IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSTITUTIONAL SHAREHOLDER SERVICES INC.,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION AND WALTER CLAYTON III in his official capacity as Chairman of the Securities and Exchange Commission,

Defendants.

Case No. 1:19-cv-3275-APM

MEMORANDUM IN SUPPORT OF INTERVENOR THE NATIONAL ASSOCIATION OF MANUFACTURERS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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October 30, 2020

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INTRODUCTION

This case is about the modest regulatory reforms that the Securities and Exchange Commission recently promulgated to bring much-needed transparency and accuracy to the market for shareholder proxy voting advice, and Plaintiff Institutional Shareholder Services Inc.'s ("ISS") attempt to block that positive development for shareholders and the companies they invest in.

At the thousands of annual and regular meetings held across the country each year, publicly traded corporations give their shareholders a say on how the corporations will be governed—decisions that impact the direction of businesses and the life savings of millions of investors. Rather than vote in person, however, most shareholders elect to vote via "proxy."

That is where ISS comes in. ISS, one of two players that control the vast majority of the proxy voting advice market, sells itself as an expert in analyzing corporate ballots, and it actively invites shareholders and institutional investors to hire it for its recommendations. Those recommendations tell shareholders and institutional investors exactly how they should vote on each and every item listed on the corporate proxy ballot. In fact, in many cases, ISS seeks and receives authority to automatically cast a shareholder's vote in accordance with ISS's recommendations.

Unsurprisingly, then, it has been well understood for decades that proxy voting advice businesses such as ISS are in the business of "soliciting" proxies, and thus are subject to the information and disclosure requirements of the Commission's proxy solicitation rules. In 1964, the Commission explained that "[m]aterial distributed" in the run-up to a proxy vote that "suggests how the stockholder should vote, would constitute soliciting material" subject to the Commission's proxy solicitation rules. *Broker-Dealer Participation in Proxy Solicitations*, 29 Fed. Reg. 341, 341 (Jan. 15, 1964). ISS and Glass Lewis, who together control roughly 97% of the market share for proxy vote advising services, likewise have each recognized that those services are subject to

the Commission's proxy solicitation rules. In fact, ISS previously sought and received an exemption from requirements that applied only to proxy solicitations.

In recent years, however, the Commission has learned of serious deficiencies in the operations and practices of proxy voting advice businesses. Conflicts of interest abound, as ISS, for example, runs a consulting business that counsels companies on the very corporate governance matters on which the advisory side of the firm makes recommendations. The process by which proxy voting advice businesses develop their benchmark policies, specialty reports, and recommendations also lacks transparency, and the recommendations often reflect errors and misleading statements. In many cases, these errors do not come to light until after the shares are voted, and proxy voting advice businesses have steadfastly resisted engaging in a dialogue with issuers to correct these deficiencies. Left unchecked, these concerns threaten the transparency and integrity of the proxy voting process.

The Commission responded to these concerns in a reasonable and measured way. In the Final Rules on review here, the Commission simply codified its longstanding position that proxy voting advice businesses are engaged in proxy solicitation. But rather than require proxy voting advice businesses such as ISS to comply with the full suite of information and filing requirements in the proxy solicitation rules, the Commission offered a pared-down, minimalist alternative: If proxy voting advice businesses are willing to offer standard disclosures about their practices and to notify investors of new information provided by the corporate subjects of their recommendations—reforms aimed at disclosing conflicts of interest and expanding investor access to information—they could claim an exemption from the proxy solicitation rules' information and filing requirements.

ISS nonetheless objects to this modest reform. It argues that the Commission lacks authority to regulate proxy voting advice, that the Final Rules are arbitrary and capricious, and that they violate the Free Speech Clause of the First Amendment. ISS's arguments are unavailing.

First, the Commission's longstanding interpretation of its authority to regulate proxy voting advice is correct. When a proxy voting advice business encourages shareholders and institutional investors to hire it for its advice, tells them exactly how they should vote their shares, and then, in many cases, automatically votes the shares *itself*, it is "soliciting" a proxy. The plain meaning of the word "solicit" bears this out. When ISS recommends that a client vote in line with ISS's analysis, it both "endeavors to obtain" an action and "move[s] [a shareholder] to action." Webster's New International Dictionary 2394 (2d ed. 1939). That is especially obvious when ISS actually votes the stock itself on behalf of the client. Accordingly, as a reasonable speaker of English would have said when Congress enacted the Securities Exchange Act of 1934, ISS "solicits" a proxy. Its statutory authority objection is therefore a nonstarter and, in any event and as the Commission explains, fails because the agency's construction of the statute is at the very least a reasonable one.

Second, and contrary to ISS's complaints, the Final Rules issued by the Commission are both reasonable and reasonably explained. The Final Rules are a direct and targeted response to well-documented problems in the proxy voting advice process, and they afford proxy voting advice businesses with considerable discretion in complying with their requirements. In administering a statutory framework whose "fundamental purpose" is to enforce a "philosophy of full disclosure," *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963), the Commission did not

err by encouraging proxy voting advice businesses to provide more information. The more investors know, and the more sides of an issue they have the opportunity to hear, the better off they and all stakeholders will be.

Finally, just like other straightforward disclosure provisions in our nation's securities laws, the Final Rules do not run afoul of the First Amendment. They do not compel ISS to speak at all, and ISS is free to avoid them by forgoing the proffered exemptions and instead complying with the information and filing requirements in the proxy solicitation rules. The Final Rules are also viewpoint- and content-neutral, because they apply regardless of the position that the proxy voting advice business, or the issuer, takes on any proxy ballot measure. At most, the Final Rules provide for purely factual disclosures that are supported by a compelling governmental need.

ISS has therefore provided no justification for setting aside the Commission's lawful, reasonable, and minimally invasive regulation of proxy voting advice businesses. The Court should deny ISS's motion for summary judgment, and it should grant the National Association of Manufacturers' (the "NAM") cross-motion for summary judgment.

BACKGROUND

A. Proxy Solicitation, Proxy Voting Advice Businesses, And The Need For Increased Transparency In Proxy Voting.

At annual and regular meetings, publicly traded corporations provide shareholders the chance to vote on various matters relevant to the management of the company. *See Exemptions from the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55,082, 55,082 (Sept. 3, 2020) ("Final

Rules").[1] Most shareholders do not attend these meetings in person, but instead exercise their voting rights on corporate matters via a proxy. *Id.*

1. Congress expressly granted the Commission authority to oversee and regulate the proxy process, including the solicitation of proxies. As stated in the Securities Exchange Act of 1934, it is "unlawful for any person" "to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security" "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1).

Consistent with the plain meaning of the word "solicit," the Commission has consistently taken the position that proxy voting advice offered by a business such as ISS—a detailed report containing "advice and voting recommendations," ISS Mem. in Supp. of Mot. for Summary Judgment ("ISS Mot.") 7, Dkt. 20-1—generally constitutes a "solicitation" within the meaning of the securities laws. *See Broker-Dealer Participation in Proxy Solicitations*, 29 Fed. Reg. 341, 341 (Jan. 15, 1964) ("Material distributed during a period while proxy solicitation is in progress, which comments upon the issues to be voted on or which suggests how the stockholder should vote, would constitute soliciting material."). That view has survived the test of time. *See, e.g.*, *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982, 43,009 (July 22, 2010) ("As a general matter, the furnishing of proxy voting advice constitutes a 'solicitation' subject to the information and filing requirements in the proxy rules."). And it has been acknowledged, for years, by proxy voting advice businesses themselves, including, notably, ISS, which as early as 1988 assumed that

[1] Citations to the Administrative Record ("AR") are to the "Doc. No." contained in the Administrative Record filed by the Commission. Dkt. 30. For convenience, citations to the Final Rules are either to the Federal Register or the text of the Final Rules themselves as they appear in AR Doc. No. 756. References to "Dkt." refer to the docket in this Court unless otherwise noted.

its advice was a "solicitation" within the meaning of the Commission's rules and regulations by seeking—and later receiving—an exemption from the filing requirements that applied only to solicitations. *See Institutional Shareholder Services, Inc.,* 1991 WL 179448, at *2 (SEC No-Action Letter Dec. 15, 1988) (seeking exemption); *Regulation of Communications Among Shareholders*, 57 Fed. Reg. 48,276, 48,282 n.41 (Oct. 22, 1992) (granting exemption for "proxy advisory services").

The Commission's longstanding position has gone unchallenged—until now.

2. Proxy voting advice businesses such as ISS have risen to prominence in the wake of increased institutional ownership of American stocks. *See* AR585 at 3; *see also* 85 Fed. Reg. at 55,083. According to one recent report, institutional investors now control nearly 80% of the market value on U.S. exchanges. AR585 at 3. Fund managers at these institutions, charged with voting an ever-increasing number of proxies on their clients' behalf, have turned to proxy voting advice businesses to shape, and sometimes even cast, their votes.

