

**Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609**

**RE: [Release No. 34-93595; File No. S7-17-21]; Comments on Proposed Rule: Proxy Voting Advice
December 22, 2021**

Dear Secretary Countryman,

Please find attached a report by the American Council on Capital Formation (ACCF), *“Proxy Advisors Are Still a Problem: 2021 Proxy Season Analysis Shows Companies Continue To Report Similar Rate Of Errors Despite Heightened Scrutiny”*.

The paper provides a comparative analysis of supplemental filings to companies’ proxy statements in the 2021 proxy season and shows at least 50 instances where proxy advisors have formulated recommendations based on data or analysis disputed by the companies themselves. In contrast to a recent statement from one Commissioner that the “error rate with respect to proxy voting advice is vanishing to none,” the continued prevalence of supplemental filings each proxy season demonstrates that errors and serious disagreements remain an issue, with the potential to harm the integrity of the proxy process.¹

These findings build on past reports conducted by ACCF, which uncovered 42 filings in 2020 and an additional 107 filings from 94 different companies between the 2016, 2017 and 2018 proxy seasons.² It is important to note that supplemental filings are the only publicly available record of potential proxy advisor errors and may only represent the “tip of the iceberg” of various disagreements that occur in any given year because issuers – unlike proxy advisors – must take on legal liability to submit a filing.

The 2020 rule addressed concerns with these errors by requiring proxy advisors to share their recommendations simultaneously with companies and their clients, as well as alert their clients of instances where companies believe there is an error or have a serious disagreement with a recommendation. The SEC simultaneously released guidance to investors urging them to make use of the new information that would be made available to them to encourage investor review of contested matters.

The findings of this report further confirm that the SEC’s 2020 rule should still be enforced despite current claims that significant provisions of the rule need to be rolled back and are unwarranted, and call into question the Commission’s proposed amendments to remove requirements that would improve the process for companies to voice concerns with recommendations and for investors to review these claims.

¹ <https://www.sec.gov/news/statement/lee-proxy-advice-20211117>

² <https://accf.org/2020/08/05/analysis-of-proxy-advisors-recommendations-during-the-2020-proxy-season/>,
<https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/>

I appreciate the opportunity to provide public comment on the proposed amendments, and note that this report, significantly, is one of the few new pieces of data for the SEC to examine as it considers this proposal.

Kyle Isakower
Senior Vice President of Regulatory & Energy Policy
The American Council on Capital Formation

PROXY ADVISORS ARE **STILL** **A PROBLEM**

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COMPANIES CONTINUE
TO REPORT SIMILAR RATE
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CONTENTS

Introduction	4
Background/Analysis	6
Summary of Findings	9
Conclusion	13
Appendix	14

INTRODUCTION

For years, the U.S. Securities and Exchange Commission (SEC) has examined and considered various regulatory reforms to enhance the inner workings of the proxy process, which governs how shareholders vote to influence the governance and strategy of publicly traded companies.

The enhanced focus from investors on Environmental, Social, and Governance (ESG) factors,¹ an increased desire to conduct oversight of portfolio companies through support for shareholder proposals on non-traditional governance issues, as well as the continued rise in passive funds who increasingly exercise their influence through the proxy process - instead of through the active buying and selling of company shares – means the spotlight will likely remain on the once obscure and byzantine world of the proxy process.

Recently, much of this debate has centered around the widespread use and influence of proxy advisors, third-party arbiters whom institutional investors often rely on to determine how to exercise their voting authority amid the thousands of votes they cast each proxy season.

To address the issues raised by market participants and specifically to address concerns raised about the role of proxy advisors, the SEC recently took a series of actions meant to address those concerns. Effective September 10, 2019, the Commission approved new [guidance](#) to investment advisers detailing their proxy voting responsibilities and confirming that it is their fiduciary duty to conduct due diligence with respect to their use of proxy advisors. On the same date, the Commission released updated [guidance](#) on the applicability of the proxy rules to proxy advisors, which interpreted

proxy advisor recommendations as a “solicitation” and therefore subjected advisor recommendations to anti-fraud provisions in the SEC’s proxy rules.

In 2020, the SEC approved a formal [rule](#) on proxy advisors (Proxy Advisor Rule), codifying the SEC’s longstanding position that proxy advice is a “solicitation”, but exempting advisors from complying with those rules if they disclosed conflicts of interest and allowed companies the opportunity to review and respond to recommendations. At the same time, the Commission approved additional [supplemental guidance](#) to investment advisers directing them to review the new information that would be made easily available as a result of the rule.

Notwithstanding the SEC’s thorough examination of proxy advisors and bipartisan support in Congress for reform of the industry, the SEC – under the leadership of recently appointed SEC Chair Gary Gensler – announced that it would not recommend any enforcement actions under the Proxy Advisor Rule until an internal review of the rule was concluded.

Additionally, the SEC issued a [proposed rule](#) in November 2021 that would effectively gut the reforms included in the 2020 Proxy Advisor Rule. **Without citing any specific evidence or data for why the rule should be amended, the SEC is proposing to do away with the requirement that proxy advisors provide public companies with an opportunity to review and comment on vote recommendations – which is the most important reform to improve upon the currently flawed process of relying on supplemental filings.** The SEC also proposes to weaken some of the antifraud provisions included in the Proxy Advisor Rule that were intended to protect investors against false or misleading statements made by proxy advisory firms.

Notwithstanding the SEC’s decision to amend the Proxy Advisor Rule, new evidence shows that proxy advisory firms remain prone to making significant errors when developing vote recommendations. These errors can impair the quality and objectivity

¹ With regard to ESG, ACCF recently noted that its application is becoming essential to investor decisions and for businesses throughout the world who work to adhere to an evolving array of ESG framework principles. As more stakeholders engage, ESG, and especially the governance factors, are playing a decisive role as investments are evaluated and decisions are made which will ultimately affect the returns on those investments and, importantly, the costs and allocation of capital. Applied appropriately, ESG factors can be a catalyst for constructive conversations and collaboration that can spur a balance of qualitative and quantitative metrics, favorably resolve differing interpretations of financial and legal materiality, and actually assist investors as they apply their own due diligence as they consider their investment decisions.

of advice and ultimately harm the interests of investors. This paper highlights ACCF's latest review of companies' supplemental filings to their proxy materials to the SEC during most of the 2021 proxy season. ACCF's review of filings shows at least 50 instances where proxy advisors have formulated recommendations based on data or analysis disputed by the companies themselves, an increase from the 42 filings uncovered in [ACCF's 2020 analysis](#), suggesting a strong need for the SEC to regulate proxy advisors.

