

Assets Undermining Management

Proxy Advisor Pandering Enshrines ESG

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September 2026 | No. 313

In recent years, the two major proxy advisors in the United States have prioritized environmental, social, and governance (ESG) considerations in their investing advice to clients. These proxy advisors—Glass Lewis and Institutional Shareholder Services (ISS)—account for an estimated 97 percent of proxy advisor services.¹

Their advice has fueled an array of speculative ESG proposals submitted by political activist shareholders. In many ways, it has legitimized fringe and polarizing issues that were once kept out of boardrooms. As a result, public companies have become inundated with a tsunami of politically focused proposals. This shift in emphasis can significantly distract board members from their duty to represent shareholder interests.

Proxy advisors are primarily used for their voting recommendations on corporate shareholder proposals. Their advice affects trillions of dollars in assets under management. Each year, companies hold annual meetings to consider hundreds of such proposals as well as numerous proposals from management. These proposals govern companies' operations, administrative programs, and financial decisions. Most institutional investors have grown weary of reviewing these proposals themselves and now rely heavily on proxy advisors. While companies originally managed the annual shareholder review process themselves, they have largely outsourced this task to a pair of obscure proxy firms.²

Regarding fiduciary duty and corporate governance, Glass Lewis and ISS are not directly accountable to the public companies affected by their recommendations in the same manner as those companies' directors and officers. The past 40 years of US financial regulation have contributed to a highly concentrated market for proxy advisory services. The firms also exercise influence indirectly: large asset managers and other institutional investors retain proxy advisors, whose recommendations may affect



voting at portfolio companies. In *Institutional Shareholder Services, Inc. v. SEC*,³ the DC Circuit held that proxy voting advice furnished upon request does not constitute a “solicitation” within the meaning of Section 14(a) of the Securities Exchange Act. The decision therefore invalidated the Securities and Exchange Commission’s effort to regulate such advice as solicitation under that provision. It did not hold that proxy advisors are categorically exempt from regulation or fiduciary obligations.

Over the past several years, asset managers have become increasingly reliant on Glass Lewis and ISS for nearly every aspect of the proxy review process. This is most evident in how asset managers enable their advisor of choice to “robo-vote” their proxies. This practice is akin to flying a plane on autopilot based entirely on the advisor’s direction. According to Paul Rose, Dean of Case Western Law School, robo-voting happens when “institutional investors mechanically follow a proxy advisor’s voting guidance without any independent review. In effect, an institutional investor transfers its fiduciary voting authority to a third party.”⁴

¹ House Committee on Financial Services, “Capital Markets Subcommittee Examines Market Influence by Proxy Advisory Firms,” news release, April 29, 2025, <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409711>.

² ISS Governance, “In Focus: U.S. Shareholder Proposals at Half-Time,” *ISS Insights*, May 23, 2025, <https://insights.issgovernance.com/posts/in-focus-u-s-shareholder-proposals-at-half-time>.

³ *Institutional Shareholder Services, Inc. v. SEC*, 142 F.4th 757 (D.C. Cir. 2025).

⁴ Paul Rose, *Proxy Advisors and Market Power: A Review of Institutional Investor Robo-Voting* (Manhattan Institute for Policy Research, April 22, 2021), <https://manhattan.institute/article/proxy-advisors-and-market-power-a-review-of-institutional-investor-robo-voting>.

This practice is problematic because many institutional investors (such as those managing mutual funds, retirement accounts, or education savings accounts) are obligated under federal law to serve their investors' best interests and uphold certain fiduciary standards. While some asset managers allow their companies to issue specific guidelines for how the proxy advisor should robo-vote on their behalf, most appear to delegate 100 percent of the responsibility to the proxy advisor to vote as it pleases. Voting blindly for the recommendations of private proxy advisors undermines the trust investors place in the fiduciaries overseeing their investments.

This dynamic raises a pair of questions: If the proxy votes in question are sufficiently important to require a vote by asset managers, shouldn't those managers evaluate the relevant risk and reward for their clients themselves? And if the topic is so trivial that it can be robo-voted without worry, why does an asset manager need to weigh in at all?

A related issue is asset managers modeling their proxy voting guidelines on the duopoly's benchmark policies. Glass Lewis and ISS regularly publish benchmark guidelines with basic recommendations on how companies should vote their proxies on a wide range of issues, most notably ESG topics.⁵ Rather than draft their own voting guidelines, many asset managers have relied entirely on the proxy voting policies of their third-party advisors. Other asset managers blend the advisor's policies with their own, relying on proxy recommendations to guide their ESG voting habits.

Policymakers can no longer afford to stand by and allow the current incentive structure to harm the long-term interests of asset holders. Many business leaders, shareholders, and analysts have expressed dismay that activist politics has hijacked annual meetings. These meetings, which should focus on shareholder value, are being held hostage by a flood of ESG proposals, powered by the influence of the proxy advisor duopoly. The SEC largely bears responsibility for incentivizing asset managers to outsource their fiduciary duty in this way. Meanwhile, the Department of Labor (DOL) has also fueled the duopoly's rise through its own misguided policies.