Proxy voting advice businesses influence the voting process from start to finish. *See* AR585 at 3. They issue general benchmark voting policies to evaluate how matters subject to a vote should be viewed. *Id.* They supplement those policies with specialty guides on matters such as corporate social responsibility, labor policy, and environmental matters. *Id.* And they make specific voting recommendations based on these and other policies, *id.*, in tens of thousands of shareholder meetings each year, *see* AR437 at 1—all with the full knowledge and intent that their advice will be followed, *see* ISS Mot. 19 ("There is no question that a proxy adviser's recommendations might 'influence' the decisions of the investor-client."). In many cases, proxy voting advice businesses go further. For trillions of shares annually, they execute their clients' votes, often automatically, based on their own recommendations. 85 Fed. Reg. at 55,144. As a result, proxy

voting advice businesses unquestionably have enormous influence over the corporate governance policies of U.S. public companies—decisions that impact the direction of a business and ultimately the life savings of millions of investors.

3. Intervenor the NAM does not object to proxy voting advice businesses playing a role in providing information to the marketplace. To the extent that their services provide institutional investors with more complete—and accurate—information on which to base proxy voting decisions, the NAM believes that proxy firms can be a constructive player in the market. A neutral, fact-based process that results in helpful recommendations presented alongside management proposals can only benefit investors and issuers. However, prior to the Final Rules, the proxy voting advice process suffered from a number of flaws that caused real harm to shareholders.

Proxy voting advice businesses labor under significant, but undisclosed, conflicts of interest that potentially cloud their recommendations. Proxy voting advice businesses ISS and Glass Lewis are effectively a duopoly in the proxy voting advice space. 85 Fed. Reg. at 55,127 n.517. The former operates a consulting business that counsels companies on the very corporate governance policies on which the advisory side of the firm makes recommendations, while the latter is owned by an investor that engages in proxy contests. AR585 at 4. The ISS consulting service is particularly concerning given that the complexity and lack of transparency inherent in ISS's proxy voting advice provides a strong incentive for companies to purchase consulting services from ISS in order to model and predict the impact of ISS's own standards. *Id.*

The proxy voting advice businesses' methodology is flawed as well. Proxy voting advice businesses insist upon a one-size-fits-all approach to corporate governance that does not take into account differences in companies' business models and the flexibility afforded by securities law. AR585 at 3. Increasingly, they also advocate for a normative agenda that seeks to shape—rather

than analyze and report on—corporate behavior. *Id*. And the process they use lacks transparency, too. The proxy voting advice businesses' policy guidelines are established out of the public eye, the specialty reports they issue are crafted with vague methodologies that depart from their standard benchmark policies, and their issuer-specific recommendations do not face public scrutiny or incorporate investor or issuer feedback. *Id.*

It should not be a surprise, then, that the proxy voting advice reports and recommendations feature significant errors and misleading statements, ranging from specific incorrect facts to flawed assumptions about, for instance, a company's peer group or compensation practices. AR585 at 3. The recommendations also feature terms with common market meanings such as "'total shareholder return,'" but often use opaque calculation methodologies that vary from traditional market practice. *Id.*

Compounding the impact of these errors, proxy voting advice businesses have been steadfastly resistant to engaging in a productive dialogue with issuers to correct errors in a timely manner. AR585 at 3. And, in many cases, issuers are not even given a chance to act. Proxy voting advice businesses often engage in the automatic submission of proxy votes (a practice known as "robo-voting") on behalf of their clients, meaning that the flaws intrinsic to their recommendations are translated immediately into voting power, completely cutting investment advisers and the company shareholders out of the process, thereby depriving issuers of a chance to correct the record or provide investors with additional information. *Id.* at 4.

As the Commission has recognized, proxy voting advice "is often an important factor in the clients' proxy voting decisions." 85 Fed. Reg. at 55,083. This level of influence gives proxy firms significant power over proxy results.

B. The Commission's Regulatory Response And This Litigation.

In response to the problems identified above, as well as others, the Commission took a series of regulatory steps, culminating in Final Rules issued on September 3, 2020.

1. In August 2019, the Commission announced a guidance document reaffirming the Commission's long-held position that proxy voting advice provided by a proxy voting advice business generally constitutes a solicitation under the agency's proxy rules. *See Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47,416 (Sept. 10, 2019) ("Proxy Guidance"). ISS filed a complaint in this Court in October 2019 challenging the Proxy Guidance, arguing for the first time in ISS's history that proxy voting advice is not a form of proxy solicitation, and thus that the Proxy Guidance exceeded the Commission's statutory authority under the Exchange Act. ISS also claimed that the Proxy Guidance was procedurally improper because it was a substantive rule that should have been subject to the notice-and-comment procedures of the Administrative Procedure Act, and that the Proxy Guidance should be set aside as arbitrary and capricious. *See* Dkt. 1.

The Commission then published proposed amendments to its rules governing proxy solicitations in November 2019, *see Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, 84 Fed. Reg. 66,518 (Dec. 4, 2019) ("Proposed Rule"), AR1, to codify, after notice and comment, the Commission's interpretation that proxy voting advice generally constitutes a solicitation. This Court stayed this litigation pending the outcome of the rulemaking. *See* Dkt. 14. Numerous commenters participated in the notice and comment period, including ISS, *see* AR437, and the NAM, *see* AR585.

2. On July 22, 2020, the Commission announced its Final Rules along with an extensive release explaining the Commission's actions. The Final Rules codify the Commission's longstanding position that "proxy voting advice" is generally within the definition of "solicitation." Rule

14a-1(*l*)(1)(iii)(A). As a result, proxy voting advice businesses such as ISS would normally be subject to various filing and anti-fraud requirements under the proxy solicitation rules. 85 Fed. Reg. at 55,131. The Final Rules, however, provide that a proxy voting advice business may qualify for an exemption from the filing (but not the anti-fraud) requirements by making certain disclosures and other information available to their clients—in particular by:

1) "includ[ing] in its proxy voting advice or in an electronic medium used to deliver the proxy voting advice prominent disclosure" of potential material conflicts of interest and the policies and procedures used to identify and remedy them, Rule 14a-2(b)(9)(i);

2) adopting and publicly disclosing written policies and procedures "reasonably designed to ensure that" "[r]egistrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting business's clients," Rule 14a-2(b)(9)(ii)(A); and

3) adopting and publicly disclosing written policies and procedures "reasonably designed to ensure that" "[t]he proxy voting advice business provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding its proxy voting advice by registrants who are the subject of such advice, in a timely manner before the security holder meeting" or before voting, Rule 14a-2(b)(9)(ii)(B).

The Final Rules also provide several safe harbors and other clarifications. Rule 14a-2(b)(9)(ii)(A) is satisfied, for instance, by adopting "written policies and procedures that are reasonably designed" to provide the registrant with a copy of the proxy voting advice, without charge, no later than the time the advice is given to the proxy voting advice business's clients. Rule 14a-2(b)(9)(iii). Similarly, a proxy voting advice business need only have "written policies and procedures reasonably designed to inform clients" that "the registrant intends to file or has filed" a "statement regarding the advice" by, for instance, "providing notice to its clients on its electronic platform" or "through email or other electronic means" and including (when available) "an active hyperlink to those materials on EDGAR," the Commission's free public database for companies' securities filings. Rule 14a-2(b)(9)(iv)(A)-(B). In addition, the pre-existing anti-fraud provision,

Rule 14a-9, is amended to include "as an example of a potentially material misstatement or omission . . . , depending upon particular facts and circumstances, the failure to disclose material information related to the proxy voting advice business's methodology, sources of information, or conflicts of interest." 85 Fed. Reg. at 55,122.

3. ISS filed its First Amended Complaint and a motion for summary judgment on September 18, 2020. Dkts. 19, 20-1. ISS argues that the Final Rules and the Proxy Guidance exceed the Commission's statutory authority under the Exchange Act and are arbitrary and capricious; it also argues that the Final Rules violate the First Amendment's protection against compelled speech. *See* ISS Mot. 16–44. ISS also continues to argue that the Proxy Guidance is procedurally improper under the Administrative Procedure Act. *Id.* at 45. The First Amended Complaint asks this Court to enter judgment in ISS's favor and grant it a host of declaratory and injunctive relief, setting aside the Final Rules and the Proxy Guidance. *See* Dkt. 19 at 29. The NAM moved to intervene in these proceedings in order to defend the Final Rules and the Proxy Guidance on behalf of its members, which include many of the same issuers that are the subjects of ISS's proxy voting advice. The NAM's motion to intervene is pending before the Court. *See* Dkt. 27.

LEGAL STANDARD

A court must grant a motion for summary judgment when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[I]n APA cases, . . . the reviewing court generally . . . reviews the [agency's] decision as an appellate court addressing issues of law," limiting itself "to the administrative record" and "the facts and reasons contained therein to determine whether the agency's action was consistent with the relevant APA standard of review." *Policy & Research, LLC v. U.S. Dep't of Health & Human Servs.*, 313 F. Supp. 3d 62, 74 (D.D.C. 2018) (quotation marks omitted; third and fourth alterations in original).

