



Filed Electronically

November 7, 2018

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: SEC Staff Roundtable on the Proxy Process, File Number 4-725

Dear Mr. Fields:

Institutional Shareholder Services Inc. (ISS), an investment adviser registered with the U.S. Securities and Exchange Commission under the Investment Advisers Act of 1940 (Advisers Act), is a full-service proxy adviser. We have more than 30 years of experience helping institutional investors to make informed proxy voting decisions, to manage the complex process of voting their shares, and to report their votes to their stakeholders and regulators. ISS annually covers more than 39,000 shareholder meetings -- every holding in ISS' clients' portfolios -- in the United States as well as in over 100 developed and emerging markets worldwide.

As part of our core offerings, ISS enables our clients to receive customized proxy voting recommendations based on a client's specific customized voting guidelines. ISS implements more than 400 custom voting policies on behalf of institutional investor clients. As of January 1, 2018, approximately 85% of ISS' top 100 clients used a custom proxy voting policy. During calendar year 2017, approximately 87% of the total shares processed by ISS on behalf of clients globally were linked to such policies.

ISS also offers a wide range of proxy voting policy options, including our publicly available standard benchmark policies focused on promoting long-term shareholder value creation and risk mitigation at portfolio firms, and specialty policies, also publicly available, that evaluate governance issues from the perspective of sustainability, socially-responsible investing, public funds, labor unions or mission and faith-based investing. Case-by-case analytical frameworks, which take into account company size, financial performance and industry practices, drive the vast majority of ISS' vote recommendations to our clients. We refer you to our website for detailed information about our voting policy guidelines.¹

Given our role in the proxy ecosystem, ISS appreciates the opportunity to comment in advance of the Staff Roundtable on the Proxy Process that is scheduled for November 15, 2018. We focus these preliminary comments on two primary areas, proxy advisory firms and the proxy process.

¹ <https://www.issgovernance.com/policy-gateway/voting-policies/>



A. Proxy Advisory Firms

As a registered investment adviser, we have a fiduciary obligation to our clients to provide advice that is in their best interest. In the free market, our clients hire us because we provide services they value and deem to be cost-effective. We listen to our clients and make our vote recommendations based on the governance policies they have selected – whether benchmark or customized. Unfortunately, many of our critics confuse causation and correlation on these vote recommendations, inferring that our clients blindly follow our advice. In fact, our clients are sophisticated institutional investors who are free to follow our recommendations or not. Often, the information that we provide to our clients is one of many different inputs they use to make their voting decisions. They often vote in accordance with our recommendations because those recommendations are tailored to their own views on corporate governance, not because they follow our advice without thought or intention.

As illustrated by the 2013 Staff Proxy Advisory Firms Roundtable,(2013 Roundtable)² and confirmed repeatedly during the five years since, proxy advisers have become a surrogate for shareholders themselves in the debate regarding what kind of voice investors should have in the companies they own. ISS looks forward to a robust and balanced discussion of the role and regulation of proxy advisory firms at the upcoming Proxy Process Roundtable. To set the stage for this conversation, we would like to briefly address the areas of interest that Chairman Clayton identified in his statement announcing the Roundtable.³

1. Whether the Regulatory Environment Has Caused Investment Advisers to Over-Rely on Proxy Advisory Firms, and Whether the Use of Such Firms is in the Best Interest of Investment Advisers' Clients

One of the most persistent urban legends about proxy advisory firms is that the SEC created the market for independent proxy advice by obligating investment advisers and mutual funds to vote every proxy that comes their way, and by creating a "safe harbor" that lets investment advisers outsource their fiduciary duties to proxy advisers. Nothing could be further from the truth.

As Chairman Clayton noted in announcing the upcoming Roundtable, the proxy process is a fundamental component of shareholder engagement, which is a hallmark of our public capital markets. Because proxy voting affects shareholder value and, in special situations, may involve the purchase or sale of securities, the standards of conduct that apply to this activity derive from the standards that apply to rendering investment advice generally.

² See Transcript of Proxy Advisory Firms Roundtable (December 5, 2013), available at www.sec.gov/spotlight/proxy-advisory-services/proxy-advisory-services-transcript.txt

³ Chairman Jay Clayton, Statement Announcing SEC Staff Roundtable on the Proxy Process (July 30, 2018), available at <https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process/>

The U.S. Department of Labor (DOL) first articulated the fiduciary implications of proxy voting thirty years ago. In a letter to the Chairman of the Retirement Board of Avon Products about proxy voting for employee benefits plans subject to ERISA, the DOL said:

In general, the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock.⁴

In the wake of Enron's widely publicized failure of corporate governance, the SEC likewise recognized the fiduciary implications of proxy voting, when then-SEC Chairman Harvey Pitt gave the following guidance concerning investment advisers' duty to vote proxies on their clients' behalf:

We believe . . . that an investment adviser must exercise its responsibility to vote the shares of its clients in a manner that is consistent with the general antifraud provisions of the Advisers Act, as well as its fiduciary duties under federal and state law to act in the best interests of its clients.⁵

The Commission formalized this view in 2003, when it adopted new rules and rule amendments relating to proxy voting by registered investment advisers and registered investment companies. In adopting Advisers Act Rule 206(4)-6, the SEC said:

The federal securities laws do not specifically address how an adviser must exercise its proxy voting authority for its clients. Under the Advisers Act, however, an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting. The duty of care requires an adviser with proxy voting authority to monitor corporate events and to vote the proxies. To satisfy its duty of loyalty, 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.⁶

Rule 206(4)-6 applies these traditional fiduciary concepts by requiring registered investment advisers to adopt written policies and procedures reasonably designed to ensure that the adviser monitors corporate actions and votes client proxies in the clients' best interests. What the rule does *not* do is require investment advisers to vote *every* proxy, regardless of facts and circumstances. To begin with, the rule applies only to those advisers who have explicitly or implicitly assumed voting authority over their clients' portfolios. Many small advisers expressly disclaim such authority and do not offer a proxy voting service to their clients. Even where an

⁴ Letter from Alan D. Lebowitz, Deputy Assistant Secretary to Mr. Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. (February 23, 1988), 1988 ERISA LEXIS 19, *5-6 (Avon Letter).

