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RE: 1210-AB91 - Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

To Whom it May Concern:

Thank you for the opportunity to submit comments on the recent rulemaking proposed by the Department of Labor (DOL) on the Fiduciary Duties Regarding Proxy Voting and Shareholder Rights. The fiduciary obligations of investors, as well as the interaction between investment advisers and third parties, are issues I have researched extensively. As part of the consultation, I am submitting two pieces of original research for your review, titled *On the Role and Regulation of Proxy Advisors* (2010) and *Robo-voting and Proxy Vote Disclosure* (2019).

As part of the DOL's proposal clarifying that fiduciaries—in this case ERISA qualified plan managers—should only vote on proposals which would have an economic impact on the plan's performance, I believe that the DOL should also seek to address the issue of robo-voting in the proposed rule, a practice which has the potential to undermine the fiduciary duties of investment managers.

As part of my research, I identified 400 asset managers who voted in line with recommendations issued by ISS or Glass Lewis **99.5% of the time or more**, on millions of resolutions. This practice calls into question adherence to the fiduciary duties set forth in your proposal for plan mangers. Fundamentally, an outsourcing of governance analysis and decision-making to third parties with no stake in the financial performance of firms, and no fiduciary duty to ultimate beneficial owners, appears incongruent with the protection afforded by fiduciary standards.

I believe there is scope for the rule to be strengthened through the addition of language specific to automatic or robo-voting, as any effort to address fiduciary duties regarding proxy voting would be incomplete without an evaluation of such a widespread phenomenon. Ultimately, spurring greater oversight of proxy voting among plan managers, as opposed to reliance on third parties, will offer greater protection to ERISA qualified plan beneficiaries and provide firmer guidance to fiduciaries who plan to engage third parties.

I hope that you find this research applicable and useful in your process of finalizing these rules.

Sincerely,

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Robovoting and Proxy Vote Disclosure

Paul Rose*

Introduction

Recent research has estimated that the recommendations of proxy advisory firms dictate as much as 25 percent of proxy voting outcomes,[1] with the potential to particularly impact on smaller companies. As concern over the power of proxy advisors has led the SEC to consider additional regulation, proxy advisors have suggested that such concerns are unfounded. ISS CEO Gary Retelny recently stated, for example, that "[t]he biggest misconception is that our institutional investors, which exceed 1,500 globally, just follow ISS blindly. Nothing could be further from the truth."[2] However, as detailed in a November 2018 report from American Council for Capital Formation (ACCF)[3], a significant number of asset managers are indeed automatically voting in-line with the recommendations and policies of the two major proxy advisors–referred to as "robovoting" or "autovoting"–rather than actually evaluating the merits of individual proposal before casting their vote.

Accepting the fact that proxy advisors play an important role in reducing costs for asset managers who must vote shares consistent with their fiduciary duties to beneficial owners, the lack of diligence with which many managers use the services of the advisors is cause for concern, particularly when many of the governance recommendations of proxy advisors are based on thin (or no) empirical evidence. Also of concern is whether investment advisers are providing transparent disclosure regarding their use of those proxy advisors, and whether that disclosure is matched by how reliant they are on proxy advisors' recommendations. Despite public statements that these advisors are merely data aggregators and independent providers of information, it appears that some institutional investors have become overly reliant on the recommendations of proxy advisors, often outsourcing analysis and voting decisions to the two largest firms in the market without adequate disclosure of that reliance.

The Prevalence of Robovoting

While many asset managers do not rely wholly on ISS and Glass Lewis for proxy advice, data from Proxy Insight reveals that there are a host of investors that vote fully, or almost fully, in line with the proxy advisors they employ.[4] ACCF had previously identified 175 asset managers with more than $5 trillion in assets under management (AUM) that have voted with ISS more than 95 percent of the time; however, there is further evidence that asset managers are voting in line with ISS or Glass Lewis on almost every single proposal for every single company, regardless of whether the proposal is a management or shareholder proposal.[5] Below, for example, is data on investors who have voted in line with ISS over 99.5 percent of the time, on at least 5,000 management resolutions, presenting a *prima facie* case of overreliance on ISS'

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Thanks to Jonathan Elsner for excellent research assistance.

[1] Nadya Malenko, Yao Shen, *The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design,* REV. OF FIN. STUD. Volume 29, Issue 12, 1 December 2016, pp. 3394-3427.

[2] Dan Bigman, *SEC Pushes Back On Power of Proxy Advisors*, Chief Executive (August 21, 2019), https://chiefexecutive.net/sec-pushes-back-on-power-of-proxy-advisors/.

[3] Available at: http://accf.org/2018/11/09/the-realities-of-robo-voting/

[4] ISS does not directly provide recommendation data to ProxyInsight.com. Synthetic recommendation data are derived using Proxy Insight's proprietary methodology.

[5] See Frank Placenti, *Are Proxy Advisors Really a Problem?*, Harvard Law School Forum on Corporate Governance and Financial Regulation (November 7, 2018), https://corpgov.law.harvard.edu/2018/11/07/are-proxy-advisors-really-a-problem/.

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recommendations.[6] It would appear difficult to argue that each of these investment advisers simply 'agreed' with ISS' recommendations and analysis; and, reaffirms the idea that proxy advisors acquire significant influence from how investment advisers use their services.

Alignment with ISS	Total number of investors	Total AUM ($bn)	Total number of resolutions
100	25	550	1,596,905
99.9	48	1,226	2,901,602
99.8	63	2,075	4,902,678
99.7	78	2,296	5,698,118
99.6	88	2,689	6,310,705
99.5	98	3,252	6,849,180

Source: Proxy Insight data based on proprietary methodology.