ARGUMENT

The Court should deny ISS's motion for summary judgment and grant the NAM's cross-motion for summary judgment because the Final Rules and the Proxy Guidance: (I) do not exceed the Commission's statutory authority; (II) are not arbitrary and capricious; and (III) do not violate the First Amendment. The NAM is thus entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

I. The Commission Properly Codified Its Longstanding Position That Proxy Voting Advice Is A Form Of Solicitation.

Contrary to ISS's assertion (at 18), the Commission properly held that "proxy voting advice" is a form of "solicitation." When Congress enacted the Exchange Act, the word "solicit" plainly encompassed proxy voting advice. Even if there were ambiguity on that point—and there is not—the Commission has long since resolved it: for forty years, the Commission's proxy regulations have made clear that to render proxy voting advice is to solicit a proxy. During that time, Congress has never questioned the Commission's longstanding interpretation. To the contrary, Congress adopted that interpretation—re-enacting the same statutory phrase ("solicit any proxy"), in the same section of the same statute, that the Commission has long construed to encompass proxy voting advice. In these circumstances, the Commission was well within its authority when it formally reiterated that proxy voting advice businesses are engaged in solicitation. Because the Commission "acted within its statutory authority," ISS's argument fails. *Am. Hosp. Ass'n v. Azar*, 964 F.3d 1230, 1241 (D.C. Cir. 2020).

A. The Statutory Text, Structure, And History Demonstrate That The Term "Solicit Any Proxy" Encompasses Proxy Voting Advice.

1. "We start with the text." *Am. Clinical Lab. Ass'n v. Azar*, 931 F.3d 1195, 1204 (D.C. Cir. 2019). Section 14(a) of the Securities Exchange Act makes it unlawful for any person "to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect

of any security" "in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78n(a)(1). The phrase "solicit any proxy" plainly encompasses proxy voting advice.

In construing the statutory phrase "solicit any proxy," the Court must "interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (alteration in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). In 1934, when the Securities Exchange Act was written, the word "solicit" ordinarily meant both: (i) "to endeavor to obtain" an action; and (ii) "to awake or excite to action." Black's Law Dictionary 1639 (3d ed. 1933); *see also* Webster's New International Dictionary 2394 (2d ed. 1939) (defining solicit as both "[t]o endeavor to obtain by asking" *and* "[t]o move to action; to serve as an urge or incentive to; to incite").

In providing proxy voting advice to a client, ISS easily satisfies these definitions. The Commission acted within its statutory authority in codifying proxy voting advice as generally being "solicitation."

a. ISS "endeavors to obtain" a vote in line with its recommendation. Black's Law Dictionary 1639. It "invite[s] and encourage[s]" an investor to hire ISS for its proxy voting advice. 85 Fed. Reg. at 55,095. It next produces a detailed report telling the investor exactly how the investor should vote on "each agenda item" on an upcoming corporate ballot. AR437 at 2. And then, in many cases, it immediately and automatically casts the investor's vote in line with its own recommendations. 85 Fed. Reg. at 55,144. That is soliciting a proxy, pure and simple.

Suppose a corporate manager approached an investor with the following proposition:

> You don't have the "need or resources" to match each proxy voting decision to your "specific investment objectives." I'll do that for you. I'll "analyze and provide a voting recommendation for each agenda item" on our upcoming ballot. And then, so you can "focus [your] resources" elsewhere, I'll automatically cast your vote on your behalf in line with my recommendations.

Cf. AR437 at 1–2. No one would doubt that the corporate manager was soliciting a proxy. And no one can doubt here that ISS is doing the same thing. When a proxy voting advice business encourages a client to hire it for its advice and then, as part of that advice, tells that client exactly how to vote her shares, it is seeking to influence a proxy vote just like the manager above.

Although ISS's motion carefully avoids drawing attention to this critical fact, ISS's practice of "robo-voting" its clients' shares destroys any credible claim that ISS is not soliciting proxies. In this scenario, ISS does not merely tell a shareholder how she should vote, but *automatically enters the vote on her behalf*. 85 Fed. Reg. at 55,144 (discussing the "automatic submission of votes"); *see also id.* at 55,126 ("ISS states that it executes about 10.2 million ballots annually on behalf of those clients representing 4.2 trillion shares."). That is not just rendering "advice," as ISS is fond to say. It is proof positive that ISS "seeks to *achieve a certain outcome*"—a vote in line with ISS's recommendations—and indeed *does* achieve that outcome. ISS Mot. 18. Such robo-voting proves beyond all doubt that ISS falls within any conceivable definition of the word "solicit." When ISS asks a client for permission to enter her vote, and then enters her vote based on ISS's own analysis, ISS has indisputably sought that person's proxy (and successfully so).

"ISS operates a consulting business that counsels companies on the very corporate governance policies on which the advisory side of the firm makes recommendations." AR585 at 4. As the Commission noted, there are good reasons to doubt that "as a matter of fact, proxy voting advice businesses necessarily do not have an interest in the outcome of matters being voted upon at shareholder meetings or do not seek proxy authority for themselves." 85 Fed. Reg. 55,093 n.141 (discussing ways in which proxy voting advice businesses may intend particular outcomes). But even if ISS *might not* care about the overall "outcome" of the proxy vote in some general sense (a limitation not supported by the statute, as discussed below), ISS Mot. 19, ISS cannot credibly

maintain that it is not at least trying to persuade each client to vote in line with ISS's recommendation—that is, when ISS does not automatically vote the shares in favor of its own recommendation itself, 85 Fed. Reg. at 55,144. In the same way attorneys in fact desire clients to take their advice on matters for which they have been retained, although the client of course ultimately decides, ISS surely intends for its clients to take its advice. After all, a firm that charges clients for "advice and voting recommendations tailored to [the] clients' specific criteria," ISS Mot. 7, will not be in business for long if clients uniformly disregard the advice.

ISS insists that it is "indifferent to the ultimate outcome of the vote," ISS Mot. 18, but nothing in the statutory phrase "solicit any proxy" necessarily focuses on such ultimate outcomes, to the exclusion of how each client regards ISS's advice. ISS surely *does* care whether its clients follow its advice, or else it would not be complaining about the supposed dilution of its proxy voting "viewpoint." ISS Mot. 39; *see infra* Part III. Moreover, ISS makes much of its assertion that it acts as an investment adviser that owes fiduciary duties of loyalty and care to its clients, *see, e.g.*, ISS Mot. 8—duties that are utterly inconsistent with ISS's feigned indifference. If the "duty of loyalty requires an adviser to act in the best interests of its clients," ISS Mot. 8, ISS must at least try to persuade its clients through "analysis and vote recommendations," *id.* at 1, to vote in the way ISS thinks they should. It must solicit their proxy.

Thus, under the ordinary and widely understood definition of the word "solicit" when Congress enacted the Exchange Act, proxy voting advice businesses "solicit" proxies. The Commission was well within its authority to reiterate that common sense reading of the statute.

b. In any event, ISS engages in activities that tend "to awake or excite [its clients] to action." Black's Law Dictionary 1639. This also qualifies as "soliciting" under its ordinary definition. *See* Webster's New International Dictionary 2394 (solicit includes "[t]o move to action;

to serve as an urge or incentive to; to incite"; "[t]o tempt (a person)"; "[t]o serve as a temptation or lure to; to attract; often, to kindle"; "[t]o draw on, out, together, etc., by physical attraction, force, or means; to bring about, forth, on, etc.").

Consistent with ordinary, contemporaneous usage in 1934, a reasonably informed speaker of English would have read the phrase "solicit any proxy" to include actions taken by a person (regardless of any subjective intent) that were likely to cause a shareholder to vote her proxy. That is what proxy voting advice businesses do. As ISS concedes, there "is no question that a proxy adviser's recommendations might 'influence' the decisions of the investor-client. Why else would the investor hire the proxy adviser?" ISS Mot. 19. Exactly right. The proxy voting advice "serve[s] as a … lure to" an investor to vote a certain way; it tends to "bring about" a vote by "attract[ing]" or tempt[ing]" the shareholder.[2] Webster's New International Dictionary 2394. This, too, is solicitation.

2. The structure and history of the Exchange Act confirm that proxy voting advice businesses are involved in proxy solicitation.

a. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974)). That rule fits this case perfectly.

[2] The record reflects the influence proxy voting advice businesses exert on shareholders. Studies, for example, "have found that the proxy firms can control up to 25 percent of the shareholder vote." AR585 at 4. Indeed, on the first business day following a report, issuers can see anywhere from 10 percent to nearly 18 percent of their shares vote in line with the proxy voting advice business's recommendation. AR558 at 34 n.72.

By the 1970s, there was no question that the Commission's administrative interpretation of the phrase "solicit any proxy" included proxy voting advice. As early as 1964, the Commission had made clear that "[m]aterial distributed during a period while proxy solicitation is in progress, which comments upon the issues to be voted on or which suggests how the stockholder should vote, would constitute soliciting material." 29 Fed. Reg. at 341. By 1979, the Commission had specifically exempted, through notice-and-comment rulemaking, the "furnishing of [certain] proxy voting advice" from some of the regulatory requirements applicable to solicitations—proving that the furnishing of proxy voting advice must be a solicitation. *See Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, 44 Fed. Reg. 68,764, 68,769–70 (Nov. 29, 1979).

"At no time," however, "did Congress express disapproval" of the Commission's longstanding interpretation, *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013), even though it amended Section 14's "solicitation" requirements on multiple occasions, *see, e.g.*, Pub. L. No. 111-203, § 953, 124 Stat. 1376, 1903 (2010); Pub. L. No. 98-38, § 2, 97 Stat. 205, 205 (1983). That decades-long acquiescence confirms that the Commission had "correctly discerned" congressional intent in the first instance. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (quotation marks omitted).

b. Congress not only acquiesced in the Commission's longstanding interpretation of the phrase "solicit any proxy," it ratified that interpretation by later reenacting the same language in another provision of Section 14.

