[10] *See e.g.,* comment letters from Richard B. Zabel, General Counsel and Chief Legal Officer, Elliott Management Corporation (Jan. 31, 2020); and Barbara Novick, Vice Chairman, BlackRock, Inc. (Feb. 3, 2020).

[11] *See e.g.* comment letters from Amy D. Augustine, Director of ESG Investing, and Timothy H. Smith, Director of ESG Shareowner Engagement, Boston Trust Walden (Jan. 31, 2020); David Harris, President & Chief Investment Officer, and Casey Clark, Director of ESG Research & Engagement, Rockefeller Asset Management (Jan. 31, 2020); Joseph V. Amato, President and Chief Investment Officer, Neuberger Berman (Jan. 27, 2020); Duane Roberts, Director of Equities, Dana Investment Advisors (Dec. 5, 2019); Medhi Mahmud, President & CEO, First Eagle Investment Management, LLC (Feb. 14, 2020); and Sharon Fay, Co-Head Equities, and Linda Giuliano, Head of Responsible Investment, AllianceBernstein (Feb. 3, 2020).

[12] *See e.g.,* comment letters from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Jan. 30, 2020); Karen L. Barr, President and CEO, Investment Adviser Association (Feb. 3, 2020); Paul Schott Stevens, President and CEO, Investment Company Institute (Feb. 3, 2020); James Allen, Head, and Matt Orsagh, Senior Director; Capital Markets Policy, CFA Institute (Feb. 3, 2020) (CFA Institute Letter); and Christopher Gerold, President, North American Securities Administrators Association (NASAA) (Feb. 3, 2020).

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groups,[13] faith-based groups[14] and even a majority of the Commission's own Investor Advisory Committee.[15] Investors expressly disputed the need for SEC intervention to address "errors" in proxy advice, with one commenter observing:

> The only supporting 'proof' [of factual inaccuracies and methodological weaknesses] contained in the proposing release are the self-serving (and we believe to be factually incorrect) statements by consultants-of-hire to the issuer community. These claims of errors. . . seem more like proof of the absence of a problem rather than the basis for regulation. . . . Globally, we understand that [these companies] cover something approaching 26,000 companies and have less than a 1% error rate").[16]

Consumers of proxy voting advice also took issue with an "error" table in the 2019 Proposing Release,[17] noting that only 0.3% of registrants that filed proxies between 2016 and 2018 raised concerns about alleged factual errors in proxy advice by filing additional proxy materials and none of those purported errors was deemed by the SEC to be material.[18] These commenters further noted the absence of any analysis of whether these so-called errors were really errors at all, or just differences of opinion.[19]

At the heart of these comments was investors' steadfast belief that the proxy voting advice they receive from the fiduciary advisers they engage must be timely, independent and cost-effective. For this reason, investors opposed any regulatory measures that would interpose the subjects of proxy

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[13] *See e.g.,* comment letter from Brandon J. Rees, Deputy Director, Corporations and Capital Markets, AFL-CIO (Feb. 3, 2020).

[14] *See e.g.,* comment letters from Sister Sandra Sherman, O.S.U., President, Ursuline Convent of the Sacred Heart (Nov. 26, 2019); N. Kurt Barnes, Treasurer and CFO, The Episcopal Church (Feb. 12, 2020); Regina McKillip, OP, Promoter of Peace and Justice, Dominicans of Sinsinawa (Feb. 3, 2020); Kathryn McCloskey, Director, Social Responsibility, United Church Funds (Feb. 3, 2020); and Josh Zinner, CEO, Interfaith Center on Corporate Responsibility (Feb. 3, 2020).

[15] Comment letters from SEC Investor Advisory Committee (Jan. 24, 2020); J. Coates, Professor of Law and Economics, Harvard Law School, and Barbara Roper, Consumer Federation of America (Jan. 30, 2020).

[16] Letter from Carl C. Icahn (Feb. 7, 2020) 4. *See also* letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Feb. 4, 2020) (CII Letter II) 6 ("[T]he evidence suggests the rate of factual errors in proxy advice is extremely low, and the mechanisms that proxy advisors have in place to correct any such errors are prompt and effective"); CFA Institute Letter at 6 ("Based on several estimates, the mistakes are a tiny fraction of annual proxy issues voted. Moreover, the quality of proxy advice has never been higher"); CoPERA Letter at 7 ("Concerns about errors in proxy reports are not shared by PERA. In the 30 years that we have contracted with proxy advisors, we have not known of any material issues with, or errors in, the proxy reports and analysis").

[17] 2019 Proposing Release at 96, 84 Fed. Reg. at 66546. *See also* SEC, Division of Economic and Risk Analysis, Memorandum to File S7-22-19 regarding "Data analysis of additional definitive proxy materials filed by registrants in response to proxy voting advice" (Jan. 16, 2020).

[18] CoPERA letter at 6. *See also* letter from Joel Schneider, Chair, Corporate Governance Committee, Dimensional Fund Advisors (Feb. 3. 2020) 1.

[19] Letter from Lisa Woll, CEO, The Forum for Sustainable and Responsible Investment (Jan. 31, 2020) 3; *see also* CII Letter II.

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voting advice between the investors and their advisers. Believing that the consumers of proxy voting advice should get the first, unvarnished look at the reports and recommendations they pay for, investors were particularly opposed to the proposed version of Rule 14a-2(b)(9)(ii), which would have given public companies two opportunities to review, and one chance to respond to, proxy advice before that advice was disseminated to covered proxy advisers' clients.[20]

The Commission responded to the public comments by replacing the proposed advance review and feedback conditions in Rule 14a-2(b)(9(ii) with a condition requiring the adoption and public disclosure of written policies and procedures reasonably designed to ensure that the subjects of proxy voting advice have that advice made available to them at or prior to the time when the advice is disseminated to advisory clients, and a condition requiring the establishment of a mechanism to make investors aware of issuers' written statements about the advice.

