

**AMENDED PETITION FOR RULEMAKING
TO PROMULGATE REGULATIONS PROHIBITING PROXY VOTING
RECOMMENDATIONS BASED ON RACE, ETHNICITY, AND SEX**

**SUBMITTED TO
SECURITIES AND EXCHANGE COMMISSION
JULY 1, 2025¹**

Paul S. Atkins
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Hester M. Peirce
Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Caroline A. Crenshaw
Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Mark T. Uyeda
Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

INTRODUCTION

The American Alliance for Equal Rights and the Alliance for Fair Board Recruitment respectfully submit this Petition for Rulemaking under

¹ Petitioners withdraw the petition for rulemaking they submitted on June 27, 2025, and substitute this one in its place. This amended petition reflects a relevant judicial decision that issued on July 1, 2025.

Section 553(e) of the Administrative Procedure Act, the Securities Exchange Act of 1934, and 17 C.F.R. § 201.192(a).

This petition requests that the Securities and Exchange Commission (the “Commission”) promulgate a rule under the Investment Advisers Act of 1940, prohibiting proxy advisory firms from making race-, ethnicity-, and sex-based proxy recommendations because they breach fiduciary duties and “are fraudulent, deceptive, or manipulative.” 15 U.S.C. § 80b-6(4). Relatedly, the Commission should prohibit investment advisers from *relying* on such proxy recommendations, too.

Additionally, or in the alternative, Petitioners request that the Commission promulgate a rule under Section 14(a) of the Securities Exchange Act of 1934, clarifying that proxy advisory firms may *not* seek to induce votes while making proxy voting recommendations based on the race, ethnicity, or sex of director nominees. Prohibiting such recommendations is “necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78n(a)(1).

I. Statement of Interest

The Alliance for Fair Board Recruitment is a Texas non-profit membership association that seeks to defend the civil rights of director candidates and shareholders, including by advocating for their right to equal protection under the law. Its members include persons who are seeking employment as corporate directors, as well as shareholders of companies that

hold board elections influenced by the recommendations and votes of proxy advisors.

The American Alliance for Equal Rights is a non-profit membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity.

Petitioners and their members are directly involved and have a stake in fighting discrimination in board elections, and thus each is an “interested person” and has a “right” to petition for the issuance of a rule. 5 U.S.C. § 553(e).

BACKGROUND

II. Legal Background

A. Investment Advisers Act of 1940

The Investment Advisers Act of 1940 makes it unlawful for “any investment adviser” to “directly or indirectly” “engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.” 15 U.S.C. § 80b-6(4). An investment adviser is “any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities,” with certain exceptions not relevant here. *Id.* § 80b-2(a)(11).

This provision “establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.” *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979). Congress delegated to the Commission the authority to “by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.” *Id.* at 16 n.6 (quoting 15 U.S.C. § 80b-6(4)). And Congress further provided the Commission with general rulemaking authority under the Act. 15 U.S.C. § 80b-11(a). Using these authorities, the Commission has adopted rules regulating advertisements by investment advisers, custody of client funds and securities, payment of cash referral fees, and the disclosure of financial and disciplinary information. 17 C.F.R. §§ 275.206(4)-1, 275.206(4)-2, 275.206(4)-3, 275.206(4)-4.

The Investment Advisers Act also requires certain investment advisers to register with the Commission, file records and reports with the Commission, and establish written policies to ensure compliance with the securities laws. 15 U.S.C. §§ 80b-3, 80b-4, 80b-4a. But the general fiduciary duty provision of Section 80b-6 “applies to any person that meets the definition of investment adviser, regardless of whether that person is registered with the Commission.” *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42982, 43,010 (July 22, 2010); 6 Thomas Lee Hazen, *Law of Securities Regulation* § 21:2 (“This antifraud provision applies to investment

advisers even though they may be exempt from the Act's registration requirements.”).

B. Section 14(a) of the Securities Exchange Act of 1934

Section 14(a) of the Securities Exchange Act of 1934 provides that the Commission “may prescribe” rules and regulations “as necessary or appropriate in the public interest or for the protection of investors,” regarding a person’s efforts “to solicit ... any proxy ... in respect of any security.” 15 U.S.C. § 78n(a)(1). The Act also gives the Commission specific authority “to define technical, trade, accounting, and other terms used in this chapter.” *Id.* § 78c(b).

The Commission previously defined proxy solicitation to include “[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.” 17 C.F.R. § 240.14a-1(l)(1)(iii)(A). Although that definition has recently been vacated during litigation, the courts (as explained further below) have acknowledged the outcome likely would be different if the Commission developed a different record during the rulemaking process. This Petition presents the opportunity for the Commission to do so.

Pursuant to its authority to regulate proxy solicitations, the Commission, among other things, prohibits false or misleading statements in

proxy statements, regulates presentation of information in companies' proxy statements to shareholders, restricts who can solicit proxies in support of board director nominees other than the company's preferred nominees, and requires companies to include in their proxy statements separate resolutions for a shareholder advisory vote on executive compensation. 17 C.F.R. §§ 240.14a-1–240.14a-21. The Commission also requires that institutional investment managers report their proxy voting record. *Id.* § 240.14Ad-1.

III. Regulatory Background

A. Investment Advisers Act of 1940

It is common ground that “the SEC is ... empowered to regulate the provision of proxy-voting advice through the Investment Advisers Act, which imposes fiduciary duties on most proxy advisory firms.” *ISS v. SEC*, No. 24-5105, Slip Op. 16 (D.C. Cir. July 1, 2025). One prominent proxy advisor has already “accept[ed]” that such advisors “are subject to ... the Investment Advisers Act of 1940,” which imposes “standards for investment advisers who ‘for compensation and as part of a regular business’ issue ‘analyses or reports concerning securities.’” *Id.* at 15 (quoting 15 U.S.C. § 80b-2(a)(11)).