In 1993, Congress added the phrase "solicit any proxy" to a new Section 14(h), modeled on 14(a). Pub. L. No. 103-202, § 302, 107 Stat. 2344, 2359 (1993) (codified at 15 U.S.C. § 78n(h)(1) ("It shall be unlawful for any person to solicit any proxy, consent, or authorization

concerning a limited partnership rollup transaction, . . . unless such transaction is conducted in accordance with rules prescribed by the Commission . . . .")). This is significant in at least two ways.

First, in new Section 14(h), the phrase "solicit any proxy" includes proxy voting advice. "Congress is presumed to be aware of an administrative or judicial interpretation" of a statutory phrase, and to "adopt that interpretation when it re-enacts" the same language elsewhere. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (quotation marks omitted); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."). As detailed above, for the nearly thirty years before Congress re-adopted the "solicit any proxy" phrase in Section 14(h), the Commission had made clear its view that that same language in Section 14(a) covered proxy voting advice. *See supra* p. 17.

Congress would have known of these longstanding administrative interpretations in 1993 when it re-enacted the "solicit any proxy" language in Section 14(h). By that time, the Commission's interpretation represented the settled view that the provision of proxy voting advice was a form of solicitation. *See, e.g.*, John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 Colum. L. Rev. 1277, 1358 (1991) ("The legal issue is whether the provision of proxy advice amounts to a proxy 'solicitation' under SEC Rule 14a–1. Clearly, the definition of solicitation reaches this far . . . ." (footnote omitted)). ISS itself got the message, for it sought and received an exemption from the proxy solicitation filing requirements that would have been needed only if it was soliciting proxies in the first place. *See Institutional Shareholder*

Services, Inc., 1991 WL 179448, at *2 (SEC No-Action Letter Dec. 15, 1988) (seeking exemption); *Regulation of Communications Among Shareholders*, 57 Fed. Reg. 48,276, 48,282 n.41 (Oct. 22, 1992) (granting exemption for "proxy advisory services").

Second, when Congress took the phrase "solicit any proxy" from Section 14(a) and replanted it in Section 14(h), it intended to give the phrase the same meaning in both sections. It is "'a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012)); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484–85 (1989) (instructing that different provisions of the securities laws must "be construed harmoniously because they 'constitute interrelated components of the federal regulatory scheme governing transactions in securities'" (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976))).

Thus, when Congress re-adopted the "solicit any proxy" language in Section 14(h) in 1993, without changing a word, it presumptively adopted the settled construction of that phrase as including proxy voting advice, and signaled its intent that both Section 14(a) and 14(h) be construed consistently to include such advice.

B. ISS's Contrary Arguments Are Meritless.

ISS's reading of Section 14(a) artificially narrows and misconstrues the Exchange Act's text, structure, and purpose. ISS asserts that the phrase "solicit any proxy" is limited to only those "actions taken by a person who seeks to *achieve a certain outcome* in a proxy vote." ISS Mot. 18. As discussed above, there is significant evidence that proxy voting advice businesses do in fact seek to achieve (and do achieve) a certain outcome in some number of cases. *See supra* pp. 14–15.

Even setting aside that evidence, however, ISS's attempts to limit the word "solicit" to *only* instances in which the advisor seeks a certain "ultimate outcome" are unfounded. Those words appear nowhere in the statute. And the plain meaning of the word "solicit" at the time Congress enacted the statute, while *encompassing* the scenario in which someone intends to achieve a particular outcome, was by no means *limited* to that situation, nor would such a limitation make sense in the broader context of Congress's regulatory goals. *See infra* pp. 21–22. And even if intent to achieve an outcome were relevant, there is no reason to suppose that the proxy voting advice business must seek to influence the ultimate outcome of the ballot measure, as opposed to the outcome of the individual proxy that was solicited. The statute speaks of "proxy" in the singular, not the aggregate outcome of all proxies. Even ISS's own chosen dictionary definitions go beyond ISS's narrow reading of the statute. *See* ISS Mot. 19 (conceding that the definition of "solicit" includes "to tempt," "to lure on," and "to attract").

ISS's interpretation also largely ignores the regulatory carve-out for the "furnishing of [certain] proxy voting advice." 44 Fed. Reg. at 68,769–70. That four-decade-old agency interpretation, promulgated through notice-and-comment rulemaking, necessarily presupposes that proxy voting advice is a form of solicitation. *See supra* pp. 18–19. Because the import of the 1979 regulation so thoroughly devastates ISS's argument, ISS resorts to mischaracterization. ISS insists that this exception "reaffirmed that proxy voting advice" "is not a 'solicitation,'" claiming that the regulation "stated that, under ordinary circumstances, those who render advice in the course of a fiduciary relationship with an investor are not solicitors." ISS Mot. 10 (emphasis omitted). But the regulation said no such thing. Footnote 11, which ISS cites for this proposition, *see id.*, reads: "It should be noted that, under ordinary circumstances, the requirements of the present proxy rules will not apply to the relationship between a client *and his attorney or accountant*. The proxy rules

regulate the conduct only of those who participate in the solicitation of proxies." 44 Fed. Reg. at 68,767 n.11 (emphasis added). Proxy voting advice firms are neither the "attorney" nor "accountant" for the client, but they are among "those who participate in the solicitation of proxies." And to fall within the exemption, such parties logically had to be subject to the proxy voting rules in the first place. ISS's revisionist argument does not hold water.

Indeed, had Congress intended to limit the scope of the word "solicit," as ISS claims, it "could easily have chosen clearer language." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017). When the Exchange Act was enacted, the concept of soliciting proxies had already been woven into the securities laws of the various states. Those laws offered a variety of options to more narrowly tailor a solicitation statute's reach. Iowa, for example, barred, among other things, "[s]oliciting of proxies by an agent of the company . . . for the use of officers of the company," *State ex rel. Pugh v. Meredith*, 167 N.W. 626, 627 (Iowa 1918)—thus limiting the prohibition to certain actors, and to certain purposes. Congress easily could have adopted similar textual limitations, instead of speaking expansively of "any person" who "solicit[s] any proxy." 15 U.S.C. § 78n(a)(1). Had Congress intended ISS's narrowing construction, Congress could have prohibited the solicitation of a proxy "for the purpose of inducing" a vote—a formulation already appearing in Section 9(a)(2) of the Act. Pub. L. No. 73-290, 48 Stat. 881, 889 (1934). "'The fact that [Congress] did not adopt [this] readily available and apparent alternative strongly supports' the conclusion that" Section 14(a) is not as limited as ISS claims. *SW Gen.*, 137 S. Ct. at 939 (first alteration in original) (quoting *Knight v. Comm'r*, 552 U.S. 181, 188 (2008)).

ISS's crabbed reading of the term "solicit," moreover, would make little sense in light of other, unchallenged portions of the proxy solicitation rules. Most shareholders own their securities in "street name," with their broker-dealers generally holding the securities in the broker-dealers'

names on behalf of the customers. 85 Fed. Reg. at 55,094. When the broker-dealers receive proxy materials, under current regulations, they must send them to their customers and ask how they would like to vote. *Id.* That is—and has long been considered to be—a solicitation. *Id.* But ISS's interpretation of "solicitation" as being limited to only those who *care* about the outcome of the ballot measure would upend this regulatory scheme and its underlying purposes. The proxy solicitation regulations aim "to prevent the dissemination to the security holders and to the general public of untruths, half-truths, and otherwise misleading information which would stand in the way of a fair appraisal of a plan upon its merits by the security holders." *Id.* at 55,118 n.424 (quotation marks omitted). There is no reason to believe Congress would have wanted to exempt an entire class of potential proxy solicitors. An intentional error from an interested solicitor is just as misleading as a careless error from a supposedly disinterested one. Congress created a governing framework that applies to both.

* * *

The Commission acted squarely "within its statutory authority" in this case. *Am. Hosp. Ass'n*, 964 F.3d at 1241. ISS's argument to the contrary therefore fails and the NAM should be granted summary judgment on that issue.

II. The Final Rules Are Eminently Reasonable And Easily Satisfy The APA's Arbitrary-And-Capricious Test.

The Final Rules codify the Commission's longstanding position that "proxy voting advice" falls within the definition of "solicitation" under Section 14(a) of the Exchange Act. Consequently, the Commission could have subjected all proxy voting advice businesses to the general regulatory framework for proxy solicitations. Instead, the Final Rules took a lighter touch: they provide an exemption from the normal filing and information requirements for proxy solicitation

if proxy voting advice businesses meet minimum disclosure standards designed to enhance transparency, accuracy, and completeness of available information and the integrity of the voting process. These amendments to the proxy rules are eminently reasonable, and ISS's arbitrary-and-capricious challenge should be rejected.

