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Filed Electronically

August 16, 2019

Ms. Vanessa A. Countryman, 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 Ms. Countryman:

Institutional Shareholder Services Inc. (ISS) is pleased to supplement our earlier comments in the above-referenced matter[1] in order to respond to comments recently submitted by ExxonMobil Corporation (ExxonMobil).[2]

ExxonMobil has proposed an audacious plan to silence shareholders' voice in corporate governance. In particular, the company asks the Commission to create a pair of "safe harbors" under the Investment Advisers Act of 1940 (Advisers Act) designed to dissuade registered investment advisers from ever casting a proxy vote against management, even when it is in their clients' best interests to do so. ExxonMobil further asks the Commission to subject the investment advice rendered by registered proxy advisers like ISS to a full-scale issuer review before that advice is disseminated to the investors who have paid for it. Should the issuer disagree with *any* part of that advice – factual statements, qualitative analysis or vote recommendations – the issuer would have the right to commandeer the proxy adviser's work product and add its own content to contradict the adviser's opinions. Finally, this commenter seeks to control advisers' internal operations by asking the SEC to dictate when and how advisers may use technology in fulfilling their proxy voting responsibilities.

ExxonMobil has wrapped its proposal in anecdotes and graphics in order to give it a benign appearance. But nothing can hide the fact that this is a radical plan to upend almost 90 years of securities law in the United States, transforming the current disclosure-based system into a merit-based system in which the government, and not the marketplace, decides what ideas can be expressed. ISS urges the Commission to see the ExxonMobil proposal for what it is and to reject it outright.

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[1] Letter from Gary Retelny, President and CEO, ISS to Brent J. Fields, Secretary, SEC (November 7, 2018), *available at:* https://www.sec.gov/comments/4-725/4725-4629940-176410.pdf (ISS Letter I). ISS restates these earlier comments and incorporates them herein by reference.

[2] Letter from Neil A. Hansen, Vice President, Investor Relations and Corporate Secretary, ExxonMobil, to Vanessa Countryman, Secretary, SEC (July 26, 2019), *available* at: https://www.sec.gov/comments/4-725/4725-5879063-188728.pdf (ExxonMobil Letter).

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A. Investment advisers have a fiduciary duty to vote proxies in their clients' best interests; there can be no safe harbor for casting votes with management.

As it stands today, the vast majority of proxy votes are cast in favor of management. Indeed, in the past 10 years, ExxonMobil's management has secured shareholder agreement with its recommendations on 98.6% of the items on the company's proxy ballots. ExxonMobil seeks to close the modest window of dissent by urging the Commission to create two new safe harbors under the Advisers Act, the effect of which would be to dissuade investment advisers from ever voting against management. The first would shield investment advisers from liability where they follow a proxy adviser's recommendation that happens to be aligned with the issuer's recommendation. The second would shield advisers from liability where they refrain from voting on a ballot proposal as to which a proxy adviser recommends voting against the issuer's recommended position. This would be so even where an "AGAINST" vote is in the underlying client's best interest.

Following to its logical conclusion the hubristic argument that management always knows best would eliminate the need for proxy voting altogether. If that is ExxonMobil's goal, it has come to the wrong forum, for it is the states, not the SEC, who have decreed that the parties who own corporations deserve a say in how those enterprises are governed. As a federal matter, however, ExxonMobil's proposal reflects a profound misunderstanding of the securities laws.

The Advisers Act establishes a principles-based regulatory regime, the essence of which is the fiduciary relationship between the adviser and its clients. As the SEC explained in its recent interpretive release on this topic, the fiduciary standard is comprised of a duty of care and a duty of loyalty which, taken together, mean that the adviser must act in the best interest of its clients with respect to *all* services undertaken on clients' behalf.[3] The fiduciary standard cannot be negotiated away or waived.[4]

The first aspect of the duty of care is an obligation to provide advice that is in the best interest of the client based on the client's particular investment objectives. A best-interest determination also requires an adviser to conduct an investigation into the subject of its advice sufficient to avoid basing the advice on materially inaccurate or incomplete information.[5]

The duty of loyalty obligates the investment adviser not to place its own interests ahead of those of its clients. A critical component of the duty of loyalty is an obligation to address conflicts of interest. Here, the Commission explained that an adviser "must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline [the] adviser . . . to

[3] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) (Fiduciary Standard Release) at 8.

