

'Solicit' Ruling Offers Proxy Advisers Compliance Relief

By **William Kane and Chloe Chung** (September 8, 2025)

On July 1, the U.S. Court of Appeals for the District of Columbia Circuit held that the U.S. Securities and Exchange Commission and the securities industry were effectively separated by a common language.

Giving heed to the plain-meaning rule when interpreting legislative intent, the court in *Institutional Shareholder Services Inc. v. SEC*,^[1] affirmed a February 2024 order of the U.S. District Court for the District of Columbia granting summary judgment to plaintiff ISS,^[2] holding that the SEC's definition of the term "solicit" went beyond the meaning Congress contemplated when enacting Section 14(a) of the Securities and Exchange Act.

The decision analyzed the SEC's 2020 amendment to its rules regulating proxy advice to define the term "solicit"/"solicitation" to include the provision of client-requested proxy voting advice.^[3] The D.C. Circuit struck down the 2020 rule as unlawful, reasoning that the meaning of "solicit" as Congress intended when it enacted the Exchange Act is to actively seek to obtain proxy authority or votes.

The court concluded that "the ordinary meaning of 'solicit' does not include entities that provide proxy voting recommendations requested by others, even if those recommendations influence the requestors' eventual votes." Proxy advisory firms like ISS are therefore in the clear when it comes to Section 14(a). As a result of this decision, proxy advisory firms are no longer subject to onerous SEC filing requirements when providing client advice.

Section 14(a) of the Exchange Act — the bedrock for SEC regulations governing proxy solicitations — prohibits any person from soliciting any proxy regarding registered securities.

In creating the statute, the term "solicit"/"solicitation" was not defined by Congress; however, prior to the 2020 rule, the SEC had described the term to include any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." Thus, the SEC has long held the view that proxy voting advice generally constitutes a solicitation under the Exchange Act requiring compliance with proxy rules and regulations.

In September 2019, the SEC issued guidance suggesting that proxy advisory services constituted solicitation under the proxy rules.^[4] ISS — a proxy advisory firm that provides recommendations to institutional investors on how to vote on corporate matters at shareholder meetings, and a major player in the proxy advisory market — quickly filed suit disputing whether the SEC could properly classify advice from proxy advisory firms such as ISS as a "solicitation." The case, however, was initially stayed pending completion of the SEC's related rulemaking.

The SEC subsequently issued the final rule in September 2020, thus expressly codifying the viewpoint from the 2019 guidance, defining "solicit" and "solicitation" to mean:



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Any 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.

The SEC's codified definition required that proxy advisory firms file proxy recommendations with the SEC as proxy solicitations unless they could claim an exemption. Following the SEC's completion of its guidance, the court proceedings were restarted, and the National Association of Manufacturers — the largest manufacturing industrial trade association in the nation and an advocate for the September 2020 rule — intervened on behalf of the SEC.

The case was stayed again from June 2021 through March 2022, pending the SEC's decision to revisit the 2020 rule. However, in July 2022, when the SEC adopted new amendments to the proxy adviser rules, only some, and not all, of ISS' claims became moot because the 2022 amendments still included the same definition of the term "solicit"/"solicitation."

Subsequently, SEC, NAM and ISS each moved for summary judgment. The district court granted ISS' motion, rejecting the SEC's expanded regulatory definition of "solicit" that included disinterested proxy voting advice, and finding that the September 2020 rule was invalid.

NAM appealed, arguing that the district court defined "solicit" too narrowly, and also that even if the district court defined "solicit" correctly, because "solicit" can mean "endeavor to obtain," advisory firms like ISS "solicit proxies by seeking to obtain client votes aligned with their recommendations."

The court exercised independent judgment under the U.S. Supreme Court's June 2024 decision in *Loper Bright Enterprises v. Raimondo* to consider whether the SEC's interpretation of its governing statute was contrary to law.^[5] Although the district court had applied the Supreme Court's framework under its 1984 decision in *Chevron USA v. Natural Resources Defense Council*^[6] to review the relevant language, and the *Loper Bright* judgment came down during the pendency of the appeal, the D.C. Circuit quickly disregarded this change in a footnote, holding that it would not disturb the district court's decision since it had found no statutory ambiguity and thus did not give deference to the agency's interpretation.

