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D.C. Circuit Gives Proxy Advisory Firms a Pass


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Appellate Court Holds That Firms' Voting Recommendations Are Not "Solicitations" Under Section 14(a) of the Securities Exchange Act of 1934

On July 1, 2025, the U.S. Court of Appeals for the D.C. Circuit issued an important decision in *Institutional Shareholder Services, Inc. v. SEC*, invalidating a 2020 SEC rule defining a "solicitation" under Section 14(a) of the Securities Exchange Act of 1934 to include proxy voting advice issued by advisory firms. The Court rooted its decision in the ordinary meaning of the word "solicit," which the Court held encompasses only advocacy on one's own behalf, not recommendations requested by others in exchange for a fee. The decision allows proxy advisory firms to continue to operate without fear of liability or the burden or expense of regulation under Section 14(a) and likely limits the SEC's discretion to expand the sweep of Section 14(a) moving forward.

Background. A key feature of corporate governance in U.S. public companies is proxy voting, which allows shareholders to grant authority to another person to vote their shares on proposals, director elections, or other business at shareholder meetings. Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to issue rules and regulations governing the "solicitation" of proxies and makes it unlawful for any person "to solicit any proxy or consent or authorization" in contravention of those rules.[1]

Proxy advisory firms offer clients proxy voting recommendations for a fee. Because large-scale institutional investors must make voting decisions on countless proposals (due to the size and breadth of their portfolios), they often rely on proxy advisory firms for research, analysis and recommendations on how to vote. Two advisory firms, Institutional Shareholder Services, Inc. (founded in 1985) and Glass Lewis & Co. (founded in 2003), dominate the industry with an estimated market share of at least 90 percent.[2]

The Exchange Act does not define "solicit" or "solicitation." However, in 2019, the SEC issued guidance that suggested that advice issued by proxy advisory firms would qualify.[3] In September 2020, pursuant to its Section 14(a) authority, the SEC issued a rule formally defining "solicit" and "solicitation" to include:

[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice and sells such proxy voting advice for a fee.[4]

Under the SEC's rule, proxy advisors would be forced to file their recommendations with the SEC as "proxy solicitations" unless they could claim a valid exemption.[5] At the same time, the SEC rule provided for an exemption if a firm complied with three conditions: (1) disclosing conflicts of interest and steps taken to address them; (2) adopting procedures to make their proxy advice available to the companies that are the target of that advice at least by the time the advice is disseminated to the adviser's clients; and (3) establishing a mechanism to inform clients of the company's response to the firm's advice before the applicable shareholder meeting.[6]

Institutional Shareholder Services (ISS) brought suit, challenging the SEC's definition as unlawfully expansive.[7] At summary judgment, the district court (D.C. District Court Judge Amit Mehta) ruled in favor of ISS, holding that the SEC's definition of "solicitation" was "foreclosed by the text of section 14(a)."[8] Specifically, the district court held that "[t]he ordinary meaning of those terms when Congress enacted the Exchange Act in 1934 did not encompass voting advice delivered by a person or firm with no interest in the outcome of the vote."[9] The SEC and an intervenor, the National Association of Manufacturers (NAM), appealed to the D.C. Circuit.[10]

The D.C. Circuit's Decision. On July 1, 2025, a unanimous panel of the D.C. Circuit (Judges Bradley Garcia, Karen Henderson and Neomi Rao) affirmed. As an initial matter, the Court explained that it owed no deference to the SEC's proffered definition of "solicitation" under the Supreme Court's June 28, 2024 decision in *Loper Bright Enters. v. Raimondo*, which overruled the Supreme Court's longstanding *Chevron* decision requiring deference to agency interpretations of statutes.[11] Relying on *Loper*, the D.C. Circuit was not bound by the SEC's proposed definition of "solicit" and instead used its own "independent judgment" in construing the term.[12]

Turning to the statutory text, the Court observed that the Exchange Act does not define "solicit" or "solicitation," so it would look to "contemporaneous dictionaries" to determine the term's "ordinary meaning."[13] Those dictionaries defined the term as "seeking to persuade another to take a specific action" not merely in a general sense, but in "a sense that solicitation involves advocacy on one's own behalf."[14] In the Court's analysis, unlike company insiders or their agents, a proxy advisory firm does not seek to obtain a particular voting outcome for its own benefit, but offers recommendations in response to requests of those who do.[15] A step removed from those who seek voting action or authority, proxy advisory firms do not "solicit" proxies within the meaning of Section 14(a).[16]

The Court also noted that structural considerations in the statute supported its interpretation of "solicit." For example, none of the other voting-integrity provisions of Section 14 suggest it was intended to reach those who "merely advise others how to vote, without themselves seeking votes or acting on behalf of those who do."[17] Congress also chose to offer investors broader protections for fraud in other Exchange Act provisions (*i.e.*, Section 10(b)) and subject proxy advisory firms to regulation under a different statute, the Investment Advisers Act of 1940.[18] The choice to limit Section 14(a) to "solicitations," therefore, was deemed deliberate and need not be accorded a broader interpretation than the plain language would naturally allow.[19]