⁵ Letter from Harvey Pitt, SEC Chairman to John M. Higgins, President, Ram Trust Services (February 12, 2002). See also Baue, Walter, "SEC Chair Calls Proxy Voting a Fiduciary Duty" (March 29, 2002) available at: www.socialfunds.com/news/article.cgi/808.html.

⁶ *Proxy Voting by Investment Advisers*, Advisers Act Rel. No. 2106 (January 31, 2003), 68 Fed. Reg. 6585, 6586 (February 7, 2003) (Proxy Rule Release) (citations omitted).

adviser undertakes to provide this service, the obligation to vote any particular proxy depends on facts and circumstances. In the Commission's words:

We do not suggest that an adviser that fails to vote every proxy would necessarily violate its fiduciary obligations. There may even be times when refraining from voting a proxy is in the client's best interest, such as when the adviser determines that the cost of voting the proxy exceeds the expected benefit to the client. An adviser may not, however, ignore or be negligent in fulfilling the obligation it has assumed to vote client proxies.⁷

Likewise, the Commission's rulemaking on proxy voting by mutual funds does not obligate funds to vote every available proxy relating to portfolio securities, but merely requires funds to disclose the policies and procedures they use to determine how to vote proxies and to file annual reports disclosing how their votes were cast.⁸ In adopting these modest requirements, the Commission noted an increased assertiveness on the part of mutual funds in exercising proxy voting responsibilities. The Commission attributed this trend to a number of factors, including the size of positions in particular portfolio companies that make it difficult to sell a poorly managed company's stock; the investment policies of index funds that have the same effect; and corporate scandals that created renewed investor interest in issues of corporate governance.⁹ In other words, institutions vote proxies to maximize shareholder value and satisfy the demands of those for whom they are managing investments, not to satisfy any regulatory mandate.

Nor has the regulatory environment created a safe harbor for investment advisers who engage proxy advisory firms. The genesis of this myth seems to be a reference to proxy advisers in the adopting release for Rule 206(4)-6. In discussing the ways in which investment advisers could manage potential conflicts of interest that might arise in the proxy voting process, the Commission said:

Advisers today use various means of ensuring that proxy votes are voted in their clients' best interests and not affected by the advisers' conflicts of interest. An adviser that votes securities based on a pre-determined voting policy could demonstrate that its vote was not a product of a conflict of interest if the application of the policy to the matter presented to shareholders involved little discretion on the part of the adviser. Similarly, an adviser could demonstrate that the vote was not a product of a conflict of interest if it voted client securities, in accordance with a pre-determined policy, based upon the recommendations of an independent third party. An adviser could also suggest that the client engage another party to determine how the proxies should be voted, which would relieve the adviser of the responsibility to vote the proxies. Other policies

⁷ *Id.*, 68 Fed. Reg. at 6587 (citations omitted).

⁸ See *Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, Investment Company Act Rel. No. 25922 (January 31, 2003), 68 Fed. Reg. 6564 (February 7, 2003).

⁹ *Id.* at 3, 68 Fed. Reg. at 6565.

and procedures are also available; their effectiveness (and the effectiveness of any policies and procedures) will turn on how well they insulate the decision on how to vote client proxies from the conflict.¹⁰

The Commission's recognition that advisers can mitigate conflicts of interest in proxy voting by seeking the advice of an independent third party was hardly radical, since the same approach is widely utilized in other areas of investment management, such as portfolio valuation, or the appointment of a sub-adviser to make investment decisions for a discrete part of a managed portfolio. In all these cases, an adviser who engages a third-party service provider retains ultimate fiduciary responsibility for the services performed. The Commission recognized this fact when it said:

Nothing in [Rule 206(4)-6] reduces or alters any fiduciary obligation applicable to any investment adviser (or person associated [therewith]).¹¹

And that statement echoed the DOL's position in the Avon Letter:

ERISA contains no provision which would relieve an investment manager of fiduciary liability for any decision he made at the direction of another person. . . . Therefore, to the extent that anyone purports to . . . delegate to another the responsibility for such voting decisions, the manager would not be relieved of its own responsibilities and related liabilities merely because it either follows the direction of some other person, or has delegated the responsibility to some other person.¹²

ISS provides institutional investors with critical assistance in analyzing and synthesizing an enormous volume of information in a short period of time, thereby giving investors a meaningful voice in corporate governance while maximizing the efficient use of limited manager resources. ISS' institutional clients are keenly aware of their fiduciary duty to act in the best interests of their own clients and beneficiaries, and ISS is keenly aware of its fiduciary duty to act in the best interests of its clients. Given the number and complexity of issues to be voted on (especially for investors with global portfolio holdings), these clients believe that their ability to satisfy their fiduciary obligations would be diminished without access to the proxy advisory services ISS provides. We agree.

On the topic of "Main Street" investors, we think it important to point out that many of these investors participate in the equity markets through retirement or other investment accounts that are managed by institutional investors. In addition, many U.S. households participate in the capital markets by investing in mutual funds.¹³ In this way, retail investors are ultimately the beneficiaries of the critical work that ISS does for its institutional clients.

¹⁰ Proxy Rule Release, 68 Fed. Reg. at 6588 (citations omitted).

¹¹ *Id.* at note 8.