Robovoting Disclosure

Since 2003, investment advisers have been required to disclose their proxy voting policy and procedures, and the votes cast under those policies (the latter of which applies to asset managers but does not apply to proxy advisors). In detailing their approach to voting, certain investment advisers are candid in setting out how reliant they are on proxy advisors. The following extract from Philadelphia International Advisors (PIA, one of the 25 managers voting in line with ISS 100 percent of the time) is transparent, and makes it clear how reliant the investment adviser is on ISS:

> *An independent third-party proxy service, Institutional Shareholder Services ("ISS"), has been retained by PIA for their fundamental research on the proxy question and subsequent recommendations. Proxies are voted by ISS in accordance with their proxy voting guidelines with the intent of serving the best interests of PIA's clients.*[8]

Likewise, the following extract from Alpine Woods Capital, another manager included above, states:

> *The Adviser has delegated to Institutional Shareholder Services Inc. ("ISS"), an independent service provider, the administration of proxy voting for the Funds' portfolio securities directly managed by the Adviser, subject to oversight by the Adviser's Proxy Manager (in his or her absence the Director of Institutional Operations).*[9]

Predictably though, other investment managers are not as keen to advertise their reliance on proxy advisors. Often, they craft policies in a way that conveys the illusion that proposals may well be independently evaluated. For example, as Stone Ridge Asset Management notes in its proxy policy:

> *The ISS Guidelines are intended to provide a general overview by highlighting the key policies that ISS applies to companies listed in the applicable geographic region. However, ISS' analysis is on a case-by-case basis, taking into consideration sector,*

[6] Details of the investors, their alignment with ISS and their assets under management is provided in the Appendix to this document.

[8] Guidestone Funds, Form N-1A (May 9, 2009), available at: https://www.sec.gov/Archives/edgar/data/1131013/000119312509121299/d485apos.htm Philadelphia Investment Advisors closed in March 2015.

[9] See, e.g., Alpine Income Trust, Definitive Materials (March 5, 2018), https://sec.report/Document/0001398344-18-003532/.

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industry and business performance factors. These guidelines have been approved by the Adviser and, ***although the Adviser intends to vote consistently with the voting recommendation of the Proxy Voting Service****, upon the recommendation of the applicable portfolio managers,* ***the Adviser may determine to override any recommendation made by the Proxy Voting Service or abstain from voting****. (emphasis added)*[10]

In reading the above, one might conclude that while the proxy advisor ISS was retained for voting recommendation and that its guidelines were adopted by the investment manager to help guide proxy decisions, the account advisor at the investment manager is empowered to make their own independent decision on each proposal. Despite the difference in language from the PIA disclosure, based on over 102,000 resolutions, Stone Ridge has never deviated from an ISS' recommendation on a management resolution.

Similarly, New Mexico Educational Retirement Board's (NMERB) proxy voting guidelines do not suggest a complete reliance on proxy advisor recommendations:

NMERB's objective in proxy voting is to support proposals that maximize the value of the Fund's investments over the long term. Proxy voting guidelines have been developed to ensure that the Fund is able to provide adequate assets to pay retirement benefits to the members of the Plan. ***NMERB believes that each portfolio's Investment Manager is in the best position to assess the financial implications presented by proxy issues and the impact a particular vote may have on the value of a security. Consequently, NMERB generally assigns proxy voting responsibility to the Investment Managers responsible for the management of each Fund portfolio.*** *The duty of loyalty requires that the voting fiduciary exercise proxy voting authority solely in the interests of members and beneficiaries of the NMERB. NMERB may retain the services of a proxy voting service to advise and assist staff in voting proxies for internally managed portfolios. Proxy voting will be in accordance with the guidelines listed below except in cases where the proxy voting service advice conflicts with the guidelines.*[11] *(emphasis added)*

Despite responsibility for proxy voting being assigned to investment managers, voting at NMERB remains 100 percent aligned with ISS. While these are only some of the clearest examples of a disconnect between what investment advisers are saying and what they are doing, it is likely that many other asset managers are also not transparently detailing their reliance on proxy advisors.

Default to Proxy Advisors

Anecdotally, this reliance has been evident for corporations for a long time. When engaging directly with shareholders following a negative recommendation from a proxy advisor, a company may receive the response that to override an ISS recommendation would simply be too difficult. This is unsurprising considering language in certain policies regarding voting with ISS guidelines. AQR capital management, for example, states "ISS will vote proxies in accordance with the subscribed proxy voting guidelines, unless instructed otherwise by AQR,"[12] while IndexIQ states, "Items that can be categorized under the Voting Guidelines will be voted in accordance with any applicable guidelines."[13] In other words, following ISS guidelines is the default, while voting independent of these guidelines is the exception and, in certain circumstances, will only occur when a portfolio manager writes a report to the Investment Committee or Chief of Compliance – something that raises the bar significantly for investment advisers wishing to deviate from proxy advisors'

[10] Stone Ridge Trust, Form N-1A (September 26, 2019), available at: https://www.sec.gov/Archives/edgar/data/1559992/000119312519256122/d808905d485bpos.htm.

[11] New Mexico Educational Retirement Board, Investment Policy Statement (February 26, 2016), https://www.nmerb.org/pdfs/investmentpolicy.pdf.

[12] AQR Funds, Form N1-A (March 1, 2019), https://www.sec.gov/Archives/edgar/data/1444822/000119312519060560/d713232d485apos.htm.