The paper also examines how, if enforced, the 2020 Proxy Advisor Rule would create a fair process for companies to respond to proxy advisor recommendations and enhance the quality of easily accessible information to investors, contrary to the current system whereby companies may only report any such issues through supplemental filings to their proxy statement.

Supplemental filings are the only publicly available record of potential proxy advisor errors² and likely only the "tip of the iceberg" of various disagreements that occur in any given year because issuers – unlike proxy advisors – must take on legal liability to submit a filing. This additional risk is not usually worth the outcome since supplemental filings are often ineffective. This is primarily because many investors who rely on proxy advisors often automatically vote before filings are submitted or simply do not review such filings. In addition to these issues, companies may be hesitant to submit supplemental filings that point out proxy advisor errors for fear of retaliation from proxy advisors in future recommendations.

The following is a brief overview of the types of errors or disagreements found in this year's filings. In one example, the proxy advisor recommended voting against the election of a director under the premise that no director who is a CEO of a company should also serve on more than two additional public company boards. However, the recommendation failed to consider that this director serves on three

boards, all affiliated with the parent company, effectively exempting the director from the rule's criteria because his duties all lie with the same organization. Another proxy advisor recommended against the election of a director because that director was a "non-independent member of the audit and compensation committees," even though the director was a member of neither, and served only in an advisory, non-voting capacity. Other filings showed instances where proxy advisors issued recommendations that appear to be contradictory with their stated policies.

These results are consistent with the prior analysis of supplemental filings we conducted over previous proxy seasons dating back to 2016 – which have uncovered a total of over 200 apparent errors and serious disagreements in the examined time periods.

If the SEC were to leave the Proxy Advisor Rule and related guidance to investment advisers in place, it would give companies a better chance to communicate their perspective on errors and serious disagreements with their shareholders and encourage investment advisers to conduct increased oversight over contested recommendations. This would ensure they are voting in their clients' best interests, and not just blindly following proxy advisors' recommendations on controversial and consequential votes.

Regardless of one's opinion on whether a proxy advisor recommendation or a company's position in any given instance is correct, the prevalence of such errors and serious disagreements suggests more, not less, scrutiny of proxy advisory firms is warranted.

² This paper's use of the term "error" in the context of proxy advisor reports signifies a discrepancy between the data and/or analysis in a proxy advisor's report and an issuer's supplemental filing. As only the issuer assumes legal liability associated with these discrepancies, we assume that the proxy advisor is in error. The author acknowledges that this does not rule out the less likely possibility that the proxy advisor is indeed factually correct.

BACKGROUND/ANALYSIS

Over the course of the past decade, Congress and the SEC have repeatedly considered the role of proxy advisors as their influence on the capital markets and institutional investors increased, and with it the ability to exert significant power over corporate governance decisions. At the crux of the debate is the concern that, historically, these third-party advisors owe no client a fiduciary duty to issue recommendations that are in their best interest, there exists a lack of disclosure over conflicts of interest, and there is no requirement for proxy advisors to engage the companies who are the subject of their recommendations.

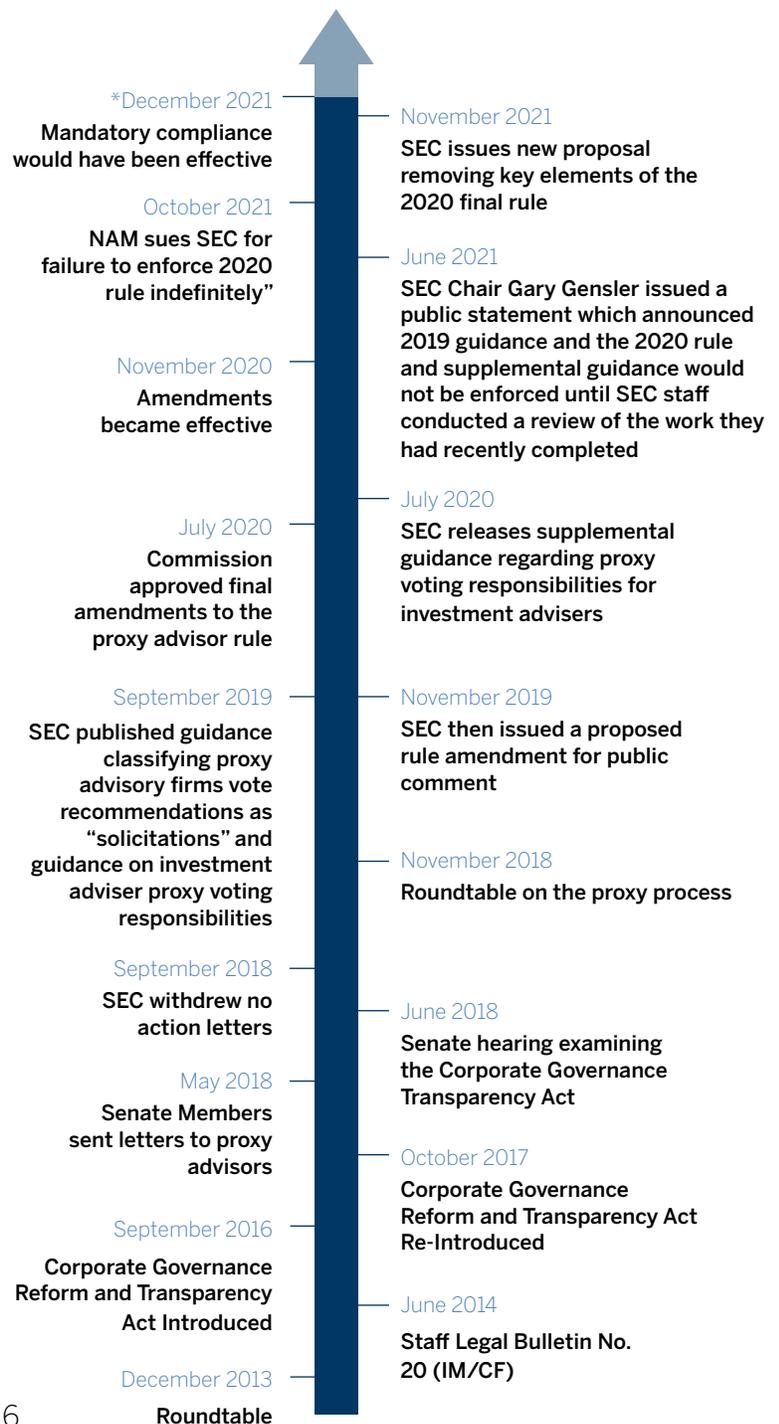
The [SEC's July 2010 concept](#) release was the Commission's first attempt at examining the U.S. proxy system and highlighted several concerns market participants have raised about the proxy advisory industry to the present day. The release specifically noted concerns over proxy advisory firm conflicts of interest, as well as a "lack of accuracy and transparency" when formulating vote recommendations. The release mentioned that many companies had expressed interest in facilitating greater interaction with and provide feedback to proxy advisory firms on their vote recommendations. The SEC also solicited comment regarding how and to what extent institutional investors vote consistently with proxy advisor recommendations to determine how often investors were automatically voting (often referred to as "robo-voting") with proxy advisor recommendations.

