Testimony of Elizabeth Ising

Partner and Co-Chair, Securities Regulation and Corporate Governance Practice Group Gibson, Dunn & Crutcher LLP

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Hearing on "Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets"

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Chairman Wagner, Ranking Member Sherman and members of the Subcommittee, thank you for the invitation to testify today. I appreciate the opportunity to share with you my observations on the significant influence of proxy advisory firms in corporate elections and the need to regulate these firms. These observations are based on my 25 years of practicing as a securities and corporate governance lawyer, including as a partner at Gibson, Dunn & Crutcher and as co-chair of the firm's Securities Regulation and Corporate Governance practice group.[1]

Proxy advisory firms play an important role, and have considerable influence, in the U.S. proxy system. That proxy system is relied on by public company shareholders and public companies alike. Shareholders rely on the proxy system to enable them to exercise their corporate voting rights, given that few shareholders actually vote during shareholder meetings. Instead, their views are represented at these meetings via the proxies they submit articulating how they would like their shares voted. Public companies rely on the proxy system to facilitate communications with shareholders and receive shareholder feedback on, and approval of, proposals addressing important governance and corporate matters. Moreover, shareholder approval of many of these matters is necessary to facilitate capital formation and foster long-term shareholder value, including electing directors who play an important role in overseeing implementation of corporate strategy, approving mergers and share issuances to fuel expansion and growth, and approving equity compensation plans that reward employees for positive corporate performance.

The U.S. proxy system is regulated by the U.S. Securities and Exchange Commission (SEC), as are many of its key players—the key exception being proxy advisory firms. Proxy advisory firms assist shareholders (primarily institutional investors) by providing research, data, and voting recommendations on matters shareholders are asked to vote on, as well as providing ancillary services such as actually submitting proxy voting instructions on behalf of their clients.

This role has become increasingly important during the past few decades as the number of proposals voted on by shareholders has dramatically increased. For example, the number of items voted on increased approximately 730% between 2000 and 2024 at Russell 3000

[1] My comments and the views that I express are my own and not those of Gibson Dunn or attributable to any client or any association of which I am a member.

companies.[2] The increase is due to a variety of factors, including the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[3] mandating periodic votes on executive compensation programs (and the proxy advisory firms' view that such votes should be held annually) and the dramatic increase in shareholder proposals (which reflects the need to meaningfully revise the SEC's shareholder proposal rule). The increase in the number of proxy proposals is all the more notable in light of the dramatic decrease in the number of public companies relying on the proxy system during approximately the same time period—from over 8,000 public companies in 1996 to approximately 4,600 public companies in 2022.[4] Indeed, the burden created by the proxy system may be one factor contributing to the decline in the number of public companies.

Against this background, the two major proxy advisory firms, Institutional Shareholder Services, Inc. (ISS) and Glass, Lewis & Co. (Glass Lewis), exercise significant influence over the voting outcomes on these thousands of proxy proposals. For example, a recent study found that the average support for non-binding shareholder votes on executive compensation ("say-on-pay") was 28% less at S&P 500 companies where ISS recommended votes "against" the proposals.[5] There also are numerous anecdotes on the dramatic swing in voting results that can occur when a proxy advisory firm, for one reason or another, reverses its voting recommendation. And, whenever ISS or Glass Lewis recommends votes for one side or the other in a proxy contest, the side they support invariably issues a press release touting the recommendation. The significant influence of these two firms has a dramatic impact on the governance and resource allocation at public companies.

Directors have fiduciary duties to act in the best interest of their company and its shareholders, which include maximizing long-term shareholder value. However, the voting recommendations issued by proxy advisory firms (which have no fiduciary duties to companies or their shareholders) often materially deviate from the well-informed determinations of boards of directors who are bound by such fiduciary duties. These voting recommendations, which are issued with no regulatory oversight and little accountability, also can reflect a failure of reasonable diligence and lack good faith given the presence of conflicts of interest—each of which would be inconsistent with a director's fiduciary duties.