[13] IndexIQ ETF Trust, Supplement dated May 17, 2011 to the Prospectus dated August 27, 2010, https://www.sec.gov/Archives/edgar/data/1415995/000089109211003309/e43620_497.htm.

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recommendations. Cadence Capital Management's proxy voting guidelines sum up this phenomenon:

- ***Cadence has adopted ISS's Voting Guidelines (the "Voting Guidelines").*** *The Voting Guidelines address routine as well as significant matters commonly encountered. The Voting Guidelines permit voting decisions to be made flexibly while taking into account all relevant facts and circumstances.*
- *Cadence may instruct ISS to vote in a manner that is inconsistent with the Voting Guidelines or ISS's recommendation upon a client's request.* ***Investment professionals deviating from these recommendations must provide the CCO with a written explanation of the reason for the deviation, as well as a representation that the Employee and Cadence are not conflicted in making the chosen voting decision.***[14]

Over almost 20,000 resolutions, Cadence has voted in line with ISS 99 percent of the time, indicating that it is a rare exception whereby an investment professional has the time or appetite to actively override a recommendation from ISS. Across the investment community, it has been made easier for many investment advisers to vote in line with proxy advisors than to deviate from their recommendations following independent evaluations of resolutions and proxy advisor analysis.

Material Impact

Robovoting is not confined to a specific size of investment firm, with the practice's impact on businesses potentially increasing with the size of the investment adviser. Of the firms mentioned previously, FFCM has roughly $1 billion in AUM, while Stone Ridge and First Quadrant have $15.9 billion and $20.1 billion in AUM, respectively. Robovoting is also prevalent at some large investment managers such as Blackstone, with $512 billion AUM largely relying on proxy advisor recommendations and policies. These large firms that robovote have the biggest identifiable influence on individual proposal outcomes due to the sheer size and of their investments.

Apparel manufacturing firm Centric Brands' 2018 voting is illustrative of the wider issue: for director elections, 44.4 percent of the votes—all of the shares held by Blackstone—were robovoted according to ISS' recommendations. Consequently, ISS all but voted the shares of almost a half of outstanding shares at a publicly listed company.

Voting Manager	Policy	Proxy Advisor	% Dec '18
Blackstone	ISS	ISS	44.4
Vanguard Group, Inc.	Own	ISS, Glass Lewis	0.9
Geode Capital Management	Own	ISS	0.2
Northern Trust Investments	Own	ISS, Hermes OES	0.1

Source: Proxy Insight data based on proprietary methodology.

Similar trends can be seen in other annual meetings, such as real estate services company Invitation Homes Inc's May 30, 2019 annual meeting, where 40.8 percent of shares were

[14] *See, e.g.*, Pacific Funds Series Trust, Form N1-A (June 27, 2019), https://www.sec.gov/Archives/edgar/data/1137761/000110465919037852/a19-11236_1485bpos.htm.

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apparently robovoted. Of that, Blackstone accounted for 34.3 percent of total voting. Considering the language in Blackstone's proxy policy, it's not difficult to imagine that the firm's robovoting behavior has impacts on a number of companies and other investors in those same companies. The Blackstone proxy voting policy states:

> *The Board of Trustees of Blackstone Alternative Investment Funds (the "Trust") has delegated proxy voting authority relating to portfolio holdings of Blackstone Alternative Multi-Strategy Fund (the "Fund") to Institutional Shareholder Services Inc. ("ISS") …ISS shall vote proxies pursuant to the ISS U.S. Proxy Voting Guidelines, as amended from time to time. The Concise Proxy Voting Guidelines are attached hereto and the complete Summary Proxy Voting Guidelines is available on ISS's website at https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.*[15]

For reference, Blackstone's votes on management proposals align with ISS recommendations 98.1 percent of the time on management proposals, and 100 percent on shareholder proposals on Environmental & Social issues.

The impact of a single significant shareholder automatically voting with proxy advisors is an obvious concern stemming from the proliferation of robovoting. Less obvious, however, is the impact experienced by companies with a number of robovoting investors – even for larger companies. Bancorp, with a market cap of over $600 million, for example, saw 6.4 percent of its votes autovoted with ISS' recommendation and 3.6 percent autovoted with Glass Lewis' recommendation on the election of board directors at their May 13, 2019 meeting. Investors following ISS included AJO L.P. (1.7 percent), AQR Capital Management (1.1 percent), Cornerstone Capital Management (1.1 percent), Bridgeway Capital Management (1 percent), Thompson Siegel & Walmsley (0.9 percent), Acadian Asset Management (0.8 percent), QS Investors (0.6 percent), IndexIQ Advisors (0.5 percent), Martingale Asset Management (0.4 percent) and MacKay Shields (0.4 percent).

While these only amounted to 6.4 percent of the total vote, having so many investment managers voting along with each other to match ISS recommendation could still have a material impact on the outcome of proxy votes. This is especially true since data from Proxy Insight shows that AJO, AQR Capital Management, Thompson Siegel & Walmsley, Acadian Asset Management, QS Investors, IndexIQ Advisors, and MacKay Shields all vote exclusively in line with ISS' "For" recommendation on these kinds of votes.

Contrasting Policies

In contrast to the autovoting policies of certain investment managers, there are a number of asset managers that produce extensive and genuinely independent policies when detailing their approach to proxy voting. The following is the language provided by Vanguard on their approach to the use of proxy advisors:

> *The Investment Stewardship team does not vote in lockstep with recommendations from proxy advisors (such as Institutional Shareholder Services [ISS] or Glass Lewis) for voting on behalf of the Vanguard funds. Data from proxy advisors serve as one of many inputs into our research process. Even when a fund's vote happens to be consistent with a proxy advisor's recommendation, that decision is made independently. In the 2018 proxy voting year, for example, Vanguard funds voted differently from ISS on 7% of ISS's "for" recommendations and 9% of its "against" recommendations.*[16]

Likewise, BlackRock, the world's largest asset manager, publishes proxy voting guidelines[17] that

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[15] Blackstone Alternative Investment Funds, Form N1-A (May 31, 2019), available at: https://www.sec.gov/Archives/edgar/data/1557794/000119312519162689/d729214d485apos.htm.