In June 2013, Congress began to examine the issue and the Capital Markets Subcommittee of the House Financial Services Committee held a [hearing](#) on proxy advisory firms. During the hearing, **Darla Stuckey, the Senior Vice President of Policy & Advocacy for the Society of Corporate Secretaries and Governance** professionals stated:

"One of the major factors undermining integrity in the proxy voting system is that the recommendations of proxy advisory firms are at times based on mistakes of fact or gross analytical errors where the drafters of the reports 'just don't get it.' Because the services do not release their proxy reports publicly except for high fees, even

after the annual meeting is concluded, and because they place strict limits on sharing of reports, it is difficult to be precise on the quantity of misinformation and clearly poor analysis produced by the firms."

Timeline of SEC Consideration of Proxy Advisors



Stuckey also testified that 65 percent of the Society's members responded in a survey that they had experienced a vote recommendation based on materially inaccurate or incomplete information.

In December 2013, the SEC again examined the issue when it held a roundtable on proxy advisory firms due to increased interest from market participants and Capitol Hill. Consistent with the issues highlighted in the SEC's 2010 release, participants at the roundtable discussed conflicts within the industry, quality of vote recommendations, and the use of proxy advisory firms by institutional investors. During the roundtable, **Harvey Pitt, the CEO of Kalorama Partners and a former Chairman of the SEC**, stated:

"...mistakes will occur invariably when there is not enough transparency so that those companies that see a problem can call attention to factual errors, not to have a debate about whether the recommendation about who should be approved as a director or not is a good one, but whether or not, for example, on compensation issues the advisory firms have properly calculated what the net impact is of these very complex formula that many companies use."

Other interested parties were also invited to submit public comments to the Commission as part of the roundtable process.

After receiving feedback from the 2013 roundtable, SEC staff issued a new [legal bulletin](#), which reaffirmed that fiduciary responsibilities permeate all aspects of proxy voting and reminded investment advisers to monitor the proxy advisory firms they hire, ensure vote recommendations are based on accurate information, and identify and address conflicts of interest.

Members of Congress took their first step to enhance oversight of proxy advisory firms in 2016 when Congressman Sean Duffy (R-WI) and Congressman John Carney (D-DE) introduced bipartisan [legislation](#) entitled the "Corporate Governance Reform and Transparency Act", which would require proxy advisory firms to register with

the SEC, employ an ombudsman to receive and resolve complaints about the accuracy of voting information used in making recommendations, hire a compliance office, and file additional disclosures with the SEC, such as information regarding conflicts of interest and the methodologies employed to develop voting recommendations. The bipartisan legislation was reintroduced in the 115th Congress reported from the House Financial Services Committee in September 2017 and placed for consideration by the full House of Representatives in December 2017 but was ultimately not enacted into law.

In May 2018, six members of the U.S. Senate sent [letters](#) to the two main proxy advisors with a series of detailed questions asking the firms to explain their business practices and disclose the specifics around how they formulate vote recommendations. Shortly thereafter, the Senate Banking Committee held a legislative [hearing](#) examining the "Corporate Governance Transparency Act" which highlighted bipartisan concern over the industry and asset managers' use of proxy advisory firms. At the hearing, John Coates, who recently served as the SEC's general counsel, opposed the specific contents of the bill but [conceded](#), "I would not want to reject out of hand the idea that some regulation of proxy advisors might be warranted – particularly concerning conflicts of interest."

In September 2018, the SEC took further action to address overreliance on proxy advisors when staff [withdrew](#) two no-action letters that had been issued to two proxy advisors in 2004. This was a significant development because the letters [suggested](#) that investment advisers could rely on advice from proxy advisors as a way to avoid the appearance of conflicts of interests. Critics of the letters [stated](#) that they contributed to investor overreliance on proxy advisors to fulfilling their voting obligations.

Another [roundtable](#) was held in November 2018 on the U.S. proxy process which featured similar calls for reform. The issue of proxy advisor errors was raised once again by Adam Kokas, General Counsel & Secretary for Atlas Air Worldwide, who [stated](#), "And for us, for Atlas, we have had circumstances where we've had material errors, and they have directly impacted the recommendation." Kokas

further stated that all companies must have a chance to review recommendations in order to correct errors and that Atlas was not afforded that opportunity since the company is not large enough under one proxy advisor's policies.