¹² Avon Letter, 1988 ERISA LEXIS 19,*7-9.

¹³ In a May 2018 speech at Temple University, Chairman Clayton noted that fifty-six million U.S. households (44% of all households) own at least one U.S. mutual fund. Jay Clayton, "The Evolving Market for Retail Investment Services and Forward-Looking Regulation – Adding Clarity and Investor

2. Whether Staff Guidance About Investment Advisers' Responsibilities in Voting Client Proxies and Retaining Proxy Advisory Firms Should Be Modified, Rescinded, or Supplemented

A corollary to the myth that the SEC's rules have led to over-reliance on proxy advisory firms is the myth that staff guidance has done so. Over the years, the staff issued three pieces of formal guidance in this area: two interpretive letters (Interpretive Letters) a year after the proxy voting rules were adopted,¹⁴ and a staff legal bulletin (SLB 20), issued in the wake of the 2013 Roundtable.¹⁵ On September 15, 2018, the staff withdrew the Interpretive Letters but left intact SLB 20 – which relies in part on the Interpretive Letters. Although the Interpretive Letters merely described fiduciary duties that continue to exist even in the absence of staff guidance, the Letters' abrupt withdrawal has created confusion among investment advisers by suggesting there was something wrong with the underlying guidance.

ISS respectfully requests that the Commission either direct the staff to issue new guidance in this area, or issue its own interpretive release to eliminate this confusion. In either case, we suggest that the replacement guidance regarding investment advisers' obligations when using third-party proxy advisory firms restate the following principles articulated in the Interpretive Letters and SLB 20:

- Whether an investment adviser breaches or fulfills its fiduciary duty of care when employing a proxy advisory firm depends upon all of the relevant facts and circumstances.
- An investment adviser must take reasonable steps to ensure that the proxy advisory firm is competent to adequately analyze proxy issues and to make recommendations in an impartial manner and in the best interests of the adviser's clients.
- These steps may include a case-by-case evaluation of the proxy voting firm's relationships with issuers, a thorough review of the proxy advisory firm's conflict procedures and the effectiveness of their implementation, and/or other means reasonably designed to ensure the integrity of the proxy voting process.

Protection While Ensuring Access and Choice" (May 2, 2018), *available at* <https://www.sec.gov/news/speech/speech-clayton-2018-05-02>.

¹⁴ Letter from Douglas Scheidt, Associate Director and Chief Counsel, SEC Division of Investment Management to Kent S. Hughes, Egan Jones Proxy Services, 2004 SEC No-Act. LEXIS 636 (May 27, 2004) ; and letter from Douglas Scheidt, to Mari-Anne Pisarri, Pickard and Djinis LLP, Counsel for Institutional Shareholder Services Inc., 2004 SEC No-Act. LEXIS 736 (September 15, 2004).

¹⁵ SEC Division of Investment Management, Division of Corporation Finance, *Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms*, Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014), *available at* <http://www.sec.gov/interp/legal/cfslb20.htm>.

- An investment adviser should have a thorough understanding of the proxy voting firm's business and the nature of the conflicts of interest that the business presents, and should assess whether the firm's conflict procedures adequately address any such conflicts.
- Because a proxy advisory firm's business and/or conflict procedures could change over time, the investment adviser has a fiduciary duty to monitor the third-party service provider's independence on an ongoing basis.
- Retention of a third-party proxy advisory firm is a fiduciary act. An investment adviser who undertakes to vote proxies on a client's behalf cannot outsource its fiduciary duty to a third party without client consent.
- In accordance with Advisers Act Rule 206(4)-7, an investment adviser has a duty to at least annually assess the sufficiency of its own proxy voting policies and procedures and the effectiveness of the implementation of those policies and procedures.
- One way an investment adviser can confirm that its clients' proxies are being voted in accordance with clients' best interests and with the adviser's proxy voting procedures, is by periodically sampling votes cast.

These principles are consistent with the principles that apply whenever an investment adviser engages a third-party service provider to assist with its investment management responsibilities.

Any new guidance on proxy voting responsibilities should also confirm that investment advisers have no absolute duty to vote every proxy relating to their clients' portfolios. Instead, advisers and their clients have the flexibility to determine the scope of the adviser's duty to exercise proxy voting authority, which may be limited by time and cost considerations or the type of issue presented.

In addition to addressing investment advisers' responsibilities with regard to voting client proxies and retaining proxy advisory firms, the staff has also issued guidance on the interplay between proxy advisory services and the federal proxy rules under section 14 of the Exchange Act. However, unlike the Advisers Act guidance, which is consistent with historic views on advisers' fiduciary duties, the proxy rule guidance cannot be squared with applicable historic guidance.

Exchange Act Rule 14a-1(l) defines a proxy "solicitation" to include the "furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." The furnishing of a proxy pursuant to a security holder's unsolicited request is excluded from this definition.¹⁶

¹⁶ 17 C.F.R. §240.14a-1(l)(2)(i).

Both the SEC and the staff have historically recognized the distinction between unsolicited and solicited proxy advice, applying the Exchange Act proxy rules to the former, but not the latter. For example, in a 1979 release, the SEC explained that, "As a general matter, unsolicited proxy voting advice would constitute a 'solicitation' subject to the proxy rules."¹⁷ In making this observation, the SEC cited an earlier opinion of the SEC's General Counsel that addressed proxy advice in a broker-dealer context:

In our view a broker normally is not engaged in solicitation where he merely responds, whether orally or in writing, to an unsolicited request from a customer for advice as to how to vote. Since the broker is merely responding to his customer's request for advice in his capacity as adviser to the customer and not actively initiating the communication, it may be concluded that he is not engaged in 'soliciting.'¹⁸

Unfortunately, SLB 20 blurred the longstanding distinction between solicited and unsolicited proxy voting advice. In paraphrasing the SEC's 1979 release, the staff omitted the critical "unsolicited" qualifier, thereby erroneously suggesting that all proxy advice is a solicitation.¹⁹

ISS respectfully asks the Commission to correct this omission and to confirm that a registered investment adviser who is contractually obligated to furnish vote recommendations based on client-selected guidelines does not provide "unsolicited" proxy voting advice, and thus is not engaged in a "solicitation" subject to the Exchange Act proxy rules.