[16] Vanguard Trustees' Equity Fund, Supplement Dated October 1, 2019 to the Statement of Additional Information, available at: https://www.sec.gov/Archives/edgar/data/313850/000093247119007325/sai046a1020191.htm.

[17] BlackRock, Proxy voting guidelines for U.S. securities (January 2019),

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run to 19 pages, with clear guidance on how the asset manager will vote on a range of issues:

- *Boards and directors*
- *Auditors and audit-related issues*
- *Capital structure*
- *Mergers, asset sales, and other special transactions*
- *Executive compensation*
- *Environmental and social issues*
- *General corporate governance matters*
- *Shareholder protections*

In employing both Glass Lewis and ISS in determining how to vote, the approach of large institutions such as BlackRock, Vanguard and others to proxy voting is distinctly different from those investors that have adopted the benchmark policies of a proxy advisor. These investors appear to utilize proxy advisors how they were intended to be employed—as third-party researchers—as opposed to entities to which voting and corporate governance analysis is effectively outsourced. Unsurprisingly, the level of alignment for BlackRock and Vanguard, as well as a number of other investors who invest in independent governance analysis, is substantially lower than many other investors:

Investor	Number of Resolutions	ISS Alignment	Glass Lewis Alignment
BlackRock	820,715	93.6%	87%
Vanguard	827,846	94.1%	86.3%
State Street	793,790	93.2%	85.6%
FMR	310,149	91.5%	87.3%
TIAA-CREF	877,815	91.1%	89.4%

Source: Proxy Insight data based on proprietary methodology.

Summary and Policy Considerations

The influence of proxy advisors tends to be linked to two primary factors: the perception that investment advisers are required to vote every proxy to meet fiduciary duty to their investors, and the lack of appetite from those same investment advisers to do so. Consequently, despite clear evidence that robovoting is widespread in US capital markets, regulating proxy advisors themselves without focusing on how they are used by investment advisers may well have the perverse outcome of simply further entrenching the two major players – ISS and Glass Lewis.

Instead, recent guidance from the SEC has placed a greater level of scrutiny on how important the relationship between investment advisers and proxy advisors is for the effective operation of capital markets for the benefit of retail investors and ultimate asset owners. Specifically, investment advisers should "consider whether certain types of matters may necessitate that the adviser conduct a more detailed analysis than what may be entailed by application of its general voting guidelines, to consider factors particular to the issuer or the voting matter under consideration"[18]; and, an investment adviser utilizing services of a proxy adviser "could consider whether a higher degree of analysis may be necessary or appropriate to assess whether any votes it casts on behalf of its

https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

[18] Securities & Exchange Commission, Release Nos. IA-5325, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers (August 21, 2019) at 14, https://www.sec.gov/rules/interp/2019/ia-5325.pdf.

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clients are cast in the client's best interest" where a matter is "highly contested or controversial."[19]

I have written previously about how there may be a level of inspiration for the SEC from the EU in developing its regulation of credit rating agencies, which focused on conflicts of interest, soundness of rating methodologies and rating activities, and overreliance on recommendations.[20] Guidance that fiduciaries relying on proxy advisors must also carry out their own governance assessments—and cannot solely or mechanistically rely on advisors' governance ratings and recommendations—would have the potential to improve the proxy voting process and have a positive impact on capital markets. Nonetheless, given the lack of transparency and variance in accuracy currently provided by the 'proxy voting policies and procedures' of a range of investment advisers, it may be necessary for the SEC to more actively manage and enforce fair disclosure of those policies.

Transparency is at the heart of efficient markets and it appears neither proxy advisors nor investment advisers are currently providing sufficient detail to market participant, regulators or beneficial owners. One possible avenue to address this problem would be to require investment advisers – when issuing their annual N-PX forms detailing how they cast their votes at general meetings – to disclose how often their final votes aligned with any proxy advisor they employed; and, what percentage of proxy advisor recommendations were reviewed internally by an investment manager. Such a rule would make it clear to the market how much due diligence was being carried out in terms of proxy voting and how reliant an investment adviser was on their proxy advisors, allowing asset owners to make informed decisions about who should manage their money. Further, such a rule would mirror proposed transparency requirements for proxy advisors under the SEC's proposed amendments to its rules on proxy voting advice;[21] However, without addressing the overreliance of a cohort of investors on proxy advisor recommendations, the impact of that rule may be blunted. Just as asset managers need transparency of process from the proxy advisory firms, so too do ultimate asset owners deserve transparency and complete disclosure from their asset managers.

[19] Id. at 16.

[20] Comment Letter of Paul Rose Re: File No. 4-725 · SEC Staff Roundtable on the Proxy Process, https://www.sec.gov/comments/4-725/4725-4395152-175587.pdf.

[21] Securities & Exchange Commission, Release No. 34-87457, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (November 5, 2019), https://www.sec.gov/rules/proposed/2019/34-87457.pdf.