Thus, the lack of regulation and accountability of proxy advisory firms, their conflicts of interest, ongoing objective errors in their reports, as well as unfounded biases and presumptions

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2 Derived from Institutional Shareholder Services data reporting proxy proposals during calendar year 2000 and calendar year 2024.

3 Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010).

4 *See Listed Domestic Companies, Total – United States* (2022), World Bank, https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=US.

5 *See 2024 Say On Pay and Proxy Vote Results*, Semler Brossy (January 16, 2025) at page 2, https://semlerbrossy.com/insights/2024-say-on-pay-reports/.

underlying their proxy voting positions, demonstrate the need for these participants in the U.S. proxy system to be subject to reasonable, common-sense regulation.

Consulting Services Create Significant Conflicts of Interest for Proxy Advisory Firms

The consulting services offered by proxy advisory firms call into question the quality, objectivity and reliability of their proxy voting recommendations. Specifically, the two major proxy advisory firms both sell advisory services to public companies on the very same matters on which they make voting recommendations.

For example, ISS markets consulting services to companies to assist them in enhancing ISS's own rating of their governance practices and in preparing matters to be submitted for shareholder approval, such as equity compensation plans. In my experience, public companies seeking shareholder approval of equity compensation plans that will be used to grant incentive awards to employees must carefully balance their strategic needs, legal considerations, communications strategy and the bests interests of the company and its shareholders when preparing the plans—but also then pay a consulting fee to ISS to determine whether ISS will recommend votes "for" the plans under ISS's formulaic standards. While some supporters of proxy advisory firms have noted that ISS maintains informational barriers between its consulting group and its research team making voting recommendations, that does not alter the fact that purchasing ISS's consulting services gives companies access to more detailed information and the analytical tools applied by the research team.

Glass Lewis previously touted that it did not provide "consulting services" to public companies, even going so far as to say that doing so creates problematic conflicts of interest.[6] But today it markets certain consulting services to companies to help them, for example, understand how their compensation programs will be evaluated and rated by Glass Lewis (and by extension, voted on by many Glass Lewis clients).[7] As a result, companies seeking shareholder approval of important matters are pressured to include the time and cost of subscribing to these firms' consulting services as part of their annual meeting planning process, or risk needing to devote

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6 *See, e.g.*, Letter on SEC Roundtable on the Proxy Process (November 14, 2018), *available at* https://resources.glasslewis.com/hubfs/Compliance/2018%20SEC%20Roundtable%20Statement.pdf ("Indeed, Glass Lewis does not offer consulting services to corporate issuers, directors, dissident shareholders or shareholder proposal proponents[.]"); *id.* ("For instance, Glass Lewis strongly believes that the provision of consulting services to corporate issuers, directors, dissident shareholders and/or shareholder proposal proponents, creates a problematic conflict of interest that goes against the very governance principles for which we advocate. As a result, Glass Lewis does not have a consulting business. This helps ensure that our voting recommendations and analysis are disinterested.").

7 *See, e.g.*, "Equity Plan Advisory Services," https://www.glasslewis.com/corporate-solutions/equity-compensation-plan-advisory (explaining that Glass Lewis can help companies "[e]nsure equity plans align with key investor priorities using the Glass Lewis model relied upon by institutional investors" and "[a]nticipate how institutional investors and Glass Lewis may assess your plan and increase your chances of shareholder approval.").

time and money to proactively campaign against a negative ISS or Glass Lewis voting recommendation.