ISS does not choose the ballots or agenda items on which it renders advice. Rather, at a client's direction, ISS has a fiduciary duty to analyze and provide a voting recommendation for each agenda item related to every equity security held in clients' portfolios. ISS is agnostic as to whether clients support a proposal, reject the proposal or abstain from voting altogether. ISS is similarly indifferent to whether clients choose to follow an ISS vote recommendation or not. ISS' only job is to analyze proxy statements and provide informed research and vote recommendations based on the policies and guidelines the institutional investors have selected, and in many cases developed, themselves. Given the diversity of these policies and guidelines, ISS may issue different recommendations on a given issue, for example, recommending voting "AGAINST" on a particular item to clients using ISS' faith-based policy guidelines, and "FOR" on that same issue to clients using ISS' "benchmark" voting policy guidelines.

¹⁷ *Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, Exchange Act Release No. 16104 (August 13, 1979), 44 Fed. Reg. 48938 (August 20, 1979) at note 25.

¹⁸ *Broker-Dealer Participation in Proxy Solicitations*, Exchange Act Release No. 7208 (January 7, 1964), 29 Fed. Reg. (January 15, 1964). This view was restated in a letter from Abigail Arms, Chief Counsel of the Division of Corporation Finance to Richard G. Ketchum, EVP, Legal, Regulatory & Market Policy of the NASD, Inc. dated May 19, 1992.

¹⁹ SLB 20, Question 6.

ISS' fiduciary proxy research and voting advice is simply not the kind of "over-the-transom" communication that the federal proxy rules are designed to address.

3. The Appropriate Regulatory Regime for Proxy Advisory Firms

In the SEC's 2010 Concept Release on the U.S. Proxy System (2010 Concept Release),²⁰ the Commission confirmed that proxy advisory firms are "investment advisers" as defined in the Advisers Act, saying:

[P]roxy advisory firms receive compensation for providing voting recommendations and analysis on matters submitted for a vote at shareholder meetings. . . . We understand that typically proxy advisory firms represent that they provide their clients with advice designed to enable institutional clients to maximize the value of their investments. In other words, proxy advisory firms provide analyses of shareholder proposals, director candidacies or corporate actions and provide advice concerning particular votes in a manner that is intended to assist their institutional clients in achieving their investment goals with respect to the voting securities they hold. In that way, proxy advisory firms meet the definition of investment adviser because they, for compensation, engage in the business of issuing reports or analyses concerning securities and providing advice to others as to the value of securities.²¹

ISS agrees. Not only does proxy voting advice clearly relate to the value of securities, but in the case of mergers, acquisitions and tender offers, it also relates to the advisability of purchasing, selling or investing in securities. Furthermore, where a proxy advisory firm assists clients in developing proxy voting policies or where it tailors its proxy voting research, analysis or vote recommendations to policies or guidelines developed or selected by the firm's clients, the proxy advisory firm does not qualify for the "publisher's exception" under Section 202(a)(11)(D) of the Advisers Act.²²

Furthermore, as a proxy advisory firm that has been registered under the Advisers Act for more than twenty years, ISS believes that subjecting proxy advisers to the same fiduciary standards that apply to the asset managers who use their services provides a critical layer of protection for investors. Having the option to receive proxy analyses and recommendations based on custom voting policies or a variety of ISS policies geared to different investor needs enables investment advisers to tailor their voting practices to each client's best interest. And the extensive array of policies and procedures ISS has adopted to satisfy its fiduciary duties of care and loyalty make it easier for investment managers to satisfy their own fiduciary obligation to conduct comprehensive due diligence before

²⁰ Advisers Act Release No. 3052 at 109-110, 75 Fed. Reg. 42981, 43010 (July 22, 2010).

²¹ *Id.* at 109-110, 75 Fed. Reg. at 43010.

²² This exception is unavailable where the advice in question is "personalized" or attuned to client needs. *Lowe v. SEC*, 472 U.S. 181 (1985).

engaging a proxy advisory service. In short, a harmonized fiduciary standard around proxy voting provides end-to-end protection of investors' best interests.

As it stands today, three of the five U.S. proxy advisory firms are registered under the Advisers Act. ISS urges the Commission to take steps to bring all proxy advisory firms under this fiduciary regulatory regime, adding a new "proxy advisory firm" category to the Advisers Act jurisdictional registration rule (Rule 203A-2) if necessary.

4. Whether Issuers Have Appropriate Opportunity to Express Concerns About Proxy Advisers' Vote Recommendations

As a registered investment adviser, ISS has a fiduciary duty of care to make a reasonable investigation to determine that it is not basing vote recommendations on materially inaccurate or incomplete information. In satisfaction of this duty, ISS has adopted a number of policies and procedures designed to ensure the integrity of our research process. To begin with, ISS' analyses and recommendations are driven by publicly disclosed and detailed policy guidelines and public information about the relevant proxy issues, in order to ensure consistency and to eliminate potential analyst implementation bias. In addition, before being delivered to clients, each proxy analysis undergoes a rigorous internal review for factual accuracy and to ensure that the relevant voting policy has been properly applied.²³

The entire analytical process, beginning with the receipt of the proxy statement, through the end of the internal review of the proxy report and vote recommendations, must be completed sufficiently in advance of the shareholder meeting to give the investor client adequate time to evaluate the report, conduct any additional analysis it deems necessary, engage with the issuer's executives and board members as needed, make a voting decision and process that decision for voting. In many cases, ISS has a contractual obligation to deliver proxy reports and vote recommendations to clients ten days to two weeks in advance of the meeting.