Asset managers have become far too reliant on the proxy advisor duopoly. The stakeholder (as opposed to

shareholder) focus of ESG theory has gradually displaced the *raison d'être* of the proxy review process, which is to facilitate healthy corporate developments that produce meaningful financial benefits to shareholders. It's time for asset managers to return to sanity and properly exercise their duty of care by growing and maintaining their clients' investments. A few key federal policy changes are therefore needed.

How financial regulations gave rise to the proxy advisor duopoly

Proxy advisors and proxy solicitation are relatively recent features of the shareholder review process. While ISS was established in 1985, the domestic market for proxy advisory services didn't fully develop until 2003, when Glass Lewis was formed. Aside from the big two proxy advisors, there are several other advisors that cater to US investors, including Egan Jones (est. 2002), Sustainalytics (est. 2020), Strive Asset Management (est. 2022), Bowyer Research (est. 2013), Georgeson, Okapi Partners (est. 2008), InvestorCom (est. 2010), Kingsdale Advisors (est. 2003), and Innisfree M&A (est. 1997).⁶ Bowyer Research, in particular, is regarded as a pro-fiduciary, pro-business advisory firm with a strong shareholder focus.⁷ Despite this wide array of proxy advisors, the US market remains dominated by two left-aligned firms.

ISS was the sole proxy advisor from the mid-80s to the early 2000s, until the SEC formally passed its 2003 Proxy Voting by Investment Advisers Rule, aka the 2003 proxy voting rule.⁸ This rule amended the Investment Advisers Act of 1940 by requiring investment advisers to craft specific policies instructing how they will vote proxies at annual meetings. This rule has three core elements: investment advisers must adopt policies that guide proxy voting in the clients' best interests, disclose how clients' proxies were voted, and adequately explain the chosen proxy policy and procedures.⁹

Rule 206(4)-6 requires SEC-registered investment advisers who exercise proxy voting authority to adopt and implement written policies and procedures reasonably designed to ensure that proxies are voted in the best interests of their clients, to describe those procedures to clients, and to explain how clients may obtain information about votes cast on their behalf. The SEC did not prescribe a single set

⁵ ISS STOXX, "ISS Governance Announces 2026 Benchmark Policy Updates," news release, November 25, 2025, <https://www.iss-stoxx.com/press-releases/iss-governance-announces-2026-benchmark-policy-updates>.

⁶ There are also several India-based proxy advisors. They appear to cater exclusively to the Indian market and are thus not included in the above list.

⁷ Dan Hugger, "Isaac Willour Is Helping Corporate America Move on from ESG," *Acton Line* podcast, reposted to *Reign of Conscience*, January 14, 2026, <https://www.reignofconscience.com/p/isaac-willour-is-helping-corporate>. This podcast episode provides a nice outline of Bowyer Research by its Director of Corporate Governance, Isaac Willour.

⁸ Securities and Exchange Commission, "Proxy Voting by Investment Advisers," Final Rule, 17 CFR Part 275, Rule 206(4)-6, January 31, 2003, <https://www.sec.gov/rules-regulations/2003/01/proxy-voting-investment-advisers>.

⁹ Paul Rose and Christopher J. Walker, *Examining the SEC's Proxy Advisor Rule* (U.S. Chamber of Commerce Center for Capital Market Competitiveness, November 2020), https://www.uschamber.com/assets/documents/proxyadvisoryrule_examine_nov2020.pdf.

of approved procedures and expressly recognized that an adviser need not vote every proxy when refraining from voting is in the client's best interest. The rule nevertheless created a compliance framework in which advisers must demonstrate that proxy voting decisions are consistent with their fiduciary obligations.

Investment advisers retain discretion to determine how best to satisfy their fiduciary obligations in light of a client's circumstances and the adviser's voting authority. The 2003 rule did not create a categorical safe harbor for following proxy advisor recommendations. It did, however, state that an adviser facing a material conflict could demonstrate that a vote was not the product of that conflict if the adviser followed a predetermined policy based on an independent third-party recommendation. Subsequent SEC staff guidance further addressed reliance on independent proxy advisory firms. Critics argued that this framework created incentives to outsource proxy analysis and voting rather than develop independent internal analysis.

After the rule and subsequent SEC staff guidance were issued, investment advisers increasingly relied on proxy advisory firms for research, recommendations, voting infrastructure, and, in some cases, vote execution. The ostensible rationale was straightforward: proxy advisors specialize in reviewing shareholder proposals and can reduce the cost of evaluating a large volume of ballot items. Critics contend that the regulatory treatment of independent third-party recommendations also reduced incentives for advisers to conduct their own analysis. That reliance does not, however, transfer the adviser's underlying fiduciary obligations to the proxy advisor. An adviser remains responsible for satisfying the duties it has undertaken on behalf of its clients.

Over the twenty-plus years since the SEC issued the rule, investment advisers have become increasingly dependent on the proxy services of Glass Lewis and ISS. In addition to providing proxy voting advice, the firms also sell research reports typically called proxy season reviews.¹⁰ They simultaneously manage proxy voting records, track general market trends on shareholder issues presented at annual meetings, and cast votes on behalf of investment advisers.