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Appendix:

Asset Managers Aligned with ISS At Least 99.5% of the Time

Investor/Voting Manager	Times voted	ISS Alignment	AUM ($bn)
AQR Capital Management LLC	282,565	100	270
Arrowstreet Capital	64,510	100	98.3
Texas Education Agency	40,467	100	46.5
ProShares	250,128	100	32
QS Investors, LLC	215,083	100	19.1
Stone Ridge Asset Management	102,554	100	15.9
Rafferty Asset Management, LLC	68,805	100	13.8
New Mexico Educational Retirement Board	38,346	100	12.8
Martingale Asset Management	11,228	100	7.8
Symmetry Partners LLC	9,792	100	5.26
IndexIQ Advisors LLC	112,815	100	4.5
ProFund Advisors LLC	179,071	100	3.9
Alpine Woods Capital Investors LLC	44,486	100	3.9
GlobeFlex Capital, LP	12,212	100	3.6
RiverFront Investment Group, LLC	17,395	100	3.3
CoreCommodityManagement, LLC	17,541	100	2.2
Rampart Investment Management	16,111	100	1.7
Philadelphia International Advisors, LP	11,058	100	1.7
NorthCoast Asset Management LLC	5,919	100	1.7
FFCM LLC	56,903	100	1
GRT Capital Partners	8,526	100	0.595
Ramsey Quantitative Systems Inc.	7,485	100	0.485
Elkhorn Investments, LLC	9,631	100	0.171
NuWave Investment Management, LLC	7,358	100	0.15
Artio Global Management LLC	6,916	100	0.141
United Services Automobile Association (USAA)	195,668	99.9	155.4
First Trust Advisors LP	280,899	99.9	113.4
PPM America, Inc.	8,970	99.9	108.4
Virginia Retirement System	222,093	99.9	87.3
ASR Nederland	20,851	99.9	66.8
First Trust Portfolios Canada	49,740	99.9	28
Winton Capital Management	7,766	99.9	18.6
Pensionskasse SBB	25,608	99.9	17
Edge Asset Management, Inc.	35,198	99.9	15.8
Cornerstone Capital Management LLC	96,437	99.9	14
Rothschild Asset Management Inc.	22,735	99.9	8.3
IPM Informed Portfolio Management	30,835	99.9	8.2

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Alameda County Employees' Retirement Association	40,527	99.9	8.1
Driehaus Capital Management LLC	35,960	99.9	6.5
Weiss Multi-Strategy Advisers LLC	28,504	99.9	5.8
Oechsle International Advisors, LLC	6,006	99.9	4.4
Meeder Asset Management, Inc.	38,821	99.9	2.8
IronBridge Capital Management LP	11,619	99.9	2.8
Brompton Group	7,719	99.9	2
Checchi Capital Fund Advisers LLC	62,934	99.9	0.789
Olstein Capital Management, L.P	9,886	99.9	0.719
North Country Investment Advisers, Inc.	6,741	99.9	0.185
Norinchukin Zenkyoren Asset Management	59,180	99.9	0.113
Wells Fargo Funds Management LLC	410,489	99.8	433.2
Teacher Retirement System of Texas	522,400	99.8	176.9
MacKay Shields LLC	51,330	99.8	108.5
PanAgora Asset Management, Inc.	118,260	99.8	44
Aerion Fund Management Ltd	5,717	99.8	25
VALIC Financial Advisors, Inc	132,340	99.8	17.6
Los Angeles City Employees' Retirement System (LACERS)	298,519	99.8	16.9
Glenmede Investment Management LP	60,559	99.8	15.3
Horizon Kinetics Asset Management LLC	14,264	99.8	5.3
Tradewinds Global Investors, LLC	9,635	99.8	3.3
Wilmington Trust Investment Management LLC	342,534	99.8	2
NorthPointe Capital, LLC	5,794	99.8	0.455
L2 Asset Management, LLC	5,703	99.8	0.174
Monteagle Funds	14,990	99.8	0.132
R Squared Capital Management L.P	8,542	99.8	0.031
SunAmerica Asset Management Corp.	327,815	99.7	69.1
TKP Investments	61,063	99.7	32.6
Matthews International Capital Management LLC	35,668	99.7	27.5
Scout Investments, Inc.	22,175	99.7	25.7
William Blair & Co. LLC (Investment Management)	82,949	99.7	25.2
Kentucky Teachers' Retirement System	101,527	99.7	19.8
Derbyshire County Council Pension Fund (Multi-Managed)	14,032	99.7	5.7
Santa Barbara Asset Management, LLC	7,712	99.7	4.7
Richard Bernstein Advisors LLC	20,708	99.7	3.5
ACT Government (Australia)	89,499	99.7	3.3
James Investment Research, Inc.	13,672	99.7	2.6
Three Peaks Capital Management LLC	5,213	99.7	0.718
Essex Investment Management Company, LLC	5,563	99.7	0.631
USA Mutuals	7,844	99.7	0.251

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Nuveen Asset Management LLC	163,709	99.6	176.3
Fisher Investments	17,534	99.6	94.1
Epoch Investment Partners	43,103	99.6	35.5
San Francisco Employees Retirement System	83,992	99.6	24.7
Local Pensions Partnership (LPP)	14,351	99.6	21.1
PenSam	35,645	99.6	17
Orange County Employees Retirement System	65,674	99.6	16.7
Nicholas Co., Inc.	10,633	99.6	4.5
NS Partners Ltd.	5,751	99.6	1.9
OppenheimerFunds, Inc.	161,539	99.6	0.869
Markston International LLC	10,656	99.6	0.802
Wells Capital Management	17,772	99.5	349.9
Acadian Asset Management LLC	133,152	99.5	84.6
RhumbLine Advisers Ltd. Partnership	46,252	99.5	50.4
Employees Retirement System of Texas	126,989	99.5	28
Kayne Anderson Rudnick Investment Management, LLC	16,163	99.5	22.8
Gateway Investment Advisers LLC	56,788	99.5	11.6
TIFF Advisory Services	111,201	99.5	5.7
Advisory Research, Inc	20,987	99.5	5.5
Stephens Investment Management Group, LLC	9,171	99.5	4.3

Source: Proxy Insight data based on proprietary methodology.