In adopting the final rule, the Commission also switched rationales for the review and feedback requirements. Instead of focusing on the need to enhance the factual accuracy of proxy voting advice—which was the driving force behind the 2019 Proposal—the Commission abandoned any reliance on purported "errors and inaccuracies" and now focused on an alleged need to give investors "a more complete mix" of information, by supplementing covered proxy advisers' independent analysis with self-interested commentary from the subjects of that advice.[21]

It is not surprising that these changes failed to assuage investors' concerns or dissipate their objections.

Although the 2020 Rules dropped the advance review requirement, the 2020 Adopting Release encouraged covered proxy advisers who were already giving issuers a "first look" at their proxy voting reports to continue to do so, despite investors' clearly articulated concerns that this practice could jeopardize the independence and timeliness of proxy advice.[22] Moreover, relying on the gauzy concept of "completeness" raises the question of who the arbiter of such completeness might be. To the extent the arbiter might be the subject of the proxy voting advice, investors' concerns about the independence of such advice are amply justified.

Concerns about the independence, timeliness and cost of proxy advice subject to the Issuer Review and Feedback conditions also arise from the fact that these conditions are so unique. As explained in more detail below, proxy voting advice is a form of investment advice and proxy advisers are investment advisers under the Investment Advisers Act of 1940 (Advisers Act). In no other circumstance does the Commission subject an investment adviser's analyses and opinions to an assessment by the subjects thereof. For example, an adviser who recommends that its clients sell

[20] *See* Proposing Release at notes 12 and 21. The proposal also would have obliged covered proxy advisers to transmit the issuers' assessment of the voting advice to clients, if the issuers so requested.

[21] 2020 Adopting Release at 86-87, 165-166 and 183-184, 85 Fed. Reg. at 55107, 55131 and 55136. However, the Commission did not drop the accuracy argument altogether, predicting that the Review and Feedback Conditions would help ensure that covered proxy advisers' clients "have more complete, accurate and transparent information to consider when making their voting decisions." Proposing Release at 11, 86 Fed. Reg. at 67385.

[22] Proposing Release at notes 21 and 22. As discussed below, ISS has listened to its clients on this point and replaced its limited pre-review process with an enhanced data integrity alternative.

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their stock in a public company after determining that the company's directors are making bad decisions is not obliged either to provide that recommendation to the company, or to ensure that clients have "ready and timely access" to the company's "perspectives" on that recommendation. It is hard to fathom why such obligations should be imposed on a proxy adviser who makes the same type of determination about a company's directors and then recommends that clients vote against the directors' re-election.

By the same token, it is hard to understand why the Commission should dictate the mix of information investors use in making proxy voting decisions. In most cases, covered proxy advisers' clients are, themselves, sophisticated fiduciaries with a duty to vote proxies in their clients' best interests. That duty already entails deciding which information to consider before casting a proxy vote.[23] There is no need for additional regulation that would increase fiduciaries' compliance burdens without producing any offsetting benefits to investors.

In light of the foregoing, we agree that it is appropriate to reassess the Commission's policy judgment to adopt the Issuer Review and Feedback Conditions and we support the Commission's proposal to rescind Rule 14a-2(b)(9)(ii) and ancillary subsections (iii) – (vi). We also agree with the Commission's observation that covered proxy advisers' current practices already address the accuracy and integrity concerns that purportedly led to the 2020 Rules.

As a registered investment adviser, ISS is committed to fulfilling its fiduciary duty of care and the attendant obligation to take reasonable steps to ensure that its investment advice is based on accurate and complete information. To this end, ISS ensures quality and accuracy in its published research in the following ways:

- Reports and recommendations are driven by publicly available information and based on publicly disclosed and detailed voting policy guidelines.
- ISS maintains comprehensive information procurement processes for company-published information and meeting documentation.
- Issuer data used by ISS is consistently collected, classified and subject to quality control review before it is used by ISS' analysts.
- Prior to finalization and delivery to clients, each proxy research report is subject to internal review for accuracy, quality and to ensure that the relevant voting policy has been correctly applied.
- All issuers may request and receive, at no charge, a copy of the published ISS benchmark research report, including the vote recommendations in advance of its shareholder meeting. Issuers who pre-register for this service are notified when such reports are available for them to access.

[23] *See Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers,* Advisers Act Rel. No. 5325 (Aug. 21, 2019), 84 Fed. Reg. 47420 (Sep. 10, 2019) (IA Voting Guidance), text accompanying note 15 ("[F]or an investment adviser to form a reasonable belief that its voting determinations are in the best interest of the client, it should conduct an investigation reasonably designed to ensure that the voting determination is not based on materially inaccurate or incomplete information.").

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- Although in response to institutional clients' comments on the 2019 Proposal ISS no longer provides draft reports to U.S. companies in the S&P 500 for pre-review, ISS regularly engages with issuer representatives, institutional shareholders, dissident shareholders, sponsors of shareholder proposals, and other parties to gain deeper insight into issuers under consideration or to check material facts relevant to our research. ISS may also, in its discretion, engage with issuers and others upon their request.

- ISS has also recently enhanced its data verification program which allows issuers to verify more than 400 governance and compensation data points that are typically used in ISS' proxy research reports, thereby providing ISS clients with greater assurance of data integrity.

- In the event new material public information becomes available or if ISS finds that a report contains a material error, ISS promptly issues a Proxy Alert (Alert) to inform clients of any corrections and, if necessary, any resulting changes in the vote recommendations. Alerts are distributed to ISS' investor clients through the same ProxyExchange platform used to distribute the original research and voting recommendations. This ensures that the clients who received an original report will also receive the related Alert, which is attached to the relevant original company meeting report. Even if a client has cast its vote before receiving an Alert, the client may cancel and change its vote at any time before the meeting cut-off date, if the client determines that such a change is warranted by the new information.

- ISS maintains a Feedback Review Board (FRB), which I oversee as ISS' President and CEO. The FRB serves as an additional channel for issuers or others to communicate with ISS any unresolved concerns regarding accuracy of research, accuracy of data, policy application and general fairness of ISS policies, research, and recommendations.