Some investment advisers at least provide their clients the courtesy of letting them choose which general strategy

they want Glass Lewis or ISS to use when casting votes on their behalf. Companies do so by providing a custom set of instructions to the proxy advisor to vote their proxies in a specific manner or to only vote on specific issues. A form of this instruction-based approach can be seen with J.P. Morgan Asset Management Group, which crafts general proxy voting guidelines for its funds.¹¹ Once each fund has reviewed and approved the guidelines, it instructs the proxy advisor to vote in accordance with them.

While the above approach affords a degree of shareholder representation, problems remain. Investment advisers can claim they work in their clients' best interests collectively when, in reality, they serve their own interests. It is rhetorically easy to subordinate the profitable operation of any given firm to some allegedly higher-order environmental or social goal that the proxy advisory team happens to favor. Advising a yes vote on a proxy ballot measure that would commit a company to an expensive renewable energy policy could be considered in the best interest of everyone in the world (including the asset owners) because slowing anthropogenic climate change is such a vital goal.

Accompanying the 2003 rule was the SEC's Rule 30b1-4,¹² which requires investment advisers to report their annual proxy voting record to the SEC on Form N-PX.¹³ This form provides the agency with a tally of all proxy votes on shareholder proposals involving the fund securities held under management. While these forms are supposed to be available to the public, this is not always the case.¹⁴

The SEC's 2003 rule was intended to address conflicts of interest involving investment advisers and their clients. Critics contend that the rule, together with subsequent staff guidance, has the unintended consequence of increasing reliance on proxy advisory firms. To the extent advisers treat independent third-party recommendations as a practical way to address conflict concerns, the framework may encourage outsourcing proxy research and voting functions rather than independent review. The relevant legal point, however, is that Rule 206(4)-6 places the fiduciary obligation on the investment adviser. Reliance on a proxy advisor does not eliminate that obligation.

Unfortunately, many participants in the asset management industry have perceived proxy advisor outsourcing in exactly that way, and subsequent enforcement activity

¹⁰ Glass Lewis, "Season Previews," accessed August 24, 2026, <https://www.glasslewis.com/resources-content-types/season-previews>.

¹¹ J.P. Morgan Asset Management, "Proxy Information: Proxy Overview," accessed August 24, 2026, <https://am.jpmorgan.com/us/en/asset-management/adv/resources/proxy-information>.

¹² 17 CFR § 270.30b1-4, "Report of Proxy Voting Record."

¹³ James Chen, "What Is SEC Form N-PX?" *Investopedia*, updated September 26, 2025, <https://www.investopedia.com/terms/s/sec-form-n-px.asp>.

¹⁴ Members of the public may access an institutional investor's Form N-PX using the SEC's EDGAR database. While some of these forms are readily available through EDGAR, many investors do not file or post them clearly. I have found that the database makes it difficult at times to disaggregate filings discussing N-PX from other miscellaneous forms, often obscuring the true proxy voting record.

did little to dissuade them. As economic scholars James Glassman and J.W. Verret argue, thanks to the SEC's 2003 rule and subsequent interpretive guidance it became common wisdom that "[i]nstitutions could easily protect themselves from legal liability by shifting responsibility to proxy advisory firms," which meant that those firms "acquired increasing power over corporate governance, to the detriment of shareholders."¹⁵ The SEC's rule incentivized asset managers and their hired investment advisers to take the initiative and vote on all proxy ballot questions regardless of topic or seriousness.

Before this rule, fund managers could simply ignore many of the frivolous shareholder proposals before them with the understanding that most wouldn't garner a majority vote, weren't relevant to the board's primary interests, or weren't worth the time to review. Additionally, prior to the 2003 rule and the duopoly's intervention, most board director elections were uncontested.¹⁶ Today, both Glass Lewis and ISS regularly recommend shareholders vote against board directors for political and ideological reasons, such as allegedly overlooking or dismissing the claims of ESG theory.¹⁷

Proxy firms may exercise substantial practical influence over voting decisions and, depending on the contractual arrangement, may also execute votes on behalf of asset managers or other clients. That influence does not necessarily eliminate the client fiduciary's legal responsibility. The degree of discretion a proxy advisor retains is also legally significant under the Employee Retirement Income Security Act of 1974 (ERISA). As discussed below, the Department of Labor's 2026 guidance states that a proxy advisory firm that exercises authority or control over shareholder rights attributable to ERISA plan assets may itself be a functional fiduciary. As the Government Accountability Office explains:

According to some industry stakeholders, based on certain interpretations of the rule and subsequent SEC staff guidance, some investment advisers determined that they could discharge their duty to vote their proxies and demonstrate that their vote was not a product of a conflict of interest if they voted based on the recommendations of a proxy advisory firm. As

a result, institutional investors tended to outsource their research and voting decisions, which helped to increase the demand for proxy advisory services.¹⁸

The SEC's 2003 rule was intended to shore up institutional investors' responsibility to vote with proper care and awareness of client needs. However, the opposite transpired. Instead, unaccountable proxy firms gained unfettered autonomy to vote proxies as they saw fit. This corporate delegation of authority has emboldened the big two proxy advisors, as they intertwine their political objectives with their professional responsibilities.