A. The Rules Benefit Shareholders And Issuers.

Contrary to ISS's assertion, the Final Rules are a reasonable solution to a recognized and growing market failure. ISS and Glass Lewis are effectively a duopoly in the proxy voting advisory space. 85 Fed. Reg. at 55,127 n.517. They exert growing influence over corporate voting matters, advising clients on tens of thousands of shareholder meetings each year, *see* AR437 at 1, executing millions of ballots representing trillions of shares, 85 Fed. Reg. at 55,126, and often executing their clients' votes automatically based on their own recommendations, *id.* at 55,144. At the same time, they lack transparency and operate under well-documented conflicts of interest. *See id.* at 55,085; AR585 at 4. Often, their advice is riddled with "errors, mistakes, and deficiencies," 85 Fed. Reg. at 55,103; *see also* AR585 at 3, and they employ unfair tactics designed to prevent issuers from addressing those errors through dialogue until *after* the shareholders' votes have been cast.

This unacceptable state of affairs has metastasized despite the "comprehensive[ ]" regulation of the Investment Advisers Act of 1940. ISS Mot. 31; *see also infra* Part II.B (discussing the Adviser's Act). Section 14(a) of the Exchange Act independently authorizes the Commission to promulgate rules concerning proxy solicitation "as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1). Because proxy voting advice businesses lack sufficient incentives to self-correct the many well-documented negative externalities of their business practices, the Commission was entirely justified to draw on its Section 14(a) authority to promulgate the Final Rules.

The Final Rules are a limited, reasonable response to this market failure. For example, the Final Rules merely *incentivize* proxy voting advice businesses to develop "publicly disclosed written policies and procedures reasonably designed to ensure" that customers have "a mechanism" by which to become aware of any issuer written statements concerning the proxy voting advice. 85 Fed. Reg. at 55,154. This minimalist approach, which furthers informational awareness, leaves a proxy voting advice business with "discretion under the rule to choose the solution it deems suitable for each particular client," *id.* at 55,101, while also benefitting investors by "contribut[ing] to more informed proxy voting decisions," *id.* at 55,107.

ISS claims that the Final Rules lack a "reasonable basis," ISS Mot. 25, but the Commission has amply justified its rationale. While ISS may disagree with the Commission's assessment of the evidence and its regulatory judgments based on that evidence, it is clear that the Commission did not "entirely fail[ ] to consider an important aspect of the problem" or "offer[ ] an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). ISS's argument boils down to its repeated assertion that "investors" "overwhelmingly *opposed*" the Final Rules. ISS Mot. 25. Even assuming *arguendo* the doubtful proposition that the comment letters reflect the views of all investors, investors' opinions are not the only evidence that matters when the Commission regulates "in the *public* interest or for the *protection* of investors." 15 U.S.C. § 78n(a)(1) (emphases added). Many commenters supported the Commission's proposal, 85 Fed. Reg. at 55,106 & n.303, including trade associations such as the NAM, whose members represent 79% of Fortune 100 manufacturers. Dkt. 27-2, ¶ 3. Many supporters of the proposed rules spoke from experience of the "flaws embedded into the business model of proxy advisory firms," and how those flaws negatively impact

issuers and their shareholders. AR585 at 3. In any event, the Commission was under "no obligation to take the approach advocated by the largest number of commenters." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 87 (D.C. Cir. 2001) (citing *NRDC v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987)). Its "only responsibilities [were] to respond to comments . . . and to choose a reasonable approach backed up by record evidence," *id.*, and the Commission discharged those responsibilities here.

ISS argues that one commenter concluded that examples of proxy voting advice businesses' factual errors were "unfounded," and the Commission "made no attempt to rebut or respond to those critiques." ISS Mot. 27–28. But the Commission was not obligated to give that critique dispositive weight. The Commission acknowledged that commenters had "argued that there was insufficient evidence of inaccuracies," but concluded that investors would still benefit from "enhanced discussion of proxy voting matters" even if there were "no errors in the advice." 85 Fed. Reg. at 55,107. As the Commission noted in its proposing release, factual accuracy is not the only source of confusion, and the issuer and "other soliciting person[s] may have disagreements that extend beyond the accuracy of data used, such as differing views about the proxy advisor's methodological approach or other differences of opinion that they believe are relevant to the voting advice." 84 Fed. Reg. at 66,530; *see also* AR437 at 41 (acknowledging "differences of opinion on methodological frameworks"). In those circumstances, "providing the clients of proxy voting advice businesses with convenient access to the views of the registrant and certain other soliciting persons at the same time they receive the proxy voting advice could improve the overall mix of information available when the clients make their voting decisions." 84 Fed. Reg. at 66,530. This "assessment [is] both reasonable and reasonably explained." *Cytori Therapeutics, Inc. v. FDA*, 715 F.3d 922, 927 (D.C. Cir. 2013).

ISS also quibbles with the relative costs and benefits of the Final Rules, arguing that the Commission's analysis was overly "qualitative" and insufficiently quantitative. ISS Mot. 29–30. That position runs into the problem that reviewing courts "do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority." *City of Los Angeles v. U.S. Dep't of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999). In this case, the Commission is authorized to make predictive judgments about investor protection and the public interest as it relates to proxy solicitation, and the Commission's judgments were reasonable.

The Commission candidly acknowledged when it was "unable to quantify the potential economic effects" of the Final Rules. 85 Fed. Reg. at 55,123. It did not simply "discount[ ]" those costs "as a mere artifact" of outside sources, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011), *cited in* ISS Mot. 30, but instead "recognize[d] the concerns" and, "[i]n response, . . . adopt[ed]" approaches to minimize those costs, 85 Fed. Reg. at 55,137. The Commission took a similar approach with the anticipated benefits of the Final Rules. Relying on nearly a century of experience, the Commission observed that the "principle that more complete and robust information and discussion leads to more informed investor decision-making, and therefore results in choices more closely aligned with investors' interests, has shaped our federal securities laws since their inception." *Id.* at 55,107; *see, e.g.*, *Capital Gains*, 375 U.S. at 186 (explaining that the "fundamental purpose" of the securities laws is to foster "a philosophy of full disclosure"). Against that background and experience, the Commission was not unreasonable in determining that more disclosure to investors would be beneficial. 85 Fed. Reg. at 55,107. It was correct.[3]

[3] ISS also argues that the Commission used the wrong economic baseline for its analysis. ISS Mot. 30. That dog won't hunt. As detailed below, *infra* Part II.C, the 2019 Guidance simply

B. The Advisers Act Insufficiently Regulates Proxy Voting Advice Businesses.

ISS claims that the Commission "failed to adequately explain . . . why the Advisers Act is insufficient to address" the Commission's concerns, ISS Mot. 31, but the Commission expressly addressed this point. The Commission explained that the Advisers Act "is a principles-based regulatory framework, at the center of which is a federal fiduciary duty to clients that is based on equitable common law principles." 85 Fed. Reg. at 55,086. In contrast, Section 14(a) "grants the Commission broad power to adopt rules to control the conditions under which proxies may be solicited." *Id.*

To illustrate the difference, consider Rule 14a-1(b)(9)(iii), which provides that a proxy voting advice business satisfies an exemption if it develops procedures to provide an issuer "with a copy of its proxy voting advice." 85 Fed. Reg. at 55,154. This rule makes good sense: an issuer cannot correct errors in, dispute, explain, or contextualize a voting recommendation it cannot see. By expanding disclosure to the issuer, the rule helps ensure that investors have all material information needed for proxy voting. That is a legitimate focus of a regulation promulgated under Section 14, which addresses the "Congressional concern that the solicitation of proxy voting authority be conducted on a fair, honest, and informed basis." *Id.* at 55,086. At the same time, it is wholly inapposite to the Advisers Act, under which the Commission could compel an advisor to disclose to *her* customer, but not to someone else. *See id.* (explaining that the Advisers Act is "center[ed]" on a "duty to clients"). The Commission was justified in drawing on its Section 14 authority to close the regulatory gap.

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tracked pre-existing law—nothing changed—so the Commission did not need to factor the Guidance into its analysis. 85 Fed. Reg. at 55,132. But the Commission did so just in case, so ISS's concern is moot. *See id.*

The Commission was likewise justified in providing "a list of examples of types of information that a provider of proxy voting advice should consider disclosing in order to avoid" liability for making false or misleading statements or omitting material facts in connection with its proxy voting advice. 85 Fed. Reg. at 55,119. As an initial matter, the Commission did not create "new liability," as ISS complains. ISS Mot. 32. Because proxy voting advice businesses have always been engaged in proxy solicitation, they have always been subject to Rule 14a-9's prohibition on false and misleading communications, even if they had previously relied on exemptions from *other* requirements. 85 Fed. Reg. at 55,131. In any event, the Commission's addition of "examples of what, depending upon particular facts and circumstances, may be misleading" was a modest, reasonable attempt to focus proxy voting advice businesses' attention on specific areas of concern, *id.* at 55,119 n.432, that were not already identified in the "principles-based regulatory framework" of the Advisers Act, *id.* at 55,086.

The Commission also reasonably explained why it chose not to await "market-based solutions." ISS Mot. 34. The Commission said that given "the important role proxy voting advice businesses currently play in facilitating clients' participation in the proxy process, as well as the importance of ensuring that clients have access to more complete information regarding matters to be voted on," the Final Rule was warranted. 85 Fed. Reg. at 55,126. Realizing those benefits now, or waiting for a market-based remedy that may never come, was a choice for the Commission, not ISS. *See Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 656 (D.C. Cir. 2019) ("Longstanding principles of administrative law teach us to give federal agencies breathing room when they make policy and 'resolv[e] the struggle between competing views of the public interest.'" (alteration in original)). And the Commission's decision to regulate was correct, given the

growing market failures surrounding proxy voting, the well-documented externalities, and the absence of incentives for proxy voting advice businesses to self-correct.

