Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

"The Proxy Advisor Duopoly's Anticompetitive Conduct"

June 25, 2025

Testimony of Nell Minow, Chair, ValueEdge Advisors[1]

I am very grateful for the opportunity to share my thoughts on proxy advisory firms and antitrust concerns. I welcome your questions and will submit supplemental materials as necessary following this session.

My connection to this field is that when I left the Justice Department's Antitrust Division during the Reagan administration as a special assistant to now-Judge Douglas Ginsburg, I was the fourth person hired and the first General Counsel at Institutional Shareholder Services (ISS). I left as president of ISS in 1990 and remained on its board of directors until 1992. While I have remained in the field of corporate governance ever since, always on behalf of shareholders, I have no connection to any company providing proxy advisory services and am appearing today on my own behalf and not representing or being paid by anyone. Neither I, my partners, nor my clients are in any way financially benefitted by the

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[1] ValueEdge Advisors is a small consulting firm focusing on corporate governance issues from the perspective of institutional investors. We hold a conference for public pension plans every fall. I am appearing on my own behalf, not representing any client or my partners, and we and our clients have no financial interest in these issues other than the overall impact on their rights and risks as investors.

[1] Graphics courtesy of ISS. I also reached out to Glass-Lewis with the same questions but they did not respond, further demonstration a lack of coordination.

matters covered in this hearing, except as they affect the options available for purchase by institutional investors to evaluate investment risk and the overall robustness of our capital markets.

Before I went to DOJ, ISS founder Bob Monks and I met working on President Reagan's Regulatory Relief initiative, he in then-Vice President Bush's office and I at the Office of Management and Budget. It may help you understand my perspective if I explain that my education at the University of Chicago Law School, those two positions in government, and my career in the private sector as a founder or co-founder of five companies, three of which have been sold, reflect my commitment to free markets as the foundation for a healthy economy. That means limiting federal government interference most of the time to matters of public health and safety, the social safety net, and resolving conflicts of interest and collective choice problems.

Proxy advisory firms are an exemplary free market success story for two reasons. They were created to respond to two critical needs not being met.

The first was the creation of securities in the 1980s that enabled any size of takeover or leveraged buy-out, creating for the first time a series of issues on proxy cards that were unprecedentedly complex. It was no longer the simple task of voting for the board members nominated by management and approving the auditors. There were new questions to be voted on with exotic, colorful names: poison pills, greenmail, and golden parachutes. These issues required expertise beyond the scope of most portfolio managers. Traditional securities analysis did not cover corporate governance risk. And that was just part of the problem.

The second need not being met was the repeatedly documented failures of investment managers to respond to proxy voting questions as fiduciaries. Vanguard founder Jack Bogle described this problem in his books and public statements. If a portfolio company was also a client of the firm, investment managers voted to benefit the corporate insiders who paid them instead of the beneficial holders they had a fiduciary obligation to consider "exclusively."[2] In more than one case, an institutional investor was paid by a corporation to switch their votes.

Access to the sole sources of independent research and recommendations is a vital, indispensable requirement for efficient markets. If this committee is concerned about proxy voting, the focus should be on the SEC and Labor Department offices overseeing the fiduciary obligation of institutional investors, not on killing the messenger, the sole providers of independent research and recommendations.

In further support of proxy advisory firms as exemplars of the free market, I will add that they provide research no one has to buy and recommendations no one has to follow. Their products are purchased—or not—exclusively by the most sophisticated financial professionals in the world. They offer a range of options and continually ask their clients for feedback on how to adjust their policies to better serve their needs and preferences. The government should not interfere with the decisions made by financial services firms on what services to buy or what their products should include.

Institutional investors who wish to have access to independent research and recommendations on proxy issues have wide and varied choices. There are no barriers to entry. In fact, there are other options, including two recent entrants who describe themselves as "anti-woke," Proxy Navigator and Bowyer Research. A few years ago, a former SEC commissioner started a proxy advisory firm. It failed because its original funding came from corporations, and so, in a market-based assessment, institutional investors did not trust them. The Shareholder Commons and As You Sow are nonprofits that make proxy voting recommendations available at no cost.

This is a textbook example of market efficiency—entrepreneurs responding to changing needs and sophisticated, knowledgeable customers responding to the wide range of options available to them. And it is also a textbook example of market efficiency that, with the help of legislation like Dodd-Frank and Sarbanes-Oxley and regulation like the SEC's requirement that

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[2] See for example https://corpgov.law.harvard.edu/2017/05/02/proxy-voting-conflicts-asset-manager-conflicts-of-interest-in-the-energy-and-utility-industries/

fund managers disclose their proxy votes, the access to independent research and recommendations from proxy advisory firms has led to improvement in corporate governance, especially more independent, better qualified corporate board members.

What is not an example of market efficiency is insisting that a successful corporation be forced to take a service it has developed and licensed and make that available to a competitor who has been unable to persuade customers to purchase its services because they consider it less valuable. That is in fact the dictionary definition of socialism.

Pass-Through Voting

I support making pass-through proxy voting available to investors who want it. I actually have exercised that option for my own small account because I benefit from the sunk cost of being an expert in proxy issues from my professional life, and my professional life benefits from the experience of voting proxies myself. Like the large institutional investors, I want to see the recommendations from proxy advisors, in my case, the non-profits, and make my own decisions.