In response to a decade's worth of feedback from market participants, the SEC began to take more substantive action to address issues that had continuously been raised regarding the use of proxy advisors. In September 2019, the SEC [published](#) guidance classifying proxy advisory firms vote recommendations as "solicitations", which subject recommendations to anti-fraud provisions companies are held to when they submit supplemental filings. The guidance also formally reversed the SEC's prior interpretation in the [Egan-Jones no-action letters](#) that investment advisors could rely on proxy advisors for independent advice and instead stated that investment advisors must do their own due diligence to ensure the firms they rely on are offering advice that aligns with their clients' interests.

The SEC then issued a [proposed rule amendment](#) for public comment in November 2019, which addressed the key issues raised in the previous SEC and Congressional fora reviewing the proxy advisory industry. Specifically, the proposal codified its interpretation, previously expressed in guidance, that proxy advisors' recommendations constitute a "solicitation" under the Commission's proxy rules. The proposal then stated that proxy advisors could be exempted from the disclosure rules if they took the following actions:

- Disclose material conflicts of interest in their proxy voting advice;
- Provide companies with an opportunity to review and provide feedback on advisor recommendations before it is issued within a certain time limit based on when the company filed their proxy statement;

- Include a hyperlink to companies' views regarding the recommendation if there is an error or disagreement.

Following an extensive comment period in which the Commission thoughtfully considered and incorporated the views of a wide spectrum of market participants, the Commission approved the final Proxy Advisor Rule in July 2020.³

The most significant changes from the proposed rule were applied to the process for company review and introduced the opportunity to provide feedback to address concerns raised by proxy advisors in their comments to the SEC. Specifically, the final rule would instead require advisors to:

- Provide companies with their recommendation before or at the same time it is released to the clients of the proxy advisor;
- Provide clients with a mechanism by which they can be reasonably expected to be aware of written statements from the company regarding the recommendation.

The final rule also provided proxy advisors with safe harbors from SEC enforcement actions due to non-compliance with the rule if companies did not file their proxy statement at least 40 days prior to the date of the meeting where votes that the subject of the recommendations would take place. It also acknowledged that companies would only use proxy advisor recommendations for internal review in order to protect proxy advisors' recommendations from public dissemination since they are subscription based services.

On the same day, the SEC approved new [supplemental guidance](#) to investment advisors how to consider company responses to proxy advisor recommendations as well as disclosure obligations to clients when using automated services for voting or "robo-voting".

The Proxy Advisor Rule became effective on November 2, 2020, but mandatory compliance was not set to commence until December 1, 2021. This compliance date is now largely irrelevant in light of the no-enforcement policy and recent proposal adopted by the SEC.

³ ACCF's last analysis of supplemental filings from the 2020 proxy season was cited in the final rule even though the analysis was [submitted](#) to the SEC on July 10, 2020, over eight months after the comment period opened on November 5, 2019.

SUMMARY OF FINDINGS

A search of the SEC's EDGAR database through September 8, 2021 found **50 examples of public companies filing supplemental proxy materials this proxy season to correct the record regarding a proxy advisory firm vote recommendation. This represents a 21% increase from the last proxy season.** As stated earlier, because supplemental filings are subject to strict antifraud provisions by the SEC, we view them as accurate and not embellished claims on the part of companies.

This year's data involve the same wide array of companies that include nearly every sector of the economy. Most are small or mid-cap entities that do not have the significant legal and compliance resources of their larger counterparts and are least able to easily engage with proxy advisors or communicate to their shareholders.

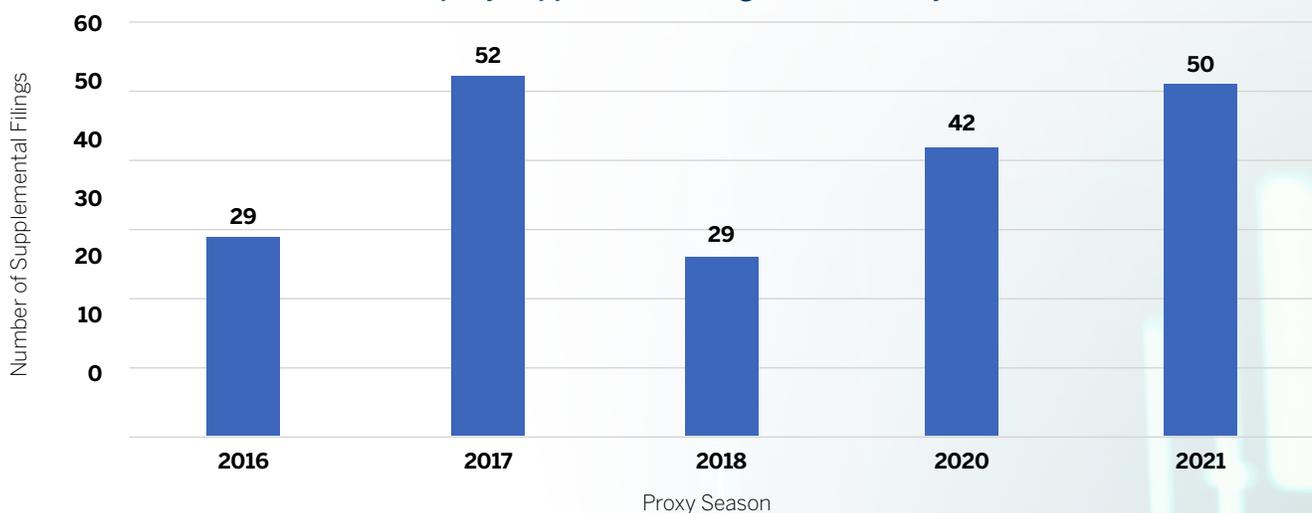
These filings are consistent with our previous research into this topic, which showed at least 200 errors dating back to 2016. They demonstrate that companies are still encountering proxy advisor recommendations that they argue are based on factual and analytical errors, as well as serious disputes, all of which should be considered by investors before casting their votes in corporate elections.

It is important to note that the number of supplemental filings highlighted in this and our previous ACCF [2020](#) and [2018](#) reports may well represent the "tip of the iceberg" and still undercount the overall instances of errors or other methodological flaws contained in proxy advisory firm recommendations.