[4] *Id.* at 10 .

[5] *Id.* at 16.

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render advice [that is] not disinterested."[6] This includes disclosure of how the adviser manages such conflicts.[7]

The Commission addressed the application of the fiduciary standard of conduct in the context of proxy voting when it adopted Advisers Act Rule 206(4)-6 in 2003. As ISS explained in its earlier comment letter, this rule applies traditional fiduciary concepts to investment advisers' proxy voting activities without either requiring advisers to offer proxy voting services to their clients, or mandating how advisers decide to vote.[8] Nor, contrary to ExxonMobil's assertion, did the Commission create a safe harbor for investment advisers who vote client proxies in accordance with the recommendations of independent proxy advisers. Despite adding a reference to engaging independent third parties to a list of **possible** ways advisers could address conflicts of interest, the Commission made it clear that

> *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*[9]

and confirmed that

> *[n]othing in [Rule 206(4)-6] reduces or alters any fiduciary obligation applicable to any investment adviser (or person associated [therewith]).*[10]

This position aligns with the position the U.S. Department of Labor took several years earlier interpreting the fiduciary standard under the Employee Retirement Income Security Act of 1974 (ERISA):

> *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*

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[6] *Id.* at 23.

[7] *Id.* at 24. The Commission also addressed the duty to manage conflicts when it adopted the Advisers Act compliance rule, saying, "Each adviser, in designing its policies and procedures, should first identify conflicts and other compliance factors creating risk exposure for the firm and its clients in light of the firm's particular operations, and then design policies and procedures that address those risks." Compliance Programs of Investment Companies and Investment Advisers, Advisers Act Release No. 2204 (December 17, 2003) at 5.

[8] *See* ISS Letter I at 3-5; Proxy Voting by Investment Advisers, Advisers Act Release No. 2106 (January 31, 2003), 68 Fed. Reg. 6585, 6586 (February 7, 2003) (Proxy Rule Release). Indeed, as noted in our earlier comment letter, a year before Rule 206(4)-6 was adopted, then-SEC Chairman Harvey Pitt confirmed that an adviser's proxy voting activities are governed by its fiduciary duty. ISS Letter I at note 5 and accompanying text.

[9] Proxy Rule Release, 68 Fed. Reg. at 6588 (citations omitted).

[10] *Id.* at note 8.

liabilities merely because it either follows the direction of some other person, or has delegated the responsibility to some other person.[11]

Likewise, neither the SEC Staff's 2004 guidance[12] nor its follow-up guidance in 2014[13] created a proxy voting safe harbor for investment advisers. Just the opposite. After explaining that a third-party proxy adviser's "independence" depends on its relationship to the adviser, the Staff went on to explain that merely confirming the independence of the third party is not enough. The investment adviser has a fiduciary duty to scrutinize the independent third party's capacity and competency to adequately analyze proxy issues, and the sufficiency of its policies and procedures to identify and address conflicts of interest. The Staff emphasized that these due diligence obligations exist not just at the time the proxy adviser is engaged, but throughout the life of the engagement. The Staff provided guidance on ways in which investment advisers could confirm that clients' proxies are being voted in accordance with clients' best interests and with the adviser's proxy voting procedures, such as by periodically sampling votes cast. And the staff reminded advisers of their obligation to test the adequacy of their proxy voting policies and the sufficiency of the policies' implementation on at least an annual basis.