Despite this extremely tight timeframe, ISS has voluntarily incorporated a limited issuer review step into the analytical process. In the U.S., constituents of the Standard and Poor's 500 Index generally receive an opportunity to review a draft analysis for factual accuracy prior to the delivery of the report to clients, and ISS considers other requests for review and comments on a case-by-case basis. Given the limited time between the hard start of receiving the proxy statement and the hard stop of delivering the report to clients sufficiently in advance of the meeting, along with the concentration of a large percentage of meetings during so called "proxy season," there simply is not time to afford all of the approximately 39,000 issuers ISS covers globally the opportunity to review draft reports. However, ISS offers **all** issuers a free copy of the published analysis for their own shareholder meetings upon request. This affords issuers the opportunity to bring any factual error in the report to ISS' attention. In many cases, however, what issuers consider to be "errors" are in fact differences in philosophy, interpretation or, simply, outright disagreements with ISS' voting policies.

²³ As noted below, ISS obtains annual SSAE 18 audits to ensure compliance with its internal control processes, including its research process.

While ISS is proud of its record of accuracy and integrity, and strives to be as accurate as possible, ISS' research team does, infrequently, identify material factual errors in research reports, such as those relating to the agenda, data or research/policy application. When this happens, or when ISS learns of a material factual error from the issuer or an investor, ISS promptly issues a "Proxy Alert" ("Alert") to inform clients of any corrections and, if necessary, any changes in the vote recommendations as result of those corrections or updates. Alerts are distributed to ISS' investor clients through the same ProxyExchange platform used to distribute the regular proxy analyses. This ensures that the clients who received an original analysis will also receive the related Alert, which is attached to the relevant company meeting. Even if a client has cast its vote before receiving an Alert, the client may cancel and change its vote at any time before the meeting date, if such a change is warranted by the new information.

Although we understand that some issuers believe they should have the right to review and object to every vote recommendation ISS makes – and in some cases, even interject their views into ISS proxy research reports – granting issuers such extreme influence over independent proxy advice would interfere with a proxy adviser's fiduciary responsibility to its clients, and hurt both investors and the integrity of the voting process. Issuers already have ample opportunities to communicate with shareholders through the proxy statement, 8-K filings, and proxy solicitor communications.

5. Whether Proxy Advisers' Proxy Voting Guidelines and Procedures Are Sufficiently Transparent.

ISS is proud of the transparency with which it formulates its standard benchmark and specialty proxy voting policies and guidelines. Each year, ISS' policy-setting process begins with a Policy Survey seeking input from both institutional investors, corporate issuers (both executives and board members) and others, such as academics, in an effort to identify emerging issues that merit attention prior to the upcoming proxy season.²⁴ Based on this feedback, ISS convenes a series of roundtables with various industry groups and outside issue experts to gather multiple perspectives on complex or contentious issues. As part of this process, ISS examines academic literature, other empirical research and relevant commentary in an effort to uncover potential links between an issue and financial returns and/or risk. ISS also back tests any proposed changes to understand the possible impact of the various policy options being considered. Such impact assessments often lead ISS to phase-in new policies over a multi-year period to allow corporate issuers adequate time to prepare for any changes.

²⁴ In 2018, ISS received survey responses from more than 650 parties, including close to 110 institutions and just over 450 from corporations and their representatives. ISS is in the process right now of eliciting feedback on its 2019 draft benchmark voting policy updates. Consistent with prior years, ISS expects to receive feedback from dozens of parties, including trade groups, such as the Society of Corporate Secretaries and Governance Professionals, the Center on Executive Compensation, the National Association of Corporate Directors, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

The ISS Global Policy Board, which is comprised of ISS' market research heads and internal subject-matter experts, uses this input to develop its draft policy updates. Before finalizing these updates, ISS publishes them for an open review and comment period (modeled on the SEC's process for commenting on pending rule-making). This open comment period is designed to elicit objective, specific feedback from investors, corporate issuers and industry-constituents on the practical implementation of proposed policies. For the past several years, unless a commenter requests confidential treatment, all comments received by ISS have been posted *verbatim* to the ISS Policy Gateway on its public website, in order to provide additional transparency into the feedback ISS has received. Final updates are published in November to apply to meetings held after February of the following year.

In addition to the Global Policy Board, ISS also has established a Feedback Review Board ("FRB"), which I chair, to provide an additional conduit for investors, executives, directors and other market constituents to communicate with ISS.

ISS' outreach is not confined to the policy-setting process. Robust engagement is an integral part of ISS' day-to-day operations. Each proxy season, ISS engages with thousands of corporate executives, board members, institutional investors and other constituents via in-person meetings, conference calls and participation in industry events. The purpose of such engagement is for ISS to obtain, or communicate, perspectives about governance and voting issues, in order to ensure that its research and policy-driven recommendations are based on the most comprehensive and accurate information available.

6. Whether Proxy Advisers Effectively Mitigate and Disclose Their Conflicts of Interest

As a registered investment adviser, ISS has a duty of loyalty which forbids it from placing its own interests above those of its clients, or to unfairly favor one client over another. While this duty does not prohibit all conflicts outright, it does oblige ISS to manage and fully disclose any conflict it may have.