The proxy advisory firms also benefit from other conflicts of interest. The dramatic increase in the number of proxy proposals fuels their businesses; the more proposals to be voted on, the more that investors with large portfolios need their support in analyzing those proposals. The proxy advisors contribute to this increase in the number of proposals through their own proxy voting policies. For example, the Dodd-Frank Act only requires public companies to hold say-on-pay votes at least once every three years. However, both ISS and Glass Lewis support annual say-on-pay votes,[8] despite the fact that over 97% of say-on-pay proposals have passed every year since 2011, including 98.7% in 2024.[9]

Widespread support by ISS and Glass Lewis for shareholder proposals also contributes to more shareholder proposals for the proxy advisory firms to assess. Proxy advisory firm recommendations "for" shareholder proposals enable proponents to achieve sufficient votes for their proposals that, even though representing only minority support, allow resubmitted proposals to avoid future exclusion under the SEC's shareholder proposal rule[10] and, in some instances, trigger a proxy advisory firm's "board accountability" voting policies. As discussed later, these "board accountability" policies further empower the proxy advisory firms by converting votes on non-binding proposals into a possible basis for threatening negative voting recommendations against directors.

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8 *See* ISS, United States Proxy Voting Guidelines, Benchmark Policy Recommendations (published January 9, 2025; updated February 25, 2025) at page 50, https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=2025.2 ("ISS Proxy Voting Guidelines") (ISS will "[v]ote for annual advisory votes on compensation, which provide the most consistent and clear communication channel for shareholder concerns about companies' executive pay programs"); Glass Lewis, 2025 Benchmark Policy Guidelines, United States at pages 62-63, https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf ("Glass Lewis Proxy Voting Guidelines") ("We believe companies should submit say-on-pay votes to shareholders every year. We believe that the time and financial burdens to a company with regard to an annual vote are relatively small and incremental and are outweighed by the benefits to shareholders through more frequent accountability. Implementing biannual or triennial votes on executive compensation limits shareholders' ability to hold the board accountable for its compensation practices through means other than voting against the compensation committee. Unless a company provides a compelling rationale or unique circumstances for say-on-pay votes less frequent than annually, we will generally recommend that shareholders support annual votes on compensation.").

9 *See 2024 Say On Pay and Proxy Vote Results*, Semler Brossy (January 16, 2025) at page 1, https://semlerbrossy.com/insights/2024-say-on-pay-reports/.

10 *See* SEC Rule 14a-8(i)(12) (permitting the exclusion of a shareholder proposal if it "addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was: (i) Less than 5 percent of the votes cast if previously voted on once; (ii) Less than 15 percent of the votes cast if previously voted on twice; or (iii) Less than 25 percent of the votes cast if previously voted on three or more times").

Proxy Advisory Firms Continue to Include Errors in Their Voting Reports

In my 25 years advising public companies, I have repeatedly seen the turmoil, both at public companies and among investors, that can follow the publication of an ISS or Glass Lewis report. This is especially the case since the proxy advisory firms' recommendations typically are released shortly before the shareholders' meeting, without any opportunity for companies to preview and comment on or correct the analyses.

While these firms market themselves based on their insights and expertise, they sometimes make mistakes and then put the burden on public companies to provide shareholders with accurate information.

Examples of recent errors include:

- Multiple instances where ISS recommended votes "against" a proposed equity compensation plan because it viewed the cost as "excessive" where its analysis essentially mistakenly included shares authorized under a former or expiring plan that would no longer be available for grant.

- ISS issued a report for a company that incorrectly stated the ownership and control of company shares by the chief executive officer, who was up for election as a director. Even after ISS was directed to an SEC filing containing the accurate share information, ISS refused to correct its report because its data came from a third party it hired to provide the data for its reports.

- A company's Glass Lewis report indicated that its board does not oversee cybersecurity risk. Despite the company pointing Glass Lewis to various disclosures about the board's cyber oversight role—including a section in one of their SEC filings titled "Oversight of Cybersecurity"—Glass Lewis failed to correct this error.