Using this authority, the Commission has previously stated that an investment adviser with the authority to vote its clients' proxies “owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf,” meaning “the adviser must cast the proxy votes in a manner consistent with the best interest of its client and must not subrogate

client interests to its own.” *Proxy Voting by Investment Advisers*, 68 Fed. Reg. 6585, 6586 (Jan. 31, 2003).

B. Section 14(a)

For sixty years, the Commission consistently took the position that proxy advisors are “solicitors” for purposes of Section 14(a).

In 1964, the Commission concluded that proxy advice is a “solicitation,” subject to proxy regulations under Section 14(a). *Broker-Dealer Participation in Proxy Solicitation*, 29 Fed. Reg. 341, 341 (Jan. 15, 1964). In 1979, the Commission once again confirmed that proxy advisors are solicitors for Section 14(a) purposes. The Commission acknowledged that its “broad definition” of “solicitation” led to significant burdens on those who “furnish proxy voting advice” to customers. *Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, 44 Fed. Reg. 48,938, 48,941 (Aug. 20, 1979). But the Commission declined to change its *definition* of solicitation under Section 14(a). *See id.* at 48,941 n.25. Instead, the Commission exempted financial advisors from certain disclosure requirements, on the condition that they disclose conflicts. *See Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, 44 Fed. Reg. 68,764, 68,766–67 (Nov. 29, 1979).

In 1992, the Commission reaffirmed its commitment to a broad definition of “solicit,” which includes “almost every expression of opinion

concerning a publicly-traded corporation into a regulated proxy solicitation.” *Regulation of Communication Among Shareholders*, 57 Fed. Reg. 48,276, 48,278 (Oct. 22, 1992). And again, the Commission exempted proxy advisory firms from certain proxy rule requirements, while never disclaiming that proxy advisors do indeed *solicit* for purposes of the Commission’s regulatory authority under Section 14(a). *See id.* at 48,281–82 & n.41.

In 2020, the Commission promulgated a final rule to “make clear” that the definition of “solicit” includes “[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.” *Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082, 55,154 (Sep. 3, 2020); 17 C.F.R. § 240.14a-1(l)(1)(iii)(A). And the 2020 rule continued the Commission’s practice of exempting proxy advisors from certain proxy rule requirements, so long as they made conflict-of-interest disclosures and complied with other requirements. 85 Fed. Reg. at 55,107, 55,154.

The 2020 rule expressly disclaimed any reliance on the fact that proxy advisors sometimes facilitate “robo-voting,” where they offer to vote a client’s shares mechanically with a particular set of recommendations. *Id.* at 55,091–96, 55,144 & n.671. As explained below, the 2020 rule has been narrowed as a

result of litigation, but the Commission still possesses a path for using Section 14(a) to stamp out race-, ethnicity-, and sex-conscious proxy recommendations in certain circumstances.

IV. Factual Background

A. Proxy Advisory Firms

Proxy advisory firms have seized tremendous power in our system of corporate law. Over the years, institutional investors like pension funds and mutual funds have acquired ever-greater amounts of U.S. equities—as much as 80% of all market capitalization. *See Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518, 66,519 & n.7 (Dec. 4, 2019). Those institutional investors vote “in potentially hundreds, if not thousands, of shareholder meetings and on thousands of proposals that are presented at these meetings each year, with the significant portion of those voting decisions concentrated in a period of a few months.” *Exemption from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082, 55,083 (Sep. 3, 2020). As a result, “they often need assistance managing the voting process, which otherwise might be unmanageable.” *NAM v. SEC*, 105 F.4th 802, 806-07 (5th Cir. 2024).

Enter the proxy advisory firms, which are “uniquely situated in today’s market to influence, and in many cases directly execute ... investors’ voting decisions.” 85 Fed. Reg. at 55,083 & nn.17–18. Proxy advisors develop standardized voting policies and rarely, if ever, modify them to accommodate

feedback from the companies themselves.² And through the process of automated “robo-voting,” proxy firms even obtain prospective authority to cast their client’s vote as the proxy firm sees fit, with no further input or supervision by the client. *See* 84 Fed. Reg. at 66,520.

The proxy advisory industry is essentially a duopoly. Founded in 1985, ISS became the first dominant provider of proxy voting advice, later joined by Glass Lewis in 2003. Together, these two firms control approximately 97% of the market for proxy advisory services and 40% of *all* shareholder votes. Ertimur et. al, *Shareholder Votes and Proxy Advisors: Evidence from Say on Pay* (Feb. 25, 2013), perma.cc/B29K-KK9N.

Since ISS’s founding in 1985, both the Commission and the proxy advisory firms themselves have acknowledged that the firms generally engage in proxy “solicitation,” though the Commission often provided exemptions from aspects of the proxy rules. 85 Fed. Reg. at 55,094 n.157, nn.160–61; SEC No-Action Letter, *Institutional S’holder Servs., Inc.*, 1991 WL 179448, at *2 (Dec. 15, 1988).