Specifically, the data includes only those companies that have taken the extraordinary step of filing a supplemental proxy. Doing so not only entails voluntarily increasing the company's anti-fraud risk, but also requires diverting significant company resources to submit the filing in the limited window available.

This report recognizes that submitting supplemental filings does not represent the most efficient solution to correcting errors or disputed analysis in proxy advisors' recommendations. The process is both laborious and time consuming, and most importantly, imposes added demands on investors to identify necessary information before voting. The SEC acknowledged as such by reining in the role of proxy advisors and providing a more equitable means for companies to correct errors in Proxy Advisor Rule and supplemental guidance. We encourage implementation of the Proxy Advisor

Company Supplemental Filings Per Year Analyzed



Rule to regulate the influence of proxy advisors and further promote increased shareholder due diligence.

Supplemental Filings to Highlight from the 2021 Proxy Season

While proxy advisors have often sought to characterize their disputes with companies as “mere differences of opinion”, a review of these results shows that the disagreements are often more substantial. As noted above, in all cases, the disagreement was substantial enough for the company to subject itself to potential liability under SEC Rule 14a-9 if they contain statements that are false or misleading, or if they omit a material fact.

The summary assigns the filings into one or more of three categories to demonstrate the types of issues commonly presented:

1. **Factual Errors** cited by the companies;
2. **Analytical Errors** in the application by which the proxy advisors arrive at recommendations. For example, issuers disagree with the proxy advisor justification to arrive at their recommendations such as leveraging inaccurate peer groups or abbreviated timelines.
3. **Serious Disputes** over the appropriateness of the “one-size-fits-all” and other methodologies used by the proxy advisor. Issuers dispute the use of certain rules that automatically induce an unfavorable recommendation just on the basis of not meeting the rule criteria.

Examples of these categories of issues follow:

<p>Factual Error</p>	<p>Westinghouse Air Brake Technologies argued that a proxy advisor recommendation against a board member relied on a factually incorrect designation that the board member voluntarily resigned even though the board member was terminated by the company. This impacted the severance pay afforded to the board member, which the company noted is consistent with all executive officers in which termination is initiated by the company and is contrary to the proxy advisor’s justification.</p> <p>ASGN Incorporated took issue with a proxy advisor recommendation against the election of a director because that director was a “non-independent member of the audit and compensation committees”, even though she is a member of neither. The company notes that while she serves as an advisor to each committee, she is not a voting member, as depicted in ASGN’s proxy statement.</p>
<p>Analytical Error</p>	<p>Evoform Biosciences disputed a proxy advisor recommendation to vote against the election of a board of directors due to concerns about the meeting attendance of the nominees in question even though the company released data on near perfect attendance for the board members.</p> <p>Schnitzer Steel cited serious oversight in a proxy advisor recommendation to vote against a say on pay proposal because the proxy advisor failed to consider the COVID-19 pandemic when measuring the company’s total shareholder return against its peer set. While many of the peers use December 31, 2019 for its fiscal year, the company shows that it uses August 31, 2020 for its fiscal year end. The company notes that its total shareholder performance would rise from the 33rd to the 65th percentile if the August 31, 2020 date was used, rather than December 31, 2019 date. The negative recommendation was ultimately correlated with a -15.6 percent change in voting support in the vote to ratify executive compensation from the prior year. It appears that the unfavorable proxy advisor recommendation had impact on the vote. The vote passed with 74.4% in favor, down from 90.1% in 2020 and 96.6% in 2019.</p>

Serious Dispute

[Ares Commercial Real Estate Corp](#) disputed a proxy advisor recommendation against the election of director Michael Arougheti under the premise that no director who is a CEO of a company should also serve on more than two additional public company boards. However, the recommendation failed to consider that Mr. Arougheti served on three boards all affiliated with the parent company, Ares Commercial, effectively exempting him from the rule's criteria because his duties all lie with the same organization. It appears that the unfavorable recommendation had impact on the vote. Mr. Arougheti received 70.7% of the vote, down from 94.1% and 81.1% when he was up for reelection in 2018 and 2015, respectively.

[Titan International's](#) Chairman vigorously disagreed with the proxy advisor recommendation to vote against three board directors, saying that the proxy advisors "should stick to advising companies that have revenue over \$10 billion, because I don't think they take the time to understand our business". The proxy advisor justification was that the board members earned some benefit due to a recent company acquisition, which the filing vehemently disputes. The final vote passed nearly 66% in favor of one director, but only narrowly passed with around 55% in favor of the two other directors. It appears that the unfavorable recommendation had impact on the vote. Of the seven directors up for reelection, the three singled out by the proxy advisor received three of the four lowest percentages, at 54.3%, 54.1% and 69.8% in favor of their election.

How the Process for Addressing Errors or Serious Disagreements Works Under the Status Quo

As noted above, currently companies who receive a proxy advisor recommendation where they believe there is an error or serious disagreement must submit a supplemental filing to their proxy statement and take on additional anti-fraud liability. Such filings are costly and often ineffective since many investors who rely on proxy advisors often vote immediately after receiving a recommendation. Further, many companies simply do not have the time to review and respond to a recommendation via supplemental filing due to lack of notice regarding an adverse recommendation or inability to even gain access to the recommendation.

Unfortunately the SEC's current [proposed amendments](#) to the Proxy Advisor Rule, if enacted, would relegate companies to continued use of supplemental filings to resolve errors or serious disagreements with proxy advisor recommendations.

A [previous analysis](#) conducted by ACCF in 2018 specifically found that **17.7% of investors relying on one proxy advisor cast their vote within three days of receiving the recommendation**. More recent [academic analysis](#) conducted by Professor Chong Shu of the University of Utah's Eccles School of Business has indicated that the **share of proxy advisor customers robo-voting has increased over time, with one proxy advisor's percentage of customers robo-voting rising from 5 percent in 2007 to 23 percent in 2017**. The study also found that over 50 percent of small index funds robo-voted.

In addition to examining robo-voting, the Professor Shu's study shows, "...an investor is less affected by its advisor's recommendations if it has viewed the proposal's proxy statement on the EDGAR website", suggesting that investors who take the opportunity to view information outside the proxy advisor's recommendation are impacted and may act differently. This further suggests that the availability of relevant information from companies could have an impact on investor votes.