When a company discovers an error in its ISS or Glass Lewis report, and that firm refuses to correct the report, the burden lies with the *company* to inform its shareholders that the proxy advisor published false or misleading statements, typically by spending resources to draft and file additional information with the SEC and leading a campaign of engagement calls with key shareholders. Glass Lewis does offer companies the ability to issue "Report Feedback Statements" directly to Glass Lewis's subscribers—but only if a company purchases the report directly from Glass Lewis.[11] This means that if, for example, a company's shareholder informs the company of statements in a Glass Lewis report that are inaccurate, and Glass Lewis refuses to correct the error, then the only means for the company to communicate its views directly to Glass Lewis clients is for the company to first purchase the Glass Lewis report for several

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11 *See* https://www.glasslewis.com/issuer-relations/report-feedback-statement-rfs (explaining that to be "eligible to submit" a Report Feedback Statement, an issuer must "have purchased the specific Proxy Paper research report directly from Glass Lewis").

thousand dollars. I have seen frustrated companies describe this approach as a "pay to play," and it is hard to imagine how this policy benefits shareholders, our capital markets, or anyone other than Glass Lewis. However, at least Glass Lewis provides some client feedback mechanism, unlike ISS.

Unfortunately, these examples are just a small sample of the types of objective errors that occur all too frequently. It is impossible to estimate the full scope of inaccurate, false, or misleading statements introduced into ISS or Glass Lewis reports every year, given that the reports are not publicly available. And these errors are troubling given the significant influence these firms wield in our public markets. When I speak with public companies and other practitioners in this space, however, the frustration is typically not that these advisory firms made a mistake. After all, mistakes happen. Instead, it is frustration with the lack of responsiveness or accountability; these firms too often refuse to shoulder responsibility for their errors—and instead leave companies to manage the fallout. For these reasons, proxy advisors (like public companies) should face potential liability for making materially false or misleading statements, since their voting recommendations clearly and directly impact some investors' proxy voting decisions.

The Proxy Advisory Firms Fuel "Robovoting," Which Encourages a One-Size-Fits-All Approach to Proxy Voting

Robovoting generally refers to when an investor follows the voting recommendations of a proxy advisor when voting its proxies for shareholder meetings without engaging in an independent review of those recommendations.

I hear about and see robovoting on a regular basis. Proxy solicitors advise public companies on how they should expect their largest investors to vote on various matters. Inevitably, public companies receive three numbers: the percentage of shares that vote lockstep with ISS, the percentage of shares that vote lockstep with Glass Lewis, and the percentage of shares that may or may not consider the ISS and/or Glass Lewis voting recommendations but make their own voting decisions. Proxy advisory firms will sometimes explain in this context that they are merely implementing the proxy voting guidelines adopted by their clients. That does not explain the instances where investors time and time again vote in line with the firms' voting recommendations and/or indicate that they are unable to override the proxy advisor's voting recommendation, and it does not fully account for the firms' roles in implementing the votes for some of their clients. I routinely see robovoting when a flood of votes are cast strictly in line with the advisory firm's recommendations almost immediately after the proxy advisory firm recommendations are released.

The ISS and Glass Lewis proxy voting guidelines demonstrate why robovoting often cannot reflect a meaningful consideration of the proxy advisory firms' analyses by their investor clients. For example, the ISS Proxy Voting Guidelines include numerous instances where ISS will recommend votes "case-by-case" on a proxy item, without any indication of the factors ISS will consider in making that recommendation, including for proposals involving corporate political spending, director qualifications and opting into or out of state takeover statutes.[12] In addition, the Glass Lewis Proxy Voting Guidelines describe the "case-by-case" assessment it undertakes with respect to matters such as board responsiveness, evaluating "the risk management function of a public company board," and evaluating proposals to reincorporate to a different state or country.[13] While I am not critical of the application of a case-by-case analysis, these situations demonstrate that investors must review the voting recommendations in these instances to understand and decide whether they concur with the underlying rationale before following the advisory firm's voting recommendations.

Moreover, while ISS offers its clients an option to always vote in line with ISS's recommendations, ISS does not offer its clients a proxy voting policy to vote as recommended by a company's board. Instead, ISS's self-titled "Global Board-Aligned U.S. Proxy Voting Guidelines" are only "generally . . . in line with the board's recommendations" on "environmental or social matters" but apply ISS's own voting standards on "matters of corporate governance, executive compensation, and corporate structure."[14] This title is misleading as the ISS policy is not, in fact, "board aligned."