B. Proxy Advisors’ Past Consideration of Race and Sex in Board Elections

After the “great awakening” of 2020, the proxy advisor industry began promoting race- and sex-conscious voting on board director nominees. Specifically, in 2021, ISS adopted a policy that recommended “withholding a

² *E.g.*, Joint Appendix 274–75, 433, 509–10, 565, 583–84, *ISS v. SEC*, No. 24-5105 (D.C. Cir.) (comments from ExxonMobil, NAM, Garmin, and U.S. Chamber of Commerce Comment).

vote, or voting against, the reelection of any chair of a nominating committee, or other directors on a case-by-case basis, where the company’s board has no apparent racial or ethnic diversity.” Morrison Foerster, Client Alert, *ISS, Glass Lewis, and Now Nasdaq—Board Diversity Is Here* (Jan. 28, 2021), <https://perma.cc/9UK8-AU69>. This race-conscious policy followed an earlier policy on gender diversity, under which ISS recommended “withholding a vote, or voting against, the reelection of any chair of a nominating committee, or other directors on a case-by-case basis, where there are no women on a company’s board.” *Id.*

Similarly, Glass Lewis launched a new race- and gender-conscious voting policy in 2021. Under that policy, Glass Lewis would assess “companies listed in the S&P 500 on their disclosure of board gender diversity in their proxy statements—noting companies with boards that have fewer than two female directors as a factor for concern.” *Id.* And Glass Lewis would also “assess board diversity based on race and ethnicity and a company’s disclosure of such data in its proxy statement.” *Id.* Starting in 2022, Glass Lewis began voting against the proposed board chairs when the board had fewer than two female directors. *Id.*

After further tweaks, Glass Lewis’s policy as of early 2025 with regard to sex quotas on company boards was that Glass Lewis would “recommend against the chair of the nominating committee if the company’s board is not at least 30 percent gender diverse” for companies within the Russell 3000

index, and for companies outside the Russell 3000 index, it would recommend against the chair if it did not have “one gender diverse director.” Glass Lewis, *2025 Benchmark Policy Guidelines*, at 40, <https://perma.cc/JZ97-9ACS>.

With regard to race quotas, Glass Lewis would generally recommend against the chair of the nominating committee of any company within the Russell 1000 index if the board had fewer than one director from “an underrepresented community.” *Id.* at 41. Glass Lewis defines an “underrepresented community director” as “an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as a member of the LGBTQIA+ community.” *Id.*

C. ISS Reverses Course, While Glass Lewis Presses on With Race- and Sex-Based Vote Recommendations

Since 2020, a number of legal and political developments have undermined race- and sex-conscious proxy recommendations and voting. The U.S. Supreme Court ruled that affirmative action in university admissions violated the Constitution and Title VI of the Civil Rights Act. *See Students for Fair Admission, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181, 231 (2023). The Commission’s approval of Nasdaq’s rule requiring its member companies to meet race and sex quotas for their boards or else explain their failure to do so, as well as disclose the racial and sex composition of company boards, was held unlawful by the *en banc* U.S. Court of Appeals for the Fifth Circuit. *See All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 185 (5th Cir.

2024) (*en banc*). California’s attempt to impose race-based quotas for public corporate boards was held unconstitutional by multiple courts. *See All. for Fair Bd. Recruitment v. Weber*, No. 2:21-CV-01951-JAM-AC, 2023 WL 3481146, at *2 (E.D. Cal. May 15, 2023); *Crest v. Padilla* (“*Crest II*”), No. 20-STCV-37513, slip op. at 22 (Cal. Super. Ct. L.A. Cnty. Apr. 1, 2022). Its sex quota was enjoined as well. *See Crest v. Padilla* (“*Crest I*”), No. 19-STCV-27561 (Cal. Super. Ct. L.A. Cnty. May 13, 2022).

Donald Trump was then elected the 47th President of the United States and swiftly issued Executive Orders seeking to stamp out race- and sex-based preferences across government and in the private sector. *See, e.g.*, Exec. Order No. 14,173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8,633 (Jan. 21, 2025).

In response, ISS reversed course on race- and sex-conscious proxy recommendations and voting. Citing “relevant legal and regulatory changes and/or other emerging issues,” ISS announced on February 11, 2025, that it would “indefinitely halt consideration of certain diversity factors in making vote recommendations with respect to directors at U.S. companies” and “will no longer consider the gender and racial and/or ethnic diversity of a company’s board when making vote recommendations with respect to the election or re-election of directors at U.S. companies.” ISS Insights, *Statement Regarding Consideration of Diversity Factors in U.S. Director Election*

Assessments (Feb. 11, 2025), <https://perma.cc/P8TW-XGW6>. There is currently nothing preventing ISS from reversing course, however.

Glass Lewis, by contrast, still makes proxy voting recommendations based on the racial, ethnic, and sex composition of corporate boards. Glass Lewis “continue[s] to believe that diversity contributes to improved company performance.” Glass Lewis, *Supplemental Statement on Diversity Considerations at U.S. Companies*, at 2 (Mar. 2025), <https://perma.cc/2R33-7T9C>. And lest there be any doubt about what “diversity” means, Glass-Lewis’s default U.S. Benchmark Policy continues to treat race-and sex-based diversity considerations as a positive factor in evaluating director elections: “We also reiterate how our US Benchmark Policy approaches these issues. As noted above, boards with gender diversity and underrepresented community representation have become the market standard. Accordingly, our benchmark policies on these issues expect most companies to have met this market practice.” *See id.* at 2–3.

Glass Lewis now includes a “DIVERSITY ALERT” for companies that do not satisfy Glass Lewis’s diversity figures. This “ALERT” says: “One or more ‘AGAINST’ or ‘WITHHOLD’ election of director recommendations in this Proxy Paper is flagged for your attention because it is based, at least in part, on considerations of gender or underrepresented community diversity. Clients that wish to not vote based on such considerations should vote ‘FOR,’ absent any other concern.”