- ISS conducts regular SSAE 18 audits to check compliance with internal control processes. Controls around ISS' research process are included in these audits.

In addition to satisfying its obligations as a registered investment adviser, ISS is also a signatory to the Best Practice Principles for Providers of Shareholder Voting Research & Analysis. These Principles are a set of industry standards in the field of shareholder voting research and analysis developed by an international consortium known as the Best Practice Principles Group (BPPG). The core Best Practice Principles are: (i) Principle One, Service Quality - maintaining a high level of service quality, (ii) Principle 2, Conflicts-of-Interest Avoidance or Management - disclosure of policies that address potential or actual conflicts of interest, and (iii) Principle Three, Communications Policy - publication of policies for communication with issuers, shareholder proponents, other stakeholders, the media and the public. As the Proposing Release notes, after reviewing member firms' compliance reports, an independent Oversight Committee of the BPPG recently concluded that ISS and the other members (one of whom is the other large covered proxy adviser) met the standards established in the three core best practice principles.[24]

The proposed rescission of the Issuer Review and Feedback Conditions is amply supported by the existence of these alternative safeguards and the fact that, even as modified, the conditions

[24] Proposing Release at 14-15, 86 Fed. Reg. at 67386. ISS' BPPG compliance report is available at: *https://bppgrp.info/wp-content/uploads/2021/03/best-practices-principles-iss-compliance-statement-jan-2021-update.pdf.*

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continue to pose a threat to the independence, timeliness and cost-effectiveness of proxy voting advice. Furthermore, rescission is warranted for two additional reasons that the Commission declined to discuss. For purposes of completeness, ISS addresses each of these, starting with the fact that the Commission did not have the authority to adopt Rule 14a-2(b)(9).

The Issuer Review and Feedback Conditions Exceed the Commission's Statutory Authority, Because Proxy Voting Advice Cannot Be Regulated as a Proxy Solicitation

Section 14(a) of the Exchange Act makes it unlawful to solicit or to permit the use of one's name to solicit a proxy, consent or authorization in contravention of the rules and regulations prescribed by the Commission. Unfortunately, the statute does not define the term "solicit."

In the absence of a statutory definition, the term must be construed in light of its ordinary meaning at the time Section 14(a) was enacted. Under a plain-text interpretation of the Exchange Act, a person who "solicits" a proxy is distinct from a person who "advises" about a proxy. At the time Congress enacted Section 14(a), "solicit" meant "[t]o ask for with earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite"; and "solicitation" was defined as, "[a]sking; enticing; urgent request."[25] These definitions make clear that a solicitor has a certain objective or goal (e.g., make a sale, win a vote, raise money for charity) and engages in solicitation (e.g., appeals, requests, petitions, campaigns, etc.) in an attempt to achieve that objective. The phrase "solicit any proxy" thus has a clear and unambiguous meaning: to seek authority or ask a shareholder to vote a certain way in order to achieve a specific outcome in a matter requiring shareholder approval.

By contrast, the contemporaneous definition of "advise" was "[t]o give an opinion or counsel, or recommend a plan or course of action. . . . 'Advise' indicates that it is discretionary or optional with the person addressed whether he will act on such advice or not."[26] The distinction between soliciting and advising is just as strong today as it was in the 1930s. Contemporary synonyms for "solicit" are "beg," "beseech," "implore" and "supplicate," while synonyms for "advise" include "caution," "point out," "recommend" and "suggest."[27]

The distinction between a person who solicits and one who advises is reflected not just in the lexicons, but in industry custom and usage as well. For example, a 2016 GAO report on the role of proxy advisers in the shareholder voting and corporate governance ecosystem draws a clear distinction between a proxy solicitor and a proxy advisory firm. The former is commonly understood to mean a "[s]pecialist (firm) hired to gather proxy votes," whose role is to "[h]elp public companies identify, locate, and communicate with shareholders to secure votes,"[28] while the latter is commonly

[25] *Black's Law Dictionary* 1639 (3d ed. 1933); *see also* the *Concise Oxford Dictionary of Current English* 1150 (1931) (defining "solicit" as "[i]nvite, make appeals or requests to, importune"); *Funk and Wagnalls New Standard Dictionary of the English Language* 2315 (1932) (defining "solicit" as "[t]o ask for with some degree of earnestness; seek to obtain by persuasion or entreaty").

[26] *Black's Law Dictionary, supra* at 68; *see also The Concise Oxford Dictionary of Current English* (1931) (defining "advise" as "[o]ffer counsel to" and "adviser" as a "person habitually consulted").

[27] *Roget's 21st Century Thesaurus* (3d ed. 2013).

[28] *See* U.S. Gov't. Accountability Office, GAO-17-47, CORPORATE SHAREHOLDER MEETINGS, Proxy Advisory Firms' Role in Voting and Corporate Governance Practices, 6 (2016).

understood to mean a "[t]hird-party that provides services to institutional investors that include research and vote recommendations on proposals."[29]

An examination of the pertinent legislative history confirms that Congress never intended Section 14(a) to be used as a weapon against proxy advisers. Congress enacted this provision in 1934 to eliminate the kinds of abuses that were deemed to have contributed to the stock market crash of 1929 and the Great Depression. Determining that a "renewal of investors' confidence in the exchange markets can be effected only by a clearer recognition upon the part of the corporate managers of companies whose securities are publicly held of their responsibilities as trustees for their corporations," Congress designed Section 14(a) to eliminate "unfair practices by corporate insiders." [30]

The only parties other than corporate insiders who were on Congress' radar when it adopted Section 14(a) were outsiders who might misuse the proxy process *to gain control over public companies:*

> It is contemplated that the rules and regulations promulgated by the Commission will protect investors from promiscuous solicitation of their proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporation officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts.[31]

There is no evidence whatsoever in the congressional record to suggest that Congress authorized the SEC to use Section 14(a) to regulate persons who were not seeking to achieve a particular outcome in a proxy vote, such as disinterested fiduciary advisers. Examining what the courts have said about this provision leads to the same conclusion.