There never has been a fiduciary safe harbor for investment advisers who vote proxies on their clients' behalf, and there never should be. Whether they engage the services of independent proxy advisers or not, registered investment advisers remain liable for exercising the care and loyalty necessary to act in their clients' best interests. ExxonMobil's proposal to create a safe harbor for advisers who refrain from voting against management must be rejected.

B. Proxy advisers are fiduciaries under the Advisers Act; the SEC may not regulate the substance of their vote recommendations or the procedures and methodologies they use to determine such recommendations.

Not content just to ask the SEC to incentivize investment advisers not to vote against issuers, ExxonMobil also asks the Commission to give issuers a say in formulating and communicating the advice proxy advisers render to their clients. Variously arguing that issuers "are recognized as the most knowledgeable party about their business;"[14] that shareholders lack timely access to issuer points of view; and that absent issuer involvement, proxy advisers are free to make

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[11] Letter from Alan D. Lebowitz, Deputy Assistant Secretary, DOL to Mr. Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. (February 23, 1988), 1988 ERISA LEXIS 19, *7-9.

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

[13] 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/interps/legal/cfslb20.htm (SLB 20). SLB 20 confirmed and expanded the 2004 Guidance.

[14] ExxonMobil Letter at 13.

false and misleading statements with impunity,[15] ExxonMobil seeks to require that proxy advisers give each benchmark and specialty research report to the issuer at least five days before the report is sent to the clients who have paid for it. An issuer who disagrees with *any* part of a report -- facts, opinions, analysis or recommendation -- would have the right to prepare its own "response statement" and to have that statement inserted in the same document as the proxy adviser's analysis and vote recommendation. According to ExxonMobil, forcing proxy advisers to grant issuers the right to review proxy research reports and to supplement those reports with their own content would create a "mutual policing relationship" between proxy advisers and the issuers they provide advice about.[16]

There are a number of reasons to reject this stunning proposal.

First, the federal securities laws do not, and cannot, regulate the content of financial service providers' opinions. Congress acknowledged this fact in 2006, when it created a new, voluntary regulatory regime for credit rating agencies and added a proviso prohibiting the SEC and the states from regulating the "substance of credit ratings or the procedures and methodologies by which" such ratings are determined.[17]

Of particular relevance to the proposal at hand is the fact that the securities laws have never required research providers to have their opinions approved by the companies on which they opine. In fact, the opposite is true. In the wake of a series of turn-of-the century scandals involving conflicted reports by research analysts at investment banks, the Commission approved a package of self-regulatory organization rules (now consolidated in FINRA Rule 2241) to "restore investor confidence in the analysts' work" by requiring independence in analysts' research and recommendations.[18]

Recognizing the risks presented by prepublication review of analyst reports by the subject company, FINRA Rule 2241 prohibits such review for any purpose other than verification of facts.[19] Before a draft report is delivered to the subject company for a factual review, the research summary, research rating and price target must be removed, and a copy of the complete draft must be delivered to the firm's legal or compliance department. If the research department decides to change the proposed rating or price target after the subject company's review, the research department must provide written justification to, and receive written authorization from, legal or compliance personnel for the change.[20]

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[15] *Id.* at 2, 5, 10 and 14.

[16] *Id.* at 13.

[17] Section 15E(c)(2) of the Securities Exchange Act of 1934.

[18] Lori Richards, Director, Office of Compliance Inspections & Examinations, SEC, Speech by SEC Staff: Analysts Conflicts of Interest—Taking Steps to Remove Bias (May 8, 2002); *See also* Order Approving Proposed Rule Changes by the NASD and NYSE, Exchange Act Release No. 45908, 67 Fed. Reg. 34968 (May 15, 2002).

[19] FINRA Rule 2241(b)(2)(N).

[20] Supplementary Material to FINRA Rule 2241 .05.