By maintaining such considerations as a default component of its recommendations and even drawing further attention to them via a “DIVERSITY ALERT,” Glass Lewis continues to pressure companies to engage in race-, ethnicity-, and sex-conscious board selection practices. And for Glass Lewis, such an approach serves its own interests. ESG-focused proxy advice can allow proxy firms, just like other financial institutions, “to present themselves as contributing to the well-being of society and the planet” and also “charge higher fees ... because ESG funds are seen as different from conventional” investments “in part because they tap into investors’ consciences.” Hans Taparia, *One of the Hottest Trends in the World of Investing Is a Scam*, N.Y. Times (Sep. 29, 2022), <https://archive.ph/wpiOW>.

ARGUMENT

I. The Commission Has Authority to Regulate Proxy Advisory Firms As Investment Advisers Under the Investment Advisers Act of 1940.

The D.C. Circuit recently held that “the SEC is ... empowered to regulate the provision of proxy-voting advice through the Investment Advisers Act, which imposes fiduciary duties on most proxy advisory firms.” *ISS v. SEC*, No. 24-5105, Slip. Op. 16 (D.C. Cir. July 1, 2025). Proxy advisory firms “issue ‘analyses or reports concerning securities’” in exchange “for compensation and as part of a regular business.” *Id.* at 15.

The general fiduciary duty provision in Section 80b-6 of the Investment Advisers Act of 1940 “applies to any person that meets the definition of investment adviser, regardless of whether that person is

registered with the Commission.” 75 Fed. Reg. at 43,010; 6 Thomas Lee Hazen, *Law of Securities Regulation* § 21:2. An “investment adviser” engages in the business of providing advice to others as to the value of securities, whether to invest in, purchase, or sell securities, or issues reports or analyses concerning securities. 15 U.S.C. § 80b-2(a)(11). As the D.C. Circuit concluded, proxy advisory firms meet that definition because they receive compensation when they provide analyses of shareholder proposals, director candidacies, or corporate actions and provide advice concerning particular votes in a manner that will assist their clients in achieving their investment goals with respect to the voting securities they hold. *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982, 43,010 & n.248 (July 22, 2010).

The Investment Advisers Act of 1940 ensures that investment advisers provide clients “competent, unbiased, and continuous advice regarding the sound management of their investments” by removing “all conflicts of interest.” *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 187 (1963) (quotation omitted). An investment adviser should “devote his time exclusively to the performance of his advisory function” and “should not directly or indirectly engage in any activity which may jeopardize (his) ability to render unbiased investment advice.” *Id.* at 189 (quotation omitted). To serve these goals, “section 206 of the Advisers Act imposes a fiduciary duty on investment advisors to act at all times in the best interest of ... its investors, and includes an obligation to provide ‘full and fair disclosure of all material

facts’ to investors and independent trustees of the fund.” *SEC v. Commonwealth Equity Servs., LLC*, 133 F.4th 152, 167 (1st Cir. 2025) (cleaned up).

Under Section 206 of the Investment Advisers Act of 1940, the Commission can issue regulations “reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.” 15 U.S.C. § 80b-6(4). While interpreting a similar delegation of rulemaking authority, the Supreme Court held that the Commission has authority to adopt rules that are “definitional and prophylactic” and may prohibit acts that are “not themselves fraudulent ... if the prohibition is ‘reasonably designed to prevent ... acts and practices [that] are fraudulent.’” *United States v. O’Hagan*, 521 U.S. 642, 667, 673 (1997) (interpreting 15 U.S.C. § 78n(e)).

The Commission can and should issue a rule making clear that, under the Investment Advisers Act of 1940, proxy advisors cannot purport to help clients pursue growth, while turning around and pushing race-, ethnicity-, and sex-based voting recommendations that the proxy advisors themselves favor for selfish reasons. ISS, for instance, advertises that it “empowers investors and companies to build for long-term and sustainable growth.” *About ISS*, ISS, <https://perma.cc/RW8W-XAYS/> (last visited June 25, 2025). And Glass Lewis advertises that it will enable clients to invest “based on research and data.” Glass Lewis, *Glass Lewis Due Dilligence*, at 4,

<https://perma.cc/52A3-83AU>. But as explained below in Part III, no research or data support race- or sex-quotas for corporate boards as a policy recommendation that will bring about increased growth.

When proxy advisors advertise themselves as offering data-based recommendations to drive investment returns, while simultaneously pushing race-, ethnicity-, and sex-based voting recommendations, they engage in a deceptive practice that the Commission can reasonably prohibit through regulations under the Investment Advisers Act, regardless of whether the advisors have registered pursuant to that Act.

The Investment Advisers Act also gives the Commission authority to prohibit *other* investment advisers (e.g., asset managers like BlackRock) from *relying on* proxy firms' race-, ethnicity-, and sex-based voting recommendations. Those other advisers themselves owe a fiduciary duty to their clients, and thus the advisers cannot rely on advice that is not in their clients' best interests. The Commission has already issued informal guidance cautioning investment advisers that their fiduciary duties require them to independently assess recommendations from proxy advisors to ensure that the investment adviser casts votes in the best interest of its clients. *See Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 84 Fed. Reg. 47,420, 47,424–25 (Sep. 10, 2019). For that reason, it is in the interest of both registered investment advisers and the ultimate fund

beneficiaries not to outsource their decision making to proxy advisors engaging in deceptive practices.

* * *

For these reasons, the Commission has authority not only to prohibit investment advisers from making improper race-, ethnicity-, or sex-based proxy recommendations, but also can prohibit investment advisers from relying on such recommendations.