C. The Rules Are Consistent With The Commission's Longstanding Policy.

ISS also seeks to undo the Final Rules on the ground that the Commission supposedly reversed a longstanding policy, without explanation, "upending 'decades of industry reliance'" in the process. ISS Mot. 34–35, 37. The reality is otherwise. Proxy voting advice businesses are, and always have been, involved in the "solicitation" of proxies.

That is why, as early as 1988, ISS sought an *exemption* for its advice from the filing requirements that applied only to solicitations. *Institutional Shareholder Services*, 1991 WL 179448; *see also* 57 Fed. Reg. at 48,282 n.41. Such an exemption obviously would have been unnecessary if ISS's proxy voting advice were not a solicitation. Similarly, as recently as 2016, the CEO of Glass Lewis testified to Congress that "[p]roxy advisory firms . . . are subject to the Securities and Exchange Commission's proxy solicitation rules." Katherine H. Rabin, Chief Executive Officer, Glass, Lewis & Co., Statement to the U.S. House of Representatives Committee on Financial Services: Markup of H.R. 5983, the "Financial CHOICE Act of 2016," at 3 (Sept. 13, 2016), *available at* https://www.glasslewis.com/wp-content/uploads/2016/09/2016_0912_Glass-Lewis-Statement-re-H.R.-5983_final.pdf. The Final Rules simply codify proxy voting advice businesses' own understanding.

In 1964, the Commission recognized that proxy voting advice generally constitutes a "solicitation." *See* 29 Fed. Reg. at 341 ("Material distributed during a period while proxy solicitation is in progress, which comments upon the issues to be voted on or which suggests how the stockholder should vote, would constitute soliciting material."). That view has been consistent over the last five decades. *See, e.g.*, *Concept Release on the U.S. Proxy System*, 75 Fed. Reg. 42,982,

43,009 (July 22, 2010) ("As a general matter, the furnishing of proxy voting advice constitutes a 'solicitation' subject to the information and filing requirements in the proxy rules.").

ISS plucks a few sentences from a 1979 and a 1992 release, and argues that they show the Commission's historical interpretation never extended to a subset of proxy voting advice—advice offered as part of a fiduciary relationship. ISS Mot. 35. These claims, however, do not withstand scrutiny. Although the 1979 release stated that "unsolicited proxy voting advice would constitute a 'solicitation,'" *Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, 44 Fed. Reg. 48,938, 48,941 n.25 (Aug. 20, 1979), that does not mean that proxy voting advice that a client requested would not constitute a "solicitation." On the contrary, the 1979 release reinforces the Commission's longstanding interpretation by fashioning an *exemption* from the proxy filing rules for certain "furnishing of proxy voting advice," without regard to whether it was solicited or not. *Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, 44 Fed. Reg. 68,764, 68,770 (Nov. 29, 1979). The need for an exemption confirms that such proxy voting advice was a solicitation in in the first place.

ISS fares no better with the 1992 release. The release warned that the historical definition of solicitation might "sweep" broadly, ISS Mot. 35 (quoting 57 Fed. Reg. at 48,278), but the Commission did not disavow or attempt to change that definition. Instead, the Commission again offered an *exemption* from certain requirements that typically apply to solicitations. 57 Fed. Reg. at 48,278. The Commission never suggested that no exemption was needed because proxy voting advice was not a "solicitation."

Accordingly, these historical examples show a remarkable consistency in the Commission's treatment of proxy voting advice over a period of decades. That consistency not only bolsters the reasonableness of the Final Rules, but it dooms ISS's claims against the 2019 Guidance. That Guidance "simply explained something" that had "already [been] required." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992) (quotation marks omitted).

ISS likewise errs in claiming (at 36) that the Final Rules are inconsistent with the Commission's previously expressed concern about creating "[a] regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote." 57 Fed. Reg. at 48,279. The Final Rules do no such thing. They create an optional regulatory exemption that, at most, requires a voting advice business to make available to certain customers a hyperlink to issuer filings on the Commission's website. 85 Fed. Reg. at 55,109. Nobody is forcing anyone to read anything, and proxy voting advice businesses have substantial discretion to choose other reasonable mechanisms, *see id.* at 55,110—or to forego the exemption entirely. This is not an intrusion "into every exchange and conversation among shareholders, their advisors and other parties." 57 Fed. Reg. at 48,279.

Finally, ISS's invocation of "reliance interests" falls flat. ISS Mot. 36. Again, ISS acknowledged that its advice was subject to Section 14(a) when it sought an exemption from the proxy rules nearly three decades ago. Likewise, the Commission, securities scholars, and even the CEO of ISS's co-duopolist Glass Lewis have all stated that proxy voting advice businesses are subject to the proxy rules. *See* 85 Fed. Reg. at 55,094 & nn.157–61. In any event, ISS claims that it "relies on providing *independent* advice" to its customers, ISS Mot. 36, and the Final Rules do

not remotely threaten ISS's independence. If having the option to avail itself of a regulatory exemption by sharing a copy of its finished work product and providing to its customers a link to a filing on a government website is really a threat to ISS's independence, there was not much independence to begin with.

In short, the Commission's views on the breadth of the "solicitation" definition have been known for a long time, including by ISS itself, and they have not materially changed. ISS's claims to the contrary lack merit.

III. Rules 14a-2(b)(9)(ii)(A) and (B) Do Not Violate the First Amendment.

ISS challenges two disclosure components of the Final Rules as "paradigmatic example[s] of compelled speech" that violate the First Amendment. ISS Mot. 37. ISS attacks what it characterizes as the Final Rules' requirement that ISS "share" its "analysis and recommendations with the subjects of that advice," and that ISS "convey issuers' 'views' to" its clients. *Id.* at 37. ISS is wrong on both counts.

The Final Rules do not violate the First Amendment because they do not compel ISS to speak at all, which should end the analysis. But they are also viewpoint- and content-neutral, and, at most, contain standard, purely factual securities disclosures supported by adequate government interests and are appropriately tailored to achieve them, whether applying the framework of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) or *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

A. The Final Rules Do Not Compel Any Speech, But Provide A Beneficial Exemption On Which ISS May Choose To Rely In Order to Avoid Generally Applicable Information and Filing Requirements.

Contrary to ISS's argument, there is no "mandate[ ]" on ISS to speak at all. ISS Mot. 37. Absent such compulsion, ISS cannot make out a compelled speech claim.

As demonstrated above, *see supra* Part II.C, the Final Rules codified the Commission's longstanding position that "proxy voting advice" is generally within the definition of "solicitation." Rule 14a-1(*l*)(1)(iii)(A). As a result, and as ISS concedes, *see* ISS Mot. 14, proxy voting advice businesses such as ISS are covered by the general regulatory framework for proxy solicitation, "including the obligation to file and furnish definitive proxy statements" and other "information and filing requirements." 85 Fed. Reg. at 55,084. But ISS does not challenge the constitutionality of those information and filing requirements; and while ISS complains that the proxy rule filing information requirements are "burdensome," ISS Mot. 14; *see also id.* at 5 (detailing the "significant informational and filing obligations" imposed by the proxy rules), it does not claim that it cannot comply with them. Instead, ISS challenges the beneficial exemption that the Commission adopted in order to minimize regulatory burdens on proxy voting advice businesses.

The Final Rules do not compel ISS to say anything: they set forth certain things ISS can do to "qualify for an exemption" to the unchallenged filing and information requirements. ISS Mot. 14. ISS is entirely free not to provide the various disclosures it complains of and instead comply with the general proxy rules. Being exempt from the proxy rules is not a "virtual necessity," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); and ISS has not asserted that it is. Thus, ISS is not being "compelled" to speak, much less to utter a particular message, *see Frudden v. Pilling*, 742 F.3d 1199, 1205 (9th Cir. 2014) (explaining that "the test is whether the individual is *forced*" to adopt a particular message (alteration and quotation marks omitted; emphasis added)). That spells the end of ISS's compelled speech claim under the First Amendment.

B. The Final Rules Are Viewpoint And Content Neutral.

Even assuming the Final Rules force ISS to say anything, which they do not, ISS's repeated assertions that the Final Rules are "viewpoint-based" and "content-based," *e.g.*, ISS Mot. 39, 40, are also wrong.

1. The Final Rules are viewpoint neutral. "[T]he essence of viewpoint discrimination" is when the government uses a law to "disapprov[e] of a subset of messages." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (quotation marks omitted); *see also id.* at 2300 (viewpoint-based speech regulations are those that "distinguish[ ] between two opposed sets of ideas" and "favor[ ]" one while "disfavor[ing]" the other). ISS's own case law confirms that viewpoint discrimination only occurs when the government "favor[s] one speaker over another" or targets "particular *views* taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (emphasis added); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (viewpoint discrimination is "Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker" (quotation marks omitted)); *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 446 (D.C. Cir. 2020) (same).