The SEC's 2003 rule unfortunately made a bad situation worse. Not only were the perceived conflicts of interest between the institutional advisers and their clients offloaded to proxy advisors, but the conflicts themselves worsened. Investment adviser robo-voting has incentivized further deference to proxy firms, discouraging individual investors and even asset managers from exercising their own voting power. This, coupled with the parallel rise in politically oriented shareholder proposals since 2020, has led to the abandonment of proxy voting responsibilities. The SEC's 2003 rule largely drove this shift in priorities.

Issues in fund management and proxy voting before 2003

The SEC's Proxy Voting by Investment Advisers Rule has politicized corporate governance more directly than any other single factor. But other federal laws and regulations have contributed to the problem. Fifteen years before the SEC's 2003 rule, the DOL issued guidance that eventually led institutional investors to become more reliant on proxy advisors.

Specifically, the DOL issued a 1988 guidance letter to Avon Products stating that voting proxies attached to ERISA plan assets is a fiduciary act of plan asset management.¹⁹

The Avon Letter therefore brought proxy voting decisions within ERISA's duties of prudence and loyalty. It did not establish an unconditional requirement to vote every proxy. Subsequent DOL guidance has expressly recognized

¹⁵ James K. Glassman and J.W. Verret, *How to Fix Our Broken Proxy Advisory System* (Mercatus Center at George Mason University, April 16, 2013), abstract.

¹⁶ In the 2020s, both Glass Lewis and ISS have enforced provisions of their benchmark policies to recommend that shareholders vote against board directors who refuse to embrace certain ESG issues. The advisors have used these policies particularly against directors who oppose diversity quotas for corporate boards. This topic will be covered more in the following section on ESG.

¹⁷ Environmental, social, and governance (ESG) theory holds that for-profit firms have an affirmative responsibility to treat shareholders as merely one of a group of stakeholders, each with legitimate claims on the firm's resources. Corporations are expected to elevate the achievement of social and environmental activist goals to an equivalent status to their responsibility to deliver financial growth to their owners. See Richard Morrison, *Environmental, Social, and Governance Theory: Defusing a Major Threat to Shareholder Rights* (Competitive Enterprise Institute, May 5, 2021), <https://cei.org/wp-content/uploads/2021/05/Richard-Morrison-ESG-Theory.pdf>.

¹⁸ Government Accountability Office, *Corporate Shareholder Meetings: Proxy Advisory Firms' Role in Voting and Corporate Governance Practices*, GAO 17-47 (November 2016), <https://www.gao.gov/products/GAO-17-47>.

¹⁹ US Department of Labor, Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc., 1988 WL 897696 (Feb. 23, 1988).

that fiduciary responsibility encompasses both deciding to vote and deciding not to vote, including circumstances in which the expected economic benefit of voting does not justify the associated cost.

The Avon letter permits pension managers to delegate their proxy voting obligations to a hired investment manager. Such entities can vote on behalf of the pension fund's clients. The DOL bases its Avon guidance on ERISA. That law was a watershed change requiring pension fund managers to exercise their fiduciary responsibilities—notably their duties of loyalty, care, prudence, and diligence—when managing their clients' assets.²⁰

ERISA specifically regulates private pension fund managers, leaving state pension funds to be regulated primarily by their respective state governments. Both public and private pension managers must submit to some SEC oversight by registering as investment advisers. In this way, pension funds are a target of dual federalism, where states regulate their execution of managerial responsibilities while federal agencies like the DOL and the SEC ensure the funds exercise proper transparency in their stewardship of assets.

While ostensibly based on the provisions of a generally well-regarded law, the DOL's Avon Letter introduced a host of unnecessary problems into the proxy review process. Like the SEC's 2003 rule, the Avon Letter allows pension fund managers to delegate proxy voting oversight to a third-party advisor. The guidance therefore appears to clash with ERISA by letting pension fund managers offload duties the law requires them to perform.

The Avon Letter should not be read to require pension fund managers to vote on every issue before a plan. The DOL's subsequent guidance has clarified that the fiduciary must make a prudent determination whether and how to exercise shareholder rights in the plan's economic interest. That framework can still create substantial compliance and monitoring burdens, particularly where a plan holds shares in many issuers and must determine which ballot matters warrant attention. Critics contend that these burdens can increase demand for third-party proxy research and voting services.

Questionable guidance such as the Avon Letter and subsequent DOL interpretive rules provides a regulatory launching pad for activist shareholders. As a result, anti-corporate activists air their political grievances before pension funds, holding them captive in the process. Rather than requiring pension managers to prioritize the most materially relevant proposals that stand to enhance the long-term value of their clients' retirements, the 1980s DOL exploited a vein of ambiguity in ERISA to grant pension managers greater autonomy. Rather than empowering the retirees to prudently exercise their voting rights or require pension managers to obtain client voting permission, the DOL opened the door to substantial mischief.