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On the Role and Regulation of Proxy Advisors

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ON THE ROLE AND REGULATION OF PROXY ADVISORS

Paul Rose[*†]

INTRODUCTION

In anticipation of proxy season—the springtime ritual where companies prepare and deliver proxy statements in preparation for annual shareholder meetings—U.S. public companies typically reexamine their corporate governance structures and policies. Many corporate governance structures that were acceptable ten years ago are now considered outmoded or even evidence of managerial entrenchment. For example, consider the classified board of directors. In recent years, many companies have shifted from a classified board of directors to an annually elected board. A company might adopt an annually-elected board structure for a number of reasons. A classified board can serve as an entrenchment device, for instance, and so the company may hope to increase the accountability to shareholders that such a structure entails. Likewise, there may be legitimate reasons to retain a classified board of directors, such as the negotiating leverage a classified structure provides the board in the context of a hostile takeover. As a company considers such a change, however, high-minded considerations of the optimal governance structure do not always, and probably do not regularly, drive the discussion. Instead, the primary consideration is often that Institutional Shareholder Services ("ISS") or another proxy advisor is opposed to classified boards, and the firm feels compelled to make the change in order to improve its corporate governance rating even though the change may have no beneficial effect on the firm's corporate governance or performance.

I have heard a number of similar tail-wagging-the-dog stories repeated by corporate counsel and public company officers and directors, usually expressed with frustration over some proxy advisors' approach to governance—particularly with respect to those firms adopting what seems to be a one-size-fits-all methodology for evaluating corporate governance. The role of proxy advisors has increasing relevance because the Securities and Exchange Commission has recently undertaken a review of the mechanisms of proxy voting—less gracefully but perhaps aptly described as "proxy plumbing"—and the role of proxy advisors in that process. Commentators have identified a number of concerns with proxy advisors and the corporate governance industry in which they operate. One is the inherent conflict of

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interest in the business model of many of these firms—providing governance advice to corporate clients while also providing voting advice to investor clients—which gives reason to doubt the accuracy of their ratings and advice.[1] Compounding this problem is the fact that figuring out exactly what matters in corporate governance is quite difficult.

I. THE VALUE OF PROXY ADVISORS

We have some evidence that some metrics used by ratings firms can meaningfully predict performance, but at least some of these studies were commissioned by the subject ratings firms themselves.[2] Other independent work suggests that the ratings used by various firms do not accurately predict firm performance.[3] To emphasize the obvious, these firms are, after all, businesses. They must have something of value to offer their clients, and they must differentiate their products. It would be problematic for these firms if something basic—for example, share ownership by independent directors, as Professors Bhagat, Bolton, and Romano suggest—is a more reliable predictor of performance than the rating firms' multitude of metrics. A simple, single metric could be produced by the clients—institutional investors—relatively cheaply. Instead, ratings firms offer a profusion of proprietary rating systems, each constantly tweaked and recalibrated—a process that could be described as "methodology churn". No two are alike, although the ratings are often offered as though there were a single grand unified theory of corporate governance, perfectly expressed by their proprietary methodology. Even Professor Bebchuk, whom I think it is fair to say is allied with governance ratings firms in the general goal of promoting shareholder empowerment, has argued that ratings that try to impose a great number of "good governance" metrics on firms are less useful predictors than simply keying on a few problematic entrenchment devices such as poison pills. In other words, it seems easier to spot "bad governance" structures than it is to effectively prescribe "good governance" structures.[4]

If we doubt at least some of firms' ability to make useful firm performance predictions, the interesting question then is why anyone buys what they are selling. Scholars and other observers have offered several non-

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1. RiskMetrics' 2009 annual report acknowledges this problem, stating that the "perceived conflict of interest between the services we provide to institutional clients and the services, including our Compensation Advisory Services, provided to certain corporate clients" must be managed. RiskMetrics Group, Inc., Annual Report (Form 10-K), at 22 (2010), *available at* http://www.sec.gov/Archives/edgar/data/1295172/000104746910001246/a2196648z10-k.htm. It admits that "in the event that we fail to adequately manage these perceived conflicts of interest, we could incur reputational damage." *Id.*

2. *E.g.*, Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803 (2008).

3. Robert Daines, et al., *Rating the Ratings: How Good are Commercial Governance Ratings?* (Stan. Law & Econ., Working Paper No. 360, 2010), *available at* http://ssrn.com/abstract=1152093.

4. Lucien Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. OF FIN. STUDIES 783, (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=593423.

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exclusive reasons. First, investors buy ratings simply to obtain the underlying data. This seems plausible, since it is indeed costly for individual investors to collect data on firms, and governance ratings firms provide this very useful service more efficiently.[5] Second, firms buy ratings as protection against future claims of breach of fiduciary duty, or even merely as, in the words of Professor Ribstein, "criticism insurance."[6] I agree that this is an important, and perhaps the primary, reason why firms buy the ratings. In response to concerns that managers were too powerful and imposed high agency costs on firms, academics and regulators in the 1980's and 1990's increasingly pushed the idea that dedicated institutional investors could reduce these costs by better monitoring. However, monitoring is costly, and few institutional investors other than CalPERS were willing to expend resources on monitoring from which they could only expect to extract a small, pro-rata gain. Regulators incentivized institutional investors to dedicate resources to monitoring efforts by underscoring that proxy voting is a fiduciary duty. As a market response, the corporate governance ratings industry developed into the force we are discussing today.