First, looking to the ordinary definition of the word "solicit" at the time the Exchange Act was enacted, the court found that the term entails "seeking to persuade another to take a specific action."^[7] Based upon this interpretation, the court held that the SEC's definition of the term was inconsistent with Section 14(a) of the Exchange Act.

The court found that a proxy adviser is not soliciting a client's vote when the proxy adviser gives advice that the client solicited. Even if those recommendations eventually are influential to the voting process, the proxy advisers are not seeking to persuade any particular outcome.

The structure of Section 14(a) reinforced the court's reasoning, which "presupposes that proxy solicitation involves parties actively seeking to secure votes or voting authority." Proxy advisers do not themselves seek votes or act on behalf of those who do. Thus, Section 14(a) is not intended to reach proxy advisers, who simply might influence proxy votes or provide recommendations.

Similarly, "[o]ther contextual clues", supported the court's reasoning — including the inclusion of certain more "expansive formulations in regulating other kinds of conduct" found in neighboring provisions of the Exchange Act, such as Section 10(b) and the separate set of standards applicable to proxy advisory firms included in the Investment Advisers Act.

The role of the proxy in the context of shareholder voting — a "formal authorization given by a shareholder to another person to vote on his behalf" — further informed the court's decision. Although the proxy advisory firms "may affect how the principal votes ... they do not seek to supplant his authority to vote."

The Court therefore concluded that proxy voting advice does not fall under the legal definition of "solicitation," and the SEC's attempt to regulate proxy advisory firms' provision of advice as solicitation under the proxy rules exceeds its authority.

This decision significantly narrows the SEC's regulatory power under Section 14(a) and has broad implications for the proxy voting process. No longer will proxy advisers be subject to burdensome Section 14(a) requirements when responding to requests for advice from their clients.

In the short term, this decision offers stability to the proxy advisory industry and provides temporary relief from new compliance burdens, giving greater certainty regarding status quo business practices. This decision could also have a persuasive effect on future court rulings in other districts interpreting the abilities of proxy advisory firms.[8]

Although Congress could move to enact legislation to clarify the SEC's authority over proxy advisers, the probability is low with the current Washington, D.C., climate forecasts. At the same time, it is a good bet that NAM and its 14,000 member companies will be looking at ways to challenge the impact of the court's opinion and limit proxy firm influence in shareholder decision-making when votes are tallied at all-important annual shareholder meetings.

In the meantime, the court has blown away the foam on the SEC's Section 14(a) strained interpretation, and proxy advisers can get back to business with their clients, knowing they can get to the real stuff that matters.[9]

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[1] No. 24-5105, —F.4th —, 2025 WL 1802786 (D.C. Cir. July 1, 2025). <https://media.cadc.uscourts.gov/opinions/docs/2025/07/24-5105-2123183.pdf>.

[2] See *Institutional Shareholder Services, Inc. v. SEC*, 718 F. Supp. 3d 7 (D.D.C. 2024).

[3] <https://www.sec.gov/files/rules/final/2022/34-95266.pdf>.

[4] <https://www.sec.gov/files/rules/interp/2019/34-86721.pdf>.

[5] 603 U.S. 369 (2024). https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

[6] 467 U.S. 837 (1984). <https://supreme.justia.com/cases/federal/us/467/837/>.

[7] The Court reasoned for example that "Webster's Dictionary defined 'solicit' to mean '[t]o make petition to; to entreat; importune . . . now, often, to approach with a request or plea, as in selling, begging, etc.' and '[t]o endeavor to obtain by asking or pleading; to plead for . . . to seek eagerly or actively.'... The Oxford English Dictionary defined the term as '[t]o entreat or petition (a person) for, or to do, something; to urge, importune; to ask earnestly or persistently.'" (internal citations omitted).

[8] Notably, newly filed litigation is pending in the Western District of Texas – Glass, Lewis & Co., LLC v. Paxton, Case No. 25-01153, and ISS v. Paxton, Case No. 25-01160 – challenging S.B. 2337 – a proxy advisory restriction. The bill was supposed to take effect in Texas on Sept. 1, 2025, and would require proxy advisory firms to provide a "specific financial analysis" for any advice concerning voting requirements for company and proxy proposals that is "materially different" from management's position.

[9] Telling it Like it is, Boone Pickens His Life. His Legacy.