Over the years, the courts have confirmed that Congress designed Section 14(a) to cover persons who seek "to maintain or gain control of a corporation through solicitation of the corporate voting rights of the shareholders."[32] The courts have further recognized that the purpose of this provision is "to protect a shareholder's investment from self-serving designs of those at odds with the best interests of the corporation."[33] Although courts have adopted a broad reading of the term "solicitation" in a vertical sense—covering a chain of communications leading to a request for shareholder action by a party whose ultimate goal was to effect a particular outcome for the corporation[34]—courts have never stretched the concept horizontally to encompass parties who

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[29] *Id*.

[30] H.R. Rep. No. 73-1383, at 13-14 (1934).

[31] S. Rep. No. 73-1455 at 77 (1934).

[32] *Greater Iowa Corp. v. McLendon,* 378 F.2d 783, 795 (8th Cir. 1967).

[33] *Cowin v. Bresler*, 741 F.2d 410, 427 (D.C. Cir. 1984). *See also Lynch v. Fulks*, 1980 U.S. Dist. LEXIS 16099 at *9 (D. Kan. Dec. 12, 1980) ("The more fundamental purpose of [Section 14(a)] is to protect the investment of the corporate shareholder from those whose inclination to use the corporation for their own selfish ends conflicts with the best interests of the corporation and its owners as a whole").

[34] *See Long Island Lighting Co. v. Barbash*, 779 F.2d 793 (2d Cir. 1985) (advertisement backed by parties interested in effecting changes at a public utility could be a solicitation if it constituted a step in a chain leading to a request to furnish, revoke or withhold proxies); *SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943) (letter by

were completely indifferent to the outcome of the matter as to which shareholder approval was sought.

In all cases where a proxy solicitation has been found, the "solicitor" had an identifiable interest in the result of the shareholder action or sought to achieve a certain specific outcome in an upcoming vote.[35] This is so even where the communication in question was authored by a disinterested party.[36] While a financial intermediary's report urging shareholders to back one suitor over another in a contested merger has been deemed to be a solicitation by the suitor who assisted in the report's preparation and then mass distributed it,[37] and while an issuer's deliberate misstatement of a proxy advisory firm's vote recommendation has formed the basis for a Section 14(a) claim against the company and its nominees for the board of directors,[38] no court has ever found a proxy adviser or other independent fiduciary itself to have "solicited" a proxy within the meaning of Section 14(a) and related rules.

In fact, no court has ever suggested that a party who advises one shareholder to vote for, and another shareholder to vote against, the same ballot proposal—as covered proxy advisers often do—could be engaged in a solicitation. On the contrary, because solicitors communicate for the purpose of effecting a particular outcome, all the recommendations at issue in the Section 14(a) cases were unidirectional. By the same token, no court has ever found that a shareholder was "solicited" by a communication she selected and paid to receive from her own fiduciary adviser.

The SEC, too, over the years has addressed the circumstances under which a financial intermediary might be deemed to engage in a proxy solicitation. Here, the Commission has drawn a distinction between *unsolicited* voting advice, which might be subject to Section 14(a) and *solicited* voting advice, which is not. A financial intermediary who voluntarily distributes soliciting material to persons who have not asked for it might be engaged in a solicitation, but an intermediary who responds to a client's request for advice and acts in its capacity as the customer's adviser is not engaged in a solicitation, because the latter adviser is not trying to effectuate a particular outcome in the shareholder vote.[39] The Commission has also acknowledged that applying the Exchange Act

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shareholder asking fellow shareholders to withhold or revoke proxies so he could get himself elected as an officer of the company held to be a solicitation because it was "part of a continuous plan ending in solicitation and which [prepared] the way for its success").

[35] *See Bender v. Jordan*, 439 F. Supp. 2d 139 (D. D.C. 2006) (solicitation made by bank employee who sent a letter to shareholders to reject a dissident shareholder); *Canadian Javelin, Ltd. v. Brooks*, 462 F. Supp. 190, 194 (S.D.N.Y. 1978) (solicitation made by shareholders' committee formed to oust current management).

[36] *See Crouch v. Prior,* 905 F. Supp. 248 (D. V.I. 1995) (research analyst note imputed to member of the board of directors seeking shareholder consent to change the composition of the board; author of the note not alleged to have solicited a proxy or to have permitted the use of her name for that purpose).

[37] *Union Pacific R.R. Co. v. Chicago and North Western Ry. Co.,* 226 F. Supp. 400 (E.D. Ill. 1964).

[38] *Burkle v. OTK Assocs., LLC*, 2 F. Supp. 3d 519 (S.D.N.Y. 2014).

[39] *Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, Exchange Act Rel. No. 16104 (Aug. 13, 1979), 44 Fed. Reg. 48938 (Aug. 20, 1979) at note 25, *citing Broker-Dealer Participation in Proxy Solicitations*, Exchange Act Rel. No. 7208 (Jan. 7, 1964), 29 Fed. Reg. 341 (Jan. 15, 1964). This view was restated in a letter from Abigail Arms, Chief Counsel of the

proxy rules to persons whose expressed opinions might be reasonably calculated to affect the views of shareholders positively or negatively toward a particular company and its management or directors, but who do not ask a shareholder to grant, revoke or deny a proxy, would lead to a "distortion of the purposes of the proxy rules."[40]

It was not until the 2019 Interpretation and Guidance that the Commission ever suggested that Section 14(a) and related rules apply to an investment adviser who distributes voting research and recommendations only to shareholder clients who have expressly engaged it to do so. Nor, until then, had the Commission ever said that the proxy rules apply to advice rendered by a disinterested party in the context of a fiduciary relationship.

ISS continues to believe that the 2019 Interpretation and Guidance and the 2020 Rules that followed are contrary to the text, congressional intent and long-standing judicial interpretation of Section 14(a) and that proxy voting advice cannot be regulated as a proxy solicitation.