ISS addresses conflicts, first and foremost, by being a transparent, policy-based organization. Its use of a series of published voting policies provides a very practical check and balance that ensures the integrity and independence of ISS' analyses and vote recommendations. While these policies allow analysts to consider company- and market-specific factors in generating vote recommendations, the existence of a published analytical framework, coupled with the fact that vote recommendations are based on publicly-available information, allows ISS clients to continuously monitor the integrity and consistency of ISS advice.

Furthermore, ISS has undertaken a comprehensive risk assessment to identify specific conflicts of interest related to its operations and has adopted compliance controls reasonably designed to manage each of those risks. In order to ensure the effectiveness of these controls, ISS conducts periodic training sessions for employees and conducts a range of transactional and forensic tests to monitor compliance. We refer you to our public website for information about the policies and procedures we have implemented to help ensure the integrity of our business operations.²⁵

²⁵ <https://www.issgovernance.com/compliance/due-diligence-materials/>

a. Conflicts in Connection with Affiliated Corporate Services

The most talked-about conflict where ISS is concerned relates to the fact that one of its subsidiaries, ISS Corporate Solutions, Inc. (“ICS”), provides governance tools and services to corporate issuer clients. Left unchecked, this conflict could result in vote recommendations that are biased in favor of corporate management. However, the fact that the most vocal critics of ISS are those who speak on behalf of corporate management, and not the investors who rely on ISS’ research and vote recommendations, indicates that ISS is managing the potential of this conflict extremely well.

The primary control for this risk is the firewall ISS maintains between the core institutional business and the ICS business. This firewall includes the physical and functional separation between ICS and ISS, with a particular focus on the separation of ICS from the ISS Global Research team. A key goal of the firewall is to keep the ISS Global Research team from learning the identity of ICS’ clients, thereby ensuring the objectivity and independence of ISS’ research process and vote recommendations. The firewall mitigates potential conflicts via several layers of separation:

- ICS is a separate legal entity from ISS.
- ICS is physically separated from ISS, and its day-to-day operations are separately managed.
- ISS Global Research team works independently from ICS.
- ICS and ISS staff are forbidden to discuss the identity of ICS clients.
- Institutional analysts’ salaries, bonuses and other forms of compensation are not linked to any specific ICS activity or sale.
- ICS explicitly tells its corporate clients and indicates in their contracts that ISS will not give preferential treatment to, and is under no obligation to support, any proxy proposal of an ICS client. ICS further informs its clients that ISS’ Global Research team prepares its analyses and vote recommendations independently of, and with no involvement from, ICS.

ISS maintains a robust training and monitoring program regarding the firewall. This program includes quarterly tests of the firewall’s integrity, new-hire orientation, and review of certain marketing materials and disclosures. There also is an ethics hotline available to both ICS and ISS staff for reporting issues of potential concern.

b. Other Conflicts

ISS has adopted, implemented and enforces policies and procedures to address other conflict situations as well. Such conflicts also may arise within the institutional advisory business where an ISS client is, itself, a public company whose proxies are the subject of analyses and voting recommendations, or other advisory research reports or where the Company is called upon to analyze and vote on shareholder proposals propounded by a Company client. Or, conflicts may arise from an ISS analyst’s stock ownership or in connection with ISS’ ownership structure. Finally, issuers’ review of draft proxy analyses may give rise to conflicts.

c. Disclosure Regarding Potential Conflicts

ISS provides its investor clients with an extensive array of information to ensure that they are fully informed of potential conflicts and the steps ISS has taken to address them. In addition to making full disclosure in the Form ADV brochure it delivers to each client, ISS supplies a comprehensive due diligence compliance package on its web site to assist clients and prospective clients in fulfilling their own obligations regarding the use of proxy advisory services. This package includes a copy of ISS' Code of Ethics, a description of other policies, procedures and practices regarding potential conflicts of interest and a description of the ICS business. A copy of the ISS Board of Directors Conflicts of Interest Policy related to Director-Affiliated Companies is also available through the ISS web site.

Moreover, each proxy analysis and research report that ISS issues contains a legend indicating that the subject of the analysis or report may be a client of or affiliated with a client of ISS, ICS or another ISS subsidiary. Each analysis and report also notes that one or more proponents of a shareholder proposal may be a client of ISS or one of its affiliates, or may be affiliated with such a party. Although investment advisers typically disclose conflict of interest information at a macro level,²⁶ ISS does more. Any institutional client that wishes to learn more about the relationship, if any, between ICS and the subject of a particular analysis or report may contact ISS' Legal and Compliance Department for relevant details. This process allows ISS' proxy voting clients to receive the names of ICS clients without revealing that information to research analysts as they prepare vote recommendations and other research. ISS clients are also provided with details about the amount that each ICS client has paid ICS and the particular products/services they purchased. Were the ICS relationship explicitly identified on the face of, or within, a proxy analysis or report, this critical information barrier would be destroyed.

In addition to obtaining report-by-report conflict information, institutional clients of ISS can obtain lists of all ICS clients. Some clients receive such lists on a monthly basis, while others receive the lists on a quarterly or annual basis. They also obtain a range of additional information regarding our information barriers, our data centers, and other aspects of our operations. Many clients meet with ISS staff on an annual basis to discuss conflicts and other due diligence matters.

B. Proxy Process

In its capacity as a voting agent, each year ISS executes millions of proxy ballots on behalf of its clients. From that vantage point we observe that the current infrastructure for voting proxies is at times inefficient, expensive, and prone to errors. Clarity and transparency can be at times difficult to obtain and there is little competition. We know the market would welcome improvements. There has been a great deal of debate around the use of technology to improve the quality, transparency, efficiency and cost-structure of proxy voting. One approach to open up the market would be to evaluate moving the responsibility

²⁶ See, e.g. Form ADV, Part 2A, Item 11.

of proxy distribution from custodians picking the service provider to the companies that are actually issuing the proxies and paying for their distribution.