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At the 2019 SEC Speaks program, the SEC's Investor Advocate noted the parallel between protecting the independence of sell-side recommendations and protecting the independence of proxy voting recommendations, saying:

> *Consider, for example, the rules currently in place for sell-side research, which generally aim to prevent issuers from influencing the research produced by investment firms. . . . I ask, why should the principle be any different when it comes to the independence of voting recommendations?"*[21]

Institutional investors who use proxy advisory services have said the same thing, and have observed that allowing issuers to "police" proxy advisers would destroy the accuracy, independence and objectivity the institutions need to fulfill their own fiduciary responsibilities.[22]

ISS also disagrees with ExxonMobil's contention that issuers have no way to communicate with their shareholders other than by appropriating space in proxy advisers' research reports. Companies make their views known to investors in a myriad of ways, including in initial and supplemental proxy statements,[23] by hiring proxy solicitors and through individual engagements. As professor John C. Coates remarked at a hearing last year before the Senate Committee on Banking, Housing and Urban Affairs, "[The issuer] has its own mouth too."[24]

Professor Coates went on to rebut the contention that issuer oversight of proxy research is the only way to ensure that accurate information enters the marketplace, saying:

> *Anyone giving advice in a public way . . . . is subject to anti-fraud rules enforced by the SEC. If ISS were to put out a report knowingly falsely, or negligently falsely, they would be subject to liability for it. I want to be clear that if they deliberately misrepresent facts, they are going to be subject to liability. . . . On basic factual*

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[21] Statement of Rick Fleming, SEC Investor Advocate (April 8, 2019) at note 18.

[22] Letter from Donna F. Anderson and Eric Veiel, T. Rowe Price, to Brent J. Fields, Esq., Secretary, SEC (December 13, 2018) at 3 ("We fail to see why the independence of sell side recommendations should be afforded greater protection than the independence of proxy recommendations"). *See also* letter from Paul Schott Stevens, President and CEO, Investment Company Institute to Vanessa Countryman, Acting Secretary, SEC (March 15, 2019) at 13 ("Fund advisers expect and must receive independent, objective, and accurate information from proxy advisory firms"); and letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, *et al.,* to Jeb Hensarling and Maxine Waters, Committee on Financial Services, Re: Proposed Legislation Relating to Proxy Advisory Firms, (November 9, 2017) at 3 ("Currently, proxy advisors provide equity holders of U.S. corporations with independent advice. [Proposed bills to regulate proxy advisory firms] threaten to abrogate that very independence, which is a hallmark of ownership and accountability").

[23] In fact, issuers "get unlimited space in the proxy statement" to voice their opposition to shareholder proposals, while the proponents of such proposals have a maximum of 500 words to explain their point of view. Statement of Michael Garland, Assistant Comptroller, Office of the New York City Comptroller at the SEC Roundtable on the Proxy Process, November 15, 2018, *transcript available at* https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf at 160; 17 CFR § 240.14a-8(d).

[24] Legislative Proposals to Examine Corporate Governance: Hearing Before the Committee on Banking Housing, and Urban Affairs (June 28, 2018) (Statement of John C. Coates).

> *disputes we have an amply robust system for getting information out there for investors.*[25]

In 2010, the Commission addressed the legal standards that govern proxy advisers, explaining that proxy advice is a form of investment advice subject to regulation under the Advisers Act, and that

> *[a]s investment advisers, proxy advisory firms owe fiduciary duties to their advisory clients.*[26]

The Commission also explained that as a fiduciary,

> *the proxy advisory firm has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.* [27]

Proxy advisers do not need issuer oversight in order to produce accurate research reports. But ExxonMobil is not concerned as much with factual accuracy as it is with some of the substantive opinions proxy advisers express. We do not have a merit-based securities regulatory regime in this country. ExxonMobil's proposal must be denied.

C. ISS' specialty policies, along with its benchmark policy and its willingness to make recommendations based on clients' custom policies, give investment advisers the range of options they need to fulfill their fiduciary duties.

Perhaps unaware of the irony of its position, ExxonMobil criticizes ISS for offering specialized voting policies that may produce vote recommendations different from the ones determined under the benchmark policy, while simultaneously criticizing ISS for taking a one-size-fits-all approach to proxy analysis.