The Issuer Review and Feedback Conditions are Constitutionally Infirm

The Issuer Review and Feedback Conditions should be rescinded not just because they are bad policy and exceed the Commission's statutory authority, but also because they are unconstitutional restrictions on speech. Proxy advisers engage in speech and expression protected by the First Amendment when they provide independent advice, recommendations and analysis to their clients. This speech addresses matters of critical importance—including corporate transactions such as mergers and acquisitions, executive compensation and corporate governance policies—and ensures that investors have "the information needed to hold corporations . . . accountable."[41] Proxy advisers may also offer their opinions about corporate proposals' compatibility with an investor's unique voting priorities regarding sustainability, labor relations, social responsibility or other investor-specific criteria. These communications to clients are clearly "form[s] of expression protected by the Free Speech Clause of the First Amendment."[42]

There is no question that the Issuer Review and Feedback Conditions burden covered proxy advisers' protected speech. The First Amendment protects the freedom to decide "both what to say and what *not* to say."[43] Yet the issuer review provision forces covered proxy advisers to share their analysis and recommendations with companies that are not their clients, while the feedback provision forces covered proxy advisers to facilitate and disseminate issuers' responses to the proxy voting advice. A requirement that forces one speaker to "assist in disseminating [someone else's] message . . . necessarily burdens the expression of the disfavored speaker."[44]

Division of Corporation Finance to Richard G. Ketchum, EVP, Legal, Regulatory & Market Policy of the NASD, Inc., dated May 19, 1992.

[40] *Regulation of Communications Among Shareholders,* Exchange Act Rel. No. 31326 (Oct. 16, 1992), 57 Fed. Reg. at 48276 - 48278 (Oct. 22, 1992).

[41] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 370 (2010).

[42] *Sorrell v. IMS Health*, 564 U.S. 552 (2011).

[43] *Riley v. Nat'l Federation for the Blind*, 487 U.S. 781, 797 (1988).

[44] *Pacific Gas & Electric Co. v. PUC of California,* 475 U.S. 1, 15 (1986).

The restrictions the Issuer Review and Feedback Conditions impose on covered proxy advisers' speech are both content-based and viewpoint-based because they target one specific type of speech (proxy voting advice) and one class of speakers (covered proxy advisers). Indeed, the whole premise of Rule 14a-2(b)(9)(ii) is that the content of covered proxy advisers' speech may be inadequate or insufficient unless it can be supplemented with issuers' speech. Furthermore, these restrictions have been designed with surgical precision to apply not to proxy voting advice generally, but only to proxy voting advice rendered by the firms who have long been the targets of disgruntled corporate issuers.[45] Likewise, the restrictions grant a special review-and-reply right only to U.S.-registered issuers and not to other parties, such as opponents of management-backed proposals.

Laws that impose content-based or viewpoint-based burdens on protected speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[46] Neither a compelling state interest nor narrow tailoring can be found in Rule 14a-2(b)(9)(ii). While on the surface the Issuer Review and Feedback Conditions were touted as an amorphous way to "enhance the mix" of information available to covered proxy advisers' investor clients, the 2020 Adopting Release makes it clear that they were really designed to promote "access to the registrant's perspective on [proxy voting] advice."[47] That "perspective" includes expressions of "disagreements that extend beyond the voting recommendation itself," such as criticizing the covered proxy adviser's "methodological approach" or offering other thoughts that the issuer "believes are relevant to the voting advice."[48] The practical effect of the Issuer Review and Feedback Conditions is to force covered proxy advisers to disseminate speech that is directly contrary to their own and may even involve broadside attacks on proxy advisers themselves. The Supreme Court has repeatedly rejected claims of compelling state interest in situations such as this.[49]

Nor can the Issuer Review and Feedback Conditions be characterized as "narrowly tailored," because they ignore the fact that issuers already have ample opportunity to explain their "perspectives" to shareholders and covered proxy advisers' clients already know how to access and assess those perspectives on their own. They also ignore covered proxy advisers' fiduciary imperatives under the Advisers Act and their robust market-based incentives to produce accurate and complete research, reports and vote recommendations. Indeed, the Commission did not promulgate the Issuer Review and Feedback Conditions because they were the least restrictive means of achieving the stated objectives. It promulgated them for the sake of convenience, in a

[45] The 2020 Rules do not apply to voting advice from an investment adviser who does not separately market its proxy advisory expertise. 2020 Adopting Release at 48, 85 Fed. Reg. at 55134.

[46] *NIFLA v. Becerra,* 138 S. Ct. 2361, 2371 (2018), *quoting Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2226 (2015). The Issuer Review and Response Conditions are not subject to a less-demanding First Amendment review standard because the conditions require far more than the disclosure of "purely factual and uncontroversial information." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

[47] 2020 Adopting Release at 194, 85 Fed. Reg. at 55136.

[48] *Id.* at 106, 85 Fed. Reg. at 5113. *See also* Proposing Release at 11, 86 Fed. Reg. at 67385.

[49] *See e.g. Pacific Gas and Electric, supra* note 44, 475 U.S. at 4 (striking down a law requiring a utility company to "include in its billing envelopes speech of a third party with which the utility disagrees"); *NIFLA v. Becerra, supra* note 46, 138 S. Ct. at 2374 (striking down a law requiring a pro-life crisis pregnancy center to inform its patients about how to obtain abortions).

belief that proxy advisers are "the best-positioned parties in the proxy system" to convey issuers' views to investors.[50] The First Amendment does not allow the government to commandeer one party's speech or message merely because it would be efficient to do so.[51]

The inescapable conclusion is that the Issuer Review and Feedback Conditions violate the First Amendment. This constitutional infirmity lends further support to the Commission's proposal to rescind Rule 14a-2(b)(9)(ii) – (vi).

With that background and as a corollary to this rescission, ISS respectfully submits that the Commission should also rescind the supplemental guidance it issued to investment advisers when it promulgated the 2020 Rules (Supplemental Guidance).[52] Advisers already have ample instruction about how to fulfill their fiduciary duties when voting proxies on their clients' behalf.[53] The Supplemental Guidance is inextricably linked to the Issuer Review and Feedback Conditions and adds nothing but a layer of unnecessary administrative burden for investment advisers who utilize the services of proxy advisory firms.