The DOL's Avon letter has also failed to account for the enhanced complexity of the proxy review process in the 21st century. Labor Department officials in the 1980s could not have predicted robo-voting and greater corporate reliance on proxy services. Since then, the DOL has reinforced the Avon Letter with several interpretive guidance letters. As a patchwork of guidance, these letters clarify the pension fund manager's obligation to vote proxies under ERISA. In Interpretive Bulletin 94-2, the DOL clarified that the Avon Letter's proxy voting requirements stem directly from ERISA's fiduciary duty standards.²¹

In drafting its Bulletin 94-2, the DOL sought to fix the Avon Letter's ambiguities on what pension fund managers could consider when voting their clients' proxies. One substantive passage that keeps to the intent of ERISA is as follows: "The fiduciary duties described [in ERISA] require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives."²²

While the bulletin properly instructs pension managers to vote in a manner that generates financial value, it also introduces a loophole managers can use to sidestep ERISA's fiduciary standards.²³ This is seen in the passage permitting ERISA fiduciaries to pursue "activities intended to monitor or influence the management of corporations in which the plan owns stock," so long as there is a "reasonable expectation" that it may increase the plan's investment in the designated company.²⁴

²⁰ Los Angeles City Employees' Retirement System, *Board Governance and Investment Policies*, p. 91. LACERS claims to exercise a high degree of "care, skill, prudence, and diligence" in carrying out its fiduciary responsibilities on behalf of its beneficiaries. It relies upon and cites from ERISA § 404(a)(1) (B) regarding the care it pursues through investment decisions.

²¹ Paul N. Watkins and Kathleen Barceleau, "The 30-Year History of Diluting ERISA's Fiduciary Duty," *Federalist Society Review*, January 16, 2024, <https://fed-soc.org/fedsoc-review/the-30-year-history-of-diluting-erisa-s-fiduciary-duty>.

²² US Department of Labor, "Interpretive Bulletin Relating to Written Statements of Investment Policy, Including Proxy Voting Policy or Guidelines," 59 Fed. Reg. at p. 38,863, <https://www.federalregister.gov/documents/2016/12/29/2016-31515/interpretive-bulletin-relating-to-the-exercise-of-shareholder-rights-and-written-statements-of>.

²³ The Wagner Law Group, "A Plan Sponsor's Fiduciary Duties Under ERISA: With Great Responsibility Comes Great Potential Liability," February 2010, <https://www.wagnerlawgroup.com/wp-content/uploads/sites/1101401/2021/07/plan-sponsors-fiduciary-duties-under-erisa.pdf>. This document outlines each of the fiduciary standards codified under ERISA.

²⁴ US Department of Labor, "Interpretive Bulletin," 59 Fed. Reg. at p. 38,864.

This implicitly permits fund managers to pursue a wide range of activist shareholder proposals, including non-traditional, non-financial topics that can be used to gauge corporate performance. ESG theory proponents often argue that their E&S initiatives can be expected to increase a company's valuation in tandem with achieving their unrelated goals, though that argument assumes that the investing patterns under consideration, if followed, will produce long-term corporate and political changes far from the status quo.²⁵ In other words, forcing ESG-aligned changes via corporate governance will lead governments to mandate those goals, thus justifying the original investments and proxy votes. This kind of motivated reasoning belongs more to the world of political activism than actual financial management. Fund managers should spare their retirees' financial futures from opportunists' convoluted expectations.

This provision heightens the risk that pension fund managers will be held liable for financial losses from their investment decisions.²⁶ Under the department's Avon Letter and Bulletin 94-2, pension managers can explore an array of ESG issues raised by shareholders while maintaining their fiduciary obligations under ERISA. The problem is that prioritizing ESG goals undermines, rather than promotes, the pension manager's ability to consistently grow the plan's financial assets over the long term. "Under ERISA Section 409," according to one law firm's analysis, "any person who is a plan fiduciary is personally liable for any losses that result from a breach of his duties under ERISA," something that is enforceable under federal law through appropriate civil action in court.²⁷

ERISA's fiduciary framework can encourage plan fiduciaries to obtain specialized assistance with proxy research and voting. But proxy advisors are not necessarily outside ERISA's fiduciary regime. In Technical Release 2026-01, issued April 1, 2026, the DOL stated that a proxy advisory firm that exercises authority or control over shareholder rights attributable to ERISA plan assets is a functional fiduciary under ERISA. The DOL further stated that a proxy advisor providing investment advice for a fee may also be a fiduciary under ERISA's investment-advice test, depending on the facts and circumstances. The guidance therefore places legal responsibility not only on plan fiduciaries selecting and monitoring proxy services, but potentially on proxy advisory firms themselves.²⁸

The Department of Labor's 2022 rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," removed the 2020 rules' distinction between "pecuniary" and "non-pecuniary" factors. The rule expressly recognized that climate change and other ESG considerations may be relevant to a risk-and-return analysis depending on the facts and circumstances. The 2022 rule did not, however, authorize ERISA fiduciaries to sacrifice investment returns or assume additional investment risk to promote objectives unrelated to participants' and beneficiaries' financial interests. The continuing legal requirement is that fiduciaries act prudently and loyally for the benefit of plan participants and beneficiaries.