To make matters worse, **the 2018 ACCF survey analysis found that many companies received little to no prior notice of an adverse recommendation from a proxy advisor with 85 percent of respondents indicating they received less than 3 days advanced notice, and 36.2 percent of**

respondents stating that they received 12 hours or less notice. Additionally, companies are at the whim of proxy advisor company engagement policies that often give preference to large companies, with one proxy advisor [previously offering](#) companies a pre-review of its recommendations only if they were in the S&P 500, which disadvantaged small companies.

How the Process for Addressing Errors or Serious Disagreements Would Work with the 2020 Final Rule and Supplemental Guidance

The Proxy Advisor Rule would solve many of the current issues listed above by creating a new process for companies to review and respond to recommendations on an even playing field, as well as making it easier for investors to review all the information they should consider before voting in a contested situation in a way that upholds their fiduciary duty to vote in their clients' best interests.

The rule stipulates that companies who have filed their definitive proxy statement at least 40 calendar days before the meeting of the votes in question, would be entitled to a copy of the recommendation at the time it is disseminated to clients or earlier. This would eliminate the issue of companies not receiving notice or being unable to obtain recommendations.

The SEC's rule would also require proxy advisors to establish a means to alert their clients if a company responds with a written statement contesting the recommendation. This requirement would better ensure that investors review information that companies are now including in often ignored supplemental filings and make it easier for investors to find such information and conduct the necessary due diligence required to uphold their fiduciary duty.

Finally, the SEC's supplemental guidance further prompts investors to make use of the information that would become easily available as a result of the rule when conducting their proxy voting activities, which discourages investors to simply robo-vote and outsource their voting responsibilities to proxy advisors as they do now.

CONCLUSION

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The continued prevalence of supplemental filings each proxy season demonstrates that errors and serious disagreements remain an issue, with the potential to harm the integrity of the proxy process. The proliferation and higher success rate of contested shareholder proposals, often where the company disagrees with the proposal sponsor on the great variety of societal issues that encompass ESG investing, renders the integrity of the proxy process all the more important.

After a decade of careful consideration of stakeholder concerns, the SEC took substantive action when they finalized a rule on proxy advisors and updated their guidance to investors on their proxy voting responsibilities. These represent important steps that are significantly less restrictive than other proposals put forward in Congress and the SEC's original proposal on this subject. The 2020 rule and supplemental guidance were crafted to recognize the important role that proxy advisors play in the proxy process while ensuring that investors retain the ultimate responsibility for voting in the best interests of their clients.

Given this robust process and new data which suggests there are many disputes regarding advisors' recommendations, the SEC should keep their rule and guidance intact and enforce it before considering further change. To do otherwise would contradict the limited new data that has been released since the SEC finalized their rule and undermine the robust process that went into enacting these important reforms.

APPENDIX

Company	Date of Supplemental Proxy Filing	Nature of Error	Summary of Error/Topic
Schnitzer Steel	1/26/21	Factual Error Analytical Error X Serious Dispute X	Company cites serious oversight in a proxy advisor recommendation to vote against a say on pay proposal and argues against a peer benchmarking that does not take into account COVID-19.
Pluralsight	2/18/21	Factual Error Analytical Error X Serious Dispute X	Company disagrees with proxy advisor analysis of transaction valuation, process, and standalone prospects, by ignoring transaction facts, industry dynamics and associated valuation, and reliance on gross margins in a peer selection that overlooks the lower sales efficiency of the company to be acquired.
Starbucks	3/8/21	Factual Error Analytical Error X Serious Dispute X	Company refutes proxy advisor recommendation against say on pay proposal on the grounds that the proposal received overwhelming support in the prior year and that it has not yet distributed value from the award.
Starbucks	3/11/21	Factual Error Analytical Error Serious Dispute X	Company provides an update to proxy advisor recommendation to vote against new director, referencing a new announcement suggesting that the director will not be as overcommitted to other board responsibilities as the initial recommendation made her out to be.
Kirby Corporation	3/31/21	Factual Error X Analytical Error Serious Dispute	Company disagrees with proxy advisor recommendation to vote against employee equity plan. The company cites a flawed overstated cost plan, company historical practices that demonstrate proxy advisor concerns are unjustified, and wrong evaluation of the plan timeline in its disagreement.
Textron	4/6/21	Factual Error Analytical Error Serious Dispute X	Company takes concern with the proxy advisor rationale to vote against say on pay because there was limited shareholder responsiveness. Company notes its extensive shareholder outreach and that feedback was promptly addressed and discussed.
Moneygram International	4/12/21	Factual Error Analytical Error Serious Dispute X	Company refutes proxy advisor suggestion that a newly adopted Tax Benefits Preservation Plan is to be treated as a poison pill. Company claims that the new plan is designed to preserve valuable tax benefits, not to entrench management or prevent acquisitions.
Cogent Communications	4/15/21	Factual Error Analytical Error X Serious Dispute X	Company disagrees with proxy advisor recommendation to vote against the CEO as a member of the audit committee. The company takes issue with the justification that a pledge of company shares by the CEO will pose risk to stockholders, and notes that the pledge policy only exists to meet tax obligations, and should not be considered an audit risk at this time.
Greenlight Capital	4/20/21	Factual Error Analytical Error Serious Dispute X	Company disputes proxy advisor recommendation to vote against say-on-pay and the proxy advisor's unfair characterization of the results of the proposal, the short window by which to solicit shareholder feedback, and the company's recent hire for a compensation consultant.
Eli Lilly	4/20/21	Factual Error Analytical Error Serious Dispute X	Company disagrees with proxy advisor recommendation to vote against the election of a board director and notes the director's relevant experience and value to the company as primary reasons to support his nomination.
Par Pacific	4/20/21	Factual Error Analytical Error X Serious Dispute X	Company refutes proxy advisor recommendation to vote against Equity Plan and notes relevant considerations such as the plan purpose, the flawed proxy advisor formulaic application of certain quantitative thresholds, and relevant peer data to support the equity plan.
Lattice Semiconductor	4/22/21	Factual Error Analytical Error X Serious Dispute X	Company disagrees with proxy advisor recommendation to vote against say-on-pay proposal based on incorrect assumptions and fails to consider superior shareholder value that warranted a change in the plan.
Brightcove	4/23/21	Factual Error X Analytical Error Serious Dispute	Company takes concern with proxy advisor recommendation to vote against new stock incentive plan. Company cites that the proxy advisor justification overstates the total plan cost and reiterates the necessity for share compensation for a competitive business strategy.
Ares Commercial Real Estate Corp	4/23/21	Factual Error Analytical Error Serious Dispute X	Company disputes proxy advisor characterization of a board member and notes that the proxy advisor inappropriately assesses his other director commitments, all of which relate to Ares Management (The Parent Company).
Newell Brands	4/26/21	Factual Error Analytical Error X Serious Dispute X	Company disagrees with proxy advisor recommendation to vote against the election of a board director and notes that the material weakness cited has already been remediated and reiterates the strong diversity of background and experience that the directors bring to the company.
Evoform Biosciences	4/26/21	Factual Error Analytical Error X Serious Dispute X	Company responds to proxy advisor recommendation to vote against the election of board of directors by releasing data on the near perfect attendance of board members at prior board meetings, hoping this new information will extinguish proxy advisor concerns about the meeting attendance of the nominees under question.