II. The Commission Also Has Authority to Regulate Certain Proxy Advisory Firms As Proxy Solicitors Under Rule 14(a).

Additionally, or in the alternative, the Commission should regulate certain proxy advisory firms under Section 14(a) of the Securities Exchange Act, which permits the Commission to regulate communications “to solicit ... any proxy.” 15 U.S.C. § 78n(a).

Congress did not define “solicit” in this context, and—as explained above—the Commission has defined “solicitation” to include “[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited.” 17 C.F.R. § 240.14a-1(l)(1)(iii)(A).

The D.C. Circuit, however, recently rejected the Commission’s 2020 rule’s definition of “solicitation” to the extent it includes entities that “merely advise others how to vote.” *ISS*, No. 24-5105, Slip Op. 14–15 (D.C. Cir. July 1, 2025). Although that narrows the Commission’s avenues for regulating proxy advisory firms under Section 14(a), it does not foreclose the option altogether.

In particular, the D.C. Circuit held that “inducing a shareholder to cast, withhold or revoke a vote can still constitute solicitation if it meets the statutory requirement of obtaining that action for the would-be solicitor’s separate purpose.” *Id.* at 17. That is a reference to the district court’s holding that the Commission could properly deem as “solicitors” those proxy advisory firms that “vigorously importune’ clients to vote in a certain way to benefit” the proxy advisors “themselves.” *ISS v. SEC*, 718 F. Supp. 3d 7, 24 (D.D.C. 2024). Where the proxy advisory firm has a self-interest in the vote and especially where it then seeks to obtain the authority to vote, that firm is “soliciting” the proxy.

This situation arises most obviously when proxy advisory firms engage in robo-voting and have “an inherent interest in the vote’s outcome.” *Id.* at 25. In such cases, the proxy advisor is “actively seeking to secure votes or voting authority” and is doing so for the “would-be solicitor’s separate purpose,” i.e., the advisor’s own interests. *ISS*, No. 24-5105, Slip Op. 17 (D.C. Cir. July 1, 2025). The district court noted there are “doubts about whether proxy advisory firms truly are disinterested in a vote’s outcome”—and thus may qualify as solicitors on that basis—but because the Commission had not made the proxy advisors’ self-interest in the voting outcome “part of the agency’s rationale for the definitional amendment” in the 2020 rule, the court could not uphold the Commission’s definition on that theory. *ISS*, 718 F. Supp. 3d at 25; *see* 85 Fed. Reg. at 55,091–96, 55,144 & n.671.

That “interest-in-the-outcome” rationale, now adopted by the D.C. Circuit, means the Commission could proceed with a new rulemaking under Section 14(a) to regulate proxy advisory firms that “induc[e] a shareholder to cast, withhold or revoke a vote ... for the would-be solicitor’s separate purpose,” *ISS*, No. 24-5105, Slip Op. 17 (D.C. Cir. July 1, 2025), including “an inherent interest in the vote’s outcome,” *ISS*, 718 F. Supp. 3d at 25.

Doing so would make eminent sense. The Commission could regulate proxy advisors that seek to induce their clients to vote despite simultaneously (1) advising those clients how to vote on corporate governance proposals and (2) consulting with the corporations themselves on those very proposals. *See, e.g.*, U.S. Gov’t Accountability Off., *Corporate Shareholder Meetings: Issues Relating to Firms That Advise Institutional Investors on Proxy Voting* (June 2007), <https://perma.cc/4FLX-NRXX>; U.S. Gov’t Accountability Off., *Corporate Shareholder Meetings: Proxy Advisory Firms’ Role in Voting and Corporate Governance Practices* (Nov. 2016), <https://perma.cc/Y8NF-GH74>. Those proxy advisors are inducing votes while having at least *some* interest in the votes going a certain way because the advisors are not “act[ing] as a mere neutral advisor but seek[] to achieve a certain outcome.” *ISS*, 718 F. Supp. 3d at 25.

Proxy advisory firms that seek to induce votes have an interest in the vote’s outcome for another reason: the firms impose race-, ethnicity-, and sex-conscious decisions because of their own interest in virtue signaling and

being seen as agents of change. As a wide range of commenters—from Jamie Dimon, to the House Committee on Financial Services, to the National Center for Public Policy Research—have emphasized, the proxy advisory firm industry shares an ideological commitment to a left-wing take on DEI and ESG. See Editorial Board, *Jamie Dimon Unloads on the Proxy Duopoly*, Wall St. J. (Mar. 14, 2025), <https://archive.ph/0lf9Q>; House Comm. on Fin. Servs., *Oversight of the Proxy Advisory Industry* (July 13, 2023), <https://perma.cc/U256-WKFM>; Scott Shepard, *The Profoundly Partisan Ways of Proxy Advisory Firms*, Nat'l Ctr. for Pub. Pol'y Rsch. (July 20, 2023), <https://perma.cc/RZ3V-NBB2>.

As Jamie Dimon put it, the proxy firms are “owned by the NGOs,” meaning the typically left-wing and pro-DEI and -ESG nongovernmental organizations. Editorial Board, *supra*. One report indicates that, in polling data, the employees of proxy advisory firms expressed higher levels of support for mandatory ESG disclosures than the employees of affected public corporations. Stone Washington, *Big Problems with SEC Climate Disclosure Mandate*, Competitive Enter. Inst. at 5 (Jan 31, 2024), <https://perma.cc/CWW4-GB62>.

The proxy advisors are also owned by foreign entities that have strongly favored ESG. For example, Deutsche Börse, which owns proxy advisor ISS, states on its website that “Companies are responsible – not just for their business but also for the transition to a sustainable society.”