ISS's argument fails "the 'most basic . . . test for viewpoint discrimination,'" *i.e.*, showing that "within the relevant subject category . . . the government has singled out a subset of messages for disfavor *based on the views expressed*." *Zukerman*, 961 F.3d at 446 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment)) (first alteration in original; emphasis added). Neither Rule 14a-2(b)(9)(ii)(A) nor (B) has anything to do with *which* views or recommendations a proxy voting advice business chooses to advance in any particular proxy vote—the exemptions are available whether a proxy voting advice business chooses to recommend voting *in favor* of management-backed proposals or *against* management-backed proposals.

ISS tries to avoid this problem in two ways, but its efforts fail. *First*, ISS argues that Rule 14a-2(b)(9)(ii)(A)—which encourages proxy voting advice businesses to make their voting advice

available to the issuer—is viewpoint-based because it "is likely to be invoked by issuers only when they *disagree* with a proxy adviser's vote recommendations or analysis." ISS Mot. 41. But the Rule is not invoked by issuers; it is invoked by proxy voting advice businesses who wish to take advantage of the exemptions. And even then, it merely requires them to adopt written policies and procedures to reasonably ensure that "[r]egistrants that are the subject of the proxy voting advice have such advice made available to them at or prior to the time when such advice is disseminated to the proxy voting business's clients," *regardless* of the vote they recommend or the ultimate view they adopt. Rule 14a-2(b)(9)(ii)(A). Indeed, as the Commission observed, even when "voting advice is not adverse to the registrant's recommendation or where there are no errors in the advice, facilitating investor access to enhanced discussion of proxy voting matters contributes to more informed proxy voting decisions." 85 Fed. Reg. at 55,107.

Second, ISS claims that both Rule 14a-2(b)(9)(ii)(A)—which is discussed above—and Rule 14a-2(b)(9)(ii)(B)—which encourages proxy voting advice businesses to share a hyperlink to where an issuer's views can be found—are viewpoint-based on the theory that they "elevate" issuers' views. ISS Mot. 39. That claim mischaracterizes the actual requirements of the Rule. ISS concedes that "[t]he Commission's own description of the alleged benefits of the Final Rules" focuses on increasing investor access to all relevant information. ISS Mot. 40–41 (citing 85 Fed. Reg. at 55,136). Making proxy voting advice businesses' advice reasonably available to issuers (Rule 14a-2(b)(9)(ii)(A)) does not privilege a particular viewpoint, nor does it burden one. The same goes for including a hyperlink to EDGAR about where an issuer's views can be found—which is all that is required, *see* Rule 14a-2(b)(9)(ii)(B); that does not elevate anybody's message over any other messages—it just makes them available to those who care to learn more.

2. The Final Rules are content-neutral. "[A] law is content-based if 'a regulation of speech "on its face" draws distinctions based on the message a speaker conveys.'" *Barr v. Am. Ass'n of Political Consultants, Inc*, 140 S. Ct. 2335, 2346 (2020); *see also Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 508–09 (D.C. Cir. 2016). The Final Rules do no such thing.

As explained above, ISS does not challenge the broader regulatory framework that, but for the exemptions, would apply to its business. Instead, ISS complains that the exemptions "impose unique restrictions" on it and other proxy voting advice businesses. ISS Mot. 39. But that is just to say that the entities that the Commission found are subject to the generally applicable proxy solicitation rules—*i.e.*, proxy voting advice businesses—are the ones who are eligible to obtain the benefits of the exemption from those rules. That is not a regulation that unfairly targets certain entities based on the content of their speech, but one that creates an opportunity for exemption from the broader regime that mirrors its coverage.

Moreover, the exemptions merely require certain disclosures, and "[d]isclosure requirements . . . do not prevent anyone from speaking." *Pursuing Am.'s Greatness*, 831 F.3d at 508 (quotation marks omitted). Nothing about the exemptions hinges on "on the message [ISS] conveys," *Reed*, 576 U.S. at 163, nor do they "draw[ ] distinctions based solely on what [ISS] says," *Pursuing Am.'s Greatness*, 831 F.3d at 509 (quotation marks omitted). No one has "to examine the content of the" proxy voting advice to know whether ISS can invoke the exemptions at issue. *Id.* The exemptions in the Final Rules are no more content-based than any standard disclosure regulation of the securities market.

C. The Final Rules Pass Both *Zauderer* and *Central Hudson* Scrutiny.

ISS asserts that the Final Rules fail "any" level of First Amendment scrutiny, but it offers no analysis to support that sweeping statement. ISS argues only that "strict scrutiny" applies because the Final Rules are supposedly viewpoint- and content-based. ISS Mot. 40. For the reasons

given above, that is not the case, and ISS ignores the broader framework for analyzing heartland disclosure requirements in the securities context. The disclosures at issue here, again, are not mandatory but rather part of an exemption from an otherwise generally applicable regulatory regime. Even assuming they qualify as actual requirements, they are subject to *Zauderer* scrutiny, or, alternatively, *Central Hudson*, and pass constitutional muster here under either framework.[4]

1. When the Commission acts "to regulate complex securities markets [and] inspire confidence in those markets," it is well settled that such "[s]ecurities regulation involves a different balance of concerns and calls for different applications of First Amendment principles." *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108–09 (D.C. Cir. 2011) (quotation marks omitted) (upholding securities disclosure requirement against First Amendment challenge). The Supreme Court has recognized that "the exchange of information about securities" and "corporate proxy statements" are both examples "of communications that are regulated without offending the First Amendment." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Such routine securities disclosure requirements of a factual and uncontroversial nature are properly analyzed under the rubric of *Zauderer*. *See Full Value Advisors*, 633 F.3d at 1109. The Final Rules here are "indistinguishable from other underlying and oft unnoticed forms of disclosure the Government requires" when regulating securities, and should thus be upheld even if their requirements were mandatory. *Id.*

[4] In disputing the applicability of *Zauderer*, ISS argues only that the (voluntary) speech at issue here goes beyond "purely factual and uncontroversial" information, *not* that it does not qualify as commercial speech. *See* ISS Mot. 42. That is because it is plainly commercial speech. The Final Rules are an "effort to regulate complex securities markets [and] inspire confidence in those markets," *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108 (D.C. Cir. 2011), and "the speaker," here ISS, "has an economic motivation for it," *Am. Hosp. Ass'n v. Azar*, No. 1:19-CV-03619 (CJN), 2020 WL 3429774, at *14 (D.D.C. June 23, 2020).

a. The first step under *Zauderer* is to "assess the adequacy of the interest motivating" the challenged provisions of the Final Rules. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) ("*AMI*"). The Final Rules are animated by compelling interests: they are expressly "designed to promote the reliability and completeness of information available to investors and those acting on their behalf at the time they make voting determinations." 85 Fed. Reg. at 55,107. That includes the Commission's "interest in the factual accuracy of proxy voting advice," but also, given "the far-reaching implications that proxy voting advice can have in the market," the overall improvement of "the mix of information available to shareholders in a manner that is compatible with the complex and time-sensitive proxy voting advice infrastructure that currently exists." *Id.* at 55,107, 55,110. The Commission's purpose is "the benefit of all participants, including shareholders that do not use proxy voting advice and yet may be affected by the recommendations of proxy voting advice businesses." *Id.* at 55,107. As the Commission noted, this principle—"that more complete and robust information and discussion leads to more informed investor decision-making, and therefore results in choices more closely aligned with investors' interests"—"has shaped our federal securities laws since their inception and is a principal factor in the Commission's adoption of these amendments." *Id.*

Notably, this is not a case in which the rules are animated by purposes unrelated to the Commission's core mission to regulate the securities markets. *Cf. Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 521–22 & n.7 (D.C. Cir. 2015) ("*NAM II*") (striking down disclosure requirement that, "unlike in most securities laws," was explicitly motivated not for market "protection" but "to serve a humanitarian purpose" and was "quite different from the economic or investor protection benefits that [the Commission's] rules ordinarily strive to achieve" (quotation marks omitted)). Even ISS does not dispute the importance of the Commission's stated objectives, but

instead argues only that Final Rules do not properly achieve those objectives. *See* ISS Mot. 40–41.

b. If a proxy voting advice business chooses to avail itself of an exemption from the proxy rules' information and filing requirements, the Final Rules require only the provision of "purely factual and uncontroversial information." *NAM II*, 800 F.3d at 554. As previously explained, the exemptions are merely conditioned on the timely disclosure to issuers of ISS's advice at the time it is disseminated to ISS's clients, so that awareness of the advice does not come to light only after shareholder votes are cast. And, at most, the Final Rules involve only disclosure to ISS's clients of a hyperlink to EDGAR, where the issuer's views, if any, can be found if the client is interested in learning about them. That is all. Such a disclosure is purely factual and uncontroversial—it is a fact that issuers may have views, positive or negative, on the proxy voting advice and that those views can be found on EDGAR when posted there.