A third possibility is that independent researchers are wrong, and that at least some ratings firms do have accurate models and metrics. Even without the benefit of research on particular ratings models, we know that some of them must be wrong because they often do not agree on whether a particular firm has "good" governance. Over the long term hopefully we will see that ratings produced by firms that engage in detailed, company-specific research will outperform ratings that apply a one-size-fits-all approach to ratings. Finally, Professors Calomiris and Mason also suggest in a recent paper that institutional investors may prefer a distracting and "noisy" signal[7] because "low-quality ratings make it harder to hold them accountable for poor decision making or poor outcomes associated with those investment decisions."[8]

Let me offer another possible reason, perhaps related to the "noise" hypothesis, why some institutional investors might value corporate governance ratings even if they have little or no value in predicting firm performance. This reason should inform not just potential regulation of proxy advisory firms, but also rulemaking that empowers shareholders. In recent years, the corporate governance ratings industry has eroded directorial and managerial power and enhanced shareholder power. Even if ISS, for example, is wrong that a particular firm should have an annually elected board, as a general matter institutional investors (at least those that tend to be activist share-

5. This conclusion is also supported with evidence supplied by Stephen Choi, Jil Fisch and Marcel Kahan in *Director Elections and the Role of Proxy Advisors,* 82 S. CAL. L. REV. 649 (2009), *available at* http://weblaw.usc.edu/why/students/orgs/lawreview/documents/ChoiforWebsite.pdf.

6. Larry Ribstein, *Larry Ribstein on* The Corporate Governance Industry, The Conglomerate, June 12, 2006, http://www.theconglomerate.org/2006/06/the_corporate_g.html.

7. Charles W. Calomiris & Joseph R. Mason, *Conflicts of Interest, Low Quality Ratings, and Meaningful Reform of Credit and Corporate Governance Ratings*, e21, Apr. 19, 2010, at 7, *available at* http://economics21.org/files/pdfs/commentary/04_19_2010_calomiris_mason_governance.pdf.

8. *Id*. at 12.

holders, such as some pension funds) have an interest in a powerful ratings industry that is allied with institutional investor power. It is no coincidence that aggressive, activist investors are affecting corporate decisions with increasing success in recent years—the rise of the corporate governance industry has made such activity inevitable. Although the initial goal of the shareholder empowerment movement—to reduce wasteful agency costs by shirking managers and directors—appears benign, the crucial issue is whether such enhanced shareholder power is being used to support long-term prosperity or is instead focused on short term gains. I fear that it is often being used for short term gains. And powerful shareholders may use their influence to extract gains at the expense of less powerful, less activist shareholders, such as retail investors. Rather than ultimately reducing agency costs from management shirking, we instead have a new set of agency costs borne by small investors and perhaps also by the beneficial owners of the activist funds that do not share in the particular gains enjoyed by the fund's management.

II. ENCOURAGING BETTER-QUALITY RATINGS BY PROXY ADVISORS

The corporate governance ratings industry itself is a market response: firms effectively resolve the collective action problem faced by institutional investors who have a fiduciary duty to vote proxies in the best interests of their beneficiaries. But the market for governance ratings is not working as it should: ratings firms produce poor-quality ratings whose validity cannot be tested because the underlying metrics are proprietary and are not disclosed. Even if they were disclosed, it is likely that we would end up merely assuring ourselves that none of them are very useful.

Arguably, increased competition will encourage users of ratings to "vote with their feet." My first inclination is that a purely market-driven response is preferable; again, depending on the availability data, firms producing one-size-fits-all ratings (which almost surely benefit from cheaply producing poor quality ratings) may be shown to underperform based on empirically sound company and issue-specific analysis. Firms that produce poor-quality ratings will be exposed and investors *will* vote with their feet. However, market pressures may not be as robust as we might like, because a significant portion of investors may be either (1) hiring a corporate governance ratings firm merely as a kind of insurance against fiduciary breach claims or criticism (which would probably support hiring the market leader: if a majority of funds hires ISS, ISS appears to be the safest choice, which perpetuates their advantage); or (2) the investors are indifferent to whether the advice results in better long term financial performance, but instead are interested in acquiring more leverage against boards and management in order to pursue short term or private gains.

If the market indeed is resistant to change through normal competitive pressures, we should then turn to other pressure points in the market. Perhaps potential liability for ratings firms could protect against poor quality ratings. Potential liability could take the form of SEC rules governing dis-

closure of methodologies of governance ratings firms, similar to the new rules applicable to credit ratings agencies. I also assume that poor quality should be more easily detected with enhanced disclosure of methodology even if, as with the credit rating agency rules, only a "sufficiently detailed" description of the methodology is produced. The danger with SEC regulation of corporate governance ratings is that, similar to what happened with the Nationally Recognized Statistical Rating Organizations, the SEC risks simply entrenching market leadership. The SEC could reduce this risk by taking the position that one-size-fits-all methodologies are not appropriate, of course, but that seems out of step with current regulatory trends.

