

# ISS Sues SEC to Set Aside Guidance Subjecting Proxy Advisors to Proxy Rules

November 12, 2019

On October 31, 2019, Institutional Shareholder Services Inc. (“ISS”) sued the U.S. Securities and Exchange Commission (the “SEC”) in federal district court in Washington, D.C., seeking to invalidate the SEC’s August 21, 2019 [interpretation and related guidance](#) on the applicability of the federal proxy rules to proxy voting advice (the “Interpretive Release”). In the Interpretive Release, the SEC stated that proxy voting advice provided by proxy advisory firms such as ISS constitutes a “solicitation” under the Securities Exchange Act of 1934 (the “Exchange Act”) and, as a result, is subject to the federal proxy rules under Section 14(a) of the Exchange Act, including the anti-fraud provisions of Rule 14a-9 of the Exchange Act. A recent Debevoise summary of the Interpretive Release can be found [here](#).

The ISS complaint set forth three principal reasons the SEC’s Interpretive Release is purportedly unlawful:

- First, the Interpretive Release exceeded the SEC’s statutory authority under the Exchange Act to the extent it regulates proxy voting advice (an activity regulated under the Investment Advisers Act of 1940 (the “Advisers Act”)) as proxy solicitation (an activity regulated under the Exchange Act). According to the complaint, the two activities are fundamentally different from one another. Stressing that ISS does not, in fact, urge “shareholders to vote a certain *way in order to achieve a specific outcome* in a shareholder vote,” ISS asserted that it does not engage in soliciting activities subject to Section 14(a) of the Exchange Act;
- Second, the Interpretive Release violated the Administrative Procedures Act (the “APA”) because the release, in fact a substantive rule, should have been subject to the notice-and-comment procedures of the APA prior to adoption; and
- Third, the Interpretive Release was “arbitrary and capricious” and therefore must be set aside under the APA. Specifically, ISS alleged that the SEC made significant changes to the regulatory regime applicable to proxy advice without taking important considerations into account or even acknowledging that it was changing the regulatory framework applicable to proxy advisory firms.

---

While the SEC has not yet filed a response to the ISS complaint, at an open meeting held on November 5, 2019, the SEC proposed new rules (the “Proposed Rules,” the full text of which can be found [here](#)) that would, among other things, codify the SEC’s interpretation that proxy voting advice constitutes a “solicitation” subject to Section 14(a). The Proposed Rules are summarized in a Debevoise In Depth available [here](#). We will continue to monitor the ISS lawsuit and the Proposed Rules and will provide updates on noteworthy developments.



**Matthew E. Kaplan**  
Partner, New York  
+1 212 909 7334  
mekaplan@debevoise.com



**William D. Regner**  
Partner, New York  
+1 212 909 6698  
wdregner@debevoise.com



**Joshua M. Samit**  
Counsel, New York  
1 212 909 6414  
jmsamit@debevoise.com



**Carolina de Barros**  
Associate, New York  
+1 212 909 6715  
cdebarros@debevoise.com