In sum, the Court held that proxy voting advice to a third party, for a fee, is a "recommendation," not a "solicitation."[20] The SEC's attempt to expand the definition of "solicitation" to encompass such advice, therefore, was "contrary to law."[21]

Implications. As a practical matter, little will change in the wake of *Institutional Shareholder Services*. Proxy advisory firms have flourished for decades, due to the needs of institutional investors to manage the high number of proxy solicitations that they receive. The ruling by the D.C. Circuit effectively returns the *status quo* under which proxy advisory firms had been operating. And the SEC, notably, dismissed its appeal with the case only continuing at the behest of intervenor NAM, a likely signal that the SEC has disavowed the position that animated its 2020 rule-making.[22]

Nonetheless, the decision is notable for the consequences that could have resulted if the Court had reached a different outcome. As the D.C. Circuit noted, if the SEC's interpretation of "solicit" held up, proxy advisory firms would have had to file their recommendations with the SEC unless they could claim an exemption, including by disclosing conflicts of interest and steps taken to address them.[23] Moreover, if advisory-firm advice qualified as a "solicitation," it could have opened up potential liability (including for damages) under other provisions of the federal securities laws, including SEC Rule 14a-9, which prohibits false or misleading statements in any "solicitation subject to this regulation."[24]

At bottom, *Institutional Shareholder Services* is a win for statutory predominance and regulatory agency restraint in the post-*Chevron* era. Citing the Supreme Court's admonition that courts should "fix[] the boundaries of the delegated authority" and "ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries,"[25] the D.C. Circuit "exercise[d] independent judgment" in interpreting the term "solicitation," rather than extending deference to the SEC's definition of a term whose ordinary meaning, arguably, is not crystal-clear.[26] If *Institutional Shareholder Services* holds, the Court's construction of the term—essentially, requiring action for one's own benefit, not another's—will constrain the SEC's ability to adopt further expansive applications of Section 14(a), through rule-making or otherwise, moving forward. How *Institutional Shareholder Services* reverberates outside Section 14(a), involving rule-making or action in other contexts, by other agencies, remains to be seen.

[1] *See* 15 U.S.C. § 78n(a).

[2] David F. Larcker *et al.*, The *Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, Harvard Law School Forum on Corporate Governance (June 14, 2018), https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/.

[3] Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, 84 Fed. Reg. 47,416, 47,417 (Sept. 10, 2019).

[4] 17 C.F.R. § 240.14a–1(l)(1)(iii); *see also* Exemptions From the Proxy Rules for Proxy Voting Advice, 85 FR 55082, 55154 (September 3, 2020) (revising 17 C.F.R. § 240.14a–1(l)(1)(iii)).

[5] *See Institutional S'holder Servs.*, 142 F.4th at 762.

[6] *Id.* (citing 85 Fed. Reg. at 55,154 (2020 Rule)). The SEC later amended this rule in 2022, removing the second two conditions. *Id.* (citing Proxy Voting Advice, 87 Fed. Reg. 43,168, 43,174 (July 19, 2022)).

[7] *Id.*

[8] *Id.* at 763 (citing *Institutional S'holder Servs. Inc. v. Sec. & Exch. Comm'n*, 718 F. Supp. 3d 7, 20–24 (D.D.C. 2024)).

[9] *Institutional S'holder Servs.*, 718 F. Supp. 3d at 12.

[10] The SEC would later dismiss its appeal "without explanation[,]" leaving NAM as the sole appellant. *Institutional S'holder Servs.*, 142 F.4th at 763. Before addressing the merits, the D.C. Circuit determined that NAM had standing to pursue the appeal. *Id.* at 763–65.

[11] *See id.* at 766 (citing *Loper v. Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024), overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

[12] *See id.*

[13] *Id.*

[14] *Id.* at 766–67 (citing *Webster's New International Dictionary of the English Language* 2393 (2d ed. 1934); 10 *The Oxford English Dictionary* 395 (1933); 2 *The New Century Dictionary* 1764 (1927); *Solicit*, *Black's Law Dictionary* (3d ed. 1933); *A Dictionary of the Law* 959 (1913)).

[15] *Id.* at 767 (noting that "the solicitation runs in the opposite direction to the one suggested by NAM").

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See id.*

[20] *Id.* at 768.

[21] *Id.*

[22] *See supra* n.10.

[23] *Institutional S'holder Servs.*, 142 F.4th at 762.

[24] *See* 17 C.F.R. § 240.14a-9(a).

[25] *Institutional S'holder Servs.*, 142 F.4th at 766 n.5 (quoting *Loper*, 603 U.S. at 395).

[26] *Id.* at 766 (quoting *Loper* 603 U.S. at 394). Note, however, that the District Court's decision came before *Loper* and was based on the *Chevron* framework. *Id.* at 763 n.2,