The exact nature of ExxonMobil's objection to the specialty policies is something of a mystery. The company variously argues that there is no need for such policies, because clients can develop their own custom guidelines if they so desire;[28] that the creation of such policies somehow destroys ISS' independence from the investment adviser;[29] and that ISS'

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[25] *Id.*

[26] Concept Release on the U.S. Proxy System (Proxy Concept Release), Advisers Act Release No. 3052 at 110, 75 Fed. Reg. 42981, 43010 (July 22, 2010) *(internal citations omitted), quoting SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-192 (1963).

[27] *Id*., at 119. The Commission again confirmed this interpretation of the duty of care in its recent fiduciary duty interpretive release. Fiduciary Standard Release, *supra* note 3 at 16.

[28] ExxonMobil Letter at note 9.

[29] *Id.* at 9.

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production of these alternative reports has "the effect of providing favored legal status to certain subsets of clients with particular issue priorities."[30]

While it is true that ISS currently implements more than 400 custom voting policies on behalf of clients,[31] these policies tend to be produced by the largest and most well-resourced institutional investors. By offering voting recommendations based on specialty policies, ISS enables smaller advisers to also tailor their proxy voting to the potentially divergent investment objectives of their clients, thereby satisfying their fiduciary duty to act in their clients' best interests. Just as investors may have different investment time horizons, risk tolerances and investment strategies, so too they may have different ways of assessing how proxy voting serves their investment goals. The possibility that specialty policies and the benchmark policy may produce different vote recommendations is hardly surprising. ISS' investment advice is not calculated to produce any particular outcome in the proxy process, but rather is designed to look at issues through whatever lens its investor clients select, and recommend accordingly.

As for independence, ISS' relationship with subscribers to its specialty voting policies is exactly the same as the arm's-length commercial relationship ISS maintains with subscribers to the benchmark policy and with subscribers who ask us to base vote recommendations on their own custom policies.

ISS is at a loss to understand what "favored legal status" ExxonMobil thinks subscribers to specialty policies enjoy. Because there is no proxy voting safe harbor, subscribers to all ISS voting guidelines, and investors who engage ISS to make vote recommendations based on custom guidelines, have the same legal rights and responsibilities as any other investment adviser who undertakes to vote proxies on its clients' behalf.

Moreover, the Advisers Act regulatory regime is well equipped to deal with any investment adviser who utilizes a specialty voting policy to serve its own interests instead of those of its clients. In a settled administrative action, the Commission sanctioned an investment adviser who voted all of its clients' proxies in accordance with labor-friendly voting guidelines in order to maintain existing, and attract new, union-affiliated clients.[32] The Commission found that in doing so, the adviser failed to act in the best interests of all its clients; failed to properly inform clients of its proxy policies, as Rule 206(4)-6 requires; and failed to disclose that its selection of the labor-friendly voting policy entailed a conflict of interest. When, in response to the SEC staff's inquiry about its voting practices, the adviser offered its clients a choice of voting guidelines, 27% of the clients chose to switch from the labor guidelines to benchmark voting guidelines. Although the adviser was censured and fined for violating its fiduciary duty, it is instructive to note that when given a choice, the clients themselves selected divergent voting guidelines.

Stripped to its essence, ExxonMobil's objection to specialty proxy voting guidelines derives from its antipathy to the content of some of the vote recommendations that the specialty policies

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[30] *Id.* at 8.

[31] For the 2018 calendar year, approximately 76% of the total shares processed by ISS on behalf of clients globally were linked to clients' custom voting guidelines.

[32] *In the Matter of INTECH Investment Management LLC and David E. Hurley,* Advisers Act Release No. 2872 (May 7, 2009).

produce. As explained in the previous section of this letter, regulating content is beyond the scope of the U.S. securities laws.

D. The Advisers Act permits the automation of advisory functions; the exercise of fiduciary duty does not preclude the use of standing voting instructions.