Subsequent SEC policy has attempted to fix the problems created by the 2003 rule. In 2020, under Chair Jay Clayton, the commission adopted amendments addressing proxy voting advice. Among other things, the regulatory framework treated certain proxy voting advice as a solicitation under the federal proxy rules and imposed conditions designed to increase disclosure of conflicts and information available to registrants and investors. The SEC subsequently amended portions of that framework in 2022.

ISS challenged the SEC's treatment of proxy voting advice as a solicitation. In *Institutional Shareholder Services, Inc. v. SEC*, the DC Circuit affirmed the district court and held that proxy voting advice furnished upon request does not fall within the ordinary meaning of "solicit" in Section 14(a) of the Securities Exchange Act. The decision invalidated the SEC's attempt to regulate such advice as a solicitation under Section 14(a). It did not hold that proxy advisors are immune from all regulation, disclosure requirements, or fiduciary duties arising under other sources of law.²⁹

To recap, the DOL's guidance letters and the SEC's best interest rule set the regulatory precedent for investment adviser neglect of fiduciary responsibilities. A rise in proxy advisor influence—most notably of the duopoly of ISS and Glass Lewis—followed this neglect. The following section explores why the market for proxy advisory services is so anti-competitive and how ESG lies at the core of proxy advisor services.

²⁵ Morrison, "Environmental, Social, and Governance Theory," pp. 60–72.

²⁶ Jon Solorzano, Jason Halper, and Josh Rutenberg, "ESG Meets ERISA: Final Judgment Issued in American Airlines 401(k) ESG Lawsuit," *Vinson & Elkins Insights*, October 17, 2025, <https://www.velaw.com/insights/esg-meets-erisa-final-judgment-issued-in-american-airlines-401k-esg-lawsuit>.

²⁷ Wagner Law Group. "Plan Sponsor's Fiduciary Duties," p. 2. This analysis is supported by the Supreme Court's 2008 decision in *LaRue v. DeWolff, Boberg & Associates*.

²⁸ US Department of Labor, Employee Benefits Security Administration, "Application of ERISA Fiduciary Requirements and Preemption Provisions to Proxy Advisory Services," Technical Release 2026-01, April 1, 2026, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/26-01>.

²⁹ *Institutional Shareholder Services, Inc. v. SEC*, 142 F.4th 757.

Proxy duopoly and ESG: A source of power and escape

The proxy advisor duopoly relies heavily on promoting ESG market trends and selling ESG products to investors. Providing both services constitutes self-dealing. Glass Lewis and ISS consistently recommend yes votes on pro-ESG shareholder proposals while simultaneously offering consulting advice on adopting ESG-themed best practices. Both Glass Lewis and ISS devote entire sections of their benchmark voting policies to championing ESG activism, typically splitting them across climate-oriented concerns; diversity, equity, and inclusion (DEI) matters; and progressive positions on board governance. Since 2020, both ISS and Glass Lewis have vigorously supported ESG across each category and sub-category, casting aside any appearance of neutrality. This support coincided with the precipitous rise in shareholder support for ESG during the COVID-19 era, particularly on E&S matters.

As a combined domain, E&S concerns overtook the number of governance issues raised in 2020. Much of that result is accounted for by organizations like the Shareholder Rights Group shopping their political pet projects around to various board meetings.³⁰ The G of ESG can be understood as the enforcement mechanism for adopting E&S standards into a company's operations. Rather than serving as a genuine safeguard over shareholder interests as intended, the G has politicized corporate governance more than ever.³¹ Corporate boards now prioritize environmental reform goals and radical social movements over their neutral oversight responsibilities. British analyst James Graham writes: "Board meetings are consumed by sustainability discussions at the expense of financial performance. Third-party proxy advisors, accountable to nobody, wield the voting power of tens of trillions of pounds in assets."³²

The Shareholder Rights Group is composed of 16 members that reportedly account for a large portion of the annual wave of ESG shareholder proposals.³³ These proposals included mandatory racial equity audits, mandatory climate disclosures, and mandatory board oversight of E&S risks facing a company. By 2022, the number of social justice proposals submitted exceeded corporate governance proposals, an entirely new trend.

Certain advocacy groups have adopted their own ESG policies to pressure asset managers toward ESG conformity.

ShareAction, for example, has tried to position itself as a leader of ESG-aligned proxy voting. ShareAction's policy encompasses a commitment to "support most governance-related shareholder proposals [and] all environmental and social shareholder proposals aimed at enhancing a company's policies and performance or increasing a company's disclosures with respect to such issues."³⁴

Traditionally, corporate shareholders focused mostly on how companies are governed, attempting to influence the firm's financial trajectory. Today, activist shareholders have crowded out the voices of mainstream shareholders by pushing a thicket of E&S proposals during annual meetings. These proposals not only cloud a company's perception of materiality, but they also distract corporate board members from the most important matters. Serious shareholders raise these matters to enhance the firm's overall financial well-being.