Proxy Advisors' Proxy Voting Positions Lack Transparency and Are Based on Unfounded Biases and Presumptions

Proxy advisory firms make proxy voting recommendations based on their publicly available proxy voting policies, which typically are updated at least annually. A review of these policies, as well as experience with their application, demonstrates that the development and application of these policies lacks transparency and that these policies often are based on unfounded biases and presumptions.

Both ISS and Glass Lewis promote their commitment to transparent and rule-based decision-making through the development and publication of their proxy voting guidelines. However, these efforts lack transparency. For example, ISS solicited public feedback during one of its recent annual policy updates, and a public company provided detailed comments to explain why a proposed one-size-fits-all ISS policy should instead apply a case-by-case approach since the justification and impact of the governance practice at issue varied depending on a company's circumstances. The new ISS policy completely ignored the issues raised in the company's comment letter without any explanation as to why. While ISS does provide limited information

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12 *See* ISS Proxy Voting Guidelines at pages 79 (political spending), 21 (director qualifications) and 34 (takeover statutes).

13 Glass Lewis Proxy Voting Guidelines at pages 16 (board responsiveness), 26 (risk management) and 73 (reincorporation).

14 ISS, United States Global Board-Aligned Proxy Voting Guidelines, 2025 Policy Recommendations (Published February 6, 2025), https://www.issgovernance.com/file/policy/active/specialty/Global-Board-Aligned-US-Voting-Guidelines.pdf?v=2025.2 ("ISS' Global Board-Aligned Policy is designed to enable subscribing investors to vote in a manner that upholds many foundational corporate governance principles as a means of protecting and maximizing their investments, whilst generally aligning with issuers' board recommendations for voting on environmental and social matters.").

on responses it receives to its annual request for policy comments, neither ISS nor Glass Lewis disclose information about which commenters most influenced their voting policy positions and their rationale for rejecting various alternative voting policy positions.

In addition, both firms have at times issued proxy voting recommendations reflecting new proxy voting positions that had not previously been published or deviated from their stated policies. These actions can distort shareholder decision-making and harm long-term shareholder value. Moreover, such inconsistencies create uncertainty for investors and undermine the very predictability and fairness that proxy advisory firms claim to provide investors.

Many ISS and Glass Lewis proxy voting policies also are based on the advisors' unfounded biases and presumptions and are even internally inconsistent. For example, ISS and Glass Lewis generally oppose supermajority voting requirements. As Glass Lewis notes, "we believe that a supermajority vote requirement can enable a small group of shareholders to overrule the will of the majority shareholders."[15] Yet the proxy voting guidelines at ISS and Glass Lewis each impose supermajority voting requirements on public companies.

For example, ISS and Glass Lewis each have "board accountability" voting standards under which they expect companies to achieve supermajority approval on their say-on-pay proposals (70% for ISS[16] and 80% for Glass Lewis[17]). Under these standards, each firm expects companies to change their executive compensation practices in response to a say-on-pay vote that falls below the firm's supermajority threshold, even when more than a majority of shares supported the company's executive compensation program (and one proxy advisor has recommended votes "against" compensation committee members for failure to take action even though a majority of the shares supported the company's say-on-pay vote and the company disclosed that it identified a lack of consensus among shareholders on whether and what changes would be appropriate during follow-up engagement).[18] Similarly, Glass Lewis wants companies to achieve supermajority votes against shareholder proposals: if a shareholder proposal does not receive at least 70% votes "against," then Glass Lewis expects to see board "responsiveness" to the

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15 Glass Lewis 2025 Proxy Voting Guidelines at page 18.

16 ISS Proxy Voting Guidelines at page 47 (explaining that ISS will "[v]ote against or withhold from the members of the Compensation Committee and potentially the full board if: . . . The board fails to respond adequately to a previous [say-on-pay] proposal that received less than 70 percent support of votes cast.").