Sustainable Finance Regulation, Deutsche Börse Grp., <https://perma.cc/2YG9-SWED> (last visited June 25, 2025). And when Deutsche Börse acquired ISS, it said that “[t]he acquisition of ISS is a further demonstration of Deutsche Borse’s commitment to ESG.” *Deutsche Börse Successfully Completes Acquisition of ISS, Strengthening the Focus on Sustainable Investing*, Deutsche Börse Grp. (Feb. 26, 2021), <https://perma.cc/XHM3-S6KS>.

Peloton Capital, which owns Glass Lewis, similarly states on its website that “[a]t Peloton Capital Management we believe in ... people first, then profits” and further states that “ESG remains a key factor in investment decision-making.” *Peloton Capital Management Is*., Peloton Capital Mgmt., <https://perma.cc/GE46-3B6Y> (last visited June 25, 2025); *Responsible Investing, Environmental, Social and Governance Policy*, Peloton Capital Mgmt., <https://perma.cc/D8FF-R9JE> (last visited June 25, 2025).

Unsurprisingly, Glass Lewis has not hidden its disdain for the elimination of race- and sex-based discrimination. In a message to clients in February 2025, Glass Lewis said that typically “[c]hange [i]s [g]ood,” but “we’re not so sure about that as it relates to some of the changes occurring across the U.S. corporate governance landscape,” as “[d]iversity is no doubt under attack” because of President Trump’s efforts to eliminate race- and sex-based discrimination. Glass Lewis referred to the Administration’s efforts as “hardline.”

In March 2025, Glass Lewis issued another client alert bemoaning even having “to deliberate over long-standing policy guidelines on board diversity and DEI shareholder proposals,” but felt compelled to do so because of “the U.S. Administration’s opposition to DEI.” Ross Kerber, *Proxy Adviser Glass Lewis Sticks With Diversity Guidance, Will Flag Risks*, Ins. J. (Mar. 6, 2025), <https://perma.cc/KQ9B-HARU>.

These are not the statements of a disinterested advisor. Like many in the pro-ESG investment space, that position likely flows from a desire “to present themselves as contributing to the well-being of society and the planet.” Hans Taparia, *supra*.

Even aside from the self-interest in pushing their own social ideology, proxy advisors’ pandering to things like race- and sex-conscious decisionmaking likely allows them to charge higher fees to investors, because ESG funds “are seen as different from conventional index funds, in part because they tap into investors’ consciences.” *Id.*

Thus, far from having “no ... governance interest in the outcome of a vote,” *ISS*, 718 F. Supp. 3d at 27, the proxy advisors are using their positions of power and influence to achieve social goals that align with their worldview. That conclusion is confirmed by the fact that, as explained below in Part III, the race/ethnicity and sex breakdowns of corporate boards have no demonstrable relationship to firm performance. Yet proxy advisory firms

insist on denying this reality, and the obvious explanation is because they have a self-interest in changing how corporate boards “look.”

The district court in *ISS* suggested that proxy advisory firms may not act this way because they would be “subject to common law torts” for not “act[ing] in a client’s interests.” *Id.* But recent events have repeatedly shown that businesses and advisors have been more than willing to prioritize their own social goals over their clients’ interests and shareholder returns, *see e.g.*, *Craig v. Target Corp.*, 2024 WL 4979234, at *9 (M.D. Fla. 2024) (noting allegations that “Target, its Board, and its GSC may have ignored social and political risks relating to the 2023 Pride Month Campaign”); Jura Liaukonyte et al., *Lessons from the Bud Light Boycott, One Year Later*, Harv. Bus. Rev. (Mar. 20, 2024), <https://archive.ph/F30gY>. Indeed, ISS itself has indicated it did not recommend a vote in favor of even one right-leaning environmental, social, or political proposal in 2023 or 2024, while recommending in favor of a majority of such proposals from left-leaning proponents those same years. *The Need for Bold Proxy Process Reforms*, Bus. Roundtable (April 2025), <https://perma.cc/UY3Z-ZZXC>.

If the proxy advisory firms were shown to seek to induce votes while having even the slightest improper interest in the outcome of the vote, then the D.C. Circuit and D.C. district court in *ISS* agreed the recommendations would likely qualify as solicitations because courts “consistently have held that communications that on their face did not seek to provide, withhold, or

revoke a proxy nevertheless were covered ‘solicitations’ because the communication was ‘a step in a chain of communications designed ultimately to accomplish such a result.’” *ISS*, 718 F. Supp. 3d at 26; *see ISS*, No. 24-5105, Slip Op. 16–17 (D.C. Cir. July 1, 2025).

* * *

The Commission can regulate all proxy advisory firms under the Investment Advisers Act of 1940 and at least some proxy advisory firms as solicitors under Rule 14(a) even under the D.C. Circuit’s view in *ISS*. As explained next, the Commission should do so.

III. The Commission Should Prohibit Proxy Recommendations Based on Race, Ethnicity, or Sex Under the Investment Advisers Act of 1940 and Section 14(a).

The Commission should prohibit proxy advisors from basing recommendations on the race, ethnicity, or sex of director nominees. Such conduct is not in the “public interest,” 15 U.S.C. § 78n(a)(1), nor does it protect investors, *id.*; *id.* § 80b-6(4). Instead, race-, ethnicity-, and sex-conscious proxy recommendations promote discrimination, mislead investors, invite legal liability, and expose companies to coercive pressure campaigns. Making such recommendations thus also qualifies as “fraudulent, deceptive, or manipulative,” and breaches fiduciary obligations. 15 U.S.C. § 80b-6(4). And, in turn, registered advisers that receive those recommendations have their own commensurate fiduciary duty not to act on them.