Tredegar	4/27/21	Factual Error Analytical Error Serious Dispute X	Company takes issue with proxy advisor recommendation against the election of director nominees, executive compensation, and approval for equity incentive plan. Company cites publicly disclosed remediation plan, executive compensation based on predetermined targets, and flawed misalignment analysis of pay and performance in their disagreement.
Delek	4/27/21	Factual Error Analytical Error Serious Dispute X	Company responds to proxy advisor recommendation to vote against the amendment of a long-term incentive plan by releasing additional data to help shareholders weigh the proxy advisor recommendation against the new provided data.
Five9	4/28/21	Factual Error Analytical Error Serious Dispute X	Company disputes proxy advisor recommendation to vote against director nominees to the board and reiterates the need for a classified board structure to align with the company's long-term interests, attract and retain top candidates, and reduce vulnerability to hostile takeovers. As well, the company cites an established peer practice to have a supermajority vote requirement as evidence of industry practice consistency.
Verizon	4/29/21	Factual Error Analytical Error X Serious Dispute X	Company disagrees with recommendation to vote against shareholder proposals involving annual equity awards, amend clawback policy, and shareholder action by written against. In all three, the company disputes the proxy advisor peer benchmark and the characterization of its current clawback policies / equity awards.
Nvent Electric	4/30/21	Factual Error Analytical Error X Serious Dispute X	Company refutes proxy advisor recommendation to vote against stock based grants on the grounds that the initial recommendation misconstrued the intent for earlier supplemental awards and ignored predetermined targets for award compensation and sufficient guards against volatility in the stock price.
TechnipFMC	5/6/21	Factual Error X Analytical Error X Serious Dispute	Company disputes proxy advisor recommendation to vote against board of director nominee and the director remuneration policy. The company cited the director's relevant background and experience to the industry (asking to disregard the proxy advisor rule against the nomination for a director with more than 3 three public company boards), and because the proxy advisor remuneration assessment of the policy is based on UK practices rather than US practices.
Xenia Hotels	5/7/21	Factual Error Analytical Error Serious Dispute X	Company takes issue with proxy advisor recommendation to vote against say on pay and its methodology to evaluate the company "during the middle of a global health crisis which has severely impacted the lodging and hospitality industry [which] is not appropriate."
Summit Materials	5/7/21	Factual Error Analytical Error Serious Dispute X	Company disagrees with proxy advisor recommendation against the omnibus incentive plan and reiterates its intention to protect stockholder interests and good corporate governance practices, as well as that the deletion of an article will not have a substantive impact on the business strategy.
Sirius Point	5/10/21	Factual Error Analytical Error X Serious Dispute X	Company disputed Glass Lewis recommendation against chair of the audit committee due to GL's claim that the audit committee held only one "formal meeting" during 2020. Company notes that its bylaws prohibit directors from participating in meetings while present in the United States and that the COVID-19 pandemic prevented directors from traveling to Bermuda for meetings in 2020. Company notes that regular meetings of board members still occurred virtually in 2020.
Agius Pharma	5/10/21	Factual Error Analytical Error Serious Dispute X	Company argues that departure of former CFO was a "qualifying termination" for purposes of its Severance Benefits Plan; ISS recommendation took position that compensation paid to former CEO did not qualify under the plan. Company believes the ISS argument is unwarranted.
Westinghouse Air Brake Technologies	5/10/21	Factual Error X Analytical Error Serious Dispute	ISS recommended against say on pay plan due to compensation paid to former EVP and chief human resources officer. ISS claimed the executive's departure was voluntary; company corrects record and states that the termination was initiated by company.
FBL Financial Group	5/10/21	Factual Error Analytical Error Serious Dispute X	Company disputes ISS recommendation against proposed merger with another company; provides detailed analysis that supports merger and states information was provided to ISS.
Piper Sandler	5/11/21	Factual Error Analytical Error X Serious Dispute	Company notes that ISS recommendation against say-on-pay proposal failed to recognize sizeable retention program for key executives resulting from the Piper acquisition of Sandler O'Neill. ISS recommendation failed to recognize a 5-year non-compete clause that was integral to the acquisition.
Alliance Data Systems	5/12/21	Factual Error Analytical Error X Serious Dispute X	ISS disputes GL recommendation against chair of the nominating and corporate governance committee due to company's disclosure regarding its 2020 virtual annual meeting. Company uses supplemental proxy filing to again provide shareholders with information for how to access, vote, and participate in the virtual annual meeting.
Denbury Resources	5/13/21	Factual Error Analytical Error Serious Dispute X	Company strongly disputes ISS recommendation against equity compensation, providing detail for how its post-bankruptcy compensation plan was struggled. Company states the ISS recommendation "does not take into account the context of how our compensation program was designed and developed."