Proxy advisory firms have aided and abetted the radical push for ESG orthodoxy during annual meetings. As mentioned previously, proxy advisors do not represent shareholders. They work on behalf of large institutional investors. This keeps shareholders two steps removed from the major decisions that shape the governance of the companies they own. Because proxy firms are paid regardless of how companies are affected by their recommendations, they can pursue non-essential ESG issues without fear of consequence.

The DC Circuit's 2025 decision in *ISS v. SEC* means that proxy voting advice furnished upon request is not regulated as a solicitation under Section 14(a) merely because it may influence a shareholder's vote. That limits the SEC's ability to regulate proxy advice through that particular statutory theory. It does not, however, eliminate other legal obligations that may apply to proxy advisors, including conflict-related requirements and, in the ERISA context, potential functional-fiduciary obligations under the DOL's 2026 guidance.

Some assume that asset managers have the same profit-seeking incentives as the public companies in their portfolios. In reality, asset managers are not singularly devoted to wealth maximization. Rather, they focus on the institutional service fees they receive for holding corporate assets under management. These fees are paid at a

³⁰ Ronald O. Mueller, testimony before the House Committee on Financial Services, hearing on *Proxy Power and Proposal Abuse: Reforming Rule 14a-8 to Protect Shareholder Value*, 119th Cong. 1st sess., September 10, 2025, <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=410856>.

³¹ James Graham and Desiree Fixler, *The Death of the Fiduciary Duty* (Prosperity Institute, March 29, 2026), executive summary, <https://www.prosperity.com/media-publications/death-of-the-fiduciary-duty>.

³² Graham and Fixler, *Death of the Fiduciary Duty*.

³³ Even with a slight decline in ESG proposals in 2025, pro-ESG groups continue to dominate the vast majority of shareholder proposals submitted (85 percent). Drew Hutchinson, "Conservative Shareholders Ramp Up as ESG Proposals Dip," *Bloomberg Law*, July 29, 2025, <https://news.bloomberglaw.com/esg/conservative-shareholder-causes-gain-clout-as-esg-proposals-wane>.

³⁴ Graham and Fixler, *Death of the Fiduciary Duty*, p. 43.

Robo-voting as nudging

Proxy advisor robo-votes somewhat mirror the default option of passive nudges.¹ In behavioral economics, governments may incentivize behavior changes by using a “behavioral nudge” toward a desired action, rather than forcing the change through regulation. An example of a default nudge: greenhouse gases represent an existential threat to humanity, and therefore companies should mitigate this threat by adopting Glass Lewis’s environmental benchmark. This policy requires a shift toward net-zero emissions by the year 2030. The default is to adopt Glass Lewis’s voting stance via robo-voting or to consciously opt out by voting one’s proxies directly.

For ESG, proxy advisors (in place of the government) advance passive “green nudges” in their proxy benchmark guidelines. As Mercatus Center scholars Rosemarie Fike, Stefanie Haeffele, and Arielle John have written, these are elitist “responses to individuals’ bounded rationality that attempt to incentivize them to change their behavior in the direction of provision or collaboration to a sustainable environment.”² Glass Lewis and ISS strategically advance green (and social) nudges by pressuring clients to adopt environmentally conscious practices. Through their information campaigns (e.g., proxy season review reports) and by flexing their status as standard bearers of proxy voting orthodoxy, this pair has nudged many investment advisers toward wholesale embrace of E&S reforms.

Many investment advisers use proxy advisor benchmark policies as an input into, or model for, their own proxy voting policies. Heavy or mechanical reliance on a third party may raise questions about whether the responsible investment adviser or ERISA fiduciary is independently satisfying its own fiduciary and proxy voting obligations. The legal analysis is fact-specific, however, and adoption of or reliance on a proxy advisor’s benchmark policy does not by itself establish a violation of ERISA or the Investment Advisers Act.

¹ Cynthia Boruchowicz, “Public Policy, the Environment, and the Use of Green Nudges,” chap. 8 in *Nudging Public Policy: Examining the Benefits and Limitations of Paternalistic Public Policies*, ed. Rosemarie Fike, Stefanie Haeffele, and Arielle John (Rowman & Littlefield, 2021). See also the book review by Richard Morrison, “After Nudging: The Rise and Fall of a Behavioral Economics Fad,” *The Daily Economy*, May 1, 2026, <https://thedailyeconomy.org/article/after-nudging-the-rise-and-fall-of-a-behavioral-economics-fad>.

² Boruchowicz, “Public Policy, the Environment, and the Use of Green Nudges,” p. 178.

consistent rate, providing the same level of revenue over time regardless of the client firm’s financial outcomes. In other words, companies in the portfolio can suffer a major decline in revenue and still pay the asset manager the fixed service fees. Just like proxy firms, asset managers are separated from the underlying companies affected by their investment decisions.