ExxonMobil proposes a ban on the use of automated voting platforms with standing voting instructions, and urges the Commission to dictate a set of rigid procedures investment advisers must follow in carrying out their fiduciary proxy voting responsibilities.[33] In this regard, advisers would be precluded from casting a vote through an automated platform for two to three days after the release of a proxy research report on the subject ballot. This holding period presumably would apply even where the report in question is based on an investor's custom guidelines and thus was not subjected to the issuer's editorial control. Before manually affirming or modifying a vote based on its standing instructions, the adviser would have to confirm its receipt and review of the vote recommendation, the issuer's response statement, if any, and any other information the adviser deems necessary to fulfill its fiduciary duty.

Anticipating how costly and burdensome these requirements would be for investment advisers, ExxonMobil suggests in the alternative, that automated voting instructions be disabled only in the case of a recommended vote "AGAINST" management, and then only if the proxy report includes issuer content. While this alternative may look reasonable by comparison to ExxonMobil's preferred scheme, it, like the other parts of ExxonMobil's proposal, is not compatible with the regulatory regime established under the Advisers Act.

Investment advisers routinely employ technology in their business operations, not only for administrative tasks, but for core advisory functions as well. For example, some advisers implement automated trading strategies, relying on algorithms to buy and sell securities immediately once a certain price is reached or a certain market activity occurs. Advisers also offer passive investment strategies such as index funds, where investment decisions automatically track a pre-selected index or other benchmark, without the adviser's manual intervention.

And some advisers go further still and move their entire operation online. Such automated or "robo" advisers create interactive, digital platforms, such as websites or mobile applications, to elicit personal information and other data from retail investors. Based on the information received, robo-advisers generate and manage portfolios for clients in an automated fashion.[34]

Although the Advisers Act predates the advent of computers and other technological tools by decades, the Commission has confirmed that this principles-based regulatory regime is flexible enough to address even fully automated advisory services. In its recent interpretation of the fiduciary standard of conduct, the Commission said:

[33] ExxonMobil Letter at 21.

[34] See Division of Investment Management, "Robo-Advisers," IM Guidance Update No. 2017-02 (February 2017) (Robo Guidance), *available at* https://www.sec.gov/investment/im-guidance-2017-02.pdf.

> This Final Interpretation also applies to automated advisers, which are often colloquially referred to as 'robo-advisers.' Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients.[35]

Automated voting -- like automated trading, index investing and robo advising -- does not violate fiduciary duty. In fact, automation enables investment advisers to fulfill their duty to vote proxies in their clients' best interest in efficient and cost-effective ways. ISS' web-based voting platform, ProxyExchange, allows institutions to manage the proxy voting process in a streamlined, seamless and global fashion by providing a single platform for receiving corporate governance data; making screening, investment and proxy decisions; executing votes; and vote reporting.

The standing voting instructions that populate the ProxyExchange platform are selected, or in many cases, created by advisers to produce votes in their clients' best interest.[36] Utilizing such an automated system in no way impedes an adviser's ability to conduct due diligence of its proxy advisory service provider, periodically sample votes to determine if they were cast in clients' best interest, annually assess the sufficiency of the adviser's proxy voting policies and procedures and the adequacy of their implementation, or make required disclosures to investors.[37] Moreover, platform users have the ability to flag issues of their choosing for manual review, override any particular vote recommendation and, critically, change any vote already cast, up to the day of the shareholder meeting.

The principles-based regulatory regime under the Advisers Act does not micromanage an adviser's operations or dictate the tools an adviser may use in serving its clients. As with the other components of ExxonMobil's proposal, its request to ban the use of automated voting strategies must be denied.

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[35] Fiduciary Standard Release, *supra* note 3 at note 27 *citing* Robo Guidance.