Note (e) to Rule 14a-9 Should Be Rescinded

In addition to recharacterizing proxy voting advice as a solicitation, the 2019 Interpretation and Guidance also broke new ground by suggesting that independent voting advice is subject to an Exchange Act antifraud rule designed for persons who seek "to maintain or gain control of a corporation."[54] Rule 14a-9 forbids proxy solicitations to contain materially false and misleading statements of fact, or to omit facts necessary to make the statements made not false or misleading. In articulating this new theory of liability, the Commission indicated that a proxy adviser could be sued not just for material misstatements or omissions, but also for its "opinions, reasons, recommendations or beliefs."[55]

Commenters were split on the Commission's proposal to codify this part of the 2019 Interpretation and Guidance by adopting a new Note (e) to Rule 14a-9 directed specifically at proxy advice. Certain public companies and their representatives predictably applauded the proposal, while—also predictably—investors and the covered proxy advisers themselves opposed it.[56] Opponents explained that adding a proxy advice note to Rule 14a-9 would create a new source of liability and heightened legal uncertainty for covered proxy advisers thereby impairing the independence

[50] 2020 Adopting Release at 90, 85 Fed. Reg. at 55108.

[51] *NIFLA v. Becerra, supra* note 46, 138 S. Ct. at 2376.

[52] *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers,* Advisers Act Rel. No. 5547 (Jul. 22, 2020), 85 Fed. Reg. 55155 (Sep.3, 2020).

[53] IA Voting Guidance *supra* note 23; *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Advisers Act Rel. No. 5248 (Jun. 5, 2019), 84 Fed. Reg. 33669, 33672-74 (Jul. 12, 2019) (2019 Fiduciary Standard Release), *Proxy Voting by Investment Advisers*, Advisers Act Rel. No. 2106 (Jan. 31, 2003), 68 Fed. Reg. 6585, 6586 (Feb. 7, 2003)

[54] *See* note 32, *supra.*

[55] 2019 Interpretation and Guidance at 11, 84 Fed. Reg. at 47419.

[56] *See* 2020 Adopting Release at 127 *et seq.*, 85 Fed. Reg. at 5519-5520.

and cost-effectiveness of proxy voting advice.[57] ISS and others further demonstrated that creating a cause of action for disgruntled issuers to use against unpopular voting advice is prohibited by the First Amendment.

In adopting a modified version of Note (e), the Commission endeavored to allay commenters' concerns by saying that the "amendment does not make mere differences of opinion actionable."[58] The Commission did not, however, expressly disavow the statement in the 2019 Guidance and Interpretation that Rule 14a-9 could be implicated by "opinions, recommendations, or similar views."[59] It is not surprising, therefore, that covered proxy advisers, their clients and other investors continue to express concerns that Note (e) will subject covered proxy advisers to undue litigation risks and compliance burdens.

To address these continuing concerns, ISS supports the proposal to eliminate Note (e) from Rule 14a-9. Although, for the reasons stated above, ISS submits that proxy voting advice is not subject to regulation under Exchange Act Section 14(a), in the context of this limited rulemaking, we also urge the Commission to amend Rule 14a-9 to state expressly that a covered proxy adviser is not subject to liability under that rule for its voting recommendations and any subjective determinations it makes in formulating such recommendations, including its decision to use a specific analysis, methodology or information. Nor should liability attach under Rule 14a-9 for a covered proxy adviser's decision as to how to respond to any disagreement a registrant may have with its proxy voting advice.

Rescinding Note (e) and amending Rule 14a-9 as indicated would not harm investors or threaten the integrity of the proxy process in any way, because covered proxy advisers are already subject to a more relevant and robust antifraud rule under the Advisers Act.

All Covered Proxy Advisers Are Regulated Under the Advisers Act

Proxy Advisers as Investment Advisers

A proxy vote is an asset to be managed according to the same standards that apply to the securities to which the vote pertains. It follows that advice about how to vote a proxy is a form of investment advice, and a party who provides such advice, for compensation, is an investment adviser subject to regulation under the Advisers Act.[60] The Commission acknowledged this fact in the 2020 Adopting Release, saying:

> *[Covered proxy advisers] provide analyses of shareholder proposals, director candidacies, or corporate actions and provide advice concerning particular votes in a manner designed to assist their institutional clients to achieve their investment goals with respect to the voting of securities they hold. In other words, [covered proxy advisers], for compensation, engage in the business of issuing reports or analyses concerning securities and providing advice to*

[57] *Id. See also* Proposing Release at note 74.

[58] 2020 Adopting Release at 132, 85 Fed. Reg. at 55121.

[59] 2019 Interpretation and Guidance at 11, 84 Fed. Reg. at 47419.

[60] Advisers Act Section 202(a)(11), 15 U.S.C. § 80b-202(a)(11).

others as to the value of securities and would therefore meet the definition of an investment adviser unless an exclusion applies.[61]

Over the years, a question has arisen as to whether proxy advisers might qualify for a statutory exclusion for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."[62] Regardless of any debate there might have been on this issue in the past, it is indisputable today that covered proxy advisers do not qualify for this exception.

The U.S. Supreme Court has interpreted the "publisher's exclusion" to be limited to publications of *general and regular circulation,* that render *impersonal* advice, meaning advice that is not tailored to the objectives or needs of any particular client.[63] The Commission Staff has long taken the position that an interactive communication between the provider and recipient of investment advice is not "impersonal" and thus, falls outside the definitional exclusion.[64]

Judged by this standard, covered proxy advisers clearly are not "publishers" for purposes of the Advisers Act. In addition to offering analyses and vote recommendations based on their own benchmark and specialty voting policies, proxy advisers also, with increasing frequency, offer analyses and vote recommendations based on their clients' customized, proprietary voting guidelines.[65] Not only are custom vote recommendations "personalized" by their very nature, but they also entail a high degree of interactive communication between proxy advisers and their clients. Furthermore, because a custom vote recommendation is given only to the client who owns the policy on which the recommendation is based, such a recommendation fails to satisfy the publisher's exclusion requirement that advice be of "general and regular circulation."[66]

In the absence of a definitional exclusion, proxy advisers are generally obliged to register as investment advisers. For this reason, ISS and the two U.S. proxy advisers whom the 2020 Rules

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[61] 2020 Adopting Release at 16, 85 Fed. Reg. at 55086 (citations omitted); *See also Concept Release on the U.S. Proxy System*, SEC Rel. No. IA-3052 (July 14, 2010) at 109-110, 75 Fed Reg. 42982, 43010 (Jul. 22, 2010) (Concept Release).