Anticipating its uphill First Amendment battle, ISS preemptively argues that the exemptions require ISS "to disseminate issuers' critiques of the proxy advisers' analysis," and thus are not limited to "purely factual and uncontroversial information." ISS Mot. 42. That conclusory statement is incorrect. Unlike the cases on which ISS relies, *see Pac. Gas & Elec. Co. v. PUC of Cal.*, 475 U.S. 1, 15 (1986) ("*PG&E*"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243 (1974), ISS does not have to disseminate issuers' views on its platform *at all*. As the Final Rules plainly state, ISS can meet the terms of the exemption by simply: (i) providing notice on its "electronic client platform that the registrant has filed, or has informed the proxy voting advice business that it intends to file" its views, and "includ[ing] an active hyperlink to those materials on EDGAR when available"; or (ii) alerting the client "through email or other electronic means" of the same.

Rule 14a-2(b)(9)(iv)(A)-(B). Whatever the constitutionality of a rule that imposed a truly *mandatory* obligation on proxy voting advice businesses to disseminate the actual *content* of the "views" of issuers, the rules at issue here do not go nearly that far.[5]

The nature of the disclosure here is substantially different than the compelled speech at issue in the cases on which ISS relies in additional ways. The typical compelled speech or disclosure case involves forcing a party "to disseminate a government-drafted notice" of some kind. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2369 (2018) ("*NIFLA*") (striking down government-scripted notice requirements); *NAM II*, 800 F.3d at 530 (striking down Commission-scripted disclosure regarding whether products had "not been found to be 'DRC conflict free'"). The risks of such compelled disclosures effectively involve "the Government compel[ling] a speaker to endorse a position." *Full Value Advisors*, 633 F.3d at 1108. In this case, there is no government-scripted message that ISS must convey; indeed, the Final Rules expressly grant proxy voting advice businesses "a significant amount of discretion" in choosing how to comply with the disclosure provision. 85 Fed. Reg. at 55,114. Relatedly, there is no risk that ISS will be "forced" "to appear to agree" with issuer's views merely by alerting clients of the *fact* that issuers have views on the matter and *where* those views can be found. *PG&E*, 475 U.S. at 15. Nothing about the Final Rules requires an inference that the proxy voting advice businesses "explicitly or implicitly endorse[s]" the hyperlinked information. 85 Fed. Reg. at 55,114. The disclosure is purely factual and uncontroversial.

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[5] Moreover, the state law at issue in *Tornillo* purported to regulate core political speech, and amounted to the government exercising "editorial control" over a newspaper's limited physical space. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994); *PG&E*, 475 U.S. at 10, 12. And unlike *PG&E*, which also involved viewpoint discrimination, the inclusion of the hyperlink here is not limited to circumstances where issuers have "hostile" views, nor does ISS claim that sending the hyperlink would "reduc[e] the free flow of information" by discouraging ISS from speaking in the first place in order "to avoid controversy." 475 U.S. at 10, 14.

c. It is "self-evident" that the Commission's "reasonably crafted disclosure mandate" here advances the Final Rules' stated interests. *AMI*, 760 F.3d at 26 (holding that reasonably crafted disclosure mandates in and of themselves demonstrate satisfaction of "the government['s] . . . burden of showing that the mandate advances its interest"). The Final Rules increase the relevant mix of information in the realm of proxy solicitations in numerous ways, including in ways that ISS does not challenge—from conflict-of-interest disclosures for proxy voting advice businesses, *see* Rule 14a-2(b)(9)(i); to antifraud provisions related to material misstatements and omissions from proxy voting advice, *see* Rule 14a-9; to ensuring access to relevant information by both issuers and shareholders, irrespective of the ultimate view taken by either, *see* Rule 14a-2(b)(9)(ii)(A), (B).

Applying *Zauderer*, as the Court should, the Final Rules easily pass constitutional muster. They are "indistinguishable from other underlying and oft unnoticed forms of disclosure the Government requires" when regulating securities, and should thus be upheld. *Full Value Advisors*, 633 F.3d at 1108–09.

2. Even if this Court were to apply intermediate scrutiny under *Central Hudson*, the Final Rules still easily meet that test because there is "a substantial government interest" that is "directly and materially advanced" and there is "a reasonable fit between means and ends." *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 372 (D.C. Cir. 2014) ("*NAM I*") (quotation marks omitted), *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2018), and *overruled in part by AMI*, 760 F.3d 18.

a. As noted above, the Commission's interest here is "substantial." ISS does not contest that the proper regulation of the mix of information in the securities markets, including information relating to proxy contests, is of the utmost importance. *See* ISS Mot. 40. Congress itself recog-

nized the importance of such information by vesting the Commission with broad authority to prescribe "necessary or appropriate" regulations "in the public interest or for the protection of investors" in the solicitation of proxies. 15 U.S.C. § 78n(a)(1).

b. Those interests are directly and materially advanced by the Final Rules. Importantly, the Commission "need not choose the 'least restrictive means' of achieving its goals" here; there need only be a "reasonable fit" between "means and ends." *NAM I*, 748 F.3d at 372.

There can be little question that the Final Rules directly and materially advance their goals of truthful, transparent, full information about proxy votes. ISS suggests that the Final Rules do not advance the Commission's "amorphous interest in promoting a better 'mix of information' or 'enhanced discussion,'" ISS Mot. 40–41, but its arguments are unpersuasive. ISS contends that the Final Rules "do not promote 'information' or 'discussion' *generally*, but instead merely seek to elevate *one specific viewpoint*: that of the issuer." ISS Mot. 40. But again, the exemptions do not "elevate" the issuer's views over others'. Some of the exemptions—on conflicts of interest, for example—have nothing to do with the issuer. And even for those that do, if the proxy voting advice business chooses to avail itself of the exemption, then the Final Rules simply seek to ensure that shareholders have the means to "become aware" of the issuer's filed written statement before their proxy is voted. 85 Fed. Reg. at 55,154.

ISS further contends that the Commission "discarded a number of less-restrictive ways of ensuring that institutional investors are well informed," ISS Mot. 42, but ISS fails to describe any such alternatives, much less show that they would be feasible.[6] That omission is fatal. *See, e.g.*,

[6] The Commission rejected a number of broader regulatory measures proposed by the NAM and by others, and also rejected existing mechanisms as a means to solve the relevant concerns at issue here. Thus, the Final Rules represent a less restrictive and contoured compromise that was taken in consideration of numerous potential regulatory options. *See*, *e.g.*, 85 Fed. Reg. at 55,103,

Harrell v. Fla. Bar, 608 F.3d 1241, 1271 (11th Cir. 2010) (rejecting First Amendment claim where plaintiff "neither suggested a less restrictive means of effectuating the [government's] important goals, nor explained how the" challenged regulation "imposes a burden that is unreasonable in relation to the goal"); *cf. Wright v. Chief of Transit Police*, 558 F.2d 67, 74 (2d Cir. 1977) ("One who mounts a First Amendment challenge on the ground of overbreadth cannot simply bring his lawsuit and then wait while the state proves that all other possible regulations would prove inadequate. The plaintiffs have an obligation to at least suggest one less restrictive alternative to the trial court.").

Instead, ISS simplistically suggests that issuers are "free to communicate" their views to investors and "investors can review the competing information and decide for themselves which recommendations to follow." ISS Mot. 43 (quotation marks omitted). Those blithe assurances ignore the well-documented reasons why the practices of proxy voting advice businesses make this option infeasible. These practices include developing often flawed recommendations in a process that lacks transparency, steadfastly refusing to engage with issuers on errors and misunderstandings, and automatically submitting proxy votes through robo-voting before issuers have a chance to correct the record. AR585 at 3–4. The Commission properly recognized the need to establish reasonable rules "in a manner that is compatible *with the complex and time-sensitive proxy voting advice infrastructure that currently exists*." 85 Fed. Reg. at 55,110 (emphasis added). The exemptions are carefully tailored to fit within that specific regulatory context. They require that proxy voting advice firms provide the disclosures "in a *timely* manner *before*" votes may be

55,104, 55,108 (declining to adopt provisions that would provide issuers with a "review and feedback" period on proxy voting advice; noting that "existing mechanisms" do not "suffice to address the concerns" or "achieve our goal of ensuring that clients of proxy voting advice business have timely access to a more complete mix of relevant information and exchange of views"; and declining to adopt "prescriptive measures" on automatic voting).

cast, Rule 14a-2(b)(9)(ii)(B) (emphases added), a critical feature given the practice of automatic voting which gives *no* time for a disclosure of full information before a vote is cast. *See* 85 Fed. Reg. at 55,144; *see* ISS Mot. 43 (conceding proxy voting advice firms' "control" over the timing issues).

ISS is left to respond that "nothing in the Exchange Act—much less the Constitution—gives issuers some special right to always have the last word." ISS Mot. 44. To state the obvious, nothing in the Exchange Act or the Constitution requires that ISS have the last word, either. But more to the point, the Final Rules do not guarantee *anyone* the "last word," and ISS is just fighting the Commission's longstanding policy of ensuring full disclosure of information prior to voting. The Final Rules appropriately reflect the "significant role proxy voting advice plays in the voting decisions of institutional investors and others," 85 Fed. Reg. at 55,083, 55,085, and they are a common-sense and reasonable response to the market failures that increasingly plague proxy voting in U.S. securities markets. They are not unconstitutional.

CONCLUSION

For the foregoing reasons, ISS's motion for summary judgment should be denied, and Intervenor the NAM's motion should be granted.

Dated: October 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2020, I caused a copy of the foregoing document to be served on all parties through the Court's CM/ECF system.

/s/ Helgi C. Walker

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