[36] In the case of a mutual fund, the policies and procedures used to determine how to vote proxies relating to portfolio securities, like the fund's investment strategies, must be disclosed in the fund's registration statement. While the SEC has not prescribed the exact content of this disclosure, it has advised that disclosure should cover a range of issues, including the use of third-party vote recommendations and the extent to which the fund will support or give weight to the views of management. The Commission has further opined that funds should inform investors about the funds' voting policies on specific issues, including corporate governance matters, management compensation issues, and social and corporate responsibility issues. "Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies," Investment Company Act Release No. 25922 (January 31, 2003) at 6, 68 Fed. Reg. 6563 (February 7, 2003) at 6567. Just as an investor can choose an index-driven or other fund that suits his investment objectives, so, too, can he assess how those objectives will be affected by the fund's proxy voting policies.

[37] In fact, the sophisticated recordkeeping and reporting features of ProxyExchange facilitate an adviser's forensic testing of its proxy voting practices, and compliance with its vote disclosure obligations.

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E. In lieu of adopting the ExxonMobil proposal, ISS urges the Commission to issue comprehensive interpretive guidance on the legal requirements that apply to proxy advisers and the investment advisers who use their services.

Consolidating legal standards on the duties of proxy advisers and the regulated investment advisers who use their services into one Commission release would benefit all parties to this long-standing debate. ISS respectfully offers the following suggestions for inclusion in such a release:

o Proxy advisory firms meet the definition of investment adviser under the Advisers Act because they, for compensation, engage in the business of issuing reports or analysis concerning securities, providing advice to others as to the value of securities, and providing advice about the advisability of purchasing and selling securities.

o A proxy advisory firm that provides proxy voting research, analysis or recommendations to investors in public companies, by means of written or oral statements that are reasonably designed to meet the objectives or needs of specific clients or accounts is not a "publisher" as that term is used in Section 202(a)(11)(D) of the Advisers Act.

o A proxy advisory firm who provides proxy voting research that includes recommendations about purchasing, selling or holding securities may not rely on the exception to the definition of investment adviser for nationally recognized statistical rating organizations under Section 202(a)(11)(F) of the Advisers Act.

o As an investment adviser, a proxy advisory firm owes fiduciary duties of care and loyalty to its clients.

o A proxy adviser has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.

o A proxy adviser has a duty to eliminate or manage and disclose all conflicts of interest which might incline the adviser – consciously or unconsciously – to render advice that is not disinterested.

o A proxy adviser's duty to disclose conflicts of interest includes a duty to disclose whether the proxy adviser has a significant relationship with the company or security holder proponent of a proposal that is the subject of a vote recommendation, or whether it otherwise has a material interest in the matter that is the subject of the voting recommendation. Whether a relationship would be "significant" or what constitutes a "material interest" depends on facts and circumstances. In making such a determination, a proxy adviser should consider the type of service being offered to the company or security holder proponent, the amount of compensation that the proxy adviser receives for such service, and the extent to which the advice given to its advisory client relates to the same subject matter as the transaction giving rise to the

relationship with the company or security holder proponent. A similar inquiry would be made for any interest that might be material. A relationship generally would be considered "significant" or a "material interest" would be deemed to exist if knowledge of the relationship or interest would reasonably be expected to affect the recipient's assessment of the reliability and objectivity of the adviser and the advice.

o The Advisers Act does not obligate registered investment advisers to vote proxies on their clients' behalf. However, such an obligation may arise by contract or from other statutes, such as ERISA.

o A proxy vote appurtenant to shares held in a managed account is an asset of that account. Therefore, an adviser who expressly or implicitly undertakes to vote proxies on its clients' behalf is bound by fiduciary duties of care and loyalty with regard to that task.

o The duty of care requires an adviser with proxy voting authority to monitor corporate events and to vote the proxies, unless it is in the client's best interest to refrain from voting or unless the proxy adviser's agreement with the client directs otherwise.

o There may 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.

o To satisfy its duty of loyalty, an adviser must cast proxy votes in a manner consistent with the best interest of its client and must not put its own interests ahead of those of its clients.