A similar accountability problem persists among state pension managers. Even in states with Republican legislatures and Republican governors, the state’s pension fund votes in favor of progressive-left ESG proposals.³⁵ That happens because the state treasurer delegates managerial oversight to their staff, who then delegate responsibility for pension fund management to hired institutional investors, who then delegate voting decisions to one of two proxy advisors. This creates a crisis of accountability whereby a pension’s retirement accounts are outsourced to a distant firm that does not answer to

the state’s elected officials.³⁶ No matter how much a state governor or treasurer might desire to secure their citizens’ public retirements, multiple layers of delegation diminish their influence.

The duopolistic nature of the market for proxy advisory services permits a wedge to form between proxy advisor interests and investor interests. Because of regulations like the Avon Letter and the SEC’s 2003 proxy voting rule, institutional investors are incentivized to avoid legal liability when exercising proxy votes. Naturally, investment advisers have come to rely on the largest, most prestigious proxy firms for assistance, rather than do business with the many competing firms. The established legal equilibrium rewards adherence to existing norms, and that means sticking with the two leading firms. Switching to one of the much smaller, insurgent firms is considered riskier than relying on the incumbents.

³⁵ Jerry Bowyer, “The Media’s ESG Mirage: Why Shareholder Votes Don’t Tell the Whole Story,” *Prospr Aligned*, June 26, 2025, <https://prospraligned.com/research-article/the-medias-esg-mirage-why-shareholder-votes-dont-tell-the-whole-story>.

³⁶ Rob Kozlowski, “Kentucky Pension Funds Caught Up in Attorney General’s Anti-ESG Demands,” *Pensions & Investments*, November 29, 2022, <https://www.pionline.com/esg/kentucky-pension-funds-caught-attorney-general-daniel-camerons-anti-esg-demands>.

Conclusions and recommendations for reform

The SEC and the DOL should restore transparency and accountability in the proxy voting process. Additionally, Congress should devote more attention to the array of legislative bills that address unaccountable proxy firms. The proxy advisor duopoly of Glass Lewis and ISS has long hijacked the shareholder review process with politicized ESG proposals. The proliferation of ESG-related proposals has often diverted companies' managerial focus from the issues that truly matter most for long-term financial success.

The big two proxy advisors exercise notable influence not only in their pro-ESG recommendations but also through their benchmark proxy voting guidelines. Specifically, Glass Lewis and ISS have encouraged investment advisers to become more closely aligned with their policy stances on environmental and social justice activism. This trend points to a blatant failure by many investment advisers to craft proxy voting policies that truly cater to their clients' needs. By substituting a third-party benchmark for their own strategy, investment advisers are subjecting their corporate clients to a radical strand of progressive-left ESG activism.

To remedy the problems presented by the proxy duopoly:

- The SEC should reconsider Rule 206(4)-6 and related proxy voting guidance to reduce regulatory incentives for mechanical or unnecessary voting while preserving the core requirement that an adviser exercising proxy authority act in its clients' best interests.
- Similarly, SEC policy should make clear that an investment adviser that undertakes proxy voting authority remains responsible for adopting and implementing its own policies and procedures reasonably designed to serve its clients' best interests, even when it uses a proxy advisory firm for research, recommendations, or vote execution.
- Congress should prohibit any future SEC requirement that investment advisers vote on every proxy ballot measure regardless of materiality or expected benefit

and should preserve advisers' ability to refrain from voting when doing so is consistent with their fiduciary obligations and clients' best interests.

- Congress should require proxy advisors to disclose any conflicts of interest when providing services to their clients. This means proxy firms like Glass Lewis and ISS should no longer hide that they are paid by an asset manager for advice on management proposals while being paid by a company's management for consulting services.
- Congress should end the regulatory whiplash at the DOL by amending Title I of ERISA, clarifying that pension fund managers may pursue only legitimate pecuniary benefits for their retirees. Members of Congress should refer to a model piece of legislation, the Protecting Americans' Investments from Woke Policies Act (H.R. 5339), that was passed by the House of Representatives in 2024.
- Institutional investors should promote proxy voting choice programs. Voting choice is a superior alternative to robo-voting because it empowers retail investors to direct how their shares are voted. Rather than requiring investors to vote on every shareholder issue, this voluntary program encourages them to select the issues they care most about.³⁷ While the big three asset managers—BlackRock, State Street, and Vanguard—have moved forward with some form of voting choice for their clients, many mid-sized managers do not appear to use it. Other asset managers should embrace this option and consider implementing their own voting-choice platforms to mitigate the ills of proxy advisor dominance. A recent Vanguard study shows a growing interest in voting choice among retail investors.³⁸

About the author

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³⁷ Dorothy S. Lund, "The Past, Present, and Future of Proxy Voting Choice," *Journal of Corporation Law* 50 (2025), p. 1075, sec. III, "Voting Choice," https://scholarship.law.columbia.edu/faculty_scholarship/4657.

³⁸ John Galloway, "Survey Highlights Strong Investor Interest in Proxy Voting Choice," Vanguard Investment Stewardship memorandum, reposted to *Harvard Law School Forum on Corporate Governance*, April 30, 2025, <https://corpgov.law.harvard.edu/2025/04/30/survey-highlights-strong-investor-interest-in-proxy-voting-choice>.



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