Another pressure point is the institutional investor client of corporate governance ratings firms. If these investors do indeed have a fiduciary duty to their beneficiaries, that duty should not be assumed to have been met by a casual acceptance of a proxy recommendation without some assurance that the mechanisms that produced the recommendation are both reliable and free of conflict. The SEC has spoken to the conflicts issue in a pair of letters to ISS and Egan-Jones. The ISS letter states:

> Consistent with its fiduciary duty, an investment adviser should take reasonable steps to ensure that, among other things, the [proxy advisory firm] can make recommendations for voting proxies in an impartial manner and in the best interests of the adviser's clients. Those steps may include a case by case evaluation of the proxy voting firm's relationships with Issuers, a *thorough* [emphasis added] review of the proxy voting firm's conflict procedures and the effectiveness of their implementation, and/or other means reasonably designed to ensure the integrity of the proxy voting process . . . When reviewing a proxy voting firm's conflict procedures, an investment adviser should assess the adequacy of those procedures in light of the particular conflicts of interest that the firm faces in making voting recommendations. An investment adviser should have a thorough understanding of the proxy voting firm's business and the nature of the conflicts of interest that the business presents, and should assess whether the firm's conflict procedures negate the conflicts. The investment adviser should also assess whether the proxy voting firm has fully implemented the conflict procedures.[9]

There is anecdotal evidence that some large public funds left ISS for other ratings firms because of ISS's potential for conflicts. However, ISS's efforts to develop a firewall between its corporate and investor advisory groups has likely reassured many investors, as suggested by the 2007 GAO report on proxy advisors, which stated:

> All of the institutional investors—both large and small—we spoke with that subscribe to ISS's services said that they are satisfied with the steps that ISS has taken to mitigate its potential conflicts. Most institutional investors also reported conducting due diligence to obtain reasonable assurance that ISS or any other proxy advisory firm is independent and

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9. Institutional Shareholder Services, Inc., SEC No-Action Letter (Sept. 14, 2004), *available at* http://www.sec.gov/divisions/investment/noaction/iss091504.htm.

> free from conflicts of interest. As part of this process, many of these institutional investors said they review ISS's conflict policies and periodically meet with ISS representatives to discuss these policies and any changes to ISS's business that could create additional conflicts.[10]

I suspect that some—maybe most—of these investors conduct due diligence on conflicts by merely reading ISS's statement that it is free from conflicts created by its corporate and investor advisory businesses. If that is true, then those firms do not appear to be complying with the guidance offered by the SEC. Furthermore, as the GAO's report points out, the possible conflict between a proxy advisor's corporate and investor advisory businesses is just one of several potential conflicts. According to the GAO, other possible conflicts include:

> 1. Owners or executives of proxy advisory firms may have a significant ownership interest in or serve on the board of directors of corporations that have proposals on which the firms are offering vote recommendations.
> 2. Institutional investors may submit shareholder proposals to be voted on at corporate shareholder meetings. This raises a concern that proxy advisory firms will make favorable recommendations to other institutional investor clients on such proposals in order to maintain the business of the investor clients that submitted these proposals.
> 3. Several proxy advisory firms are owned by companies that offer other financial services to various types of clients, as is common in the financial services industry.[11]

Given the voting power of active institutional investors, the SEC has focused relatively little attention on enforcing the fiduciary duties created by its proxy voting rules. To give the SEC some credit, in 2009 it brought a case alleging breach of fiduciary duty with respect to proxy voting against INTECH, a registered investment adviser.[12] INTECH engaged ISS to vote proxies in accordance with AFL-CIO proxy voting recommendations. According to the SEC, INTECH followed the AFL-CIO recommendations because it was participating in the annual AFL-CIO key votes survey that ranked investment advisers based on their adherence to the AFL-CIO's recommendations. INTECH hoped that improving its ranking in the AFL-CIO survey would help it maintain existing union clients and recruit new ones. INTECH failed to note in its disclosures the material conflict of interest between INTECH and its clients who did not share the AFL-CIO's voting policies. Indeed, in its proxy voting policies INTECH noted that because it

10. Gov't Accountability Office, GAO-07-76, Report to Congressional Requesters: Issues Relating to Firms That Advise Institutional Investors on Proxy Voting (June 2007), at 11, *available at* http://www.gao.gov/new.items/d07765.pdf.

11. *Id.* at 11-12.

12. Press Release, Securities and Exchange Commission, SEC Charges Investment Adviser for Proxy Voting Rule Violations (May 8, 2009), *available at* http://www.sec.gov/news/press/2009/2009-105.htm.

relied on ISS, it did not "expect[] that any conflicts w[ould] arise in the proxy voting process."[13]

In the end, despite guidance such as the ISS letter, I think the SEC has not adequately encouraged investors to scrutinize not just potential conflicts of interest, but also the content of the advice they receive from corporate governance raters and proxy advisors. Unless the SEC provides better guidance on what such scrutiny should entail and undertakes a sustained enforcement program to detect and discipline fiduciaries who fail to meet their duties, the beneficiaries of the funds these institutional investors manage will suffer.

Finally, poor quality ratings by corporate governance ratings firms have serious consequences not just for the investors who purchase deficient ratings and advice, but also for the economy as a whole. Capital is allocated and crucial corporate governance decisions are often driven on the basis of these ratings and advice. An executive of a corporate governance ratings firm once described advising institutional investors as akin to herding cats. While that may often be true (and let us hope that it is, because it suggests that at least some are not blindly accepting ratings and advice), these firms still wield significant influence over institutional investors, as proxy solicitors and corporate secretaries assert. This influence is not always evident in proxy voting; indeed, the traces of the influence are probably more likely to appear in the corporate governance choices of public companies from year to year.. It is not a stretch to say that corporate governance ratings firms serve as a *de facto* regulator, with some firms offering a set of one-size-fits-all best practices that directors and executives ignore at their peril.

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13. *Id.*