Below we provide more specific thoughts on potential reforms that we believe would benefit investors.

1. End-to-End Vote Confirmation

End-to-end vote confirmation is the one topic that our clients raise most often in conversations related to the U.S. proxy voting system. ISS clients have continually expressed frustration that there is currently no mechanism whereby a vote for a specific holding can be clearly tracked all the way through the voting process from the time the vote is cast through the time that vote is tabulated and certified.

Unfortunately, very little has changed since we commented on this problem in response to the SEC's 2010 Concept Release.²⁷ The path between investor and issuer in the proxy voting process remains confusing. This complexity introduces data and process issues that impede the flow of accurate vote confirmation information back up the voting chain to the investor once a vote has been cast; impediments which have not been addressed in the current system of ballot distribution or since the conversations from 2010 on the proxy process.

Data Flow and Process Issues

As we explained in the 2010 Comments, ISS is able to verify only certain parts of the voting process for our clients: (1) that the proxy delivery agent has delivered ballots that match its clients' reported holdings, (2) that the agent has received the voting instructions sent by ISS on behalf of clients, and finally (3) that the agent has delivered the votes, in aggregate, to the tabulator. ISS has no ability to confirm that votes were received and counted. Because many issues can occur from the tabulator to the final vote tally, anything less than a confirmation of that final vote tally is not an end-to-end confirmation. There could be better interim steps than those that currently exist, but the ultimate goal should be getting accurate insight into the final vote tally to ensure there are no under/overvoting or chain of custody issues, which do not get reported to the beneficial owners or their agents with in any standardized or regular manner.

Balancing Investors' Competing Needs for Confirmation and Privacy

On the surface, it appears that in order to allow issuers to confirm to upstream parties that a specific investor's votes have been cast and counted, they, or their agents, would need some level of access to beneficial owner information, which would upend the privacy protections of the OBO/NOBO process.

However, while we understand that many beneficial owners would like to have vote confirmations, it is unclear whether they are willing to compromise the confidentiality of their

²⁷ Letter from Stephen Harvey, Business Head, ISS to Elizabeth Murphy, Secretary, SEC, (October 20, 2010), available at <https://www.sec.gov/comments/s7-14-10/s71410-154.pdf> (2010 Comments).

portfolio holdings in order to get such confirmations. In previous client surveys, and other client engagements, institutional investors appear to be roughly split down the middle on this privacy issue. Some investors would trade some degree of privacy in exchange for vote confirmation while others would not. In practice, many of our clients wish not to disclose their ownership positions to outside parties and many investors actively rely on the NOBO/OBO process to achieve that goal.

Proposed Model for Vote Confirmations

While current industry practices create obstacles to vote confirmation, we believe that these obstacles are far from insurmountable. Given the growing importance of proxy voting, the process must be enhanced to allow proxy voting agents, third-party intermediaries and, most importantly, beneficial owners to confirm that in fact the issuer, or its agents, have received and counted their votes properly. Enhancing the process in a way that ensures such confirmation would be a very positive step in furthering the Commission's goals of increased transparency and engagement within the proxy voting process.

To alleviate privacy concerns, we envision that an impartial entity could act as "owner" or "trustee" of vote confirmation data and would either sit between the proxy delivery/voting entities and the issuers or alongside the proxy voting chain. This independent entity would be able to provide a true confirmation back to the beneficial owners and their agents, but still maintain investors' privacy, if they so desire. We believe that a potential paradigm for this structure exists in the Depository Trust and Clearing Corporation (DTCC).

Such vote confirmations should be provided free of charge to the actual voters, as well as their designated agents, and should be done 10 days, 5 days, and one business day prior to the actual voting deadline. This would ensure that any miscast votes, missed votes and/or missing share positions can be rectified in a timely and transparent fashion. All vote confirmations should be readily viewable through electronic means and in a standardized, human and machine-readable format.

In addition, the creation of a standardized, unique identifier for each distinct beneficial owner has the potential to advance the vote confirmation process further. ISS invites other market participants to explore this option, cognizant of some key issues:

- Mappings between omnibus positions and underlying beneficial data would need to be maintained in a highly secure and trusted environment in order to respect investors' desires to keep their positions private.
- Strict oversight and controls would be required, with standard inter-firm procedures across proxy delivery agents, voting agents, issuers, custodians and transfer agents.

As a voting agent for a large number of financial institutions, ISS is already required to adhere to a very strict regimen of audits and controls and we meet with many of our clients on an annual basis for the purposes of compliance with current regulations. ISS, for example, obtains an annual SSAE-18 from an audit firm of national reputation, and has

many predefined and well documented internal controls in place to ensure that its mechanisms are working as intended. We are confident that a solution to the vote confirmation can be found that continues to respect the OBO/NOBO system. The information only needs to be unlocked from its current silos.

2. Agenda Disclosure Prior to Record Date

Historically in the U.S. market, in order to vote at a shareholders meeting, investors must own shares on a record date that is typically more than six weeks in advance of the actual meeting date. At the time the meeting and record dates are announced, an issuer does not generally disclose the meeting agenda, which is not released until after the record date has passed.

Due to these time lags, investors who participate in share lending often do not have sufficient knowledge about the scope of the meeting to make an informed decision about recalling any shares they may have on loan. Investors are not able to weigh the true economic impact of voting their full share position, including any shares on loan, versus the value of leaving the shares on loan. By the time the agenda is disclosed, the record date has passed, and the investor is unable to recall shares to reclaim voting rights.