A. *Encouraging Discrimination Is Not in the Public Interest, It Violates Fiduciary Duties, and It Exposes Firms to Legal Liability.*

Discrimination based on race, ethnicity, or sex is never in the public interest. There are no “benign” racial classifications, because such distinctions “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Racial and ethnic classifications “stimulate our society’s latent race consciousness,” *id.* at 643 (quoting *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part)), “perpetuat[e] the very racial divisions the polity seeks to transcend,” *Schuette v. Coal. to Def. Affirmative Action, Integration, and Immigrant Rts. and Fight for Equality by Any Means Necessary (BAMN)*, 572 U.S. 291, 308 (2014), and “delay the time when race will become ... truly irrelevant,” *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 229 (1995). Likewise, “our Nation has had a long and unfortunate history of sex discrimination,” and the “inherent differences” between men and women never justify “denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *United States v. Virginia*, 518 U.S. 515, 532–34 (1996).

The Commission is fully within its statutory authority to promulgate a regulation that discourages such conduct in the context of proxy advising and soliciting.

That is especially true where the encouragement of such invidious behavior is coming from the proxy advisory firm itself, which is barred under the Investment Advisers Act of 1940 from “subrogat[ing] client interests to its own.” *Proxy Voting by Investment Advisers*, 68 Fed. Reg. at 6586. As explained above, proxy advisory firms make recommendations based on race, ethnicity, and sex because the firms want to be seen as agents of change, thereby elevating their own interests above their clients’. And any investment adviser who relies on those recommendations is himself violating his obligations under the Investment Advisers Act of 1940, meaning, for example, large asset managers should likewise be prohibited from relying on proxy advice that makes recommendations based on race, ethnicity, or sex.

Further, it is in the public interest to deter proxy advising that turns even in part on protected status, as otherwise companies that rely on such advice or change their behavior to curry favor with such advisors will risk violating federal civil rights laws. For example, if a company hires its officers or directors based on a goal of race or sex parity, it likely violates 42 U.S.C. § 1981’s prohibition on racialized contracting and Title VII’s prohibition on considering race or sex in employment decisions. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976); *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973); *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998). The Eleventh Circuit thus found a likely violation of Section 1981 where a venture capital fund’s policy stated it would

deal only with black-female-owned businesses. *See Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024).

The Commission is well within its statutory authorities to discourage and prevent proxy advisory firm solicitations that pressure or otherwise lead shareholders and companies to engage in discriminatory conduct that could subject them to liability under federal civil rights laws.

In addition, to the extent proxy advisors like Glass Lewis offer their “robo-voting” services to government pension funds, the pension funds themselves risk violating the Constitution by knowingly outsourcing their decisionmaking to a firm that explicitly makes race- and sex-conscious decisions on behalf of the pension funds. Public pension funds opposing or supporting board candidates because of their race or sex would not satisfy heightened scrutiny under constitutional principles of equal protection, and “it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

Encouraging private corporations to violate federal civil rights laws and public pension funds to flout the Constitution are indisputably not in the public interest and do not align with fiduciary obligations. At the very least, avoiding the risks of such liability and legal violations is a sufficient basis for rulemaking under both the Investment Advisers Act of 1940 and Section 14(a).

Glass Lewis may respond that there is no reason to eliminate its current procedure, which is to affix a “DIVERSITY ALERT” that says Glass Lewis is recommending against election of certain directors on the basis of “considerations of gender or underrepresented community diversity.” That is not meaningfully different in effect than Glass Lewis’s prior procedure. This type of “DIVERSITY ALERT” still expressly injects race and sex into the voting process, especially given that Glass Lewis’s default is to consider such improper factors. If they wish their vote not to be based on race or sex, investors must affirmatively disregard Glass Lewis’s recommendations.

Further, Glass Lewis itself has bemoaned such alerts in related contexts. In response to a Texas bill that would require that proxy advice be accompanied by a “warning” notice that ESG- and DEI-based recommendations are not “solely in the financial interest of the shareholders of the company,” Glass Lewis wrote to several key legislators to argue that such warnings are “pointless, misleading and costly.” Glass Lewis, *Glass Lewis Response to TX SB 2337* (May 21, 2025), <https://perma.cc/968G-TFAV>. Taking Glass Lewis at its word, including a “DIVERSITY ALERT” is likewise “pointless, misleading and costly,” as it simply perpetuates the status quo of race-, sex-, and nationality-based discrimination; it encourages companies to violate anti-discrimination laws; and it misleads investors into thinking race and sex matter for performance (as explained next, it doesn’t).

Proxy advisory firms like Glass Lewis should applaud the elimination of “pointless, misleading and costly” warnings like Glass Lewis’s own “DIVERSITY ALERTS.”

B. Proxy Advisory Firms Mislead Investors into Thinking Race, Ethnicity, and Sex Matter for Corporate Performance.

Proxy advice based on race, ethnicity, and sex misleads investors. Proxy advisors market themselves as providing objective, data-driven recommendations that support long-term growth and fiduciary stewardship. But there is no credible empirical evidence that mandating racial or gender quotas on boards improves corporate performance. As the Commission is fully aware, it previously declined to find *any* correlation between the race/sex of boards and the firm’s performance. *See Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, To Adopt Listing Rules Related to Board Diversity & To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service*, 86 Fed. Reg. 44,424, 44,431–33 (Aug. 12, 2021).