[62] Advisers Act Section 202(a)(11)(D).

[63] *Lowe v. SEC,* 472 U.S. 181 (1985), *cited in* 2020 Adopting Release at note 48.

[64] Reuters Information Services, Inc. 1991 SEC No-Act. LEXIS 96 (Jan. 17, 1991).

[65] 2020 Adopting Release at 7, 85 Fed. Reg. at 55,083. In addition, proxy advisers sometimes help their clients implement voting policies that best serve the clients' particular needs and objectives. *See e.g., Egan-Jones Proxy Services*, https://www.ejproxy.com/services/ (last visited Dec. 21, 2021) ("Egan-Jones reviews the client's research and voting requirements including voting guidelines. If desired, Egan-Jones suggests modification to the client's proxy voting guidelines to facilitate fulfillment of fiduciary obligations.")

[66] Nor does the Advisers Act exclusion for Nationally Recognized Statistical Rating Organizations (NRSROs) apply to proxy advisory firms. [Advisers Act Section 202(a)(11)(F).] Congress added the NRSRO exception to the Advisers Act when it enacted the Credit Rating Agency Reform Act of 2006 establishing a new regulatory regime for such firms under the Exchange Act. Because the existing NRSROs were already registered under the Advisers Act, the exception was necessary to avoid duplicative regulation. However, the NRSRO exception applies only to credit rating activities, not ancillary investment advisory services.

did not reclassify as solicitors are registered under the Advisers Act. As explained further below, although the other two covered proxy advisers have declined to register, their status as investment advisers, alone, subjects them to the Advisers Act's fiduciary standard, antifraud provision and related rules.

Fiduciary Duties and Antifraud Protections

The regulatory regime established under the Advisers Act addresses each of the issues addressed in the 2020 Rules and does so in a precise and robust fashion. The Advisers Act establishes a federal fiduciary standard of conduct that imposes duties of care and loyalty on investment advisers. The Commission has previously acknowledged the applicability of this standard to proxy advisers, saying that "[a]s investment advisers, proxy advisory firms owe fiduciary duties to their advisory clients."[67]

In the 2019 Fiduciary Standard Release, the Commission confirmed that the fiduciary duty of care obliges a proxy adviser to reasonably ensure the accuracy and soundness of the advice it renders. In this regard, the Commission cited to the Concept Release, which said:

> [*A]s a fiduciary, the proxy advisory firm has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.*[68]

The Commission further explained that the duty of loyalty requires an investment adviser to "eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline [the adviser]—consciously or unconsciously—to render advice [that is] not disinterested."[69] The Commission went on to say that "[i]In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the . . . conflict of interest and make an informed decision whether to provide consent."[70]

The fiduciary standard of conduct embedded in the Advisers Act is enforced through Section 206, the statute's antifraud provision. Like Exchange Act Rule 14a-9, Section 206 outlaws material misstatements and omissions; but Section 206 goes farther, to include a broad prohibition against fraudulent or deceptive transactions, practices or courses of action. This additional language serves as the basis for a series of specific antifraud rules, including those targeting the matters covered by the 2020 Rules. These include a requirement to implement comprehensive policies and procedures reasonably designed to prevent, detect and correct violations of the Advisers Act and the rules thereunder,[71] as well as a requirement for policies and procedures specifically

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[67] Concept Release, *supra* note 61 at 110, 75 Fed. Reg. at 43010.

[68] *Id.* at 119, 75 Fed. Reg. at 43012, *cited in* 2019 Fiduciary Standard Release, *supra* note 53 at 16 and note 40, 84 Fed. Reg. at 33674 and note 40. *See also* IA Voting Guidance, *supra* note 23, at 4, 85 Fed. Reg. at 47421.

[69] *Id.* at 23, 84 Fed. Reg. at 33676, *citing Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191 (1963) (*Capital Gains*).

[70] 2019 Fiduciary Standard Release, text at note 59. *See also* Supplemental Guidance, *supra* note 51 at 6, 85 Fed. Reg. at 55156.

[71] Rule 206(4)-7.

designed to ensure that proxies are voted in clients' best interests.[72] The latter procedures must include how the adviser addresses material conflicts that may arise between its interests and those of its clients. The adviser must describe its proxy voting policies and procedures to clients and must furnish those policies and procedures to clients upon request.[73] In addition, investment advisers must disclose meaningful information about conflicts and their mitigation. Failure to make such disclosure would be deemed fraud or deceit and would subject the adviser to liability under the Advisers Act's antifraud provision.[74]

The fact that two of the covered proxy advisers have declined to register under the Advisers Act does not diminish the relevance of this regulatory regime because both Section 206 and the rules thereunder apply to any person that meets the definition of investment adviser, whether that person is registered with the Commission or not.[75]

The sufficiency of the Advisers Act to address the issues at stake in the 2020 Rules is demonstrated not just by investors' satisfaction with the completeness and accuracy of the proxy voting advice they receive but by their satisfaction with proxy advisers' conflict mitigation and disclosure practices as well. Investor-centric commenters on the 2019 Proposal characterized the proposal's conflict-of-interest provision, Rule 14a-2(b)(9)(i), as "a solution to an academic problem that poses no practical threat,"[76] and confirmed that proxy advisers already provide adequate conflict disclosures to meet the needs of investors.[77]

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[72] Rule 206(4)-6(a). *See also* Supplemental Guidance at 4, 85 Fed. Reg. at 55155.

[73] Rule 206(4)-6(b).