17 Glass Lewis Proxy Voting Guidelines at page 52 ("When companies receive a significant level of shareholder opposition to a say-on-pay proposal, which occurs when more than 20% of votes on the proposal are cast as AGAINST and/or ABSTAIN, we believe the board should demonstrate a commensurate level of engagement and responsiveness to the concerns behind the disapproval, with a particular focus on responding to shareholder feedback.").

18 ISS, United States Executive Compensation Policies, Frequently Asked Questions at page 12 (updated December 13, 2024), https://www.issgovernance.com/file/policy/active/americas/US-Compensation-Policies-FAQ.pdf ("If the company has demonstrated poor responsiveness, ISS will generally recommend a vote against the say-on-pay proposal and incumbent compensation committee members. ISS may limit the adverse recommendation to the say-on-pay proposal if the board has demonstrated a limited degree of responsiveness, but which falls short of a robust response.").

shareholder proposal before the next annual meeting. As a result, ISS and Glass Lewis drive public companies to expend valuable board and company resources catering to small blocks of shareholders or pursuing objectives not supported by holders of a majority of outstanding shares—thereby, in the words of Glass Lewis, "overrul[ing] the will of the majority."

ISS and Glass Lewis also do not hesitate to essentially act as regulators. For example, the New York Stock Exchange (NYSE) and Nasdaq have established standards for director independence in order to assess whether directors can operate independently from management. Nevertheless, ISS has developed its own standards for director independence, which are stricter than those maintained by either the NYSE or Nasdaq. Among other reasons, ISS will consider a director "not independent" if the director is an *employee* of an organization (no matter its size, and no matter if there is a "firewall" separating the director from the provision of such services) that provides so-called "professional services" to the company in excess of $10,000 per year.[19] ISS itself defines these "professional services" to include (among other things) consulting services. Based on my experience, ISS typically charges well above $10,000 to provide its consulting services to public companies on the very items that it is recommending votes on. Put differently, ISS would likely fail its own independence evaluation with respect to each public company for which it provides consulting services and then subsequently issues voting recommendations. While directors play a different role than proxy advisors, both are important actors in the U.S. proxy system, and shareholders should be able to understand and evaluate these firms' conflicts of interest, including whether the proxy advisors are improperly motivated to recommend votes on proposals that fuel their consulting businesses.

The proxy advisory firms also are criticized for repeating false and misleading statements made by shareholder proponents without conducting any independent research or analysis. For example, when a company wrote to the SEC that a shareholder proponent's public statements about its proposal contained verifiably false and misleading statements about the company's business, and the shareholder filed additional materials to revise the misleading statement, the ISS report merely repeated the misleading statement, along with a note that the company objected to it. That is, rather than conduct any basic factual investigation to guide its clients on whether the statements were reliable, ISS merely repeated the offending language to its audience. At another company, Glass Lewis repeated in its proxy report the viewpoint of a shareholder organization without disclosing that Glass Lewis itself was a member of that organization. In another situation, a Glass Lewis report cited exempt solicitations filed with the SEC by various shareholder organizations critical of the company but did not cite or reference the company's SEC filing responding to those criticisms.

Proxy advisory firms also make materiality determinations and circulate that information to their clients as fact without any evidence that they have conducted a cost/benefit analysis or possess the necessary qualifications to make such declarations. For example, in a recent report regarding shareholder proposals, Glass Lewis declared: "We view measures related to human capital

[19] ISS Proxy Voting Guidelines at page 10-11.

management as *financially material for all companies*, potentially resulting in lower attrition, higher employee engagement and more access to the broadest pool of talented employees" (emphasis added).[20] The SEC has well-developed legal standards for materiality,[21] under which it is clear that human capital management matters are not financially material to every single public company. Proxy advisory firms also have portrayed certain corporate actions as harming shareholder rights (without disclosing their analysis or any factual or legal basis for their conclusions) and have cited controverted studies in their proxy reports.