BioMarin	5/17/21	Factual Error Analytical Error X Serious Dispute	Company responds to ISS negative recommendation regarding advisory vote on executive compensation by stating compensation paid to former CEO was in the wake of a not-for-cause termination by the company, thereby eligible under the company's compensation plan.
Exxon Mobil	5/19/21	Factual Error Analytical Error X Serious Dispute X	Company provides detailed presentation in opposition to dissident director nominees; states that activist investor has "no plans" to create shareholder value at company. ISS recommendation in favor of dissident slate.
CEVA	5/20/21	Factual Error Analytical Error Serious Dispute X	Dispute with ISS and Glass Lewis over recommendations against chair of nominations and governance committee; company disagrees with ISS/GL assertions that director does not meet standards of independence.
Affiliated Managers Group	5/28/21	Factual Error Analytical Error X Serious Dispute X	Company disagrees with ISS's use of 3 and 5-year periods to assess executive compensation, leading to negative recommendation on say-on-pay. Company argues that ISS' approach is a "mechanical one-size-fits-all evaluation that [does] not take into account the factors that the compensation committee considered and described" in the company's proxy statement related to the compensation of certain executives.
United Health Group	5/28/21	Factual Error Analytical Error Serious Dispute X	Company baffled by ISS recommendation against say-on-pay given that ISS had previously stated that company's "pay and performance are reasonably aligned. Company notes that about 75% of senior executive compensation is delivered as company stock, with 50% of equity awards conveyed through long-term performance based shares.
Activision Blizzard	5/28/21	Factual Error X Analytical Error Serious Dispute	Company states that Glass Lewis proxy paper "mischaracterizes" the company's pay plans. Notes that the granting of a 2021 equity award did not impact whether the award was subject to the performance criteria used by company - a fact that Glass Lewis got wrong in their report.
Ares Capital Corporation	6/2/21	Factual Error Analytical Error X Serious Dispute X	Company strongly disagrees with ISS recommendation against three director nominees and also notes that ISS' assertion the company's board "appears to lack any racial/ethnic diversity" is incorrect.
ASGN Incorporated	6/3/21	Factual Error X Analytical Error Serious Dispute	Filing notes that ISS erroneously stated a company director was a "non-independent member of the audit and compensation committees" even though she is a member of neither. ISS's mistake contributed to a negative vote recommendation against her.
Ennis Corp	6/3/21	Factual Error Analytical Error Serious Dispute X	Disagreement with ISS over say on pay recommendation; company lays out differences in new long-term incentive program they established that took into account past criticisms of ISS.
G-III Apparel Group Ltd	6/7/21	Factual Error Analytical Error X Serious Dispute X	Company strongly disputes ISS and GL recommendation against say on pay votes, noting that the company's share price had appreciated 90% since the depths of the COVID crisis and that the CEO and Vice Chairman's pay and performance are strongly linked.
Ambarella	6/7/21	Factual Error Analytical Error Serious Dispute X	Disagreement with ISS recommendation on company's equity plan; company states that ISS uses a "formulaic application of its quantitative thresholds and our three-year burn rate." Company also notes that ISS uses a broader peer group than the company uses.
Monolithic Power	6/7/21	Factual Error Analytical Error X Serious Dispute X	Company states GL recommendation against executive compensation plan "is based on insufficient consideration of the facts and material errors in their analysis." Says Glass Lewis has a "lack of fundamental understanding of semiconductor business cycle." Also noted that Glass Lewis failed to recognize that market-based performance awards contained rigorous conditions.
Titan International	6/9/21	Factual Error Analytical Error Serious Dispute X	Filing from Chairman of company vigorously disagreeing with ISS/GL recommendations against three directors. Says that "ISS and Glass-Lewis should stick to advising companies that have revenue over \$10 billion, because I don't think they take the time to understand our business."
Simulations Plus	6/10/21	Factual Error Analytical Error X Serious Dispute X	Company points out that ISS recommendation on equity incentive plan is flawed, including ISS' decision to include all remaining shares in its shareholder value transfer analysis, despite the fact the company had committed to not issuing any new shares under its existing 2017 equity plan.
Mastercard	6/10/21	Factual Error Analytical Error Serious Dispute X	Company disagrees with ISS recommendation on say-on-pay and argues ISS did not take into account the unique headwinds of 2020.
Natural Gas Services Group	6/11/21	Factual Error Analytical Error X Serious Dispute X	Company says ISS recommendation against company director are based on an "inaccurate and careless" analysis. Company also states that recommendation against director is "contrary to the facts and an egregious factual and analytical oversight leading to an irresponsible and inaccurate conclusion. This lack of analytical rigor and callous omission is detrimental to the Company's shareholders and raises serious practical and ethical questions about the objectivity and motives of ISS. We have demanded ISS correct this error and re-issue its report based upon factually accurate and objective analysis."

Brown-Forman	7/12/21	Factual Error Analytical Error Serious Dispute X	Dispute with ISS recommendation against board of directors. Company argues that non-audit fees it pays Ernst & Young were appropriate and should not lead to shareholders rejecting board candidates.
Jazz Pharmaceuticals	7/15/21	Factual Error X Analytical Error Serious Dispute	Dispute with ISS regarding the company's share issuance proposal and alleged misalignment of ISS' "against" recommendation with ISS' own policies. ISS recommendation also based upon guidelines for U.K.-listed companies, even though company is listed in the United States.
American Software Inc.	8/3/21	Factual Error X Analytical Error Serious Dispute	Disagreement with ISS regarding adverse recommendation on company's equity compensation plan. Filing notes that ISS claimed the company's plan did not prohibit dividends prior to vesting. Company points out the plan does include such a prohibition for options and restricted stock.

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Kyle possesses over 35 years of energy, environmental and regulatory policy experience. This includes work in trade association, consulting and government positions. In his trade association experience prior to ACCF, Kyle managed climate policy development, environmental regulatory policy and a review of U.S. tax policies. Furthermore, he oversaw economic and scientific research and the creation of statistical products covering the industry and energy markets.



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