[74] *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, Advisers Act Rel. No. 1092 (Oct. 8, 1987), 52 Fed. Reg. 38400 (Oct. 16, 1987) text at note 20, *quoting Capital Gains*, 375 U.S. at 184.

[75] *Investment Adviser Marketing,* Advisers Act Rel. No. 5653 (Dec. 22, 2020) at n. 327, 86 Fed. Reg. 13024 (Mar. 5, 2021) n. 327 (Marketing Rule Release) ("If a person meets the definition of 'investment adviser,' as defined under section 202(a)(11) of the Advisers Act, such person has a fiduciary duty to clients, regardless of whether the adviser is registered or required to be registered, and thus is liable under the anti-fraud provisions of the Advisers Act . . . for failure to disclose conflicts of interest."). *See also* Concept Release at 110, 75 Fed. Reg. at 43010; *SEC v. Parrish,* 2012 U.S. Dist. LEXIS 137544 (D. Col. Sep. 25, 2012) ("Defendant acted as an investment adviser as defined by Section 202(a)(11) of the Advisers Act, and he is subject to the antifraud provisions of . . . Section 206 which applies to 'any investment adviser' whether registered with the SEC or not."); *SEC v. Saltzman*, 127 F. Supp. 2d 660, 668 (E.D. Pa. 2000) (denying a motion to dismiss where the SEC adequately pled an unregistered person acted as an investment adviser and was subject to Section 206); *In the Matter of Six Financial Information USA Inc.,* Advisers Act Rel. No. 4780 (September 28, 2017) (unregistered investment adviser found to have violated Section 206).

[76] CalPERS Letter, *supra* note 8 at 4.

[77] *See e.g.,* letter from Simon Frechet, Chair, Pension Investment Association of Canada (Jan. 23, 2020) 2; CalSTRS Letter *supra* note 8 at 4. Consumers of proxy advisory services expressed the same view at the SEC's 2018 Roundtable on the Proxy Process. *See e.g.* Testimony of Jonathan Bailey, Managing Director and Head of ESG Investing, Neuberger Berman, LLC, Transcript of the Roundtable on the Proxy Process at 193 (Nov. 15, 2018) *available at* https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf at 212 ("We have seen no evidence that there has been any impact from conflicts of interest

Avoiding Duplication

In addition to being comprehensive, the Advisers Act regulatory regime is also efficient, since it is designed and administered in a manner that avoids wasteful duplication. In this regard, the statute provides exclusions to the definition of "investment adviser" and an exemption from the registration requirements for parties whose advisory activities are already governed by, or are incidental to financial services governed by, another regulatory regime.[78] Furthermore, in 1996, Congress divided jurisdiction over investment advisers between the SEC and the states for the express purpose of eliminating redundant regulation.[79]

In administering the Advisers Act, the Commission has also acknowledged the importance of avoiding "regulatory overlap that [yields] little benefit.[80] For example, in adopting a new Advisers Act marketing rule (one of the antifraud rules that applies to each covered proxy adviser), the Commission excluded communications to investors in registered investment companies (RICs) and business development companies (BDCs) from the concept of "advertisement" and exempted broker-dealers from the rule's solicitation disclosure and disqualification provisions because other federal securities laws already govern these activities.[81]

ISS respectfully submits that the accuracy and completeness of proxy voting advice and the disclosure and management of proxy advisers' conflicts of interest are already effectively governed under the Advisers Act. That being the case, the 2020 Rules are nothing more than regulatory overlap yielding little benefit.

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on the services provided to us, and we feel comfortable with the level of disclosure that we get. And on an annual basis, we review that with our chosen service providers, and will continue to do so."); testimony of Patti Brammer, Corporate Governance Officer, Ohio Public Employees Retirement System, *Id.* at 213 ("I would just say that I can speak to—our experience has been that yes, the conflict disclosure is very easy to understand. It's not boilerplate language. It does provide sufficient detail, and it is an element that we use and consider.).

[78] The Advisers Act provides definitional exclusions for banks (Section 202(a)(11)(A)); broker-dealers (Section 202(a)(11)(C)); and, as noted above, NRSROs (Section 202(a)(11)(F)). A registration exemption is provided for certain advisers who are registered as commodity trading advisers with the Commodity Futures Trading Commission. Section 203(b)(6).

[79] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416. Investment advisers whose advice is deemed to affect the national markets are regulated under the Advisers Act, while those whose advice has a more localized effect are left to state law.

[80] Marketing Rule Release, *supra* note 75 at 117, 86 Fed. Reg. at 13055.

[81] *Id.* at note 179 ("Given the regulatory framework applicable to investors in RICs and BDCs, we do not believe the additional protections of the Advisers Act marketing rule are necessary."); *Id.* at 102, 86 Fed. Reg. at 13051 ("[W]e believe the Disclosure Obligation under Regulation BI is sufficiently similar to satisfy the disclosure provision under our final rule."); *Id.* at 116, 86 Fed. Reg. at 13055. ("[W]e agree that registered broker-dealers acting as compensated promoters need not be subject to the disqualification provisions of both the Advisers Act marketing rule and the Exchange Act.").

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For all the foregoing reasons, we support the Commission's proposal to rescind the Issuer Review and Feedback Conditions and to eliminate Rule 14a-9, Note (e). We submit, however, that these limited amendments do not go far enough and that the 2020 Rules, the 2019 Interpretation and Guidance on which they are based, and the Supplemental Guidance should all be rescinded in their entirety.

We would be happy to supply the Commission or the staff with additional information regarding any of the matters discussed herein. Please direct questions about these comments to the undersigned, to our General Counsel, Steven Friedman, who can be reached at [redacted], or to our outside counsel, Mari-Anne Pisarri, who can be reached at [redacted].

Respectfully submitted,

Gary Retelny
President and CEO

cc: The Honorable Gary Gensler, Chairman
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison H. Lee
The Honorable Caroline A. Crenshaw
Renee Jones, Director, Division of Corporation Finance
William Birdthistle, Director, Division of Investment Management
Rick Fleming, Office of the Investor Advocate