A detailed literature review of major studies on the issue—attached hereto as Exhibit A—found “no credible evidence that diversity requirements systematically improve firm performance.” Jonathan Klick, *Review of the Literature on Diversity on Corporate Boards* 1, Am. Enterprise Inst., Apr. 2021. An updated and complementary version—attached as Exhibit B—similarly concluded that the claim that diversity improves performances is “wishful thinking” and “unrealistic.” Jonathan Klick, *The Evidence Regarding*

Diversity's Effect on Firm Performance, 62 Am. Bus. L. J. 75, 92 (2025), <https://perma.cc/23HF-ZZTK>.

A separate report—attached as Exhibit C—concluded that judicial injunctions *against* California's race- and sex-based board-diversity requirements actually *improved* corporate performance and that companies not in compliance with those diversity quotas performed better than companies that were in compliance. Jonathan Klick, *Market Response to Court Rejection of California's Board Diversity Laws*, J. of Empirical Legal Stud. (Nov. 28, 2024), <https://perma.cc/R7EY-A2NC>.

And another recent study—attached as Exhibit D—concluded that the oft-cited McKinsey reports touting the supposed performance benefits of diversity “neither conceptually (in terms of the correct direction of causality) nor empirically (in terms of their set of large US public firms) support the argument that large US public firms can expect on average to deliver improved financial performance if they increase the racial/ethnic diversity of their executives.” Jeremiah Green & John R.M. Hand, *McKinsey's Diversity Matters/Delivers/Wins Results Revisited*, 21 Econ. J. Watch 5, 9 (Mar. 2024), <https://perma.cc/6VVU-AZLG>. In other words, the McKinsey reports were all hogwash.

When proxy advisors state or even imply that race-, ethnicity-, or sex-conscious board selection will yield financial or other corporate benefits, they mislead investors about material considerations and misstate the basis for

their recommendations. Such recommendations are therefore deceptive and harm the very investors the Commission is charged with protecting. Indeed, if companies select their boards based on race, ethnicity, or sex, they are necessarily pursuing goals besides merit and are violating legal requirements, both of which will ultimately harm the company.

C. Recent Events—Including Executive Orders That Apply to the Commission—Confirm That Race-, Ethnicity-, and Sex-Conscious Recommendations Are Not in the Public Interest.

ISS's recent retreat from race- and sex-based proxy voting further confirms that these practices are neither prudent nor defensible. Citing "legal and regulatory changes," ISS reversed its prior diversity policy and halted such considerations in February 2025. ISS Insights, *supra*. This shift underscores what the Commission must recognize: so-called "diversity-based" voting advice based on protected characteristics like race, ethnicity, and sex is no longer viable as a matter of law, risk management, or public interest. But proxy advisory firms can easily change their policies. Durable regulations are needed to ensure that the financial markets are protected from rogue proxy advisors that inject race-, ethnicity-, and sex-based considerations into board elections.

ISS's *volte-face* was caused, at least in part, by the new Administration's policy agenda. Executive Order 14173, entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," sets out the Administration's policy of "ending illegal preferences and discrimination." § 1. It orders federal agencies both to cease "all discriminatory and illegal

preferences” in their own activities and to “enforce ... longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, polices, programs, and activities.” § 2. The Order also directs the Attorney General and other agency heads to investigate the worst DEI practices in the private sector and explore litigation and regulatory approaches to stop them.

§ 4. Attorney General Bondi has already issued her own order directing DOJ’s Civil Rights Division to “investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.” Memorandum from the Att’y Gen., U.S. Dep’t of Just., to All Dep’t Emps., *Ending Illegal DEI and DEIA Discrimination and Preferences* 1 (Feb. 5, 2025), <https://perma.cc/Q8LE-VP7T>.

Because the Commission is accountable to the President, *see* Exec. Order No. 14215, *Ensuring Accountability for All Agencies*, 90 Fed. Reg. 10,447 (Feb. 18, 2025), it should prohibit race-, ethnicity-, and sex- based proxy voting recommendations.

* * *

In sum, proxy advisory firms’ voting recommendations based in any way on race, ethnicity, or sex are not “in the public interest” under Section 14(a), nor are they consistent with fiduciary obligations under the Investment Advisers Act. The Commission should engage in rulemaking to prohibit them.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission initiate a rulemaking to:

1. Prohibit proxy advisory firms from making voting recommendations based on race, ethnicity, or sex considerations under both the Investment Advisers Act of 1940 and Section 14(a);
2. Prohibit investment advisers from relying on proxy recommendations based on race, ethnicity, or sex considerations under the Investment Advisers Act of 1940; and
3. Confirm and further demonstrate that proxy voting advice in certain circumstances constitutes a “solicitation” under Section 14(a).

July 1, 2025

Respectfully submitted,

The American Alliance for Equal Rights
The Alliance for Fair Board Recruitment

/s/ R. Trent McCotter

R. TRENT MCCOTTER

BOYDEN GRAY PLLC

800 Connecticut Ave. NW, Suite 900

Washington, DC 20006

202-706-5488

tmccotter@boydengray.com

Exhibits A through D contain material that appears to be subject to copyright protection and therefore have been withheld from posting on sec.gov. The withheld exhibits are listed below.

Exhibit A – Klick, Jonathan. Review of the Literature of Diversity on Corporate Boards. *American Enterprise Institute*. (April 2021).

Exhibit B – Klick, Jonathan. The evidence regarding diversity’s effect on firm performance. *American Business Law Journal*. 2025;62:75–93.

Exhibit C – Klick, Jonathan. Market Response to Court Rejection of California's Board Diversity Laws. *Journal of Empirical Legal Studies*. 2025; 22:4–26.

Exhibit D – Green, Jeremiah and Hand, John R. M. McKinsey’s Diversity Matters/Delivers/Wins Results Revisited. *Econ Journal Watch*. 21(1) March 2024: 5–34.