Conclusion

As former SEC Commissioner Daniel M. Gallagher noted in his 2018 testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, "SEC rules have accorded to proxy advisers a special and privileged role in our securities laws - a role similar to that of nationally recognized statistical ratings organizations (NRSROs) before the financial crisis."[22] Just as Congress and the SEC stepped into regulate NRSROs following the financial crisis, such action is necessary with respect to the proxy advisory firms.[23] I believe that proxy advisory firms clearly and directly impact investors' proxy voting decisions and the voting outcomes at public companies. Their activities are, or should be treated as, solicitations within the meaning of

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[20] *Dueling DEI Proposals Put Boeing Between a Rock and a Hard Place*, Glass Lewis (April 8, 2025), https://www.glasslewis.com/article/dueling-dei-proposals-put-boeing-between-a-rock-and-a-hard-place.

[21] *See, e.g.*, SEC Staff Accounting Bulletin No. 99—Materiality (using a materiality threshold based on 5% of financial statement line items); Item 601(b)(10)(ii)(C) of Regulation S-K (providing that certain contracts are not deemed material, and thus need not be filed with the SEC, if they do not involve an acquisition or sale "for a consideration that exceeds 15 percent of . . . fixed assets").

[22] *Proxy Process and Rules: Examining Current Practices and Potential Changes: Hearing Before the Senate Banking, Housing and Urban Affairs Committee*, 115th Congress (2018) (statement of Daniel M. Gallagher), https://www.banking.senate.gov/imo/media/doc/Gallagher%20Testimony%2012-6-18.pdf.

[23] The SEC previously did so. In 2020, pursuant to Section 14(a) of the Securities Exchange Act of 1934, as amended, the SEC promulgated a final rule regulating the business of proxy advisory firms. *See Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082 (Sept. 3, 2020) (the "2020 Rule"). The 2020 Rule defined proxy solicitation to include the provision of proxy voting advice. It also required proxy firms to satisfy certain "notice-and-awareness conditions" to qualify for an exemption from the SEC's regulation of proxy solicitation. These conditions require proxy firms to (1) share their voting advice with registrants no later than the time they share it with their clients, and (2) provide a mechanism that will reasonably be expected to make their clients aware of registrants' written responses to proxy firms' advice before a shareholder vote. In 2022, following a change in administrations, the SEC rescinded parts of the 2020 Rule. *Proxy Voting Advice*, 87 Fed. Reg. 43,168 (July 19, 2022) (the "2022 Rescission"). The 2022 Rescission eliminated the notice-and-awareness conditions but it did not rescind the 2020 Rule's defining proxy solicitation to include proxy voting advice. The 2022 Rescission was challenged in two different proceedings. In June 2024, a panel of the Fifth Circuit court of appeals unanimously held that the SEC's rescission of the notice-and-awareness conditions was arbitrary and capricious. *National Association of Manufacturers v. SEC*, 105 F.4th 802 (5th Cir. 2024) ("*NAM*"). But in September 2024, a divided panel of the Sixth Circuit court of appeals affirmed and upheld the 2022 Rescission rule. *U.S. Chamber of Commerce v. SEC*, 115 F.4th 740 (6th Cir. 2024) ("*Chamber*"). Notably, both the Fifth and Sixth Circuits did not question the SEC's authority to regulate proxy advisory firms in their decisions reversing and upholding, respectively, the SEC's 2022 rescission of proxy advisory firm regulations adopted in 2020. *See NAM*, 105 F.4th at 807 & n.1; *Chamber*, 115 F.4th at 747.

Section 14(a) of the Securities Exchange Act of 1934, as amended.[24] For these reasons, Congress and the SEC need to act to adopt and implement common-sense regulation of proxy advisory firms to protect the integrity of the U.S. proxy system and capital markets.

Thank you again for inviting me to testify, and I look forward to answering your questions.

[24] *See* 15 U.S.C. § 78n(a) (2022).