To address this problem, ISS favors a system whereby record dates for voting entitlement fall after both (1) the announcement of the meeting date and (2) the disclosure of the meeting agendas and other relevant voting information. Moreover, ISS recommends that record dates fall approximately two weeks after the release of the detailed agendas for meetings, with even more time given in the case of contested elections. Such an early-warning system would encourage increased participation in shareholder meetings, as shareholders would have meaningful opportunities to make informed decisions on recalling shares based on the merits of the issues that will be considered by shareholder at the meeting.

In past surveys of our clients, the overwhelming majority of respondents favored requiring issuers to release their agendas in advance of record dates, more than half favored a two-week window, and more than one-third of respondents said such a change would increase the likelihood of their recalling their shares.

Practical Challenges to Record Date Changes

We recognize that there are practical challenges to any change in the current record date system.

The record date system must provide flexibility for issuers in the case of contested meetings or meetings in which shareholder proposals are pending for which the issuer is seeking no-action relief. In such cases, we believe that a record date “significantly closer” to—but no closer than two weeks prior to – the meeting date would be a reasonable solution. In order to accommodate such a system, issuers would need the ability to change record dates after the initial announcement date, particularly in the case of contested elections.

As record dates for the establishment of voting entitlements would be set after the release of the meeting date and agenda details, additional checks and balances would need to be established to protect against possible mistakes in proxy mechanics. Specifically, given that the share positions eligible to vote proxies at the time of the initial announcement of the meeting will certainly change by the record date, tools must be implemented to ensure that the final eligible voter lists are reconciled at the time of the record date.

Without proper controls, risks could be introduced into the process that would increase the likelihood of disenfranchising shareholders who are eligible to vote, or allowing shareholders who are ineligible to vote to cast ballots. If unchecked, such flaws could exacerbate over-voting and under-voting. We believe, however, that proper controls are feasible.

We do not believe that a change to the record date system would materially impact loan stability or result in adverse effects on capital markets. Shareholders will continue to look at recalling shares in connection with the proxy voting process based on the economic merits of doing so. The benefit derived from the change will principally be that shareholders will be able to make informed decisions as to whether to recall shares on loan as opposed to the current arrangement, which often forces shareholders to take an “all or nothing” approach to pulling back shares. This benefit would also further the Commission’s goals of increasing transparency and engagement as well as reducing the occurrence of “empty voting.”

The keys to an advance notice requirement are consistency and simplicity. Rules should be applicable to all issuers in terms of the level of material disclosure and timing. Significant variance among issuers would lead to confusion in the marketplace and increased risk. Optimally, advanced notice would be implemented through both filings with the Commission and web site postings. Using these two media would satisfy the requirements of transparency, accessibility, and sustainability in an increasingly electronic age.

3. Universal Ballot

Current rules for contested meetings allow for the issuance of two or more competing proxy cards, typically with competing lists of nominees for board elections. This system of having a “management ballot” and a “dissident ballot” creates additional impediments to the proxy voting process and can present unique challenges for investors when it comes to deciding which board nominees best represent their interests.

One of the biggest challenges created by this multiple ballot approach is that there currently is no practical mechanism by which an investor can submit votes through any means for nominees from both lists unless the investor attends the meeting in person. In order for an investor to attempt such a vote, known as a “cross-slate vote,” there are several hurdles that must be cleared, all of which are cumbersome and require that the voting process be done manually.

Typically, the investor must first obtain consent from the inspector of the election, as well as the issuer’s solicitor, to confirm that such a vote will not simply be discarded as invalid.

Once the consent has been granted, the investor must then proceed with requesting necessary documentation from the proxy delivery agent that will allow the investor to attend and vote at the meeting, known as a "legal proxy request." The issuance of this documentation can take anywhere from 48-72 hours to complete due to the need for the delivery agent to work with custodians and other intermediaries in the voting process to confirm the holdings data. Once the legal proxies have been issued, the investor must then manually complete a proxy card and then add manual edits to indicate which director nominees from both slates are being chosen. The completed card and the legal proxies are then submitted to the issuer's solicitation agent and the votes are processed manually at the meeting.

Contested Ballot Voting Limits Engagement

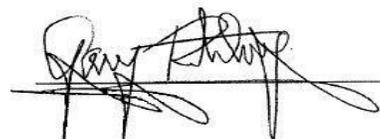
The complexity and manual nature of the process introduces multiple risk points into the process, because human error could cause the investor's vote to be miscast or fail to be processed altogether. When clients reach out to ISS to determine the feasibility of submitting a cross-slate vote, they are usually deterred from proceeding once they discover the complexity of the steps involved. As a practical matter, cross-slate voting is not an option for smaller investors.

This leads to a situation where the vote submitted for director nominees becomes a zero-sum affair, even if there may be candidates from both slates that an investor would like to support. This all-or-nothing approach limits shareholder engagement with the issuer and can negatively impact board diversity if shareholders' interests and voting desires are not accurately represented. Enacting rules that allow for shareholders to vote on all nominees or proposals on a single proxy ballot would result in increased engagement between issuers and investors. Having a single voting agenda will make it much easier for investors to accurately represent their interests with regards to both the optimal board composition and other corporate governance items that shareholders may wish to present on meeting agendas.

* * * * *

ISS looks forward to discussing these issues at the upcoming Staff Roundtable on the Proxy Process. We would be happy to supply the Commission or the staff with additional information regarding any of the matters discussed herein. Please direct questions about these comments to the undersigned or to our outside counsel, Mari-Anne Pisarri. She can be reached at [REDACTED].

Very truly yours,



Gary Retelny
President and CEO



Institutional Shareholder Services Inc.

1177 Avenue of Americas, 2nd Floor

New York, NY 10036

T: +1.646.680.6300 | F: +1.646.417.6090

cc: The Honorable Jay Clayton, Chairman
The Honorable Kara M. Stein
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
Dalia Blass, Director, Division of Investment Management
William Hinman, Director, Division of Corporation Finance