I also understand that the push for making pass-through voting available does not come from market forces. There is no evidence that a large group of index fund investors or pension fund beneficiaries are interested in this option, and in fact, very few of them have exercised it. They like to have the proxy voting decisions made by professionals for the same reason they like to have buy-sell-hold decisions made by professionals: expertise and fiduciary obligation. Proxy voting is like any other investment decision; it is likely to be better when made by professionals governed by the strictest legal standard for care and loyalty.

BlackRock and other firms offer that option to customers. Very few have the time, interest, or expertise to vote their proxies and prefer to let the same professionals who make the buy-sell-hold decisions vote their proxies as well. This is an economically sound conclusion from the retail shareholder perspective, and it also ensures that companies obtain a quorum.

Further information on proxy advisory firms

Proxy advisors publish reports for subscribers. Unlike proxy solicitors, they are not paid advocates for any party. Unlike the ratings agencies, they are not mandatory, and they are not paid by the companies they report on. The First Amendment requires us to be very careful about government restrictions on independently produced publications. In this case there is simply no evidence of any kind that there is anything improper in the way they do business.

The proxy advisory services constantly adapt and improve their recommendations according to client preferences, like any other business. They are more likely to be influenced by their institutional investor clients than to influence them. With the exception of the small non-profits, they are market-driven.

Their recommendations are to support corporate managers as much as 96 percent of the time. Their clients like their analysis of the other four percent but make their own decisions on whether to follow their advice. For example, in 2024, for Russell 3000 companies, ISS recommended voting against 12 percent of the proposals on executive pay. Fewer than one percent failed to receive a majority vote, and that number is lower than it was in 2023. The most outrageous pay plan in American history by far was the $55.8 billion for Elon Musk at Tesla, approved twice by his board and thrown out twice by the Delaware Chancery Court. Despite proxy advisory firm recommendations against this plan, however, it was overwhelmingly approved by more than 70 percent of the outside shareholders. ISS recommended a vote in favor of Tesla's move from Delaware to Texas, and it received 84 percent of the votes cast.

The Council of Institutional Investors is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $5 trillion. Their survey of members found overwhelming support for proxy advisory firms, used by about 90 percent. Notably, 77 percent responded that they use proxy advisory firms to implement their own policies. More than a quarter said they ignore the recommendations, and 64 percent said that a recommendation to vote against management's recommendation triggers additional scrutiny. 62 percent oppose efforts to require proxy advisors to submit their reports to the corporations they cover, a proposal that I note raises concerns about prior restraint that likely violates the First Amendment.

Response to Criticism of Proxy Advisory Firms:

In general, the claims are selective and slanted. ISS and Glass Lewis are successful because the sophisticated financial professionals who have a range of choices do not think their competition's proxy advice is as valuable. As noted above, the two biggest firms have a variety of products and services, constantly changing to meet client demands, and there are also new entrants to the field who give institutional investors an unprecedented range of options. Many fund managers choose not to purchase any proxy advisory services at all, doing all of their research in-house. There is no possible justification for any government interference with this industry.

Specifically:

Conflicts of interest: Some critics object to proxy advisors providing consulting services. I did not allow it when I was the president of ISS, and yet I recognize the frustration of the insiders at the companies we covered who said it was unfair to make determinations without giving them guidance on how to do better. Those clients who are clear about the potential conflicts and choose to purchase their services factor that in when assessing the value of their products, and there is no need for government interference. One of Egan-Jones' best selling points in distinguishing itself from the competition is freedom from most conflicts of interest and I recommend they emphasize that in their marketing materials to see if it will help.

"**Robo-voting:**" Robo-voting is a made-up term for a non-existent issue. But there is no evidence of any kind of any institutional investor who has failed to assess the risks and values of proxy votes. More than 90 percent of the items put to a vote are routine: elect unopposed candidates for the board and approve the auditors. Authorizing a third party to cast those votes is not "robo-voting." There is no evidence that the non-routine items are voted without care and loyalty, consistent with proxy voting policies on issues like CEO pay and shareholder proposals. But as noted above, I endorse any inquiry into the SEC's and DOL's enforcement of fiduciary obligation in voting by investment managers and pension funds.

Platform: Unless Congress is prepared to force Amazon truck drivers to deliver packages from anyone who wants to use them, the Committee should not tell a private company that developed its own online delivery system that they have to make it available to competitors who do not have the skill, the resources, or the strategic judgment to develop their own. The platforms developed by ISS and Glass-Lewis are like your interface with your bank or brokerage. Clients log in and see information about their own accounts along with the research and recommendations according to their own policies. ISS tells me that if enough clients ask for another service to be distributed on their platform, they will provide it, and that includes Egan-Jones' materials.

Providing Proxy Recommendations to Issuers Before the Vote: There is no justification for forcing a proxy advisory firm to give their proprietary product to the companies they cover before the proxy vote. This would be a "prior restraint" violation of the First Amendment and would harm the ability of the sole sources of independent analysis to get their materials to their clients in a timely fashion. We don't require newspapers to provide their editorials to politicians before publication or theater critics to submit their reviews to the director before they appear in the press.

The entire basis of capitalism is allowing outsiders to invest based on their confidence in the checks and balances that minimize agency costs and assure them that their capital will be used to create shareholder value, not for the benefit of corporate insiders. What has made our economy the envy of the world is our unparalleled commitment transparency and strong corporate governance. Any effort to limit shareholder oversight further will diminish confidence in our markets and increase the cost of capital.

Again, well over 90 percent of the proxy issues they cover are routine votes as management recommends. If corporate executives and boards cannot handle having shareholders make an advisory-only, non-binding vote against them less than four percent of the time, I recommend they go private at a fair price and see how they like dealing with private equity instead of public shareholders.