o Advisers Act Rule 206(4)-6 requires an adviser that undertakes to vote client proxies to implement written policies and procedures that are reasonably designed to ensure that the adviser votes proxies in the best interest of its clients.

o In voting proxies on a client's behalf, an adviser can follow a pre-determined policy to use a recommendation by an independent third party such as a proxy advisory firm. However, the use of such a service does not reduce or otherwise alter the adviser's fiduciary obligation to its client. The adviser continues to have full responsibility and liability for the exercise of proxy voting decisions.

o An adviser's due diligence obligations in engaging a proxy advisory firm are similar to its obligations in engaging other kinds of third party service providers. The adviser must reasonably determine that its use of any third-party service will enable the adviser to fulfill its fiduciary duties to clients.

o Consistent with its fiduciary duty, an investment adviser should take reasonable steps to ensure that the proxy advisory firm can make recommendations for voting proxies in an impartial manner and in the best interests of the adviser's clients.

o An adviser should consider, among other things, the adequacy and quality of the proxy advisory firm's staffing and personnel, and the robustness of its policies and procedures regarding its ability to ensure that its proxy voting recommendations are based on current and accurate information.

o If an adviser determines that a proxy advisory firm's recommendation was based on a material factual error that causes the adviser to question the process by which the proxy advisory firm develops its recommendations, the adviser should take reasonable steps to investigate the error. This investigation should take into account, among other things, the nature of the error and the related recommendation. The adviser should also seek to determine whether the proxy advisory firm is taking reasonable steps to seek to reduce similar errors in the future.

o An investment adviser should have a thorough understanding of the proxy advisory firm's business and the nature of the conflicts of interest that the business presents, and should assess whether the firm's conflict procedures effectively address the conflicts. The investment adviser should also assess whether the proxy advisory firm has fully implemented the conflict procedures.

o When reviewing a proxy advisory firm's conflict procedures, an investment adviser should assess the adequacy of those procedures in light of the particular conflicts of interest that the firm faces in making voting recommendations.

o An adviser should also examine any other considerations that the investment adviser believes would be appropriate in considering the nature and quality of the services provided by the proxy advisory firm.

o A proxy advisory firm’s business and/or conflict procedures could change after an investment adviser’s initial assessment, and such changes could alter the effectiveness of the conflict procedures that the adviser previously assessed. Consequently, an investment adviser must adopt and implement policies and procedures reasonably designed to provide sufficient ongoing oversight of the third party in order to ensure that the adviser, acting through the third party, continues to vote proxies in the best interests of its clients.

o Engaging a proxy adviser is not the only way for an investment adviser to mitigate potential conflicts in connection with proxy voting. The effectiveness of any policies and procedures will depend upon how well they insulate the decision on how to vote client proxies from the potential conflict.

o A proxy advisory firm's use of technology to enhance the efficiency of the proxy voting process -- for example, by providing a standing voting instruction capability -- does not alter the adviser's fiduciary responsibility to vote proxies in its clients' best interests.

o An adviser can demonstrate its compliance with its fiduciary duties and Advisers Act Rule 206(4)-6 in a number of ways. These include, for example, periodically sampling proxy votes to review whether they complied with the adviser's

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proxy voting policies and procedures. By way of further example, the adviser also could specifically review a sample of proxy votes that relate to certain proposals that may require more analysis.

o As part of its ongoing compliance program under Advisers Act Rule 206(4)-7, an adviser should, no less frequently than annually, review the adequacy of its proxy voting policies and procedures, including whether those policies and procedures continue to be reasonably designed to ensure that proxies are voted in the best interests of its clients. The adviser must also at least annually review the effectiveness of the proxy voting policies and procedures' implementation.

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As always, we are 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,

/s/

Gary Retelny
President and CEO

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison H. Lee
Dalia Blass, Director, Division of Investment Management
William Hinman, Director, Division of Corporation Finance
Rick Fleming, Office of the Investor Advocate